

WHAT REMAINS OF THE “FORFEITED” RIGHT TO CONFRONTATION? RESTORING SIXTH AMENDMENT VALUES TO THE FORFEITURE-BY-WRONGDOING RULE IN LIGHT OF *CRAWFORD V. WASHINGTON* AND *GILES V. CALIFORNIA*

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Under the forfeiture-by-wrongdoing rule, a criminal defendant loses his Sixth Amendment right to confront a government witness when he intentionally prevents that witness from testifying at trial. As the rule currently operates, any and all prior statements by the missing witness can be admitted as substantive evidence against the defendant, regardless of whether they have been subjected to any of the procedural elements of confrontation. In this Note, I argue against such a “complete forfeiture” rule and propose a more “limited” rule in its stead. I argue, contrary to most courts and scholars, that forfeiture-by-wrongdoing cannot be justified by its punitive rhetoric, rendering its sweeping “complete forfeiture” result vulnerable to criticisms based on the primary lessons of Crawford v. Washington.

INTRODUCTION

Imagine two defendants, Dan and Dave, jointly charged with homicide and conspiracy to distribute drugs.¹ The prosecution’s homicide case relies almost entirely on a single alleged eyewitness, Willie Witness. Willie, a confessed drug dealer, was arrested with Dan and Dave. However, back in the police station after the arrests, Dan and Dave invoked their rights to remain silent, while Willie spoke to the police alone in a room. Willie confessed to a minor involvement with the drug deal but denied any connection to the homicide. He por-

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¹ This fact pattern is inspired by a hypothetical in Alexandra Natapoff, Comment, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 *GOLDEN GATE U. L. REV.* 107, 116–17 (2006), and the facts and holdings of *United States v. Carson*, 455 F.3d 336, 361–63 (D.C. Cir. 2006), *Steele v. Taylor*, 684 F.2d 1193, 1201–03 (6th Cir. 1982), *Commonwealth v. Edwards*, 830 N.E.2d 158, 170 (Mass. 2005), and *People v. Cotto*, 699 N.E.2d 394, 403 (N.Y. 1998).

trayed Dan and Dave as the leaders of the drug ring, and claimed he personally witnessed Dan and Dave commit the murder, apparently based on a personal dispute between them and the victim. Willie's statement was not videotaped, tape-recorded, nor transcribed, but a police officer jotted down a few brief notes, while mentioning casually to Willie how much the State appreciated his candor.

One week before Dan and Dave's homicide trial, Willie hires an attorney, who advises him to invoke his Fifth Amendment privilege against self-incrimination and not testify at the trial. Because Willie is short on cash, Dan's friend Charlie Conspirator pays for the attorney's services. Willie obeys the attorney's advice and refuses to testify. In lieu of Willie's live testimony at trial, the prosecution presents Willie's stationhouse accusation to the jury, recited secondhand by the police officer who claims he heard it. The jury never sees Willie nor hears him recount the story himself. Dan and Dave are never allowed to question Willie about his claims. On the basis of the police officer's recitation of Willie's statement, the jury convicts Dan and Dave of first-degree murder.

The Sixth Amendment to the U.S. Constitution guarantees criminal defendants the right to "confront" their accusers in court.² But what happens when literal confrontation is impossible? Should we *never* allow hearsay evidence to support a criminal conviction if the testimony cannot be communicated in open court by a live witness subject to contemporaneous cross-examination?

The Supreme Court's watershed decision in *Crawford v. Washington*³ proclaimed that such situations should be extremely rare. *Crawford* instructs that, because confrontation, especially cross-examination, is essential to determining the truth and promoting real and apparent fairness in the process, testimonial statements⁴ by witnesses must be subject to cross-examination or else entirely barred from the courtroom.⁵ Though this rule may result in excluding relevant and probative evidence, it binds us to our Sixth Amendment principles, based on centuries of accumulated wisdom, which demand that the State satisfy particular safeguards before our society consents to the deprivation of an individual's freedom.⁶

² U.S. CONST. amend. VI.

³ 541 U.S. 36 (2004).

⁴ See *infra* notes 62–65 and accompanying text (describing testimonial statements).

⁵ See *infra* notes 59–61 and accompanying text (describing *Crawford*'s cross-examination rule).

⁶ See *infra* notes 19, 26 and accompanying text (describing Confrontation Clause's importance to promoting systemic legitimacy and demonstrating symbolic commitment to treating accused with fairness and dignity).

Confrontation Clause doctrine, however, admits of an important exception: Under the “forfeiture-by-wrongdoing” rule,⁷ a defendant loses his constitutional right to confrontation if he intentionally causes the witness’s unavailability at trial.⁸ Under the current formulation of this rule, Willie’s incriminating statement to the police could be admitted as substantive evidence against both Dan and Dave at trial, despite Willie’s refusal to testify before the jury or submit to cross-examination, and despite the potential that Willie’s statement was either an outright lie or heavily shaded by self-serving falsehoods.⁹ The judge could admit the statement against the defendants by finding by a preponderance of the evidence that Willie’s unavailability at trial is attributable to Dan and Dave,¹⁰ inferring that the purpose of paying for Willie’s lawyer was to pressure Willie not to testify against them.¹¹ Under the rule implicitly endorsed by the Supreme Court in 2008 in *Giles v. California*¹² and so far unquestioned by lower courts—which I will call the “complete forfeiture” rule—the analysis stops there. The

⁷ For brevity, I will often refer to the “forfeiture-by-wrongdoing rule” simply as “forfeiture,” except where such shorthand would create confusion.

⁸ For purposes of the Confrontation Clause, witnesses are considered unavailable when (1) they are physically unavailable, such as when the witness is dead, too sick to travel, or outside the court’s jurisdiction and exempt from compulsory process; (2) they invoke an evidentiary privilege (such as the Fifth Amendment or marital privileges); (3) they completely refuse to testify or submit to cross-examination; or (4) they fail to appear in court despite the prosecution’s good faith efforts to produce them. See generally *infra* notes 89–90 (describing unavailability requirements). It is possible, though rare, for a witness to be available for purposes of the Confrontation Clause while unavailable for the purposes of hearsay law. *Id.*

⁹ See *infra* notes 149–51 (discussing notorious unreliability of statements by codefendants, accomplices, and informants).

¹⁰ Even if Willie had independent reasons for refusing to testify, courts usually consider his unavailability to be “caused” by witness tampering so long as the pressure was one of his reasons not to testify. See 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, 484–87 (2003) [hereinafter Flanagan, *Forfeiture*] (authored by counsel for petitioner in *Giles v. California*, 128 S. Ct. 2678, 2681 (2008)). Though Charlie actually implemented the plan, both Dan and Dave are presumed to intend the acts of their co-conspirators in furtherance of the conspiracy. See *United States v. Cherry*, 217 F.3d 811, 820 (10th Cir. 2000) (adopting conspiracy liability standard from *Pinkerton v. United States*, 328 U.S. 640 (1946), to forfeiture analysis); *United States v. Carson*, 455 F.3d 336, 363–64 (D.C. Cir. 2006) (same). In addition, though Dan appears more directly connected to the witness intimidation than Dave (because Charlie is Dan’s friend), Dave will probably be subject to forfeiture as well because, as codefendants, they are “united in interest and effort.” See *Steele v. Taylor*, 684 F.2d 1193, 1208 (6th Cir. 1982) (Taylor, J., dissenting) (internal quotation marks omitted).

¹¹ See *Steele*, 684 F.2d at 1203–04 (holding that directing witness to exercise his Fifth Amendment privilege constitutes wrongdoing sufficient to trigger forfeiture-by-wrongdoing exception).

¹² 128 S. Ct. 2678 (2008).

Sixth Amendment turns off entirely, and any and all prior statements by Willie can be admitted to the jury.¹³

This Note argues that while the forfeiture-by-wrongdoing theory is sensible and necessary to the criminal justice system, “complete forfeiture”—wherein the full spectrum of confrontation rights is extinguished—is inconsistent with *Crawford*’s Confrontation Clause revolution. I argue instead for what I call “limited forfeiture”: Confrontation rights are not extinguished entirely upon a finding of forfeiture but rather continue to operate in limited form.

Part I of this Note provides background on the confrontation right and the forfeiture-by-wrongdoing exception. It suggests *Crawford* advanced three main tenets about the right to confrontation by: (1) emphatically reasserting the importance of confrontation in criminal trials as the best assurance of reliable evidence and fair procedure; (2) warning of the risk of granting judges discretionary authority to waive that right; and (3) clarifying that the right to confrontation is defined by the confrontation right that existed at the time of our Constitution’s framing. Part II argues against complete forfeiture as inconsistent with these lessons of *Crawford*. In Part II.A, relying on the work of legal historians, I demonstrate that complete forfeiture is inconsistent with the founding-era confrontation right, the touchstone of confrontation analysis under *Crawford*. In Part II.B, I suggest problems that result from complete forfeiture. In Part II.C, I argue that the forfeiture rule is not primarily animated by principles of punishment, despite contrary rhetoric, undercutting the primary policy rationale for complete forfeiture.¹⁴ Finally, in Part III, I argue

¹³ However, other evidentiary rules continue to operate, rendering objections based on relevance, lack of personal knowledge, double hearsay, and Rule 403 prejudice still viable. Cf. Advisory Comm. on Evidence Rules, Minutes of the Meeting (May 4–5, 1995), available at 1995 WL 870911, at *4 (resolving that declarant’s hearsay statement would become admissible under Rule 804(b)(6), hearsay forfeiture rule, to extent that it would have been admissible had declarant testified at trial).

¹⁴ Very few courts or scholars question the presumed punishment/retribution rationale of forfeiture-by-wrongdoing, though at least two commentators have identified the inconsistency between the rationale and the rule. See, e.g., James F. Flanagan, *Confrontation, Equity, and the Misnamed Exception for “Forfeiture” by Wrongdoing*, 14 WM. & MARY BILL RTS. J. 1193, 1240–42 (2006) [hereinafter Flanagan, *Confrontation*] (distinguishing waiver from true forfeiture on similar grounds); Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 516–18 (1997) [hereinafter Friedman, *Chutzpa*] (arguing forfeiture-by-wrongdoing is better understood as governed by principle that defendant cannot complain about consequences of his own wrongdoing rather than equitable maxim that no one should profit from his own wrong). However, neither fully rejects the punishment rationale, nor identifies the ramifications I advance of removing a punishment rationale from forfeiture’s underpinnings. See Flanagan, *Confrontation, supra*, at 1239–45 (continuing to endorse “essentially equitable grounds” of rule) (internal quotation marks omitted); James F. Flanagan, *We Have a “Purpose” Requirement If We Can*

that limited forfeiture is both feasible and more consistent with the confrontation values enshrined in *Crawford*.¹⁵

I

THE RIGHT TO CONFRONTATION AND THE RULE AGAINST HEARSAY

The Confrontation Clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment,¹⁶ guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”¹⁷ In the usual case, confrontation requires the prosecution to produce its witness to testify live at trial, allowing for administration of the oath, face-to-face accusation with the defendant in a solemn, public proceeding, an opportunity for the jury to assess the witness’s demeanor as he testifies, and full cross-examination.¹⁸

A. *The Three Primary Purposes of the Sixth Amendment Confrontation Clause*

The Confrontation Clause imposes a demanding framework on criminal trials to ensure the State fulfills certain bedrock principles of

Keep It, 13 LEWIS & CLARK L. REV. 553, 575 (2009) [hereinafter Flanagan, *Purpose*] (referring to forfeiture as “equitable principle” and suggesting equity-balancing between parties is proper); Friedman, *Chutzpa*, *supra* at 506 (predicating doctrine on fairness rationale, in comparing defendant who demands confrontation of witness whose absence he caused, to man who murders parents and claims sympathy as orphan); Richard D. Friedman, *Giles v. California: A Personal Reflection*, 13 LEWIS & CLARK L. REV. 733, 742–43 (2009) [hereinafter Friedman, *Personal Reflection*] (continuing to endorse equity-based rationale for doctrine).

¹⁵ Many scholars have argued for limits on forfeiture in various ways, such as by requiring a heightened standard of proof for forfeiture, or by strengthening the predicate fact-findings that trigger forfeiture. *See, e.g., infra* note 265 (describing arguments). However, most nonetheless suggest that once forfeiture is found, the Confrontation Clause ceases to operate entirely. I reject this all-or-nothing view. One of my primary contributions to the literature is my suggestion that confrontation should be analyzed in terms of its component elements rather than as a single, undifferentiated phenomenon, and that any departure from its requirements likewise should be analyzed fractionally, not wholesale.

¹⁶ *Pointer v. Texas*, 380 U.S. 400, 403–06 (1965).

¹⁷ U.S. CONST. amend. VI.

¹⁸ *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) (“In the usual case . . . the prosecution must . . . produce . . . the declarant whose statement it wishes to use against the defendant.”); *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982) (“The law prefers live testimony over hearsay, a preference designed to protect everyone, particularly the defendant.”); *see also* *R. v. Woodcock* (1789) 168 Eng. Rep. 352, 352 (L.R.C.C.R.) (“The most common and ordinary species of legal evidence consists in the [trial testimony] of witnesses taken on oath before the [j]ury, in the face of the Court, in the presence of the prisoner, and received under all the advantages which examination and cross-examination can give.”).

fundamental fairness¹⁹ when it acts to deprive a citizen of his “transcendent” interest in personal liberty.²⁰ The Clause has three primary purposes. First, the Clause’s “ultimate goal is to ensure reliability of evidence” adduced against a criminal defendant;²¹ this is widely considered the most “central concern” of the Clause.²²

Second, the Clause evinces particular concern about preventing government abuse, a subset of the general concern about evidentiary reliability, having been designed to prevent “the paradigmatic evil” of “trial by affidavit”²³—that is, evidence the government has developed in secret, without subjecting its witness to public airing and adversarial testing.²⁴ As stated in *Crawford*, the “[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse.”²⁵

¹⁹ *Pointer*, 380 U.S. at 405 (“[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.”); Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1258 (2003) (“[R]equiring confrontation is a way of reminding ourselves that we are, or [at] least want to see ourselves as, the kind of people who decline to countenance or abet what we see as the cowardly and ignoble practice of hidden accusation.”).

²⁰ *Speiser v. Randall*, 357 U.S. 513, 525 (1958) (stating that defendants in criminal trials have “at stake an interest of transcendent value”).

²¹ *Crawford v. Washington*, 541 U.S. 36, 61 (2004); *accord Roberts*, 448 U.S. at 65 (“[The Confrontation Clause’s] underlying purpose [is] to augment accuracy in the factfinding process . . .”).

²² *Maryland v. Craig*, 497 U.S. 836, 845 (1990). However, *Crawford* emphasized reliability cannot be determined in the abstract, but only through the process of confrontation itself; thus, confrontation should not be abandoned even in good faith attempts to pursue reliability more expeditiously. *See infra* notes 70–75 (discussing *Crawford*’s holding that confrontation right is *procedural* guarantee).

²³ *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring); *see also Crawford*, 541 U.S. at 50 (“[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”); *Mattox v. United States*, 156 U.S. 237, 242–43 (1895) (stating that primary purpose of Confrontation Clause was “to prevent depositions or *ex parte* affidavits . . . [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness”).

²⁴ *See, e.g., Clark, supra* note 19, at 1261–63 (stressing openness of confrontation procedure as check against government pressure and false accusations); AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 129–31 (1997) (cited favorably by *Crawford*, 541 U.S. at 61) (arguing confrontation eschews “private and secret examinations”); Anthony Bocchino & David Sonenshein, *Rule 804(b)(6)—The Illegitimate Child of the Failed Liaison Between the Hearsay Rule and Confrontation Clause*, 73 MO. L. REV. 41, 54 (2008) (arguing *Crawford* suggests Confrontation Clause is most concerned with secret government evidence); Andrew E. Taslitz, *What Remains of Reliability: Hearsay and Free-standing Due Process After Crawford v. Washington*, 20 CRIM. JUST. 39, 43 (2005) (“[T]he Confrontation Clause is designed primarily to prevent intentional or accidental creation of flawed evidence by governmental investigatory abuses . . .”).

²⁵ *Crawford*, 541 U.S. at 56 n.7. Government involvement in the creation of evidence can uniquely flaw evidence in three primary ways: (1) intentional manipulation or

Finally, confrontation serves an independent symbolic purpose of respecting the dignity of the accused and promoting the appearance of procedural fairness, both crucial to assuring the criminal justice system’s legitimacy.²⁶ As stated by the Court, the Clause advances “symbolic goals” by “contribut[ing] to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails.”²⁷

B. *The Constitutive Elements of Confrontation*

Confrontation encompasses many components that promote these three primary purposes of ensuring evidentiary reliability, safeguarding against government evidence-shaping, and maintaining systemic legitimacy. The primary elements of confrontation are: (1) cross-examination; (2) oath; (3) face-to-face accusation; (4) live public testimony; and (5) demeanor evidence.²⁸

Cross-examination, generally considered the most critical element of confrontation,²⁹ “entails close, pointed, persistent questioning of the witness on the substance of his testimony.”³⁰ Dean Wigmore

fabrication by the government officer; (2) unconscious shaping of the evidence by the officer, such as through leading questions or selective recording; (3) alteration of the statement by the witness herself based on her perception that it will be used in criminal prosecution. *See generally* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 372–73 (1790); Taslitz, *supra* note 24, at 41–43.

²⁶ *Craig*, 497 U.S. at 847 (noting “strong symbolic purpose” of confrontation and stating it is “essential to a fair trial in a criminal prosecution” (quoting *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988))); *Pointer v. Texas*, 380 U.S. 400, 405 (1965) (“There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.”); Taslitz, *supra* note 24, at 42 (arguing Clause promotes “perceived fairness and legitimacy of the justice system”).

²⁷ *Lee v. Illinois*, 476 U.S. 530, 540 (1986).

²⁸ *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8:3 (3d ed. 2003) (describing oath, demeanor evidence, and cross-examination as key trial safeguards to mitigate risk of witness unreliability); *see also* 21A AM. JUR. 2D CRIMINAL LAW § 1074 & n.3 (2010) (“The Confrontation Clause affords two types of protections to criminal defendants: the right physically to face those who testify against them and the right to cross examine adverse witnesses.”).

²⁹ *E.g.*, *Crawford*, 541 U.S. at 68 (holding that cross-examination is essential to confrontation); Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 118, 176–77 (2005) [hereinafter Davies, *Fictional Originalism*] (noting cross-examination came to be considered most important element of confrontation in early- to mid-nineteenth century United States).

³⁰ MUELLER & KIRKPATRICK, *supra* note 28, § 8:3; *see also* 5 JOHN HENRY WIGMORE, EVIDENCE § 1395, at 123 (3d ed. 1940) (“[C]ross-examination . . . cannot be had except by the direct and personal putting of questions and obtaining immediate answers.”).

characterized it as “beyond any doubt the greatest legal engine ever invented for the discovery of truth.”³¹

The other elements of confrontation, called “secondary advantage[s]” by Wigmore,³² also promote the Clause’s three purposes. The oath, by which the witness must swear or solemnly affirm that he will speak the truth, subjects the witness to legal compulsion to testify truthfully, as well as impressing upon him the moral seriousness of the occasion.³³ Having the witness testify face-to-face with the defendant in a formal, public proceeding—considered crucial to the symbolic fairness and dignity values of the Clause³⁴—also promotes reliability by requiring a witness to consider the defendant’s humanity, causing him to take a more sober approach to his testimony.³⁵ Requiring a witness to recount his testimony live may reveal weaknesses that could be masked by a piece of paper.³⁶ And finally, the witness’s presence before the jury as he testifies and answers questions allows the jury to assess his voice and demeanor for clues as to his reliability.³⁷

³¹ 3 JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 1367 (2d ed. 1923); accord BLACKSTONE, *supra* note 25, at 373–74 (“This open examination of witne[ss]es *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth”); MATTHEW HALE, *THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND* 258 (1713) (“[Cross-examination] beats and bolts out the [t]ruth much better than when the [w]itne[s] only delivers a formal [s]eries of his [k]nowledge without being interrogated”).

³² 5 JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 1395 (3d ed. 1940).

³³ See MUELLER & KIRKPATRICK, *supra* note 28, § 8:3 (“Testifying under oath carries with it the threat of a perjury prosecution More importantly, the ceremony of the oath brings home to the witness that the time has come to be serious, careful, and honest.”).

