

FORFEITURE OF CROSS-EXAMINATION RIGHTS IN CALIFORNIA

By Miguel A. Méndez*

I. INTRODUCTION

This Article is an outgrowth of my participation in a study the California Law Revision Commission undertook to determine whether California should add a new exception for hearsay by a declarant whose unavailability to testify at a criminal trial can be attributed to some wrongdoing by the defendant. In 1953, the California Legislature gave the Commission the responsibility for continuing to review California statutory and decisional law in order to discover defects and anachronisms, and recommend legislation to make needed reforms.¹

In February 2007, Assemblyman Charles Calderon introduced Assembly Bill 268 (AB 268), a measure that would amend the Evidence Code by adding a new forfeiture by wrongdoing exception to the hearsay rule.² After some amendments, the Assembly on June 5, 2007, unanimously passed the measure and referred it to the Senate.³ “Because of the serious implications of codifying the forfeiture doctrine as a hearsay exception,” a bill analysis prepared for the Senate Judiciary Committee recommended that the California Law Revision Commission be “directed to conduct a study of ‘forfeiture by wrongdoing’ doctrine, and issue a recommendation before the Legislature considers such a drastic change to the current hearsay rule.”⁴ By letter dated August 21, 2007, the

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1. See California Law Revision Commission: History, Purpose and Procedure, <http://www.clrc.ca.gov/Mbg-history.html> (last visited Feb. 11, 2009).

2. See A.B. 268, 2007-08 Reg. Sess. (Cal. 2007)

3. See Unofficial Ballot, http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0251-0300/ab_268_vote_20070605_1045AM_asm_floor.html (last visited Feb. 11, 2009).

4. See Senate Judiciary Committee Bill Analysis at 12, *available at* http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0251-0300/ab_268_cfa_20070627_16252

Chair of the California Senate Judiciary Committee asked the Commission to undertake the study.⁵ At its February 2008 meeting, the Commission approved a final recommendation for submission to the Legislature.⁶

Although the Commission staff asked me to provide an analysis of the forfeiture by wrongdoing doctrine, I refrained from endorsing any of the Commission's tentative recommendations. I focused principally on the impact the hearsay exception proposed by Assemblyman Calderon would have on the accused's opportunity to use cross-examination to expose the unreliability of the prosecution's testimonial evidence. In this Article, I go further. I take a position on the wisdom of both Assemblyman Calderon's proposals as well as of an initiative that would have added a similar forfeiture hearsay exception as part of a broad anti-crime measure that was placed before the voters in the November 2008 election.⁷ Although the initiative was rejected by the voters⁸ and Assemblyman Calderon's bill was not voted upon by the California Senate, other similar measures have been introduced in both the Assembly and Senate.⁹

Parts II and III of the Article explain why the hearsay rule serves as an essential barrier to conviction and why cross-examination and confrontation are indispensable to exposing flaws in the credibility of witnesses. Part IV examines AB 268's hearsay exception in detail, including the author's claims that the exception is necessary to implement the Confrontation Clause's forfeiture doctrine. This Part also discusses whether AB 268 is appropriately circumscribed to preserve confrontation values.

Part V explores AB 268's proposal to add a new ground of unavailability for witnesses who refuse to testify despite a court order to do so (the contumacious witness). As will be explained, such a provision, if not carefully limited, can undermine California law preserving the right to cross-examine adverse witnesses by restricting a judge's power to declare as unavailable, witnesses

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5. See CAL. L. REVISION COMM., TENTATIVE RECOMMENDATION, MISCELLANEOUS HEARSAY EXCEPTIONS, FORFEITURE BY WRONGDOING 3 & n.1 (2007), <http://www.clrc.ca.gov/pub/Misc-Report/TR-K600-Forfeiture.pdf>.

6. California Law Revision Commission meeting minutes, held in Sacramento on February 14, 2008, at 4, available at http://www.clrc.ca.gov/pub/Minutes/Minutes_2008-02.pdf.

7. The views I express in this Article are mine and should not be attributed to the Commission or its staff.

8. See <http://vote.sos.ca.gov>Returns/props/map190000000006.htm>.

9. See S.B. 657, 2006-07 Reg. Sess. (Cal. 2007), which was introduced in February 2007 and amended in January 2008, and would add provisions identical to those of the initiative. See http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0651-0700/sb_657_bill_20080107_amended_sen_v98.html. See also A.B. 2417, 2008-2009 Reg. Sess. (Cal. 2008), which was introduced in February 2008. It also largely mirrors the initiative. See http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2401-2450/ab_2417_bill_20080221_introduced.html.

who refuse to testify out of fear for their safety.

Part VI explores the initiative's analogous provisions establishing a forfeiture hearsay exception and declaring contumacious witnesses unavailable. The Article concludes with my assessment of AB 268 and the initiative (Part VII), my proposal for a forfeiture hearsay exception (Part VIII), and my views on the wisdom of enacting important rules of evidence by initiative (Part IX). At the end, I include an Addendum evaluating the proposals considered by the Commission.

II. THE HEARSAY RULE AS A BARRIER TO CONVICTION

Occasionally, prosecutors find it indispensable to offer the statements of declarants who for some reason are unable to testify at the trial. Since these statements are often offered for the truth of the matter stated, California's hearsay rule would bar their use in the absence of an exception.¹⁰ Fortunately for prosecutors, the Evidence Code contains numerous useful exceptions. Among them are the exceptions for excited utterances,¹¹ dying declarations,¹² statements regarding gang-related crimes,¹³ statements relating the infliction or threat of physical injury,¹⁴ statements by the elderly and dependent adults offered in prosecutions for the crime of elderly or dependent adult abuse,¹⁵ statements by children describing acts of child abuse,¹⁶ and statements by declarants who are prevented from testifying in trials charging a serious felony.¹⁷

With the exception of excited utterances and dying declarations,¹⁸ the remaining exceptions require prosecutors to prove the declarant's unavailability to testify at the trial. If the declarant is available to testify, no justification exists for depriving defendants of their right to cross-examine the declarant under oath in the presence of the fact finder.

All of the exceptions contain other restrictions. Some limit the exception to certain kinds of prosecutions, for example, prosecutions charging a serious fe-

10. See CAL. EVID. CODE § 1200.

11. See CAL. EVID. CODE § 1240.

12. See CAL. EVID. CODE § 1242.

13. See CAL. EVID. CODE § 1231.

14. See CAL. EVID. CODE § 1370.

15. See CAL. EVID. CODE § 1380.

16. See CAL. EVID. CODE § 1360.

17. See CAL. EVID. CODE § 1350.

18. The declarant does not have to die. If the declarant unexpectedly survives, the dying declaration may still be offered in an attempted homicide prosecution as long as the foundational facts are satisfied.

lony,¹⁹ elderly or dependent adult abuse,²⁰ or gang activities.²¹ Some require the statement to be memorialized in a writing or recorded electronically.²² Others require the prosecution to give the defendant notice of its intention to offer the statement.²³ Still others provide the judge with guidelines for determining the admissibility of the statement.²⁴ Some require the statement to be supported by corroborative evidence.²⁵ Others merely require the judge to consider the presence or absence of supporting evidence in determining the admissibility of the statement.²⁶ The exception for statements offered in cases charging a serious felony is specifically designed to make admissible statements by declarants who have been prevented from testifying.²⁷ None of the exceptions authorizes the judge to consider the hearsay declaration in determining whether the proponent has met the foundational requirements.

Subdivision 1390(a) of AB 268 purports to enlarge the prosecutors' arsenal by creating a hearsay exception for a statement that "is offered against a party who has engaged or acquiesced in wrongdoing that has caused the unavailability of the declarant as a witness." The Federal Rules of Evidence contain a similar, though more limited, hearsay exception. Rule 804(b)(6) provides a hearsay exception for a "statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."²⁸ Unlike Subdivision 1390(a), the Rule requires the proponent to prove the opposing party's intent to silence the declarant.

Whether or not the declarant is unavailable as a witness is generally determined by Evidence Code Section 240. A declarant is unavailable if he or she is (1) exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant, (2) disqualified from testifying to the matter, (3) dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity, (4) absent from the hearing and the court is unable to compel his or her attendance by its process, or (5) absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or

19. See CAL. EVID. CODE § 1350(a).

20. See CAL. EVID. CODE § 1380(a).

21. See CAL. EVID. CODE § 1231(a).

22. See, e.g., CAL. EVID. CODE §§ 1350(a)(3), 1370(a)(5), 1380(a)(3), and 1231(b).

23. See, e.g., CAL. EVID. CODE §§ 1231.1, 1350(b), 1360(b), 1370(c), and 1380(b).

24. See, e.g., CAL. EVID. CODE §§ 1231(f) and 1370(b).

25. See, e.g., CAL. EVID. CODE §§ 1350(a)(6) and 1380(a)(5).

26. See, e.g., CAL. EVID. CODE §§ 1231(f)(3) and 1370(b)(3).

27. See CAL. EVID. CODE § 1350(a)(1).

28. See FED. R. EVID. 804(b)(6).

her attendance by the court's process.²⁹

AB 268 would add a sixth ground of unavailability. A declarant would also be unavailable as a witness if "the declarant refuses to testify, notwithstanding imposition of sanctions, and the statement is offered against the party that has engaged or acquiesced in wrongdoing that was intended to, and did procure the unavailability of the declarant as a witness." The Federal Rules of Evidence contain a similar but broader ground. Rule 804(a)(2) defines as unavailable a declarant who "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so."³⁰

Each of the two provisions added by AB 268 will be discussed separately.³¹ At the outset, however, it is important to underscore that proposed Section 1390 is not limited to criminal cases or to prosecutors. By its terms the section applies both to criminal and civil cases, and is available to any of the parties to the proceeding. This Article, however, focuses primarily on the use of Section 1390 by prosecutors because the author's principal concern, as disclosed in the Assembly Committee on Public Safety's analysis of May 3, 2007, is with the prosecutors' need for a broader forfeiture hearsay exception than is currently provided by the Evidence Code.³²

III. CROSS-EXAMINATION, CONFRONTATION, AND THE HEARSAY RULE

A chief goal of the hearsay rule is to enhance the fact finding process by excluding certain declarations whenever the declarants cannot be cross-examined under oath in the presence of the fact finders.³³ The rule achieves this goal by permitting the opposing party to object to the use of out of court statements that are offered to prove the truth of the matter asserted. Since the use of hearsay deprives the opponent of an opportunity to challenge the credibility of the hearsay declarant whenever the declarant is not produced at the trial, the rule proceeds on the assumption that cross-examination is vital to assuring the reliability of evidence.

The nature of testimony supports this assumption. In evaluating the testimony of witnesses, the fact finder should take into account the witnesses' abili-

29. See CAL. EVID. CODE § 240.

30. FED. R. EVID. 804(a)(2).

31. AB 268 would also amend the Evidence Code by adding a hearsay exception for present sense impressions. This provision is not discussed in this analysis.

32. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY ANALYSIS (2007), available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0251-0300/ab_268_cfa_20070522_154136_asm_comm.html p3 (last visited Feb. 11, 2009).

33. See MIGUEL A. MÉNDEZ, EVIDENCE: THE CALIFORNIA CODE AND THE FEDERAL RULES – A PROBLEM APPROACH § 5.01 (4th ed. 2008).

ties to perceive the subject matter of their testimony and to recall and narrate those perceptions at the hearing.³⁴ Flaws in these abilities need to be exposed, a task that falls upon the party opposing the witness. That party is given a tool calculated to do just that—the right to cross-examine the witness under oath in the presence of the fact finder. The hearsay rule gives substance to that right by allowing the opposing party to object whenever an out of court statement is offered for the truth of the matter stated. In the absence of exceptions, the rule would force the proponent of the statement to produce the testimonial sources for cross-examination under oath in the presence of the fact finder.³⁵

The Confrontation Clause of the Sixth Amendment protects similar values. In *Crawford v. Washington*,³⁶ the United States Supreme Court held that the Confrontation Clause generally requires the prosecution to present its evidence through witnesses who can be cross-examined under oath in the presence of the fact finder.³⁷ To safeguard this right, the prosecution may not, over the defendant's confrontation objection, use "testimonial" hearsay from a declarant it does not call to the stand.³⁸ The Court, however, created an exception to the exclusionary rule. Even if the prosecution fails to produce the declarant, no confrontation violation will occur if the declarant is unavailable and the accused was given an adequate opportunity prior to the trial to cross-examine the declarant.³⁹ An example would be offering the transcript of the testimony given by the complaining witness at a preliminary hearing. If the prosecution offers the transcript at the trial without producing the complaining witness, the judge could overrule the defendant's confrontation objection, if the defendant was given an opportunity to cross-examine the complaining witness at the preliminary hearing with a motive and interest similar to those the defendant would have at the trial.⁴⁰

In *Davis v. Washington*,⁴¹ the Court described an additional circumstance when the state's failure to produce the hearsay declarant will not result in a

34. See FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, at Art. VIII, 105-06 (2003) (Advisory Committee Note).

35. When a witness refuses to submit to cross-examination, the conventional remedy is for the trial judge to strike the testimony the witness gave on direct examination. See *Fost v. Superior Court*, 95 Cal. Rptr. 2d 620, 627 (Ct. App. Ct. 2000).

36. 541 U.S. 36 (2004).

37. *Id.* at 59.

38. *Id.* The Court declined in *Crawford* to provide a comprehensive definition of "testimonial" hearsay. For a summary of the kinds of hearsay that may qualify as testimonial, see MÉNDEZ, *supra* note 33, §§ 6.05-6.10.

39. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

40. In offering the transcript, the prosecution would rely on the former testimony exception to the hearsay rule. See CAL. EVID. CODE § 1291(a)(2).

41. 126 S.Ct. 2266 (2006).

confrontation violation:

But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: that the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.” 541 U.S., at 62, 124 S.Ct. 1354 (citing *Reynolds*, 98 U.S., at 158-159). That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.⁴²

In this circumstance, the trial judge must overrule the accused’s confrontation objection and allow the fact finder to consider the hearsay statement if the statement is otherwise admissible for the truth of the matter stated under the forum’s evidence rules. The Court, however, declined to specify (1) the elements of the forfeiture prima facie case, (2) the burden of persuasion the prosecution must meet to enable the judge to make a forfeiture finding, or (3) the kind of evidence the judge may consider in making the finding.

We take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Fed. R. Evid. 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance-of-the-evidence standard, *see, e.g., United States v. Scott*, 284 F.3d 758, 762 (C.A.7 2002). State courts tend to follow the same practice, *see, e.g., Commonwealth v. Edwards*, 444 Mass. 526, 542, 830 N.E.2d 158, 172 (2005). Moreover, if a hearing on forfeiture is required, *Edwards*, for instance, observed that “hearsay evidence, including the unavailable witness’s out-of-court statements, may be considered.” *Id.* at 545, 830 N.E.2d, at 174.⁴³

To provide guidance to California judges, in *People v. Giles*⁴⁴ the California Supreme Court specified (1) the elements of the forfeiture doctrine, (2) the burden of persuasion the prosecution must meet, and (3) the kind of evidence the judge can consider in making a forfeiture finding. *Giles* was convicted of murdering his former girlfriend. At the trial, the judge admitted a statement the victim had made to a police officer. The officer testified that the victim told him that *Giles* had said, “If I catch you fucking around I’ll kill you.”⁴⁵ The hearsay was admitted under California Evidence Code Section 1370, which establishes an exception for out of court statements relating a threat of physical injury upon the declarant if the judge, among other matters, finds that the decla-

42. *Id.* at 2280.

