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Liza Karsai

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## FROM GAUDIN TO GILES: CONTEXT, EQUITY, AND THE ADMISSION OF “WORDS FROM THE GRAVE” AGAINST THE ACCUSED KILLER

*Liza I. Karsai\**

### I. INTRODUCTION

“If anything happens to me, Bobbie did it.” Such explosively powerful evidence can be admitted at Bobbie’s homicide trial to prove that Bobbie did in fact do it, on the ground that Bobbie’s conduct constituted a forfeiture of her objections to the admission of the evidence. Traditionally used to level the playing field when a defendant thwarted the prosecution by causing a witness to become unavailable for live testimony, the forfeiture by wrongdoing doctrine is increasingly used in homicide cases as a means of admitting the victim’s otherwise inadmissible hearsay statements against the victim’s accused killer.<sup>1</sup> Coined “reflexive application” of forfeiture by wrongdoing because both judge and jury must decide the same factual “predicate,” its basic tenet is that admission of the victim’s words against the accused killer is warranted where the victim has been silenced by the very act of homicide for which the defendant has been hailed before the court.<sup>2</sup>

Scholars who advocate reflexive application of forfeiture by wrongdoing have called the defendant’s assertion of his Sixth Amendment right to confront witnesses, and of his objections to hearsay, “chutzpa”<sup>3</sup> The potential for reflexive application of forfeiture by

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\* Associate Professor, Atlanta’s John Marshall Law School. The author would like to thank Dean Richard Lynn, Professor Lee Adams, and Professor Helen de Haven for their support and for their comments on drafts of this Article. She would also like to thank Professor Jeffrey van Detta and Professor Michael Kent for their encouragement and insight as well as Nicole Page for her invaluable research assistance.

1. See, e.g., *State v. Calhoun*, No. 91328, 2009 WL 1419498, slip op. at 3 (Ohio Ct. App. May 21, 2009) (applying forfeiture by wrongdoing where defendant was charged with aggravated homicide for killing victim who was expected to testify against defendant at attempted homicide trial).

2. Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 506, 508, 522 (1997) [hereinafter Friedman, *Chutzpa*]; Josephine Ross, *When Murder Alone Is Not Enough: Forfeiture of the Confrontation Clause After Giles*, 24 CRIM. J. 24, 35–36 (2009). Professor Friedman analogizes the homicide defendant’s assertion of his Confrontation Clause right and hearsay objections to “the man who kills both his parents and then begs the sentencing court to have mercy on an orphan.” Friedman, *Chutzpa*, *supra*, at 517. But who should decide whether the man is guilty of killing his parents?

3. Friedman, *Chutzpa*, *supra* note 2, at 506; Ross, *supra* note 2, at 35–36.

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wrongdoing to greatly increase the likelihood of conviction has been the subject of significant lay press coverage in connection with highly publicized homicide prosecutions, such as the Drew Peterson case and the Mark Jensen murder-by-antifreeze trial.<sup>4</sup> Legal commentators have lauded the doctrine's potential for aiding convictions of perpetrators of domestic violence.<sup>5</sup>

But, who is to decide whether the defendant killed the victim—judge, or jury? When applied reflexively, a rule that “[d]efendants with unclean hands should not be able to invoke the constitutional confrontation doctrine and the hearsay rules in their defense”<sup>6</sup> strips constitutional protections from those defendants deemed likely to be guilty, thereby increasing the likelihood of a guilty verdict, while other defendants, believed to be less likely culpable, retain their rights and enjoy greater likelihood of acquittal.<sup>7</sup>

The Supreme Court's holding in *Giles v. California*, that the Confrontation Clause demands that a purpose of the killing be to prevent the victim from becoming a testifying witness, does not adequately

4. *Anderson Cooper 360: President Obama's Supreme Court Pick?; Small Town, Big Change – Part 2* (CNN television broadcast May 22, 2009), transcript available at <http://archives.cnn.com/TRANSCRIPTS/0905/22/acd.01.html> (discussing case against Drew Petersen and question of admissibility of victim's statements to friends and families under forfeiture by wrongdoing rule); *Larry King Live: Drew Peterson Arrested in Connection With Death of Third Wife; Interview With Kate of 'Jon & Kate Plus 8'; Maria Shriver's Heartbreaking Battle* (CNN television broadcast May 7, 2009), transcript available at <http://archives.cnn.com/TRANSCRIPTS/0905/07/lk1.01.html>; Julie Manganis, *DA: Suspect Took Photos of Girlfriend's Murder*, EAGLE-TRIBUNE, June 10, 2008, available at <http://www.eagletribune.com/local/x1876436637/DA-Suspect-took-photos-of-girlfriends-murder/print> (reporting prosecutor's intent to introduce victim's prior statements under forfeiture by wrongdoing rule); Barbara Grzincic, *MD Woman Who Killed Husband Wins New Sentence*, THE DAILY RECORD, May 2, 2005, available at [http://findarticles.com/p/articles/mi\\_qn4183/is\\_20050502/ai\\_n14609666/](http://findarticles.com/p/articles/mi_qn4183/is_20050502/ai_n14609666/) (discussing insurance fraud case in which defendant, paradoxically—and unsuccessfully—argued that her deceased husband's statements that she would kill him were admissible under forfeiture by wrongdoing only in the murder trial, but not in the insurance fraud trial).

5. Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 889–90 (2009) [hereinafter Lininger, *The Sound of Silence*]; Tom Donaldson, *Combating Victim/Witness Intimidation in Family Violence Cases: A Response to Critics of the "Forfeiture by Wrongdoing" Confrontation Exception Resurrected by the Supreme Court in Crawford and Davis*, 44 IDAHO L. REV. 643, 699–700 (2008) (arguing that “fully functional wrongdoing exception is essential to combat victim/witness intimidation” such that a person who seeks assistance in ending domestic violence should be considered witnesses for purpose of doctrine).

6. Lininger, *The Sound of Silence*, *supra* note 5, at 911.

7. *Compare* *People v. Banos*, 100 Cal. Rptr. 3d 476, 492 (Cal. Ct. App. 2010) (finding that it was not an error for the trial court to find that defendant's knowledge that he would be prosecuted for prior domestic abuse and that victim would testify at those proceedings, such that purpose of killing was to prevent victim's testimony), *with* *Ivy v. Tennessee*, No. W2003-00786-CCa-R3-DD, 2004 WL 3021146 (Tenn. Crim. App. Dec. 30, 2004) (holding in part that the trial court abused its discretion in applying forfeiture by wrongdoing where, although defendant had made statements supporting his intent to kill victim if she involved the police, proceedings at which victim would testify were “potential” future proceedings at the time of the homicide).

address whether reflexive application of the doctrine undermines other constitutional rights.<sup>8</sup> Of some note, *Giles* does not bar states from applying forfeiture by wrongdoing reflexively, without finding the defendant’s purpose, to admit hearsay statements that do not implicate the Confrontation Clause.<sup>9</sup> In such cases, a judge could apply forfeiture if he or she believed that the defendant more likely than not killed the victim, thus making it more likely that a jury would find that the defendant killed the victim.<sup>10</sup> But whether under the *Giles* rule requiring purpose or under the more expansive rule potentially applied to non-testimonial hearsay statements, reflexive application of forfeiture by wrongdoing in a homicide case requires a judicial fact-finding that the defendant killed the victim, one of the elements of the crime charged, before the jury has convicted the defendant.<sup>11</sup> This fact-finding, generally by a preponderance of the evidence,<sup>12</sup> then becomes part (or, in the case of a state’s expansive application of forfeiture by wrongdoing to statements that do not implicate the right to confront witnesses, the entire) basis for admitting otherwise inadmissible evidence against the defendant.

Although some view *Giles* as a “windfall” for murderers because it curtails the reach of reflexive application of forfeiture by wrongdoing

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8. *Giles v. California*, 554 U.S. 353, 376–77 (2008). However, all nine Justices were united in supporting the reflexive application of forfeiture by wrongdoing. *Id.* Justices Scalia, Roberts, Thomas, Alito, and Ginsberg were united in the view that defendant must have killed the victim with the “purpose” of preventing the victim from being a witness, while Justice Souter—although concurring—apparently would have required only “intent.” *Id.* at 364–65, 379–80. Justices Breyer, Stevens and Kennedy would not have imposed a “purpose” requirement for a finding of forfeiture by wrongdoing and would have allowed a more expansive use of the doctrine. *Id.* at 405–06.

9. *Id.* at 376.

10. *Id.*

11. Michael J. Polelle, *The Death of Dying Declarations in a Post-Crawford World*, 71 MO. L. REV. 285, 308–09 (2006) (discussing circularity of “automatic forfeiture”—e.g., reflexive application with no intent or purpose requirement). Forfeiture by wrongdoing may be used as a ground to admit a homicide victim’s statements in a trial against a defendant where the homicide victim was expected to testify—e.g., if the victim is killed shortly before the alleged killer’s trial on drug trafficking charges—as well as in the homicide trial itself. Compare *United States v. Mastrangelo*, 693 F.2d 269, 269–72 (2d Cir. 1982) (defendant convicted of drug charges forfeited objections to testimony of witness killed during first trial), and *State v. Black*, 291 N.W.2d 208, 214 (Minn. 1980) (applying forfeiture by wrongdoing to admit hearsay statements of witness who refused to testify after she reported that defendant threatened her and her family if she testified), with *United States v. Vallee*, 304 F. App’x 916, 920 (2d Cir. 2008) (noting that homicide for which defendant was charged provided basis for forfeiture ruling). Only the latter provides overlap between the required judicial fact-finding and the jury’s required fact-finding.

12. See, e.g., *Commonwealth v. Edwards*, 830 N.E.2d 158, 172 (Mass. 2005) (preponderance); *People v. Hagos*, No. 05CA2296, 2009 WL 3464284, at \*22 (Colo. App. Oct. 29, 2009) (preponderance). Cf. *People v. Geraci*, 85 N.Y.2d 359, 367 (1995) (adopting clear and convincing evidence standard in New York).

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when the Confrontation Clause is implicated,<sup>13</sup> this Article suggests that the *Giles* ruling nonetheless fails to resolve an underlying discontinuity with the Court's historical interpretation of a different triumvirate of constitutional rights accorded a criminal defendant. In *United States v. Gaudin*, a unanimous Court held that the Fifth and Sixth Amendments demand that every element of the charged crime, and not just the factual components of the essential elements, be submitted to a jury for decision under the beyond a reasonable doubt standard.<sup>14</sup> In *Gaudin*, the Court recognized that context could affect whether judicial fact-finding violated a defendant's Sixth Amendment right to a jury trial, Fifth Amendment right to proof beyond a reasonable doubt, and Fifth Amendment right to due process.<sup>15</sup>

*Gaudin*'s holding appears facially unrelated to the forfeiture by wrongdoing doctrine addressed in *Giles*, but, as this Article discusses, *Giles*'s continued approval of the reflexive application of forfeiture by wrongdoing implicates the very core of *Gaudin*'s holding because the Court did not consider the context of forfeiture by wrongdoing and how that differs from the context of preliminary questions of evidentiary admissibility, which are ordinarily appropriately allocated to the judge for decision. This Article suggests that reflexive application of the forfeiture by wrongdoing doctrine cannot be easily reconciled with *Gaudin*'s holding or its reasoning, and considers the extent to which it undermines the constitutional rights linked by the Court in *Gaudin*. Part II discusses the rights linked by *Gaudin*. Part III then addresses forfeiture by wrongdoing and its recent expansion to the reflexive case, while Part IV closely examines *Giles*. Part V considers the Supreme Court's authorization of reflexive application. Finally, Part VI concludes that the allocation of fact-finding to judges in the reflexive case violates the constitutional principles addressed by *Gaudin*.

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13. Lininger, *The Sound of Silence*, *supra* note 5, at 863–64 (calling decision a “windfall” for some defendants and discussing authorities predicting that *Giles* will have dire consequences for domestic abuse prosecutions).

14. *Gaudin v. United States*, 515 U.S. 506, 511–12, 522–23 (1995). The Court explained that the context might dictate allocation to the judge if a preliminary question of the admissibility of evidence, such as whether evidence should be excluded as seized in violation of the Fourth Amendment, but to the jury “when it is one of the elements of the crime of depriving a person of constitutional rights under color of law . . . .” *Id.* at 521.

15. *Id.* at 510, 511 n.1, 522–23. See also Colleen P. Murphy, *Context and the Allocation of Decisionmaking: Reflections on United States v. Gaudin*, 82 VA. L. REV. 961, 964 (1996) (arguing that the Court's use of “the context of ‘elements of the offense’ to determine whether certain questions must be decided by the jury” is “too narrow” and led to the Court's unsupported allocation of offense-related sentencing factors to the court rather than the jury).

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II. THE CONSTITUTIONAL RIGHTS LINKED BY *GAUDIN*

In *Gaudin*, the Supreme Court held that the interrelated nature of the Fifth and Sixth Amendments requires every element of a criminal charge be submitted to the jury for determination by proof beyond a reasonable doubt.<sup>16</sup> The issue in *Gaudin* was whether the Constitution required a trial judge to submit to the jury the question of the “materiality” of a false statement in a criminal prosecution for making “material false statements in a matter within the jurisdiction of a federal agency.”<sup>17</sup> Before the Supreme Court, the government argued that materiality was a “legal” question, and therefore, was not a factual component of an essential element of the crime that must be presented to the jury.<sup>18</sup>

Led by Justice Scalia, the Supreme Court unanimously rejected the government’s position finding first that the inquiry into materiality was the sort of “‘mixed question of law and fact’ . . . [that] has typically been resolved by juries,” and second, there was no case law leaving the jury with only factual questions and removing from the jury the ultimate application of law to fact.<sup>19</sup> Any “device,” such as a statutory inference or presumption, passes constitutional muster only if it does “‘not undermine the factfinder’s responsibility at trial, based on evidence adduced by the State, to find the *ultimate* facts beyond a reasonable doubt.’”<sup>20</sup>

To reach its holding, the Court first reaffirmed the linkage of two important constitutional rights—the Fifth Amendment right to due process and the Sixth Amendment right to jury trial—noting its prior holding in *Sullivan v. Louisiana*<sup>21</sup> that “these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.”<sup>22</sup> Implicit in this language is the Court’s recognition that, as put by the *Sullivan* Court:

the Fifth Amendment requirement of proof beyond a reasonable doubt

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16. *Gaudin*, 515 U.S. at 522–23.

17. *Id.* at 507. The defendant, a real estate broker and developer, was charged with equity-skimming and making false statements on loan settlement statements and appraisal report forms in violation of federal law. *United States v. Gaudin*, 986 F.2d 1267, 1269–70 (9th Cir. 1993), *rev’d* 515 U.S. 506 (1995). The crime of making false statements to a federal agency was governed by 18 U.S.C. § 1001 (1988), which was interpreted as containing an element of materiality. *Gaudin*, 986 F.2d at 1271.

18. *Gaudin*, 515 U.S. at 511–12. *See also* Murphy, *supra* note 15, at 965.

19. *Gaudin*, 515 U.S. at 512–13.

20. *Id.* at 514–15 (quoting *Court of Ulster County v. Allen*, 442 U.S. 140, 156 (1979)).

21. 508 U.S. 275, 277–78 (1993).