³⁴ *Maryland v. Craig*, 497 U.S. 836, 847 (1990) (“[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as essential to a fair trial in a criminal prosecution.” (quoting *Coy v. Iowa*, 487 U.S. 1012, 1017 (1958) (internal quotation marks omitted))); *Coy*, 487 U.S. at 1018 (1988) (arguing face-to-face accusation is essential to feelings of fairness, as evidenced by commonplace phrase, “[l]ook me in the eye and say that”) (internal quotation marks omitted).

³⁵ See *Coy*, 487 U.S. at 1019 (“A witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts.”) (internal quotation marks omitted); *Jay v. Boyd*, 351 U.S. 345, 375–76 (1956) (Douglas, J., dissenting) (noting that testifying face-to-face requires witness to consider defendant’s humanity); BLACKSTONE, *supra* note 25, at 373 (“[A] witne[s] may frequently depo[s]e that in private, which he will be a[s]hamed to testify in a public [] and [s]olemn tribunal.”).

³⁶ *Jay*, 351 U.S. at 376 (Douglas, J., dissenting).

³⁷ *Mattox v. United States*, 156 U.S. 237, 242–43 (1895) (“[Confrontation compels the witness] to stand face to face with the jury in order that they may . . . judge by his demeanor . . . whether he is worthy of belief.”); see also MUELLER & KIRKPATRICK, *supra* note 28, § 8:3 (“A testifying witness gives her evidence on the stand under the gaze of the trier of fact, and her demeanor provides valuable clues about meaning and credibility.”).

C. The Connection to Hearsay Law

To be admitted against a criminal defendant, out-of-court statements must independently satisfy both hearsay law and the Confrontation Clause. Hearsay law is governed by statutory and common law rules of evidence rather than constitutional law. While hearsay law is not uniform across states, most states follow rules similar to the Federal Rules of Evidence.³⁸ Under federal and most state rules, “[h]earsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.³⁹

Evidence law generally prohibits the admission of hearsay in both civil and criminal trials⁴⁰ because it is considered less reliable than live witness testimony.⁴¹ There are four primary reliability risks associated with hearsay (often called “hearsay risks”): (1) misperception, (2) failed memory, (3) insincerity (lying), and (4) communicative ambiguity.⁴² The first two are “input” risks: They affect the declarant’s own mental impression of the reality she purports to recount. The latter two are “output” risks: They affect the declarant’s ability accurately to convey to the fact-finder the impression in her mind. Confrontation tends to mitigate each of these four risks.⁴³ Codified exceptions to the hearsay rule—through which hearsay statements are admitted despite lack of trial safeguards—are generally premised on the reduction or absence of one or more of these hearsay risks based on the statement’s nature or setting,⁴⁴ coupled with some sort of special necessity for the out-of-court statement.⁴⁵ For example, “excited utterance[s],”

³⁸ 2 BARBARA E. BERGMAN & NANCY HOLLANDER, WHARTON’S CRIMINAL EVIDENCE § 6.1 & n.2 (15th ed. 1998) (stating this proposition and providing citations to state rules).

³⁹ FED. R. EVID. 801(c). Statements not offered for the truth of the matter asserted are not hearsay. For example, the out-of-court statement, “Henry has a gun!” is hearsay if admitted to prove that Henry actually had a gun, but it is *not* hearsay if admitted to prove that a hearer of this statement *thought* that Henry had a gun.

⁴⁰ See FED. R. EVID. 802. It is important to note, however, that evidence codes contain voluminous exceptions to this general hearsay bar. See *id.* 801(d) (excluding from definition of hearsay party admissions and certain prior statements by declarant who appears in court); *id.* 803 (excepting from hearsay bar certain statements considered inherently reliable); *id.* 804 (excepting from hearsay bar certain statements if declarant is unavailable at trial); *id.* 807 (creating “residual” hearsay exception for statements bearing “equivalent circumstantial guarantees of trustworthiness” as Rule 803 and 804 exceptions).

⁴¹ MUELLER & KIRKPATRICK, *supra* note 28, § 8:3.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Bocchino & Sonenshein, *supra* note 24, at 47 (noting hearsay exceptions are premised on both reliability and necessity). Necessity concerns recognize that the “matter to be proved would otherwise lie almost beyond proof or other evidence would be even less

made by a speaker in immediate response to a startling event, are excepted from the hearsay ban on the basis of being so spontaneous that memory and veracity hearsay concerns are mitigated.⁴⁶

The connection between hearsay law and the constitutional right to confrontation remains obscure. Both “protect similar values”⁴⁷ in that both hearsay law and the confrontation right are designed to guard against evidentiary unreliability.⁴⁸ Further, the Framers likely viewed the general hearsay bar as mandated by the confrontation right.⁴⁹ Yet, the Supreme Court has rejected any perfect “congruence”⁵⁰ between them; indeed, each recognized exception to the hearsay rule contravenes a literal interpretation of the right to confrontation when applied to testimony against a criminal defendant.⁵¹

satisfactory.” CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 8:3 (3d ed. 2007). For example, statements of a then-existing mental condition are exempted from the hearsay rule because the speaker is describing her present internal state of mind, as opposed to an external reality, and thus there is no better source for this information. *See* FED. R. EVID. 803(3). Further, all of the hearsay exceptions enumerated in FED. R. EVID. 804 require witness unavailability for their admission, adding a necessity component.

⁴⁶ *See* FED. R. EVID. 803(2). However, excited utterances do not provide any assurance regarding the other two hearsay risks: adequate perception and communicative clarity. Indeed, the startling nature of the situation and the impulsivity of the statement if anything increase these risks. Nonetheless, such statements have long-standing pedigree as a valid hearsay exception. This may reflect the fact that hearsay exceptions tend to focus more on the assurance of sincerity than on guarding against the other three hearsay risks. *See* Fred O. Smith, Jr., Note, *Crawford’s Aftershock: Aligning the Regulation of Nontestimonial Hearsay with the History and Purposes of the Confrontation Clause*, 60 *STAN. L. REV.* 1497, 1521–23 (2008) (arguing hearsay exceptions are chiefly justified by preventing intentional lying, without ensuring against other reliability concerns).

⁴⁷ *California v. Green*, 399 U.S. 149, 155 (1970); *see also* *Giles v. California*, 128 S. Ct. 2678, 2686 (2008) (“[I]t seems apparent that the Sixth Amendment’s Confrontation Clause and the evidentiary hearsay rule stem from the same roots.” (quoting *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (plurality opinion))).

⁴⁸ *E.g.*, *United States v. Owens*, 789 F.2d 750, 756 (9th Cir. 1986) (stating “cross-examination is thought to be the most important” trial safeguard that justifies excluding hearsay), *rev’d* on other grounds, 484 U.S. 554 (1988).

⁴⁹ Thomas Y. Davies, *Selective Originalism: Sorting out Which Aspects of Giles’s Forfeiture Exception to Confrontation Were or Were Not “Established at the Time of the Founding,”* 13 *LEWIS & CLARK L. REV.* 605, 633 (2009) [hereinafter Davies, *Selective Originalism*] (“[T]here is ample reason to think that the American Framers understood that the ban against hearsay was required by the confrontation right.”); *see also* *Giles*, 128 S. Ct. at 2686 (“[C]ourts prior to the founding excluded hearsay evidence in large part because it was unfronted.”).

⁵⁰ *Green*, 399 U.S. at 155.

⁵¹ *See* *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (“If one were to read [the Confrontation Clause] literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial.”).

D. The Crawford v. Washington Revolution

Prior to the *Crawford* decision in 2004, the standard of *Ohio v. Roberts*⁵² governed Confrontation Clause doctrine, explicitly making reliability the touchstone of confrontation analysis. The 1980 *Roberts* Court essentially affirmed the then-emerging trend in holding that out-of-court hearsay statements of unavailable witnesses satisfied the Confrontation Clause so long as they bore “adequate indicia of reliability,” a standard the government could meet by showing that the evidence either (1) fell within a “firmly rooted hearsay exception” or (2) bore “particularized guarantees of trustworthiness.”⁵³ The *Roberts* test, especially as interpreted by later decisions, proved to be an exceedingly low bar,⁵⁴ rarely preventing the introduction of out-of-court statements at trial⁵⁵ and generally collapsing confrontation analysis into hearsay law.⁵⁶

With *Crawford* in 2004,⁵⁷ the Court transformed Confrontation Clause jurisprudence by discarding *Roberts*’s reliability standard as too amorphous.⁵⁸ It instead created a bright-line rule that prior testi-

⁵² *Id.*

⁵³ *Id.* at 66 (internal quotation marks omitted).

⁵⁴ Only two hearsay exceptions ever failed the “firmly rooted” prong of the *Roberts* test: the Rule 807 “residual” or “catch-all” hearsay exception, *Idaho v. Wright*, 497 U.S. 805, 817 (1990), and accomplice confessions inculcating the defendant, *Lilly v. Virginia*, 527 U.S. 116, 134 (1999) (plurality opinion). In *Bourjaily v. United States*, 483 U.S. 171 (1987), the Court further relaxed the *Roberts* test by holding that hearsay exceptions counted as “firmly rooted” simply by being long-recognized, rejecting the argument that only hearsay exceptions bearing inherent reliability guarantees should qualify. *Id.* at 183–84 (internal quotation marks omitted). In addition, *United States v. Inadi*, 475 U.S. 387 (1986), greatly broadened *Roberts*’s applicability by holding that unavailability of the declarant was not a necessary prerequisite to admitting her out-of-court statements. *Id.* at 392–94.

⁵⁵ See *Crawford v. Washington*, 541 U.S. 36, 63 (2004) (“The unpardonable vice of the *Roberts* test . . . [is] its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”).

⁵⁶ Because a “firmly rooted” hearsay exception served as an admissibility ticket under both the Confrontation Clause and hearsay rules, courts could often dispose of hearsay and confrontation objections with a single, undifferentiated analysis. See Friedman, *Chutzpa*, *supra* note 14, at 509–10 (noting Confrontation Clause posed “no barrier” to evidence if hearsay law did not); see also Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 759 (2005) (noting *Roberts* imposed nothing more than hearsay law for all “firmly rooted” hearsay exceptions). The Court in *Roberts* acknowledged this overlap but commented that it merely “reflects the truism that ‘hearsay rules and the Confrontation Clause are generally designed to protect similar values,’” *Roberts*, 448 U.S. at 66 (quoting *California v. Green*, 399 U.S. 149, 155 (1970)), and suggested that the redundancy represented a useful efficiency gain for the overworked trial judge, *Roberts*, 448 U.S. at 66 (“[The overlap between hearsay rules and constitutional requirements] also responds to the need for certainty in the workaday world of conducting criminal trials.”).

⁵⁷ 541 U.S. 36 (2004).

⁵⁸ *Id.* at 68 n.10 (“[T]he *Roberts* test is *inherently*, and therefore *permanently*, unpredictable.”).

monial statements of a missing witness are flatly inadmissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.⁵⁹ As stated by the Court:

To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.⁶⁰

Though the Framers' goal was reliability, they prescribed confrontation as its method of attainment: Reliability is a product of confrontation, not something that can be assessed in its absence. The Confrontation Clause thus acts as an absolute bar to the government's use of testimonial hearsay against a defendant unless it provides an opportunity for cross-examination, either at trial, or if the witness is unavailable, on a prior occasion.⁶¹

However, the Court limited its new rule's applicability to what it called "testimonial statements"⁶²—that is, "solemn declaration[s],"⁶³ usually to a government officer, that are made to establish past events potentially relevant to a criminal prosecution.⁶⁴ By limiting the

⁵⁹ *Id.* at 68.

⁶⁰ *Id.* at 61.

⁶¹ *Id.* at 68–69.

⁶² *Id.* at 51.

⁶³ *Id.* (internal quotation marks omitted).

⁶⁴ *Davis v. Washington*, 547 U.S. 813, 822 (2006) (“[Statements] are testimonial when the circumstances objectively indicate . . . that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”); *Crawford*, 541 U.S. at 51 (“‘Testimony,’ in turn, is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’” (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828))). The *Crawford* Court left “for another day” the question of exactly which types of statements are “testimonial” for purposes of the Confrontation Clause, 541 U.S. at 68, but provided that “core” testimonial statements include affidavits, depositions, prior testimony, and statements made to police officers that “declarants would reasonably expect to be used prosecutorially,” *id.* at 51 (internal quotations omitted). Under the post-*Crawford* jurisprudence, nontestimonial statements, such as a “casual remark to an acquaintance,” *id.* at 51, do not trigger Confrontation Clause protections at all. *Whorton v. Bockting*, 549 U.S. 406, 420 (2007) (“Under *Crawford*, . . . the Confrontation Clause has no application to [out-of-court nontestimonial] statements”); *Davis*, 547 U.S. at 824 (holding that “testimonial” statements mark out not only the Confrontation Clause’s “‘core,’ but [also] its perimeter”). Delineating testimonial from nontestimonial statements has proved contentious since *Crawford* erected this line. *E.g.*, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009) (ruling that certified reports by lab technicians are testimonial); *Giles*, 128 S. Ct. at 2693 (Thomas, J., concurring) (disagreeing with government’s concession that victim’s post-assault statements to police were testimonial); *id.* at 2694 (Alito, J., concurring) (same); *Davis*, 547 U.S. at 822 (designating as “nontestimonial” statements made to police

Clause’s scope to statements generally made by or to government officers, *Crawford* seemingly endorsed the view that the Clause’s most important function is policing government abuse in evidence-creation, over and above ensuring evidentiary reliability generally.⁶⁵

In introducing this new rule, *Crawford* advanced three main tenets for Confrontation Clause analysis. First, Confrontation Clause analysis is originalist: The right is defined by the “right of confrontation at common law”⁶⁶ and must be construed in accordance with “the Framers’ design.”⁶⁷ Accordingly, Justice Scalia’s majority opinion examined historical sources and concluded that the founding-era confrontation right erected an absolute bar to non-cross-examined testimonial hearsay.⁶⁸ The Court has continued to endorse this originalist approach in its subsequent Confrontation Clause decisions.⁶⁹

Second, confrontation is a procedural guarantee, designed to effectuate the Clause’s underlying purposes in a *particular* way. The Court rejected the *Roberts* regime’s circumvention of confrontation in a misguided attempt to pursue the Clause’s purposes more directly: “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”⁷⁰ Reliability is not something that can be assessed in the abstract, but only through the

to respond to immediate emergency, rather than to recount past events). Indeed, the Court appears disposed to limit the “testimonial” category only to statements made to government officers, demonstrating how capacious an exception to the Confrontation Clause the nontestimonial category represents. See *Giles*, 128 S. Ct. at 2692–93 (exempting, in dicta, all statements to friends, neighbors, and physicians as nontestimonial). Many scholars have criticized *Crawford*’s jettisoning of nontestimonial statements from Confrontation Clause protection, especially as contrary to the historical foundations on which *Crawford* purportedly relied. See, e.g., Davies, *Fictional Originalism*, *supra* note 29, at 119 (examining framing-era sources and finding no basis for “testimonial” distinction because Framers never anticipated that informal hearsay could be considered valid evidence in criminal trials at all); Smith, *supra* note 46, at 1504 (arguing Confrontation Clause was intended to cover nontestimonial statements); see also *Crawford*, 541 U.S. at 72 (Rehnquist, C.J., concurring in the judgment) (“[W]e have never drawn a distinction between testimonial and nontestimonial statements.”). However, analysis of the propriety of the testimonial/nontestimonial distinction is beyond the scope of this Note.

⁶⁵ To justify limiting the Clause to testimonial statements, the Court emphasized that “[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse.” *Crawford*, 541 U.S. at 56 n.7.

⁶⁶ *Id.* at 54.

⁶⁷ *Id.* at 68.

⁶⁸ *Id.* at 53–54. But see Davies, *Fictional Originalism*, *supra* note 29, at 178 (arguing cross-examination requirement did not emerge until early nineteenth century).

⁶⁹ See *Giles*, 128 S. Ct. at 2680 (reaffirming *Crawford*’s rule that confrontation right admits only those exceptions “established at the time of the founding” (quoting *Crawford*, 541 U.S. at 54)); *Davis*, 547 U.S. at 836 (relying on Framers’ intent to determine boundary of testimonial category).

⁷⁰ *Crawford*, 541 U.S. at 68–69.

process of confrontation itself.⁷¹ The Court thus declared the confrontation procedure *itself* indispensable to the Clause's primary purposes⁷² because it provides the only acceptable means of assuring evidentiary reliability and preventing government abuse.⁷³ Further, confrontation procedure promotes the Clause's symbolic purposes of ensuring apparent fairness and respecting individual dignity, which are lost when courts dispense with confrontation to pursue the vague goal of reliability more expeditiously through other methods.⁷⁴ In declaring confrontation procedure indispensable *regardless* of an out-of-court statement's apparent reliability, the Court demanded an institutional design that operates to maximize confrontation, rather than acceding to claims that it is inconvenient, difficult, or unnecessary.⁷⁵

Third, *Crawford* exhibited a strong wariness toward empowering judges to discretionarily dispense with confrontation. Emphasizing that the Confrontation Clause was born of governmental distrust,⁷⁶ and that such distrust extended to judges as well as police and prosecutors,⁷⁷ the Court warned that granting judges discretion to waive

⁷¹ *Id.* at 68 n.10 (“[T]he *Roberts* test is *inherently*, and therefore *permanently*, unpredictable.”). Lower courts under *Roberts* attempting to divine “reliability” by assessing “particularized guarantees of trustworthiness” not only produced widely inconsistent results, they even attached the same significance to opposite factors. For example, statements were endorsed as reliable for being “detailed” in one case and for being “fleeting” in another; for being given “immediately after” the event in one case and two years later in another; for being given in police custody in one case and for *not* being in police custody in another. *Id.* at 63 (summarizing cases) (internal quotation marks omitted); see also Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1031 (1998) (cited favorably by *Crawford*, 541 U.S. at 61) (“The language of the Clause, as well as its theory, suggests a strong, absolute right—not simply some interest that should be weighed against others. Balancing tests are not very good protectors of rights, because a judge disposed to rule against the right will generally have an easy enough time finding ample weight on the other side of the balance.”).

⁷² See *supra* Part I.A (describing primary purposes of Clause).

⁷³ See *supra* notes 65, 70–75 and accompanying text (describing confrontation's central importance to evidentiary reliability and prevention of government abuse).

⁷⁴ Cf. *Crawford*, 541 U.S. at 62 (“Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”).

⁷⁵ *Id.* at 61 (“The Clause thus reflects a judgment, not only about the desirability of reliable evidence . . . , but about how reliability can best be determined.”); *id.* at 62 (stating that confrontation cannot be traded for “surrogate[s]” or “alternative means” of accomplishing its aims); *id.* at 67 (“The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.”); see also Flanagan, *Confrontation*, *supra* note 14, at 1244 (“Read affirmatively, *Crawford* requires the use of live witnesses whenever possible.”).

⁷⁶ *Crawford*, 541 U.S. at 56 n.7 (emphasizing Framers' “keen[] familiar[ity]” with “potential for prosecutorial abuse” in testimony not subject to confrontation).

⁷⁷ *Id.* at 67 (“[The Framers] knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys

confrontation rights would threaten this hard-won safeguard against governmental abuse⁷⁸ and would strike the founders as an alarming irony.⁷⁹

E. The Forfeiture-by-Wrongdoing Exception to Crawford

Despite reinvigorating the deflated right of confrontation, *Crawford* exempted from its protections any exceptions to the right that had been “established at the time of the founding.”⁸⁰ The Court specifically noted two such exceptions: dying declarations⁸¹ and statements admissible under the doctrine of forfeiture-by-wrongdoing.⁸² The forfeiture-by-wrongdoing rule (hereinafter also called “forfeiture”) permits an absent witness’s out-of-court statements to be introduced at trial (for the truth of the matter asserted) if a judge finds that the defendant intentionally caused the witness’s absence.⁸³

To demonstrate the grounds of forfeiture, the prosecution must establish three elements: (1) that the defendant “kept away” the witness⁸⁴ (2) by wrongdoing⁸⁵ (3) with the specific intent to prevent her

were not yet too distant a memory. They were loath to leave too much discretion in judicial hands.”).

⁷⁸ *Id.*; see also *id.* at 61 (“Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.”).

⁷⁹ *Id.* at 66 (stating Framers “would be astounded” to learn that assurances of government officers’ “neutral[ity]” bore on whether confrontation was required).

⁸⁰ *Id.* at 54.

