

CONFRONTATION AND THE DEFINITION OF CHUTZPA

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You may know the standard illustration of *chutzpa* — the man who kills both his parents and then begs the sentencing court to have mercy on an orphan.' In this article, I discuss a case of *chutzpa* that is nearly as outlandish — the criminal defendant who, having rendered his victim unavailable to testify, contends that evidence of the victim's statement should not be admitted against him because to do so would violate his right to confront her. I contend that in a case like this the defendant should be deemed to have forfeited the confrontation right. On the same grounds, if the jurisdiction applies a rule against hearsay, he should be deemed to have forfeited the right to invoke it against evidence of the statement.

In one sense, this conclusion is very unstartling. Courts have held, in a variety of contexts, that if the accused has rendered a potential witness unavailable — whether by murder, concealment, intimidation, improper payment, or chicanery — the accused should be deemed to have forfeited the confrontation right or the hearsay objection.² And this rule, which I shall call the forfeiture principle, has gained legislative recognition as well in some jurisdictions. Long ago it was reflected in section 13(3)(a) of the English Criminal Justice Act (1925). That clause has since been superseded by an arguably overbroad provision, section

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1 See Leo Rosten, *The Joys of Yiddish*, (1968) 92 ("[t]he classic definition"); Alan M. Dershowitz, *Chutzpah*, (1991) 18 ("[t]he classic illustration").

2 Some courts speak of the defendant as having waived the confrontation right, but this is inaccurate: It is not necessarily so that an accused who has acted in the ways described here has knowingly, intelligently, and deliberately relinquished the right. See *Steele v. Taylor*, 684 F.2d 1193, 1201 n.8 (6th Cir. 1982), cert. denied, 460 U.S. 1053 (1983).

23(3) of the 1988 Act,' which is similar in some respects to section 10A(b) of Israel's Evidence Ordinance.⁴ Soon, it appears, the principle will also be reflected, though with somewhat greater solicitude to the rights of criminal defendants, in a new Rule 804(b)(6) of Federal Rules of Evidence of the United States.'

3 Sec. 13(3) of the 1925 Act allowed the use of a deposition against an accused if the witness was unavailable for any of several reasons, including having been "kept out of the way by means of the procurement of the accused or on his behalf". The limitation as to how the witness was "kept out of the way" sometimes prevented application of the provision. See *R. v. O'Loughlin & McLaughlin*, [1988] 3 All E.R. 431, 85 Cr. App. Rep. 157, 161-62 (1986) (failing to find sufficient proof that threats were made by or on behalf of the defendant, and refusing to hold that threats "with the defendant's interests at heart" would suffice).

Sec. 23(3) of the 1988 Act is considerably more generous to prosecutors. Subject to some qualifications, it allows admissibility in criminal proceedings of a statement that is embodied in a document and was "made to a police officer or some other person charged with the duty of investigating offences or charging offenders" if "the person who made it does not give oral evidence through fear or because he is kept out of the way". This provision has been held to apply even if the witness does give some testimony at trial, if the testimony was limited (to what extent it must be does not yet seem clear) because of fear. *R. v. Ashford Justices, ex p. Hilden*, [1993] Q.B. 555, [1993] 2 All E.R. 154 (1992). Also, the disjunctive wording can be satisfied by proof of spontaneous fear, not attributable to any affirmative conduct by the defendant or anybody else. One significant qualification on section 23 is that, in general, if the statement was made for "pending or contemplated criminal proceedings" or "a criminal investigation", admission requires leave of the court, which should not be given unless doing so appears in the interests of justice upon consideration of factors laid out by the statute in section 26. This qualification may reflect some implicit sensitivity to the confrontation right discussed in this article.

4 Under that provision, subject to some qualifications, a written statement made by a witness out of court may be admissible in criminal proceedings "if the person who made it is not a witness either because he refuses to testify or is incapable of testifying or because he cannot be brought to court since he is not alive or cannot be found, provided that the court is satisfied, from the circumstances of the case, that improper means have been used to dissuade or prevent the person who made the statement from giving testimony". Unlike the 1988 English act, this provision requires a showing of improper means to prevent testimony, rather than simply fear; it does not, however, require attribution to the defendant.

5 The proposed Rule, which has been approved by the Supreme Court and submitted to Congress, states a new exception to the rule against hearsay for a statement that was made out of court by a declarant deemed unavailable to testify at trial and that satisfies this description:

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

Thus, I write not to articulate a new principle, but to defend it, to give some ideas of the issues it raises and how they may be addressed,⁶ to place it in the context of what I believe would be a preferable law of confrontation and hearsay -- and to make a modest suggestion. I believe the forfeiture principle applies with full force, and without much controversy, when the declarant, the potential witness whose statement is at issue, is the victim of the crime alleged. My suggestion is that courts should be willing to apply the principle reflexively — that is, even when the act that rendered the declarant-victim unable to testify was the same criminal act for which the accused is now on trial.

Despite my claim of modesty, reflexive application of the forfeiture proposal is likely to be controversial. For one thing, it is quite far-reaching. The reflexive forfeiture principle can, I believe, successfully address three disparate types of situations with which the courts have had great difficulty: first, a dying declaration by a homicide victim; second, the physical inability to testify of the survivor of a savage assault; and third, the psychological inability to testify of a child victim of physical or sexual assault.

Furthermore, application of the reflexive forfeiture principle requires the court to conclude in essence, as a predicate for admissibility of the evidence, that the defendant is guilty of the very crime with which he is accused. I do not believe that this is an insuperable objection to the principle. But it does require that the principle be surrounded by sufficient procedural safeguards to insure a high probability that the principle is invoked only when appropriate. And even then, the principle must be applied with caution, to ensure that it does not gratuitously abrogate the defendant's rights.

Throughout this article, my emphasis will be on the law of the United States, for that is the only system of law that I know tolerably well. But,

Thus, the wrongdoing must be attributable to the party opponent at least to the extent that he must have "acquiesced" in it, which presumably requires some degree of prior knowledge. The progress of the proposed Rule has been rapid; it had not even been discussed, at least not publicly, when I presented this paper at the International Conference on Rights of the Accused, Crime Control and Protection of Victims in Jerusalem in December 1993.

⁶ An earlier defense of the principle, discussion of some of the issues, and a recommendation for a new Federal Rule much like the one now pending may be found in a student comment, Paul T. Markland, "The Admission of Hearsay Evidence where Defendant Misconduct Causes the Unavailability of a Prosecution Witness", (1994) 43 Am. U. L. R. 995.

I believe, the confrontation right is more universal. So too are the problems addressed here. And so too, I believe, is the appeal of the solution I propose.

In Part I, I set the context for the forfeiture principle against the general background of the law of hearsay and confrontation, and of the reformulation of that law that I propose. I suggest that recognition of the forfeiture principle will allow courts and rulemakers to recognize a stronger basic confrontation right, and that this in turn will give courts and rulemakers greater confidence to allow liberal admissibility of hearsay where no confrontation rights are at stake. In Part II, I discuss reflexive application of the forfeiture principle. I address general issues concerning this type of application, show how the principle might apply in each of the three contexts mentioned above, and argue that it would lead to more satisfying and sensible results than do the doctrines now commonly in use.