22. *Gaudin*, 515 U.S. at 510.

and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt.<sup>23</sup>

The Court emphasized the historical importance of the right to a jury trial, tracing its “impressive pedigree” to England, where the right was viewed as “the great bulwark of their civil and political liberties.”<sup>24</sup> The Court also completed the task of repudiating its 1929 decision in *Sinclair v. United States*, which had held that in a prosecution for criminal contempt of a witness before Congress who refused to answer a “pertinent” question, “pertinency” was a question of law for the court.<sup>25</sup>

The *Gaudin* Court reasoned that the context of a fact determination is important to evaluating the constitutionality of allocations between judge and jury.<sup>26</sup> Justice Scalia emphasized that “the same mixed question of law and fact” could be appropriately allocated to “the court for one purpose, and to the jury for another.”<sup>27</sup> If probable cause “arises in the context of a motion to suppress,” it is appropriately allocated to the judge.<sup>28</sup> But if probable cause is an element of the crime charged, then it is for the jury.<sup>29</sup>

The Court also distinguished *Kungys v. United States*, which had held that the question of materiality in a denaturalization proceeding could be decided by an appellate court rather than by the trial court on remand,<sup>30</sup> noting that the context of the fact-finding function was different.<sup>31</sup> *Kungys* was focused on whether an appellate court could decide the question in a non-jury denaturalization proceeding, while *Gaudin* concerned the constitutionality of a court finding of materiality in a criminal jury trial.<sup>32</sup> Additionally, *Kungys* involved a proceeding at which no Sixth Amendment right attached.<sup>33</sup> The Court concluded that unlike *Kungys*, *Gaudin* had a constitutional right to have the jury decide materiality because materiality was an element of the crime charged, and

23. *Sullivan*, 508 U.S. at 278.

24. *Gaudin*, 515 U.S. at 510 (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 541 n.2 (4th ed. 1873)).

25. *Sinclair v. United States*, 279 U.S. 263, 299 (1929).

26. *Gaudin*, 515 U.S. at 521.

27. *Id.*

28. *Id.*

29. *Id.*

30. 485 U.S. 759, 772 (1988).

31. *Gaudin*, 515 U.S. at 522.

32. *Id.*

33. *Id.*

the Sixth Amendment right attached to the criminal proceeding.<sup>34</sup>

The Court’s emphasis on the interrelationship between the Fifth and Sixth Amendments and its discussion of the characterization of the context or purpose of the finding to be put to judge or jury is significant when considering reflexive application of forfeiture by wrongdoing. That is because *Gaudin* confirmed that the Fifth and Sixth Amendments work together to address *who* decides the defendant’s guilt—the jury—as well as *what* the jury decides—whether the government has persuaded the jury “beyond a reasonable doubt” of the facts establishing each element of the criminal charge.<sup>35</sup> This suggests that judicial acts that have the effect of lessening the prosecution’s burden of proof on any element of the crime charged could under some circumstances undermine, if not violate outright, the Fifth and Sixth Amendments.

Thus, under *Gaudin*, a critical issue in determining the constitutionality of an allocation of judicial fact-finding is the way in which one frames the context of the determination to be made. If one characterizes a probable cause finding as a preliminary evidentiary ruling, one result follows—the judge decides; if one characterizes it as an element of the crime charged, then another follows—the jury decides. Accordingly, the context of the fact-finding is an important measure of the constitutionality of the judge–jury allocation. Thus, the context in which reflexive application of forfeiture by wrongdoing arises, and the ways in which that context demonstrates that forfeiture by wrongdoing differs from questions of evidentiary competence, are important considerations if the integrity of the Fifth and Sixth Amendments is to be wholly preserved.<sup>36</sup> When context is considered, the *Gaudin* Court’s example of probable cause being a judge question when used to determine the admissibility of evidence but being a jury question when it is an element of the crime<sup>37</sup> does not provide a satisfying explanation of why the reflexive application of forfeiture by wrongdoing is constitutionally sound.<sup>38</sup> Because, as discussed *infra* in Part V.A., the

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34. *Id.* at 511.

35. *Id.* at 510–11; *Sullivan v. Louisiana*, 508 U.S. 275, 277–78 (1993).

36. Murphy, *supra* note 15, at 964–65, 984–85 (arguing that in some “respects, the Supreme Court misuses context as a substitute for sound reasoning [leading to] a usurpation of the jury’s constitutional province” and calling for “more analysis and less unexplained reliance on context” to “bring needed precision to the often difficult task of allocating decisionmaking between judge and jury”).

37. *Gaudin*, 515 U.S. at 521.

38. See Friedman, *Chutzpa*, *supra* note 2, at 522–23 (describing the fact-finding as an evidentiary one when being used to apply forfeiture by wrongdoing and as substantive when being used to determine guilt or innocence). Professor Murphy notes that judicial allocation of evidentiary issues is based on the “intention to enhance the reliability of the factfinding process,” while judicial allocation of pretrial issues is justified by the collateral nature of pretrial issues or the object of keeping “from the jury



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forfeiture by wrongdoing doctrine does not address evidentiary competence, the Court's and scholars' analogy to preliminary questions of evidentiary admissibility has troubling implications for important constitutional principles.

Although forfeiture by wrongdoing is a rule of equity that does not evaluate the competence of evidence, clearly it affects the admissibility of evidence.<sup>39</sup> That it does so should be troubling when the doctrine is applied reflexively in homicide cases to admit evidence that makes a conviction more likely.<sup>40</sup> The Supreme Court has long distinguished evidence that may be admitted at a jury trial from evidence that may be used in other proceedings, on the ground that the rules of evidence are linked to the reasonable doubt standard, such that the prosecutor's proof must be made "by evidence *confined* to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard."<sup>41</sup> The evidence rules themselves are largely exclusionary and have been

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matters on which reasonable people could differ." Murphy, *supra* note 15, at 976–77. These justifications do not support judicial allocation of the decision-making when applying forfeiture by wrongdoing reflexively in homicide cases. The doctrine's application to hearsay objections eliminates a screen against the admission of unreliable evidence; the required fact-findings are closely intertwined with the jury's purpose of determining guilt or innocence of homicide; and the object of the doctrine is not to keep matters from the jury.

39. Application of forfeiture by wrongdoing does not require any assessment of the competence of the evidence sought to be introduced. Others have questioned whether the competence of that evidence should be an implied requirement of the doctrine. See, e.g., 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, 41 (2008).

40. This proposition would find support even were forfeiture by wrongdoing merely a preliminary question of evidentiary admissibility. As Professor Stephen Salzberg pointed out, different preliminary fact questions present different risks to the reliability of the verdict. Stephen A. Salzberg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271, 275 (1975). Professor Salzberg recognized that the closer the unity between the judicial fact-finding required for a preliminary fact-finding and the jury's fact-finding, the greater the risk that an error in the preliminary fact-finding will produce an unreliable verdict. *Id.* at 283. However, he concluded that most preliminary fact-findings were appropriately decided by the judge using the preponderance of the evidence standard, for "few cases actually involve a coincidence between preliminary facts and ultimate issues; one must actually strain to find such cases. Thus in the typical case we need not fear that the preliminary fact question is the twin of the ultimate fact question." *Id.* at 291–92. Reflexive application of forfeiture by wrongdoing, if it were appropriately characterized as merely a preliminary question of evidentiary admissibility, would be that rare case. While Professor Salzberg advocated applying a higher standard of proof to preliminary questions of admissibility in some situations where the judge and jury were to decide the same facts, adjusting the standard of proof to be applied to judicial fact-finding would not completely address the question of whether a court may sanction the defendant for the conduct for which he is brought before the jury by reducing the burden on the government. See *id.* at 305 (recommending higher standard for confessions, dying declarations, and some declarations against interest).

41. *Brinegar v. United States*, 338 U.S. 160, 174 (1949) (affirming trial court's consideration of evidence at hearing seeking suppression of evidence seized during a search of the defendant's vehicle) (emphasis added).

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described by the Court as “historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.”<sup>42</sup> It logically follows that the erroneous admission of outcome determinative evidence is grounds to vacate a criminal conviction.<sup>43</sup> If forfeiture by wrongdoing is more than a preliminary question of evidentiary admissibility, its expansion of the scope of admissible evidence threatens the integrity of the beyond a reasonable doubt standard.<sup>44</sup> Its employment in a homicide case to admit victim hearsay evidence is intended to admit important, likely outcome determinative evidence.<sup>45</sup> Applied reflexively, forfeiture by wrongdoing intertwines the judge’s fact-finding with the jury’s fact-finding. Therefore, a subsequent guilty verdict could be used to justify even an erroneous judicial fact-finding on one or more of the same factual elements of the crime.<sup>46</sup>

## III. FORFEITURE BY WRONGDOING

A. *Two Objections Lost*

Whether under a common law or statutory construct, forfeiture by wrongdoing deprives the defendant of the constitutional right to confront a witness and objections to the admission of hearsay evidence. The doctrine thus may be applied to bar a criminal defendant from objecting to the admission of hearsay evidence on the ground that the defendant’s constitutional right, to confront a witness has been forfeited. However, the doctrine may also be applied to bar any litigant—such as a civil

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42. *Id.* at 174.

43. *Arizona v. Fulminante*, 499 U.S. 279, 302 (1991); *Rose v. Clark*, 478 U.S. 570, 579 (1986). See also Margaret A. Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error?*, 25 LOY. L.A. L. REV. 893 (1992) (discussing instances of non-constitutional evidentiary error that led to reversal).

44. See Edward J. Imwinkelreid, *Trial Judges Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Testimony Without Invading the Jury’s Province to Evaluate the Credibility and Weight of the Testimony?*, 84 MARQ. L. REV. 1, 9–10 (2000) (discussing early American shift away from allocating preliminary findings of fact to judges due to the risk that judges could use such findings to dictate trial outcomes, thus undermining the jury’s power).

45. *Larry King Live: Drew Peterson Arrested in Connection with Death of Third Wife* (CNN television broadcast, May 7, 2009), transcript available at <http://archives.cnn.com/TRANSCRIPTS/0905/07/kl.01.html> (discussing likelihood that, if victim hearsay is admitted through forfeiture by wrongdoing doctrine, jury will convict).

46. In *State v. Fry*, the Ohio Supreme Court expressed the view that the defendant’s conviction of aggravated homicide for killing a witness (rendered upon evidence including statements admitted by reflexive application of forfeiture by wrongdoing) supported the conclusion that the trial court correctly determined that the defendant killed the victim with the intent of preventing her from being a witness against him. 926 N.E.2d 1239, 1262 (Ohio 2010).

litigant for whom no constitutional right to confront witnesses exists—from invoking the rule against hearsay.<sup>47</sup>

The rule that hearsay is inadmissible and the constitutional right to confront witnesses are related because they protect similar interests, but, as illustrated above by the difference between civil and criminal litigants, they are not identical or coextensive. In *Crawford v. Washington*, the Supreme Court held that the Confrontation Clause bars the admission of un-confronted “testimonial” statements, such as statements made to a police officer investigating a crime, testimony in depositions or in court, and sworn affidavits.<sup>48</sup> Non-testimonial statements, such as statements made to friends or family members or statements made in emergency situations (such as on a 911 call), ordinarily may be admitted without raising Confrontation Clause concerns, although the Court left open whether the admission of non-testimonial statements could ever violate the right to confront witnesses.<sup>49</sup> The right to confront witnesses thus may provide a basis for excluding from evidence even those hearsay statements that fall within an exception to the rule against hearsay, but only if the statement is testimonial. Thus, under a Confrontation Clause analysis of forfeiture by wrongdoing, the forfeiture is of the right to confront, which applies to testimonial hearsay statements.<sup>50</sup>

In comparison with the right to confront witnesses, objections to the admission of hearsay evidence provide both civil and criminal litigants with the opportunity to seek exclusion of hearsay statements that do not fall within the jurisdiction’s recognized exceptions to the rule against hearsay.<sup>51</sup>

As discussed more fully in the following subpart, the doctrine of forfeiture by wrongdoing has evolved considerably from its common

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47. See, e.g., *Proffit v. State*, 191 P.3d 963, 967 (Wyo. 2008). Some states have not applied forfeiture by wrongdoing to admit statements that do not meet an exception to the rule against hearsay, but the Federal Rules of Evidence and many state courts apply forfeiture by wrongdoing both to the right to confront witnesses and to the defendant’s ability to assert hearsay objections. See, e.g., *People v. Hagos*, No. 05CA2296, 2009 WL 3464284, at \*21 (Colo. App. Oct. 29, 2009) (holding that the forfeiture by wrongdoing doctrine did not permit admission of evidence otherwise inadmissible under Colorado’s evidence rules), *cert. denied*, No. 10SC192, 2010 WL 3529276 (Col. Sept. 13, 2010).

48. *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004); *Davis v. Washington*, 547 U.S. 813, 822 (2006).

49. *Davis*, 547 U.S. at 829.

50. *Crawford*, 541 U.S. at 60–61; *Davis*, 547 U.S. at 822–23. The *Crawford* Court cast doubt on its prior refusal to confine the Confrontation Clause to testimonial statements, but because the statement at issue was testimonial under any definition of the term, the Court did not reach the question of whether a non-testimonial statement’s admission could ever violate the Confrontation Clause. *Crawford*, 541 U.S. at 60–61.

51. See, e.g., FED. R. EVID. 803, 804 (2010).

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law roots. Modern rules, such as Federal Rule of Evidence 804(b)(6), have expanded the common law forfeiture by wrongdoing doctrine to encompass forfeiture not only of the right to confront but also of evidentiary objections to otherwise inadmissible hearsay, making it possible to admit hearsay statements under the doctrine without regard for whether those statements meet an exception to the rule against hearsay.<sup>52</sup> The doctrine has also been expanded to encompass the admission of statements of victims who might have been witnesses in a future, potential, or unrelated proceeding.

*B. Evolution to an Expanded Doctrine*

Modern forfeiture by wrongdoing rules are deeply rooted in the common law. The Supreme Court has traced the doctrine's origins trace to Lord Morley's Case, in which the English Court admitted a witness's hearsay statements where the witness was "detained by the means or procurement of the prisoner."<sup>53</sup> In 1879, the United States Supreme Court first addressed the doctrine in *Reynolds v. United States*.<sup>54</sup> The Court upheld the trial court's finding that a defendant in a criminal bigamy case forfeited his right to confront his alleged second wife where the trial court had heard evidence on the issue and concluded that the defendant had kept her from being subpoenaed.<sup>55</sup> The Court announced the principle, long applied in England, that "[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege."<sup>56</sup> In *Reynolds*, as in the preceding authorities supporting the doctrine, the defendant stood accused of a crime other than the act of making the witness

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52. Prior to the Supreme Court's ruling in *Crawford*, the right to confront and the right to object to hearsay arguably were coextensive, but *Crawford's* ruling that only the admission of testimonial statements violates the Confrontation Clause made clear that although they may share the same roots, the rule against hearsay is separate and not coextensive with the right to confront witnesses. *Crawford*, 541 U.S. at 50, 68. A non-testimonial statement that is not admissible under any other exception to the rule against hearsay may be admitted under the forfeiture by wrongdoing doctrine if state law allows. *Giles v. California*, 554 U.S. 353, 376 (2008). Compare *Commonwealth v. Wholaver*, 989 A.2d 883, 900, 900 n.11 (Pa. 2010) (noting that under the Pennsylvania evidence rules, forfeiture by wrongdoing extinguishes hearsay objections and the right to confront witnesses), with *Hagos*, 2009 WL 3464284, at \*21 (noting that in Colorado, forfeiture by wrongdoing does not extinguish hearsay objections).