⁸¹ *Id.* at 56 n.6. Dying declarations are statements made by a declarant while aware of her imminent death, concerning the cause or circumstances of the impending death. FED. R. EVID. 804(b)(2). The rationale for their admissibility is partially necessity—often providing the only evidence of a crime that necessarily eliminates its primary witness—combined with the statements’ presumed intrinsic reliability: “[T]he sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the . . . oath.” *Mattox v. United States*, 156 U.S. 237, 244 (1895); accord *R. v. Osman*, 15 Cox Crim. Cas. 1, 3 (Eng. N. Wales Cir. 1881) (Lush, L.J.) (“[N]o person, who is immediately going into the presence of his Maker, will do so with a lie on his lips.”). Dying declarations are thus explicitly justified as a surrogate means of assuring reliability, the very constitutional subversion rejected by *Crawford* as illegitimate under the Confrontation Clause. See *Crawford*, 541 U.S. at 62 (stating confrontation cannot be traded for “surrogate[s]” or “alternative means” of accomplishing its aims). Nonetheless, because the exception for dying declarations was recognized at the time of founding, the Court has indicated that they are admissible “on historical grounds,” as a *sui generis* exception to the Confrontation Clause. *Id.* at 56 n.6.

⁸² *Crawford*, 541 U.S. at 62.

⁸³ *Giles v. California*, 128 S. Ct. 2678, 2683 (2008).

⁸⁴ *Id.* at 2683. This requirement actually has two parts: that the witness is unavailable (or “detained” or “kept away”), and that the defendant “caused” (or “procured”) such unavailability. See *id.* (noting rule and providing various historical terminology).

⁸⁵ *Id.* at 2687. However, *Giles* indicates that the “wrongdoing” element lacks little if any independent significance, as the requisite wrongdoing refers to “conduct *designed* to prevent the witness from testifying,” *id.* at 2683, thus largely collapsing this element into the third. The only exception may be when the defendant invokes a proper privilege, such

from testifying.⁸⁶ The Supreme Court, however, has not affirmatively fixed the standards that govern this determination.⁸⁷ Most states allow the trial judge to base her finding on a preponderance of the evidence, though three states require a heightened clear-and-convincing standard.⁸⁸ Exactly how “unavailable” the witness must be remains an open question,⁸⁹ especially in cases where the witness resides in the

as in Washington State, where the defendant, rather than the witness, invokes the privilege of spousal immunity. *See Crawford*, 541 U.S. at 42 n.1 (noting but not reaching issue); WASH. REV. CODE § 5.60.060(1) (2009) (providing that criminal defendant’s spouse may not testify against defendant without defendant’s consent). However, a sham marriage by the defendant, entered into for the purpose of preventing the spouse’s testimony, would probably qualify as wrongdoing sufficient to trigger forfeiture. *See United States v. Barlow*, 693 F.2d 954, 962 (6th Cir. 1982) (suggesting that such a sham marriage would result in waiver).

⁸⁶ *Giles*, 128 S. Ct. at 2687. *Giles* resolved a prior circuit and state court split over whether such an intent requirement was necessary. Petition for Writ of Certiorari at 10, *Giles*, 128 S. Ct. 2678 (No. 07-6053), 2007 WL 4729835 (noting split of six to five among ten state supreme courts and one federal circuit court that had ruled on question). However, in domestic violence cases, *Giles* suggests that such intent can be inferred from the mere existence of a battering relationship. *See Giles*, 128 S. Ct. at 2693 (stating evidence of abusive relationship may support finding of intent to isolate victim, including preventing cooperation with criminal prosecution); *id.* at 2695 (Souter, J., concurring) (stating intent requirement could “normally” be inferred from “classic abusive relationship”); *see also id.* at 2708 (Breyer, J., dissenting) (arguing majority’s rule transforms “purpose” into mere knowledge requirement where domestic violence is at issue).

⁸⁷ *Davis v. Washington*, 547 U.S. 813, 833 (2006) (“We take no position on the standards necessary to demonstrate such forfeiture . . .”).

⁸⁸ MD. CODE ANN., CTS. & JUD. PROC. § 10-901 (LexisNexis 2006); *People v. Geraci*, 649 N.E.2d 817, 822 (N.Y. 1995); *State v. Mason*, 162 P.3d 396, 404 (Wash. 2007) (en banc).

⁸⁹ *See Flanagan*, *Purpose*, *supra* note 14, at 567 (“The current law on the government’s obligation to prove the witness’s unavailability is ambiguous in form and lenient in application.”). A witness is clearly physically unavailable if he is dead, *see Giles*, 128 S. Ct. at 2683, too sick to travel, *see infra* note 108 (describing this historical unavailability requirement), or indefinitely beyond the court’s jurisdiction and the state is “powerless to compel his attendance.” *Mancusi v. Stubbs*, 408 U.S. 204, 212 (1972). Even if physically present, a witness is also considered unavailable for purposes of the Confrontation Clause if she has invoked an evidentiary privilege preventing her testimony, such as the Fifth Amendment privilege or a marital privilege, or completely refuses to submit to cross-examination in court. *See Crawford*, 541 U.S. at 40 (marital privilege); *Toolate v. Borg*, 828 F.2d 571, 572–73 (9th Cir. 1987) (cross-examination refusal); *Steele v. Taylor*, 684 F.2d 1193, 1201–03 (6th Cir. 1982) (Fifth Amendment privilege). A witness’s mental incapacity may also render her unavailable. *See Idaho v. Wright*, 497 U.S. 805, 806, 816 (1990) (“assum[ing] without deciding” that incompetence satisfies unavailability test). Interestingly, a witness’s total memory loss at the time of trial probably does not render the witness unavailable. *See United States v. Owens*, 484 U.S. 554, 560–62 (1988) (suggesting witness is “available” for purposes of cross-examination despite total memory loss at time of trial so long as he is “placed on the stand, under oath, and responds willingly to questions,” even though such a witness would be deemed “unavailable” for purposes of hearsay under FED. R. EVID. 804(a)(3)). Though the Court has indicated that “unavailability” analysis under the Confrontation Clause differs from “unavailability” analysis under hearsay law, *see id.* (suggesting divergence in meaning and purpose), courts often look to Rule 804(a) for guidance in their unavailability determinations. 2 BARBARA E. BERGMAN & NANCY HOLLANDER,

jurisdiction but fails to appear at trial.⁹⁰ The degree to which the defendant must have “caused” such unavailability also remains open.⁹¹ Witnesses often have independent reasons for refusing to testify, making it difficult to determine whether the defendant “caused” their reticence.⁹² A further open causation question is the extent to which the defendant’s *intent* to prevent testimony must have motivated his actions that in fact prevented testimony:⁹³ Defendants often

WHARTON’S CRIMINAL EVIDENCE § 6:10.50 n.1 (15th ed. 2009). Rule 804(a) deems a witness unavailable for purposes of federal hearsay rules if the witness invokes a privilege; refuses to testify in spite of a court order; testifies to total memory loss; is unable to be present due to death or illness; or is absent despite the prosecution’s use of “reasonable means” to obtain the witness’s presence. FED. R. EVID. 804(a).

⁹⁰ Difficult unavailability determinations arise when a subpoenaed witness does not show up for trial. Under a portion of *Roberts* not overruled by *Crawford*, a witness is considered unavailable if the prosecution cannot locate the witness “despite good-faith efforts undertaken prior to trial to locate and present that witness,” *Ohio v. Roberts*, 448 U.S. 56, 74 (1980), though the government must demonstrate that it undertook reasonable efforts to find and produce the declarant. *Barber v. Page*, 390 U.S. 719, 722–25 (1968); *accord Hernandez v. State*, 188 P.3d 1126, 1128 (Nev. 2008). However, recent Supreme Court jurisprudence has signaled growing acquiescence to weaker showings of unavailability, applying forfeiture when a witness simply does not show up for court, without requiring any showing of effort by the prosecution to secure her appearance besides the bare issuing of a subpoena. *See Davis*, 547 U.S. at 820 (not questioning unavailability finding in *Hammond* case where missing witness “was subpoenaed, but she did not appear at [her husband’s] subsequent bench trial” for battery, without other proof of prosecution efforts).

⁹¹ *See Flanagan, Purpose, supra* note 14, at 566 (calling this gap “critical issue” in forfeiture doctrine and arguing for strict but-for causation requirement—that is, that “‘but for’ the intentional wrongdoing, the witness would have testified”).

⁹² *See Flanagan, Forfeiture, supra* note 10, at 486–87 (noting that under current doctrine, defendant’s intimidation need not even be primary cause of witness’s unavailability); *see also, e.g., Commonwealth v. Edwards*, 830 N.E.2d 158, 171 (Mass. 2005) (holding that causation can be established by defendant’s facilitating witness’s execution of independent intent not to testify, even if witness had already decided “on his own” not to testify) (internal quotation marks omitted). Cases involving co-conspirators, who have independent self-incrimination reasons not to testify, and domestic violence victims, who have independent personal, financial, and familial reasons not to testify against their domestic partners, frequently raise these causation concerns.

⁹³ *Flanagan, Purpose, supra* note 14, at 566 (calling this question doctrinally “not clear,” and advocating but-for causation requirement—that is, “the wrongdoing would [not] have occurred ‘but for’ the defendant’s desire to prevent the witness from testifying”). An example of mixed motives appears in *United States v. Houlihan*, where the court found that defendant Fitzgerald had conspired to kill a potential witness primarily to “show respect” for Mafia bosses, but stated that if preventing testimony had been “one of [his] motives at all,” forfeiture would apply. 887 F. Supp. 352, 364–65 (D. Mass. 1995) (internal quotation marks omitted), *aff’d in part, rev’d in part, and vacated in part*, 92 F.3d 1271 (1st Cir. 1996); *see also, e.g., United States v. Dhinsa*, 243 F.3d 635, 654 (2d Cir. 2001) (“The government need not, however, show that the defendant’s sole motivation was to procure the declarant’s absence; rather, it need only show that the defendant ‘was motivated *in part* by a desire to silence the witness.’” (quoting *Houlihan*, 92 F.3d at 1279)). Such causation questions frequently arise in domestic violence cases, where the defendant’s desire to prevent the victim’s testimony often does not solely or even primarily ani-

have mixed motives for their actions, and the Court has noted (though without providing further guidance) that suppressing testimony need not have been the defendant's sole or even primary motivation for his actions, even where the alleged wrongdoing occurred prior to the filing of criminal charges.⁹⁴

II

COMPLETE FORFEITURE VIOLATES THE SIXTH AMENDMENT

Under current constitutional doctrine, the Confrontation Clause places no limits on the nature of the out-of-court statements that may be admitted upon a finding of forfeiture-by-wrongdoing. Rather, the Confrontation Clause simply turns off and countenances the admission of *any* prior statements of *any* wrongfully absented witness.⁹⁵ I refer to this result as “complete forfeiture,” as it allows the admission of any and all prior statements of an unavailable witness upon a finding of wrongful procurement by the defendant.⁹⁶

Complete forfeiture is inconsistent with the three primary tenets of *Crawford* and therefore violates the Sixth Amendment. First, as discussed above, despite *Crawford*'s warnings, the power to dispense with confrontation currently resides in a judge's discretion, often based on a mere preponderance standard.⁹⁷ Second, as discussed below in Part II.A, complete forfeiture is contrary to the originalist framework developed by *Crawford* because it grossly exceeds the forfeiture exception that existed at the time of framing. Third, as

mate his actions against the victim. *See Giles*, 128 S. Ct. at 2708–09 (Breyer, J., dissenting) (noting domestic abusers may often have “other matters in mind apart from preventing the witness from testifying”).

⁹⁴ Though counterintuitive at first blush, defendants can forfeit their confrontation rights by actions they commit before criminal charges are filed against them, even in the post-*Giles* regime requiring specific intent to prevent testimony. *See, e.g., id.* at 2693 (holding that killing of witness can trigger forfeiture even where no criminal charges were pending at time of homicide).

⁹⁵ *See Giles*, 128 S. Ct. at 2686 (endorsing forfeiture-by-wrongdoing rule without placing any limits on types of evidence that may be introduced under rule); *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (“[T]he rule of forfeiture by wrongdoing . . . *extinguishes* confrontation claims”) (emphasis added); Flanagan, *Forfeiture, supra* note 10, at 527 (describing forfeiture-by-wrongdoing rule as applied by courts as giving Sixth Amendment no role whatsoever when defendant is deemed responsible for witness's absence at trial).

⁹⁶ In addition, the statements can be used for any and all purposes, without subject matter limitation. Flanagan, *Forfeiture, supra* note 10, at 493; *see e.g., Giles*, 128 S. Ct. at 2681–82 (admitting statement from prior assault to rebut defendant's claim of self-defense).

⁹⁷ *See supra* note 88 and accompanying text (describing standard of proof to establish forfeiture); *infra* notes 171–76 and accompanying text (describing malleability of threshold forfeiture findings).

described in Part II.B, rather than creating a scheme that maximizes opportunities for confrontation, complete forfeiture eliminates confrontation altogether, endangering the three primary concerns underlying the confrontation right. Finally, Part II.C argues that, despite appealing rhetoric, a retribution rationale cannot justify such violations of *Crawford*'s tenets.

A. History of Forfeiture-by-Wrongdoing

The historical origins of the forfeiture rule contrast starkly with the current rule of complete forfeiture.⁹⁸ The common law forfeiture rule did not operate as a total nullification of the confrontation right, but rather admitted only a limited class of testimony that was formal, sworn, transcribed, and taken in the defendant's presence.⁹⁹ Thus, the forfeiture exception was “originally of limited scope, [barring] only the wrongdoer's objection to the absence of the witness at trial,” not sanctioning the government's “total failure” to afford any confrontation rights.¹⁰⁰ Indeed, because post-*Crawford* Confrontation Clause doctrine allows for exceptions to the confrontation right *only insofar* as they were “established at the time of the founding,”¹⁰¹ the current rule of complete forfeiture, to the extent that it exceeds its historical origins, directly violates the Sixth Amendment.¹⁰²

1. The Founding-Era Marian Unavailability Rule

In founding-era America, only two types of out-of-court statements were admissible in criminal trials: (1) dying declarations,¹⁰³ and (2) special, sworn, judicial statements made in the presence of the defendant according to particular procedures (commonly called “Marian depositions”).

⁹⁸ See John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L. REV. 835, 889 (1996) (“Careful analysis of the rule's common law origins suggests that current practice represents an alarming break with the past, and not a continuance, because the current rule provides significantly less protection to the right to confront hostile witnesses than any version of the rule applied since the late seventeenth century.”).

⁹⁹ Davies, *Selective Originalism*, *supra* note 49, at 605 (concluding framing-era forfeiture admitted only formal, sworn, transcribed depositions); Robert Kry, *Forfeiture and Cross-Examination*, 13 LEWIS & CLARK L. REV. 577, 579 (2009) [hereinafter Kry, *Forfeiture*] (“Framing-era forfeiture doctrine was a narrow rule that applied only to [testimony taken in the defendant's presence].”).

¹⁰⁰ *State v. Moua Her*, 750 N.W.2d 258, 287 (Minn. 2008) (Page, J., concurring).

¹⁰¹ *Crawford v. Washington*, 541 U.S. 36, 54 (2004); *Giles v. California*, 128 S. Ct. 2678, 2682 (2008) (quoting *Crawford*, 541 U.S. at 54); *id.* at 2696 (Breyer, J., dissenting) (same).

¹⁰² *Cf. Giles*, 128 S. Ct. at 2693 (“We decline to approve [a version of the forfeiture] exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter.”).

¹⁰³ For a discussion of dying declarations, see *supra* note 81 and accompanying text.

The Marian statutes,¹⁰⁴ enacted in England in the mid–sixteenth century, laid out the procedure for felony arrests and prosecutions.¹⁰⁵ The statutes required that when a suspected felon was arrested, a justice of the peace must interview the felony arrestee, as well as his accuser, before committing the arrestee to jail.¹⁰⁶ The judicial officer then certified the resultant “Marian depositions” of both the witness and defendant to the trial court.¹⁰⁷ Though the Marian statutes themselves did not address the question of admissibility, judicial interpretation as early as 1666 deemed the depositions admissible against the defendant if by the time of trial the witness had become unavailable in one of three specific ways: if he was “dead, unable to [t]ravel, or kept away by the [m]eans or [p]rocurment of the [p]ri[s]oner.”¹⁰⁸ This third prong of the Marian unavailability rule is the historical progenitor of the forfeiture-by-wrongdoing rule.

Marian procedures, including the three-part unavailability rule, were understood to be part of the law of the American colonies and early states.¹⁰⁹ Thus, at the time of the country’s framing, forfeiture was not an independent doctrine, but merely a “species of unavailability,”¹¹⁰ no different than a witness’s death or inability to travel, that

¹⁰⁴ 1555, 2 & 3 Phil. & M., c. 10 (Eng.); 1554 1 & 2 Phil. & M., c. 13 (Eng.).

¹⁰⁵ Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford’s “Cross-Examination Rule”: A Reply to Mr. Kry*, 72 BROOK. L. REV. 557, 560 n.13 (2007) [hereinafter Davies, *Revisiting*]. The statutes also laid out the procedure for coroner investigations of homicides. *Id.*

¹⁰⁶ See Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493, 512–16 (2007) [hereinafter Kry, *Confrontation*] (quoting 1555 2 & 3 Phil. & M., c. 10 (Eng.); 1554 1 & 2 Phil. & M., c. 13 (Eng.)) (describing these procedures).

¹⁰⁷ See *id.*

¹⁰⁸ 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 429 (3d ed. 1721) (emphasis added). However, such testimony was not admissible if the prosecution simply could not find the witness in spite of “all their [e]ndeavours.” *Id.* at 430. The House of Lords first laid down this rule in 1666 in Lord Morley’s Case. *Lord Morley’s Case*, (1666) 6 How. St. Tr. 769, 771 (H.L.) (resolving that Marian deposition would be admissible if witness were dead, too sick to travel, or kept away by accused, but not otherwise).

¹⁰⁹ Davies, *Selective Originalism*, *supra* note 49, at 626, 636–38; Davies, *Fictional Originalism*, *supra* note 29, at 126; Todd E. Pettys, *Counsel and Confrontation*, 94 MINN. L. REV. 201, 219 (2009) (noting American courts and prosecutors “looked directly to the English common law for guidance” regarding admissibility of unavailable witnesses’ prior statements); see, e.g., *State v. Houser*, 26 Mo. 431, 440 (1858) (citing *Lord Morley’s Case*, and stating rule that “in [the] case of death or absence by procurement of the prisoner or his friends, or in case of sickness from which there was no probability of recovery, the deposition could be used”). Hawkins’s treatise, see HAWKINS, *supra* note 108, provides particularly strong evidence of how the Framers understood the forfeiture prong of the Marian unavailability rule, as Americans imported the treatise and widely copied its phrasing of the rule in framing-era justice of the peace manuals. Davies, *Selective Originalism*, *supra* note 49, at 624–25.

¹¹⁰ Kry, *Forfeiture*, *supra* note 99, at 582.

justified admitting a single type of prior formal statement.¹¹¹ Importantly, *no other* out-of-court statements were admissible under a forfeiture theory in founding-era common law.

Furthermore, Marian depositions in founding-era America were subject to numerous requisite formalities: The statement must have been made under oath, before a judicial officer, recorded in writing, signed by the declarant, and certified by the justice for its accuracy.¹¹² And because it took place at arrest, the defendant was present at the examination of his accuser and afforded an opportunity contemporaneously to “contradict[]” the witness’s statements.¹¹³ This *de facto* presence requirement soon evolved into a full-fledged right to cross-examination, either by the time of the country’s framing,¹¹⁴ or soon thereafter.¹¹⁵ Indeed, the *Crawford* Court derived its modern cross-examination rule from its conclusion that by the time of framing, Marian procedures mandated full cross-examination.¹¹⁶

Importantly, in direct opposition to the rule of “complete forfeiture,” testimony *not* taken in accordance with Marian procedures could *not* be admitted at trial on forfeiture grounds, regardless of

¹¹¹ *Id.*; see also Davies, *Selective Originalism*, *supra* note 49, at 626 (“[I]n framing-era common law, the admission of prior testimony by a witness who was kept away from trial by the defendant was simply one of the prongs of the Marian unavailability rule. There was no broader or generalized forfeiture exception to the confrontation right.”); Robert P. Mosteller, *Giles v. California: Avoiding Serious Damage to Crawford’s Limited Revolution*, 13 LEWIS & CLARK L. REV. 675, 688 (2009) (“[Scalia’s historical evidence in *Giles*] do[es] not clearly establish a strong forfeiture doctrine separate from the forfeiture ground for admission of previously confronted statements.”).