43. *Id.*

44. 152 P.3d 433 (2007).

45. *Id.* at 437.

rant is unavailable to testify and the statement is trustworthy.⁴⁶

The California Supreme Court affirmed Giles' conviction. Even though the court conceded that the victim's statement was "testimonial" under the Sixth Amendment,⁴⁷ the court held that Giles had forfeited his right to object to its introduction on confrontation grounds.⁴⁸ In reaching its holding, the court laid down a number of guidelines to assist California judges in applying the Sixth Amendment's forfeiture doctrine.

First, a judge should not find that the accused has forfeited his or her right to object on Sixth Amendment grounds unless the prosecution persuades the judge by a preponderance of the evidence that "the witness [is] genuinely unavailable to testify and the unavailability for cross-examination [was] caused by the defendant's intentional criminal act."⁴⁹

Second, in determining whether the prosecution has carried its persuasion burden, the judge may consider the hearsay declarant's statement. But the judge's forfeiture finding may not be based "solely on the unavailable witness's unopposed testimony; there must be independent corroborative evidence that supports the forfeiture finding."⁵⁰

Third, although relevant, the prosecution does not have to prove that the accused's purpose was to prevent the hearsay declarant from testifying. It is sufficient for the prosecution to prove that the accused's criminal act had the effect of preventing the hearsay declarant from testifying.⁵¹ In this regard, it is immaterial that the act giving rise to the witness's unavailability at the trial is also the criminal act for which the accused is on trial.⁵²

In January 2008, the United States Supreme Court granted Giles' petition for certiorari.⁵³ The Court framed the question presented as whether

a criminal defendant "forfeit[s]" his or her Sixth Amendment Confrontation Clause claims upon a mere showing that the defendant has caused the unavailability of a witness, as some courts have held, or must there also be an additional showing that the defendant's actions were undertaken for the purpose of preventing the witness from testifying, as other courts have held?⁵⁴

In June, the Court responded by holding that the Sixth Amendment's for-

46. See CAL. EVID. CODE § 1370.

47. *People v. Giles*, 152 P.3d 433, 437 (2007).

48. *Id.* at 447.

49. *Id.* at 446.

50. *Id.*

51. *Id.* at 442.

52. *Id.* at 444.

53. *People v. Giles*, 152 P.3d 433 (Cal.), *cert. granted*, 76 USLW 3371 (U.S. Jan. 11, 2008) (No. 07-6053).

54. See *id.*

feiture doctrine requires the prosecution to persuade the judge that the accused's purpose was to prevent the hearsay declarant from testifying.⁵⁵ The Court, however, did not specify the standard of persuasion that should govern a forfeiture hearing or the kind of evidence the judge can consider in making the forfeiture finding. Until the Court does so, California judges may continue to apply the more likely than not standard and may consider the hearsay declarant's statement in determining whether the prosecution has met its burden.

IV. PROPOSED SECTION 1390

Section 2 of AB 268 would add the following section to the Evidence Code:

1390. (a) Evidence of a statement is not made inadmissible by the hearsay rule if the statement is offered against a party who has engaged or acquiesced in wrongdoing that has caused the unavailability of the declarant as a witness.

(b) (1) The party seeking to introduce a statement pursuant to subdivision (a) shall establish, by a preponderance of the evidence, that the elements of subdivision (a) have been met at a foundational hearing.

(2) Hearsay evidence, including the hearsay evidence that is the subject of the foundational hearing, is admissible at the foundational hearing. However, a finding that the elements of subdivision (a) have not been met shall not be based solely on the uncontroverted hearsay statement of the unavailable declarant, and shall be supported by independent corroborative evidence.

(3) The foundational hearing shall be conducted outside the presence of the jury. However, if the hearing is conducted after a jury trial has begun, the judge presiding at the hearing may consider evidence already presented to the jury in deciding whether the elements of subdivision (a) have been met.

(c) If a statement to be admitted pursuant to this section includes a hearsay statement made by anyone other than the declarant who is unavailable pursuant to subdivision (a), that other hearsay statement is inadmissible unless it meets the requirements of an exception to the hearsay rule.

Subdivision 1390(a) would create a new hearsay exception for statements by declarants when the proponent offers the hearsay against a party who "engaged or acquiesced in wrongdoing" that caused the declarant's unavailability to testify at the trial. Among the concerns that the Legislature should consider

55. *Giles v. California*, 128 S.Ct. 2678, 2688 (2008).

in crafting such exception are (1) whether a new exception is necessary; (2) whether any new exception is appropriately circumscribed to preserve the accused's right to cross-examine adverse witnesses; (3) whether the proposed exception poses an inadvertent double hearsay problem; and (4) whether California should deviate from its practice of prohibiting the use of inadmissible evidence as proof of the foundational elements of any exception.

A. *Whether a New Hearsay Exception is Necessary*

1. Whether a New Hearsay Exception is Needed to Implement *Giles*

The Assembly Committee on Public Safety's analysis quotes the author as stating:

California prosecutors need to utilize the forfeiture by wrongdoing doctrine in order to admit hearsay statements of victim/witnesses whose failure to appear to testify at trial is the result of the criminal conduct of the defendant. Based on the holding of *People v. Giles*, decided on March 6, 2007, prosecutors must establish that evidence proffered to establish forfeiture by wrongdoing meets a statutory hearsay exception. Current law provides no viable hearsay exception to permit the introduction of this evidence. This bill provides this needed hearsay exception.⁵⁶

If the author is claiming that a new hearsay exception is needed to establish forfeiture under the Sixth Amendment, he is mistaken. Under *People v. Giles*, the prosecution does not need a new hearsay exception to offer evidence to prove forfeiture. As a matter of Sixth Amendment jurisprudence as interpreted by the California Supreme Court, the prosecution is entitled to establish the elements of the forfeiture doctrine by admissible, as well as some inadmissible evidence. As has been noted, *Giles* allows the prosecution to offer and the judge to consider the hearsay statement in issue as proof of the forfeiture requirements, provided the prosecution also offers independent corroborative evidence that supports the forfeiture finding.⁵⁷ *People v. Giles* simply prohibits the judge from making a forfeiture finding solely on the basis of the declarant's hearsay statement.⁵⁸

Of course, the prosecution may not offer the hearsay declarant's statement to the jury for the truth of the matter stated, unless California law provides an exception. If the author is claiming that California law provides no exceptions

56. ASSEMBLY COMMITTEE ON PUBLIC SAFETY ANALYSIS 4 (2007), available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0251-0300/ab_268_cfa_20070507_100204_asm_comm.html (last visited Feb. 11, 2009).

57. See *supra* text accompanying note 50.

58. *Id.*

useful to prosecutors, he is mistaken. In *People v. Giles* the hearsay declarant's statement was admitted under Evidence Code Section 1370, which creates a hearsay exception for statements by unavailable declarants relating the infliction or threat of physical injury.⁵⁹

People v. Giles' relationship to the hearsay rule can be illustrated by the sequence in which a criminal defendant objects to hearsay offered by the prosecution. First, the defendant will object on hearsay grounds. If the judge finds that the evidence is hearsay, the prosecution will be given an opportunity to explain why it falls within an exception. Second, if the judge overrules the defendant's objection on the ground that the hearsay falls within an exception, the defendant can object on confrontation grounds. If the judge finds that the evidence constitutes inadmissible testimonial hearsay under *Crawford* and its progeny, the prosecution may seek to persuade the judge to overrule the defendant's confrontation objection by offering evidence that satisfies the *Giles v. California* forfeiture test. Third, if the judge finds that the defendant has forfeited his confrontation objection, the judge may allow the jury to hear the hearsay declaration.⁶⁰ The judge may do so because the judge had previously ruled that a state exception applied.

2. Section 1390 as a Codification of *People v. Giles*

The Assembly Committee on Public Safety's analysis also quotes the author as saying that:

California must enact a forfeiture by wrongdoing exception so that the doctrine can operate fairly and effectively. This bill is consistent with the *Giles* case to ensure that defendants [sic] are not deprived of any applicable constitutional protections. At the same time, this bill provides guidance to judges, prosecutors and criminal defense attorneys by setting forth a concise description of the manner in which the doctrine is practically applied.⁶¹

This language suggests that the purpose of the Section 1390 is not just to create a new hearsay exception in order to implement *People v. Giles* (a need which, as noted, is nonexistent) but also to codify *People v. Giles*' forfeiture doctrine. In assessing the wisdom of codifying a constitutional doctrine, the California Legislature should keep a number of considerations in mind.

59. See CAL. EVID. CODE § 1370.

60. The judge retains discretion to exclude hearsay falling within an exception if the judge concludes that its probative value on the contested issues is substantially outweighed by the countervailing considerations enumerated in Evidence Code Section 352.

61. ASSEMBLY COMMITTEE ON PUBLIC SAFETY ANALYSIS 6 (2007), available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0251-0300/ab_268_cfa_20070507_100204_asm_comm.html (last visited Feb. 11, 2009).

First, in *People v. Giles* the California Supreme Court was attempting to respond to questions that ultimately must be answered by the United States Supreme Court. It is up to the federal justices to prescribe the elements of the Sixth Amendment's forfeiture doctrine, the prosecution's burden of persuasion, and whether inadmissible evidence, including uncorroborated hearsay, may be offered by the prosecution in support of a forfeiture finding. Therefore, if Section 1390 is merely an attempt to codify *People v. Giles*' forfeiture doctrine, the Legislature should refrain from enacting an implementing forfeiture provision until the United States Supreme Court addresses the questions raised by the Sixth Amendment's forfeiture doctrine. Thus far, the United States Supreme Court has answered only one of these questions: the prosecution must persuade the trial judge that the accused's purpose was to prevent the hearsay declarant from testifying.⁶² But the Court has yet to specify the standard of persuasion that should govern a forfeiture hearing or the kind of evidence the judge can consider in making the forfeiture finding. Until the Court does so, California judges may continue to apply the more likely than not standard of persuasion and may consider the hearsay declarant's statement in determining whether the prosecution has met its burden.

Second, the California Legislature retains its competency to regulate some aspects of the Sixth Amendment's forfeiture doctrine. In *People v. Giles* the California Supreme Court was simply setting out a forfeiture doctrine the court believed is mandated by the Sixth Amendment. State law—whether decisional, statutory, or constitutional—may impose more stringent standards for the admission of evidence offered by the prosecution and regulated by the Federal Constitution. At one time, for example, California required prosecutors to prove beyond a reasonable doubt that defendants had waived their *Miranda* rights.⁶³ That standard of persuasion changed with the advent of Proposition 8's Right to Truth-in-Evidence provision. Subject to enumerated exceptions, this provision gives parties to California criminal proceedings the state constitutional right not to have relevant evidence excluded.⁶⁴ Since a confession is legally relevant irrespective of whether it was taken in violation of *Miranda*, Proposition 8 overturned those state decisions requiring prosecutors to prove compliance with *Miranda* beyond a reasonable doubt.⁶⁵ Proposition 8, of course, cannot diminish federal constitutional rights. Today, the admissibility of evidence over a federal constitutional objection is determined by the stan-

62. *Giles v. California*, 128 S.Ct. 2678, 2688 (2008).

63. *See People v. Stroud*, 78 Cal. Rptr. 270, 275 (Ct. App. 1969).

64. CAL. CONST. art. 1 § 28(d).

65. *See People v. Kelly*, 800 P.2d 516, 542 & n.1 (Cal. Ct. App. 1990) (Mosk, J., concurring), *cert. denied*, 502 U.S. 842 (1991).

dards the United States Supreme Court laid down in *Lego v. Twomey*.⁶⁶ In that case, the Court held that the accused is entitled to a “clear-cut” determination that his or her constitutional rights have been observed.⁶⁷ According to the Court, that demand can be met by requiring the prosecution to prove compliance with the constitutional standards at least by a preponderance of the evidence.⁶⁸

Proposition 8 allows the Legislature to override the provisions of the Right to Truth-in-Evidence provision if the legislation is supported at least by two-thirds of the membership of each house.⁶⁹ Accordingly, if Section 1390 draws the required votes, the Legislature may (1) add elements to the Sixth Amendment prima facie case, (2) impose a higher persuasion burden on prosecutors, and (3) prohibit the judge from considering inadmissible evidence in making the forfeiture finding.

A comparison of proposed Section 1390 with the *People v. Giles* forfeiture doctrine reveals both similarities and differences. The similarities relate to the persuasion burden the prosecution must meet and to the kind of evidence the prosecution may offer to establish forfeiture. The differences relate to the kind of wrongdoing that can give rise to forfeiture and to whether the judge may base a forfeiture finding solely on the hearsay declaration at issue.

(1) Subdivision 1390(b)(1) provides that “the party seeking to introduce a statement pursuant to Subdivision (a) shall establish, by a preponderance of the evidence, that the elements of Subdivision (a) have been met at a foundational hearing.” This is identical to the persuasion burden specified in *People v. Giles*.⁷⁰

(2) Subdivision 1390(b)(2) provides that “[h]earsay evidence, including the hearsay evidence that is the subject of the foundational hearing, is admissible at the foundational hearing.” Subdivision (c), however, provides that a “hearsay statement made by anyone other than the declarant who is unavailable pursuant to Subdivision (a) . . . is inadmissible unless it meets the requirements of an exception to the hearsay rule.” Combined, Subdivisions (b)(2) and (c) create a limited hearsay exception that allows the judge to consider the hearsay declaration at issue in determining whether the accused has forfeited his confrontation rights. This limited hearsay exception is identical to the one specified in *People v. Giles*.⁷¹

66. 404 U.S. 477 (1972).

67. *Id.* at 489.

68. *Id.*

69. See CAL. CONST. art. 1, § 28(d).

70. *People v. Giles*, 152 P.3d 433, 446 (Cal. Ct. App. 2007).

71. *Id.*

(3) Subdivision 1390(a) provides that “[e]vidence of a statement is not made inadmissible by the hearsay rule if the statement is offered against a party who has engaged or acquiesced in wrongdoing that has caused the unavailability of the declarant as a witness.” “Wrongdoing” under Subdivision 1390(a) is not limited to criminal wrongs. The term can embrace civil wrongs as well. *People v. Giles*, by contrast, requires the witness’s unavailability to be “caused by the defendant’s intentional criminal act.”⁷² Under Subdivision 1390(a), negligent offenses, such as involuntary manslaughter, and strict liability offenses, such as felony murder, could be offered to establish the witness’s unavailability, so long as other evidence shows that the commission of the crime “caused” the witness’s unavailability. Presumably, offenses predicated on negligence or strict liability would not qualify as “intentional criminal acts” under *People v. Giles*.⁷³ After *Giles v. California*, however, these differences are immaterial where the evidence offered by the prosecution qualifies as “testimonial.” As a matter of Sixth Amendment jurisprudence, in this circumstance, the prosecution must persuade the judge that the hearsay declarant’s unavailability to testify at the trial was the result of wrongdoing undertaken by the accused’s for the purpose of preventing the declarant from testifying.⁷⁴ Thus, if Section 1390 is designed to codify the Sixth Amendment’s forfeiture doctrine, it goes too far in defining the kind of wrongdoing giving rise to forfeiture.