53. *Giles v. California*, 554 U.S. 353, 359 (2008) (quoting Lord Morley's Case, 6 How. St. Tr. 769, 770–71 (H.L. 1666)).

54. 98 U.S. 145 (1879).

55. *Id.* at 159–60.

56. *Id.* at 158.

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unavailable.<sup>57</sup> To determine whether the defendant had made the witness unavailable, the trial court did not need to determine any facts that were elements of the crime for which the defendant stood trial. The *Reynolds* Court considered forfeiture to be a rule of equity that prevented a party from gaining a tactical advantage at trial through acts designed to thwart the prosecution's ability to bring witnesses against him.<sup>58</sup>

After *Reynolds*, forfeiture by wrongdoing received little attention until the early 1980s.<sup>59</sup> Federal Rule of Evidence 804(b)(6),<sup>60</sup> entitled "Forfeiture by Wrongdoing," was approved by the Supreme Court in 1997. The Rule was drafted in response to a perception that witness intimidation had increasingly thwarted criminal prosecutions.<sup>61</sup> The Rule permits the admission of otherwise inadmissible hearsay statements, including both testimonial and non-testimonial statements, if a party has "engaged or acquiesced in wrongdoing that was intended to,

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57. *Reynolds v. United States*, 98 U.S. 145, 160 (1878) (finding evidence to support the conclusion that defendant caused witness, his wife, to be away during bigamy trial); *Williams v. State*, 19 Ga. 402, 402 (1856) (affirming admission of absent witness's "written memorandum" where defendant, on trial for larceny, induced complaining larceny victim to stay away from trial; witness's prior statement was confronted so no Confrontation Clause issue was implicated); *Queen v. Scaife*, 117 Eng. Rep. 1271, 1273 (1851) (noting that there was evidence that defendant caused witness to be unavailable at defendant's robbery trial); *Rex v. Barber*, 1 Root 76, 76 (Conn. Super. Ct. 1775) (noting that defendant caused witness to remain away from his trial for counterfeiting and other charges); *Harrison's Case*, 12 How. St. Tr. 833, 851 (H.L. 1692) (noting that witness was bribed to stay away from defendant's trial).

58. *Reynolds*, 98 U.S. at 159 ("[I]f a witness is absent by [defendant's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.").

59. In 1976, the Eighth Circuit Court of Appeals could not identify a single state or federal court opinion directly addressing whether a defendant "waived" or forfeited the right to confront a witness after engaging in witness intimidation that resulted in the witness being unavailable at trial. *United States v. Carlson*, 547 F.2d 1346, 1358 (8th Cir. 1976). The doctrine of forfeiture by wrongdoing had been applied to uphold removing a misbehaving defendant from the trial courtroom and to prevent the defendant from claiming constitutional error when he voluntarily absented himself from the courtroom. *Illinois v. Allen*, 223 U.S. 337, 342-43 (1970) (removal of defendant); *Taylor v. United States*, 414 U.S. 17, 20 (1973) (defendant voluntarily absent); *Diaz v. United States*, 223 U.S. 442, 455 (1912) (defendant voluntarily absent). In 1934, in *Snyder v. Massachusetts*, the Supreme Court noted in dicta that the criminal defendant could forfeit the right to confrontation by misconduct—a scenario not present in that case. 291 U.S. 97, 106 (1934).

60. FED. R. EVID. 804(b)(6); 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, 903-04 (2001) (discussing motivations for the new rule, including pressure from the Department of Justice, along with the perception that it was becoming more difficult to prosecute federal crimes due to witness intimidation and murders).

61. *Id.*

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and did, procure the unavailability of the declarant as a witness.”<sup>62</sup> The Rule was intended to deter witness “intimidation” and other conduct designed to thwart the prosecution of crimes, a significant problem in “organized crime and drug prosecutions.”<sup>63</sup>

The Advisory Committee intended that courts would be the arbiters of whether the declarant’s hearsay statement is admissible under Rule 804(b)(6) by employing Federal Rule of Evidence 104(a), which provides that the court decides questions of evidentiary admissibility.<sup>64</sup> As drafted, Rule 804(b)(6) addresses both hearsay statements and the right to confront witnesses.<sup>65</sup> It permits admission of otherwise inadmissible hearsay when the declarant is unavailable and the defendant caused or acquiesced in wrongdoing intended to and having the effect of making the declarant unavailable.<sup>66</sup> It does so without regard to the nature or reliability of the declarant’s hearsay statements.<sup>67</sup> The Rule does not distinguish between testimonial and non-testimonial statements and allows courts to admit hearsay to which the Confrontation Clause does not apply.<sup>68</sup> Thus, the plain language of the Rule is more expansive than the constitutional common law doctrine. However, its breadth is not unlimited, being constrained by the high court’s jurisprudence on the permissible scope of forfeiture of the right to confront a witness.

A number of states have codified the common law rule in their rules of evidence,<sup>69</sup> while others continue to apply the common law rule

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62. *Id.*

63. James F. Flanagan, *Confrontation, Equity, and the Misnamed Exception for ‘Forfeiture’ by Wrongdoing*, 14 WM. & MARY BILL RTS. J. 1193, 1197 n.19 (2006) (citations omitted).

64. James 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, 520–26 (2003) [hereinafter Flanagan, *Reach*]; FED. R. EVID. 104(a).

65. FED. R. EVID. 804(b)(6).

66. *Id.*

67. *See* Flanagan, *Reach*, *supra* note 64, at 520–26 (2003) (discussing lack of reliability requirement).

68. FED. R. EVID. 804(b)(6) (2010).

69. *See, e.g.*, CAL. R. EVID. § 1350 (2002) (providing hearsay exception for certain types of victim statements in serious felony cases); DEL. R. EVID. 804(b)(6) (2001) (same as federal rule); HAW. R. EVID. 804(b)(7) (2009) (no intent required for forfeiture); KY. R. EVID. 804(b)(5) (2009) (same as federal rule); MD. R. EVID. 5-804(b)(5)(B) (2009) (limiting application of exception in criminal cases); MICH. R. EVID. 804(b)(6) (2009) (same as federal rule); N.D. R. EVID. 804(b)(6) (2009) (same); OHIO R. EVID. 804(b)(6) (2001) (same); OR. R. EVID. 804 (3)(g) (2009) (same); PENN. R. EVID. 804(b)(6) (same); TENN. R. EVID. 804(b)(6) (1999) (same); VT R. EVID. 804(b)(6) (2004) (same). Alabama, Alaska, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, West Virginia, and Wyoming do not have a rule of evidence recognizing forfeiture by wrongdoing as a hearsay exception; however, those states may apply the common law rule. Bocchino & Sonenshein, *supra* note 39, at 79–80.

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announced in *Reynolds* in one form or another.<sup>70</sup> Only a few states require the court to find forfeiture by wrongdoing by the clear and convincing evidence standard,<sup>71</sup> with the majority permitting proof by a preponderance of the evidence.<sup>72</sup> Many require a pretrial hearing before forfeiture may be applied.<sup>73</sup>

### C. Crawford's Promotion of Reflexive Application

Although courts rarely applied forfeiture by wrongdoing reflexively before *Crawford v. Washington*,<sup>74</sup> the *Crawford* Court's re-working of the Confrontation Clause test encouraged its use in homicide cases. Before *Crawford*, if a victim's statement fell within a firmly rooted hearsay exception or had particularized guarantees of trustworthiness, admission of that statement was not a violation of the Confrontation Clause.<sup>75</sup> After *Crawford*, however, the hearsay inquiry no longer resolved the Confrontation Clause inquiry; the proper inquiry became whether an un-confronted statement was "testimonial."<sup>76</sup> As a result of *Crawford's* major reassessment of Confrontation Clause jurisprudence, a victim's testimonial statements would be inadmissible even if they fell within a firmly rooted hearsay exception or were accompanied by particularized guarantees of trustworthiness. For example, a victim's

70. See, e.g., *State v. Poole*, 232 P.3d 519, 524–25 (Utah 2010) (common law doctrine of forfeiture by wrongdoing); *State v. Fry*, 926 N.E.2d 1239, 1262 (Ohio 2010) (common law doctrine); *Hunt v. State*, 218 P.3d 516, 519 (Okla. Crim. App. 2009) (C. Johnson, P.J., concurring) (common law doctrine applies to Confrontation Clause, but no rule of evidence exists).

71. See, e.g., *People v. McCrae*, 895 N.Y.S.2d 101, 102–03 (N.Y. App. Div. 2010) (noting that court must find by clear and convincing evidence that defendant was "involved" in the murder); *State v. Mason*, 162 P.3d 396, 404 (Wash. 2007) ("clear, cogent, and convincing" standard).

72. See, e.g., *State v. Sheppard*, 484 A.2d 1330, 440–41 (N.J. Super. Ct. Law Div. 1984) (adopting preponderance standard, reasoning that wrongdoing "is invariably accompanied by tangible evidence such as . . . the murder of a key witness, and there is hardly any reason to apply a burden of proof which might encourage behavior which strikes at the heart of the system itself").

73. See, e.g., *People v. Hagos*, No. 05CA2296, 2009 WL 3464284, at \*19 (Colo. App. Oct. 29, 2009) (hearing required in Colorado), *cert. denied*, No. 10SC192, 2010 WL 3529276 (Col. Sept. 13, 2010); *People v. Cotto*, 642 N.Y.S.2d 790, 793 (N.Y. Sup. Ct. 1996) (*Sirois* hearing in New York).

74. 541 U.S. 36 (2004). See *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999) (finding forfeiture by wrongdoing based on defendant's alleged killing of federal informant, for which defendant was on trial). The Eighth Circuit found that the defendant would "benefit" from having killed the victim to prevent her testimony in another case if forfeiture was not applied. *Id.* Professor Polelle points out that the fallacy in this argument is that the victim is never a witness at a homicide trial; the benefit to the defendant only would accrue in the trial at which the victim would have testified had she been alive. Polelle, *supra* note 11, at 310 (noting "illogic[ ]" of reflexive application of forfeiture by wrongdoing, for "[t]he definition of criminal homicide presupposes the unavailability of the witness; therefore, one cannot intentionally procure the unavailability of a victim whose unavailability because of death is a necessary part of the crime").

75. *Roberts v. Ohio*, 448 U.S. 56, 66 (1980).

76. *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004).

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statement to a police officer that the defendant had threatened to kill her might meet a number of hearsay exceptions, such as the exception for excited utterances. Prior to *Crawford*, the statement may have been admissible; however, after *Crawford*, if the statement were deemed testimonial, then it would have been excluded as violating the defendant's right to confront witnesses.

*Crawford* has been found to have had a profound effect on domestic violence prosecutions, including homicide cases related to domestic violence, because the admission of statements within a firmly rooted hearsay exception or made under circumstances that supported their reliability was now foreclosed as a violation of the defendant's rights under the Confrontation Clause.<sup>77</sup> The use of forfeiture by wrongdoing in homicide cases is now commonly invoked as a legitimate means of avoiding *Crawford*'s ill-effects on domestic violence prosecutions.<sup>78</sup> However, *Crawford* also affected the prosecutions of other homicides, such as those in which the victim lived long enough to speak to

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77. Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747 (2005) [hereinafter Lininger, *Prosecuting Batterers*] (presenting data reflecting dramatic detrimental effect of *Crawford* and recommending, among other needed reforms, that "[a]ll states should codify the doctrine of forfeiture by wrongdoing," which should be construed to allow admission of even victim hearsay statements that do not fall within a recognized hearsay exception). See also Carol A. Chase, *Is Crawford a "Get Out of Jail Free" Card for Batterers and Abusers? An Argument for a Narrow Definition of "Testimonial,"* 84 OR. L. REV. 1093 (2005). The amicus brief of the Battered Women's Justice Project and Other Domestic Violence Organizations in *Giles* further highlights the problem:

The realities of battering and domestic violence homicides have forced prosecutors to be resourceful in identifying and obtaining a variety of evidence to prove the guilt of a murderer. Recognizing the unique characteristics presented by domestic violence homicides, prosecutors have developed "evidence-based" prosecution. Evidence-based prosecution emphasizes the gathering of reliable evidence, such as 911 tapes, photographs, medical records, admissions by a defendant, statements of relatives or neighbors, and police observations, in order to build a case that does not depend upon the participation of the victim. Utilizing long-accepted exceptions for excited utterances, medical treatment statements, and present sense impressions, prosecutors attempt to hold batterers accountable for their criminal conduct, even in the absence of the victim.

Amicus Curiae Brief of the Battered Women's Justice Project and Other Domestic Violence Organizations in Support of Respondent at 11–12, *Giles v. California*, 554 U.S. 353 (2008) (No. 07-6053).

78. To a large extent, Professor Friedman recommended this approach long before *Crawford*, when he wrote:

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. 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.

Friedman, *Chutzpa*, *supra* note 2, at 526.



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investigating police officers but died before the perpetrator was tried.<sup>79</sup>

Before *Crawford*, few courts had considered the reflexive application of forfeiture by wrongdoing.<sup>80</sup> The majority of courts that had considered whether to apply forfeiture by wrongdoing reflexively favored application of the rule.<sup>81</sup> The rationale for applying the rule in this way was that having killed the victim, the defendant would benefit in his homicide trial if permitted to object to the admission of the victim's hearsay statements.<sup>82</sup>

For example, in *United States v. Natson*,<sup>83</sup> where the district court could

discern no reason that a homicide victim's statements should not be admissible if the party against whom the statements are to be used committed the homicide, at least in part, to prevent the victim's testimony. It would be folly to exclude such evidence, and yet admit into evidence in a homicide case hearsay statements of a witness (not the victim of the underlying crime) who the defendant threatened and scared into leaving the country.<sup>84</sup>

However, the court declined to rule on the admissibility of the statements, finding that a hearing was necessary to establish that the defendant had intended to make the victim unavailable as a witness.<sup>85</sup> The flaw in this logic is that there is a significant difference between a criminal defendant, who seeks to thwart the progress of the trial by keeping witnesses from coming to that trial, and the criminal defendant

79. See, e.g., *Gonzalez v. State*, 195 S.W.3d 114, 116–17, 124–26 (Tex. Crim. App. 2006) (finding forfeiture by wrongdoing doctrine appropriate where shooting victim described shooter to police officer responders and later died from wounds, on ground that defendant intended to “silence” victims).

80. Flanagan, *Reach*, *supra* note 64, at 544 (pointing out that in the twenty-five years before 2003, forfeiture by wrongdoing was only invoked in approximately seventy-five cases); *United States v. Carlson*, 547 F.2d 1346, 1358 (8th Cir. 1976) (finding no state or federal case directly applying forfeiture by wrongdoing doctrine in instance of witness intimidation).