I. Hearsay, Confrontation, and Forfeiture

A. The Traditional Model of Hearsay and Confrontation, and its Difficulties

American hearsay law adheres to the traditional model: Evidence that is classified as hearsay is presumptively excluded,⁷ but can escape this barrier if it fits within one of a long list of categorical exceptions,⁸ or if it is deemed for other reasons to exhibit particular guarantees of trustworthiness.⁹ Superimposed on the body of ordinary hearsay law is the constitutional right of a criminal defendant, under the Sixth Amendment of the Constitution, "to be confronted with the witnesses against him". The meaning of the Confrontation Clause is an enigma. In recent years, the Supreme Court has shown a tendency to construe it nearly in conformity with the hearsay sections of the Federal Rules of Evidence. That is, if the declarant's out-of-court statement, offered to prove

7 See Fed. R. Evid. 801, 802.

8 See Fed. R. Evid. 803(1)-(23), 804(b)(1)-(4).

9 See Fed. R. Evid. 803(24), 804(b)(5). A proposal to replace these exceptions by a new single exception, Fed. R. Evid. 807, virtually identical to each of them, has been approved by the Supreme Court of the United States and in all likelihood will become law in December 1997 at the same time as the new Rule 804(b)(6).

the truth of what she asserted, is offered against an accused, the Court will almost certainly perceive the Confrontation Clause as posing no barrier if the hearsay sections of the Federal Rules do not;¹⁰ correspondingly, it seems likely that if a state court admits evidence that would run afoul of the Federal Rules (which do not apply of their own force in state courts), the Supreme Court will conclude that the Confrontation Clause bars the evidence."

Other common law nations have cut back severely on the rule against hearsay in civil cases, but they retain it in criminal cases. Although the retention is not generally phrased in these terms, it is, I believe, intended to preserve the uncertain right that we in the United States refer to by the label of confrontation. And, while the Continental systems do not have a law of hearsay, at least not one comparable to that of common law systems, the European Court of Human Rights protects some right of confrontation. In interpreting Article 6, paragraphs 1¹² and 3(d)¹³ of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights has held that these provisions, as a general rule, "require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings".¹⁴ Moreover, the Court has made clear that a declarant should be regarded as a witness if her

10 See *White v. Illinois*, 502 U.S. 346 (1992) (holding that Confrontation Clause was not violated by admission of child's statements, alleging sexual abuse, that fit within hearsay exceptions for spontaneous declarations and statements made for purposes of medical treatment, irrespective of whether declarant was available to be a witness).

11 See *Idaho v. Wright*, 497 U.S. 805 (1990) (holding that Confrontation Clause was violated by admission, under state's residual exception, of child's statement, alleging sexual abuse, that did not fit any of the categorical exceptions and that the Supreme Court believed did not have sufficient guarantees of trustworthiness).

12 Para. 1 is a general provision guaranteeing a criminal defendant "a fair and public hearing ... by an independent and impartial tribunal".

13 Para. 3(d) guarantees a criminal defendant the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

14 *Kostovski v. Netherlands*, 12 E.H.R.R. 434, **448-49** (1989), **1 41**.

statement is "before the trial court and ... taken into account by it", even though the declarant does not actually testify at trial.¹⁵

I believe that these European developments suggest that there is a fundamental right of confrontation, and that its recognition and protection do not depend on the jurisdiction maintaining anything resembling the common law of hearsay. But defining the bounds of this right is no simple matter. Surely the right cannot be to exclude evidence of any out-of-court declaration that is offered to prove the truth of what it asserts and that was made by a person whom the accused has not had an opportunity to cross-examine. Such an extreme rule would lead to intolerable results, excluding even such evidence as routine records of sales prices. But, short of such absolutism, how is the line to be drawn? I believe that, in using traditional hearsay doctrine to mark out the bounds of the confrontation right, the common law jurisdictions perpetuate a great mistake, for several reasons.

First, the key element under traditional hearsay doctrine in determining whether an item of hearsay should be admitted is often said to be reliability or, synonymously, trustworthiness.¹⁶ But reliability is notoriously difficult to determine, especially across a broad category of cases. It seems bizarre, for example, to hold that, because the declarant was so distressed that she hardly knew what she was doing, her statement was so reliable — as reflected in the hearsay exception for excited

15 *Ibid.*, 1 40. The issue in *Kostovski* was actually whether the declarant could be considered a witness even though his statement was not read aloud at trial, and the Court answered in the affirmative. It follows *a fortiori* that if the statement were read aloud the declarant would be considered a witness. And indeed, in an extensive string of cases since *Kostovski*, the Court has given force to the defendant's right "to challenge and question a witness against him", *Windisch v. Austria*, 13 E.H.R.R. 281 (1991) (judgment September 1990), even though the witness made the statement out of court, before the trial. See, e.g., *Saidi v. France*, Series A, no. 261-C (20 Sept. 1993). I offer a comparative perspective on these European cases in an essay, *Confrontation Rights of Criminal Defendants*, published in J.F. Nijboer and J.M. Reijntjes, *Proceedings of the First World Conference on New Trends in Criminal Investigation and Evidence (1997)* 533-41.

16 "Because hearsay rules and the Confrontation Clause are designed to protect similar values and stem from the same roots, ... no independent inquiry into reliability is required when the evidence falls within a firmly rooted hearsay exception". *Bourjaily v. United States*, 483 U.S. 171, 182 (1987) (citations and quotation marks omitted and punctuation simplified).

utterances" — that we can rest easy about admitting it against the accused without affording him the right to confront her.

Second, even if reliability were readily determinable, it is an inappropriate standard to use for measuring the limits of the confrontation right. In one sense, it is too restrictive. We do not demand that the ideal form of evidence -- live testimony under oath, subject to cross-examination — be reliable, for if we did there would never be a conflict of admissible testimony. We should not impose so stringent a standard on out-of-court declarations. On the other hand, in one sense a reliability test is far too lenient. It is most unsatisfactory to say to a criminal defendant, in effect:

We realize that you have not had a chance to confront the maker of a crucial statement offered against you, and that this is ordinarily a fundamental right, but don't worry about that. The judicial system has determined, based on its profound knowledge of social psychology and on the circumstances surrounding the making of this statement, that the statement is highly reliable, that confrontation therefore would have done you little good, and so that it would be wasteful to give you the right in this case.

A reliability test, in short, simply does not respond to the underlying concerns that make the confrontation right fundamental.

Third, linking the confrontation right to hearsay doctrine is bound to have two ill effects: On the one hand, it makes ordinary hearsay law too restrictive, and on the other hand, it makes confrontation law insufficiently protective.¹⁸ In fact, it appears probable that a large part of the reason why the drafters of the Federal Rules of Evidence took a

¹⁷ See, e.g., Fed. R. Evid. 803(2).

¹⁸ The first of these problems is particularly glaring if the jurisdiction, like all those in the United States, applies hearsay law in civil as well as in criminal cases. But even if the jurisdiction does not apply hearsay law in civil cases, the problem remains: The use of hearsay law to reflect a confrontation right that should be articulated separately will tend to result in hearsay law that is too stringent in excluding hearsay offered by the defendant and hearsay that is offered by the prosecution but does not raise any genuine confrontation concerns.

The second of these problems — inadequate protection of the confrontation right — is not substantially affected by whether or not the jurisdiction applies hearsay law in civil cases.

rather traditional approach to hearsay law was their concern to protect the rights of criminal defendants.

B. A *Reconceived Confrontation Right*

It seems essential, therefore, to break the link between ordinary hearsay law and the law of confrontation. That is, the confrontation right must be conceptualized and articulated, as the European Court of Human Rights has begun to do, in a way that does not depend upon hearsay doctrine, but rather captures and responds to the underlying concerns that make the confrontation right fundamental.

I believe that we may discern in the language of the Confrontation Clause of the Sixth Amendment to the United States Constitution a key to understanding the appropriate sense of the confrontation right. That amendment provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...". This suggests to me that not all hearsay raises a potential confrontation problem. Rather, the declarant of the statement introduced against the accused must be, in some sense, *a witness* against the accused.⁹

If the declarant actually testifies at trial for the prosecution, then it is obvious that the declarant is a witness against the accused and that the confrontation right applies. Thus, at least ordinarily, the defendant has the right to subject the witness to adverse examination, under oath and before the factfinder. In this context, the confrontation right determines not whether hearsay should be admitted against the defendant, but rather what protections in trial practice should be afforded him.