(4) *People v. Giles* holds that in determining whether the prosecution has carried its persuasion burden, the judge may consider the hearsay declarant’s statement.⁷⁵ But the judge’s forfeiture finding may not be based “solely on the unavailable witness’s unfronted testimony; there must be independent corroborative evidence that supports the forfeiture finding.”⁷⁶ It is unclear, however, whether Section 1390 allows the judge to consider the hearsay declaration at issue in making the forfeiture finding. On one hand, Subdivision 1390(b)(2) provides that “[h]earsay evidence, including the hearsay evidence that is the subject of the foundational hearing, is admissible at the foundational hearing.” On the other hand, Subdivision 1390(b)(3) provides that “a finding that the elements of Subdivision (a) have not been met shall not be based solely on the unfronted hearsay statement of the unavailable declarant, and shall be supported by independent corroborative evidence.” The ambiguity in this Subdivision could be eliminated if the first “not” is stricken. Then the two subdivisions

72. *Id.*

73. Arguably, however, an “intentional criminal act” can be construed to include negligent and strict liability offenses, so long as the defendant intends to engage in the conduct constituting the actus reus of the crime. *See infra* text accompanying note 269.

74. *Giles v. California*, 128 S.Ct. 2678, 2688 (2008).

75. *See Giles*, 152 P.3d. 433

76. *Id.*

in combination would prohibit the judge only from making a forfeiture finding solely on the hearsay declaration at issue. Such a construction would be in accord with *People v. Giles*' requirements. The Senate Committee on Judiciary's analysis prepared in connection with the June 26, 2007 hearing states that "a finding of 'wrongdoing' shall not be based solely on the un-confronted hearsay statement of the unavailable declarant and shall be supported by independent corroborative evidence."⁷⁷ If this indeed the intent of Section 1390, then the first "not" in Subdivision 1390(b)(3) should be stricken.

Striking the first "not" would not, however, conform Section 1390's forfeiture doctrine with the Sixth Amendment's forfeiture doctrine as defined in *Giles v. California*. The kind of "wrongdoing" contemplated by Section 1390 would still embrace criminal misconduct that would not qualify as the kind of purposeful misconduct prescribed by the Court.

3. Section 1390 as an Independent Hearsay Exception

i. Civil Cases

The most persuasive evidence that Section 1390 is not intended solely as a codification of the *People v. Giles* forfeiture doctrine is its application to civil cases. Section 1390's hearsay exception can be invoked by any party (not just prosecutors) and can be applied against any party (not just criminal defendants) who engage or acquiesce in the requisite wrongdoing. In contrast, the Sixth Amendment forfeiture doctrine is limited to criminal cases.

Because parties to civil proceedings do not have to satisfy the Sixth Amendment's forfeiture doctrine to invoke Section 1390, the new hearsay exception would be useful to parties in civil proceedings whenever existing hearsay exceptions are unavailable. The Evidence Code does not contain a forfeiture exception for use in civil cases, and none appears to have been crafted by the appellate courts. Other jurisdictions provide such an exception. Federal Rule of Evidence 804(b)(6) applies in civil cases as well as in criminal cases, and so does Uniform Rule of Evidence 804(b)(5), which is almost identical to the Federal Rule.⁷⁸

77. S. COMM. ON JUDICIARY, ANALYSIS PREPARED FOR JUNE 26, 2007 HEARING 5-6 (Cal. 2007), available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0251-0300/ab_268_cfa_20070627_162526_sen_comm.html.

78. Federal Rule 804(b)(6) speaks of "wrongdoing that was intended to, and did, *procure* the unavailability of the declarant" while the Uniform Rule of Evidence speaks of "wrongdoing that was intended and did *cause* the unavailability of the declarant." (Emphasis added). The framers of the Uniform Rule believe the Uniform Rule to be "in accord" with the Federal Rule. See UNIF. R. EVID. 804(b)(5) cmt.

"As of January 1, 2007, forty-two states and Puerto Rico had adopted the Federal Rules

ii. Criminal Cases

In criminal cases the utility of Section 1390 as an independent hearsay exception for “testimonial” hearsay has been undermined by *Giles v. California*. If as a matter of Sixth Amendment jurisprudence the prosecution must persuade the judge that the accused’s purpose was to prevent the hearsay declarant from testifying, prosecutors would have nothing to gain by a hearsay exception that imposes a lesser burden but that cannot be invoked until after the Sixth Amendment’s higher standard has been satisfied. Thus, only where the hearsay is not testimonial would Section 1390 be of benefit to prosecutors as an independent hearsay exception.

Consider a case where the defendant is prosecuted for assaulting the victim. The victim refuses to testify, claiming that she is afraid that the defendant might harm her. The prosecution calls the doctor who treated the victim in the emergency room to testify as follows: “When I asked the victim, ‘What happened?’, she said, ‘The defendant hit me.’”

The victim’s statement does not appear to qualify as an excited utterance, as the proponent has offered no evidence that the declarant made the statement while under the stress of an exciting event.⁷⁹ Nor is the statement a business entry if the doctor failed to include the victim’s statement in the medical record.⁸⁰ Neither does the statement qualify under the exception for statements made for the purpose of medical diagnosis or treatment. In California, this exception is available only if the statement was made by a victim who is still a minor at the time of the proceeding, was under the age of twelve when she made the statement, and the statement describes an act or attempted act of child abuse or neglect.⁸¹ Nor does the victim’s statement qualify under the exception for statements describing the infliction of physical injury.⁸² This exception requires the proponent to prove the declarant’s unavailability to testify under Section 240 of the Evidence Code.⁸³ Where the declarant refuses to testify out of fear of the defendant, Section 240 requires the proponent to offer expert testimony in convincing the judge that the physical or mental trauma suffered by the declarant has caused such harm that the declarant cannot testify or can do so

in various forms.” JACK B. WEINSTEIN ET. AL., EVIDENCE – 2007 RULES, STATUTE AND CASE SUPPLEMENT, at iii (2007). It is unclear how many of the state adoptions include a version of Rule 804(b)(6).

79. See CAL. EVID. CODE § 1240.

80. See *id.* §§ 1271, 1280.

81. See *id.* § 1253.

82. See *id.* § 1370.

83. See *id.* § 1370(a)(2).

only by enduring additional substantial trauma.⁸⁴ Courts impose this requirement to prevent inconvenience, including the anguish and physical discomfort produced by testifying, from stripping the opponent of the right to cross-examine the declarant.⁸⁵ Here, the prosecution has not offered the requisite expert testimony.

Nonetheless, the unavailability of existing hearsay exceptions is immaterial if the victim's statement is not testimonial hearsay. That would be the case in California if the judge finds that the doctor's purpose was to elicit information pertinent to medical diagnosis and care, and not to gather evidence that might be useful in a possible prosecution.⁸⁶ Under these circumstances, the victim's statement would be admissible under Section 1390's forfeiture hearsay exception, so long as the judge finds that the victim's refusal to testify was "caused" by the defendant's wrongdoing. Unlike Section 240, proposed Section 1390 does not require the proponent to offer expert testimony to prove the declarant's unavailability. The accused could thus be convicted of assault on the basis of hearsay admitted under Section 1390 even if he was never accorded an opportunity to cross-examine his accuser.

Consider also a case where the defendant is charged with murder. The prosecution calls as a witness A's girlfriend who testifies as follows: "A said to me, 'I intend to meet the [defendant] at the [victim's] home the night of July 4.'" Other evidence shows July 4 to be the date of the murder. In response to the defendant's hearsay objection, the prosecutor invokes Section 1390 and offers evidence that A died as a result of a traffic accident in which the defendant ran a red light.

The prosecution does not rely on the exception for coconspirators' declarations because of the absence of proof that A was the defendant's coconspirator at the time he made the statement to the witness.⁸⁷ Neither does the prosecution rely on the exception for declarations against interest because the portion implicating the defendant is inadmissible under the California Evidence Code.⁸⁸ Nor does the prosecution rely on the exception for state of mind declarations regarding future plans because under California law the exception may be used

84. See *People v. Williams*, 155 Cal. Rptr. 414, 421 (Ct. App. 1979).

85. *Id.* The additional requirement is now codified in CAL. EVID. CODE § 240(c).

86. See *People v. Cage*, 155 P.3d 205, 218 (Cal. 2007). Some courts, however, take the position that statements to medical personnel are testimonial if they are part of an ongoing police investigation. See, e.g., *State v. Hooper*, 176 P.3d 911, 917 (Idaho 2007) (holding that a child's statement to a forensic nurse made in the course of a police investigation was testimonial). Some courts take the opposite position. See, e.g., *State v. Stahl*, 855 N.E.2d 834, 844 (Ohio 2006) (holding that a rape victim's statement to a nurse collecting rape kit in coordination with police was not testimonial).

87. See CAL. EVID. CODE § 1223.

88. See MÉNDEZ, *supra* note 33, § 9.01.

to prove only A's future plans.⁸⁹ Since A's statement to the witness does not appear to qualify as "testimonial" hearsay under *Crawford*, any Sixth Amendment objection by the defendant would have to be overruled. So long as the judge finds that A's unavailability as a witness was "caused" by the defendant's civil or criminal wrongdoing, A's declaration would be admissible under Section 1390. Admitting the statement would deprive the defendant of the opportunity to challenge its reliability through cross-examination, even though the statement is devoid of any circumstantial guarantees of trustworthiness. Thus quite apart from Sixth Amendment considerations, reliability concerns still favor limiting a forfeiture hearsay exception to those circumstances where the opposing party engages in wrongdoing for the purpose of preventing the hearsay declarant from testifying.

B. Whether the New Exception Is Appropriately Circumscribed so as to Preserve the Accused's Right to Cross-Examine the Prosecution's Witnesses

AB 268 is not the first provision to address the need for a hearsay exception for damaging statements made by declarants who are prevented from testifying in a criminal case. Evidence Code Section 1350, which the Legislature added to the Code in 1985, allows the use of such statements in criminal proceedings.⁹⁰ Proposed Section 1390, however, is much broader than Section 1350 and lacks many of the protections of Section 1350.

While Subdivision 1350(a) is limited to criminal proceedings charging a serious felony,⁹¹ Subdivision 1390(a) applies to any prosecution, irrespective of the gravity of the crimes charged.

Additionally, Subdivision 1350(a)(1) limits unavailability to death by homicide or kidnapping of the declarant.⁹² Subdivision 1390(a) includes any "wrongdoing that has caused the unavailability of the declarant as a witness." Moreover, "wrongdoing" under Section 1390 is not limited to homicide and kidnapping but could include other criminal wrongdoing such as a threatened assault⁹³ as well as such civil wrongs as wrongful deaths that are predicated on civil, not criminal, negligence. Nothing in Subdivision 1390(a) limits "wrongdoing" to criminal wrongdoing.

Subdivision 1350(a)(1) requires proof that the declarant's "unavailability

89. *Id.* § 9.10.

90. *See* CAL. EVID. CODE § 1350 cmt.

91. *See id.* § 1350(a).

92. *See id.* § 1350(a)(1).

93. *See* CAL. PENAL CODE § 422.

was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution” of that party.⁹⁴ In contrast, Subdivision 1390(a) prescribes a strict liability causation element. Its text merely requires proof that the declarant’s unavailability was caused by wrongdoing engaged or acquiesced in by the defendant. Proof of intent to silence the declarant as a witness is not required.

Subdivision 1350(a)(1) requires the proponent to prove the foundational facts by clear and convincing evidence and does not authorize the use of inadmissible hearsay as proof of the foundational facts.⁹⁵ Subdivision 1390(b) imposes upon the proponent the burden of proving the foundational facts only by a preponderance of the evidence and purports to allow the use of the hearsay statement at issue as proof of those facts.⁹⁶

Subdivision 1350(a)(3) requires the statement offered in evidence to have “been memorialized in a tape recording made by a law enforcement official, or in a written statement prepared by a law enforcement official and signed by the declarant and notarized in the presence of the law enforcement official, prior to the death or kidnapping of the declarant.”⁹⁷ Section 1390 has no such requirements.

Subdivision 1350(a)(4) empowers the judge to exclude the declaration unless the judge finds that the declaration was made under circumstances that “indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion.”⁹⁸ Section 1390 does not contain an equivalent trustworthiness limitation.

Subdivision 1350(b) requires the prosecution to serve a written notice advising the defendant of its intention to offer evidence under the section.⁹⁹ Section 1390 does not contain a notice provision.

In sum, Section 1350 evinces the Legislature’s concern with preserving the accused’s right of cross-examination even when the accused has been charged with bringing about the hearsay declarant’s unavailability by death or kidnapping. In this regard, the Assembly Committee on Public Safety’s analysis of AB 268 is in greater accord with Section 1350. The analysis correctly emphasizes that out of court statements are “inherently inferior proof” because they can preclude the opponent from exposing their unreliability by probing for

94. See CAL. EVID. CODE § 1350(a)(1).

95. *Id.*

96. As has been noted, it is unclear whether the language of Subdivision 1390(b)(2)-(3) allows the judge to consider the hearsay declaration in making the forfeiture finding. See *supra* text accompanying note 76.

97. See CAL. EVID. CODE § 1350(a)(3).

98. *Id.* § 1350(a)(4).

99. See *id.* § 1350(b).

flaws in the declarant's powers of perception, recollection, narration, and sincerity.¹⁰⁰

Section 1350's emphasis on procedural safeguards also reflects a concern that hearsay admitted under the exception may be bereft of any circumstantial guarantees of trustworthiness. Many hearsay exceptions are justified on the ground that they possess such circumstantial guarantees of trustworthiness as to render cross-examination unnecessary. Declarations against interest are believed to be reliable because their admission requires proof that it was against the declarant's interest to make the declaration.¹⁰¹ Dying declarations are believed to be reliable because of the improbability that persons who know they are about to die would do so with a lie on their lips.¹⁰² Excited utterances are considered reliable because to qualify under the exception the proponent must establish that the declarant did not have time to fabricate the statement.¹⁰³ Contemporaneity also explains the justification for the hearsay exceptions for state of mind declarations¹⁰⁴ and, to a lesser degree, entries in business and official records.¹⁰⁵

Where the declaration lacks these kinds of circumstantial guarantees of trustworthiness, some exceptions expressly empower the judge to exclude the declaration if the circumstances attending its making lead the judge to conclude that the declaration is untrustworthy.¹⁰⁶ Section 1350 gives this power to the judge.¹⁰⁷ So do Sections 1360 (hearsay exception for statements made by minors describing acts of child abuse or neglect),¹⁰⁸ 1370 (hearsay exception for statements made by victims describing the infliction or threatened infliction of physical injury),¹⁰⁹ 1380 (hearsay exception for statements made by victims offered in prosecutions charging elder or dependent adult abuse),¹¹⁰ and 1231 (hearsay exception for statements made by deceased declarants relating to acts

100. ASSEM. COMM. ON PUBLIC SAFETY'S ANALYSIS 6 (2007), available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0251-0300/ab_268_cfa_20070507_100204_asm_comm.html.