81. See, e.g., *United States v. Garcia-Meza*, 403 F.3d 364 (6th Cir. 2005) (but whether defendant killed victim not in dispute); *United States v. Emery*, 186 F.3d 921 (8th Cir. 1999); *United States v. Cubie*, No. 05-CR-146, 2007 WL 3223299 (E.D. Wis. Oct. 26, 2007); *United States v. Natson*, 469 F. Supp. 2d 1243 (M.D. Ga. 2006); *United States v. Mayhew*, 380 F. Supp. 2d 961 (S.D. Ohio 2005); *State v. Meeks*, 88 P.3d 789 (Kan. 2004); *Gonzalez v. State*, 155 S.W.3d 603 (Tex. App. 2004); *People v. Moore*, 117 P.3d 1 (Colo. Ct. App. 2004); *State v. Jensen*, 727 N.W.2d 518 (Wis. 2007).

82. As others have noted, this rationale is not logical because the victim is never available to testify at the homicide trial. Polelle, *supra* note 11, at 310.

83. 469 F. Supp. 2d 1243 (M.D. Ga. 2006).

84. *Id.* at 1250–51.

85. *Id.* at 1252. The court noted that the rule “is not designed to provide an additional sanction for the homicide of someone who may have been a witness had they not been killed” and that to satisfy the exception's purpose of denying the defendant the benefit of “intentionally eliminating a witness” and “to deter parties from seeking to eliminate witnesses . . . there must be some connection between the party's motive and his elimination of the witness.” *Id.*

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being tried for killing an individual, whatever the motive.<sup>86</sup>

In *State v. Jensen*,<sup>87</sup> a highly-publicized<sup>88</sup> homicide case in which defendant stood trial for murdering his wife with antifreeze, the Supreme Court of Wisconsin likewise upheld the application of the forfeiture by wrongdoing doctrine to admit the deceased wife's hearsay statements.<sup>89</sup> A letter from Jensen's wife to detectives stating that the defendant was her probable killer in the event of her early demise was held to be testimonial.<sup>90</sup> The court adopted a broad construction of the forfeiture by wrongdoing doctrine, holding that intent to make the victim unavailable as a witness was not a necessary component of the doctrine, and remanded the case for a determination of whether Jensen "caused [his wife's] unavailability, thereby forfeiting his right to confrontation."<sup>91</sup> In its analysis, the Wisconsin Supreme Court was swayed by the reasoning of Professor Friedman and numerous courts that the defendant's motive was irrelevant to whether the defendant would "benefit through his own wrongdoing if such a witness's statements could not be used against him."<sup>92</sup>

But, not all courts accepted the proposition that the alleged homicide to prevent a witness from testifying in a proceeding should give rise to an adverse evidentiary ruling in a subsequent criminal prosecution for the alleged homicide. Those that rejected the reflexive application of

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86. In the wake of *Crawford*, forfeiture by wrongdoing also has been expanded to what this Article calls the hybrid case in which the defendant allegedly killed the victim during the commission of a crime, such as robbery, ostensibly so that there would be no witnesses to that crime. See e.g., *Gonzalez v. State*, 195 S.W.3d 114, 125 (Tex. Crim. App. 2006) (It is "logical [to infer that] appellant killed the Herreras because he wanted to steal their truck and their money, and he didn't want any witnesses to his crime—especially witnesses that knew him, and knew where to find him.").

87. 727 N.W.2d 518 (Wis. 2007).

88. The trial, including the victim's letter to detectives that was ultimately admitted under the forfeiture by wrongdoing exception, received national news coverage. See, e.g., *ABC Primetime Live* (ABC television broadcast July 3, 2008), transcript available at 2008 WLNR 12479020 (Westlaw); Carrie Antlfinger, *Wife: I 'Fear For My Early Demise'; Defense: Letter Was an Attempt to Frame*, CHI. TRIB., Jan. 8, 2008, at 4; *ABC 20/20* (ABC television broadcast Mar. 1, 2008), transcript available at 2008 WLNR 4218022 (Westlaw). During the 20/20 interview, Special Prosecutor Robert Jambois stated that prosecuting the case would be "very difficult without the letter coming in." *Id.*

89. *Jensen*, 727 N.W.2d at 535.

90. *Id.*

91. *Id.* at 521. On remand, the trial court found that the defendant had caused the witness to be unavailable and admitted the letter at trial. Carrie Antlfinger, *Jensen Convicted of Murder*, WIS. ST. J., Feb. 22, 2008 (First ed.), at B1, available at 2008 WLNR 3566541 (Westlaw). The defendant may receive a new trial as a consequence of the Supreme Court's decision in *Giles*, which held that intent to make the victim unavailable as a witness must be found before the right to confront is deemed forfeited. Tom Kertschner, *Mark Jensen May Get New Trial in Wife's Poisoning: U.S. Supreme Court Ruling May Bar Letter From Wife*, THE MILWAUKEE J. SENTINEL, June 26, 2008, available at 2008 WLNR 11972694 (Westlaw).

92. *Jensen*, 727 N.W.2d at 534.

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forfeiture by wrongdoing in homicide cases expressed concern about undermining the defendant's right to trial by jury—a subject given little, if any, insightful discussion in the majority of cases applying forfeiture by wrongdoing to victim hearsay in homicide cases.

In *United States v. Lentz*,<sup>93</sup> Judge Lee of the Eastern District of Virginia refused to apply Federal Rule of Evidence 804(b)(6) to admit the hearsay statements of the victim at her spouse's murder trial even though the victim would have been a witness against her husband in an unrelated divorce proceeding.<sup>94</sup> Notwithstanding the Rule's requirement that the defendant must have intended to prevent the victim from being a witness, the district court expressed concern that application of forfeiture by wrongdoing to admit “the testimony of a decedent victim for whose death a defendant is on trial” would trample the presumption of innocence and the defendant's right to a jury trial.<sup>95</sup> The court also noted the factual impossibility of finding the victim to be a witness within the meaning of Rule 804(b)(6), stating:

[T]he divorce proceeding [in which the victim was expected to be a witness] is not the proceeding that will be before this Court. Defendant is on trial for the kidnaping [sic] and murder of Doris Lentz. Ms. Lentz would not be testifying in this case if she were available because Defendant could not have been charged with such offense. Therefore, statements made by Ms. Lentz to others are inadmissible under the forfeiture by wrongdoing exception to the hearsay rule.<sup>96</sup>

Several other courts have declined to apply forfeiture by wrongdoing reflexively where the defendant disputed having killed the victim<sup>97</sup> or where there was no evidence that the homicide was motivated by the desire to prevent the victim from testifying.<sup>98</sup> Those courts cited similar

93. 282 F. Supp. 2d 399 (E.D. Va. 2002), *aff'd in part, rev'd in part on other grounds by* 383 F.3d 191 (4th Cir. 2004).

94. *Id.* at 426.

95. *Id.*

96. *Id.* at 426–27.

97. *People v. Gilmore*, No. 258334, 2006 WL 744268, at \*2 (Mich. Ct. App. Mar. 23, 2006) (“[T]o allow in the statement where the defendant denies doing the killing can only be done if the Court is willing to ignore the presumption of innocence and invade the province of the jury and make a preliminary finding of guilt. This we are unwilling to do. We are not willing to determine whether a defendant is entitled to a right guaranteed him by the Constitution based upon the trial judge's determination of a contested factual issue at trial.”).

98. *See, e.g., State v. Jordan*, No. Crim. 04-CR-229-B, 2005 WL 513501, at \*6 (D. Colo. Mar. 3, 2005) (declining to apply forfeiture by wrongdoing reflexively where there was no evidence that victim would have been a witness, but stating that the reflexive case where the victim would have been a witness to an unrelated proceeding is “archetypical”); *State v. Mason*, 162 P.3d 396, 412 (Wash. 2007) (Sanders, J., dissenting) (stating that application of reflexive forfeiture by wrongdoing violated defendant's presumption of innocence and invaded province of jury by “forcing the judge to decide Mason's guilt prior to his trial”); *People v. Maher*, 89 N.Y.2d 456, 462 (N.Y. 1997) (holding that

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concerns about the right to trial by jury.<sup>99</sup> One state, Ohio, has enacted a rule of evidence that bars the reflexive application of forfeiture by wrongdoing to admit homicide victim hearsay statements in the prosecution of that homicide.<sup>100</sup>

## IV. GILES V. CALIFORNIA

*Giles* presented the question of whether a criminal defendant forfeited the right to confront a witness when there was no evidence that the defendant acted with the intention of preventing the declarant from testifying.<sup>101</sup> The defendant, Dwayne Giles, stood trial for murdering his girlfriend, Brenda Avie. At trial, the government offered statements that Avie made to a police officer responding to a domestic violence incident.<sup>102</sup> The statements were admitted under a state rule of evidence rule that permitted the admission of an unavailable declarant's statements describing the "infliction or threat of physical injury on a declarant . . . [if the] statements are deemed trustworthy."<sup>103</sup> After Giles's conviction and during the pendency of his appeal, the Supreme Court decided *Crawford v. Washington*,<sup>104</sup> which required exclusion of testimonial statements such as Avie's unless the defendant had already had an opportunity to confront the witness.<sup>105</sup> The California Court of Appeal then held that admission of the victim's hearsay statements at Giles's trial did not violate the Confrontation Clause because *Crawford* recognized a doctrine of forfeiture by wrongdoing, and Giles had forfeited his right to confront Avie by murdering her, thereby making her unavailable to testify.<sup>106</sup> The California Supreme Court affirmed.<sup>107</sup>

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forfeiture by wrongdoing rule was inapplicable where there was no evidence that defendant intended to make the victim unavailable as a witness and the rule was "invoked against a defendant in the very trial in which the charge is murder of the unavailable witness").

99. *Jordan*, 2005 WL 513501, at \*6; *Mason*, 162 P.3d at 412; *Maher*, 89 N.Y.2d at 462.

100. OHIO R. EVID. 804(b)(6) (2001); OHIO R. EVID. 804(b)(6), 2001 STAFF NOTES (2001) ("[T]he rule does not apply to statements of the victim in a homicide prosecution concerning the homicide . . ."); *State v. McCarley*, No. 23607, 2008 WL 375842, at \*3 (Ohio App. Feb. 13, 2008) (finding trial court's admission of numerous victim hearsay statements to be error, but harmless, noting, "[i]t would be a very strange case indeed if a person murdered another for the purpose of preventing the other from testifying in their own murder trial").

101. *Giles v. California*, 554 U.S. 353, 354 (2008).

102. *Id.* at 354–55. The statements met the requirements of a California exception to the hearsay rule but implicated the Sixth Amendment Confrontation Clause because they fit *Crawford's* definition of testimonial statements.

103. *Id.* at 2682 (citing CAL. EVID. CODE ANN. § 1370 (West Supp. 2008)).

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

105. *Id.* at 61.

106. *California v. Giles*, 19 Cal. Rptr. 3d 843, 847 (Cal. Ct. App. 2004).

107. *People v. Giles*, 152 P.3d 433, 435 (Cal. 2008).

The United States Supreme Court granted certiorari and vacated the judgment, finding that more was required for forfeiture of the right to confront than a judicial finding that Giles intentionally killed the victim.<sup>108</sup> In a plurality opinion,<sup>109</sup> Justice Scalia wrote that forfeiture by wrongdoing could be applied in a case such as *Giles* if the trial court found that: (1) the defendant killed the victim and (2) at least one purpose for the killing was an intent to make the victim unavailable as a witness.<sup>110</sup> Justice Breyer's dissent, which was joined by Justice Stevens and Justice Kennedy, would have applied the forfeiture by wrongdoing doctrine more expansively, without requiring any proof of the defendant's purpose.<sup>111</sup>

Justice Scalia discussed the original purposes of forfeiture by wrongdoing: to remedy conduct that interfered with the ability to try a case and deter others from engaging in similar conduct.<sup>112</sup> The Court acknowledged the potential intersection between the forfeiture by wrongdoing doctrine and the right to a fair trial:

[t]he 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.<sup>113</sup>

In concluding that "purpose" or "intent" was required for the forfeiture of one's right to confront witnesses, the Court further noted that "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

108. *Giles v. California*, 554 U.S. 353, 377 (2008).

109. Justice Scalia authored the main opinion except for section II-D-2, which took issue with any version of forfeiture by wrongdoing that did not have a purpose requirement due to the risk of abridging the right to trial by jury. *Id.* at 373–74. Chief Justice Roberts and Justices Alito and Thomas filed separate opinions concurring with Justice Scalia's opinion in full. Justice Souter filed a separate opinion concurring in part (except to Part II-D-2), in which Justice Ginsberg joined, *id.* at 379–80; and Justice Breyer filed a dissenting opinion in which Justices Stevens and Kennedy joined, *id.* at 380–406.

110. *Id.* at 377.

111. *Id.* at 387–88 (Breyer, J., dissenting). Notwithstanding the Court's lack of unity on whether knowledge-based intent was sufficient to invoke forfeiture by wrongdoing, it appears that the majority of the Justices would permit purpose to be inferred in domestic violence cases. *Id.* at 375–76, 380 (Souter, J., and Ginsberg, J., concurring in part); *id.* at 384–85 (Breyer, J., Stevens, J., and Kennedy, J., dissenting); Ross, *supra* note 2, at 39.

112. "The common-law forfeiture rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them—in other words, it is grounded in 'the ability of courts to protect the integrity of their proceedings.'" *Id.* at 373 (plurality opinion) (quoting *Davis v. Washington*, 547 U.S. 813, 834 (2006)).

113. *Id.*

determined *by a jury*, and on the basis of evidence the Constitution deems reliable and admissible.”<sup>114</sup> Thus, although its holding focused on the right to confront witnesses, the Court implicitly recognized that forfeiture by wrongdoing also implicates the right to trial by jury. The plurality’s addition of the “purpose” requirement was an attempt to save the forfeiture by wrongdoing doctrine from violating both the Confrontation Clause and the right to trial by jury.

However, the rationale for the reflexive use of forfeiture by wrongdoing—that it is an “exception to ordinary practice” that is “needed to protect the integrity of court proceedings,” “based upon longstanding precedent,” and “much less expansive than the exception proposed by the dissent”—is unpersuasive.<sup>115</sup> The Court transformed the traditional intent requirement of forfeiture by wrongdoing, which was that the defendant acted with a purpose of preventing a witness from coming to court, to a motive for the homicide for which he is being prosecuted.<sup>116</sup> In other words, if a defendant is on trial for homicide and a motive for the homicide was to prevent the victim from testifying in some proceeding, intent can be found even if the defendant did not seek to hinder or prevent the homicide case from proceeding against him. By treating forfeiture by wrongdoing as a “preliminary evidentiary ruling,” the plurality sanctioned the very circularity that it claimed the forfeiture by wrongdoing rule was “intelligently fixed” to avoid:

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114. *Id.* at 374. Although inviting states to apply forfeiture by wrongdoing expansively to non-testimonial statements, the Court left open the question of whether admitting unreliable hearsay through the doctrine could violate due process. *See id.* at 376. *See also* Tim Donaldson, *Combating Victim/Witness Intimidation in Family Violence Cases: A Response to Critics of the “Forfeiture by Wrongdoing”*, *Confrontation Exception Resurrected by the Supreme Court in Crawford and Davis*, 44 *Id. L. Rev.* 643, 693–94 (2008) (discussing scholars’ concerns about the absence of a reliability requirement in Federal Rule of Evidence 804(b)(6)).