Now consider the situation in which the prosecution seeks to introduce hearsay — evidence of an out-of-court statement made by the declarant, offered to prove the truth of what it asserts. My essential conception is this: Even though the statement was not made in court, it might amount to witnessing, and so be subject to the confrontation right, just as much as a statement made from the witness stand, if the

19 In this respect, I agree with the concurring opinion of Justice Thomas in *White v. Illinois*, 502 U.S. 346, 358-59 (1992), and also with the analysis of Akhil Amar, in "Sixth Amendment First Principles", (1996) 84 Geo. L.J. 641, at 691-92, 696. I do not agree entirely with their analyses, however, and hope to elaborate on the differences, as well as on the points of agreement, in a forthcoming essay in the Georgetown Law Journal.

declarant's anticipation was that the statement would be used in much the same manner that in-court testimony would be. Note the limitation on this principle. The declarant did not act as a "witness against" the accused if she was merely going about her business, criminal or otherwise, in making the statement. Rather, to be deemed a witness for purposes of the confrontation right, the declarant should have recognized at the time of the statement that in some sense she was bearing witness. This occurs when the declarant makes a statement, either directly to a law enforcement officer or through an intermediary, that she realizes will likely aid in the investigation or prosecution of a crime.

I believe this description roughly captures the idea of when a declarant should be considered a "witness against" the defendant within the meaning of the confrontation right. I will be satisfied in this article with this rough sense of the matter; rather than trying to fine-tune a definition of "witness", I will refer to the statements meeting this description as "accusatory".²⁰ If the declarant has made an accusatory statement, she has lined up against the accused, or at least with the prosecution. It is in this situation that the right to confront should attach. This is not merely a matter of preference in designing a truth-determining process. Rather, it is a matter of fundamental right, to preserve both fairness and the perception of fairness. It is unsatisfactory to punish an accused without giving him an opportunity to confront those who have borne witness against him, consciously making statements that might lead to his conviction.

I would apply this confrontation right absolutely, without exceptions, because it is so fundamental in nature. Thus, for the reasons suggested above, I would not create an exception to the confrontation right because the court believes that the particular statement at issue is reliable, or because the statement fits within a traditional hearsay exception or into any other broad category of statement that is deemed to be reliable in general.

²⁰ In the forthcoming essay in the Georgetown Law Journal mentioned above in n. 19, I will reflect somewhat further on the matter. Perhaps a statement, even though made outside the law enforcement context, should also be considered accusatory if it is hostile and accuses the defendant of a crime. The requirement of hostility distinguishes situations such as that in which a co-conspirator makes a statement, perhaps in the course of the conspiracy, describing criminal activity of the defendant.

Nor would I hold that the confrontation right applies only when the declarant is available to be a witness.²¹ The concept of the right presented here does not merely express a rule of preference, or a "best evidence" principle intended to give the prosecutor the incentive to produce better evidence — live testimony rather than hearsay — where that is possible. Rather, it reflects a fundamental belief that it is not tolerable to allow the defendant to be convicted if he has not had an adequate opportunity to confront persons who have acted as witnesses against him by making accusatory statements with the anticipation that they will be used against him by the prosecution.

Such a conviction is obviously intolerable when that lack of opportunity is attributable to the conduct, particularly the wrongful conduct, of the prosecution. And I believe it does not become tolerable when that opportunity is attributable to the fault of neither party. In other words, the risk that the declarant will be unable to testify should fall on the prosecution rather than on the accused. This sometimes means that, because of the unavailability of a prospective witness, a successful prosecution cannot be brought. But that is a familiar proposition. When witnesses are unable or unwilling to testify, the prosecution — which

21 In *California v. Green*, 399 U.S. 149, 172-89 (1970) (concurring), Justice John M. Harlan II adopted a theory of Confrontation limited to available declarants, and my friend and colleague Peter Westen defended a similar theory in "The Future of Confrontation," (1979) 77 Mich. L.R. 1185. Justice Harlan renounced this view a few months after *Green*, in *Dutton v. Evans*, 400 U.S. 74, 94-96 (1970) (concurring), in favor of a more restrictive theory limited to declarants who provide formal testimony. Interestingly, both Westen and Justice Harlan (in his *Green* period), while applying the confrontation right only if the declarant is available, would apply it generally if this condition is satisfied. See *Green, supra*, 399 U.S. at 186 ("what I ... deem the correct meaning of the Sixth Amendment's Confrontation Clause — that a State may not in a criminal case use hearsay when the declarant is available".) (Harlan, J., concurring). I believe that in this expansive aspect this concept of confrontation is too broad: The right should not apply, for example, to routine business records entered without anticipation that they would be used in investigation or prosecution of crime, even if the person making the entries would be available as a witness. Westen, apparently recognizing the problem, suggests that even if the declarant is available the confrontation right applies only if "the prosecution can reasonably expect the defendant to wish to cross-examine" the declarant at the time of trial (at 1207). But I do not believe this attempted avoidance works: No matter how routine, or apparently reliable, the statement might appear to be to the court, the accused might welcome the opportunity to cross-examine the declarant in an attempt to introduce some element of doubt, and certainly the accused has every incentive to *say* he wishes to examine her.

bears the burden of proving the accused's guilt, and by evidence that complies with the accused's rights — must do without.

But there is a third situation of unavailability of the witness-declarant — when it is procured by the defendant. And that situation is radically different.

C. The Forfeiture Principle

A defendant may *forfeit* his right to confront adverse witnesses by conduct so obstreperous that the trial cannot be carried on in a suitable manner with him in the courtroom.²² In this article, I am considering forfeiture from the other end — conduct by the defendant that prevents his confrontation with a prosecution by making it impossible or infeasible for the witness, rather than the defendant himself, to be at the trial.

Consider first a relatively straightforward illustration. The accused is on trial for narcotics crimes. Shortly before the prosecution's star witness was about to testify at trial, she was murdered, and compelling evidence demonstrates that the accused arranged for the murder. The prosecutor then offers into evidence the grand jury testimony given by the murdered declarant. The accused objects on the ground that he never had the opportunity to confront the declarant.²³ In such a case, it seems clear to me -- as it has to the courts — that the confrontation right should not apply and prevent the evidence from being admitted, and on similar grounds neither should the rule against hearsay. This is the forfeiture principle.

The proper basis for this principle is not, as some courts have suggested it is, the broad dictum that no one should profit by his own wrong.²⁴ As an ideal, that is probably true, but in some cases exclusion of the evidence on confrontation grounds will not be *necessary* to guarantee that the accused does not profit by his own wrong, and in some cases such exclusion will not be *sufficient* to guarantee that result. Furthermore, the

²² *Illinois v. Allen*, 397 U.S. 337, 342-43 (1970).

²³ This description closely fits the facts of *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982), cert. denied, 467 U.S. 1204 (1984).

²⁴ See, e.g., *United States v. Mastrangelo*, *ibid.* (quoting other cases); *State v. Corrigan*, 10 Kan. App.2d 55, 691 P.2d 1311, 1314 (1984); *Olson*, 291 N.W.2d 203, 207 (Minn. 1980).

dictum might miss the point, because, as discussed below, arguably wrongdoing does not underlie the forfeiture principle at all.

As to necessity: At least ordinarily, and pretty much always if the principle is limited to wrongdoing, the act that rendered the declarant unavailable — in this case, conspiring to murder her -- is in itself punishable by the criminal law. And in this case, though not in all, the punishment may be greater for that act of wrongdoing than for the crime currently being tried; therefore, even if the act of rendering the declarant unavailable turns out to be a but-for cause of the accused's avoiding punishment on the crime now being charged, which of course it will not always be, the accused may be worse off for having rendered the declarant unavailable.

