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Forfeiture of the Confrontation Right After Crawford and Davis

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FORFEITURE OF THE CONFRONTATION RIGHT AFTER *CRAWFORD* AND *DAVIS*

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Well, thank you, James,[1] and thank you all, and once again it is a delight to be here, and I'm appreciative to James and to the members of the Law Review for organizing this terrific conference.

So my topic this morning is on forfeiture of the confrontation right, which I think plays a central role in confrontation doctrine. And to try to present that, let me state the entirety of confrontation doctrine as briefly as I can. This is, at least, what I think the doctrine is and what it can be: A testimonial statement should not be admissible against an accused to prove the truth of what it asserts unless the accused either has had or will have an opportunity to confront the witness—which should occur at trial unless the witness is then unavailable—or has rendered the confrontation unfeasible.

That's pretty compact. If it is a testimonial statement, it can't be admitted for the truth unless the witness is unavailable, and even then only if the accused either had the opportunity to confront or forfeited the right.

Now, a few complexities lie in there. Notice, I said it is limited to testimonial statements. So one of the questions to Professor Nesson was about business records. Most business records would not be testimonial statements. There has to be an opportunity to confront the witness, and I want to emphasize that confrontation is not limited to cross-examination. Cross-examination is what we've come to think of as the most important aspect of confrontation, but I think the oldest aspect of confrontation was just the idea of being face to face. Notice that there's no room for hearsay exceptions within the doctrine as I've stated it. That is, there is no room for the idea that if a statement falls within a hearsay exception—excited utterance or any other—therefore, it is excepted from the confrontation right. The statement of the confrontation right, as I've given it, is integral; it states the whole doctrine.

Well, how about dying declarations, you might ask. I will get to that. I think that dying declarations are best understood as an instance of forfeiture doctrine. And if forfeiture doctrine is applied properly, it will cover those dying declarations that should be admitted and will do so in

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1 Addressing Professor James Duane of Regent University School of Law.

a much more sensible way than does the traditional hearsay exception for dying declarations.

What is the basic idea behind forfeiture doctrine? The basic idea, I think, is that if the defendant renders confrontation impossible, at least by wrongdoing, then the defendant cannot complain about the inability to confront. It is not a matter that we don't want someone to profit by his own wrongdoing; it is more precisely that you can't complain about a situation that you created, particularly if it is by your own wrongdoing. Some years ago, I wrote an article called *Confrontation and the Definition of Chutzpa*.[2] *Chutzpa*, as some of you probably know, is the quality illustrated by the person who kills both parents and then begs for mercy as an orphan. And that is the standard definition of chutzpa. What I'm suggesting is that nearly as blatant an illustration of chutzpa is the quality demonstrated by the defendant who, say, murders a witness and then complains about his inability to confront.

Okay, so the core illustration of forfeiture doctrine would be the case in which you have a witness on the way to court to testify against the defendant in, let's say, a robbery case or a drug case, whatever, and the defendant says, "I'm not going to let you testify. I am now going to kill you in order to render that testimony impossible." Bang! Bang! The witness is dead. It turns out that there is ample proof of the murder and the defendant's statements. The prosecution offers the prior statement by the murdered witness—a testimonial statement—and the defendant says, "But that's a testimonial statement. I never had a chance to confront the witness and cross-examine." The prosecution presents this strong proof that the defendant murdered the witness, and the court says, "Let me get this straight: you are complaining about the fact that you didn't get a chance to confront the witness, but you murdered her, didn't you?" "Well, yes I did." "Okay, well, if you murdered her and that's why you didn't get a chance to confront her, you really can't complain about that situation. Therefore, you forfeited the right and the prior statement can come in." That, I say, is the core case. I think that core case has been around for many years. It has been understood for a long time that if by murder, intimidation, or kidnapping, the defendant renders the witness unavailable to testify, forfeiture of confrontation applies.

Well, okay. That's the core case, but let's ask: Must the conduct that renders the witness unavailable to testify subject to confrontation have been motivated in significant part by the desire to achieve that result? And must the conduct have been wrongful? Those are two separate questions, but they are overlapping.