115. *Giles*, 554 U.S. at 373. Of note, however, neither of the first two justifications for the rule comport with the Court’s recitation of the purpose and history of the rule. First, when the defendant stands trial for homicide, the fact that he or she has killed the victim, if true, has no impact on the ability of the court to maintain the integrity of the trial process in that proceeding. Once the defendant is brought before the court and jury for the killing, the reason for the killing is irrelevant to the ability of the trial court to conduct the proceedings. In contrast, when a defendant standing trial for a crime prevents a witness from coming to court, the defendant *has* interfered with the court’s ability to conduct the trial. Second, the longstanding precedent cited by the Court reveals that historically, the rule was not used to admit victim statements in homicide trials, but was used when the defendant, on trial for one crime, committed a different crime or wrongful act in order to prevent or dissuade a witness from appearing at the trial. *Id.* at 359.

116. The purpose requirement has been interpreted by lower courts to include the defendant’s desire to keep the victim from testifying against someone other than the defendant in some other proceeding. *See, e.g.*, *Dednam v. Norris*, No. 5:06CV00076 WRW/BD, 2008 WL 4006997 (E.D. Ark. Aug. 25, 2008) (applying forfeiture by wrongdoing rule where defendant stood trial for murdering victim, and the court found that defendant committed the murder in order to prevent victim from testifying against defendant’s relative in unrelated armed robbery trial).

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We do not say, of course, that a judge can never be allowed to inquire into guilt of the charged offense in order to make a preliminary evidentiary ruling. That must sometimes be done under the forfeiture rule that we adopt—when, for example, the defendant is on trial for murdering a witness in order to prevent his testimony.<sup>117</sup>

The plurality must have been aware that adding a purpose element to the required judicial fact-finding did not adequately address the conundrum of reflexive application of forfeiture by wrongdoing. Indeed, Justice Breyer's dissent<sup>118</sup> argued that adding a "purpose" requirement was unnecessary, in part because "any forfeiture rule requires a judge to determine as a preliminary matter that the defendant's own wrongdoing caused the witness to be absent."<sup>119</sup>

The plurality's intent requirement does not reach non-testimonial victim hearsay, which might be admitted solely based upon a judicial finding of guilt before the jury has ever reached a verdict.<sup>120</sup> Because *Crawford* and *Giles* held that the Sixth Amendment right to confront reaches only testimonial statements, courts remain free to apply forfeiture by wrongdoing to find that a homicide defendant has forfeited his right to object to any non-testimonial hearsay evidence.<sup>121</sup> Thus, "[s]tatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules," and as to such non-testimonial hearsay, states "are free to adopt the dissent's version of forfeiture by wrongdoing."<sup>122</sup> *Giles* thus supports the following legal propositions: (1) if a statement is testimonial, then a court may find that the defendant has forfeited his right to object under the Confrontation Clause if the court determines that the defendant committed the killing and that *one* purpose for the killing was to silence the victim as a potential witness; and (2) if a statement is non-testimonial hearsay, a state court may find that the defendant forfeited any hearsay objection if the court determines that the defendant committed the killing.<sup>123</sup> The Court suggested that

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117. *Giles*, 554 U.S. at 374 n.6.

118. Justice Breyer was joined by Justices Stevens and Kennedy. *Id.* at 380 (Breyer, J., dissenting).

119. *Id.* at 403.

120. *Id.* at 376–77 (plurality opinion).

121. In *State v. Fallentine*, 215 P.3d 945, 947 (Wash. Ct. App. 2000), the Washington Court of Appeals discussed the state's expansive application of forfeiture by wrongdoing to non-testimonial statements and the more restrictive requirements imposed by *Giles* on testimonial statements.

122. *Giles*, 554 U.S. at 376.

123. Federal courts are constrained by the plain language of Federal Rule of Evidence 804(b)(6), which requires a finding that the defendant procured the unavailability of the witness with the intention of preventing the witness from testifying.

states may admit non-testimonial statements through reflexive application of forfeiture by wrongdoing without regard to the unreliability of those statements.<sup>124</sup>

The *Giles* decision has been attacked on one hand as a boon to batterers<sup>125</sup> and hailed on the other as leaving “plenty . . . to boost the hopes among prosecutors and domestic violence advocates about the way the decision will be applied in future cases.”<sup>126</sup> In the aftermath of *Giles*, some state courts have been receptive toward an expanded homicide exception to the rule against hearsay.<sup>127</sup> Others have permitted “intent” to be inferred from evidence of a pattern of domestic violence that culminated in the murder or from the fact that the defendant had been charged with domestic violence before the murder occurred.<sup>128</sup>

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124. The federal rule contains an express intent requirement. FED. R. EVID. 804(b)(6). Application of forfeiture by wrongdoing to admit otherwise inadmissible, nontestimonial statements does not follow from the doctrine’s roots as a means of preventing misuse of the right to confront. Bocchino & Sonenshein, *supra* note 39, at 61 (“To the extent that the common law Forfeiture by Wrongdoing hearsay exception and its codified exception in Rule 804(b)(6) are rationalized as merely an analogue to the forfeiture by wrongdoing doctrine excusing Confrontation, such analogy is misplaced. Given the differences between the functions of the Confrontation Clause and the hearsay rule, and the fact that the Confrontation Clause no longer applies to ‘non-testimonial’ hearsay, it makes little sense to argue that forfeiture of the Constitutional right to confront a witness by the criminal defendant through cross-examination somehow requires equivalent forfeiture of the reliability and trustworthiness requirements of an hearsay exception regarding non-testimonial hearsay.”).

125. Lininger, *The Sound of Silence*, *supra* note 5, at 862.

126. Ross, *supra* note 2, at 34.

127. *Roberts v. State*, 894 N.E.2d 1018, 1025–26 (Ind. Ct. App. 2008) (holding that a party who has rendered a witness unavailable for cross-examination through a criminal act, including homicide, may not object to the admission of non-testimonial hearsay as inadmissible under the Indiana Rules of Evidence, but leaving for “another day” proof of wrongdoing required when defendant disputes killing victim); *Proffit v. State*, 191 P.3d 963, 967 (Wyo. 2008) (noting that defendant tried for conspiracy to commit murder of sexual assault victim having affirmed based on *Giles* that defendant forfeited Confrontation Clause right, Wyoming Supreme Court considered “whether, given application of the forfeiture by wrongdoing doctrine, it was also necessary for the State to satisfy a hearsay exception to have B.C.’s statement admitted” and concluded, “We think not”).

128. *See, e.g., State v. MacLaughlin*, 265 S.W.3d 257, 272–73 (Mo. 2008) (en banc) (noting that victim’s hearsay statements that since their breakup, defendant had stalked her, made threats, and was abusive, coupled with charge that defendant had burglarized victim’s home, provided sufficient grounds to support trial court finding that defendant intended to make the victim unavailable as a witness); *People v. Banos*, 100 Cal. Rptr. 3d 476, 492 (Cal. Ct. App. 2010) (finding it “reasonable” to infer intent from: (1) 911 call victim had made ten months before murder, during which defendant asked whether victim wanted “to speak to the police” and repeatedly asked victim whether she was going to talk, and (2) multiple later violations of a restraining order).



V. JUDICIAL FACT-FINDING FOR FORFEITURE IN HOMICIDE CASES:  
UNDERMINING JURIES?

Application of the forfeiture by wrongdoing doctrine in homicide cases to admit the homicide victim's hearsay against the defendant affects the jury verdict by altering the standard of proof. It does this by admitting evidence that would not be admissible if the court did not first determine, at a minimum, that the defendant is guilty as charged. *Gaudin* suggests that the context in which one considers the judge-jury allocation is important and that preliminary evidentiary admissibility are appropriately allocated to the courts. However, if forfeiture by wrongdoing is not properly characterized as merely a preliminary question of evidentiary admissibility, but is more properly considered to be a sanction, then the constitutional soundness of allocating the required fact-finding to the court has received insufficient consideration and is not adequately supported by *Giles*.

## A. Not a Question of Evidentiary Admissibility

When considering whether the judge/jury fact-finding allocation passes constitutional muster, Justice Scalia, in *Gaudin*, distinguished preliminary questions of evidentiary admissibility from elements of the criminal offense for purposes of constitutional analysis.<sup>129</sup> Thus, "every essential ingredient of the crime must be proven to the satisfaction of the jury beyond a reasonable doubt."<sup>130</sup> The Court recognized that juries act as more than "mere factfinder[s]."<sup>131</sup> Accordingly, devices, such as statutory inferences and presumptions, do not pass constitutional muster if they "undermine the factfinder's responsibility at trial."<sup>132</sup>

Thus, if reflexive application of forfeiture by wrongdoing is viewed as a preliminary evidentiary ruling, allocation of the fact-finding to the judge appears to comport with the holding in *Gaudin* because the judge's finding that the defendant killed the victim looks akin to a judge's determination of probable cause in the context of a suppression hearing. But, if the reflexive application of forfeiture by wrongdoing is considered as a sanction designed to deter and punish conduct that is inimical to the judicial system, it seems reasonable to ask whether that sanction operates as a device that undermines the defendant's

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129. *United States v. Gaudin*, 515 U.S. 506, 520–21 (1995).

130. *Id.* at 519 (quoting Brief for Appellant in *Sinclair v. United States*, 279 U.S. 26, 277 (1929), O.T. 1928, No. 555, at p. 109, (argument for appellant)).

131. *Id.* at 514.

132. *Id.* at 514–15 (quoting *Court of Ulster v. Allen*, 442 U.S. 140, 156 (1979)).

constitutional right to have a jury determine every element of the crime charged beyond a reasonable doubt.

Long before *Giles* was decided, Professor Friedman argued that because the reflexive application of the doctrine invoked a preliminary question of evidentiary admissibility, the identity between the factual evidentiary predicate to be decided by the judge and the factual elements of the crime of homicide should not be troubling.<sup>133</sup> This reasoning has been adopted by subsequent court decisions as a justification for the reflexive application of the doctrine.<sup>134</sup> When deciding preliminary questions of evidentiary admissibility, courts are engaging in fact-finding for a different purpose than juries, and courts adhere to a different standard of proof.<sup>135</sup> Application of the forfeiture rule in homicide cases is thus said to be analogous to the admissibility determination of a court when deciding whether to admit the statements of a coconspirator under the coconspirator admission exception to the rule against hearsay.<sup>136</sup> It also has been said that there is no risk that the jury will be infected by the judge's fact-finding because the judge is not announcing to the jury that he made such a fact-finding, so the jury is still free to reach its own conclusion about the defendant's guilt or innocence.<sup>137</sup> None of these justifications for the reflexive application of the doctrine supports the conclusion that doing so does not undermine the defendant's right to have the jury determine every element of the crime charged by the beyond a reasonable doubt standard.

First, that a judge decides facts for the purpose of sanctioning the defendant with the admission of evidence, while the jury decides facts for the purpose of rendering a verdict, does not ensure that reflexive forfeiture by wrongdoing is constitutionally sound. As Justice Scalia pointedly noted in *Gaudin*, context is an important consideration. The context of judge/jury fact allocations led the Court to declare sentencing schemes to be a violation of the right to trial by jury when the judge decided facts for purposes of sentencing a defendant to a term of

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133. Friedman, *Chutzpa*, *supra* note 2, at 522.

134. *United States v. Mayhew*, 380 F. Supp. 2d 961, 968 (S.D. Ohio 2005); *State v. Jensen*, 727 N.W.2d 518, 533–34 (Wis. 2007); *People v. Baca*, No. E032929, 2004 WL 2750083, at \*11 (Cal. Ct. App. Dec. 2, 2004).

135. Richard D. Friedman, Am. Bar. Assoc., *Does an Accused Forfeit the Confrontation Right by Murdering a Witness, Absent a Purpose to Render Her Unavailable?*, 35 PREVIEW OF THE U.S. SUPREME COURT CASES 364 (2008), available at [http://www.abanet.org/publiced/preview/ABA\\_Preview7\\_2008.pdf](http://www.abanet.org/publiced/preview/ABA_Preview7_2008.pdf).

136. *Mayhew*, 380 F. Supp. 2d at 968; *Jensen*, 727 N.W.2d at 535–36.

137. Friedman, *Chutzpa*, *supra* note 2, at 523; *Mayhew*, 380 F. Supp. 2d at 968 (noting that "jury's ignorance of the court's threshold evidentiary determination" supports the court's application of forfeiture by wrongdoing to admit murder victim's statements against defendant alleged to have committed murder).

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confinement outside the statutory maximum—a purpose that is different from the jury’s function.<sup>138</sup> In *United States v. Booker*,<sup>139</sup> the Supreme Court reaffirmed its prior holding in *Apprendi v. New Jersey*<sup>140</sup> that

Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.<sup>141</sup>

Difference of purpose then cannot be an entirely satisfactory ground for finding that the reflexive application of forfeiture by wrongdoing does not undermine the right to trial by jury. Had it been, the Supreme Court would have had ample ground to uphold the power of the courts to decide facts for the purpose of sentencing defendants.<sup>142</sup> The context of the fact allocation, therefore, seems to be an important consideration when evaluating its constitutionality.

The context in which forfeiture by wrongdoing is applied suggests that comparisons with questions of evidentiary admissibility are misplaced when assessing the extent to which the judge/jury allocation undermines constitutional principles. The required fact-findings for forfeiture by wrongdoing are unlike any hearsay exception. All hearsay exceptions focus on the nature and circumstances under which the statements were made, as a proxy for reliability or trustworthiness.<sup>143</sup> Even the coconspirator admission exception to the hearsay rule,<sup>144</sup> which is frequently cited to support the proposition that reflexive application of forfeiture by wrongdoing does not create constitutional

138. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

139. *United States v. Booker*, 543 U.S. 220 (2005).

140. 530 U.S. 466 (2000).

141. *Booker*, 543 U.S. at 244 (quoting *Apprendi*, 530 U.S. 466).

142. Murphy, *supra* note 15, at 981–82 (forecasting *Apprendi* and *Booker* by arguing that Sixth Amendment should not be susceptible to manipulation through legislatively converting elements of offense into sentencing factors).

143. *See, e.g.*, FED. R. EVID. 804(b)(2) (dying declarations); 804(b)(3) (statement against interest); 804(b)(4) (statement of personal or family history); 803(2) (excited utterance); 803(4) (statements for purposes of medical diagnosis or treatment); 803(3) (then-existing mental, emotional, or physical condition). *See also* Bocchino & Sonenshein, *supra* note 39, at 51 (“Unlike all other hearsay exceptions, the Forfeiture by Wrongdoing exception is not based on trustworthiness, but rather a combination of deterrence, punishment and equity, and is more fairly described as a sanction for such conduct. Unlike the other Rule 804(b) exceptions to the hearsay rule, there are no requirements in Rule 804(b)(6) for circumstantial indicia of reliability for the statements involved.”); Murphy, *supra* note 15, at 976–77 (noting that allocation of evidentiary or pretrial matters to judges finds support in the purposes of enhancing the reliability of evidence or shielding the fact-finder from evidence that is unconstitutionally obtained).