101. See CAL. EVID. CODE § 1230.

102. See *id.* § 1242.

103. See *id.* § 1240.

104. See *id.* § 1250.

105. See *id.* §§ 1270-1280.

106. Even though the contemporaneity of state of minds declarations furnish them with a degree of trustworthiness, doubts about their reliability led the California Legislature to include a provision giving the judge the power to exclude them whenever the judge finds that they were not made under circumstances indicating their trustworthiness. See *id.* § 1252.

107. See *id.* § 150(a)(4).

108. See *id.* § 1360(a)(2).

109. See *id.* § 1370((a)(4).

110. See *id.* § 1380(a)(1).

or events relevant in a prosecution for gang related crimes).¹¹¹ Section 1390 does not contain an equivalent provision. Since hearsay declarations that would be admissible under Section 1390 do not need to possess any circumstantial guarantees of trustworthiness, consideration should be given to providing judges with discretion to exclude the declarations whenever they conclude from the evidence that the declarations were not made under circumstances indicating their trustworthiness.

Other jurisdictions impose more stringent conditions on the admissibility of hearsay under their forfeiture doctrines than does Section 1390. Federal courts, in particular, limit the forfeiture doctrine to those instances in which the defendant's wrongdoing "was intended to, and did, procure the unavailability of the declarant as a witness."¹¹² As has been noted, Subdivision 1390(a) does not include this limitation. Instead, Subdivision 1390(a) is predicated on the kind of broad equitable principle cited by the California Supreme Court in *People v. Giles*:

Although courts have traditionally applied the forfeiture rule to witness tampering cases, forfeiture principles can and should logically and equitably be extended to other types of cases in which an intent-to-silence element is missing. As the Court of Appeal here stated, "Forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts. A defendant whose intentional criminal act renders a witness unavailable for trial benefits from his crime if he can use the witness's unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible. This is so whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable."¹¹³

But as the California Supreme Court acknowledged, other courts have rejected such a broad equitable principle. They have limited forfeiture to circumstances where the defendant intended to silence the hearsay declarant.¹¹⁴ They have done so for a good reason. To these courts, the question regarding the declarant's unavailability is not merely one of causation. Their concern is with safeguarding the integrity of the trial process by discouraging defendants from gaming the system. Defendants who are ejected from trials because they deliberately engage in misconduct that disrupts the trial should and do forfeit their Sixth Amendment right to be present at the trial.¹¹⁵ Similarly, defendants who succeed in preventing potential witnesses from offering incriminating testimo-

111. *See id.* § 1231(f).

112. *See e.g.*, FED. R. EVID. 804(b)(6); UNIF. R. EVID. 804(b)(5).

113. *People v. Giles*, 152 P.3d 433, 443 (Cal. 2007).

114. *Id.*

115. *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

ny should forfeit their Sixth Amendment right to bar the introduction of the witnesses' extrajudicial statements. As Justice Souter noted in his concurrence in *Giles v. California*, "[T]here is a substantial indication that the Sixth Amendment was meant to require some degree of intent to thwart the judicial process before thinking it reasonable to hold the confrontation right forfeited."¹¹⁶ Subdivision 1390(a), however, divorces forfeiture from the blameworthy state of mind underlying this equitable principle. Subdivision 1390(a) would strip parties, including criminal defendants, of their right to confront adverse witnesses on a strict liability basis. So long as the requisite civil or criminal "wrongdoing" causes the declarant's unavailability, the causation element will be satisfied even if the objecting party had no idea that his or her "wrongdoing" could have possibly resulted in the declarant's unavailability. Enacting a forfeiture hearsay exception without including an intent to silence the declarant limitation is thus tantamount to creating a forfeiture doctrine by causation. Such a broad approach is at odds, not just with the equitable justification advanced by other courts, but also with the United States Supreme Court's admonition in *Davis*. As the Court explained, it is "when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims" that their "confrontation claims on essentially equitable grounds" are extinguished.¹¹⁷

The Legislature should consider following the lead set by other state legislatures. In its study, the Commission found that of fourteen states (counting California) that have adopted a forfeiture hearsay exception, all but possibly one (Hawaii) require the proponent to prove the opponent's intent to silence the witness:

Six states [Delaware, Kentucky, New Mexico, North Dakota, Pennsylvania, Vermont] have adopted laws or court rules identical to the federal rule exception for forfeiture by wrongdoing. In addition to mirroring the language used in the federal provision, several of these state provisions have comments that explicitly say the state and federal provisions are identical.

Four other states have adopted provisions similar but not identical to the federal exception: Connecticut, Michigan, Ohio, and Tennessee.

...

Three other states have provisions quite different from the federal exception. In Hawaii, it is sufficient that a party procured the unavailability of the declarant as a witness."

...

116. *Giles v. California*, 128 S.Ct. 2678, 2695 (2008).

117. *Davis v. Washington*, 126 S.Ct. 2266, 2280 (2006) (quoting from *Crawford v. Washington*, 541 U.S. 36, 62 (2004)).

Oregon draws a distinction between when a party intentionally or knowingly engages in criminal conduct that causes death, incapacity, or incompetence of the declarant, and when a party engages in, directs, or otherwise participates in wrongful conduct that causes the declarant to be unavailable. In the latter situation, the proponent of the hearsay statement must show that the declarant intended to cause the declarant to be unavailable as a witness.

...

Finally, Maryland has two different hearsay exceptions for forfeiture by wrongdoing, one for a civil case and the other for a criminal case. Both of these exceptions are detailed and, like California's forfeiture by wrongdoing exception, provide safeguards that are not present in the federal exception.¹¹⁸

Among the Maryland and California safeguards is a provision requiring the prosecution to prove the defendant's intent to silence the declarant.¹¹⁹

The Legislature should also take into account the position taken by the lower federal courts. In incorporating the intent to silence limitation into Federal Rule of Evidence 804(b)(6), the Advisory Committee noted that the split among the federal circuits was over the persuasion burden that applies to the forfeiture prima facie case and not over the inclusion of the limitation.¹²⁰

The United States Supreme Court has acknowledged that denying a party the right to cross-examine adverse witnesses calls into question "the integrity of the fact finding process."¹²¹ Confidence in the reliability of verdicts is necessar-

118. CAL. L. REVISION COMM., PRE-PRINT RECOMMENDATION, MISCELLANEOUS HEARSAY EXCEPTIONS: (1) FORFEITURE BY WRONGDOING, (2) PRESENT SENSE IMPRESSION 16-18 (2008), available at <http://www.clrc.ca.gov/pub/Printed-Reports/RECcpp-K600-Forfeiture.pdf> (last visited Feb. 11, 2009) (footnotes omitted).

119. See MD. CTS. & JUD. PROC. § 10-901 (requiring in criminal cases that the declarant's statement be offered only "against a party that has engaged in, directed, or conspired to commit wrongdoing that was intended to and did procure the unavailability of the declarant of the statement."); see also CAL. EVID. CODE § 1350(a)(1) (requiring clear and convincing evidence that the defendant caused the declarant's unavailability "for the purpose of preventing [his] arrest or prosecution.").

120. See FED. R. EVID. 804(b)(6) advisory committee's note:

Every circuit that has resolved the question has recognized the principle of forfeiture by misconduct, although the tests for determining whether there is a forfeiture have varied. See e.g., *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992); *United States v. Potamitis*, 739 F.2d 784, 789 (2d Cir. 1984), cert. denied, 469 U.S. 918 (1984); *Steele v. Taylor*, 684 F.2d 1193, 1199 (6th Cir. 1982), cert. denied, 460 U.S. 1053 (1983); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980); *United States v. Carlson*, 547 F.2d 1346, 1358-59 (8th Cir. 1977), cert. denied, 431 U.S. 914 (1977). The foregoing cases apply a preponderance of the evidence standard. *Contra United States v. Thevis*, 665 F.2d 616, 631 (5th Cir. 1982) (clear and convincing standard), cert. denied, 459 U.S. 825 (1982). The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.

121. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

ily undermined when a party is stripped of the right to cross-examine material adverse witnesses. Accordingly, in crafting a forfeiture hearsay exception, the Legislature should consider whether a party's "wrongdoing" should result in the loss of this essential procedural right without proof of the defendant's intent to silence the witness.

C. Whether the Proposed Exception Inadvertently Poses a Double Hearsay Problem

Subdivision 1390(c) would prohibit the use of any "hearsay statement made by anyone other than the declarant who is unavailable pursuant to Subdivision (a)," unless the statement meets the requirements of an exception to the hearsay rule. This provision comports with California's general rule regarding hearsay within hearsay. Under the Evidence Code, a party may not use admissible hearsay to prove another hearsay statement unless that statement also falls within an exception.¹²² It is unclear, however, whether Subdivision 1390(c) precludes the use of double hearsay when the unavailable declarant's statement implicitly embraces another declarant's statement.

Most Evidence Code hearsay exceptions begin with a preamble similar to the one used in Subdivision 1390(a): "Evidence of a statement by a declarant is not made inadmissible by the hearsay rule."¹²³ In many cases, the preamble is followed by language specifying with particularity the type of declaration that falls within the exception.¹²⁴ The preamble for declarations against interest, for example, is followed by a detailed definition of what constitutes such a declaration.¹²⁵ The definition consists of the circumstances justifying the exception: "the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created

122. See CAL. EVID. CODE § 1201.

123. See e.g., CAL. EVID. CODE §§ 1220 (party admissions), 1221 (adoptive admissions), 1222 (authorized admissions), 1223 (coconspirators' declarations), 1230 (declarations against interest), 1235 (inconsistent statements), 1236 (consistent statements), 1237 (past recollection recorded), 1238 (statements of prior identification), 1240 (excited utterances), 1242 (dying declarations), 1250 (existing state of mind declarations), 1271 (business records), 1280 (official records), 1291 (former testimony), 1341 (learned treatises).

124. See, e.g., CAL. EVID. CODE §§ 1230 (declarations against interest), 1238 (statements of prior identification), 1240 (excited utterances), 1242 (dying declarations), 1250 (existing state of mind declarations), 1253 (statements for purposes of medical diagnosis or treatment), 1261 (decedents' statements offered against their estates), 1271 (business records), 1280 (official records), 1291 (former testimony), 1340 (learned treatises), 1370 (threats of infliction of injury).

125. See CAL. EVID. CODE § 1230.

such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.”¹²⁶ If the declaration contains assertions falling outside the definition, the opponent may object to those portions on hearsay grounds, and the judge will uphold the objection, unless the proponent convinces the judge that those portions fall within another exception. An example can be found in *People v. Dixon*,¹²⁷ where the reviewing court upheld the trial court’s redaction of that portion of a declaration against penal interest in which the declarant expressly stated that the accused had nothing to do with the crime for which he was on trial. Only the portion in which the declarant admitted responsibility for the crime was admissible under the exception.¹²⁸

Out of court statements admissible under proposed Subdivision 1390(a) are bereft of any definitional circumstances designed to assure their reliability. The section merely refers to “a statement made by the declarant.” Arguably, any statement made by the hearsay declarant should be admissible over a hearsay objection if the proponent persuades the judge to make a favorable forfeiture finding. If this is the proper construction of Subdivision 1390(a), then the declarant’s statement, “I heard that the defendant is planning to kill me,” might be admissible even though examination would disclose that the declarant based his statement on someone else’s statement.

Presumably, the goal of Section 1390 is to admit evidence that would otherwise be admissible through the declarant if the defendant had not brought about the declarant’s unavailability as a witness. One way to attain this goal and remedy the potential hearsay within hearsay problem is by including a qualification that the hearsay declaration is admissible only to the extent that it would have been admissible if made by the declarant while testifying. Some exceptions expressly include this limitation. For example, the preamble for the exception for statements of prior identification states: “Evidence of a statement previously made by a witness [declarant] is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying.”¹²⁹ Likewise, the exception for past recollection recorded contains a similar limitation.¹³⁰ This limitation is especially pertinent because the exception for recorded recollection, like Section 1390’s, does not require the statement to possess circumstantial guarantees of trustworthiness. Complying with the exception’s procedural requirements is insufficient for admission, if the statement would have been inadmissible if made by the declarant while testify-

126. *Id.*

127. 63 Cal. Rptr. 3d 637, 647 (Ct. App. 2007).

128. *Id.*

129. See CAL. EVID. CODE § 1237(a).

130. See *id.*

ing.¹³¹

D. *Whether California Should Deviate from its Practice of Prohibiting the Use of Inadmissible Evidence as Proof of the Foundational Elements of Any Hearsay Exception*

Proposed Section 1390 applies to civil cases as well as to criminal cases. Its application to civil cases raises the question whether California should deviate from its practice of prohibiting the use of inadmissible evidence as proof of preliminary facts, including the foundational elements of hearsay exceptions. When the Legislature approved the California Evidence Code in 1965, it rejected a recommendation by the California Law Revision Commission permitting a judge to consider unprivileged, inadmissible evidence in determining the existence of foundational facts. The Legislature declined to enact the recommendation and, instead, retained the California practice of requiring the use of admissible evidence to establish these facts.¹³² This practice has generally served California well and avoided some problems experienced by the federal courts.

In contrast, Federal Rule of Evidence 104(a) allows federal judges to consider unprivileged, inadmissible evidence in determining the existence of foundational facts.¹³³ Rule 104(a) thus allows a federal judge to consider the hearsay declaration at issue as proof of the foundational facts of the exception for the declaration. But whether the declaration alone should suffice as proof of the foundational facts proved controversial. The federal appellate courts that considered this practice found such gross bootstrapping unacceptable and required the proponent to offer some evidence in addition to the hearsay declaration as proof of the foundational facts.¹³⁴ In 1997, Rule 801(d)(2) was amended to reflect the concerns expressed by the federal circuit judges. The amended rule provides that:

the contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and participation therein of the declarant and the party against whom the statement is offered under subdivision (E).¹³⁵

These subdivisions refer to the hearsay exemptions for authorized admissions, admissions by agents and servants, and coconspirators' declarations.

131. *Id.*

132. *See* MÉNDEZ, *supra* note 33, § 17.06.

133. *See* FED. R. EVID. 104(a).

134. *See* cases cited by the Advisory Committee in its Note to FED. R. EVID. 801.

135. *See* FED. R. EVID. 801(d)(2).