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[2] 31 ISRAEL L. REV. 506 (1997).

What if the conduct wasn't actually motivated by the desire to render the witness unavailable? Let's take this case. Suppose there is a drug conspiracy and an informant in the drug conspiracy reports back to the police, making testimonial statements about the chief of the conspiracy, saying he is a drug kingpin, etc., etc., detailing the chief's role in some depth, but then the informant goes back into his mole role in the conspiracy. The kingpin is none the wiser, but they get into a fight—maybe it is over a card game or something else unrelated. The kingpin has no idea that this person has made the statements. They get into a fight and the kingpin murders the informant—malice aforethought, the whole thing. And then the kingpin is tried for drug crimes, and the prior statement of the informant is offered. The kingpin claims violation of the confrontation right, and the prosecution offers proof that the kingpin murdered the informant. It seems to me that even though there is no proof in that case that the murder was for the purpose of preventing testimony by this person—that, in fact, the kingpin did not know that the informant had testified against him—it nevertheless seems to me that the right should be forfeited. That, in other words, is a circumstance in which we say, the reason that you can't cross-examine this person—can't confront this person—is because you murdered him. And that is sufficiently wrongful conduct that even though you weren't aiming at eliminating this person as a witness, you cannot complain about the situation you've created by that wrongdoing.

Now if I'm right there, a consequence is that, in what I've referred to as the reflexive situation, forfeiture doctrine still applies. That is, it may be that the conduct that leads to forfeiture is the very conduct with which the defendant is charged in the particular case. So here is where we get to dying declarations. The typical sequence would be fatal blow, victim makes a statement identifying the accused, victim dies, prosecution, claim of confrontation right, and the prosecution says—well, what usually happens is that they just say, "Dying declaration!" and the statement gets in.

The theory of the dying declaration exception that is usually received is that nobody would go to heaven to meet his Maker with a lie upon his lips. In order for that to be persuasive, I think we'd have to have faith in the universality of the religious view that, if one does die with unabsolved sin, there is going to be eternal damnation. There may have been virtually unanimous universal acceptance of that view a couple of hundred years ago, but I think that now there isn't. For myself, I've always said that if I were in that situation, I'd look at it as an opportunity to even some old scores without adverse consequences! But, hopefully, I won't be in that situation.

It may be that these statements are more reliable than the run-of-the-mill statements, but what *Crawford* tells us is that reliability is not

what confrontation is all about. I'm not sure that a statement identifying a killer is so clearly reliable, in any event, because the victim is clearly speaking in distress and may not have had a good opportunity to observe the killer. But let's say that instead of going through the analysis required by this old-fashioned hearsay exception—let's say that what we have is a preliminary hearing in which the court determines whether the right was forfeited. Suppose the court says, "If I conclude"—to whatever standard of proof is appropriate—"that the defendant killed the victim, and that that is why the victim is not around to testify"—and you know the difference between a murder case and an assault case, practicing lawyers here today, the difference is one witness!—"if that's why we don't have an ordinary assault case in which the victim is able to testify, because the defendant killed the victim, then"—just as in my murder-over-the-card-game case—"I'm going to find that the defendant forfeited the confrontation right." To me that makes an awful lot more sense than the dying declaration exception.

Now, it tends to raise the problem of—people say you are "bootstrapping," that you are assuming the conclusion. Not at all. Not at all. For one thing, nobody is *assuming* that the defendant committed the killing; that has to be proved. It has to be proved on the basis of evidence, both with respect to forfeiture of the confrontation right and with respect to the underlying charge. The judge has a function, to determine the forfeiture quesiton, and the jury has a function, to determine the facts bearing on the underlying charge. They are separate functions. And the judge decides the matter of forfeiture for purposes of deciding whether the confrontation right still stands. The judge doesn't say, "Ladies and gentlemen of the jury, you may wonder why you've heard the accusation from the dead victim notwithstanding the absence of confrontation. I will tell you why. It is because I have determined that, in fact, the defendant killed the victim, all right, and then forfeited the right. And now you go on and consider. I don't mean to prejudice you on the merits, you go on and consider." No, no, no, no, no! The judge doesn't announce that to the jury at all. The situation really is basically the same as with respect to the conspirator exception to the hearsay rule. (I want you to note that I've said the conspirator exception to the hearsay rule. I did not say the co-conspirator exception to the hearsay rule. The reason is because Professor Duane wrote, I think, about twelve pages of a law review article explaining why it is the conspirator exception, not the co-conspirator exception.[3] I felt that anybody who put that much energy into such a small point must be right!)