¹¹² Though not mandated by statute, witness examinations under the Marian statutes were taken under oath, and this was quickly viewed as a statutory requirement. Davies, *Selective Originalism*, *supra* note 49, at 619 (citing justice of the peace manual from 1581 requiring Marian statements to be taken under oath). The justice of the peace roughly transcribed the witness’s statement, obtained her signature, and then certified the statement to the trial court. Davies, *Revisiting*, *supra* note 105, at 583; Davies, *Fictional Originalism*, *supra* note 29, at 128–31.

¹¹³ See *R. v. Woodcock*, (1789) 168 Eng. Rep. 352, 353 (L.R.C.C.R.) (refusing to admit witness examination because “[i]t was not taken, as the statute directs, in a case where the prisoner was brought before [the justice] in custody; the prisoner therefore had no opportunity [to] contradict[] the facts it contains”); see also Davies, *Revisiting*, *supra* note 105, at 609; Kry, *Confrontation*, *supra* note 106, at 495, 512–16.

¹¹⁴ *Crawford v. Washington*, 541 U.S. 36, 46–47 (2004) (stating courts applied cross-examination rule to admission of Marian depositions); *Giles v. California*, 128 S. Ct. 2678, 2702 (2008) (Breyer, J., dissenting) (same); Kry, *Confrontation*, *supra* note 106, at 495 (arguing that Marian procedure imposed *de facto* cross-examination requirement by time of framing).

¹¹⁵ Davies, *Selective Originalism*, *supra* note 49, at 643–45 (“[T]here is solid evidence that a cross-examination rule became part of the unavailable-prior-witness rule during the nineteenth century.”).

¹¹⁶ *Crawford*, 541 U.S. at 46–47.

defendant wrongdoing.¹¹⁷ Such statements were subject to the residual common law rule against hearsay and excluded entirely,¹¹⁸ unless the statement qualified as a dying declaration.¹¹⁹ Early cases demonstrated this principle of excluding prior testimony on the grounds that it was not a proper Marian deposition in spite of witness unavailability of any cause. For example, in 1791 in *King v. Dingler*,¹²⁰ the court excluded a murder victim's deposition identifying her killer, concluding it was an improper Marian deposition because the magistrate had conducted the deposition at the infirmary where the victim was receiving care rather than in the defendant's presence in conjunction with his committal to jail.¹²¹ And in 1794 in *State v. Webb*, the North Carolina Supreme Court refused to admit a missing witness's prior deposition because it was taken in the absence of the prisoner, and thus did not afford "cro[s]s examin[ation]."¹²²

2. Post-Framing-Era Expansion of Forfeiture

In the nineteenth century, the Marian unavailability rule underwent two primary changes: First, cross-examination became a clear precondition for Marian testimony's admissibility.¹²³ Second, the rule

¹¹⁷ Davies, *Selective Originalism*, *supra* note 49, at 638; Kry, *Forfeiture*, *supra* note 99, at 579.

¹¹⁸ Davies, *Fictional Originalism*, *supra* note 29, at 196 (noting longstanding common law rule that "[h]earsay is no evidence" (internal quotation marks omitted)); Davies, *Revisiting*, *supra* note 105, at 616 (noting that common law excluded all unfronted statements, and Marian procedure operated as exception to this common law rule); *cf.* *Crawford*, 541 U.S. at 54 n.5 ("[T]o the extent Marian examinations were admissible, it was only because the statutes *derogated* from the common law.").

¹¹⁹ See generally Davies, *Selective Originalism*, *supra* note 49, at 636–43 (discussing dying declarations); Kry, *Forfeiture*, *supra* note 99, at 582–83.

¹²⁰ (1791) 168 Eng. Rep. 383, 384 (L.R.C.C.R.); see also *R. v. Woodcock* (1789) 168 Eng. Rep. 352, 353 (L.R.C.C.R.) (admitting that testimony taken by justice of peace, prior to trial, of badly injured victim identifying husband as killer before she died of injuries, was a dying declaration but excluding from evidence because it was unfronted and "the prisoner therefore had no opportunity . . . [to] contradict[] the facts it contains").

¹²¹ *Dingler*, 168 Eng. Rep. at 384; see also *Pettys*, *supra* note 109, at 212 (describing case).

¹²² 2 N.C. (1 Hayw.) 103, 104 (1794) ("[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cro[s]s examine . . ."); see also *State v. Moody*, 3 N.C. (2 Hayw.) 31, 31–32 (1798) (conditioning admissibility of missing witness's Marian deposition on whether it was "regularly taken pursuant to the act," and in particular, whether defendant was present); Kry, *Forfeiture*, *supra* note 99, at 582–83, 586 & n.37 (describing cases).

¹²³ Davies, *Selective Originalism*, *supra* note 49, at 645–46; *e.g.*, *Drayton v. Wells*, 10 S.C.L. (1 Nott & McC.) 409, 411 (Constitutional Ct. 1819) (listing being "kept away by the contrivance of the opposite party" as a species of witness unavailability, but concluding it permitted admission only of prior cross-examined testimony); *Bostick v. State*, 22 Tenn. (3 Hum.) 344 (1842) (admitting in murder trial deposition of mortally-wounded victim taken by magistrate in defendant's presence with opportunity for cross-examination, where

expanded to permit the admission of other sworn, cross-examined statements, such as prior trial testimony.¹²⁴ However, forfeiture was still bound together with other forms of unavailability, creating no greater exception to confrontation than a witness’s death or inability to travel.¹²⁵ And courts stridently rejected the idea of extending the rule to statements that had not been cross-examined.¹²⁶

When the Supreme Court first considered the issue of forfeiture in 1878 in *Reynolds v. United States*¹²⁷—which the 2008 *Giles* plurality cited approvingly as “adopting the common-law rule”¹²⁸—the Court found “wrongful procurement” by the defendant and therefore approved admission of a missing witness’s sworn, cross-examined testimony from the defendant’s former trial for the same offense.¹²⁹ Because the testimony was previously confronted, the Court did not directly address the issue of “complete forfeiture”—that is, whether the testimony would have been admissible even if it had not been subject to any of the procedural elements of confrontation. The Court’s reasoning, however, conflicts with such a sweeping rule.

In the first place, even upon finding that the defendant’s actions constituted “wrongful procurement,” the Court decided it necessary to consider the nature of the testimony to be admitted under the rule.¹³⁰ This exercise would have been wholly unnecessary under a rule of complete forfeiture, which allows any testimony at all to come in once wrongful procurement is established. Secondly, in finding the evidence admissible, the Court emphasized that “[t]he accused was

defendant willfully walked out of deposition of his own accord); see *Pettys*, *supra* note 109, at 220 (describing case); see also *supra* notes 114–15 and accompanying text (describing development of cross-examination requirement).

¹²⁴ Davies, *Selective Originalism*, *supra* note 49, at 645–46; e.g., *Drayton*, 10 S.C.L. (1 Nott & McC.) at 411 (permitting introduction of prior trial testimony upon showing of unavailability provided that earlier trial was “between the same parties” and “the point in issue was the same”).

¹²⁵ Davies, *Selective Originalism*, *supra* note 49, at 622.

¹²⁶ E.g., *State v. Houser*, 26 Mo. 431, 436 (1858) (“At all events, [testimony taken by coroners without opportunity for cross-examination] has never been permitted in this country, and in England its admissibility has been altogether placed upon the peculiar dignity and importance attached to the office of coroner; and no such reasons exist here. So, in England the times have been when the accused was not allowed witnesses, nor counsel, but such abuses of justice had been swept away long before our separation from that country.”).

¹²⁷ 98 U.S. 145 (1878). This was the first and only Supreme Court case directly to address forfeiture until *Giles* in 2008.

¹²⁸ *Giles v. California*, 128 S. Ct. 2678, 2687 (2008); cf. *Davis v. Washington*, 547 U.S. 813, 833 (2006) (citing *Reynolds*, 98 U.S. 145, as standing for forfeiture-by-wrongdoing doctrine); *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (same).

¹²⁹ *Reynolds*, 98 U.S. at 158.

¹³⁰ *Id.* at 160 (“This brings us to the consideration of what the former testimony was . . .”).

present at the time the testimony was given, and had full opportunity of cross-examination.”¹³¹ Finally, the Court declared that evidence admitted through forfeiture must be “competent,” and its admission otherwise “lawful,”¹³² further suggesting clear limits on the type of testimony admitted under forfeiture.

Only in the late twentieth century did courts expand the forfeiture doctrine to the sweeping exception to confrontation that it is today.¹³³ At least one scholar attributes this expansion to the *Roberts* reliability regime, which paved the way for courts to forego confrontation regularly.¹³⁴ Others point to an increase in witness tampering in response to the war on organized crime and illegal drugs as leading to the expansion.¹³⁵ Since the late 1970s and 1980s, limits on forfeiture testimony have progressively eroded, with courts first eliminating the requirement of prior cross-examination,¹³⁶ then oath and other judicial formalities,¹³⁷ and finally even a reliable record of the state-

¹³¹ *Id.* at 161; *see also* *Mattox v. United States*, 156 U.S. 237, 244 (1895) (admitting prior trial testimony of deceased witness because subjected to prior face-to-face accusation and cross-examination, stating “[t]his, the law says, he shall under no circumstances be deprived of”).

¹³² *Reynolds*, 98 U.S. at 158.

¹³³ *See* Davies, *Selective Originalism*, *supra* note 49, at 648 (describing “drastic expansion” of forfeiture by wrongdoing); Kroger, *supra* note 98, at 893 (“[N]o common law court since 1692 admitted uncrossed statements [based on defendant wrongdoing] before the Eighth Circuit did in *United States v. Carlson*.”); *see also* *United States v. Carlson*, 547 F.2d 1346, 1355 (8th Cir. 1976) (admitting uncontroverted testimonial statements under forfeiture-by-wrongdoing theory, though apparently relying on waiver principles).

¹³⁴ Davies, *Selective Originalism*, *supra* note 49, at 648 (“The adoption of the reliability rationale for the confrontation right also opened the way for a drastic expansion of forfeiture by wrongdoing.”). Under *Roberts*, so long as courts could identify other “indicia of reliability,” the statement could be admitted, even without confrontation. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); *see also supra* notes 52–56 and accompanying text (describing *Roberts* regime).

¹³⁵ *E.g.*, Leonard Birdsong, *The Exclusion of Hearsay Through Forfeiture by Wrongdoing—Old Wine in a New Bottle—Solving the Mystery of Codification of the Concept into Federal Rule 804(b)(6)*, 80 NEB. L. REV. 891, 904–05 (2001) (noting rise in witness intimidation due in part to explosion in gang-related drug activity beginning in 1980s) (citing KERRY MURPHY HEALEY, U.S. DEP’T OF JUSTICE, VICTIM AND WITNESS INTIMIDATION: NEW DEVELOPMENTS AND EMERGING RESPONSES 2 (1995)); Flanagan, *Forfeiture*, *supra* note 10, at 466 (“Witness intimidation and the loss of testimony became a serious concern in the 1960s and 1970s as the war on organized crime and illegal drugs intensified.”).

¹³⁶ *Carlson*, 547 F.2d at 1354 (admitting grand jury testimony despite lack of cross-examination because it exhibited indicia of reliability insofar as it was under oath and subject to sanction of perjury); Flanagan, *Forfeiture*, *supra* note 10, at 524 (noting grand jury testimony is more reliable than other hearsay insofar as given under oath, in formal proceeding, subject to open questioning, recorded in formal record, and likely corroborated by other evidence).

¹³⁷ *E.g.*, *Rice v. Marshall*, 709 F.2d 1100, 1104 (6th Cir. 1983) (admitting signed statement to police).

ment.¹³⁸ Ironically, while *Crawford* overturned the *Roberts* regime as underprotective of confrontation, *Crawford* neglected to reconsider the extent of the sweeping forfeiture rule that had been ushered in during *Roberts*’s reign.

B. Problems of Complete Forfeiture

Complete forfeiture can implicate concerns of evidentiary reliability, government abuse, and systemic legitimacy—the three primary concerns addressed by the Confrontation Clause.

1. Risk of Unreliability

Complete forfeiture creates a substantial risk of admitting unreliable evidence, increasing the risk of wrongful convictions.¹³⁹ In most jurisdictions, forfeiture-by-wrongdoing operates as both a hearsay exception and a Confrontation Clause exception.¹⁴⁰ Unlike all other hearsay exceptions, however, forfeiture-by-wrongdoing testimony does not possess any inherent reliability guarantees.¹⁴¹ Rather, its admissibility is based on the wholly different premise of deterring and punishing witness tampering.¹⁴² Further, any argument that forfeiture-by-wrongdoing provides a proxy for reliability has been empirically and doctrinally rejected.¹⁴³ Indeed, the Supreme Court in *Crawford* endorsed forfeiture-by-wrongdoing explicitly *because* it “make[s] no

¹³⁸ *United States v. Houlihan*, 92 F.3d 1271, 1278 (1st Cir. 1996) (admitting unsworn hearsay statements made by police informant during police investigation where agent had been instructed not to take notes).

¹³⁹ Flanagan, *Purpose*, *supra* note 14, at 564.

¹⁴⁰ Federal law codified the forfeiture-by-wrongdoing hearsay exception in Rule 804(b)(6) in 1997. FED. R. EVID. 804(b)(6) advisory committee’s note. Today, at least twenty-four states have formally adopted forfeiture-by-wrongdoing as a hearsay exception, and thirteen have incorporated it into their codified rules of evidence. Bocchino & Sonenshein, *supra* note 24, at 81.

¹⁴¹ *Id.* at 41 (“Unlike the other thirty hearsay exceptions, . . . [the forfeiture exception] admits out-of-court statements bearing no indicia of trustworthiness.”); Flanagan, *Forfeiture*, *supra* note 10, at 529–30 (“No one asserts that the [forfeiture] exception is based upon the inherent reliability of the statements.”); Tom Lininger, *The Sound of Silence: Holding Batterers Accountable*, 87 TEX. L. REV. 857, 908–09 (2009).

¹⁴² FED. R. EVID. 804(b)(6) advisory committee’s note (stating forfeiture is “prophylactic rule to deal with abhorrent behavior ‘which strikes at the heart of the system of justice itself’” (quoting *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982))).

¹⁴³ The “consciousness of guilt” theory would suggest that the fact that the defendant acted to silence the witness is evidence the witness was telling the truth. As an empirical matter, however, this rationale is very weak: A defendant facing trial has a similarly strong incentive to eliminate a dishonest adverse witness as an honest one. Flanagan, *Forfeiture*, *supra* note 10, at 521; *see also* *State v. Ackley*, No. 43666-O-I, 2001 WL 210681, at *4–5 (Wash. Ct. App. Mar. 5, 2001) (ruling that truth of accusations is irrelevant to motive to suppress them). Further, doctrinally, the Supreme Court in *Crawford* abrogated this rationale. 541 U.S. 36, 62 (2003).

claim to be a surrogate means of assessing reliability.”¹⁴⁴ Thus, forfeiture testimony lacks both the reliability safeguard of confrontation¹⁴⁵ and the trustworthiness guarantees of hearsay law. While the right of due process theoretically bars convictions based on evidence “totally lacking in reliability,”¹⁴⁶ this low standard does not pose any significant reliability screen on evidence.¹⁴⁷

Moreover, the nature of the testimony admitted through forfeiture presents particular unreliability risks. The “absented” witnesses are often accomplices, co-conspirators, or otherwise involved in the defendant’s criminal enterprise.¹⁴⁸ The Supreme Court has recognized that statements by such persons are highly suspect because of the speakers’ strong incentives to shift blame and minimize their own culpability.¹⁴⁹ Other times, the missing prosecution witnesses are govern-

¹⁴⁴ 541 U.S. at 62.

¹⁴⁵ See *Whorton v. Bockting*, 549 U.S. 406, 420 (2007) (noting that for statements that fall into exception from Confrontation Clause, Clause “permits their admission even if they lack indicia of reliability”).

¹⁴⁶ *United States v. Thevis*, 665 F.2d 616, 633 (5th Cir. Unit B 1982).

¹⁴⁷ The Supreme Court has instructed that the Due Process Clause, being largely preempted by the specific provisions in the Bill of Rights, has very “limited operation” in the realm of criminal procedure. *Medina v. California*, 505 U.S. 437, 443 (1992); see also *Flanagan, Forfeiture*, *supra* note 10, at 525, 540 (noting no court has excluded forfeiture testimony on grounds of due process). Another possible reliability backstop is Rule 403, which gives the trial court discretion to exclude evidence “if its probative value is substantially outweighed by the danger of unfair prejudice.” FED. R. EVID. 403. However, the Rule 403 balancing test, applied only at the court’s discretion and reviewable only for abuse of discretion, *Thevis*, 665 F.2d at 634, provides at best only minimal protection against unreliable evidence. *Kroger*, *supra* note 98, at 862 (noting no court has suppressed hearsay under Rule 403 after finding it admissible under forfeiture). Called “an extraordinary remedy which should be used sparingly,” *Thevis*, 665 F.2d at 633, the rule poorly captures the reliability concerns of forfeiture, powerless as it is to reach evidence of anything more than “scant” probative value, *id.* at 634, and unable to take witness credibility into account, *Flanagan, Forfeiture*, *supra* note 10, at 525. Further, forcing the defendant to rely only on Rule 403 shifts (arguably unconstitutionally) the burden of reliability of the State’s evidence to the defendant. Kelly Rutan, Comment, *Procuring the Right to an Unfair Trial: Federal Rule of Evidence 804(b)(6) and the Due Process Implications of the Rule’s Failure To Require Standards of Reliability for Admissible Evidence*, 56 AM. U. L. REV. 177, 202 (2006).

¹⁴⁸ *Flanagan, Forfeiture*, *supra* note 10, at 470–72 (“A very high percentage of declarants [in forfeiture cases] were accomplices in the crimes for which the defendant was charged, and many others were so sufficiently involved that there was some risk of criminal prosecution.”).

¹⁴⁹ See *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (recognizing “presumptive unreliability that attaches to accomplices’ confessions that shift or spread blame”); *Williamson v. United States*, 512 U.S. 594, 603–04 (1994) (refusing to admit codefendant statement implicating another because of motivation to “curry favor” and implicate others); *Lee v. Illinois*, 476 U.S. 530, 541 (1986) (finding accomplice testimony implicating others presumptively unreliable). While statements by accomplices and co-conspirators help illuminate the reliability risks of forfeiture, posing well-recognized reliability risks, my arguments are not limited to only those declarants. The lesson of *Crawford* is that *no* declarant’s statement can

ment informants who cooperated with the government by trading testimony favorable to the prosecution for leniency for their own crimes.¹⁵⁰ After first providing an inculpatory statement to the State, an informant may claim to be intimidated by the defendant to resist testifying at trial, leading the prosecution to attempt to introduce the informant’s prior statement under forfeiture doctrine. Informants are notoriously unreliable and known for fabricating evidence.¹⁵¹

In addition to the potential unreliability of the substance of such statements, the form of the statements admitted under forfeiture often poses reliability concerns as well.¹⁵² Prior trial testimony is least worrisome, having been subject to prior cross-examination.¹⁵³ Testimony that has been recorded verbatim in a formal proceeding, such as grand jury testimony, allows for reasonable precision in establishing the statement’s content, as well as oath and some solemnity.¹⁵⁴ By contrast, oral statements to police officers recorded only in brief notes are more difficult to reconstruct accurately and pose risks of improper

be adjudged reliable in the abstract; only through testing in confrontation’s crucible do testimonial statements become palatable to the justice system. *Crawford v. Washington*, 541 U.S. 36, 61 (2003).

¹⁵⁰ *E.g.*, *United States v. Houlihan*, 92 F.3d 1271, 1278 (1st Cir. 1996) (cooperated after arrest); *Thevis*, 665 F.2d at 621 (given immunity); *La Torres v. Walker*, 216 F. Supp. 2d 157, 162 (S.D.N.Y. 2000) (received immunity after volunteering information while in jail and facing twenty-year sentence); *United States v. Melendez*, No. Crim. 96-0023, 1998 WL 737994, at *4 (D.P.R. Oct. 15, 1998) (cooperated after arrest for drug importation); *People v. Cotto*, 699 N.E.2d 394, 403 (N.Y. 1998) (Smith, J., dissenting) (claimed to identify defendant four years after incident, while jailed on unrelated charge).

¹⁵¹ One study found that nearly fifty percent of wrongful murder convictions involved perjury by someone who stood to gain from the false testimony such as a “jailhouse snitch.” Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 543–44 (2005). See generally Natapoff, *supra* note 1 (exploring insidiousness and pervasiveness of government reliance on informant testimony).