As to sufficiency: In some cases, there may be no tolerable way of assuring that the accused does not profit by his own wrong. Suppose now that the crime for which the accused is on trial is *more* severely punished than is the wrongdoing that rendered the declarant unavailable. Suppose, for example, a defendant on trial for murder knows a declarant has made a statement to the police inculcating him. The defendant may find that intimidating the declarant into silence is worthwhile, because it substantially increases his chances of success in the murder trial, even if the price is having to face trial for his threatening conduct. And it may well be that the accused's chances in the murder trial have indeed been improved, even if his confrontation objection to the prior statement by the intimidated declarant is denied: It may be that the police officer's second-hand rendition of that statement is far less powerful evidence against the accused than the declarant's own live, vivid testimony would have been, even though the accused would have had an opportunity to cross-examine her. Therefore, unless we are to do something drastic and intolerable like convict the accused without trial, the accused may be better off for having rendered the declarant unavailable.

I believe, then, that the broad ideal that no one should benefit by his own wrong is an inadequate explanation for the admissibility, notwithstanding the confrontation right, of secondary evidence of a declarant's accusatory statement when the accused has rendered the declarant unavailable. A more satisfying explanation may be that the accused should not be heard to *complain* about the consequences of his own conduct. Thus, the accused ought not be able to cause exclusion of the secondary evidence on the ground that he has been unable to confront and examine the declarant when his own conduct

accounts for that inability. This principle applies most obviously when that conduct is wrongful, but arguably it applies even when it is not, so long as a natural and desired consequence of the conduct was the declarant's inability to testify.²⁵

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".²⁶

In a variety of circumstances, courts have had rather little difficulty reaching the result called for by this principle. Whether the accused has rendered the declarant unavailable by murder,²⁷ intimidation,²⁸ im-

25 See below, n. 30. Note that the **proposed** Fed. R. Evid. 804(b)(6), quoted above in n. 5, does depend on wrongdoing by the party opponent; in this sense, the proposed Rule might be too narrow.

One can conceive of situations in which it is merely fortuitous that the defendant's conduct, even if wrongful, caused the declarant's unavailability to testify: Suppose the defendant drives negligently on the way to court, and happens to run over the declarant, who was on her way to testify. But I do not think it is necessary, for the principle to apply, that rendering the declarant unavailable to testify have been the motivating, or the principal, purpose of the defendant's conduct.

26 See *United States v. Mayes*, 512 F.2d 637, 651 (6th Cir.), 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"); cf. *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] and profit from it ... while repudiating that preference by creating the condition that prevents it").

27 E.g., *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982), cert. denied, 467 U.S. 1204 (1984); *United States v. Thevis*, 665 F.2d **616, 627-31** (5th Cir. **1982**), cert. denied, 459 U.S. 825 (1982); *People v. LaTorres*, 186 A.D.2d 479, 480, 590 N.Y.S.2d 187, 188 (1st Dept. 1992) ("the People proved defendants or one acting in their behalf caused the death of an eyewitness to the shooting spree herein prior to trial"); *State v. Gettings*, 244 Kan. 236, 769 P.2d 25 (1989).

28 E.g., *United States v. Potamitis*, 739 F.2d 784 (2d Cir.), cert. denied, 469 U.S. 918, 934 (**1984**) (**intimidation by father of defendant**); *Rice v. Marshall*, 709 F.2d 1100, 1102 (6th Cir. **1983**), cert. denied, 465 U.S. 1034 (1984); *Black v. Woods*, **651 F.2d 528, 530-31** (8th Cir.), cert. **denied, 454 U.S. 847** (1981); *United States v. Balano*, 618 F.2d 624 (**10th Cir. 1979**), cert. denied, **449 U.S. 840** (1980); *United States v. Carlson*, **547 F.2d 1346, 1355-60** (8th Cir. **1976**), cert. **denied, 431 U.S. 914** (1977); *State v. Olson*, 291 N.W.2d **203, 207-08** (Minn. 1980) (**acts of intimidation by co-conspirator attributed to defendant**).

proper payment,²⁹ or chicanery,³⁰ or by concealing the declarant or persuading her to absent herself,³¹ courts have concluded that the accused has thereby forfeited his confrontation right, so that secondary evidence of the declarant's accusatory statement may be admitted.

Of course, application of the forfeiture principle requires the court to conclude that the defendant has indeed rendered the declarant unavailable. A threshold question is the applicable standard of proof. In my view, given the importance of the confrontation right, the court should not hold that the accused has forfeited it unless the court is persuaded to a rather high degree of probability that the accused has rendered the declarant unavailable;³² a plausible argument can be

29 See *United States v. Williamson*, 792 F. Supp. 805, 810-11 (M.D. Ga.), conviction affd, 981 F.2d 1262 (11th Cir. 1992), vacated, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994) (confrontation right would be lost on satisfactory showing, not made here, of an agreement by defendant and declarant that defendant would pay declarant's legal fees in return for declarant's silence).

30 *United States v. Mayes*, 512 F.2d 637 (6th Cir.), cert. denied, 422 U.S. 1008 (1975) (improper claim by attorney for defendant, supposedly on behalf of declarant, defendant's brother, of privilege against self-incrimination). Had the defendant merely persuaded the declarant, without coercion, to make a legitimate claim of the privilege, the result should arguably be the same. The absence of the declarant is not attributable to any wrongdoing by the defendant. But by hypothesis it is attributable to the defendant's conduct intended toward that end — that is, the court finds that but for the defendant's intercession the declarant would in fact not have claimed the privilege, and this was the anticipated, presumably desired, result of the defendant's conduct. How, then, can the defendant complain about his inability to confront and examine the declarant? He might argue that he merely persuaded another person to exercise her rights. I think this is a close issue. Perhaps the defendant ought t.; avoid forfeiture in this setting only if he has a sufficiently close relationship with the declarant that he has a substantial reason, apart from impairing the prosecution's case against him, to persuade the declarant not to testify.

31 *Reynolds v. United States*, 98 U.S. 145, 158 (1878) (concealment or persuasion of declarant, and misleading of authorities as to her whereabouts). See generally *Steele v. Taylor*, 684 F.2d 1193, 1201 & n.10 (6th Cir. 1982), cert. denied, 460 U.S. 1053 (1983) (declarant under control of defendant; summarizing case law from England and United States: "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".).

32 See *United States v. Thevis*, 665 F.2d 616, 627-31 (5th Cir. 1982), cert. denied, 459 U.S. 825 (1982).

made, however, that the lower "more likely than not" standard should apply.³³

Given whatever standard of proof is applicable, the court must resolve two types of uncertainties. First, should it attribute to the defendant whatever conduct is said to have rendered the declarant unavailable? Sometimes this question will be a frustrating one, because, while the unavailability of the declarant to testify might clearly be in the interests of the defendant, it may be impossible to trace the conduct to the defendant. The drafters of the prospective Fed. R. Evid. 804(b)(6) have, I believe, made a sound judgment in allowing forfeiture so long as the defendant "acquiesced" in the conduct rendering the declarant unavailable; if, say, the defendant is in prison, knows about the illicit efforts about to be made on his behalf, and does nothing to stop them, forfeiture seems appropriate. But proving that the defendant knew about the conduct may be as difficult in some cases as proving that he ordered or engaged in it. Indeed, it was this concern that led to a dubious loosening of the English statutory expression of the *forfeiture* principle.'

Second, has the declarant genuinely been rendered unavailable for confrontation? In some cases, such as when the declarant has been murdered shortly after making the declaration and died almost instantly, unavailability will be clear. In other cases, the question may be in doubt. In particular, notwithstanding the wrongdoing by the accused, it may be that the prosecution could have done — or when the declarant is living might still do — something to preserve a possibility

33 See, e.g., *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), cert. denied, 467 U.S. 1204 (1984); *State v. Gettings*, 244 Kan. 236, 769 P.2d 25, 29 (1989). If the court errs in *either* direction on the predicate question of whether the defendant wrongfully rendered the declarant unavailable, the negative consequences are substantial. Note *Lego v. Twomey*, 404 U.S. 477 (1972), in which the Supreme Court held that the prosecution is not required by the Constitution to prove the voluntariness of a confession by a standard greater than preponderance of the evidence — that is, more likely than not. The *Lego* Court emphasized that "the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts" (at 486). The same might be held of the inquiry into the assertion that the defendant's misconduct rendered the declarant unavailable.