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[3] James Joseph Duane, *Some Thoughts on How the Hearsay Exception for Conspirators' Statements Should—And Should Not—Be Amended*, 165 F.R.D. 299 (1996).

If I'm right about all this, notice how dying declarations and excited utterances are entirely different matters. If there is an ordinary excited utterance, so what? That is a hearsay exception and has nothing to do with the confrontation right. The declarant is around. If it was a testimonial statement, it is within the confrontation right and there ought to be confrontation. But dying declarations, I think properly best viewed, are an instantiation of forfeiture doctrine. And that is, I think, probably the underlying reason that motivated the courts that developed the exception, although it wasn't articulated this way at the framing, and I think that is why the doctrine still should stand.

I think the same principle would apply in cases of intimidation. I think it can apply, for instance, in cases of intimidation created by assault. It can also apply in cases like *United States v. Owens*.[4] That is another case in which it is not intimidation, but as you might remember, the victim's head was bashed in. And at some point the victim was able to make a statement identifying the assailant, but by the time of trial he wasn't. But he got on the stand, and the court, in what I think was a bad opinion, said, "Well, okay, it is a good enough opportunity for cross-examination," which is the topic that Chris was addressing,[5] "because he is there. He is on the witness stand able to answer questions." It would have been much more satisfying if the court would have said, "No, Owens didn't have an adequate opportunity to cross-examine, but he forfeited because I find, as a preliminary matter, that he bashed the victim's head in."

On the other hand, suppose you had, say, a negligent homicide—let's say you have a domestic violence case—and between the time of the incident and the time of the trial, the defendant is driving with his wife, who happens to be the accuser, and she dies as a result of negligence. I hesitate to say in that case, even though there was negligence, that the confrontation right ought to be forfeited. I do think that this is a matter of judgment and weighing.

An interesting question, I think, is what if there is no wrongful conduct, but the conduct is aimed at keeping the witness away? Let's say there is somebody who has an ability not to testify, either because she is beyond the reach of the subpoena power or because she has a privilege, and the defendant, not wrongfully, says, "You don't have to testify against me, and I really think it would be a nice loyal thing not to." Is that forfeiture? I don't know. I suppose, at least I think, that if the defendant has a privilege and keeps the witness off the stand by virtue of that privilege, at least there, there should not be a forfeiture because I

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4 484 U.S. 554 (1988).

5 *See* Christopher Mueller, *Cross-Examination Earlier or Later: When Is It Enough to Satisfy* Crawford, 19 REGENT U. L. REV. 319 (2006-2007).

don't think that the defendant should be forced to select between the confrontation right and his privilege.

There are a lot of procedural issues that are important in the forfeiture realm, and these are going to have to be resolved. One is whether the statement itself should be a permissible part of the proof on the basis of which the court decides whether the accused has forfeited the right. In other words, take the murder case in which the victim says that the defendant did it. Can the judge—in deciding that the defendant did this and therefore that there was forfeiture—can the judge take the statement into account? And I think, why not? Under the approach of Rule 104(a) of the Federal Rules of Evidence, the judge can take anything into account, if it is not privileged, in determining a threshold matter. And I'd say that here, too, there is sort of an endless loop. What if it is a testimonial statement, and if I'm concerned about testimonial, about confrontation with respect to threshold issues, do I worry about that? Well, I guess I'd say at the end of the day, either the right was forfeited or not. And if the judge says that he is going to take the statement into account, and in the end the judge concludes the defendant killed the witness, I think there is no harm done. That is, the judge says, "You killed him. You forfeited that right," and so there is nothing wrong with taking the statement into account. And if the judge fails to conclude that the defendant forfeited the right, and so the jury never hears the statement, then there is also no harm done.