¹⁵² Reliability concerns based on the *form* of the out-of-court statement are apparent in hearsay rules governing the admission of prior inconsistent statements. For example, Rule 801(d)(1)(A) admits prior inconsistent statements of a testifying witness as substantive evidence only if the prior testimony was taken in a formal proceeding and under oath. FED. R. EVID. 801(d)(1)(A). Thus, the risk of unreliability from an unsworn, informal, or non-transcribed past statement is considered too great to risk its admission, *even though* the witness can be cross-examined about it at trial.

¹⁵³ Indeed, such testimony would be admissible under *Crawford* based on mere witness unavailability, without requiring forfeiture. See *supra* notes 59–61 and accompanying text (describing *Crawford*’s cross-examination rule).

¹⁵⁴ Having the full transcript can also provide context for the statement. See FED. R. EVID. 106 (allowing introduction of other parts of recorded statements “which ought in fairness to be considered contemporaneously with” submitted portion). However, such statements still lack the testing and probing of cross-examination, and the cold record eliminates the jury’s ability to assess the witness’s tone and demeanor.

evidence-shaping and selective memory.¹⁵⁵ Most troubling are entirely unrecorded statements, recounted in court from memory by a supposed hearer of the statement.¹⁵⁶ Complete forfeiture freely admits all of these hearsay statements. Though the person conveying the declarant's statement in court can be cross-examined, it is difficult to discredit the messenger, especially if he carries the authority of a police officer.¹⁵⁷ In addition, as these statements are by definition testimonial, they constitute the "paradigmatic evil" that the Confrontation Clause was designed to prevent.¹⁵⁸ In allowing defendants to be "tried and convicted on the basis of statements made by absent declarants that are unavailable for cross-examination,"¹⁵⁹ the current forfeiture rule threatens to undermine the confrontation right to an extent unheard of since it was developed in the 1600s.

2. *Risk of Government Abuse and Perverse Prosecution Incentives*

The risk of government abuse in the forfeiture context appears at two levels: (1) when the State first obtains the statement and (2) when the State later determines whether to rely on forfeiture for its admission. At the evidence-creation stage, complete forfeiture opens the floodgates to testimony created by the government's hand, the primary concern of the Confrontation Clause. Admitting such "paradigmatic[ally]" suspect statements marks a return to the nightmare of "trial by affidavit,"¹⁶⁰ permitting criminal convictions solely on the basis of evidence developed by the government in secret with witnesses who never show their faces nor reveal their identity.¹⁶¹

¹⁵⁵ John C. Douglass, *Confronting the Reluctant Accomplice*, 101 COLUM. L. REV. 1797, 1836 (2001) (noting danger that police, even inadvertently, will induce witness to tailor statements to suit police's hypotheses).

¹⁵⁶ Flanagan, *Forfeiture*, *supra* note 10, at 492–93. Government agents are adept at selective recording. See *Houlihan*, 92 F.3d at 1288–89 (approving prosecutor's instruction to agents not to take notes of witness interview); Douglass, *supra* note 155, at 1836 n.172 (stating prosecutors are trained to avoid creating records that would be discoverable under Jencks Act, 18 U.S.C. § 3500 (2006), and *Brady v. Maryland*, 373 U.S. 83 (1963)).

¹⁵⁷ See Flanagan, *Purpose*, *supra* note 14, at 565 (explaining that relying on forfeiture may be advantageous for prosecutors because important testimony will be provided by "authority figure" whose statement "cannot be qualified, modified, or retracted").

¹⁵⁸ *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring).

¹⁵⁹ Kroger, *supra* note 98, at 893.

¹⁶⁰ *Dutton*, 400 U.S. at 94 (Harlan, J., concurring) (stating Confrontation Clause was designed to prevent "the paradigmatic evil" of "trial by affidavit"); see also *Crawford v. Washington*, 541 U.S. 36, 50 (2003) ("[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.").

¹⁶¹ See *supra* notes 23–25 and accompanying text (describing special reliability concerns of evidence created with government involvement).

Secondly, at the invocation stage, the lack of scrutiny of testimony admitted under complete forfeiture may incentivize the prosecution to abuse the doctrine. The Confrontation Clause is one of the most onerous burdens on the State in any criminal trial, an intentional asymmetry essential to the criminal justice system.¹⁶² Having to comply with confrontation requirements means that the prosecution must locate witnesses, ensure their appearances in court, and expose them to cross-examination—opening up their biases, inconsistencies, prior crimes, and other credibility problems. The prosecution thus has a strong incentive to avoid the hassle and unpredictability of confrontation whenever given the opportunity.¹⁶³ Indeed, it was the government’s natural preference for *ex parte* affidavits and bench trials that led to the adoption of the Sixth Amendment confrontation and jury trial requirements in the first place.¹⁶⁴ Thus, proper Confrontation Clause analysis must ensure that the State honors the system’s preference for live, in-person, cross-examined testimony.¹⁶⁵

¹⁶² Cf. *Giles v. California*, 128 S. Ct. 2678, 2692 n.7 (2008) (“The dissent also implies that we should not adhere to *Crawford* because the confrontation guarantee limits the evidence a State may introduce without limiting the evidence a defendant may introduce. . . . That is true. . . . The asymmetrical nature of the Constitution’s criminal-trial guarantees is not an anomaly, but the intentional conferring of privileges designed to prevent criminal conviction of the innocent. The State is at no risk of that.”).

¹⁶³ Cf. Confrontation Blog, <http://confrontationright.blogspot.com> (Mar. 4, 2005, 15:39 EST) (“Ordinarily, we discount the difficulties that testifying subject to confrontation poses for the witness and for the adjudicative system; she, and we, must cope with them as best as possible.”).

¹⁶⁴ The initial omission of the confrontation right from the proposed federal constitution led to vituperous objections at the ratifying conventions, including cautionary predictions that the federal judiciary would soon resemble the tribunals of the Spanish Inquisition. See *Crawford*, 541 U.S. at 48–49 (“[W]e shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, . . . the *Inquisition*.” (quoting 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 110–11 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co., 2d ed. 1863) (statement of Abraham Holmes)). The right was accordingly enshrined in the Sixth Amendment, in addition to appearing in most state declarations of rights adopted during the time of the Revolution. *Id.* at 48.

¹⁶⁵ See *Barber v. Page*, 390 U.S. 719, 722–25 (1968) (holding that prosecution cannot claim witness is unavailable where prosecution makes “absolutely no effort to obtain the [witness’s] presence” because “[t]he right of confrontation may not be dispensed with so lightly”); see also *Motes v. United States*, 178 U.S. 458, 470–74 (1900) (finding forfeiture inappropriate where witness’s absence was attributable to government’s negligence); *Hernandez v. State*, 188 P.3d 1126, 1135 (Nev. 2008) (refusing to find witness unavailable when State simply accepted witness’s claim of “family emergency” at time of trial and did not investigate in any way); *State v. King*, 706 N.W.2d 181, 188 (Wis. Ct. App. 2005) (refusing to find witness unavailable due to insufficient effort by State, which had contacted witness several times, learned of her reluctance to appear, and failed to issue subpoena).

The system does not shy away from the sometimes harsh results of the confrontation requirement. Murderers may go free if the prosecution cannot produce witnesses to testify,¹⁶⁶ regardless of the State's certainty about the defendant's guilt. Under our justice system, conviction without confrontation is deemed worse than no conviction at all,¹⁶⁷ and the Framers were fully aware of the potential for a guilty defendant to go free under this system. Countless historical cases document the exclusion of unopposed hearsay statements (and resulting dismissal of criminal charges), even in extreme cases, such as when the statements were from murder victims identifying their killers.¹⁶⁸

Forfeiture-by-wrongdoing must be evaluated within this framework: a criminal justice system that is extremely hostile to government reliance on hearsay and is in constant tension with the government's contrary incentives. The burden of confrontation encourages the prosecution to embrace the possibility of forfeiture¹⁶⁹ because when armed with a persuasive hearsay statement, the State would usually prefer to present the statement to the factfinder in its crystalline form, free from the qualifications, uncertainties, and contradictions that riddle in-court testimony and cross-examination.¹⁷⁰

The triggers of forfeiture can be manipulated to some extent by the government, facilitating excessive invocation of forfeiture by the State. As the Introduction's hypothetical shows, both the witness's "unavailability" and the defendant's responsibility for such unavailability may be ambiguous. Witnesses often have many independent rea-

¹⁶⁶ *But see supra* note 81 (describing narrow dying declarations exception).

¹⁶⁷ *See* *Bridges v. Wixon*, 326 U.S. 135, 153–54 (1945) (“[A]llow[ing] men to be convicted on unsworn testimony of witnesses . . . [is] a practice which runs counter to the notions of fairness on which our legal system is founded.”).

¹⁶⁸ *See supra* notes 119–21 and accompanying text (describing dying declaration principle and supporting cases). In such cases, to be admissible, the statement had to either be a proper Marian deposition or else qualify as a dying declaration. Otherwise, the statement was strictly inadmissible. *Id.* *See generally* Kry, *Forfeiture, supra* note 99, at 582–83.

¹⁶⁹ Flanagan, *Purpose, supra* note 14, at 564 (“[The state has] very strong pressures to apply forfeiture whenever possible.”); Lininger, *supra* note 141, at 893–94 (“[P]rosecutors and courts might be too willing to substitute hearsay for live testimony, forgoing the utilitarian benefits of cross-examination.”). Of course this is not always the case: Sometimes the prosecution prefers the persuasive power of live testimony. However, live testimony and cross-examination risk exposing weaknesses and revealing inconsistencies—a concern for any witness, especially one with imperfect memory, a poor ability to articulate, prior or ongoing criminal involvement, motives to obscure certain facts, or even simply an unlikable demeanor.

¹⁷⁰ Flanagan, *Purpose, supra* note 14, at 565 (“The prosecution gains in many cases when it admits absent witness testimony because the real witness, with all the inevitable warts, does not appear before the jury, and the critical testimony is presented by an authority figure who presents a statement that cannot be qualified, modified, or retracted.”).

sons for not testifying, and the defendant’s intimidation may not be the primary reason.¹⁷¹ Indeed, testifying at trial poses an inconvenience to all witnesses, and it is the State’s obligation to help witnesses overcome these burdens.¹⁷² Further, the defendant’s “wrongdoing” need not be criminal¹⁷³ and can include gifts, slight assistance, and suggestions to invoke a privilege.¹⁷⁴ In addition, the defendant’s personal involvement in the wrongdoing can be substantially attenuated, including mere acquiescence in another’s acts.¹⁷⁵ Such scenarios raise valid concerns that the State may be all too happy to rely on the forfeiture rule for getting a statement admitted rather than taking steps to preserve a defendant’s confrontation right by ensuring that the witness appears for trial or offering the defendant an opportunity for a pretrial deposition.¹⁷⁶ Forfeiture analysis should remain cognizant of the doctrine’s potential to be used by the prosecution to evade the confrontation right, as this would undermine *Crawford*’s goal of maximizing confrontation rather than concocting justifications for its absence.

¹⁷¹ Flanagan, *Forfeiture*, *supra* note 10, at 486–87.

¹⁷² Flanagan, *Purpose*, *supra* note 14, at 569–70; *see also infra* notes 176, 285 and accompanying text (describing methods by which State can encourage witnesses’ willingness to testify).

¹⁷³ FED. R. EVID. 804(b)(6) advisory committee’s note (“The wrongdoing need not consist of a criminal act.”).

¹⁷⁴ *See* United States v. Scott, 284 F.3d 758, 763–64 (7th Cir. 2002) (stating that giving gifts to witness to procure her absence from trial would constitute “wrongdoing” under Rule 804(b)(6)); United States v. Ochoa, 229 F.3d 631, 639 (7th Cir. 2000) (stating that if defendant allowed witness to use his phone in order to assist witness in fleeing, defendant would be found guilty of wrongdoing); Steele v. Taylor, 684 F.2d 1193, 1201 (6th Cir. 1982) (“Wrongful conduct obviously includes the use of force and threats, but it has also been held to include persuasion and control by a defendant, the wrongful nondisclosure of information, and a defendant’s direction to a witness to exercise the fifth amendment privilege.”).

¹⁷⁵ FED. R. EVID. 804(b)(6) (describing forfeiture-by-wrongdoing exception as admitting, if declarant is unavailable, “[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” (emphasis added)). The Supreme Court has stated that the hearsay forfeiture-by-wrongdoing exception codifies the constitutional rule. *Davis v. Washington*, 547 U.S. 813, 833 (2006). *But see* Flanagan, *Forfeiture*, *supra* note 10, at 508 (arguing that more than mere acquiescence should be required to surrender constitutional right).

¹⁷⁶ Flanagan, *Purpose*, *supra* note 14, at 569–70 (noting witness support programs and reimbursing travel expenses leads to well-documented increase in witness appearance at trial); Deborah Tuerkheimer, *Forfeiture After Giles: The Relevance of “Domestic Violence Context,”* 13 LEWIS & CLARK L. REV. 711, 730 n.107 (2009) (noting that social services are often critical to securing victim cooperation in domestic violence prosecution); *see also* Friedman, *Personal Reflection*, *supra* note 14, at 740 (arguing for prosecution mitigation requirement, stating that “[i]f the state has a good chance to preserve the confrontation right, notwithstanding the accused’s wrongdoing, it should take advantage of that chance, rather than using the wrongdoing as a lever for wiping out the confrontation right”).

3. *Threat to Dignity and Apparent Fairness*

Complete forfeiture also threatens the Confrontation Clause's interest in respecting the dignity of the accused and promoting apparent fairness. Each element of confrontation individually promotes these values; thus, eliminating confrontation wholesale is a greater affront to symbolic fairness and systemic legitimacy than eliminating only certain elements. For example, preserving face-to-face accusation, even if not in the presence of a jury, such as at a deposition or pretrial hearing, preserves the defendant's dignity interest in facing his accuser at least in a reduced form.

C. *Theoretical Rationales for Forfeiture-by-Wrongdoing*

Complete forfeiture's drastic derogation from the Sixth Amendment is often justified as punishment for the defendant's wrongful conduct. In this Section, however, I demonstrate that retributive principles fail to guide forfeiture analysis. The retribution rationale is descriptively indeterminate and normatively inappropriate, and was implicitly rejected as a guiding rationale by the Supreme Court in *Giles v. California*,¹⁷⁷ which adopted the requirement that the defendant act with a specific intent to prevent the witness's testimony. Eliminating the punishment rationale for forfeiture in turn forces us to "closely examine[]"¹⁷⁸ the remaining rationales supporting forfeiture, "be[ing] watchful of every inroad" on confrontation.¹⁷⁹

¹⁷⁷ 128 S. Ct. 2678 (2008).

¹⁷⁸ *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) ("[The] denial or significant diminution [of the right to confrontation] calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined." (quoting *Berger v. California*, 393 U.S. 314, 315 (1969))).

¹⁷⁹ *United States v. Burr*, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14,694) (Marshall, C.J.). Chief Justice Marshall cautioned:

"I know not . . . why a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him. I know of no principle in the preservation of which all are more concerned [than the confrontation right]. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important." *Id.*

1. The Potential Rationales for Forfeiture: Retribution, Estoppel, Deterrence, and Judicial Integrity

a. Retribution

A retribution rationale attempts to justify forfeiture based on substantive fairness: The defendant deserves it.¹⁸⁰ The rationale is often expressed through recitation of the equitable maxim that “no one shall be permitted to take advantage of his own wrong.”¹⁸¹ Retribution focuses attention on the “abhorrent” nature of the defendant’s act¹⁸² and demands forfeiture to punish him for it. In this posture, forfeiture, even complete forfeiture, may seem a modest penalty in contrast to the defendant’s often reprehensible act.¹⁸³ Focusing on retribution may thus lead to unquestioning acceptance of complete forfeiture.¹⁸⁴

b. Estoppel

The conceptually distinct principle of estoppel,¹⁸⁵ on the other hand, focuses on a defendant’s self-contradictory intentions, rather

¹⁸⁰ I will interchangeably refer to this rationale as “retribution,” “equity,” or “substantive fairness,” all of which are meant to express a policy of “just deserts” or an attempt to sanction or penalize the defendant in proportion to his wrongdoing.

¹⁸¹ *Giles*, 128 S. Ct. at 2696 (Breyer, J., dissenting) (internal quotation marks omitted) (quoting *Reynolds v. United States*, 98 U.S. 145, 159 (1878)); see also *id.* at 2709 (arguing forfeiture rule was meant to prevent defendant’s “windfall” in eliminating adverse witness testimony); *State v. Meeks*, 88 P.3d 789, 794 (Kan. 2004) (“The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him.” (internal citations and quotations omitted)).

¹⁸² FED. R. EVID. 804(b)(6) advisory committee’s note.

¹⁸³ Flanagan, *Forfeiture*, *supra* note 10, at 500, 525.

¹⁸⁴ In fact, the word “forfeiture” itself implies a close association with retribution principles. Defined as simply a loss supplied by operation of law, see BLACK’S LAW DICTIONARY 677 (8th ed. 2004) (defining forfeiture as “loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty”), it requires no consideration of the defendant’s intent, leaving courts free to impose it whenever they think the defendant deserves it. See Flanagan, *Confrontation*, *supra* note 14, at 1229 (“[The] fundamental aspect of forfeiture is the idea of penalty for conduct deemed detrimental to the state.”); Kroger, *supra* note 98, at 842 n.41 (stating that term “forfeiture” “lacks the implications of intent that are inherent in waiver”). Lacking internal limits, forfeiture has potentially unbounded application and can be imposed as “an unforeseen and unintended consequence to the actor of another action.” Flanagan, *Confrontation*, *supra* note 14, at 1202.

¹⁸⁵ Estoppel and waiver are very closely related, and the terms are often used interchangeably. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 991 (3d ed. 2002). Waiver, defined as “[t]he voluntary relinquishment or abandonment—express or implied—of a legal right or advantage,” BLACK’S LAW DICTIONARY 1611 (8th ed. 2004), is governed by the classic *Zerbst* standard, requiring both knowledge of the right as well as a deliberate intention to abandon it. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (defining waiver as “an intentional relinquishment or abandonment of a known right or privilege”). Express waiver requires a deliberate and informed statement of relinquishment in a formal judicial proceeding, such as a guilty plea.

than punishment. Its core notion is that a person's own knowing and intentional actions may preclude him from claiming a right to something inconsistent with those actions.¹⁸⁶ Estoppel is defined as “[a] bar that prevents one from asserting a claim or right that contradicts what one has said or done before.”¹⁸⁷ The estoppel rationale is analytically distinct from the retribution rationale; estoppel responds to rights that are *inconsistent* with the defendant's own intentional and knowing actions, rather than focusing on what he *deserves*.¹⁸⁸ Language supporting an estoppel rationale appears in many forfeiture cases.¹⁸⁹

Unlike retribution, estoppel does not embody a substantive policy goal, making its application less sweeping. While the retributive rationale instructs the tribunal to “pay back” the defendant's wrong as a matter of substantive policy, estoppel does not *instruct* the tribunal to do anything; it merely *authorizes* the tribunal to take remedial actions otherwise closed to it by *excusing* it from having to honor the

Flanagan, *Confrontation*, *supra* note 14, at 1200. In cases of implied waiver, the court infers the requisite knowledge and intent from conduct that seems to demonstrate intent to abandon the right or privilege, usually to gain some other advantage in its stead. *Id.* at 1200–01. I prefer to use the term estoppel rather than waiver for two primary reasons: First, it does not carry the same implication of eliminating the confrontation right entirely, but only of estopping the defendant from asserting particular objections, and second, it focuses on the extent of the contradiction between the defendant's intentional actions and his subsequent exercise of the right.

¹⁸⁶ See LAYCOCK, *supra* note 185, at 985 (“Estoppels have in common that a party is prevented from asserting a claim or defense because some past statement, act, or event is held to be determinative.”); Flanagan, *Confrontation*, *supra* note 14, at 1242 n.279 (“[T]he core of estoppel . . . is that one's act may preclude the actor's ability to have something inconsistent with that act.”). Although distinct from what I am calling the “equity” or “retribution” rationale, estoppel can also be called “equitable” in a technical sense due to its origins in courts of equity. *E.g.*, Crawford v. Washington, 541 U.S. 36, 62 (2004) (stating forfeiture-by-wrongdoing “extinguishes confrontation claims on *essentially equitable grounds*” (emphasis added)).

¹⁸⁷ BLACK'S LAW DICTIONARY 589 (8th ed. 2004).

¹⁸⁸ Friedman, *Chutzpa*, *supra* note 14, at 518 (“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.’”).