34 See *supra* n. 3. Cf., e.g., *United States v. West*, 574 F.2d 1131 (4th Cir. 1978) (witness testifies **before** grand jury testimony and is later murdered in a manner suggestive of contract killers admitted; the prosecution offers no evidence linking the defendants to the murder; grand jury testimony admitted at trial, but on dubious grounds without relying on forfeiture principle).

of confrontation, or at least some aspect of it.³⁵ When that is so, we cannot say without qualification that the accused's conduct has rendered confrontation impossible. I will postpone consideration of this complexity until the next Part. There I will discuss it in the context of three different situations in which the declarant is the victim of the crime alleged and that crime is at least part of the conduct that has assertedly rendered her unavailable to testify.

II. *Forfeiture When the Declarant is the Victim*

A. *Identity of the Victim and Declarant*

Now suppose that the declarant who has assertedly been rendered unavailable is not just any potential witness but the victim of the crime being charged. That in itself should not have any bearing on application of the forfeiture principle.

Suppose, for example, that the accused is charged with armed robbery, that sometime after the alleged crime the alleged³⁶ victim made a statement asserting that the accused committed the crime, and that at some point after the statement and before trial the accused murdered the victim, death resulting immediately. Evidence of the victim-declarant's accusatory statement may be particularly damning, but the reasons for concluding that the accused has forfeited his confrontation right by rendering her unavailable apply with the same force as if she were merely an observer unaffected by the crime: By his intervention, the accused has prevented the victim from being a witness for the prosecution, and so he should not be able to exclude secondary evidence of her statement on the ground that he had no chance to confront her.

B. *Should the Forfeiture Principle be Applied Reflexively?*

Now ratchet the problem up another notch: Suppose that the conduct that rendered the declarant-victim unavailable, rather than occurring at some time after the crime charged, *was* the crime charged. This

35 Cf. *State v. Corrigan*, 10 Kan. App.2d 55, 691 P.2d 1311, 1316 (1984) ("the State made the required reasonable effort to produce the missing witness to justify a finding that she was 'unavailable'").

36 For convenience's sake, I will now usually drop this word.

situation raises the problem that is the particular focus of my interest in this article, that of the reflexive forfeiture principle.

To take a straightforward example, suppose that the accused is on trial for murder, and that during the short interval between the murderous blow and the death of the victim, she made a statement accusing the defendant of the crime. In such a case, for the court to conclude that the accused committed the act rendering the declarant-victim unavailable, the court must also conclude that the defendant committed the criminal act charged, because those two acts are the same. In other words, a predicate proposition underlying the question of evidentiary admissibility — here, that the accused murdered the victim — is identical to the proposition that one or more of the elements of the crime being charged (here, perhaps all of them) are true.

I do not believe, however, that this identity presents a reason not to apply the forfeiture principle. The identity should not distract us from the importance of deciding the evidentiary predicate. If the predicate is true, then (assuming for the moment that no failure on the part of the prosecution contributed to the problem) the defendant's inability to confront the declarant is attributable to his own misconduct. And if that is true, the defendant should not be able to keep the declarant's statement out of evidence by a claim of the confrontation right. A court should not decline to decide the predicate question, for evidentiary purposes, simply because the same question must also be decided in making the bottom-line determination of guilt.

Moreover, although the matter is delicate, the identity of issues does not pose insuperable administrative problems for application of the forfeiture principle. Such an identity between predicate evidentiary proposition and substantive element is not unheard of, but rather quite familiar. When the prosecution offers an out-of-court statement as the statement of a co-conspirator of the accused, then often a similar identity occurs — if the accused is being charged with conspiring with the declarant, or the manner in which the crime was allegedly committed involved such a conspiracy. To secure admission of the statement in such a case, the prosecution must prove that the accused conspired with the declarant, which it also must prove to secure conviction.

But the conundrum, in both the co-conspirator setting and in the case of the crime that renders the victim unavailable to testify at trial, is more apparent than real. If the case is being tried to a jury, the predicate evidentiary question and the substantive question are determined by different factfinders, and the jury (unless knowledgeable in

the law of evidence) will not be aware that the judge made a finding on the evidentiary predicate. And, whether the case is being tried to a jury or not, the two questions are tried on different factual bases³⁷ and under different standards of proof.³⁸ It is not a charade, therefore, to say that, although the two questions may be identical, they are tried separately for separate purposes. It is perfectly plausible that the judge would answer the predicate evidentiary question in favor of the prosecution, but that the jury, applying a more stringent standard of proof to a more limited set of information, would refuse to conclude that the same proposition is proven beyond a reasonable doubt.

There remains the "bootstrapping" problem — that is, the question of whether, in determining the truth of the evidentiary predicate, the court may consider the very statement that is at issue. Thus, if the judge is trying to determine whether Victim's statement, "Accused has stabbed me!" should be admitted on the grounds that Accused did indeed stab Victim, resulting in her death and her unavailability at trial, may the court use Victim's statement itself in making that determination? In *Bourjaily v. United States*, reversing prior federal law, the United States Supreme Court has held in the co-conspirator context that such bootstrapping is permissible.³⁹ Many jurisdictions, however, continue to adhere to the older rule against bootstrapping. For reasons suggested in the paragraph just above, I believe that *Bourjaily* is correct, and that bootstrapping is not troublesome: The evidentiary predicate is tried separately from the substantive question, and so there is no incoherence in allowing the judge, in determining the predicate evidentiary question, to consider the very statement the admissibility of which is in question. Indeed, so long as we generally allow the judge, in determining the evidentiary predicate, to consider non-privileged evidence that would not be admissible before the jury,⁴⁰ I do not believe that there is

37 Under Fed. R. Evid. 104(a), the judge, in making the predicate evidentiary determination, "is not bound by the rules of evidence except those with respect to privileges". Thus, the predicate question may be decided on a wider factual base than the substantive question. On the other hand, if the jurisdiction adheres to the traditional rule against bootstrapping, discussed below, the statement at issue will not itself be considered for the truth of what it asserts with respect to the predicate question, though of course it will be considered on the substantive question if the court holds it admissible.

38 See *supra* nn. 32-33 and accompanying text (discussing standard of proof for predicate question).

39 483 U.S. 171 (1987).

40 See Fed. R. Evid. 104(a).

any good ground for excluding from the judge's consideration the statement at issue, which might be very good evidence of the predicate fact.

But this entire issue is collateral to my main argument, and so I will put it aside. The bootstrapping question, though important, goes merely to the method by which the predicate proposition may be proved. The theoretical underpinnings of the forfeiture principle, like those of the doctrine of coconspirator statements, are the same whether bootstrapping is allowed or not.

One other logical problem lurks, but I do not regard it as particularly troublesome. Assuming that, but for the accused's conduct in committing the crime alleged, the victim would be available to testify, it may also appear that, but for the same conduct, she would have nothing to testify about. Thus, if the defendant had not murdered the victim, she would have been able to testify, but if he had left her unharmed, she would have no testimony to offer. How, then, can we say that, but for the defendant's conduct, the victim would have testified? The solution, it seems, is to compare the actual case not to the situation that would exist if the defendant had done nothing, but to that in which the defendant committed the same criminal conduct but not to the point of substantially impairing the victim. We might bear in mind the irreverent insight of one lawyer that a murder case is basically an assault case with one fewer witness.

C. Specific Applications of the Reflexive Forfeiture Principle

I will now focus on three recurrent types of cases in which the forfeiture principle might be applied to statements by the victim of a crime who has been rendered unavailable by the criminal conduct itself.