Subdivision 1390(a)(2) allows the judge to consider the hearsay statement that is the subject of the foundational hearing as proof of the foundational facts. Like the Federal Rule, the subdivision appears to prohibit the judge from making a forfeiture determination solely on the evidence of the hearsay declaration. The judge's finding must be "supported by independent corroborative evidence."¹³⁶ Since in a civil case Section 1390 cannot be viewed as a codification of the *People v. Giles* forfeiture doctrine, the subdivision raises the question of whether California should depart from its longstanding and unbroken practice of insisting on the use of admissible evidence in resolving foundational fact disputes. Perhaps, some circumstances might justify relaxing the California requirement, but these are not apparent from the language of Section 1390 or the bill analyses.

V. PROPOSED SECTION 240(A)(6)

Section 1 of AB 268 would amend Section 240 of the Evidence Code as follows:

240. (a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:

- (1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.
- (2) Disqualified from testifying to the matter.
- (3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.
- (4) Absent from the hearing and the court is unable to compel his or her attendance by its process.
- (5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.
- (6) *If the declarant refuses to testify, notwithstanding imposition of sanctions, and the statement is offered against the party that has engaged or acquiesced*

136. As has been noted, the language of subdivision 1390(a)(2) is not a model of clarity. On one hand, the subdivision seems to require the introduction of "independent corroborative evidence" to support a finding of the foundational facts. On the other hand, the subdivision provides that "a finding that the elements of subdivision (a) have not been met shall not be based solely on the uncontroverted hearsay statement of the unavailable declarant." Perhaps what the author of subdivision 1390(b)(2) has in mind is that a finding that the foundational elements *have been met* shall not be based solely on the hearsay statement of the unavailable declarant unless the finding is supported by independent corroborative evidence. Such a construction would be consistent with the California Supreme Court's decision in *Giles*.

in wrongdoing that was intended to, and did procure the unavailability of the declarant as a witness.

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying.

(c) Expert testimony *that* establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term “expert” means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.

AB 268 would amend Section 240 of the Evidence Code by adding a new ground of witness unavailability. It would allow a judge to declare as unavailable a declarant who “refuses to testify, notwithstanding imposition of sanctions, and the statement is offered against the party that has engaged or acquiesced in wrongdoing that was intended to, and did procure the unavailability of the declarant as a witness.”

Some existing hearsay exceptions require the proponent to establish as a condition of admissibility the declarant’s unavailability to testify. Among these are the exceptions for declarations against interest¹³⁷ and former testimony.¹³⁸ Unlike the Federal Rules of Evidence, the California Evidence Code does not expressly include the “contumacious” witness among those declarants who are deemed unavailable to testify. In contrast, Federal Rule of Evidence 804(a)(2) defines, as unavailable, a declarant who “persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so.”¹³⁹

The California courts, however, have construed a provision of Subdivision 240(a) as embracing the contumacious witness in one circumstance. Witnesses who refuse to testify because of fear for their safety or that of their families can be declared unavailable under Subdivision 240(a)(3) under some circumstances.¹⁴⁰ This subdivision defines, as unavailable, “declarants who are unable

137. See CAL. EVID. CODE § 1230

138. See *id.* §§ 1291-92.

139. See FED. R. EVID. 804(a)(2).

140. See, e.g., *People v. Rojas*, 542 P.2d 229, 235-36 (Cal. 1975).

to testify because of a then existing physical or mental illness or infirmity.”¹⁴¹ Proposed Subdivision (a)(6) is an important step toward empowering California judges to declare contumacious witnesses unavailable without having to resort to other provisions. The proposed amendment, however, does not go as far as the Federal Rule. A declarant who refuses to testify despite a court order to do so would be deemed to be unavailable under the amendment only if in addition the calling party establishes that the declarant was subject to sanctions and the statement is offered against a “party that has engaged or acquiesced in wrongdoing that was intended to, and did procure the unavailability of the declarant as a witness.” Merely defying a court order to testify would be insufficient proof of unavailability.

Proposed Subdivision (a)(6)’s intent to silence limitation should not be considered in isolation. Its value stems in part from Subdivision 1390(a)’s failure to include a similar limitation. As has been noted, Subdivision 1390(a)’s requirement that the unavailability of the declarant be “caused” by the opponent’s “wrongdoing” sets out a causation element that is bereft of any mental state.¹⁴² Any civil or criminal “wrongdoing” that happens to result in the declarant’s unavailability would appear to satisfy Subdivision’s 1390(a)’s causation element, even if opponents did not anticipate that their “wrongdoing” might have that effect. If to use Section 1390 the proponent also has to comply with proposed Subdivision 240(a)(6), the proponent will have to convince the judge (among other matters) that “the statement is offered against the party that has engaged or acquiesced in wrongdoing that was intended to, and did procure the unavailability of the declarant as a witness.” Under this construction of the two proposed amendments, Subdivision 240(a)(6) would provide an important check to the loss of the right to cross-examine adverse witnesses under Section 1390.

The two amendments, however, do not have to be construed together. A party invoking Subdivision 1390(a)’s forfeiture doctrine is not required to rely exclusively on the new unavailability provision of Subdivision 240(a)(6). That party may rely as well on any of the existing unavailability provisions of Subdivision 240(a). Thus, the proponent of hearsay under Section 1390 may be able to circumvent the intent to silence limitation of Subdivision (a)(6). The proponent, for example, could, under Subdivision 240(a)(3), rely on the declarant’s death as the ground of unavailability if the proponent can establish that the declarant’s inability to attend the trial was brought about by the opponent’s “wrongdoing” in killing the declarant. Even more troubling, a party relying on proposed Section 1390 may not have to comply with any of the unavailability

141. See CAL. EVID. CODE § 240(a)(3).

142. See *supra* text accompanying note 114.

provisions of Section 240.

Section 240 is designed to substitute “a uniform standard for the varying standards of unavailability” that applied to hearsay exceptions in California prior to the adoption of the Evidence Code.¹⁴³ Accordingly, where the proponent relies on a hearsay exception requiring proof of the declarant’s unavailability, the proponent must ordinarily prove the declarant’s unavailability under Section 240. Examples include the hearsay exceptions for declarations against interest¹⁴⁴ and former testimony.¹⁴⁵ Neither exception expressly refers to Section 240, but compliance with Section 240 is required.

New hearsay exceptions enacted after the adoption of the Evidence Code sometimes specifically refer to Subdivision 240. An example is the recently enacted hearsay exception for out of court statements narrating threats to inflict physical injuries.¹⁴⁶ Instead of referring to Section 240, some new exceptions provide a definition of unavailability that applies only to the exception created. Section 1350, for example, requires the prosecution to prove that the accused procured the declarant’s unavailability for the purpose of preventing his arrest or prosecution.¹⁴⁷ With regard to unavailability, proposed Subdivision 1390(a) provides that the hearsay declaration must be offered against “a party who has engaged or acquiesced in wrongdoing that has caused the unavailability of the declarant as a witness.” It is unclear whether “unavailability” is to be defined under Subdivision 240(a), or whether Subdivision 1390(a) creates a new ground of unavailability. The question is important because the Legislature should consider whether the creation of a new forfeiture hearsay exception might undermine current protections of the right to cross-examine adverse witnesses who refuse to testify out of fear of the accused (or his allies).

Subdivision 240(a)(3) provides that a declarant is unavailable if the declarant is “unable to attend or testify at the hearing because of then existing physical or mental illness or infirmity.”¹⁴⁸ This provision has been construed to include declarants who refuse to testify because of fear for their or their families’ safety.¹⁴⁹ However, to preserve the accused’s cross-examination rights, mere inconvenience, including the anguish and physical discomfort that testifying can produce, is considered an insufficient basis to render the declarant unavailable on the ground of “mental infirmity.”¹⁵⁰ But a judge can rule the declarant

143. See CAL. EVID. CODE § 240 (Comment).

144. See *id.* § 1230.

145. See *id.* §§ 1291-92.

146. See *id.* § 1370.

147. See *id.* § 1350(a)(1).

148. See *id.* § 240(a)(3).

149. See *People v. Rojas*, 542 P.2d 229, 240 (Cal. 1975).

150. See *People v. Williams*, 155 Cal. Rptr. 414, 421 (Ct. App. 1979).

unavailable as a result of physical or mental infirmity if expert testimony establishes that the physical or mental trauma suffered by the declarant during the commission of the crime charged has caused such harm that the declarant cannot testify or can do so only by suffering additional substantial trauma.¹⁵¹ This limitation is now incorporated into Subdivision 240(c). It authorizes a judge to find a witness to be unavailable under Subdivision 240(a)(3) if “[e]xpert testimony establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma.”¹⁵²

If the unavailability provision of proposed Section 1390 is subject to Section 240, then a witness’s refusal to testify out of fear of the defendant will be an insufficient ground for a judge to find the witness to be unavailable to testify, unless the requirements of Subdivision (c) are met. But if Section 1390 is construed as creating a new ground of unavailability, then a witness’s refusal to testify on account of the fear generated by his or her belief that the defendant committed the offense charged could result in a finding that the witness is unavailable even if the requirements of Subdivision (c) are not met. In the words of proposed Subdivision 1390(a), the defendant’s wrongdoing still “caused the unavailability of the declarant as a witness.” Such a construction of Subdivision 1390(a) would especially imperil a defendant’s right to confront his or her accusers if courts fail to require prosecutors to prove that the declarant’s fear was reasonable as well as sincere.

If Section 1390 does not create a new ground of unavailability and the Legislature adopts the Federal Rules’ broad approach to the contumacious witness, Subdivision 240(c)’s expert testimony limitation could still be undermined. The adoption of the federal approach could be viewed as replacing the more limited approach to contumacious witnesses currently provided by the Subdivisions 240(a)(3) (unable to testify because of “then existing physical or mental illness or infirmity”) and (c) (the expert witness limitation). Moreover, even if the broad approach is not viewed as a replacement, it would still provide an alternative ground for finding a witness who refuses to testify to be unavailable without having to comply with Subdivision (c)’s expert testimony requirement. Subdivision 240(c) is expressly linked to Subdivision 240(a)(3).¹⁵³ The Rule’s contumacious witness provision does not require expert testimony.¹⁵⁴ It allows a judge to find a fearful witness unavailable if the witness defies the judge’s or

151. *Id.*

152. *See* CAL. EVID. CODE § 240(c).

153. *See id.* § 240(c).

154. *See* FED. R. EVID. 804(a)(2).

der to testify.

A number of solutions are available. One is to include language in the federal approach that compliance with the new subdivision is not intended to excuse compliance with Subdivision 240(c) when the witness refuses to testify out of fear of the defendant. Another solution is to require a party relying on Subdivision 1390(a)'s forfeiture provision to comply with the intent-to-silence requirement of proposed Subdivision 240(a)(6). A third is to move Subdivision 240(a)(6)'s intent requirement to Subdivision 1390(a), where it would replace that subdivision's causation requirement. This would have the added benefit of eliminating the strict liability causation approach of Subdivision 1390(a).

The third solution would duplicate the Federal Rules' approaches to contumacious witnesses and forfeiture by wrongdoing. By including the intent to silence limitation in its hearsay exception,¹⁵⁵ the Federal Rules provide a broader ground of unavailability for contumacious witnesses without unduly risking the loss of the right to cross-examine adverse witnesses.¹⁵⁶ Although the federal approach allows a judge to declare the fearful witness unavailable if the witness defies the judge's order to testify, the prosecution may not use the federal forfeiture hearsay exception to offer the victim's extrajudicial statements without first convincing the judge that the victim's refusal to testify was the result of wrongdoing undertaken by the defendant for the purpose of silencing the witness.

Giles v. California favors the inclusion of a right to silence limitation in Section 1390. If as a matter of Sixth Amendment jurisprudence a criminal defendant does not lose his right to object on confrontation grounds unless the prosecution convinces the judge that the defendant engaged in wrongdoing that was designed to prevent the hearsay declarant from testifying, then any statutory forfeiture hearsay exception that imposes a lesser burden on the prosecution would be of no value to the state since the prosecution would have to meet the higher constitutional burden in order to take advantage of the exception. But, as has been pointed out, this is true only where the prosecution offers "testimonial" hearsay under an exception. If the hearsay does not qualify as testimonial, then the defendant may not object on Sixth Amendment grounds. So unless the exception imposes the intent to silence limitation, any non-testimonial hearsay would be admissible against the defendant even if the defendant is unable to cross-examine the declarant and was not given an opportunity to do so prior to the trial. Equally troubling, Section 1390 would compound the unreliability problems because it would admit hearsay bereft of any circumstantial guarantees of trustworthiness.

155. *See id.* 804(b)(6).

156. *See id.* 804(a)(2).

To summarize, if proposed Subdivision 240(a)(6) is unnecessary to effectuate Subdivision 1390(a), the Legislature has several options: (1) by enacting Subdivision 240(a)(6) it can provide only a limited new ground for finding a contumacious witness to be unavailable; (2) by enacting a provision similar to Federal Rule 804(a)(2), it can provide a broader new ground for finding a contumacious witness to be unavailable; (3) by enacting provisions similar to Federal Rules of Evidence 804(a)(2) and (b)(6), it can provide a broader new ground of unavailability while placing constraints on the forfeiture of the right to cross-examine adverse witnesses; or (4) by declining to enact any of these provisions, it can leave unchanged the existing grounds for finding a witness to be unavailable under Subdivision 240(a). But, as has been explained, in the case of non-testimonial hearsay enacting a provision similar to the federal contumacious witness provision (option 2) could undermine current protections of the right to cross-examine adverse witnesses, unless the intent to silence the witness limitation is incorporated into the new forfeiture hearsay exception (option 3).

VI. THE INITIATIVE

In October 2007, the proponents of “The Safe Neighborhood Act: Protect Victims, Stop Gang and Street Crime” requested the California Attorney General to prepare a title and summary for an initiative which they intended to submit to the California electorate.¹⁵⁷ Although the initiative qualified for inclusion in the November 2008 ballot, it failed to get the votes required for approval. Section Five of the initiative, entitled “PROTECTION AND SUPPORT FOR VICTIMS,” would have amended the Evidence Code by adding Section 1390, which, with one exception, is identical to the forfeiture doctrine proposed in AB 268.¹⁵⁸ The sole difference is that the initiative’s provision eliminates the

157. See <http://ag.ca.gov/404.php> (search “The Safe Neighborhood Act: Protect Victims, Stop Gang and Street Crime Initiative”; follow link for “Initiative 07-0076 A1S”). The initiative was not the only measure that would have added a forfeiture hearsay exception and a contumacious witness provision. SB 657, introduced in February 2007 and amended in January 2008, and AB 2417, introduced in February 2008, largely mirror the initiative. See http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0651-0700/sb_657_bill_20080107_amended_sen_v98.html; http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2401-2450/ab_2417_bill_20080221_introduced.html.

Additionally, in December 2007 a group also calling itself the “Safe Neighborhood Act Proponents” requested the California Attorney General to prepare a title and summary for an initiative that appears to mirror the Safe Neighborhood Act, including the provisions establishing a forfeiture hearsay exception and a contumacious witness provision. See http://ag.ca.gov/cms_attachments/initiatives/pdfs/i765_07-0094_a1s.pdf. This initiative did not appear on the November 2008 ballot.