¹⁸⁹ See, e.g., Reynolds v. United States, 98 U.S. 145, 158 (1878) (“[I]f 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.”); Steele v. Taylor, 684 F.2d 1193, 1202 (6th Cir. 1982), *cert. denied*, 460 U.S. 1053 (1983) (“A defendant cannot prefer the law's preference [for live testimony over hearsay] . . . while repudiating that preference by creating the condition that prevents it.”); United States v. Mayes, 512 F.2d 637, 651 (6th Cir. 1975), *cert. denied*, 422 U.S. 1008 (1975) (“[The defendant] cannot now be heard to complain that he was denied the right of cross-examination and confrontation when he himself was the instrument of the denial.”); Brief for Richard D. Friedman as Amicus Curiae Supporting Respondent at 20 n.21, Giles v. California, 128 S. Ct. 2678 (2008) (No. 07-6053), 2008 WL 859395, at *20 (“[T]he more precise governing principle is that no one should be able to complain about the consequences of his wrongdoing.”).

defendant’s otherwise valid objection to its failure to satisfy certain standards. Estoppel’s rationale is thus more limited than retribution in two ways: Unlike punishment, estoppel is strictly limited to the inconsistency that gives rise to it such that when the inconsistency ceases, so does estoppel’s power. Further, estoppel only authorizes or excuses the tribunal’s action; it does not provide independent substantive reasons to take that action.¹⁹⁰

Estoppel principles guide implied waivers of rights.¹⁹¹ For example, the right to confrontation creates a concomitant right for the defendant to be present throughout trial.¹⁹² However, a defendant can impliedly waive this right by undertaking intentional actions inconsistent with its exercise, such as voluntarily absenting himself from trial,¹⁹³ absconding from jail during trial,¹⁹⁴ or repeatedly disrupting court proceedings such that the trial cannot continue.¹⁹⁵ In such cases, the trial may proceed in the defendant’s absence. Under estoppel, the defendant loses his right because it is *inconsistent* with his intentional actions, not because it is the appropriate *sanction* for those actions. For example, whether a defendant is overly disruptive by repeatedly proclaiming his innocence or by leaping up and strangling the court reporter, both actions lead to the same result: exclusion from the courtroom.¹⁹⁶ Conversely, a defendant who acts “badly” but not

¹⁹⁰ In shifting the rule’s operation to estoppel principles, I reject “pure” forfeiture, generally aligning myself with other scholars who have argued persuasively that the “forfeiture”-by-wrongdoing rule is in fact justified by implied waiver principles rather than true unbounded forfeiture. *See generally, e.g.,* Flanagan, *Confrontation*, *supra* note 14; Kroger, *supra* note 98; Monica J. Smith, *Goodbye Forfeiture, Hello Waiver: The Effect of Giles v. California*, 13 BARRY L. REV. 137, 150 (2009). By contrast to true “forfeiture,” *see supra* note 184 (describing meaning of “forfeiture”), which is potentially unbounded and if actually applied would swallow the confrontation right (applying, for example, in all homicides), both waiver and estoppel are internally limited by consideration of the defendant’s intentions: estoppel from the evident *change* in the defendant’s intentions regarding whether to exercise the right, and waiver from his knowing and intentional relinquishment of the right.

¹⁹¹ *See* Flanagan, *Confrontation*, *supra* note 14, at 1241–42; *see also supra* note 185 (discussing waiver).

¹⁹² *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987).

¹⁹³ *Taylor v. United States*, 414 U.S. 17, 20 (1973); *Diaz v. United States*, 223 U.S. 442, 458 (1912).

¹⁹⁴ *Golden v. Newsome*, 755 F.2d 1478, 1481–82 (11th Cir. 1985); *People v. Concepcion*, 193 P.3d 1172, 1176 (Cal. 2008).

¹⁹⁵ *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (holding that defendant could be excluded from courtroom because of repeated outbursts).

¹⁹⁶ Of course, the defendant who strangles may also be subject to criminal sanctions for his conduct. Thus, we can clearly divide the “punishment” that attends the defendant’s conduct (the subsequent criminal charge) from the “estoppel” result that attends the conduct: mere exclusion from the courtroom. This same division can be seen in the forfeiture context. A defendant that tampers with a witness often subjects himself to further criminal liability for the act, such as a bribery or murder charge. However, this “punishment” can be

inconsistently with the court's ability to proceed, such as his using profanity, does not waive his right to be present.¹⁹⁷ Finally, the waiver extends only so far as strictly necessary: Regardless of the nature of his original outburst, the defendant can return to the courtroom upon supplying assurances that he will behave.¹⁹⁸

c. Deterrence and Judicial Integrity

While estoppel *permits*—but does not affirmatively command—derogation from confrontation, deterrence and judicial integrity supply affirmative policy rationales for forfeiture-by-wrongdoing. As for deterrence, admitting the prior testimony of a wrongfully absented witness deters witness-tampering by making it less valuable, because the damaging statement is admitted anyway.¹⁹⁹ However, deterrence can be achieved in many ways; in general, any harsh enough sanction or disincentive will do. Forfeiture's particular deterrent mechanism of admitting “second-best” evidence evinces judicial integrity concerns. The concept of judicial integrity recognizes the right of tribunals to protect the integrity of their proceedings. In the case of forfeiture, when the defendant acts to deprive the tribunal of relevant, probative testimony, the judicial system admits second-best evidence to avoid being diverted from its pursuit of adjudicating guilt on the basis of all proper evidence.²⁰⁰ Thus, deterrence and judicial integrity are inti-

separated from the attendant “estoppel” result of admitting the out-of-court statement in the pending case. *See infra* notes 241–43 and accompanying text (describing this division between punishment and estoppel in forfeiture context).

¹⁹⁷ *Allen*, 397 U.S. at 343 (holding that right can be lost only if defendant is “so disorderly . . . that his trial *cannot be carried on* with him in the courtroom”) (emphasis added).

¹⁹⁸ *Id.* (holding that defendant's right to be present can 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”).

¹⁹⁹ *E.g.*, *Giles v. California*, 128 S. Ct. 2678, 2691 (2008) (Scalia, J.) (plurality) (“[The rule] remov[es] the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them”); *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982), *cert. denied*, 460 U.S. 1053 (1983) (“The rule . . . is [also] based on a public policy protecting the integrity of the adversary process by deterring litigants from acting on strong incentives to prevent the testimony of an adverse witness.”).

²⁰⁰ *E.g.*, *Giles*, 128 S. Ct. at 2691 (“[The forfeiture rule] is grounded in the ability of courts to protect the integrity of their proceedings.” (internal quotation marks omitted)); *Davis v. Washington*, 547 U.S. 813, 833–34 (2006) (“But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. . . . [Courts have the] ability . . . to protect the integrity of their proceedings.”); *Commonwealth v. Edwards*, 830 N.E.2d 158, 167 (Mass. 2005) (“Additionally, the doctrine furthers the truth-seeking function of the adversary process, allowing fact finders access to valuable evidence no longer available through live testimony.”); Flanagan, *Purpose, supra* note 14, at 557 (“Witness tampering is one example of a long established rule that a defendant can forfeit constitutional protections by attempting to improperly manipulate constitutional rights to the derogation of the integrity of the judicial process.”).

mately connected in the forfeiture context. Indeed, a plurality in *Giles* endorsed these dual rationales as encompassing the “basic purposes and objectives” of forfeiture doctrine.²⁰¹

These two substantive rationales are secondary to the court’s estoppel authority and do not provide independent authorization for the withdrawal of the confrontation right. That is, the court is generally powerless to alter criminal procedure rights, even to achieve deterrence or judicial integrity purposes. For example, where there has been no finding of forfeiture, the court cannot bar cross-examination in all domestic violence cases, even though it might have a salutary effect on domestic violence reporting. And the court cannot simply admit statements it thinks would improve the tribunal’s fact-finding if they are barred by the Confrontation Clause or the rules of evidence. Thus, deterrence and judicial integrity provide substantive rationales that can support the court’s exercise of its estoppel authority but can never provide justification for exceeding that authority.

2. *The Retribution Rationale Fails Descriptively and Normatively To Guide Forfeiture Analysis*

The retribution rationale fails to describe forfeiture as a descriptive matter and is misplaced as a guiding normative principle.

First, contrary to the equity maxim most often recited in support of forfeiture—that “no one shall be permitted to take advantage of his own wrong”²⁰²—forfeiture descriptively fails to assure substantive equity.²⁰³ Sometimes forfeiture is insufficient to prevent the defendant from benefiting from his wrong, such as when the cold written record fails to make the same impression on the jury as the witness’s live testimony would have. Further, forfeiture provides no sanction for defendants that intimidate prospective witnesses who have not yet

²⁰¹ *Giles*, 128 S. Ct. at 2691 (stating “basic purposes and objectives” of forfeiture are “aimed at removing the otherwise powerful incentive” to witness-tamper and “grounded in the ability of courts to protect the integrity of their proceedings”) (internal quotation marks omitted).

²⁰² *Id.* at 2696 (Breyer, J., dissenting) (quoting *Reynolds v. United States*, 98 U.S. 145, 159 (1878)).

²⁰³ Friedman, *Chutzpa*, *supra* note 14, at 516–17 (arguing forfeiture is neither necessary nor sufficient to prevent criminal defendants from benefiting from their wrongs). As Ronald Dworkin has pointed out, principles such as “no man may profit from his own wrong” are rarely analytically decisive in the law. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 25 (1967). “In fact, people often profit, perfectly legally, from their legal wrongs.” *Id.* A clear example is adverse possession: If I trespass on your land long enough, I gain the right to cross it whenever I please. *Id.* Another example is a man jumping bail to make a profitable investment in another state; while he may be sent back to jail, he will get to keep the profits from his investment. *Id.* at 26.

made any statements. Conversely, forfeiture may sometimes overstep the maxim, leaving the defendant worse off: A defendant who kills a potential witness in a minor drug offense faces a subsequent murder charge that sufficiently disgorges his minor gain in the drug case without recourse to forfeiture.²⁰⁴ And, complete forfeiture's total preclusion of the opportunity for cross-examination and other aspects of confrontation of the prosecution's evidence often leaves the defendant worse off than if the witness had testified live.²⁰⁵

In addition to being descriptively under-determinative, the equity rationale is normatively misplaced. Our society has resolved that "wrongs" ought not to be "punished" by abridging wrongdoers' constitutional trial rights.²⁰⁶ Even in the forfeiture context, the Court has specifically denounced toying with constitutional rights as a means of administering punishment: "[L]egislatures may choose to combat [serious offenses] through many means . . . [but] abridging the constitutional rights of criminal defendants is not in the State's arsenal."²⁰⁷ Constitutional trial rights may not be discretionarily parceled out or withheld based on a "vague and amorphous sense of what ought to be

²⁰⁴ Further, the defendant can be charged with the separate crime of witness tampering. See 18 U.S.C. § 1512 (2006). If the prosecution forgoes this subsequent prosecution, it suggests that the prosecution does not have enough proof of the witness-tampering act to prove it beyond a reasonable doubt. Where the State relies on forfeiture specifically because of its more inviting standard of proof, this causes concern that the prosecution is abusing the doctrine by imposing punishment-based burdens on the defendant without sufficient proof.

²⁰⁵ Kry, *Forfeiture*, *supra* note 99, at 591 (arguing that forfeiture does not simply disgorge defendant's benefit, but "leaves the defendant worse off because the prosecution can introduce out-of-court accusations rather than live testimony that the defendant can cross-examine at trial"); Kroger, *supra* note 98, at 869 ("Indeed, the defendant guilty of witness tampering may be in a worse position, for his actions result not only in admission of the missing declarant's extrajudicial statements, but in the loss of an opportunity to cross-examine the declarant about the statements.").

²⁰⁶ *Illinois v. Allen*, 397 U.S. 337, 343 (1970) ("[C]ourts must indulge every reasonable presumption against the loss of constitutional rights . . ." (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938))); see also Flanagan, *Confrontation*, *supra* note 14, at 1248 ("[The term] forfeiture . . . carr[ies] connotations of blame for the act against the declarant. [But] [t]he 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 requirements of confrontation in seeking its conviction.]); Jeffrey Kahn, *The Search for the Rule of Law in Russia*, 37 *GEO. J. INT'L L.* 353, 396 (2006) ("[T]he rule of law requires legal protections to be universally and equally applied precisely because those suspected or accused of violating the law are those most in need of reliable legal guarantees for their rights.").

²⁰⁷ *Giles v. California*, 128 S. Ct. 2678, 2693 (2008); see also *id.* at 2692 ("But a legislature may not 'punish' a defendant for his evil acts by stripping him of the right to have his guilt in a criminal proceeding determined by a jury, and on the basis of evidence the Constitution deems reliable and admissible.") (emphasis omitted).

permitted.”²⁰⁸ Criminal procedure rights should not hinge on a post hoc case-by-case balancing of equities.²⁰⁹

To the extent that confrontation can be lost through “forfeiture,” it is unique among all constitutional rights.²¹⁰ Except for the right of confrontation, all constitutional rights—including all other Sixth Amendment rights—can be lost only through waiver, either express or implied.²¹¹ For example, the right to jury trial and the right to counsel are absolute and can only be waived, not forfeited.²¹² Even the most heinous murderers are granted a jury trial, and even the most unsavory clients are granted counsel.²¹³ Indeed, the Supreme Court has explicitly required waiver even for the confrontation right,²¹⁴

²⁰⁸ *State v. Romero*, 156 P.3d 694, 2007-NMSC-013, 141 N.M. 403 (“Defendant has argued on appeal that the right of confrontation is not the sort of benefit to which the [equity] rationale ought to be applied[,] . . . mak[ing] a compelling argument that we are being asked to balance a constitutional right against a somewhat vague and amorphous sense of what ought to be permitted.”).

²⁰⁹ Equity-balancing rarely descriptively explains the precise contours of a legal rule, especially criminal procedure rights. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989) (arguing that “firm, clear” principles are most important in criminal procedure context, where risk is greatest that “individual criminal defendant[s] [will be overwhelmed by] excesses of [the] popular will”).

²¹⁰ Flanagan, *Confrontation*, *supra* note 14, at 1231.

²¹¹ *Id.* at 1199 (“The Supreme Court has always based the loss of constitutional rights on a waiver analysis.”).

²¹² See 21A AM. JUR. 2D CRIMINAL LAW § 983 (2008) (stating that waiver of right to jury trial must be knowing, voluntary, and intelligent); *id.* § 1149 (same for right to counsel). Waiver requires knowledge of the right as well as a deliberate intention to abandon it, though such elements can be inferred from conduct, see *supra* note 185 (discussing *Zerbst* waiver standard), whereas forfeiture with its punishment rationale lacks any internal limits and could theoretically expand to any case where the government would find it useful, see *supra* note 184 (discussing forfeiture).

²¹³ *Cf. Davis v. Washington*, 547 U.S. 813, 833 (2006) (“We may not . . . vitiate constitutional guarantees [even] when they have the effect of allowing the guilty to go free.”).

²¹⁴ *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (expressly ruling that *Zerbst* waiver test, requiring “an intentional relinquishment . . . of a known right or privilege,” applies to Sixth Amendment confrontation right (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) (internal quotation marks omitted)). Indeed, even when not explicit, the Court has continued to endorse a waiver framework for loss of the confrontation right. See Flanagan, *Confrontation*, *supra* note 14, at 1231 (indicating that review of Supreme Court confrontation cases shows waiver and implied waiver have been only analyses applied to loss of confrontation right, regardless of whether Court explicitly used word “waiver,” even when defendant wrongdoing was involved). Even when the defendant was accused of sexually abusing a child who could not testify in the presence of the defendant because of potential trauma, the Court did not find forfeiture appropriate, even though it could be argued the defendant’s actions, in choosing such an emotionally vulnerable victim, rendered confrontation infeasible for the State. See *Maryland v. Craig*, 497 U.S. 836 (1990). Instead, the Court maintained the assumption that the confrontation right applied and excused only face-to-face confrontation by having the child testify via one-way closed circuit camera. *Id.* at 850–51 (emphasizing that procedure “preserves all of the other elements of the confrontation right,” including oath, demeanor evidence, and full cross-examination by defense counsel). Professor Flanagan has argued that “forfeiture” by wrongdoing is actually a

seemingly conflicting with its recent blessing of more sweeping forfeiture principles.

In addition, the maxim that no one shall be permitted to benefit from his own wrong is inapplicable in the criminal procedure context. The most famous application of the adage, in *Riggs v. Palmer*,²¹⁵ prevented a grandson from inheriting under his grandfather's will after murdering him.²¹⁶ But constitutional rights are not "benefits" of a crime like financial proceeds of an estate; they do not derive from the crime itself, but only from our laws constraining the State's subsequent prosecution. "[N]o one commits crimes in order to obtain constitutional rights in a criminal trial."²¹⁷ Indeed, the "benefits" argument proves too much, as its logic could render all constitutional trial rights forfeitable as "benefits" of the crime.²¹⁸

Further, forfeiture fails to assure proportionality, the archetypal requirement of retribution, by making no attempt to match the degree of the wrong with the resulting punishment. The degree of the wrongful act at issue may vary widely, from murdering the witness to simply giving him gifts for not testifying.²¹⁹ Yet each equally results in forfeiture.²²⁰ Similarly, the harm to the defendant from the sanction may vary widely: The admitted hearsay statement could be overwhelmingly inculpatory or hardly probative.²²¹ No attempt is made to distinguish among such statements based on how "punishing" they

dangerous misnomer, as in fact the doctrine consistently operated as waiver rather than true forfeiture, even in the modern era. Flanagan, *Confrontation*, *supra* note 14, at 1196–98. Indeed, the "forfeiture" label, first used in 1982 without explanation of its significance, was probably adopted based on a confusion about the requirements of implied waiver. *Id.* Arguments supporting a true forfeiture theory have only appeared since *Crawford*, as prosecutors have sought new ways to circumvent *Crawford*'s stricter cross-examination regime. *Id.*

²¹⁵ 22 N.E. 188, 190 (N.Y. 1889) ("No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.").

²¹⁶ *Id.* at 191.

²¹⁷ Flanagan, *Confrontation*, *supra* note 14, at 1240.

²¹⁸ *Id.* at 1241. For example, all homicide defendants could be said to derive special "benefits" from the confrontation right by having eliminated the primary witness against them. Similarly, all defendants charged with specific intent crimes "benefit" from the Fifth Amendment privilege by being able to block the State's access to the best source of evidence to the defendant's internal state of mind.

²¹⁹ See *supra* note 174 and accompanying text.

²²⁰ Of course both must satisfy the *Giles* specific intent requirement. See *infra* notes 226–35 and accompanying text (describing Court's requirement of specific intent to prevent testimony to trigger forfeiture).

²²¹ A statement can satisfy Rule 401's relevance requirement simply by "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. A statement can thus be "relevant" without necessarily being very consequential to the outcome of the case.

are. In sum, the rule does not embrace a fine-grained culpability determination, making no effort to assign each defendant his proper just deserts.²²²

In addition, explaining forfeiture as *punishment* conflicts with its low preponderance-of-the-evidence standard of proof. A defendant’s loss of confrontation “constitutes a substantial deprivation,”²²³ impairing his ability to exercise a constitutional right that has been deemed essential to a fair trial,²²⁴ thereby increasing his risk of conviction. Generally, when the State imposes such a burden on an individual as *punishment*, the Court has required a higher standard of proof,²²⁵ reflecting society’s commitment to avoiding unjust punishment.

3. *Giles v. California’s Requirement of Specific Intent To Silence Testimony Further Undermines the Retribution Rationale*

Finally, the Supreme Court implicitly rejected the retribution rationale in 2008’s *Giles v. California*, holding that forfeiture did not apply unless a defendant had acted with the *specific intent* to prevent the testimony in question.²²⁶ This conclusion overruled many lower court decisions holding, based on equity principles, that forfeiture should apply *whenever* the defendant’s wrongdoing caused the witness’s inability to testify, regardless of the defendant’s intent.²²⁷

²²² See also *infra* notes 241–43 and accompanying text (addressing counterargument that forfeiture’s retribution principles apply only to “wrong” of preventing testimony, not particular means employed to do so).

²²³ *State v. Mason*, 162 P.3d 396, 404 (Wash. 2007) (en banc) (quoting *People v. Geraci*, 649 N.E.2d 817, 822 (N.Y. 1995) (imposing heightened clear-and-convincing standard for forfeiture finding)).