1. Murder Victims

One type of case on which I have already touched is perhaps the simplest: The defendant is on trial for murder, but before the victim died she made a statement accusing the defendant of the crime, and the court concludes as a predicate matter that he did indeed commit the crime. Had the victim survived and been able to testify at trial without impairment, her prior statement would have been excluded by the confrontation right, under the view of that right presented here. But in fact the defendant's own conduct has rendered the victim unavailable

to testify.

In such a case, the most difficult problem in applying the forfeiture principle will usually be determination of the predicate proposition, that the defendant actually did murder the victim. Unavailability usually will not be in doubt: Dead people don't testify.

Questions concerning unavailability are not altogether foreclosed, however. Although, by hypothesis, the defendant's conduct rendered it impossible for the victim to testify at trial, that does not necessarily mean that preservation of any right to confront was impossible. The prosecution should bear the burden of taking all reasonable steps to protect whatever aspects of confrontation are possible given the defendant's conduct, and of demonstrating that it has done so.

Suppose, then, that, after making her statement or indicating that she would do so, the victim does not die immediately of her wounds but rather lingers for some time in a fully cognizant state. Depending on the precise nature of the victim's condition during this interim, it might be reasonable to hold that, if the prosecution wishes to preserve the victim's statement for use at trial, it ought to give the accused an opportunity to take her deposition. That is, the prosecution ought to notify the accused that the victim has made, or will make, a statement; it should take the statement, or a repeat of the prior statement, under oath; it should give the accused an opportunity to cross-examine; and if possible it should videotape the proceedings.⁴¹ Of course, the victim's condition might make the arrangement of cross-examination or even the formality of oath-taking too burdensome or impossible. Difficult factual questions will surely arise.

But the notion of subjecting a dying victim to a deposition, complete with cross-examination, is not far-fetched. Indeed, this seems to have been fairly standard practice nearly two centuries ago, and the courts guarded with remarkable care the defendant's right to confront and cross-examine the victim.⁴²

41 If the prosecution understands that the victim is prepared to make a statement, then the prosecution ought not delay the taking of the statement until a time when a deposition would be impossible; such delay should be charged against the prosecution, and probably should result in refusal to apply the forfeiture principle.

42 Under the statutes 1 & 2 Ph. & M. c. 13, § 4 (1554), and 2 & 3 Ph. & M. c. 10 (1555), justices of the peace were directed to take the examinations of a felony suspect and of the accusing witnesses. By custom, the examinations of the witnesses were taken in the presence of the prisoner and under oath, and if the witness was later unavailable to testify at trial this earlier examination could be admitted. These examina-

Under the approach I suggest, the fact that a statement fits within an exception to the rule against hearsay would not take the statement over the confrontation barrier.⁴³ Thus, the traditional exception for dying declarations would not defeat a confrontation claim. But notice how sensible application of the forfeiture principle takes up the slack left by the absence of the dying declaration exception — reaching the same result in most cases, but not in all, and operating on a far more justifiable basis.

The classic rationale for the dying declaration exception is that "no person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips".⁴⁴ However valid this logic may have been in an earlier age, it hardly seems universally applicable now. For one thing, many people do not believe in a hereafter; for them, indeed, the impending end of life may offer relief from the consequences of speaking falsely. Furthermore, even if the classic rationale were accurate, it

tions were sometimes used in the case of murder victims who lingered after the fatal blow. See, e.g., *R. v. Radbourne*, 1 Leach 457, 516 (1787) (noting that the whole of the deposition was taken in the presence of the prisoner, and signed by the victim). In *R. v. Woodcock*, 1 Leach 500, 168 Eng. Rep. 352 (K.B. 1789), in which the available time was only a matter of hours, the defendant was not present at the examination, but the examination was taken under oath and in writing; she affixed her mark to a written rendition of the statement. It appears that the authorities, aware that the victim might not be able to testify at trial, were careful to preserve at least part of the protections that the accused would have if she did testify.

By the early nineteenth century, a greater adversarial spirit in litigation yielded even greater judicial care. In *R. v. Forbes*, Holt 599, 171 E.R. 354 (1814), the defendant was not present at the commencement of the deposition of his victim, though the whole of the deposition was read over to him, apparently still in the presence of the victim. The judge refused to admit the portion of the deposition taken before the prisoner was present; he said that presence of the defendant "whilst the witness actually delivers his testimony" was crucial "so that he may know the precise words he uses, and observe throughout the manner and demeanour with which he gives his testimony". *R. v. Smith*, Holt 614, 171 E.R. 357 (1817), involved similar facts, though there the murder victim was resworn in the defendant's presence, and "re-asserted what he had before said, by assenting to the deposition when slowly read over to him". On these facts, a consultation of the judges apparently concluded that the entire deposition was admissible. But the trial judge, Richards, C.B., took care to note that "the decisions establish the point, that the prisoner ought to be present, that he might cross-examine".

⁴³ See above p. 514.

⁴⁴ *Queen v. Osman*, 15 Cox Crim. Cas. 1, 3 (Eng. N. Wales Cir. 1881) (Lush, L.J.). Remarkably, this rationale was endorsed recently by the Supreme Court in *Idaho v. Wright*, 497 U.S. 805, 820 (1990).

would bear only on the testimonial capacity of sincerity; it would not, in particular, offer any guarantee at all that, while the victim was being murdered, her capacity of perception was operating in an especially high gear. And, even assuming that the classic rationale does offer some guarantee as to a dying declarant's truth-telling, the shape of the exception for dying declarations is curious: It should then apply to all statements made under the sense of impending death, and not merely to statements concerning the cause of the declarant's death.

The forfeiture principle, by contrast, does not operate on the principle that the dying declaration is particularly trustworthy. Rather, the premise is merely that the accused rendered the victim-declarant unable to testify at trial. The principle does not apply to dying declarations in general; rather, when death is the reason for unavailability, the prosecution must persuade the court that the accused is responsible for the declarant's death. Accordingly, the rationale and scope of the forfeiture principle, unlike those of the dying declaration exception, are congruent with each other.

In another respect, the forfeiture principle is broader than the rationale underlying the dying declaration exception: The statement need not have been made under a sense of impending death for the principle to apply. But if death did not follow quickly upon the statement, there may be, depending upon the precise circumstances, an issue as to whether the prosecution might have preserved at least some aspects of the confrontation right. Thus, whether death is impending has significance under the forfeiture principle, but not for the dubious about-to-meet-her-Maker reason of the dying declaration exception.

2. *Severely Battered Victims*

Sometimes a criminal batters his victim so badly as to leave the victim severely impaired, but not so badly as to kill her or deprive her completely of testimonial ability. Thus, the victim might make a significant statement, perhaps identifying the accused as the perpetrator, but be unable to testify without impairment and subject to cross-examination at trial.

For example, in *United States v. Napier*,⁴⁵ about eight weeks after the beating, the victim, a Mrs. Caruso, was shown a newspaper photograph

45 518 F.2d 316 (9th Cir. 1975), cert. denied, 423 U.S. 895 (1975).

of the accused and reacted with great distress, saying "He killed me, he killed me". She was not, however, called to testify at trial. Nevertheless, the United States Court of Appeals for the Ninth Circuit concluded that the statement was admissible because viewing the picture was a stressful event that brought the victim's responsive statement within the exception for excited utterances. This application does not grievously distort that exception, which is a rather odd one. But the suggestion that because of the stressful circumstances the battered victim's statement was highly reliable, and that because the statement fits within the exception there is no confrontation concern, should be highly disturbing.⁴⁶

*United States v. Owens*⁴⁷ provides another interesting example. There, Foster, a prison guard, was savagely beaten. About three weeks after the beating, Foster made a statement identifying Owens as the assailant. Foster was able to testify at trial, but he was impaired to the point that, although he could remember making the prior statement, he did not remember other statements he had made identifying the assailant, or whether Owens really was the assailant, or why he had identified Owens. Justice Brennan, joined by Justice Marshall, argued that in these circumstances Owens' opportunity to cross-examine Foster did not satisfy the Confrontation Clause. Brennan and Marshall stood alone, however. Simply because Foster did not remember, Justice Scalia wrote for the Court, did not mean that Owens' opportunity to cross-examine him was unsatisfactory. Indeed, Justice Scalia contended, one of the goals of Owens' cross-examination might be to demonstrate the weakness of Foster's memory.⁴⁸ But this argument is most unsatisfactory, given that there was no doubt that Foster's memory loss was genuine, and that the state of his memory at the time of trial had no clear bearing on the state of his memory at the time he made the statement. There was a good deal of truth to Justice Brennan's statement that "the John Foster who ... identified [Owens] as his attacker ... did not testify at [Owens] trial".⁴⁹

⁴⁶ *Napier* did not actually discuss the Confrontation Clause, but under *White v. Illinois*, 502 U.S. 346 (1992), the holding that the statement satisfied the excited utterance exception would also be sufficient to satisfy the Confrontation Clause.