158. See <http://ag.ca.gov/404.php> (search “The Safe Neighborhood Act: Protect Vic-

first “not” in Subdivision 1390(a)(2), so as to make it clear that a forfeiture finding cannot “be based solely on the uncontroverted hearsay statement of the unavailable declarant.”¹⁵⁹ Section Five would also have amended the Evidence Code by adding Subdivision 240(a)(6) which, unlike AB 268’s proposed amendment to Section 240, is in substance identical to Federal Rule of Evidence 804(a)(2). Under the initiative, a declarant is unavailable if the declarant is present at the hearing and refuses to testify concerning the subject matter of the declarant’s statement despite an order from the court to do so.¹⁶⁰ Under the federal provision, a declarant is unavailable if the declarant “persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so.”¹⁶¹

Because the forfeiture doctrines of AB 268 and the initiative are virtually the same, all of the criticisms of AB 268’s doctrine apply with equal force to the initiative’s doctrine. In particular, prosecutors do not need the initiative’s forfeiture provision to prove forfeiture. As has been pointed out, the elements of the forfeiture doctrine are matters to be determined by the United States Supreme Court, and until the Court prescribes the burden of persuasion prosecutors must discharge and the kind of evidence the judge can consider, the California Supreme Court has provided prosecutors with the necessary guidance in *People v. Giles*. Neither do prosecutors need the initiative’s provision to apply the Sixth Amendment’s forfeiture doctrine. Both *Giles v. California* and *People v. Giles* are written clearly enough. California judges, prosecutors, and defense lawyers should have no difficulty discerning the elements of its forfeiture doctrine, its specification of the persuasion burden, or the kind of evidence the judge can consider in making a forfeiture finding.

The value of the initiative’s forfeiture doctrine is thus the same as AB 268’s—as an independent hearsay exception. Prosecutors can profit from a new forfeiture hearsay exception whenever the hearsay they are attempting to introduce is inadmissible under existing exceptions. Even if this need justifies creating a new exception, questions remain whether the initiative’s forfeiture doctrine is appropriately circumscribed so as to preserve the accused’s right to cross-examine the state’s witnesses. In this respect, the criticisms leveled at AB 268 apply equally to the initiative. Enacting a forfeiture hearsay exception without any limitations is tantamount to creating a doctrine of forfeiture by causation. Defendants would be stripped of their right to confront their accusers without proof of a blameworthy state of mind, and judges would be powerless to exclude the hearsay even if its lack of circumstantial guarantees of reliability

tims, Stop Gang and Street Crime Initiative”; follow link for “Initiative 07-0076 A1S”).

159. *Id.*

160. *Id.*

161. See FED. R. EVID. 804(a)(2).

caused them to disbelieve the declarant.

To the extent that the absence of these guarantees causes judges to doubt the credibility of the hearsay declarant, Evidence Code Section 352 would be unavailing. Section 352 empowers California judges to exclude relevant evidence whenever in their estimation its probative value is substantially outweighed by such enumerated concerns as undue prejudice to the objecting party.¹⁶² But Section 352 does not empower judges to exclude hearsay on the ground that the declarant is unworthy of belief. In weighing the evidence's probative value against its prejudicial effects, judges are not permitted to take into account the witness's credibility.¹⁶³ Credibility is a question reserved for the jurors.¹⁶⁴ Accordingly, in weighing the probative value of the hearsay against its prejudicial effects, judges must ignore their doubts about the declarant's credibility.

The initiative's provision creating a new ground of witness unavailability is also problematical. On the plus side, creating a provision that expressly addresses the problem of the contumacious witness is desirable. To make up for this deficiency, the California appellate courts have had to resort to creative statutory interpretations of the Evidence Code's witness unavailability provisions.¹⁶⁵ On the minus side, enacting a contumacious witness provision without taking into account its impact on existing unavailability provisions threatens to undermine the Code's provisions preventing judges from declaring witnesses to be unavailable solely on account of their fear of the defendant. As has been explained,¹⁶⁶ Subdivision 240(c) prevents proponents from using a crime victim's fear of the defendant to establish the victim's unavailability to testify under Subdivision 240(a)(3) ("existing physical or mental infirmity"), unless expert testimony "establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma."¹⁶⁷ Without the expert witness requirement, a serious erosion of the right to cross-examine adverse witnesses would occur if judges could declare crime victims to be unavailable solely on the basis of their fear of the accused.¹⁶⁸ The initiative's contumacious witness provision does just that since it allows a judge to declare a fearful witness unavailable if the witness defies the judge's order to testify.

162. See CAL. EVID. CODE § 352.

163. See MÉNDEZ, *supra* note 33, § 15.12.

164. *Id.*

165. See *supra* text accompanying note 148.

166. *Id.*

167. See CAL. EVID. CODE § 240(c).

168. *Id.* See also *supra* text accompanying note 148.

VII. CRIME VICTIMS V. DEFENDANTS

A. *Murder of the Declarant*

The question whether a forfeiture hearsay exception should require an intent to silence limitation cannot be divorced from concerns about crime victims. Focusing exclusively on the value of cross-examination to defendants ignores the victims' interests. Victims' stories simply would not be told if they could not be cross-examined either because they are dead or afraid to testify against the accused. But accommodating the interests of crime victims at the expense of depriving defendants from cross examining them also has its costs. Whenever life or liberty are at stake, confidence in the accuracy of guilty verdicts is necessarily undermined when defendants are deprived of the opportunity to cross-examine adverse witnesses to expose flaws in their credibility. The challenge posed by measures such as AB 268 and the initiative is striking an appropriate balance between the interests of crime victims and the rights of defendants.¹⁶⁹

In vacating the judgment of the California Supreme Court, however, the United States Supreme Court did not engage in this kind of balancing. To the Court, the historical record was clear: the only exception to the Confrontation Clause known to the Founders required the prosecution to prove the defendant's intent to prevent the hearsay declarant from testifying.¹⁷⁰ The Court expressly rejected the state's claim that under equitable principles the prosecution should be relieved of this burden in murder cases. According to the state:

Murder falls in the worst class of wrongdoing and "unclean hands." The resultant unavailability of the witness for testifying in any future case will be obvious to all, including the defendant in committing the homicide. The murder prosecution itself is in the first rank among the most serious ones the State brings. The notion of allowing the killer to silence the victim on account of her

169. Framing the issue as one of balancing the "interests" of victims with the "rights" of defendants may be too narrow. Professor Sherman J. Clark believes that witnesses have obligations as well as interests. The Confrontation Clause should be understood not solely as a right enjoyed by criminal defendants, but also, even primarily, as an obligation imposed upon would-be witnesses. Confrontation is not only something to which we are entitled once accused; it is something we are required to do if we seek to act as accusers. From the defendant's perspective, it is not so much a right to confront witnesses, as a right to require witnesses to confront you. We have decided that if one is willing to play this central, crucial role in taking a man's liberty, one ought also to be willing to look him in the eye and literally stand behind his accusation. More to the point, and recognizing the strong sense in which rules of criminal procedure are a form not only of self-regulation but also self-definition, we have decided that we want to be the kind of people who stand face to face with those we would accuse. Sherman J. Clark, *an Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1261 (2003).

170. *Giles v. California*, 128 S.Ct. 2678, 2688 (2008).

absence in such cases is worse than unpalatable. It is intolerable.¹⁷¹

In dismissing the state's argument, the Court missed an opportunity to consider whether from an equitable point of view a murderer's mental state should be considered as the moral equivalent of a desire to prevent the witness from testifying. Balancing the competing interests between victims and defendants may be, as the state argued, least problematical in homicide prosecutions where the defendant has been charged with murder. Murder in California requires proof of malice aforethought.¹⁷² Malice is express when the defendant's purpose was to kill.¹⁷³ It is implied when the defendant does not wish to kill but consciously disregards a substantial risk that death may result from his conduct.¹⁷⁴ Murder is of the first degree if it is deliberated, that is, when the defendant elects to kill after weighing the consequences of taking human life.¹⁷⁵ All other malicious killings are of the second degree.¹⁷⁶

Of course, the taking of human life necessarily results in preventing the victim from testifying against the perpetrator. But it is only when a defendant kills with malice aforethought that his blameworthy mental state ought to suffice to justify forfeiting his right to object on hearsay grounds to the introduction of the victim's extrajudicial statements implicating him in the homicide. If other hearsay exceptions are unavailable (for example, the exception for dying declarations), prosecutors should be able to rely on a forfeiture exception. The justification would not simply be that it would be wrong to allow the defendant to profit from his own wrongdoing—an overly broad equitable principle—but that the consequences flowing from his indifference to the value of human life is the moral equivalent of killing to prevent the victim from testifying.

The case for forfeiture without proof of the intent to silence the victim is strongest when the defendant is charged with first degree murder. A defendant who chooses to kill after weighing the consequences of taking human life is supremely indifferent to the value of life. Lesser homicides, however, should not result in forfeiting the right to object on confrontation grounds. Voluntary manslaughter, while requiring proof of purpose or recklessness,¹⁷⁷ does not rise to murder because the defendant does not kill with malice.¹⁷⁸ An unexpected, extenuating provocation that would move a reasonable person to kill is present.¹⁷⁹

171. Brief of Respondent-Appellant at 13, *Giles*, 128 S.Ct. 2678 (No. 07-6053).

172. See CAL. PENAL CODE § 187.

173. See CAL. PENAL CODE § 188.

174. *Id.*

175. See *id.* § 189.

176. *Id.*

177. See *People v. Lasko*, 999 P.2d 666, 670-671 (Cal. 2000).

178. See CAL. PENAL CODE § 190(a).

179. See *People v. Berry*, 556 P.2d 777, 780 (Cal. 1976).

Likewise, involuntary manslaughter should not result in forfeiting a hearsay objection. As a crime of negligence,¹⁸⁰ conscious risk creation is not an element. The defendant is guilty not because he was aware of the homicidal risk, but because he failed to appreciate the risk.¹⁸¹

Felony murder,¹⁸² although punishable as first or second degree murder,¹⁸³ should also not result in forfeiture. With respect to the death element, felony murder in California is a strict liability offense.¹⁸⁴ The prosecution does not have to prove either that the defendant intended to kill or that he disregarded the risk that his conduct might result in death. The only mental state the prosecution has to prove is the one of the crime serving as the predicate offense (burglary, for example).¹⁸⁵

Neither should murder based on the negligence component of California's accomplice liability doctrine result in forfeiture. In California an accomplice is guilty not only of the offenses he promotes or facilitates, but also of additional crimes committed by his accomplices which he should have foreseen.¹⁸⁶ In *People v. Solis*,¹⁸⁷ for example, a defendant who was an accomplice to the misdemeanor of brandishing a firearm was convicted of a murder committed by his accomplice.¹⁸⁸ Since his liability for the murder was predicated on negligence (his failure to foresee the killing), a murder based on this aspect of the accomplice liability doctrine should not strip the defendant of the right to confront his accusers. Nor should murder based on the negligence component of California's conspiracy doctrine result in forfeiture. In California, conspirators are guilty not only of the crime they agree to commit but also of any reasonably foreseeable crimes a coconspirator commits in furtherance of the conspiracy.¹⁸⁹

Prior to *Giles v. California*, some jurisdictions exempted murder from the requirement that the prosecution prove the defendant's intention to procure the

180. See CAL. PENAL CODE § 192(b).

181. *Id.*

182. See CAL. PENAL CODE § 189.

183. *Id.* § 190.

184. See *People v. Stamp*, 82 Cal. Rptr. 598, 601 (Ct. App. 1969).

185. *Id.* at 210. For the same reason, forfeiture should not result from the application of California's "unlawful act not amounting to a felony-involuntary manslaughter rule." See CAL. PENAL CODE § 192(b). The only mental state the prosecution must prove is that of the predicate "unlawful" act.

186. See *People v. Beeman*, 674 P.2d 1318, 1326 (Cal. 1984) ("The liability of an aider and abettor extends also to the natural and reasonable consequences of the acts he knowingly and intentionally aids and encourages.").

187. *People v. Solis*, 25 Cal. Rptr. 2d 184 (Ct. App. 1993), *disapproved of on other grounds* by *People v. Prettyman*, 926 P.2d 1013, 1025 n.7 (Cal. 1996).

188. *Solis*, 25 Cal. Rptr.2d at 189.

189. See *People v. Croy*, 710 P.2d 392, 398 n.5 (Cal. 1985).

victim's unavailability.¹⁹⁰ Although the issue arose in state cases involving forfeiture under the Sixth Amendment, the rationale, as explained by the Illinois Supreme Court, would apply as well to dispensing with the requirement in statutes creating a forfeiture hearsay exception:

Notwithstanding that some cases contain broader language, the above cases have essentially held that the prosecution need not *prove* that the defendant committed murder with the intent of procuring the victim's absence. This is consistent with presuming such intent when the wrongdoing at issue is murder. When a defendant commits murder, notwithstanding any protestation that he did not specifically intend to procure the victim's inability to testify at a subsequent trial, he will nonetheless be sure that this would be a result of his actions. Murder is, in this sense, different from any other wrongdoing in which a defendant could engage with respect to a witness—more than a possibility, or a substantial likelihood, a defendant knows with absolute certainty that a murder victim will not be available to testify. Although we express no opinion on the topic, as it is not before us on this appeal, the total certainty that a murdered witness will be unavailable to testify could theoretically support presuming intent in the context of murder, while requiring proof of intent in all other situations.

Regardless, we find the cases involving murder distinguishable. As our appellate court has noted, outside of the context of murder, the authorities uniformly require proof of intent. See *Melchor*, 362 Ill.App.3d at 351, 299 Ill.Dec. 8, 841 N.E.2d 420.¹⁹¹

Whether a murderer knows with “absolute certainty” that the victim will be unavailable to testify depends on the murderer's state of mind. In California, a murderer who kills intentionally may have that mental state but not necessarily the murderer who acts only recklessly and certainly not the murderer who entertains only the mental state of the crime that serves as the predicate offense for felony murder or for the negligence component of accomplice or conspiratorial liability. A better justification is that killing purposely or recklessly reflects such an extreme indifference to the value of human life as to be the moral equivalent of killing to prevent the victim from testifying.

That justification, however, applies equally in any case where the opponent purposely or recklessly murders the hearsay declarant and not just in cases where the opponent is on trial for murdering the declarant. Accordingly, the Court should reconsider whether proof that the opponent intended to silence the declarant should be excused where the opponent murders the declarant pur-

190. See *People v. Stechly*, 870 N.E.2d 333, 352 (Ill. 2007) (“[S]o far as our research has discerned, every case holding intent irrelevant has involved the defendant's murdering the witness.”).

191. *Id.* at 277 (emphasis in original); accord *State v. Sanchez*, 177 P.3d 444, 455 (Mont. 2008).

posely or recklessly. Moreover, it should be unnecessary for the opponent to kill the declarant directly. Complicity in the murder should suffice and can be satisfied by proof that the opponent, with the purpose of promoting or facilitating the declarant's murder, solicited another to engage in conduct designed to culminate in the declarant's death, or aided or agreed to aid another in planning or bringing about the declarant's death.