²²⁴ *Pointer v. Texas*, 380 U.S. 400, 403 (1965). Additionally, “society has a weighty investment in the outcome, [b]ecause of the intimate association between the right to confrontation and the accuracy of the fact-finding process.” *Geraci*, 649 N.E.2d at 822 (quoting *United States v. Thevis*, 665 F.2d 616, 631 (5th Cir. Unit B 1982) (alteration in original) (internal quotation marks omitted)) (imposing heightened clear-and-convincing standard for forfeiture finding).

²²⁵ See, e.g., *In re Winship*, 397 U.S. 358, 363–64 (1970) (holding that due process and presumption of innocence require prosecution to prove all elements of offense beyond reasonable doubt whenever defendant stands to lose interest in liberty or face stigma).

²²⁶ *Giles*, 128 S. Ct. at 2684, 2693. In so holding, the Court impliedly rejected a “pure” forfeiture theory, instead embracing an implied waiver theory for the rule (despite not explicitly acknowledging this fact), because acting with specific intent to prevent testimony presupposes at least rudimentary knowledge of the costs and benefits of the right to confrontation and an intent to dispense with it.

²²⁷ At the time the issue finally came before the Supreme Court in *Giles*, 128 S. Ct. 2678, five state supreme courts, as well as the Sixth Circuit, had held that intent to silence was not a necessary element of the forfeiture rule. See *United States v. Garcia-Meza*, 403 F.3d 364, 370–71 (6th Cir. 2005); *People v. Giles*, 152 P.3d 433, 441–43 (Cal. 2007); *State v. Meeks*, 88 P.3d 789, 794–95 (Kan. 2004), *overruled in part on other grounds by State v. Davis*, 158 P.3d 317, 322 (Kan. 2006); *Mason*, 162 P.3d at 404; *State v. Mechling*, 633 S.E.2d

In *Giles*, the defendant was convicted of first-degree murder of his former girlfriend.²²⁸ To rebut the defendant's claim of self-defense, the prosecution introduced the victim's statements made to a police officer three weeks before the killing, indicating that the defendant had physically abused and threatened to kill her.²²⁹ The lower court predicated the statements' admissibility on forfeiture, finding that the defendant had "procured" the victim's unavailability by committing the homicide.²³⁰ Though the State did not present any evidence that the defendant killed the victim in order to prevent her from testifying at a future trial, the California Supreme Court affirmed the conviction, holding that the defendant forfeited his confrontation right by causing the victim's unavailability, regardless of whether he had

311, 326 (W. Va. 2006) (stating rule in domestic violence context); *State v. Jensen*, 727 N.W.2d 518, 534–36 (Wis. 2007).

²²⁸ *Giles*, 128 S. Ct. at 2681–82.

²²⁹ *Id.*

²³⁰ *Giles*, 152 P.3d at 447. Because the defendant's alleged homicide was both the predicate wrongdoing for forfeiture analysis and the very crime for which the defendant was on trial, *Giles* presented a case of "reflexive forfeiture." See *People v. Giles*, 102 P.3d 930, 930 (Cal. 2004) (granting review to determine question, "Does the doctrine [of forfeiture-by-wrongdoing] apply where the alleged 'wrongdoing' is the same as the offense for which defendant was on trial?"); see also Friedman, *Chutzpa*, *supra* note 14, at 508 (coining term "reflexive forfeiture"). After *Crawford*, numerous courts extended forfeiture to permit "reflexive forfeiture," especially in homicide prosecutions. See, e.g., *Garcia-Meza*, 403 F.3d at 370; *People v. Moore*, 117 P.3d 1, 5 (Colo. App. 2004); *Meeks*, 88 P.3d at 794–95; *State v. Ivy*, 188 S.W.3d 132, 138, 147–48 (Tenn. 2006); *Gonzalez v. State*, 155 S.W.3d 603, 610–11 (Tex. App. 2004), *aff'd*, 195 S.W.3d 114 (Tex. Crim. App. 2006), *cert. denied*, 549 U.S. 1024 (2006). A few courts refused to allow reflexive forfeiture. See, e.g., *United States v. Mikos*, No. 02 CR 137-1, 2004 WL 1631675, at *5 (N.D. Ill. July 16, 2004) ("[T]he Court is concerned by . . . the fact that the alleged wrongdoing is one of the crimes to be proven at trial."); *State v. Wiggins*, No. 99 CRS 46567, 2005 WL 857109, at *2 (N.C. Super. Ct. Mar. 18, 2005) (finding forfeiture-by-wrongdoing inapplicable where "[t]here is no evidence that defendant engaged in an affirmative act separate from the crimes for which he was tried that resulted in [the declarant's] unavailability"). Many have defended reflexive forfeiture on the grounds that asking the judge to make a pretrial determination of the ultimate issue in the case is no different than the task of a court admitting co-conspirator statements in a conspiracy prosecution. E.g., *Giles*, 128 S. Ct. at 2707 (Breyer, J., dissenting) (making this argument). However, in *Giles*, Justice Souter, joined by Justice Ginsburg, objected to reflexive forfeiture's seeming circularity, concluding that only a specific intent requirement confined it within acceptable limits. *Id.* at 2694 (Souter, J., concurring) ("[A]dmissibility of the victim's statement to prove guilt would turn on finding the defendant guilty of the homicidal act causing the absence . . . Equity demands something more than this near circularity before the right to confrontation is forfeited, and more is supplied by showing intent to prevent the witness from testifying."). Justice Scalia (in a portion of his opinion joined only by Chief Justice Roberts and Justices Alito and Thomas) also evinced concern that reflexive forfeiture would be problematic absent an intent-to-silence requirement. *Id.* at 2691 (plurality opinion) ("The boundaries of the doctrine seem to us intelligently fixed so as to avoid a principle repugnant to our constitutional system of trial by jury: that those murder defendants whom the judge considers guilty (after less than a full trial, mind you, and of course before the jury has pronounced guilt) should be deprived of fair-trial rights, lest they benefit from their judge-determined wrong.").

intended to do so.²³¹ On certiorari,²³² the U.S. Supreme Court vacated the conviction and remanded, insisting that forfeiture-by-wrongdoing applies only when the defendant engages in wrongdoing with the *specific purpose* of preventing the witness from testifying against him.²³³ The Court based its holding on historical practice, finding that the framing-era forfeiture exception applied only to intentional witness-tampering.²³⁴ Further, the Court explained that the “wrong” that the rule targets is not generalized wrongdoing, but only a very specific wrong: conduct designed to prevent a witness from testifying.²³⁵

Giles’s requirement that the defendant act with an intent to silence the witness demonstrates that retribution principles do not govern forfeiture analysis. Pure equity cannot countenance refusing

²³¹ *Giles*, 152 P.3d at 447.

²³² Petition for Writ of Certiorari at i, *Giles*, 128 S. Ct. 2678 (No. 07-6053), 2007 WL 4729835 (presenting question of whether intent to silence is necessary to forfeiture-by-wrongdoing); *Giles v. California*, 552 U.S. 1136 (2008) (granting certiorari).

²³³ *Giles*, 128 S. Ct. at 2684, 2693. In imposing an intent-to-silence requirement, the Court impliedly rejected an extension of reflexive forfeiture to what I call “spontaneous witness” forfeiture: cases in which the witness’s only testimony relates to the wrongdoing itself, not to a prior crime. For example, if a fatally wounded victim made a statement to police about her assault, and then subsequently died from the wounds (and the statement did not qualify as a dying declaration), the prosecution could only admit the statement under a theory of “spontaneous witness” forfeiture, as the victim was not a potential witness against the defendant until the very act of wrongdoing that prevented her testimony. *E.g.*, *Gonzalez*, 155 S.W.3d at 605–06, 610–11 (finding forfeiture with regard to victim’s excited utterance to police identifying assailant after fatal shooting); *see also* Joshua Deahl, Note, *Expanding Forfeiture Without Sacrificing Confrontation After Crawford*, 104 MICH. L. REV. 599, 607–08 (2005) (discussing spontaneous witness scenario, but failing to distinguish it from simple “reflexive forfeiture”). The intent-to-silence requirement logically eliminates the possibility of “spontaneous witness” forfeiture: The defendant could not have had a prior intent to silence testimony, since there was nothing to silence until the act took place. *See, e.g.*, *Gonzalez*, 195 S.W.3d at 119 (“[U]ndoubtedly [the defendant] didn’t murder the victim to prevent him from testifying in the murder trial.” (quoting 4 STEPHEN A. SALTZBURG, DANIEL J. CAPRA & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL § 804.02[16] (9th ed. 2006))). The only possible exception would be if the defendant escalated a crime specifically to silence the victim about the initial crime. *See, e.g., id.* at 126 (determining that forfeiture was applicable based on finding that murder was motivated by defendant’s desire to “permanently silence” victim about initial robbery).

²³⁴ *Giles*, 128 S. Ct. at 2684 (“We are aware of no case in which the exception was invoked although the defendant had not engaged in conduct designed to prevent a witness from testifying, such as offering a bribe.”); *see also id.* at 2693 (“We decline to approve an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter.”).

²³⁵ *Id.* at 2686 (“But as the evidence amply shows, the ‘wrong’ and the ‘evil Practices’ to which these statements referred was conduct *designed* to prevent a witness from testifying.”). The Court bolstered its historical conclusions with a normative assessment, warning that extending the rule beyond these limits could threaten the very essence of the defendant’s right to a jury trial, by “strip[ping] [him] of a right that the Constitution deems essential to a fair trial, on the basis of a [mere] judicial assessment that the defendant is guilty as charged.” *Id.* (emphasis omitted).

forfeiture to the State when defendants murder prospective witnesses out of rage, spite, or cold-blooded evil, rather than to prevent testimony.²³⁶ All have committed extremely culpable acts, the nature of which aids them in evading sanction. And any murderer is clearly more culpable than someone who merely encourages a witness not to testify.²³⁷ Indeed, Justice Breyer dissented in *Giles* precisely because the Court's intent-to-silence requirement could not be squared with the retribution rationale that prior cases had appeared to endorse: "To the extent that it insists upon an additional showing of purpose, the Court breaks the promise implicit in [the Court's previous retribution-themed rhetoric] and, in doing so, grants the defendant not fair treatment, but a windfall."²³⁸

The *Giles* plurality recognized that the logical conclusion of a retribution-driven forfeiture doctrine would be "repugnant to our constitutional system of trial by jury" by abridging constitutional rights without principled limits.²³⁹ The Court thus backtracked from the retributive language it had used in the past, cabining it as mere rhetoric that had been invoked to support the rule but which failed to guide its interpretation.²⁴⁰ While substantive equity principles might sometimes align with the forfeiture result, they do not determine its operation.

Opponents may try to reconcile the intent-to-silence requirement with a retribution rationale with respect to proportionality by arguing that the defendant has in essence committed two wrongs: (1) the prevention of the witness's testimony, and (2) the particular means employed to prevent it. Forfeiture is the sanction only for the former wrong, to which it is proportionate. Meanwhile, proportionality for the second wrong is achieved through the criminal law: a murder charge for a murderer, a bribery charge for a briber.

²³⁶ Friedman, *Personal Reflection*, *supra* note 14, at 742–43 (describing *Giles*'s intent-to-silence requirement as irreconcilable with equity, and arguing that equitable principles mandate applying forfeiture whenever defendant's wrong prevents witness from testifying, as otherwise, "[n]o matter how evil [the defendant's] purpose was, so long as it was not to prevent [the witness] from testifying in some proceeding, it could not result in forfeiture").

²³⁷ See *Giles*, 128 S. Ct. at 2699 (Breyer, J., dissenting) (calling it "anomalous" and contrary to equity that defendant who assaults wife and then threatens her with harm if she testifies against him faces forfeiture, while defendant who assaults wife and then "subsequently murders her in a fit of rage" does not).

²³⁸ *Id.* at 2709 (Breyer, J., dissenting).

²³⁹ *Id.* at 2691 (Scalia, J., plurality opinion).

²⁴⁰ *Id.* at 2687 ("*Reynolds* invoked broad [equity] forfeiture principles to explain its holding . . . [and] relied on [broad equitable] maxims . . . to be sure. But it relied on them (as the common-law authorities had done) [only] to admit prior testimony in a case where the defendant had engaged in wrongful conduct designed to prevent a witness's testimony.").

This argument, however, fails to salvage the retribution rationale. First, it renders the nature of the defendant’s wrongdoing irrelevant to forfeiture, depriving the retributive rationale of its primary rhetorical appeal: The odious nature of the act, such as murder, can no longer be used to justify the rule.²⁴¹ Second, the argument is question-begging: It assumes, rather than demonstrates, that forfeiture is necessarily proportionate to the first wrong. But as discussed above, forfeiture provides no assurance that the statement admitted will be appropriately punitive in relation to the defendant’s act of tampering.²⁴² Third, the argument merely underscores that, properly considered, forfeiture in fact operates more like a waiver, governed by estoppel principles,²⁴³ than like retribution, making no examination into the substantive fairness of its application. Unlike the law’s response to the “second wrong,” which involves a traditional retribution assessment through substantive criminal law, the law’s response to the “first wrong” operates like a mechanical trigger: The defendant loses the right because he has taken intentional actions inconsistent with its exercise, not because the rule assures a punishment in proportion to his wrong.²⁴⁴ Thus, the *Giles* holding demonstrates that retribution is not the guiding rationale of forfeiture analysis.

By contrast, the rationales of estoppel, deterrence, and judicial integrity all neatly align with *Giles*’s intent-to-silence requirement. First, estoppel classically hinges on the mental state of the defendant, arising as a result of his knowing and deliberate acts.²⁴⁵ Second, the defendant’s actions are uniquely deterrable when by definition they are carried out with considerations of judicial repercussions in mind; requiring a specific intent to prevent testimony restricts the rule’s application to cases where the defendant had actually contemplated the effect of his actions on the judicial process.²⁴⁶ Finally, judicial

²⁴¹ *E.g., id.* at 2697 (Breyer, J., dissenting) (“What more ‘evil practice,’ what greater ‘wrong,’ than to murder the witness?”).

²⁴² *See supra* notes 202–05, 220–22, and accompanying text (arguing that forfeiture descriptively fails to assure retributive proportionality).

²⁴³ *See* Flanagan, *Confrontation*, *supra* note 14, at 1202, 1241–42 (arguing that forfeiture-by-wrongdoing operates as waiver, not true forfeiture).

²⁴⁴ Analogously, a defendant may be excluded from the courtroom for his disruptive conduct based on similar principles. *See supra* note 195.

²⁴⁵ *See supra* note 185 (discussing requirements for waiver); *see also* Smith, *supra* note 190, at 150 (arguing that *Giles* indicates Supreme Court’s embrace of waiver/estoppel framework for forfeiture-by-wrongdoing rule, thereby rejecting true forfeiture).

²⁴⁶ *See* Kroger, *supra* note 98, at 879 (“A prophylactic rule such as the confrontation waiver doctrine can have no influence on criminal conduct unless the actors, at whom the doctrine is directed, are aware of the rule and its implications.”).

integrity concerns are most implicated by actions specifically designed to thwart the judicial system.²⁴⁷

III LIMITED FORFEITURE

A. *Forfeiture's True Rationales Counsel Circumspection*

While retributive theories lead to complacency about lost Sixth Amendment protections, the true rationales governing forfeiture-by-wrongdoing counsel more circumspection. Estoppel merely authorizes waiver, but does not provide substantive policy support for it. Conversely, judicial integrity and deterrence provide substantive policy justifications for the forfeiture-by-wrongdoing doctrine, but are circumscribed by estoppel: Since estoppel provides the mechanism by which the defendant loses his otherwise valid constitutional claim, the other rationales can encroach on constitutional rights no further than estoppel authorizes.²⁴⁸

As described previously, estoppel is limited to the inconsistency that gives rise to it.²⁴⁹ In the case of forfeiture, the inconsistency is limited to the witness's appearance at trial, and need not necessarily extend to non-trial-specific elements of confrontation, such as oath, formality, demeanor evidence, face-to-face accusation, and even prior cross-examination.²⁵⁰ Thus, estoppel alone does not provide *carte blanche* for complete forfeiture.

In addition, concerns about judicial integrity function to ensure that the system operates as designed. The Sixth Amendment is part of the brick and mortar of that system that judicial integrity deems sacrosanct. Thus, the judicial integrity policy rationale should reincorporate Sixth Amendment values into forfeiture policy goals, including *Crawford's* renewed emphasis on the importance of confrontation to the integrity of the criminal trial, despite the onerous barrier it poses to the State. While limited forfeiture may advance judicial integrity by

²⁴⁷ Flanagan, *Purpose*, *supra* note 14, at 558 (“[A] defendant can lose a constitutional right when he manipulates the trial process. The intentional attack on the judicial process to gain an unfair advantage is the triggering act, not the crime charged.”).

²⁴⁸ See *Reynolds v. United States*, 98 U.S. 145, 159 (1878) (“[I]f there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony.”); Flanagan, *Purpose*, *supra* note 14, at 558 (“That affront to the judicial process [triggering waiver] is the only basis for eliminating a constitutional right, and easing the state’s constitutional obligations. Otherwise, constitutional rights would vary on the needs or whims of the government and not the defendant.”).

²⁴⁹ See *supra* notes 188–98 and accompanying text (describing estoppel and its limitations).

²⁵⁰ See Confrontation Blog, *supra* note 163 (discussing desirability of partial confrontation when possible).

restoring otherwise lost probative evidence, complete forfeiture often overshoots judicial integrity goals by recalibrating the system too far toward elimination of confrontation entirely.

At minimum, discrediting the punishment rationale for forfeiture counsels much greater prudence with regard to complete forfeiture—including greater attention to the true inconsistency that the defendant has caused—and greater regard for Sixth Amendment principles within forfeiture analysis.

B. *Confrontation Is Divisible*

Most often, complete forfeiture is simply assumed rather than directly defended. Indeed, it appears no scholar has ever identified complete forfeiture as a conceptual problem, separate and distinct from forfeiture generally. This undefended assumption of complete forfeiture stems from an image of the right to confrontation as all-or-nothing. Thus, when it is forfeited, such forfeiture is automatically assumed to be complete.²⁵¹ However, as described in Part I.B, confrontation encompasses many components, including oath, formality, demeanor evidence, face-to-face accusation, and cross-examination. While ideally testimonial evidence is subject to this full panoply, the loss of one element need not entail the loss of all elements, nor a conclusion that the Confrontation Clause has ceased to operate entirely.

Crawford refers to forfeiture’s operation as “extinguish[ing]” confrontation claims,²⁵² seemingly suggesting that derogations from confrontation must be total. Nonetheless, the holding and reasoning of *Crawford* implicitly acknowledge that the confrontation right admits of degrees. Under *Crawford*, when a witness is available to testify at trial, the Sixth Amendment requires that full confrontation be afforded.²⁵³ When a witness’s unavailability makes physical confrontation at trial impossible, the Confrontation Clause continues to operate in a diminished form, allowing only those testimonial statements that were subject to prior cross-examination to be read to the jury.²⁵⁴ This is an imperfect form of confrontation: While cross-examination and face-to-face accusation are preserved, the jury loses the “secondary advantage[s]”²⁵⁵ of live testimony, demeanor evi-

²⁵¹ *E.g.*, *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (describing forfeiture as “*extinguish[ing]*” confrontation claims) (emphasis added); *Davis v. Washington*, 547 U.S. 813, 833 (2006) (same).

²⁵² 541 U.S. at 62.

²⁵³ *Id.* at 59.

²⁵⁴ *Id.*

²⁵⁵ WIGMORE, *supra* note 32, § 1395, at 94–97.

dence, and even—depending on the statement—oath and solemnity.²⁵⁶

*Maryland v. Craig*²⁵⁷ provides another example of the confrontation right's divisibility. In *Craig*, the Court found that permitting an emotionally vulnerable child victim to testify via closed-circuit television from another room—to protect the child from the emotional distress of facing the defendant—did not violate the Sixth Amendment.²⁵⁸ Although some elements of confrontation were lost, including face-to-face accusation and the solemnizing effect of the public courtroom on the witness, others were preserved, including cross-examination and demeanor evidence.²⁵⁹ Other examples of confrontation's divisibility abound. When a defendant voluntarily absents himself from the courtroom, or is so disruptive that he must be excluded, the trial may at times proceed in his absence.²⁶⁰ The Confrontation Clause, however, is not wholly extinguished: Face-to-face accusation is lost, but live witness testimony and contemporaneous cross-examination by his attorney continue. In addition, cross-examination itself varies in degree,²⁶¹ and is limited by rules of evi-

²⁵⁶ *Crawford* requires cross-examination, but not necessarily at a prior trial. Indeed, at least one scholar has argued that a defendant's prior "cross-examination" of the witness at the scene or in the police station would likely suffice under *Crawford*. See Pettys, *supra* note 109, at 203–06. Of course, such statements would still have to satisfy hearsay rules.