What should the standard of persuasion be? I think it should probably be more than "more likely than not." Most courts have gone with "more likely than not." I think it should probably be more elevated. I don't know if that is going to make much of a difference.

Much more significantly, it seems to me, it is essential to impose upon the prosecution a duty to mitigate the problem created by the accused's conduct. So, for instance, take the homicide case and the dying declaration, and the victim makes an accusation after the blow. I think that forfeiture should not apply if the authorities could reasonably have arranged an opportunity to afford confrontation, but failed to do so. That might sound grotesque—the idea of bringing in a lawyer and a stenographer for a deposition with a dying defendant—but, in fact, you go back a couple of hundred years, and there are cases just like that where a confrontation was arranged. And certainly the police and the authorities have no compunction about taking accusatory statements from dying declarants. I think that we probably shouldn't have compunction about arranging for some opportunity for confrontation.

And by the way, this is where I think the idea about imminence comes in. You know the old idea for a dying declaration exception is that the gates of heaven have to be opening for the exception to apply, and I think what that really reflects, in sounder terms, is the idea that if death

is imminent—and I think it should be an objective test rather than a subjective test—but if death is really imminent, then it is probably going to be hard to provide an opportunity for confrontation, hard to provide a deposition.

Another opportunity to mitigate would be in the domestic violence context. If there is a contention of forfeiture, based on intimidation, and also with respect to children, there are many difficult problems, but I think probably it is not enough to say, "She is scared. She doesn't want to testify. All bets are off—no confrontation right." I think that there has to be some burden on the prosecution and on the trial court to do what can be done to protect whatever of the confrontation right can be protected. And if the Supreme Court goes down this line, it will take a while to work out. But, for example, perhaps the accuser should be brought in, at least to testify *in camera*. Perhaps, at least, she should be asked questions about why she won't testify.

This is a rather complicated matter. Maybe what we need to do is disaggregate the confrontation right and think of it in terms of components. You want testimony subject to cross-examination. Ideally, you also want it in the presence of the accused. Maybe we can have cross-examination without the presence. Maybe it is the actual closeness of the defendant that creates the difficulty. Maybe if we pose the question, we realize that the witness is willing to talk as long as the defendant isn't in the room but is instead hooked up electronically. What I'm suggesting is that there has got to be some burden—and working out just how much is going to be a difficult matter—but there has to be some burden on the prosecution and on the court to figure out, given the state of intimidation, what is the best we can do to preserve something of the Confrontation Clause. So that's one more aspect of this whole area that will have to be worked out over a great deal of time. Thanks very much.

Question 1: The question is in regards to wrongful conduct. You say that that is the second prong. To give you a quick hypothetical, say you've got an attorney in the office, you have a Chinese Wall and another attorney, husband and wife come in—it's a domestic violence case. Husband sits down with you. He is currently represented by the public defender's office, and he's shopping for attorneys. And one of the first things he tells you is, "I did it, but my wife doesn't want to testify against me." All right, happens a lot. At that very point, you stop him and say, "Wait," leave the room, and you go to the other attorney who rents from you, and you say to him, "I need you to represent the wife in this case to declare a Fifth Amendment privilege on the stand." Done. Would that rise to the level of wrongful conduct—because it is an ethical problem, perhaps, between the lawyers—but do you charge that to the defendant under your evaluation?

Professor Friedman: That is an interesting question. In other words, as I understand it, the defendant is saying, "My wife doesn't want to testify against me." I don't know of any reason she can avoid doing so. And the lawyer, without perhaps explaining that this is wrongful, is going to make up a Fifth Amendment privilege. Is that what you are saying?

Question 1: The privilege claim is based on the fact that, assuming that she testifies, she is going to testify that it never happened. Therefore, that would be her on the hook for filing a false police report—that is why the Fifth Amendment would apply.