B. *Domestic Violence and Child Abuse*

In its *Davis* opinion, the United States Supreme Court acknowledged the negative impact the Confrontation Clause could have in domestic violence cases where victims are especially susceptible to intimidation and coercion:

Respondents in both cases, joined by a number of their amici, contend that the nature of the offenses charged in these two cases—domestic violence—requires greater flexibility in the use of testimonial evidence. This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall.¹⁹²

The Court's response, however, was not to relax the prohibition against testimonial hearsay but to offer as a possible solution the forfeiture of the right to object on confrontation grounds in some circumstances.

But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: that "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds." 541 U.S., at 62, 124 S.Ct. 1354 (citing *Reynolds*, 98 U.S., at 158-159). That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.¹⁹³

In its amicus brief in *Davis*, the National Association of Counsel for Children (Association) reports that only about 10% of child sexual abuse is ever reported to the authorities.¹⁹⁴ Among the reasons they cite is that most sexual abuse is perpetrated by adults who are close to the child.¹⁹⁵ But "[c]hildren also fail to disclose [sexual abuse] because the abusers often threaten to harm them or their

192. *Davis v. Washington*, 547 U.S. 813, 832-833 (2006).

193. *Id.*

194. See Brief for the American Civil Liberties Union as Amicus Curiae Supporting Petitioner at 8-9, *Davis v. Washington*, 547 U.S. 813 (2006) (No. 05-5224).

195. *Id.* at 7.

loved ones.”¹⁹⁶

In one nationwide survey of 954 criminal cases of childhood sexual abuse, children were threatened in over a fourth of the cases: “[W]arnings ranged from pleas that the abuser would get into trouble if the child told (or that the abuser would be sent away and the child would never see them again - a powerful message to a young child whose abuser is also a ‘beloved’ parent), to threats that the child would be blamed for the abuse (especially troubling were children who were told that the defendant’s intimate—the child’s mother—would blame the child for ‘having sex’ with the defendant and would thus turn against him or her), to ominous warnings that the defendant would hurt or kill the child (or someone he or she loved) if they revealed the abuse. Barbara Smith & Sharon G. Elstein, *The Prosecution of Child Sexual and Physical Abuse Cases: Final Report* 93, 122 (1993).”¹⁹⁷

The Association does not cite statistics on the number of children who fail to disclose abuse because they fear their abusers, even though they do not threaten the children or their loved ones. Such data may be unavailable. But there is no reason to discount the claim that some children fail to report the abuse out of fear of their abusers. The number of such children is probably not trivial, given the large number of American children who are sexually abused. The Association conservatively estimates “that more than 500,000 children fall victim to abuse every year.”¹⁹⁸

Some victims of domestic violence, like some sexually abused children, fail to report the abuse or cooperate with the authorities for reasons having nothing to do with fear of their abusers. The American Civil Liberties Union (ACLU), in its *Davis* amicus brief,¹⁹⁹ cites a number of studies that indicate that domestic violence victims fail to report their abuse because of “economic dependence on their batterer; concern that an immigrant batterer will be deported upon conviction; fear of an adverse reaction from family or community, who might regard a victim’s participation in the prosecution as a betrayal; apprehension that involvement in the criminal justice system will lead to the loss of child custody to child protective services; or continuing emotional connections to their batterer.”²⁰⁰ In addition:

Victims of domestic violence, like other victims of crime, sometimes cease to cooperate in prosecution because of the time and effort that such cooperation entails. The difficulties presented by taking repeated time off work or repeat-

196. *Id.*

197. *Id.* at 7-8.

198. *Id.* at 5.

199. *Id.* at 7-8.

200. *See id.* at 20 (citing Deborah Epstein et al., *Transforming Aggressive Prosecution Policies, Prioritizing Victims’ Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL’Y & L. 465, 477-82 (2003)).

edly finding child care in order to participate in court proceedings, for instance, can impose significant barriers to participation, particularly to individuals who may be facing other crises in their lives as a result of the violence they have experienced. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 *Yale J. L. & Feminism* 3, 25 (1999); Hart, *supra*, at 628.

...

It is also important to recognize, however, that as with all crimes, some alleged victims refuse to testify because their initial accusations were untrue or exaggerated. For instance, batterers may falsely accuse their partners of abuse in an attempt to gain an upper hand in the relationship. E.g., Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 *Wis. L. Rev.* 1657, 1692-93 (2004). Thus, the function of confrontation as a tool to vindicate the innocent has as much of a role in domestic violence prosecutions as in other criminal prosecutions.²⁰¹

Still, some victims do not cooperate with prosecutors because they fear retaliation by their batterers.

That fear may be a reasonable projection from past conduct. In other instances there may be express threats of retaliation or actual retaliatory violence by the batterer. Indeed, data indicate that such threats and retaliation may occur in the majority of domestic violence prosecutions. E.g., Lininger, *supra*, at 769; Laura Dugan et al., *Exposure Reduction or Retaliation? The Effects of Domestic Violence Resources on Intimate Partner Homicide*, 37 *Law & Soc'y Rev.* 169, 179 (2003); Barbara Hart, *Battered Women and the Criminal Justice System*, 36 *Am. Behavioral Scientist* 624, 626 (1993); see also Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 *Am. U.J. Gender Soc. Pol'y & L.* 465, 476 & n.38 (2003) (describing study in which women identified fear of batterer as the number one reason why they were unwilling to cooperate with government).²⁰²

If in a majority of domestic violence prosecutions the defendant either threatens or retaliates against the victim, then in many of these cases prosecutors should have access to evidence of the defendant's intent to silence the victim. The majority in *Giles v. California* seized on this point:

Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or

201. *Id.* at 20-21.

202. *Id.* at 19.

threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.²⁰³

States, moreover, can do more to encourage domestic violence victims to cooperate with the authorities. According to the ACLU:

States have many tools available to address the reasons that domestic violence victims fail to testify and thus pursue domestic violence prosecutions consistent with the Confrontation Clause. Some data suggest that by using combinations of these techniques, victims will cooperate fully in a prosecution in sixty-five to ninety-five percent of cases. Angela Corsilles, Note, No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?, 63 *FORDHAM L. REV.* 853, 873 (1994).²⁰⁴

As Professor Jeffrey Fisher notes, these statistics are especially impressive since prior to *Crawford*, prosecutors had less of an incentive to produce the domestic violence victims.²⁰⁵ Their extrajudicial statements implicating the defendant were admissible in many jurisdictions under hearsay exceptions designed to meet the then prevailing confrontation standards.²⁰⁶ In light of *Giles v. California*, the California Legislature should consider enacting steps the authorities can take to encourage victims of domestic violence and child abuse to cooperate.²⁰⁷

In the meantime, California prosecutors will not be helpless. The Legislature has already enacted a number of evidence provisions that are designed to facilitate the introduction of extrajudicial statements made by victims of child abuse and domestic violence as well as of elder and dependent adult abuse. Section 1360 creates a hearsay exception for a statement made by a child under the age of twelve describing any act of child abuse or neglect if the judge finds at “a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability.”²⁰⁸ Section 1370 creates a hearsay exception for a statement made by a declarant narrating, describing, or explaining the infliction or threat of physical injury

203. *Giles v. California*, 128 S.Ct. 2678, 2693 (2008).

204. See Brief for the Petitioner at 22-23, *Davis v. Washington*, 547 U.S. 813 (2006) (No. 05-5224).

205. See the Comments of Professor Jeffrey Fisher, California Law Revision Commission, First Supplement to Memorandum 2007-41, at EX 23 (October 16, 2007), available at <http://www.clrc.ca.gov/pub/2007/MM07-41s1.pdf>.

206. See, e.g., CAL. EVID. CODE §§ 1370 (hearsay exception for statements relating threats to inflict physical injury), and 1380(a)(6)(A) (hearsay exception for statements by victims of elder or dependent adult abuse).

207. To be sure, implementing new measures in the near future is not likely because of the unprecedented budget deficits facing the state and local governments in 2009.

208. See CAL. EVID. CODE § 1360. Other limitations apply.

upon the declarant if the statement was made at or near the time of the infliction or threat of physical injury and the judge finds that the statement was made under circumstances indicating its trustworthiness.²⁰⁹ Section 1380 creates a hearsay exception for a statement offered in elder or dependent adult prosecutions if the statement was made by an elder or dependent adult and the declarant is “deceased or suffers from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunction, to the extent that the ability of the person to provide adequately for the person’s own care or protection is impaired.”²¹⁰ As in the case of the other two provisions, Section 1380 empowers the judge to exclude statements lacking circumstantial guarantees of trustworthiness.²¹¹

Because each of these provisions allows the prosecution to offer the statement through a source other than the declarant, in most instances the statements would constitute inadmissible testimonial hearsay under *Crawford*. But the statements would nonetheless be admissible if the defendant has forfeited his right to object on Sixth Amendment grounds.

The Legislature has also amended the Evidence Code to allow prosecutors to prove the defendant’s guilt by offering evidence of the defendant’s propensity to commit sexual offenses,²¹² and to engage in acts of domestic violence²¹³ and elder and dependent adult abuse.²¹⁴ Until 1995, this kind of bad character evidence was inadmissible in California to prove the defendant’s propensity to commit the offense charged.²¹⁵ Although the evidence cannot replace the victim’s testimony in establishing the state’s prima facie case, its power to move jurors to convict is unquestioned.

Finally, the Legislature has enacted a number of provisions designed to facilitate the testimony of children and other crime victims.

1. The Legislature has eased the competency requirement for children. Under the Evidence Code, being of tender years is not a disqualification if the child nonetheless appreciates the duty to tell the truth and can express himself in a manner that can be understood by the parties, the fact finder, and the judge.²¹⁶ Moreover, as a concession to their age, children who appear as witnesses need only promise to tell the truth instead of taking the conventional

209. *See id.* § 1370. Other limitations apply.

210. *See id.* § 1380. Other limitations apply.

211. *See id.* § 1380(a)(2).

212. *See id.* § 1108.

213. *See id.* § 1109.

214. *Id.*

215. *See* MÉNDEZ, *supra* note 33, § 3.14.

216. *See* CAL. EVID. CODE § 701.

oath.²¹⁷

2. The Legislature has charged judges with a special duty to protect child witnesses. If the child witness is under fourteen, the judge is enjoined to take “special care” to protect the child from undue embarrassment and to restrict the unnecessary repetition of questions.²¹⁸ In addition, the judge has a duty to ensure that questions are stated in a form that are appropriate to the age of the witness, and, upon objection, may forbid the asking of questions unlikely to be understood by a child.²¹⁹

3. In prosecutions for child endangerment, cruelty to children, and lewd acts with children, judges may permit the use of leading questions in the direct examination of children under ten years of age.²²⁰ The danger of improper suggestion may perhaps be greatest when leading questions are asked of children. But by allowing such questions, the Legislature has signaled its willingness to modify conventional limits on witness examination to obtain the testimony of children.

4. In some circumstances a judge may allow a child to testify outside the presence of the defendant, without violating the defendant’s confrontation rights. In *Maryland v. Craig*²²¹ the United States Supreme Court held that the Sixth Amendment did not prohibit a child witness in an abuse prosecution from testifying outside the defendant’s physical presence.²²² Under Maryland procedure, the child was examined by the prosecution and the defendant’s lawyer in a room separate from the courtroom. The defendant, judge, and jury remained in the courtroom where they watched the examination on a video monitor. In upholding the Maryland procedure, the Court emphasized a provision requiring the prosecution to persuade the judge that forcing the child to testify in the defendant’s presence would cause such serious emotional distress as to prevent the child from communicating reasonably.²²³

The Legislature has enacted similar provisions giving California judges discretion to order that the testimony of minors under fourteen years of age be taken outside the presence of the defendant by means of closed circuit television. The judge must find that the minor’s testimony will involve a recitation of the facts of an alleged sexual offense committed on or with the minor, an alleged violent felony of which the minor is a victim, or an alleged felony involv-

217. *See id.* § 710.

218. *See id.* § 765(b).

219. *Id.*

220. *See id.* § 767(b).

221. *Maryland v. Craig*, 497 U.S. 836 (1990).

222. *Id.* at 855.

223. *Id.* at 856.

ing child endangerment or child cruelty of which the minor is a victim.²²⁴ In addition, the judge must find by clear and convincing evidence that the impact on the minor of one or more enumerated factors is so substantial as to make the minor unavailable as a witness unless closed circuit testimony is used.²²⁵ Among these factors are that testimony by the minor in the presence of the defendant would result in the child suffering serious emotional distress so that the child would be unavailable as a witness,²²⁶ that the defendant threatened serious bodily injury to the child or the child's family to prevent or dissuade the minor from attending or giving testimony at any trial or court proceeding,²²⁷ or that the defendant inflicted great bodily injury upon the child in the commission of the offense.²²⁸

5. The California Penal Code allows some witnesses to be accompanied to the stand by a support person of his or her choosing.²²⁹ Though the Penal Code provision is not limited to child witnesses, it is designed especially to assist the young witness or the witness who is a victim of a sexual offense by reducing the psychological harm and trauma the witness might experience.²³⁰ The witness is not automatically entitled to the presence of the support person. To diminish the risk of diluting the accused's right to confront his accusers, the witness's need for the presence of a support person must be demonstrated at an evidentiary hearing.²³¹ Consistent with *Craig*, the prosecution must show that, unless accompanied by the support person, the accused's presence would so traumatize the witness as to impair the witness's ability to communicate.²³²

Enacting a forfeiture hearsay exception that, like Federal Rule of Evidence 804(b)(6), requires the prosecution to prove the defendant's intent to silence the victim would provide prosecutors with an additional avenue for offering incriminating evidence against the accused. If prosecutors are unable to prove the defendant's intent to silence the witness, they would still be free to resort to other hearsay exceptions when offering non-testimonial hearsay, including

224. CAL. PENAL CODE § 1347(b)(1)(A)-(C).

225. *Id.* § 1347(b)(2).

226. *Id.* § 1347(b)(2)(A).

227. *Id.* § 1347(b)(2)(C).

228. *Id.* § 1347(b)(2)(D).

229. *Id.* § 868.5.

230. *See* *People v. Lord*, 36 Cal. Rptr. 2d 453, 455 (Ct. App. 1994).

231. *See* *People v. Adams*, 23 Cal. Rptr. 2d 512, 531 (Ct. App. 1993).

232. *Id.* *But see* *People v. Johns*, 65 Cal. Rptr. 2d 434, 438 (Ct. App. 1997) (holding that because the use of a support person does not deprive the accused of the opportunity to confront his accusers face to face, as a constitutional matter the prosecution does not have to demonstrate that the accused's presence would so traumatize the witness as to impair the witness's ability to communicate).

those exceptions specifically crafted to favor the admission of statements by crime victims.