144. FED. R. EVID. 801(d)(2)(E) (1997). Strictly speaking, coconspirator admissions are exempt from the definition of hearsay altogether but are commonly referred to as an exception to the hearsay rule.

concerns,<sup>145</sup> rests on the competence of the evidence sought to be admitted: Was the statement made by a coconspirator during the course of and in furtherance of a conspiracy?<sup>146</sup> Moreover, in contrast to the rationale underlying forfeiture by wrongdoing, judicial allocation of the coconspirator exception *protects* the potentially innocent defendant from the jury's unnecessary exposure to highly prejudicial evidence, making it a less than apt comparison.<sup>147</sup> Forfeiture by wrongdoing differs from coconspirator admissions on both of these counts. The judicial fact-finding operates to prejudice the defendant, not protect him. And, more importantly, the doctrine's application does not turn on preliminary questions of evidentiary admissibility—such as whether a confession is inadmissible because it was coerced;<sup>148</sup> whether a statement qualifies as

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145. See, e.g., *United States v. Houlihan*, 92 F.3d 1271, 1280–81 (1st Cir. 1996); *United States v. White*, 116 F.3d 903, 912 (D.C. Cir. 1997); *United States v. Mayhew*, 380 F. Supp. 2d 961, 968 (S.D. Ohio 2005); *Commonwealth v. Edwards*, 830 N.E.2d 158, 173 (Mass. 2005) (“functionally equivalent”); *People v. Baca*, No. E032929, 2004 WL 2750083, at \*11 (Cal. Ct. App. Dec. 2, 2004) (“[T]he procedures for addressing forfeiture by wrongdoing were drawn from the coconspirator hearsay exception . . .”).

146. FED. R. EVID. 801(d)(2)(E) provides, in relevant part, that a statement is not hearsay if it is offered against a party and is:

a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish . . . the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered . . . .

See also *Bourjailly v. United States*, 485 U.S. 681 (1988); Christopher B. Mueller, *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 HOFSTRA L. REV. 323, 387–88 (1984). Although the judge decides the same factual predicate when it determines whether a statement meets the coconspirator exception, the judge is engaging in an evidentiary competence analysis. Of course, as with reflexive application of forfeiture by wrongdoing, it is troubling that the judge's fact-finding controls the jury's fact-finding on the same question. *Id.* But the fact-finding being made is contextually quite different and the reason for its allocation to the court is theoretically to benefit the defendant, which is quite unlike the reason for judicial allocation of the factual predicate for forfeiture by wrongdoing. See *infra* note 147.

147. David E. Seidelson, *The Federal Rules of Evidence: A Few Surprises*, 12 HOFSTRA L. REV. 453, 457 (1984); Stephen A. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271, 283 n.38 (1975) (“[T]he judge is making the preliminary determination for a reason, and often the reason is to protect the jury from evidence likely to be misused. The defendant's protection in such cases rests with the judge. Even where the rationale for the rule of competency is not at all related to enhancing the reliability of the jury verdict, once it is recognized that a preliminary fact question is also an element of a criminal charge, it is difficult to argue that a conviction should stand where a trained judge finds a reasonable doubt as to an element of the crime.”). The congruency of the judicial fact-finding with the jury fact-finding that can arise under the coconspirator exception provoked considerable unease in the courts before the Supreme Court's decision in *Bourjailly*, with six circuit courts taking the view that the fact-finding must be allocated to the jury. *United States v. Honneus*, 508 F.2d 566, 577 (1st Cir. 1974); *United States v. Appolo*, 476 F.2d 156 (5th Cir. 1973); *United States v. Hoffa*, 349 F.2d 20 (6th Cir. 1965); *United States v. Santos*, 385 F.2d 43 (7th Cir. 1967); *United States v. Sanders*, 463 F.2d 1086 (8th Cir. 1972); *United States v. Pennett*, 496 F.2d 293 (10th Cir. 1974).

148. See, e.g., *Arizona v. Fulminante*, 499 U.S. 279, 287–88 (1991) (applying harmless error standard to coerced confession).

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a dying declaration,<sup>149</sup> excited utterance,<sup>150</sup> or record of regularly conducted activity;<sup>151</sup> whether evidence is inadmissible because seized in violation of the Fourth Amendment;<sup>152</sup> and whether evidence is relevant<sup>153</sup> or if its probative value is substantially outweighed by the danger of unfair prejudice—which all focus on the competence of evidence.<sup>154</sup> Instead, forfeiture by wrongdoing is concerned with punishing and discouraging egregious conduct.

Numerous authorities agree that forfeiture by wrongdoing is appropriately characterized as a sanction for wrongful conduct derived from equitable principles.<sup>155</sup> In its ordinary application (i.e., when it is not applied reflexively), the sanction is considered necessary to partially remedy the harm caused to the state's ability to prosecute the case.<sup>156</sup> The alleged wrongful conduct—i.e., making a witness unavailable at trial—is penalized by the loss of hearsay and confrontation right objections to the admission of evidence. But, it could just as easily be any other penalty that accomplished the desired remedial and

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

150. FED. R. EVID. 803(2).

151. FED. R. EVID. 803(6).

152. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 654 (1961) (evidence seized in violation of the Fourth Amendment is inadmissible in state courts).

153. FED. R. EVID. 402.

154. FED. R. EVID. 403.

155. Joan Comporet-Cassani, *Crawford and the Forfeiture By Wrongdoing Doctrine*, 42 SAN DIEGO L. REV. 118, 1212 (2005) (noting that forfeiture by wrongdoing is an “equitable punishment”); Bocchino & Sonenshein, *supra* note 39, at 51 (stating that forfeiture is grounded in “a combination of deterrence, punishment and equity, and is more fairly described as a sanction”); Lininger, *The Sound of Silence*, *supra* note 5, at 896 (describing forfeiture by wrongdoing as “[t]he sanction for witness tampering”); Ralph Ruebner & Eugene Goryunov, *Giles v. California: Sixth Amendment Confrontation Right, Forfeiture By Wrongdoing, and A Misguided Departure From The Common Law and The Constitution*, 40 U. TOL. L. REV. 577, 586–88 (2009) (refuting arguments that forfeiture by wrongdoing is a “waiver” rather than a true “forfeiture” and stating that “forfeiting of confrontation rights is the price that the accused pays as a penalty for having caused the unavailability of the out-of-court declarant’s live testimony through his or her wrongful conduct”) (emphasis added); *People v. Geraci*, 649 N.E.2d 817, 821 (N.Y. 1995) (finding that rather than being a waiver, the doctrine is “more realistically described as a forfeiture dictated by sound public policy”). *But see* James F. Flanagan, *Foreshadowing The Future of Forfeiture/Estoppel By Wrongdoing: Davis v. Washington and The Necessity of The Defendant’s Intent to Intimidate The Witness*, 15 J.L. & POL’Y 863, 867–68 (2007) (describing rule as an “estoppels” to avoid “label” that implies “automatic and unintentional loss of the right to confrontation” or assumes the conclusion that defendant waives the right to confront through “actions against the witness”). In the author’s view, the rule operates as a forfeiture rather than a waiver, in that the defendant has not acquiesced in the loss of his rights or voluntarily relinquished them. See Flanagan, *Reach*, *supra* note 64, at 473–74 (citing Peter Westen, *A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1214 (1977)) (arguing that defendant has not voluntarily relinquished rights and that the rule “occurs by operation of law, regardless of the state of mind of the defendant,” thus making forfeiture a more appropriate rationale).

156. Flanagan, *Reach*, *supra* note 64, at 474–75.

prophylactic goals.<sup>157</sup>

Thus, in *Illinois v. Allen*, the Court observed that a defendant could be stripped of his Confrontation Clause right to remain in the courtroom and personally confront the witnesses against him as a penalty for behavior that was so disruptive as to obstruct trial proceedings.<sup>158</sup> Similarly, the California Court of Appeal in *People v. Pearson*, applied forfeiture by wrongdoing to a defendant's claim of double jeopardy.<sup>159</sup> In *Pearson*, the defendant was tried for assault with special circumstances (using a deadly weapon), stalking, and threatening the victim, but because the victim refused to appear to testify on behalf of the prosecution, the stalking and threatening counts were dismissed.<sup>160</sup> Shortly thereafter, defense counsel advised the court that the defendant had been in touch with the victim, who wished to appear to testify on the defendant's behalf on the other charges.<sup>161</sup> The trial court reinstated the dismissed counts and permitted the prosecution to reopen its case.<sup>162</sup> After the victim testified, the defendant was found guilty of assault, but was acquitted of stalking and making criminal threats.<sup>163</sup>

On appeal, the defendant argued that the trial court erred by reinstating the stalking and criminal threat counts of the indictment on the ground that it constituted double jeopardy.<sup>164</sup> The California Court of Appeal held that

a defendant is estopped from seeking refuge under the jeopardy umbrella where he has procured an 1118.1 [the relevant California code making the dismissal of charges final] judgment by designed wrongdoing. Even from the cold record it is apparent that appellant prevented or dissuaded a witness . . . and/or conspired with [the victim] to obstruct justice.<sup>165</sup>

In reaching that holding, the court cited *Reynolds*<sup>166</sup> and *Giles*<sup>167</sup> to support the conclusion that "there is no logical reason why the forfeiture concept should not be applicable here. The presenting situation . . . is equally, if not more, egregious and cries out for an estoppel."<sup>168</sup> The

157. James F. Flanagan, *In Defense of Giles – A Response to Professor Lininger*, 87 TEX. L. REV. 67, 72 (2009).

158. *Illinois v. Allen*, 397 U.S. 337, 342–43 (1970).

159. 81 Cal. Rptr. 3d 234, 238–39 (Cal. Ct. App. 2008).

160. *Id.* at 237.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 239.

166. *Reynolds v. United States*, 98 U.S. 145, 158–61 (1878).

167. *Giles v. California*, 554 U.S. 353 (2008).

168. *Pearson*, 81 Cal. Rptr. 3d at 239.

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court relied on the doctrine's purpose of—"removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill witnesses against them—in other words, it is grounded in 'the ability of courts to protect the integrity of their proceedings'"<sup>169</sup>—to support reinstatement of the dismissed counts under the unusual factual circumstances.

The context of forfeiture by wrongdoing thus suggests that it is more closely analogous to discovery sanctions than to preliminary questions of evidentiary admissibility. A duty to preserve evidence arises when a party reasonably should know that the evidence may be relevant to probable or anticipated litigation, even before a lawsuit arises.<sup>170</sup> Failure to observe that duty to preserve may properly be viewed as an interference with the conduct of trial, and the judge may appropriately employ his "inherent power to control the judicial process and litigation"<sup>171</sup> to sanction the failure as a means of "leveling the playing field."<sup>172</sup> The sanction may include permitting the jury to draw an adverse inference from the absent evidence<sup>173</sup> or even result in the "death" of the party's claims or defenses.<sup>174</sup>

Moreover, Federal Rule of Evidence 804(b)(6), the leading codification of the common law rule, does little to answer the question of whether forfeiture by wrongdoing should be properly characterized as a preliminary question of evidentiary admissibility for the purpose of evaluating the constitutionality of the judge/jury fact-finding allocation. The cases cited by the Advisory Committee in support of Rule 804(b)(6) uniformly applied forfeiture by wrongdoing as a sanction for conduct interfering with the conduct of the judge's proceedings, but did not apply the Rule reflexively.<sup>175</sup> The history of the doctrine before the

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169. *Id.* (quoting *Giles*, 554 U.S. at 374).

170. *See Asian Jade Soc'y of N.Y. & N.J. Inc. v. Port Auth.*, 601 F. Supp. 2d 566 (S.D.N.Y. 2009).

171. *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001).

172. *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995).

173. *See Mosaid Tech. Inc. v. Samsung Elec. Ltd.*, 348 F. Supp. 2d 332, 338 (D.N.J. 2004) (discussing "spoliation inference" sanction).

174. *See, e.g., Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 945 (11th Cir. 2005) (holding that dismissal was warranted where plaintiff sold vehicle for salvage without notice to defendant despite defendant's request to examine vehicle).

175. *United States v. Mastrangelo*, 693 F.2d 269, 273 (2nd Cir. 1982) (applying doctrine where key prosecution witness was murdered on third day of defendant's trial on drug charges); *United States v. Aguiar*, 975 F.2d 45, 47 (2nd Cir. 1992) (witness withdrew from plea agreement requiring cooperation with government prosecution of defendant after receiving threatening letters from defendant); *United States v. Potamitis*, 739 F.2d 784, 789 (2nd Cir. 1984) (witnesses in conspiracy case); *Steele v. Taylor*, 684 F.2d 1193 (6th Cir. 1982) (murder-by-hire defendant found to have caused witness to refuse to testify); *United State v. Carlson*, 547 F.2d 1346, 1358–59 (8th Cir. 1976); *United States v. Thevis*, 665 F.2d 616, 631 (5th Cir. 1982) (affirming district court's admission of murdered witness's grand jury testimony as substantive evidence on RICO charges that were already pending).

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Federal Rules of Evidence were enacted supports its characterization as a rule of equity designed to remove any supposed benefit that the defendant might achieve by witness tampering.<sup>176</sup>

Consequently, any comparison drawn between preliminary questions of evidentiary admissibility, which *Gaudin* recognized are properly allocated to the judge, and forfeiture by wrongdoing seem misplaced. When applied reflexively, it is a penalty placed on a defendant for allegedly committing a crime that he has not yet been convicted of committing, with the penalty being the admission of evidence that the government believes will increase the likelihood of conviction. The context suggests that the judge's fact-finding is very closely intertwined with the jury's fact-finding and, perhaps more troubling, is expressly designed to determine whether the defendant committed the crime he is charged with committing.

Adding a requirement that the court *also* find a purpose to keep the victim from being a *witness*—which the *Giles* Court held is constitutionally required only when the government seeks to admit testimonial statements—does not alter the basic dilemma presented by the trial court's use of forfeiture to sanction the conduct being charged through the admission of otherwise inadmissible evidence.<sup>177</sup> First, *Gaudin* instructs that the criminal defendant is entitled to have every element decided by the jury.<sup>178</sup> If the jury does not decide each element by the beyond a reasonable doubt standard, the defendant has not been afforded the full extent of his rights under the Fifth and Sixth Amendments.<sup>179</sup> The purpose requirement does not address the question of whether the required judicial fact-finding on an element of the crime charged changes the burden of proof regarding that same element. Thus,

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before the murder of the witness; indictment was amended to add charge of violating the witness's civil rights but the witness's grand jury testimony was not offered in support of that charge of the indictment). None of these cases involved the reflexive application of forfeiture by wrongdoing. *Thevis* suggests the great care that was sometimes taken by courts to avoid reflexive application. *Thevis*, 665 F.2d at 627–28. The witness was murdered after testifying before the grand jury and after the grand jury issued the RICO indictment. *Id.* The government then obtained a second indictment adding a charge of violating the witness's civil rights. *Id.* At trial, the government asserted that the grand jury testimony should be admitted as evidence supporting the RICO claims under the forfeiture by wrongdoing doctrine, but did not assert that the evidence should be considered in support of the civil rights claim. *Id.* at 627. The court permitted the government to present evidence of the civil rights claim first, then, after that evidence had been presented to the jury, the court applied the forfeiture by wrongdoing doctrine to admit the grand jury testimony in support of only the RICO charges. *Id.* at 628.

176. *Reynolds v. United States*, 98 U.S. 145, 146 (1878).

177. In *Apprendi v. New Jersey*, the Supreme Court noted that intent or motive for a crime is “more often than not the *sine qua non* of a violation of criminal law.” *Apprendi v. New Jersey*, 530 U.S. 466, 493 n.18 (2000).

178. *United States v. Gaudin*, 515 U.S. 506, 511–12, 522–23 (1995).