Professor Friedman: Well, all right, so can you tell me more to help me work through this. The wrongful conduct on the part of the attorney, then.

Question 1: I'll tell you, it is a common issue especially up in Northern Virginia.

Professor Friedman: What is? Wrongful is?

Question 1: The point is, what you have is supposed to be a Chinese Wall between these attorneys, and yet, you are going to go in to this attorney and not simply tell him, "I've got a potential client over here that you might want to interview." You are going to go in to specifically say, "Hey, I need you to instruct this individual to plead the Fifth so that my guy can walk," and the question, returning to it, does the wrongful conduct prong in the analysis that you've just presented cover attorneys' actions or is it just restricted to the defendant?

Professor Friedman: That's a tough question—it is obviously a tough question. And I think it is part of a broader question of conduct taken by someone else where the accused is the passive beneficiary. In other words, the simpler case is where somebody else knocks the witness off and the accused said, "Well, I didn't do anything about it." I suppose that that would be my approach there—if the accused came in and did nothing wrong and the attorney just does an attorney-ish thing that benefits the accused, the accused can say, "Hey, what do I know?" It's a tough call.

Question 1: Essentially, I don't see it as something that is a wrong on behalf of a defense attorney or a wrong on behalf of the defendant to say that if this person were already lawyered-up, let's say the victim,

man or woman, they would go to their lawyer and say, "I don't want to testify," and there would be Fifth Amendment, spousal privilege, all those things. Then you have someone who does not have a lawyer, and you try to get them a lawyer so they know their options. Why does that mean wrongdoing?

Professor Friedman: That's what I was wondering. If it is a plausible Fifth Amendment claim, so there is no wrongdoing, then it is a stronger case for no forfeiture.

There was one question that was asked before, the question about why the rest of the world is not paying attention to the Confrontation Clause. I don't think that is actually so. I think that what is a very fascinating development is that under the European Convention on Human Rights there is a whole jurisprudence on confrontation. Even though the Convention does not use the word *confrontation*, the cases have developed this confrontation right, and what is particularly fascinating about it is that they have begun to impose it on the United Kingdom, which is a signatory. So here we have the United Kingdom, which has to learn about confrontation from a court that sits in France! How is that for backwardness, considering that for hundreds of years, the English proclaimed confrontation to be one of the glories of their system.

Professor Laird Kirkpatick: In the O.J. Simpson case, there were all sorts of statements by Nicole Brown that "O.J.'s beat me," "I'm afraid of O.J.," and "I'm afraid he's going to kill me." All sorts of statements were offered in that case, and the trial judge kept out most of them saying that her statements about fear and so forth weren't relevant in a murder prosecution. If the judge had conducted a preliminary hearing and found that, by a preponderance or clear and convincing evidence, O.J. was a killer, would everything that Nicole Simpson said about him be admissible under your theory?

Professor Friedman: It is a very interesting question because these were statements that were made before the crime itself with which he was charged. So the threshold question, of course, is can those statements be considered to be testimonial? And I think yes, they can, because it is anticipated that if there has been one instance of violence in the domestic relationship, that there are going to be others. So I think I would consider those testimonial, and then the judge could decide, nevertheless, that there has been a forfeiture by O.J. Simpson. What becomes particularly interesting, I suppose, is: Should the prosecution be required to mitigate once state authorities know that she is making these statements? Should they anticipate the possibility of wanting to

use those at a time when she wouldn't be available for cross-examination? Should they anticipate murder? And, of course, in the domestic violence community, the answer is yes. When you have a repeated pattern of violence, then murder is anticipatable. But, I don't know, maybe that is pushing it too far. That's answering your question as if I were a student answering a law school exam, spotting issues, and laying it out without coming down one way or another. Is it testimonial? I say yeah. Can the conduct forfeit it? Yeah, I think so. Should there be a requirement of mitigation by the police, saying, "Geez, she is making these statements. We've got to do something"? I don't know.

Thank you.