⁴⁷ 484 U.S. 554 (1988).

⁴⁸ *Ibid.*, at 559-60.

⁴⁹ *Ibid.*, at 566.

Now let us see how *Napier* and *Owens* would be addressed under the approach presented in this article. First of all, clearly Foster's statements, and probably Mrs. Caruso's as well, should be considered accusatory and so covered by the confrontation right.⁵⁰ Second, a violation of that right would not be countenanced because the statement fit within an exemption to the rule against hearsay, either the traditional one for excited utterances, the one created by Rule 801(d)(1)(C) for prior statements of identification and held applicable in *Owens*,⁵¹ or any other. Third,, a court should frankly acknowledge that the condition of the declarant would be inadequate to satisfy the confrontation right under ordinary circumstances. But finally, if— a very big if — the court concludes to the requisite degree of certainty that the impairment of the declarant's testimonial capacities was indeed attributable to battering by the accused, the forfeiture principle would apply.

The question remains, though, what the prosecution should be required to do in such a case to preserve whatever aspects of confrontation are possible. In *Napier*, it seems the prosecution should be required at least to give the defense notice that Mrs. Caruso has made a statement identifying him, and to give him an opportunity to take her testimony under oath at a deposition. Arguably, the prosecution should also be required to present her as a witness at trial, to allow the defendant to have whatever cross-examination is possible given her condition. I do not believe this should always be required, however. It seems to me sufficient if the prosecution does whatever it has to do to ensure that the defendant can, if he wishes, procure her testimony. If the defendant decides to do without her live appearance, then the hearsay statement ought to be admitted. But, if the defendant does timely present her in

50 There is some ambiguity in Mrs. Caruso's case, because she might well have lacked the capacity to appreciate the law enforcement consequences of her statement. But the statement did accuse Napier of committing a crime, and it clearly was hostile. See *supra n.* 20 and accompanying text.

51 A predicate for applicability of this rule is that the declarant must "testif[y] at the trial ... and [be] subject to cross-examination concerning the statement". Under analysis similar in some respects to that used in the Confrontation Clause context, the Court held that Foster was subject to cross-examination notwithstanding his assertion of memory loss.

court, then the prosecution ought to be required to put her on the stand as part of its case or forgo use of the prior testimony.⁵²

In *Owens*, the prosecution went further than in *Napier*: It actually did call Foster to the stand, thus giving Owens the chance to cross-examine him for whatever it was worth. But could the prosecution have done more? I see one possibility, though it is unclear from the Supreme Court opinions whether the prosecution should be held accountable to failure to follow it. Foster's statement was apparently made during a period of relative lucidity. Perhaps the prosecution should be held

52 This procedure would implement a proposal I offered, for the context in which confrontation rights are not at stake, in "Improving the Procedure for Resolving Hearsay Issues", (1991) 13 *Cardozo L. R.* 883, at 892-97. I suggested there that ordinarily, if the court is inclined to admit a hearsay declaration but the opponent of the evidence timely produces the declarant, the proponent of the evidence ought to be required either to present the live testimony of the declarant as part of his case or forgo use of the declaration. One impetus behind this suggestion is that, for various reasons, the opponent's ability to subject the declarant to an effective adverse examination is far better if the declarant is already on the stand as part of the proponent's case than if the opponent must later call her to the stand as part of his own case. Given that this procedure offers the opponent a good opportunity to examine the declarant — assuming the opponent could produce her and he finds it worthwhile to do so — it makes admission of the hearsay a more palatable alternative. It also avoids waste. Under current practice, the opponent often objects to the hearsay evidence not because he really wishes to examine the declarant but in hopes that the proponent will be forced to forgo her evidence altogether; often, though, the proponent's response is to undertake the cost of producing the declarant as a live witness. Under this proposal, by contrast, the declarant is produced only if the opponent genuinely believes that the opportunity to examine her is worth the cost of doing so.

I do not believe that this procedure should generally be implemented when confrontation rights are at issue. In general, I believe the prosecution, rather than the defense, ought to go to the trouble and expense of producing a declarant whose statement it wishes to use; moreover, if there is a chance that the declarant could not be produced, the prosecution, rather than the defense, ought to bear that risk. In the *Napier* situation, however, several factors cut the other way. First, the judicial system ought to be reluctant to press the declarant to testify. Second, it seems highly likely that the defendant's objection is indeed a bluff: He does not want a chance to cross-examine the declarant, but is rather hoping that the prosecution loses the evidence. Third, it appears clear that the declarant could be brought to the witness stand, if that is really desired. In these circumstances, it seems reasonable to say to the defendant, in effect, "The secondary evidence of the declaration will be admitted, unless you produce the declarant", rather than to say to the prosecution, "The secondary evidence will be excluded, unless you produce the declarant".

accountable for failure to anticipate that this period would be fleeting. Perhaps, therefore, as in the case of a victim whose death it anticipated, the prosecution should have given the accused prompt notice of the statement and an opportunity to cross-examine while that opportunity would have potential value.

Once again, then, I do not contend that my approach would avoid the need to decide difficult factual questions. But these questions would at least be the right ones to decide. And they would avoid the type of hypocrisy that led the *Owens* Court to conclude that Owens' opportunity to cross-examine Foster was satisfactory. The opportunity was not satisfactory; if the decision to admit Foster's statement was nevertheless proper, that is because Owens himself was responsible for the problem.

3. *Child Victims of Physical or Sexual Abuse*

The problem has become all too familiar: How should a judicial system present the observations of a child who, allegedly at least, has been the victim of physical or sexual abuse? In a frequently recurring pattern, the child makes a statement to a trusted adult, such as a parent, but her live testimony is not presented at trial. Perhaps she is too young to be able to answer questions directly addressed to the incident, especially when surrounded by the trappings of trial. Perhaps her parents or other caretakers, or even the prosecution, are afraid of traumatizing her. And perhaps she has been intimidated into silence. Whatever the reason for her failure to testify, the prosecution offers secondary evidence of her out-of-court statement, and the accused objects on confrontation grounds.

Some courts, eager to secure the admittance of such evidence, have brought into play traditional hearsay exceptions, such as those for excited utterances, statements made for purposes of medical diagnosis or treatment, and statements of bodily or mental condition.⁵³ Some of these decisions apply the exceptions within their customary bounds, but others do not. Other jurisdictions have developed a "tender years" exception specifically addressed to this type of case.⁵⁴

⁵³ See, e.g., *White v. Illinois*, 502 U.S. 346 (1992) (excited utterances and statements for medical treatment).

⁵⁴ E.g., Rev. C. Wash. Ann. § 9A.44.120.

For reasons already discussed, I do not believe that this genus of approaches — using or developing exceptions to the rule against hearsay — is an appropriate solution to this very serious problem. Assuming, as is usually the case, that the child's statement is one to which the confrontation right ought to apply,⁵⁵ the right should not be defeated by invocation of any hearsay exception, whether new or old, whether a sound application of doctrine or a distortion of it.