179. *Id.*



while adding a purpose requirement may avoid question-begging, it does not address the potential conflict with *Gaudin*'s holding and reasoning.

Second, when applying forfeiture by wrongdoing reflexively in a homicide case, the purpose inquiry does not protect the integrity of the homicide trial's proceedings. Where a defendant prevents a witness who would be expected to testify against him at trial from appearing, forfeiture operates to preserve the integrity of the judicial process.<sup>180</sup> But when that defendant is brought before the court for allegedly murdering a victim who might have testified at some future or other proceeding or might have cooperated with the police about another crime, the defendant has not thwarted or in any way interfered with the murder trial.<sup>181</sup> Regardless of the defendant's motive for killing a victim, her conduct has not achieved the goal that purportedly supports the application of forfeiture by wrongdoing—she has not “thwarted the normal operation of the criminal justice system by virtue of the wrongful act.”<sup>182</sup> Because the rule is not being applied to preserve the integrity of the trial itself, it seems incongruous to assert that the purpose fact-finding relates to a legitimate equitable interest in protecting the integrity of the trial proceedings.

A hypothetical demonstrates this incongruity. Assume that Davis kills his spouse to prevent her testimony at a divorce proceeding, and then is hailed before the court for her homicide. In the divorce proceeding, the unavailability of his spouse creates a benefit to Davis and also represents an interference with that proceeding. In the homicide proceeding, the unavailability of Davis's spouse does not alter the ordinary availability of witnesses and cannot be said to interfere with the homicide trial.<sup>183</sup> The purpose of killing the victim does not relate to the equitable interest in having the homicide trial proceed without improper or illegal interference. Thus, the Supreme Court's addition of purpose to the required fact-finding does not provide a principled basis to conclude that the homicide defendant's Fifth and Sixth Amendments are adequately protected.

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180. Camparet-Cassani, *supra* note 155, at 1196 (Forfeiture “partially offsets the perpetrator's rewards for his misconduct.”).

181. *See id.* at 1192.

182. *Id.* at 1207.

183. Indeed, if Davis's spouse was alive, his homicide trial could not proceed—there could be no more effective means of interfering with the homicide trial than to produce the victim alive.

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*B. Allocation to the Judge: Undermining the Jury?*

The context of forfeiture by wrongdoing demonstrates that it should not be deemed a question of evidentiary admissibility for the purpose of assessing the judge/jury fact-finding allocation. Therefore, closer scrutiny should be given to the effect of judicial allocation of the required fact-findings on the defendant's right to have every element of the criminal charges decided by the jury by the beyond a reasonable doubt standard.<sup>184</sup> If courts remove the right to confront witnesses, as well as the right to make hearsay objections, on the basis of a judicial finding that the defendant committed the homicide and had a purpose of preventing the victim from being a witness or cooperating with authorities, or admit non-testimonial hearsay on the basis of the judicial determination that the defendant killed the victim, then there is a significant risk that an erroneous fact-finding will interfere with the jury's determination of whether the defendant committed the homicide. The judicial fact-finding affects the jury both in its fact-finding role and its role of evaluating the credibility of witnesses,<sup>185</sup> and indeed, is calculated to affect the trial's outcome.<sup>186</sup>

## 1. Complete Circularity

In *Giles*, the Court acknowledged that "a prior *judicial* assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury."<sup>187</sup> Adding the requirement that a purpose of the killing be to prevent the victim from being a witness—a fact-finding thought to be different from the one engaged in by the jury—was described as a means of avoiding the problem of complete circularity between judicial and

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184. When a judge admits evidence based in part on her view that the defendant committed the act of homicide as charged, the effect is to reduce the jury's discretionary power by treating that defendant differently than other homicide defendants. The jury's acquittal power is designed to allow juries to "protect the defendant's liberty, not to threaten it." Rachel Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 49 n.63 (2003).

185. The circularity is particularly troublesome given the differences between judge and jury; judges may view evidence through an institutional bias that could affect the fact-finding process. *See id.* at 72 ("[B]ecause the judge is a repeat player, she might be more inclined to favor the government's view of the facts as the government also is a repeat player in the criminal justice process.").

186. The position that forfeiture by wrongdoing has as its primary purpose the elimination of the benefit that the defendant would have achieved by the killing does not support reflexive application of forfeiture by wrongdoing. First, the victim of a homicide could never testify at the homicide trial; there is no difference between the availability of a victim killed in a random act of violence and the victim killed because the victim is a threatened witness to some other proceeding. Thus, only the punitive and deterrent purposes of the doctrine are served when it is applied reflexively in the homicide case.

187. *Giles v. California*, 554 U.S. 353, 375 (2008). Part II-D-2 of the Court's opinion found support only from Justices Roberts, Thomas and Alito.

jury decision-making.<sup>188</sup> The addition of purpose does not solve the circularity problem identified by the Supreme Court. First, it does not always remove the complete circularity that “does not sit well with the right to trial by jury.”<sup>189</sup> Even in those cases where complete circularity does not exist, *Gaudin*’s requirement that “every element” be submitted to the jury casts some doubt on the legitimacy of solving the circularity problem by requiring additional fact-finding.

In those jurisdictions that provide enhancements for murders intended to prevent a witness from testifying, the purpose element of forfeiture by wrongdoing merely cements complete unity with the elements of the charges against the defendant.<sup>190</sup> Following *Giles*, at least one state supreme court has found that the jury’s verdict finding the defendant guilty of the aggravating circumstances established the correctness of the trial court’s fact findings for purposes of applying forfeiture by wrongdoing reflexively,<sup>191</sup> aptly demonstrating the complete circularity that the *Giles* plurality sought to avoid by requiring that a purpose of the homicide be to prevent the victim from being a witness. In other words, the *mens rea* that equity is said to demand may be the same *mens rea* that the jury will consider as an element of one or more of the charges. In cases where this complete circularity exists, allocation of the forfeiture by wrongdoing fact-findings to the judge creates a very real risk that if the judge’s fact-findings are erroneous, the jury’s fact-findings will have been infected by that error. Allowing the judge to pre-judge the defendant’s guilt using the preponderance standard creates a risk that different courts could reach different outcomes. In one case, the defendant will be allowed to make his Sixth Amendment and hearsay objections while in another he will be stripped of them. There is a significant risk that the defendant stripped of his rights will be convicted where if these rights were retained, he may not have been convicted.

Moreover, requiring a finding of purpose does not eliminate the complete unity between the judicial fact-finding that the defendant

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188. *Id.* at 353. *See also id.* at 378 (Souter, J., concurring) (“The only thing saving admissibility and liability determinations from question begging would be (in a jury case) the distinct functions of judge and jury: judges would find by a preponderance of evidence that the defendant killed (and so would admit the testimonial statement), while the jury could so find only on proof beyond a reasonable doubt. Equity demands something more than this near circularity before the right to confrontation is forfeited, and more is supplied by showing intent to prevent the witness from testifying.”).

189. *Id.* at 353.

190. *See, e.g., State v. Fry*, 926 N.E.2d 1239, 1262 (Ohio 2010) (holding that forfeiture by wrongdoing applied in case in which jury subsequently found the defendant guilty of murder and aggravating circumstance of purposely killing the victim to prevent testimony, or in retaliation for testimony, in a criminal proceeding).

191. *Id.*

caused the victim to be unavailable and the homicide charge—both the judge and the jury must decide whether the defendant killed the victim.<sup>192</sup> If, as *Gaudin* holds, judicial determination of *any* element of the crime charged violates the defendant's Sixth Amendment right to trial by jury, then the additional requirement that a purpose of the killing be to prevent the victim from being a witness does not answer the question of whether the court may prejudice an element of the crime charged, thereby making the prosecutor's case less burdensome.<sup>193</sup> Thus, because there is complete unity between the judge's fact-finding and at least one element of the crime charged and because this fact-finding forms the basis for a sanction that is calculated to aid the prosecution and harm the defense, the reflexive application of the forfeiture by wrongdoing doctrine has troubling implications for the constitutional rights addressed by the *Gaudin* Court.

A related concern is the allocation of witness credibility to the judge. A court that applies forfeiture by wrongdoing reflexively must reject the defendant's version of events if a defense is raised.<sup>194</sup> When forfeiture by wrongdoing is applied reflexively, the credibility questions to be decided by the court closely align with the credibility questions that the jury will address. Federal Rule of Evidence 412(c)—the Rape Shield rule—was substantively amended in 1994 to remove the following sentence:

Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the accused seeks to offer in trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.<sup>195</sup>

The Advisory Committee recognized that the amendment was necessary to avoid undermining a defendant's right to trial by jury as

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192. Although *Giles* called purpose a separate fact-finding that eliminated complete circularity between judge and jury fact-findings, the distinction may be more apparent than real in many homicide cases. The Supreme Court pointed out in *Apprendi v. New Jersey* when it held that a state law hate crime sentence enhancement "define[d] a particular kind of prohibited *intent*, and a particular intent is more often than not the *sine qua non* of a violation of a criminal law." 530 U.S. 446, 493 n.18 (2000).

193. Furthermore, it is not clear that "purpose" is truly meaningfully distinct from "motive" or "intent," which, in a homicide case, could be an element of the crime and thus intertwined with the ultimate issue of guilt or innocence. See *Apprendi*, 530 U.S. at 493 n.18 ("[A] particular intent is more often than not the *sine qua non* of a violation in criminal law.").

194. *People v. Moore*, No. 01-CA-1760, 2004 WL 1690247 (Colo. App. July 29, 2004) (defendant found guilty of criminal negligence).

195. Advisory Committee Note to FED. R. EVID. 412.

well as the constitutional right to due process.<sup>196</sup> The Advisory Committee indicated that a rule that allowed the judge to admit the defendant's evidence of prior consensual activities with the victim if the judge believed the defendant, but exclude the evidence if the judge concluded that the defendant's evidence was not credible, would violate the right to trial by jury.<sup>197</sup> This raises the question whether there is any principled basis to distinguish between a rule that excludes the evidence proffered by the defendant based on the court's determination that the defendant's version of the facts is untrue, and a rule that admits the prosecutor's evidence based on the same conclusion about the defendant's credibility.

In any homicide case in which a defense is asserted, reflexive application of forfeiture by wrongdoing necessarily turns on the judge's view of the defendant's credibility, including the judge's view of the defendant's affirmative defenses. Consider the Jensen case—a high-profile case in which the defendant was convicted of murdering his wife by poisoning her.<sup>198</sup> The asserted defense was that the victim had been depressed and taken her own life, framing the defendant.<sup>199</sup> Before her death, the victim wrote a letter to a police detective, which was to be delivered in the event anything happened to her.<sup>200</sup> In the letter, the victim prospectively pinned her husband as the cause of her death.<sup>201</sup> In order to admit the letter under the forfeiture by wrongdoing doctrine, the trial court first had to reject the defendant's version of events, finding the prosecutor's version to be more credible.<sup>202</sup>

If excluding the defendant's proffered evidence under the prior Rape Shield rule was considered to be a likely violation of the right to a jury trial by substituting the judge's evaluation of witness credibility for the

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196. *Id.*

197. 1 STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL: A COMPLETE GUIDE TO THE FEDERAL RULES OF EVIDENCE 396 (5th ed. 1990) (“This is quite a bit different from having Judges rule on most competency questions [where the] Judge is not usurping the function of the jury. [In such cases t]he Judge is not addressing the merits of the case and deciding whether one side or the other is truthful. Rather, the Judge is assuring that the evidence meets the usual evidentiary standards. But when the Judge decides whether or not a defense is true or false and decides that on the basis of the credibility of the witnesses, the Judge is doing what the jury is supposed to do in a serious criminal case covered by the Sixth Amendment.”).

198. Jay Schadler & Susan B. Miller, *Death Foretold*, 20/20 (ABC television broadcast Feb. 29, 2008), available at <http://abcnews.go.com/2020/story?id=4359389>.

199. *Id.*

200. *Id.*

201. *Id.*

202. *State v. Jensen* 727 N.W.2d 518, 521 (Wis. 2007). See also *United States v. Garcia-Meza*, 403 F.3d 364, 369 (6th Cir. 2005) (affirming trial court's application of forfeiture by wrongdoing before Supreme Court imposed purpose requirement; in his defense, defendant asserted lack of premeditation, which is inconsistent with having a “purpose” for the homicide).

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jury's, then the application of forfeiture by wrongdoing to admit the victim's words in the homicide case seems equally troubling. While it is true that refusing to admit the defendant's evidence of innocence implicates due process as well as the right to trial by jury,<sup>203</sup> that difference should not affect the right to trial by jury analysis. The test for whether the right to trial by jury has been violated is whether the device has undermined the jury's fact-finding function.<sup>204</sup> If that is the correct test, then it seems unpersuasive to distinguish the trial court's consideration of witness credibility when deciding reflexive application of forfeiture by wrongdoing questions from the credibility allocation that led to the amendment of Rule 412. In either instance, the admission or exclusion of the evidence holds great potential to be outcome determinative against the defendant.

## 2. Reducing the Burden of Proof

Although forfeiture by wrongdoing is not a preliminary question of evidentiary admissibility that turns on evidentiary competence, its application does result in the admission of otherwise inadmissible inculpatory evidence. Admitting such evidence has a direct impact on whether the beyond a reasonable doubt standard has been met. Accordingly, the Supreme Court has recognized that "guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard."<sup>205</sup> The rules of evidence, having evolved from the common law and the criminal defendant's constitutional rights, play an important role in assessing whether the jury has determined the defendant's guilt of every element of the crime charged beyond a reasonable doubt. Rules of evidence are protections designed, at least in part, to ensure that the defendant is not wrongfully convicted by placing too much power with the jury to act capriciously.<sup>206</sup> When a court strips those protections from the homicide

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203. Advisory Committee Note to FED. R. EVID. 412.

204. *Sullivan v. Louisiana*, 508 U.S. 275, 277–78 (1993).

205. *Brinegar v. United States*, 338 U.S. 160, 174 (1949) (affirming court's consideration of evidence at suppression hearing seeking to exclude evidence seized during search of vehicle).

206. One reason for rules of evidence

is mistrust of juries . . . and this point goes far to prove that faith in juries is limited. The hearsay doctrine exists, for example, largely because we think lay jurors cannot properly evaluate statements made outside their presence, and the rules governing character evidence assume that juries place too much weight on such proof or employ it improperly for punitive purposes.

defendant on the ground that he in fact killed the victim (whether the court also must determine the defendant's purposes in committing the crime), the effect is to give an advantage to the government's case.

When a defendant engages in witness tampering, the result is harm to the government's proof because a witness who would have testified at trial is no longer available. But when a defendant is charged with murder, the victim is not a witness in that proceeding, and there has been no harm to the prosecution's murder case. For example, assume that a homicide defendant would duly lodge her hearsay and Confrontation Clause objections to the proffered victim statements—she in fact tells the court that she objects. Assume also that the prosecutor's response is that the defendant forfeited the right to object to the admission of the victim's words because the defendant made the victim unavailable to testify with the purpose of making that victim unavailable as a witness at some proceeding. Before the court can rule that the defendant forfeited the right to object, the court must first conclude that the defendant did something to make the victim unavailable as a witness—i.e., that the defendant killed the victim as the prosecution charges. Moreover, because forfeiture by wrongdoing requires that this act be wrongful, the court's ruling on the question of whether the defendant killed the victim is likely to incorporate a factual determination that the killing was not justified or excused. In other words, the court must decide that the defendant's alleged defenses, if any, are invalid or untrue.