²⁵⁷ 497 U.S. 836 (1990).

²⁵⁸ *Id.* at 840, 855. Though decided before *Crawford*, *Craig* has continuing vitality, as *Crawford* did not reach the issue of the requisite quality of cross-examination needed to satisfy the Confrontation Clause, while *Craig* focused on the requirement of face-to-face accusation as a component of effective confrontation. Cf. United States v. Yates, 438 F.3d 1307, 1313 (11th Cir. 2006) (applying *Craig* in post-*Crawford* context to hold two-way video conference testimony violated Confrontation Clause).

²⁵⁹ It is especially striking to note that the Confrontation Clause continued to have "meaning and effect," even though the impossibility of literal face-to-face confrontation was largely the defendant's fault, having victimized "an emotionally vulnerable" child. Flanagan, *Forfeiture*, *supra* note 10, at 528. Thus, even the defendant's having committed a culpable act did not eliminate the Sixth Amendment protection entirely. The fact that the culpable act was itself the act for which the defendant was on trial is insignificant, as it is no different from the case of "reflexive" forfeiture. See *supra* note 230 (explaining reflexive forfeiture, where predicate wrongdoing for forfeiture is same as crime for which defendant is on trial).

²⁶⁰ See *supra* notes 191–98 and accompanying text (discussing cases establishing courts' ability to exclude defendant from courtroom during his trial).

²⁶¹ The task of determining the constitutional adequacy of cross-examination in particular cases is not abrogated by *Crawford*, as even under *Crawford*'s bright-line cross-examination rule courts must engage in a purposive inquiry to determine what does, or does not, qualify as an adequate opportunity for cross-examination. See *Yates*, 438 F.3d at 1314 n.4 (noting that *Crawford* does not answer question of whether confrontation that occurred in particular case is constitutionally sufficient). Many cases both before and after *Crawford* demonstrate the difficulty of making this determination. See, e.g., *Craig*, 497 U.S. at 840, 855 (holding that Sixth Amendment right to confrontation did not prohibit child witness from testifying outside defendant's physical presence by one-way closed circuit tel-

dence and procedure and by rulings by the trial judge.²⁶² The key insight is that confrontation can be a dimmer, rather than an on/off switch. Indeed, the Court has specifically recognized this graduated quality in referring to the right’s “denial or *significant diminution*.”²⁶³

If confrontation is not all-or-nothing, then limited forfeiture is possible, and complete forfeiture need not be uncritically assumed. While forfeiture necessarily eliminates the possibility of live testimony *at trial*, the other elements of confrontation need not be lost.²⁶⁴ For example, where the prior statement is grand jury testimony, oath and formality are satisfied despite the witness’s inability to appear at trial. Pretrial depositions can afford cross-examination, oath, and face-to-face accusation. Videotaped statements preserve demeanor evidence. Even statements to police in the defendant’s presence at least afford face-to-face accusation.

evision); *United States v. Owens*, 484 U.S. 554 (1988) (concluding cross-examination of witness with total memory loss of all relevant events satisfied confrontation right); *California v. Green*, 399 U.S. 149, 165–66 (1970) (speculating in dicta that mere “opportunity” for cross-examination at preliminary hearing would satisfy confrontation right, even if it was not exercised and would have been futile and uncustomary to exercise); *Yates*, 438 F.3d at 1315–16 (holding that two-way video teleconference testimony by witnesses beyond government’s subpoena power violated defendants’ Sixth Amendment right to physically confront witnesses against them, where government failed to show special circumstances preventing it from taking witnesses’ testimony at pretrial depositions that defendants could attend).

²⁶² *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (“[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.”); *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam) (“[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is ineffective in whatever way, and to whatever extent, the defense might wish.”); *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (“[The cross-examiner is] . . . [s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation”); 21A AM. JUR. 2D CRIMINAL LAW § 1075 (2008) (emphasizing broad discretion trial judges retain under Confrontation Clause “to impose reasonable limits on such cross-examination”); *see also, e.g.*, *United States v. Crowley*, 318 F.3d 401, 417 (2d Cir. 2003), *cert. denied*, 540 U.S. 894 (2003) (holding that trial court’s preclusion of cross-examination of putative victim on alleged prior instances of false accusations was not abuse of discretion, and did not violate Confrontation Clause, even though they were relevant to victim’s credibility and defendant had good faith basis for proposed questioning); *United States v. Honken*, 381 F. Supp. 2d 936, 1001–02 (N.D. Iowa 2005) (declining to find reversible error on Confrontation Clause grounds in trial court’s refusal of capital defendant’s request to cross-examine witness regarding his precarious mental condition).

²⁶³ *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (emphasis added).

²⁶⁴ Friedman, *Personal Reflection*, *supra* note 14, at 740 (“[T]he state should not be able to invoke forfeiture doctrine to the extent that it could have preserved the confrontation right in whole or part by reasonable measures that were available to it but that it forsook.”); Comment, *Confrontation Blog*, *supra* note 163 (“[T]o be precise[,] the consequence of the accused’s misconduct is not that the witness is unavailable to testify subject to confrontation; it is only that the witness is unavailable to testify *at trial*.”).

C. *A Proposal for Limited Forfeiture*

Because of the originalism groundings of Confrontation Clause analysis, I suggest a limited forfeiture rule that follows most directly from its historical usage.²⁶⁵ Such a solution would limit the class of testimony admissible upon a finding of forfeiture to a specific, predetermined subset of highly formalized evidence, analogous to Marian depositions. Following framing-era Marian rules, the requisite formalities should include transcription, oath, and appearance before a judicial officer.²⁶⁶ Requiring the defendant's presence should also be strongly considered.²⁶⁷ If extended to modern-day technologies, audio- and videotaping could be required, which would provide greater demeanor evidence to the jury. However, in keeping with the framing-era practice, cross-examination would not be a prerequisite for admissibility, making forfeiture-by-wrongdoing still a potent exception to usual confrontation requirements.

If applied the Introduction's hypothetical,²⁶⁸ however, this limited forfeiture rule would most likely exclude Willie's statement to the police. Lacking any elements of confrontation, the statement fails to satisfy the requisite procedural safeguards prescribed by the Sixth

²⁶⁵ Heightening the stringency of the predicate forfeiture findings could also be a salutary change to the forfeiture rule, though such arguments are beyond the scope of this Note. For example, more stringent requirements for witness unavailability, including requiring documented good faith efforts by the State to produce the witness, could be required to mitigate perverse prosecution incentives to allow a witness to go "unfound" when armed with a favorable police report and reluctant to subject its witness to the rigors of cross-examination. See Flanagan, *Purpose*, *supra* note 14, at 567–70 (arguing for prosecutor due diligence standard); Friedman, *Personal Reflection*, *supra* note 14, at 739–40 (arguing for prosecutorial mitigation of lost confrontation rights); Adam Sleeter, Note, *Injecting Fairness into the Doctrine of Forfeiture by Wrongdoing*, 83 WASH. U. L.Q. 1367, 1394 (2005) (arguing that government should be required to show good faith effort to produce witness); see also *supra* note 90 (describing recent Supreme Court acquiescence to weak showings of unavailability). In a similar vein, Professor Flanagan has recommended requiring but-for causation for both the finding that the defendant caused the witness's unavailability and that he did so with specific intent to silence the witness. Flanagan, *Purpose*, *supra* note 14, at 566–67. In addition, elevating the standard of proof from preponderance to clear and convincing evidence that the witness's unavailability is due to the defendant's wrongdoing may be appropriate given *Crawford's* renewed emphasis of the importance of confrontation to the integrity of the criminal trial. See Aaron R. Petty, *Proving Forfeiture and Bootstrapping Testimony After Crawford*, 43 WILLAMETTE L. REV. 593, 609 (2007) ("A standard of review higher than the preponderance of the evidence may be necessary to address society's determination of the gravity of the interest at stake . . ."); see also *supra* note 224 and accompanying text (discussing association between confrontation right and necessity of accurate fact-finding at trial).

²⁶⁶ See *supra* notes 112–13 and accompanying text (describing these and other founding-era Marian admissibility requirements).

²⁶⁷ See *supra* notes 113–14 and accompanying text (describing de facto presence requirement for Marian depositions).

²⁶⁸ See *supra* note 1 and accompanying text (describing hypothetical).

Amendment to mitigate the core dangers of evidentiary unreliability and government abuse. Thus, unless Willie could be convinced to testify at trial, his prior statement could not be used as evidence against Dan and Dave.

A common response to this result is that it seems unfair. As stated by Justice Souter, it seems “reasonable to place the risk of untruth in an unconfrosted, out-of-court statement on a defendant who meant to preclude the testing that confrontation provides.”²⁶⁹ Such arguments to dispense with Sixth Amendment concerns often have an “underlying theme of retribution.”²⁷⁰ However, as argued above, equity concerns, in the sense of achieving substantive fairness, neither descriptively nor normatively determine a defendant’s constitutional trial rights.²⁷¹ In addition, inequity is inherent in the confrontation right; whenever a witness dies or absconds before trial and the prosecution thereby loses its key testimony and must drop the case,²⁷² the result seems like a windfall for the defendant. Constitutional trial rights do not bow to every cry of equity.

Second, even crediting the sentiment of the above objection, it masks the objection’s underlying complexity. How *much* risk of untruth does the Sixth Amendment countenance?²⁷³ What *type* of risk of untruth does it countenance—does it allow even government evidence-shaping, the Clause’s “paradigmatic” reliability concern?²⁷⁴ What testing *exactly* has the defendant “preclude[d]”?²⁷⁵ The objection assumes a static system; but actors within the criminal justice system adjust conduct and develop procedures in response to the governing rules. A rule that incentivizes efforts to enhance confrontation opportunities should be preferred to one that simply accepts prosecutors’ current practices as given.

The limited forfeiture rule better addresses the three primary concerns of *Crawford* than the current rule of complete forfeiture.²⁷⁶

²⁶⁹ *Giles v. California*, 128 S. Ct. 2678, 2694 (2008) (Souter, J., concurring).

²⁷⁰ Flanagan, *Forfeiture*, *supra* note 10, at 525.

²⁷¹ See *supra* notes 202–25 and accompanying text (describing inappropriateness of equity-based arguments to justify constriction of criminal procedure rights).

²⁷² This is the case unless, of course, the witness’s prior statement satisfied the narrow exception for dying declarations, which only applies in homicide trials, and only if the statement concerns the events of the killing and was made by the victim under apprehension of imminent death. See *supra* note 81 (describing dying declaration exception).

²⁷³ See Flanagan, *Forfeiture*, *supra* note 10, at 522 (noting that courts overvalue presumed punitive purpose of forfeiture).

²⁷⁴ *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring); see also *supra* notes 23–25 and accompanying text (describing Clause’s primary purpose of preventing government abuse in evidence-creation).

²⁷⁵ *Giles v. California*, 128 S. Ct. 2678, 2694 (2008) (Souter, J., concurring).

²⁷⁶ See *supra* Part I.D (setting out *Crawford*’s three primary concerns).

First, unlike complete forfeiture, which drastically deviates from the historical rule, my proposed rule closely aligns with the forfeiture exception that existed “at the time of the founding,”²⁷⁷ which under *Crawford* is the *only* justification for recognizing an exception to the confrontation right.²⁷⁸

Second, this proposal is preferable to a solution allowing a judge to conduct case-by-case reliability assessments of the out-of-court statements to determine their admissibility under forfeiture. Though the latter approach may be appealing for its flexibility, *Crawford* rejected such an approach as fundamentally at odds with the Confrontation Clause, which demands categorical rules and rejects ad hoc judicial balancing—especially any involving abstract reliability assessments²⁷⁹—as inherently unpredictable and prone to under-protect the confrontation right.²⁸⁰ Consistent with these concerns, my limited forfeiture rule is categorical and not subject to judicial case-by-case discretion.

Third, the limited forfeiture rule better promotes the Clause’s three primary purposes of confrontation: enhancing evidentiary reliability, reducing the danger of government fabrication or shaping of testimony, and safeguarding systemic legitimacy.²⁸¹ The proposal’s requisite formalities—which guarantee a subset of confrontation elements despite surrendering live testimony and cross-examination at trial—assure that some minima of the Sixth Amendment’s prescriptions continue to operate for all evidence that the State adduces in seeking a criminal conviction.

Moreover, such a rule adheres to the Sixth Amendment’s systemic values by creating incentives for the prosecution to design its procedures to maximize confrontation, rather than evade it. Under the existing “complete forfeiture” rule, the prosecution has a strong, ever-present incentive to evade confrontation.²⁸² In contrast to complete forfeiture, my proposed limited forfeiture rule creates incentives for the State to provide opportunities for confrontation in order to

²⁷⁷ *Crawford v. Washington*, 541 U.S. 36, 54 (2004).

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 61 (“[The Confrontation Clause] is a procedural rather than a substantive guarantee. It commands . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

²⁸⁰ *See id.* (“Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.”); *id.* at 63 (“The unpardonable vice of the *Roberts* test . . . [is] its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”); *see also supra* notes 54–58, 71–75 and accompanying text (describing *Crawford*’s criticisms of *Roberts*).

²⁸¹ *See supra* Part I.A (describing primary purposes of Confrontation Clause).

²⁸² *See supra* Part II.B.2 (describing prosecution incentives to evade confrontation).

preserve its evidence. For example, law enforcement and prosecutors could establish procedures to ensure more statements be given under oath and recorded, or at minimum transcribed.²⁸³ In cases that present high risks of witness tampering, such as organized crime and domestic violence offenses, the prosecution could arrange for pretrial depositions of witnesses.²⁸⁴ The prosecution could also encourage witnesses

²⁸³ This would not require a drastic change from current procedures. Police interrogation is a formal art, replete with trainings, manuals, and required procedures. Many police departments require arrestees to sign a document indicating their waiver of *Miranda* rights, and some departments prepare a written statement for the arrestee to sign at the end of interrogation. Cf. *United States v. Bernard S.*, 795 F.2d 749, 753 n.4 (9th Cir. 1986) (citing *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)) (noting that “a written waiver of one’s *Miranda* rights is ‘strong’ evidence that the waiver is valid”). Such procedures could be altered relatively easily to provide for more precise transcription. Additionally, audio- and videotape recording equipment is readily available in most police precincts, see CRIM. JUSTICE SECTION, AM. BAR ASS’N & N.Y. COUNTY LAWYER’S ASS’N, REPORT ON THE ELECTRONIC RECORDING OF POLICE INTERROGATIONS 6 (2002), available at www.nycla.org/publications/revisevideotapereport.pdf (stating that audiotape recording equipment is readily available at all precincts, and one-third of all police departments with populations over 50,000 sometimes record interrogations by videotape), demonstrating no impediment to making the practice of electronically recording interrogations more consistent and uniform. While requiring the defendant’s presence for such statements would represent a greater departure from past practice, it would be feasible to require witnesses to repeat their statements in front of the defendant.

²⁸⁴ In the federal system, depositions in criminal cases, though rare, are permissible at the discretion of the trial court. See FED. R. CRIM. P. 15(a)(1) (“A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice.”); see also *United States v. Yates*, 438 F.3d 1307, 1315–16 (11th Cir. 2006) (holding that testimony by two-way video teleconference by witnesses in Australia violated Confrontation Clause, in part because prosecution had not demonstrated inability to take pretrial depositions of witnesses that defendants could attend). Under *Crawford*, if the prosecution foresees a witness’s future unavailability (for any reason), the prosecution has a strong incentive to take the deposition of the witness under confrontation conditions to preserve her testimony. Confrontation Blog, *supra* note 163. This incentive to maximize confrontation should remain, even when the unavailability risk includes a risk that it will be due to the fault of the defendant. *Id.*; Friedman, *Personal Reflection*, *supra* note 14, at 740 (“If the state has a good chance to preserve the confrontation right, notwithstanding the accused’s wrongdoing, it should take advantage of that chance, rather than using the wrongdoing as a lever for wiping out the confrontation right.”); see also Flanagan, *Purpose*, *supra* note 14, at 570 (“When the government is aware that there are risks that the witness might not appear at trial, it must respond with efforts to provide confrontation by other means.”). The Advisory Committee on Rules of Evidence effectively rejected such a mitigation requirement in the hearsay context, resolving not to include a reference to Rule 804(b)(6)’s forfeiture-by-wrongdoing exception in Rule 804(a)(5), indicating that admissibility under Rule 804(b)(6) did not require “the proponent to demonstrate that the declarant’s testimony could not be obtained through other means, such as taking a deposition.” Advisory Comm. on Evidence Rules, Minutes of the Meeting (Apr. 22, 1996), available at 1996 WL 936789, at *4. However, there is no reason hearsay requirements must be identical to constitutional requirements for forfeiture. Indeed, the Committee, chaired by Judge Ralph K. Winter, Jr., the author of the sweeping *Mastrangelo* opinion, *United States v. Mastrangelo*, 693 F.2d 269, 273–74 (2d Cir. 1982) (emphasizing repugnant act of killing witness, and

to testify at trial by granting them immunity or increasing social services.²⁸⁵ Creating such incentives aligns with *Crawford*'s goal of maximizing confrontation, rather than acceding to its absence.

Because estoppel principles delimit forfeiture's derogation from the confrontation right,²⁸⁶ any confrontation elements not strictly inconsistent with a defendant's actions should remain constitutionally required.²⁸⁷ Estoppel only justifies forfeiture to the extent confrontation is strictly inconsistent with the defendant's actions. While the defendant's actions are inconsistent with the witness's testimony at trial, whether they are inconsistent with other confrontation elements—including oath, cross-examination, demeanor evidence, and defendant presence—depends on how much pretrial confrontation the system affords. By incentivizing the prosecution to structure its procedures to provide more opportunities for confrontation, we reduce the degree to which the defendant's actions render confrontation impossible. This estoppel limitation felicitously aligns with the Confrontation Clause's primary purpose of safeguarding against government abuse, as the greater the government's involvement in creating and preserving the witness's testimony, the less likely the defendant's act is solely responsible for eliminating the opportunity for confrontation. For when the government controls the statement, it likely can afford to provide opportunities for confrontation, or at least minimal formalities.

ruling broadly that act can be attributed to defendant based only on his “[b]are knowledge of a plot to kill [the witness] and a failure to [warn] appropriate authorities”), also extended the rule to reach mere “acquiescence” by the defendant in others’ acts preventing witness testimony. Advisory Comm. on Evidence Rules, *supra* note 13, at *3. Mere acquiescence by the defendant without more may not pass constitutional muster either. See Flanagan, *Forfeiture*, *supra* note 10, at 508 (arguing that no satisfactory test exists for “acquiescence” and more proof connecting defendant to acts by others must be required to justify loss of constitutional right).

²⁸⁵ This is particularly the case in domestic violence offenses, where such support can prove crucial both to a victim's cooperation with prosecution, as well as to her eventual healing. See Tuerkheimer, *supra* note 176, at 730 & n.107 (noting that social services are often critical factor in securing victim cooperation in domestic violence prosecution, and arguing that requiring domestic violence victims to testify can be positive development by “empowering” victims vis-à-vis their batterers); see also Flanagan, *Purpose*, *supra* note 14, at 569–70 (“It is well established that support programs for witnesses improve appearance rates.”).

²⁸⁶ See *supra* notes 185–98, 243–45 and accompanying text (describing estoppel rationale and its application to forfeiture).

²⁸⁷ For example, even where a defendant's actions preclude demeanor evidence by preventing the witness's live testimony before the jury, they may not necessarily preclude face-to-face accusation or oath, where it is possible to question the witness under oath in the defendant's presence prior to trial.

CONCLUSION

When *Crawford* clarified the originalist foundation for Confrontation Clause doctrine, it neglected to prune the forfeiture-by-wrongdoing exception, which had drastically expanded from its founding-era operation. *Giles* partially corrected that problem, rejecting lower courts' extension of the rule to reach defendant conduct not undertaken with a specific intent to prevent witness testimony. The Court must now correct forfeiture's other primary deviation from its foundations: admission of testimony that goes far beyond the formal depositions that the founding-era exception admitted. A limited forfeiture rule that continues to impose confrontation requirements on testimony admitted pursuant to forfeiture would better align the doctrine with its historical origins, and would also provide an ongoing safeguard for the evidentiary reliability, government abuse, and systemic legitimacy concerns that underlie the Confrontation Clause.