Nor, for several reasons, do I believe that secondary evidence of the child's statement should be admitted because of fear that requiring her to testify would cause her great trauma. First, child witnesses are not alone in finding testimony traumatic. The adult rape complainant may find the experience equally as traumatic, or perhaps even more so, but we do not conclude for that reason that the accused may be convicted on the strength of her statement without affording him the opportunity to confront her.

Second, while the experience of testifying in front of the accused may undoubtedly cause significant trauma to the child, the available evidence suggests that testifying does not usually have severe, long-term effects."

Third, if the experience of testifying in court, surrounded by the full formal trappings of the procedure, genuinely is likely to cause the child severe trauma, there are better alternatives, more consonant with the accused's rights than simply doing without her live testimony and relying instead on secondary evidence of her prior statement. Her

55 There is a possibility that, in some cases, the confrontation right ought not to apply because the child lacked so much maturity and understanding at the time of her statement that the statement ought not be considered accusatory. (The child's lack of maturity and understanding might also diminish the probative value to be attached to the statement, but not necessarily below the point sufficient to warrant admissibility.) If a dog's bark has sufficient probative value, we do not exclude it because the accused has not had a chance to cross-examine the dog. It may be that the cry for help of a young child, even if verbalized, bears a closer material resemblance to the dog's bark than to an adult's accusatory declaration.

56 See Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims* (1992) 114-15 (summarizing conclusions from a large study: "On average, the short-term effects [of testifying] on the children's behavioral adjustment, as reported by their caretakers, were more harmful than helpful. In contrast, by the time the cases were resolved, the behavioral adjustment of most, but not all, children who testified was similar to that of children who did not take the stand. The general course for these children, as for the control children, was gradual improvement").

testimony, might, for example, be videotaped outside the courtroom, if necessary outside the physical presence of the accused. I have doubts whether such a procedure should be deemed adequate,⁵⁷ but it is certainly better than nothing.

Fourth, if the child's caretakers are genuinely concerned that, no matter what precautions are taken, testifying will cause the child severe trauma, they simply need not require her to do so. Of course, if absent her live testimony secondary evidence of the prior statement is inadmissible, the probability of securing a conviction against the accused may diminish to the vanishing point. And, when the accused is in fact guilty, that is a very unfortunate result. But it is nothing new. Often prosecutions are lost, or never brought, because the complaining witness is unwilling to testify. Again, the case of adult rape provides a prime example.

Finally -- a point that will not have universal appeal — I find disturbing an approach that says to the accused, in effect, 'Well, perhaps you have a fundamental right at stake here, but someone else would be hurt if we allowed you to invoke it against the state and yet insisted on prosecuting you'. Perhaps it is too late in this "age of balancing" to argue against such willingness to balance away the rights of an accused against the state.⁵⁸ But I prefer viewing the accused's fundamental rights, at least at their core, as truly fundamental and not subject to being balanced away.

In some circumstances, however, the forfeiture principle may validly come into play. Suppose that the prosecutor, with the cooperation of the child's caretakers, makes a genuine effort by appropriate means to get the child to testify, but that the child fails to do so. Sometimes this failure may be attributable to the child's age and immaturity, and thus be independent of the abuse being tried. But in other cases, the child has been intimidated, either by the abusive conduct itself or by a threatening statement — "Don't tell anyone!" — that accompanied or

57 But see *Maryland v. Craig*, 497 U.S. 836 (1990) (considering a procedure allowing a child to testify in a child abuse case out of the presence of the accused by one-way closed circuit television, and holding the procedure permissible if the trial court determines that the procedure "is necessary to protect the welfare of the particular child witness who seeks to testify", *ibid.*, at 855).

58 But see T. Alexander Aleinikoff, "Constitutional Law in the Age of Balancing", (1987) 96 Yale L.J. 943.

followed the conduct. In such a case, application of the forfeiture principle may be appropriate.⁵⁹

Applying the principle in this context is, I acknowledge, particularly difficult. There is, of course, the basic predicate question that underlies any application of the forfeiture principle: Did the accused actually commit the conduct that assertedly rendered the witness unavailable? But the complexities only begin there. Is the child's silence really a product of intimidation, rather than age and immaturity?⁶⁰ And even if the child should be deemed unavailable to testify in court under ordinary procedures, there is the question of what steps, if any, the prosecution must take, as a prerequisite to introducing secondary evidence of the prior statement, to preserve as much as possible of the confrontation right. For example, perhaps the prosecution ought to have made the child available for examination, either at a pretrial deposition or during trial, under as comforting circumstances as possible, presumably without the defendant present.

59 See *State v. Sheppard*, 197 N.J. Super. 411, 435-42, 484 A.2d 1330, 1345-48 (Burlington Co. 1984) (confrontation right held inapplicable because defendant threatened to kill child victim of sexual abuse if she revealed his activities); but see *State v. Jarzbek*, 204 Conn. 683, 699, 529 A.2d 1245, 1253 (1987), cert. denied, 484 U.S. 1061 (1988) ("Here, ... although the threats made by the defendant against the minor victim were ... designed to conceal his wrongdoing, they were made during the commission of the very crimes with which he is charged ... The constitutional right of confrontation would have little force ... if we were to find an implied waiver of that right in every instance where the accused, in order to silence his victim, uttered threats during the commission of the crime for which he is on trial".).

60 The child's silence may also be attributable to her caretaker's desire to protect her from trauma. The caretaker may refuse to make the child available to testify, or instruct her not to testify. In such a case, the child should probably not be deemed unavailable by virtue of the defendant's wrongdoing unless the prosecution uses against the caretaker the coercive measures that it would use if the caretaker were the declarant. If such measures fail to yield the testimony, and if the court is persuaded that the caretaker's refusal to allow the testimony is attributable to the defendant's wrongdoing, then probably the case should be treated as if the caretaker were the declarant and was intimidated by the defendant. Arguably, to reach this point the prosecution should have to show only that coercive measures would have been futile. Such a rule would require great care in operation, however, for under it admission of the prior statement could be secured if the caretaker merely stood up to what might be an idle threat by a friendly prosecutor; the door would be wide open to collusion and strategic game-playing.

Notwithstanding the great difficulty in resolving issues such as these, I believe this is a burden that should be shouldered. On the one hand, our eagerness to secure just convictions for the tragic crime of child abuse ought not lead us to abrogate fundamental rights of the accused. And on the other hand, to the extent that the accused's own conduct has prevented the child from testifying against him, invocation of his confrontation right should not prevent the best possible evidence of her story from being considered by the factfinder.

III. Conclusion

My conclusions do not all point in one direction. Rather, they rebound from one direction to another: A conclusion that is receptive to evidence in one respect makes it easier to accept another conclusion that, in some other respect, burdens or precludes the admissibility of evidence.

I have suggested that, to invoke the forfeiture principle, the prosecution should be required to show that it has done what it could reasonably do to preserve to the maximum extent possible the defendant's confrontation right.

Imposing this restriction on the prosecution makes it more appropriate to impose the forfeiture principle, including its reflexive aspect, on the accused. Thus, if the accused's conduct has rendered the victim-declarant unavailable to testify, secondary evidence of her statement may be admitted over his objection based on the confrontation right.

In turn, recognition of the forfeiture principle makes it more palatable to recognize a strong confrontation right that, while limited in scope, generally excludes secondary evidence of an accusatory statement — irrespective of whether the statement fits within a hearsay exception, new or old, of whether the court deems the statement reliable, of whether the declarant is unavailable, or of whether exclusion of the statement entails substantial costs.

And recognition of such a strong confrontation right in turn makes it easier to accept a generous law of hearsay that usually, when confrontation rights are *not* at stake, results in admission of the evidence for what it is worth.

In short, significant as the forfeiture principle is in its own right — because the cases to which it applies are so important — one of its most crucial roles may be to help provide the underpinnings for a sound theory of confrontation and hearsay.