*Gaudin* instructs that a criminal defendant is constitutionally entitled to have the jury decide every element of the crime charged by the beyond a reasonable doubt standard. In a homicide case, this includes the question of whether he or she killed the victim. The court cannot take these issues from the jury. The court cannot give a directed verdict of conviction, no matter how overwhelming the evidence of guilt.<sup>207</sup> Nor can the court affect the jury's consideration of each element of the crime charged by applying a conclusive presumption to any such element.<sup>208</sup> The question is whether anything less than a conclusive presumption can constitute a "device" that "undermines" the rights linked in *Gaudin*. In other words, is judicial interference with the beyond a reasonable doubt standard, based in whole or in part on fact-findings that represent circularity with the jury's required consideration

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CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 2 (4th ed. 2009). For a contrary view, see Edson R. Sunderland, *The Problem of Trying Issues*, 5 TEX. L. REV. 18, 24 (1926) (arguing that evidence should not be excluded from jury's consideration).

207. *Sparf v. United States*, 156 U.S. 51, 105–06 (1895).

208. *Neder v. United States*, 527 U.S. 1, 10 (1999).

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of each element of the crime, constitutionally suspect?<sup>209</sup>

Using forfeiture, a court can admit evidence that is (a) strong, (b) possibly un-confronted and untested by cross-examination, and (c) otherwise inadmissible—and therefore potentially unreliable, untrustworthy, or susceptible to misuse or overreliance by the jury.<sup>210</sup> Removing the defendant’s right to object to the admission of the victim’s words makes it more likely that a jury will find the element of killing the victim to have been proven than if the court had not found that the defendant killed the victim as a predicate for finding forfeiture of the right to object.<sup>211</sup>

What’s the effect on the jury? The jury is instructed to apply the beyond a reasonable doubt standard, so one might naturally assert that the jury’s function has not been impaired. But consider the burden of proof beyond a reasonable doubt—which is constitutionally protected and, as the Supreme Court has stated, incorporates “a fundamental value determination by our society that it is far worse to convict an innocent than to let a guilty defendant go free.”<sup>212</sup> The higher burden of proof in criminal cases may result in more factually guilty defendants going free than if the preponderance of the evidence standard were applied, but it also reduces the likelihood that a factually innocent defendant is convicted.<sup>213</sup>

The difference between the beyond a reasonable doubt standard and a lesser standard, such as the preponderance of the evidence, has much to do with the quantum of proof. As evidence mounts, one first meets the preponderance hurdle and then, with more evidence, the reasonable doubt hurdle. In other words, evidence only sufficient to prove that a defendant killed the victim by a preponderance of the evidence is insufficient to prove that the defendant killed the victim beyond reasonable doubt. To meet the beyond a reasonable doubt standard, the prosecution needs *more* or more powerful evidence than it would to

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209. The criminal defendant’s right to trial by jury “differs fundamentally from other rights to trial by jury” thus suggesting “that the criminal defendant’s right carries unique implications for evidence rules that allow courts to interfere with a jury fact-finding.” Katherine Goldwasser, Essay, *Vindicating The Right To Trial By Jury And The Requirement of Proof Beyond A Reasonable Doubt: A Critique Of The Conventional Wisdom About Excluding Defense Evidence*, 86 GEO. L. J. 621, 642 (1998).

210. Bocchino & Sonenshein, *supra* note 39, at 61 (positing that forfeiture by wrongdoing permits admission of unreliable statements contrary to the Sixth Amendment).

211. See, e.g., Tom Kertscher, *Legal Standard to Be Tested; Jensen Could Get Another Trial*, Milwaukee Journal Sentinel, Feb. 24, 2008, at B1, available at 2008 WLNR 3633101 (Westlaw) (reporting that after the trial of accused murderer Mark Jensen, several jurors disclosed that the victim’s hearsay letter, admitted through reflexive application of forfeiture by wrongdoing, was “perhaps the most important piece of evidence” in favor of conviction).

212. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

213. Goldwasser, *supra* note 209, at 644.



meet the lower preponderance of the evidence standard.

The victim's words may constitute the more or more powerful evidence that is necessary for the prosecution to meet its burden of proof. This proposition is supported by the impact that the Supreme Court's ruling in *Crawford* had on domestic violence prosecutions and the numerous discussions the ruling spawned about the need to restore the victim's voice.<sup>214</sup> For many cases, whether the victim's hearsay statements are admissible will affect whether the case is prosecutable.<sup>215</sup> Indeed, if this were not true, prosecutors would not argue for an expansive use of forfeiture because there would be no need to. The admission of the victim's statements thus has the effect of reducing the burden on the government, effectively making it easier to prove guilt of a homicide beyond a reasonable doubt. By making it easier for the government to prove guilt, the forfeiture ruling has an effect that is akin to reducing the standard of proof.

The United States Supreme Court tacitly accepted that the admission of inculpatory evidence reduces the burden of proof, in *Carmell v. Texas*.<sup>216</sup> There, in a 5–4 decision,<sup>217</sup> the Court held that the Constitution's Ex Post Facto Clause was violated when a Texas statute was revised to dispense with a corroboration condition on testimony of teen victims of sexual offenses, thereby making the victim's testimony admissible, and applied retroactively to the defendant.<sup>218</sup> In its analysis

214. Lininger, *Prosecuting Batterers*, *supra* note 77, at 772 (discussing examples of *Crawford*'s impact, including dismissal of "up to a dozen domestic violence cases per day [in Dallas County, Texas alone] because of evidentiary problems related to *Crawford*").

215. *Id.*; Chase, *supra* note 77, at 1112 (noting that "without the victim's statements in evidence, great difficulty frequently arises in attempting to prove" acts of domestic violence).

216. 529 U.S. 513 (2000).

217. Justices Stevens, Scalia, Souter, Thomas and Breyer formed the majority; Justice Ginsberg dissented, joined by Chief Justice Rhenquist, Justice O'Connor, and Justice Kennedy. *Id.* at 515, 553.

218. The Texas statute originally provided:

A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 14 years of age at the time of the alleged offense.

TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon 1983). The statute was amended to change the age of the victim from fourteen to eighteen. As to the defendant,

four counts stand or fall depending on whether the child victim exception applies. Under the old law, the exception would *not* apply, because the victim was more than 14 years old at the time of the alleged offenses. Under the new law, the exception would apply, because the victim was under 18 years old at that time. In short, the validity of four of petitioner's convictions depends on whether the old or new law applies to his case, which, in turn, depends on whether the *Ex Post Facto* Clause prohibits the application of

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of the Ex Post Facto Clause issue, the Court analogized eliminating the corroboration requirement to

retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof . . . . In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption; by threatening such severe punishment so as to induce a plea to a lesser offense or a lower sentence; or by making it easier to meet the threshold for overcoming the presumption. Reducing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end.<sup>219</sup>

Just as revision of the Texas statute in *Carmell* allowed previously inadmissible evidence—uncorroborated testimony by fourteen to eighteen year old sexual assault victims—to be submitted to the jury, the forfeiture by wrongdoing sanction likewise admits previously inadmissible evidence. By eliminating objections to evidence when the court determines that the homicide defendant killed the victim, forfeiture by wrongdoing similarly makes it easier for the government to overcome the presumption of innocence and convince the jury of guilt beyond a reasonable doubt.

To be sure, when forfeiture is applied to a case in which the defendant causes a witness other than the victim to be unavailable, the effect on the government's burden is similarly reduced. But in the homicide case where the homicide is the act giving rise to forfeiture the difference is that the court is prejudging an element of the crime, which the jury must ultimately decide and is using that prejudgment to alter the burden of proof. In effect, if the court finds that the defendant killed the victim with a purpose of preventing future testimony in some other proceeding, the defendant has forfeited the right to have the issue of whether he killed the victim decided by the jury under the beyond a reasonable doubt standard.

Where a defendant is being tried for a crime other than making the witness unavailable, there is no conflict between the defendant's right to have the jury decide the facts and the judge's finding that the defendant warrants forfeiture of the right to confront a missing witness. For example, if the defendant is accused of conspiracy and the prosecutor

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the new version of Article 38.07 to his case.

*Carmel*, 529 U.S. at 518–19. Highlighting the importance of context to evaluating the constitutionality of a device, the majority characterized the Texas statute as affecting the sufficiency of the evidence, while the dissent characterized it as an evidentiary provision dictating the circumstances under which the jury could evaluate victim testimony. *Id.* at 553.

219. *Carmel*, 529 U.S. at 532–33.

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has been unable to secure the trial attendance of witnesses because the defendant's threats caused the witnesses to flee to Canada, the judge's determination that the defendant threatened the witnesses is distinct from the matter before the jury: whether the defendant is guilty of conspiracy. Similarly, if the defendant is accused of domestic violence and the prosecutor demonstrates that the victim of the domestic violence is unavailable to testify due to the defendant's separate wrongdoing intended to keep the victim from attending the trial, the court's application of forfeiture by wrongdoing requires a finding that the defendant wrongfully acted to secure the witness's unavailability to testify and does not bear on the question before the jury: whether the defendant is guilty of domestic violence.

*C. Impermissible Comment on the Evidence?*

A somewhat less visible concern is the wisdom of allocating fact-finding in the reflexive case to the court even if courts and commentators alike express no discomfort with the effect on the defendant's rights under *Gaudin*. Professor Friedman makes the point that

if the judge does make the factual findings necessary to support a conclusion of forfeiture, he or she does not announce to the jury, "Ladies and gentlemen, you should know that the reason you have heard this statement by the victim is that I have determined as a preliminary matter that the accused murdered her. Of course, you shouldn't let my decision on that point affect you in performing the job assigned to you."<sup>220</sup>

While it is true that the jury is not told of the ruling and does not know why victim hearsay statements were admitted, this Article suggests that in some ways, in today's world of modern communication technology, this makes the situation worse, not better.

There seems little dispute that "the trial judge 'may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination.'"<sup>221</sup> The Court has also warned that particular care is required before a judge comments upon the guilt of the defendant, for "[a]lthough the power of the judge to express an opinion as to the guilt of the defendant exists, it should be exercised cautiously and only in exceptional cases."<sup>222</sup> Applying these

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220. Richard D. Friedman, *Does an Accused Forfeit the Confrontation Right by Murdering a Witness, Absent a Purpose to Render Her Unavailable?*, 35 PREVIEW OF THE U.S. SUPREME COURT CASES 364 (2008), available at [http://www.abanet.org/publiced/preview/ABA\\_Preview7\\_2008.pdf](http://www.abanet.org/publiced/preview/ABA_Preview7_2008.pdf).

221. *Quercia v. United States*, 289 U.S. 466, 469 (1933).

222. *United States v. Murdock*, 290 U.S. 389, 394 (1933).

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principles to reflexive forfeiture by wrongdoing, the judge *has*, in fact, expressed an opinion on the defendant's guilt and inferentially communicated that opinion by admitting evidence that makes it all the more likely that the jury will find the defendant guilty, without making clear the jury's right to disagree with the judge's opinion. Especially in the modern electronic age, a juror could question or even determine whether the admission of the evidence was based on such an opinion—an infection of the jury that is difficult to cure through instruction.<sup>223</sup> It is not a far stretch to suggest that one or more jurors in any case either may discern that certain evidence was admitted under the doctrine, or suppose that it was, even if it was not.

## VI. CONCLUSION

Prosecutors and courts have increasingly used the forfeiture by wrongdoing doctrine as a means of circumventing the exclusionary effects of the rule against hearsay and the right to confront witnesses to admit the victim's hearsay statements to prove that the defendant is guilty of the crime of killing the victim. Using the doctrine in this manner raises constitutional concerns that merit closer examination. The vexing evidentiary problems in the prosecution of domestic violence cases as a result of the rule against hearsay and the criminal defendant's constitutional right to confront witnesses deserve redress, but redress ought not be in the form of undermining the rights conferred by the Constitution. Expansion of the doctrine of forfeiture by wrongdoing to the reflexive case seems poised to continue well beyond its original scope.<sup>224</sup> The literature offers a number of options that could serve as alternatives to the reflexive application of the forfeiture by wrongdoing doctrine, such as creating pretrial opportunities to cross-examine victims so that their statements are confronted,<sup>225</sup> creating a hearsay exception that admits the statements of unavailable victims of

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223. See, for example, CNN, Trials on Demand, <http://www.cnn.com/SPECIALS/2008/news/trials.on.demand/> (last visited Mar. 22, 2011), which hosts selected video footage of portions of trials and commentary about ongoing trials. See also, James Holderman, *As Generations X, Y and Z Determine the Jury's Verdict, What Is The Judge's Role?*, 58 DEPAUL L. REV. 343, 347–49 (2009) (discussing Generation X, Y, and Z's exposure to the internet and other technology); Erika Patrick, *Protecting The Defendant's Right To A Fair Trial In The Information Age*, 15 CAP. DEF. J. 71, 71 (2002) (noting that the advent of the television and the internet has increased the media in which a trial of public opinion can affect the outcome of a legal trial).

224. Marc C. McAllister, *The Disguised Witness and Crawford's Uneasy Tension with Craig: Brining Uniformity to the Supreme Court's Confrontation Jurisprudence*, 58 DRAKE L. REV. 481, 534–39 (2010) (arguing that forfeiture by wrongdoing should be applied to permit disguise of in-court witnesses who are intimidated and fearful).

225. Lininger, *Prosecuting BATTERERS*, *supra* note 77, at 786.

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violent crime concerning the crime and its perpetrator,<sup>226</sup> narrowly tailoring the definition of “testimonial” for purposes of the Confrontation Clause,<sup>227</sup> providing increased protections for victims before trial,<sup>228</sup> and expanding substantive criminal charges to permit prosecution of batterers without the need for the victim’s testimony.<sup>229</sup>

The United States Supreme Court has on many occasions reaffirmed the importance of the right to trial by jury and the proof beyond a reasonable doubt standard. Because the right to trial by jury is so fundamental to the concept of ordered liberty that it has been called the “very palladium of free government,”<sup>230</sup> any potential for a rule of law to undermine or invade it should receive very close attention. The reasons for the use of forfeiture by wrongdoing in homicide cases, measured against the potential to undermine the right to trial by jury, may be insufficient to justify the means. If the criminal defendant really is to be presumed innocent until a jury has found him guilty beyond a reasonable doubt, if the jury really is to be the sole fact-finder, and if the rules of evidence stand in part to protect the defendant’s constitutional right to a fair trial, then there is an obligation to give those principles meaning and substance. If using forfeiture by wrongdoing to sanction the defendant charged with murder for killing the victim is an intrusion on the defendant’s constitutional right, then the invasion should not be easily justified by the strong societal goal of convicting murderers and batterers. As Blackstone wrote in 1769:

[H]owever convenient [any intrusion] may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that this inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.<sup>231</sup>

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226. *Id.* at 800.

227. Chase, *supra* note 77, at 1119–21.

228. Lininger, *Prosecuting Batterers*, *supra* note 77, at 814.

229. *Id.* at 816–17.

230. THE FEDERALIST NO. 83, at 426 (Alexander Hamilton) (M. Beloff ed. 1987).

231. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 350 (1769).