A virtue of these exceptions is that, unlike the forfeiture exception proposed by AB 268 and the initiative, each empowers the judge to exclude the statements if they are bereft of circumstantial guarantees of trustworthiness. A vice of AB 268 and the initiative is that their forfeiture exception would in effect repeal the carefully crafted provisions. In the case of non-testimonial hearsay, prosecutors would have no incentive to comply with their reliability requirements: they could bypass them entirely by relying on forfeiture provisions modeled on AB 268 or the initiative.

VIII. RECOMMENDATION

I recommend adding a new hearsay exception to the Evidence Code modeled on Federal Rule of Evidence 804(b)(6):

(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness, the statement would have been admissible if made by the declarant while testifying and the statement is offered against a party who has engaged in, or was an accomplice in, wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

(b) A statement is admissible pursuant to this section only if the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.

(c) If the statement is offered during trial, the court's determination as to the availability of the victim as a witness shall be made at a hearing out of the presence of the jury. If in a criminal case the defendant elects to testify at the hearing pursuant to this section, the court shall exclude from the examination every person except the clerk, the court reporter, the bailiff, the prosecutor, the investigating officer, the defendant, the defendant's counsel, an investigator for the defendant, and the officer having custody of the defendant. Notwithstanding any other provision of law, the defendant's testimony at the hearing shall not be admissible in any other proceeding except the hearing brought pursuant to this section. If a transcript is made of the defendant's testimony, it shall be sealed and transmitted to the clerk of the court in which the action is pending.

The goal of the new hearsay exception is to promote the admissibility of evidence that would have been available if the party against whom it is offered had not successfully engaged or been an accomplice in wrongdoing designed to bring about the declarant's unavailability. Problems posed by multiple hearsay,

inadmissible opinion, lack of personal knowledge, and the like are avoided by limiting the exception to those statements that would have been admissible if made by the declarant while testifying.

In order to preserve a party's right to cross-examine adverse witnesses, a statement is inadmissible unless the proponent convinces the judge that the declarant's unavailability was the result of wrongdoing by the opponent that was intended to, and did, procure the unavailability of the declarant. It is unnecessary, however, for the opponent to engage in the wrongdoing directly. It is enough for the proponent to establish the opponent's complicity in wrongdoing that was intended to, and did, procure the declarant's unavailability. A desire to bring about the forbidden result is the linchpin of California's complicity doctrine.²³³ Accordingly, proof of the opponent's complicity can be established by evidence that the opponent, with the purpose of promoting or facilitating the declarant's unavailability, solicited another to engage in the wrongdoing resulting in the declarant's unavailability, or aided, or agreed or attempted to aid another in planning or bringing about the declarant's unavailability. The proposed exception omits the term "acquiesced" employed in Federal Rule of Evidence 804(b)(6). Of the six states that have adopted a version of the Federal Rule, four omit this unusual term and instead use terms widely associated with accomplice liability.²³⁴

The proposed exception specifies the burden of proof the proponent must meet. The proponent must come forward with evidence that establishes the foundational facts, including the opponent's mental state, by a preponderance of the evidence.²³⁵ Unless otherwise provided by law, the more likely than not standard is the default standard under the Code.²³⁶

The proposed exception is faithful to California's tradition of insisting on the use of admissible evidence to establish an exception's foundation. In enacting the California Evidence Code, the Legislature declined to enact the California Law Revision Commission's recommendation allowing judges to consider unprivileged, inadmissible evidence at foundational hearings.²³⁷ Accordingly, over a hearsay objection the proponent may not offer the contested hearsay

233. See *People v. Beeman*, 674 P.2d 1318, 1326 (Cal. 1984).

234. These states are Connecticut (CONN. EVID. CODE § 8-6(8)), Michigan (MICH. R. EVID. 804(b)(6)), Ohio (OHIO R. EVID. 804(B)(6)), and Tennessee (TENN. R. EVID. 804(b)(6)). See generally, CALIFORNIA LAW REVISION COMMISSION, MISCELLANEOUS HEARSAY EXCEPTIONS: (1) FORFEITURE BY WRONGDOING, (2) PRESENT SENSE IMPRESSION 16 (2008), available at <http://www.clrc.ca.gov/pub/Printed-Reports/RECp-K600-Forfeiture.pdf>.

235. See CAL. EVID. CODE § 115.

236. *Id.*

237. See *supra* text accompanying note 132.

statement as proof of the foundational facts.

The exception includes key procedural safeguards which are modeled on those found in existing exceptions for statements by crime victims. Pretrial notice is required where the proponent anticipates making use of the exception.²³⁸ If the statement is offered at the trial, the admissibility hearing must take place out of the presence of the jury.²³⁹ In criminal cases, defendants are not penalized by testifying at the admissibility hearing. No part of the defendant's testimony may be offered in any proceeding other than the admissibility hearing, whether offered substantively or for impeachment.²⁴⁰

IX. THE WISDOM OF LEGISLATING THROUGH INITIATIVES

Convincing the California Legislature to enact a version of Federal Rule of Evidence 804(b)(6) is one matter, but persuading the California electorate to reject provisions embedded in an initiative is quite another. One problem with initiatives, such as the Safe Neighborhood Act, is that their provisions are not easy to spot and analyze. For example, the Safe Neighborhood Act provisions creating the forfeiture hearsay exception and declaring contumacious witnesses unavailable are buried in a 32 page document. The initiative addresses numerous other subjects, from establishing a commission to evaluate publicly-funded programs designed to deter crime, to a crime-stoppers reward fund, a new witness tampering offense, new assessments on fines, new parole procedures, increased penalties for vandalism, increased penalties for joyriding, new probation limitations for persons who have committed more than one act of vehicle theft, expanded accomplice liability in some obstruction of justice cases, new penalties for violating criminal gang injunctions, a new cause of action for suing criminal street gangs, a new convict registration statute, new prison sentences for possession of enumerated controlled substances, increased penalties for some felons who possess firearms, new prohibitions on the release of illegal immigrants on bail or their own recognizance when charged with enumerated crimes, new prohibitions on the release of defendants on bail or their own recognizance when charged with violent crimes if they previously have failed to appear in court, new parole procedures, and the establishment of a new annual half billion dollar fund (to be adjusted for inflation) to support public safety, anti-gang, and juvenile justice programs.²⁴¹ It is doubtful that an electorate un-

238. Compare CAL. EVID. CODE § 1370(c).

239. Compare *id.* § 1380(c).

240. *Id.*

241. [Http://ag.ca.gov](http://ag.ca.gov) (search "Safe Neighborhood Act"; follow link). The summary provided here is designed to give the reader only a sense of the breadth of topics covered by the initiative. Readers interested in all its provisions as well as in the complete text should

trained in the law would discover the provisions creating the forfeiture hearsay exception and declaring contumacious witnesses unavailable amid so many provisions.

Another problem is that most voters may not understand fully the competing interests underlying some provisions, such as the one creating the forfeiture hearsay exception. A grounding in constitutional law, evidence, and trial advocacy is essential. Without a clear and concise explanation of the interests at stake, the appeal of an initiative that purports to make our neighborhoods safe and protect crime victims may prove irresistible.

The Safe Neighborhood Act initiative is not the first to propose significant changes in California's evidence rules. Over 25 years ago, the electorate approved an anti-crime initiative that introduced radical changes in the rules of evidence. The "Victims' Bill of Rights" (also known as Proposition 8) included a provision—"The Right to Truth-in-Evidence"—that had the effect of creating two systems of evidence in California: one for use in civil cases (the Evidence Code) and another to govern evidence in criminal cases. "The Right to Truth-in-Evidence" provision achieves this result in criminal cases by mandating the introduction of relevant evidence as a matter of state *constitutional* right.²⁴²

Until the California Legislature and appellate courts intervened,²⁴³ a literal interpretation of this provision would have repealed the rules banning the use of character evidence, regulating expert testimony, and promoting important social policies extrinsic to the law of evidence.²⁴⁴ The effect of the provision on witness credibility has been profound. The "Right to Truth-in-Evidence" provision has repealed most Evidence Code sections governing the use of evidence on witness credibility, including statutory and decisional law limitations on the use of convictions.²⁴⁵ In light of the detailed consideration given by the California Law Revision Commission and the Legislature to the original evidence code, it is surprising as well as disconcerting that the adoption of a new code for criminal cases would be left to voters untrained in the intricacies of a highly specialized body of law.

The Evidence Code is the product of an exhaustive study commencing in 1956 by the California Law Revision Commission to determine whether California should replace its hodgepodge rules of evidence with a modern code

consult the initiative.

242. See CAL. CONST. art I, § 28(d). Some evidentiary provisions are exempted from the initiative, notably those pertaining to hearsay, privileges, and a judge's discretionary power to exclude evidence whose probative value is substantially outweighed by such concerns as undue prejudice.

243. See MÉNDEZ, *supra* note 33, § 3.07.

244. *Id.*

245. *Id.* § 15.01.

modeled on the Uniform Rules of Evidence.²⁴⁶ The Commission retained Professor James H. Chadbourne to conduct the study. As a result of his work, nine tentative recommendations and research studies relating to the Uniform Rules were published by the Commission.²⁴⁷

In January 1965, the Commission published its Recommendation Proposing an Evidence Code and presented it to the California Legislature.²⁴⁸ Each house of the legislature referred the recommendation to its respective Judiciary Committee for further study. In April 1965, the Assembly Committee on the Judiciary presented to the Assembly a special report on the recommendation. Later that month, the Senate Judiciary Committee presented its report. Except for certain “new or revised” comments by the Senate committee, the Senate committee adopted the recommendation as revised by the Assembly committee. Later that year, both houses approved the recommendation and the Evidence Code became effective on January 1, 1967. The Code was the first complete revision of the rules of evidence since the evidence portion of the Civil Procedure Code was enacted in 1872.²⁴⁹

Among the problems posed by initiatives, such as the Victims’ Bill of Rights and the Safe Neighborhood Act, two are especially troubling. One is the difficulties voters encounter in understanding the changes proposed by complex initiatives on esoteric subjects. At the time Proposition 8 appeared on the ballot, I had taught evidence, including the California Evidence Code sections governing character evidence and credibility, for over four years. Nothing in the ballot statements or in the political propaganda surrounding the initiative or in the initiative itself gave me a hint of the enormous changes the proposition could effect. Perhaps only its framers understood that the initiative was intended to establish a new criminal evidence code. The evidentiary changes proposed by the Safe Neighborhood Act are not as broad as those proposed by Proposition 8. Still, as this Article demonstrates, an analysis of the provisions creating the forfeiture hearsay exception and declaring contumacious witnesses unavailable requires many pages permeated with language and concepts most voters cannot be expected to understand.

The other troubling aspect is the lack of scrutiny accompanying complex propositions. In retrospect, it is clear that the authors of Proposition 8 intended to effect changes in the admission of evidence that would favor the prosecution. The playing field was to be re-contoured in a fashion that would allow the fact finder to learn about the defendant’s bad character and all of his felony convic-

246. PARKER’S EVIDENCE CODE OF CALIFORNIA vi-vii (1979).

247. *Id.*

248. *Id.*

249. *Id.*

tions. The key was the “Right to Truth-in-Evidence” provision. But by removing the bars to the introduction of relevant evidence, the authors unwittingly risked eliminating statutory and judicial barriers to evidence unfavorable to prosecutors. The authors had the foresight to exempt the rape shield laws from the effect of the proposition, but their efforts fell short.

From a prosecutorial perspective, the “Right to Truth-in-Evidence” provision had an especially unfortunate and unforeseen impact on a law that was enacted only months before Proposition 8 and was designed to place strict limits on the use of intoxication and diminished capacity in California criminal cases.²⁵⁰ Reacting to the public outrage over the voluntary manslaughter convictions of Dan White in the killings of San Francisco Mayor George Moscone and Supervisor Harvey Milk, the Legislature restricted the scope of expert testimony in cases involving mental impairments and banned the use of evidence of intoxication and mental impairments to disprove the accused’s capacity to form the mens rea of specific intent offenses.²⁵¹ Since such evidence is especially pertinent in any crime requiring a mens rea, Proposition 8 called into question the validity of the new law. Ultimately, the new law was saved by the re-enactment of the statute. But because of another provision of Proposition 8, the re-enactment had to be approved by at least a two-thirds vote of the membership of each house. Undoubtedly, the framers of the proposition hardly envisioned the application of the supermajority requirement to an anti-crime measure.

The Safe Neighborhood Act was less worrisome in this respect. The introduction of AB 268 in the Legislature, and especially that body’s referral of the matters embraced by the bill to the California Law Revision Commission for further study, fortuitously provided the electorate with indirect analyses of the initiative’s two evidentiary provisions. But even if the voters learned about the Commission’s study, it is problematical whether the electorate understood the Commission’s recommendations as well as the arguments supporters and opponents provided to the Commission.

The legislative process, to be sure, does not always guarantee a perfect statute. But it does afford an opportunity for the kind of scrutiny designed to flag the type of unanticipated difficulties posed by such sweeping measures as Proposition 8. For all their faults, properly conducted legislative hearings can generate the information needed for a more complete analysis and an informed choice. The legislative process is simply better at identifying and eliminating the uncertainties and ambiguities that can plague initiatives.

The California Legislature did not act before the Safe Neighborhood Act

250. See CAL. PENAL CODE §§ 22, 28-29.

251. See *id.*

was placed on the ballot. But even if it had, any legislative changes to the Evidence Code that would have differed significantly from the initiative's proposals could have been easily undone by voters who did not appreciate fully the effects of their vote. Had the electorate approved the Safe Neighborhood Act, the Legislature's power to change any of the initiative's provisions would have been severely compromised by the initiative itself. Not to be outdone by the proponents of Proposition 8 which prohibits changes unless "enacted by two-thirds vote of the membership in each house,"²⁵² Section 21 of the "Safe Neighborhood Act" provides that:

The provisions of this act shall not be amended by the Legislature except by a statute passed in each house by roll call vote entered in the journal, three-fourths of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters. However, the Legislature may amend the provisions of this act to expand the scope of their application or to increase punishments or penalties provided herein by a statute passed by majority vote each house thereof.²⁵³

Initiatives were an early Twentieth Century response to the political clout of special interests. They provided the California electorate with the means to circumvent an unresponsive legislature held captive by powerful groups. Increasingly, the evidence today suggests that this reform tool has now been taken over by special interests and that changes may be necessary to preserve it as a viable democratic tool. As one editorial lamented as early as 1990:

Initiatives have spawned an industry of highly paid political strategists, lawyers, pollsters, fund-raisers and petition circulators. Using the latest computer technology, they can qualify just about anything for the ballot for a price. Some initiative mills offer a money-back guarantee if a proposal does not gain enough signatures to qualify for the ballot.²⁵⁴

It was not coincidental that the proponents of Proposition 8 titled their initiative, "The Victims' Bill of Rights," and the provision barring the exclusion of relevant evidence, "The Right to Truth-in-Evidence." Who can be against crime victims and the truth? Nor is it coincidental that the proponents of the current initiative have titled it, "The Safe Neighborhood Act: Protect Victims, Stop Gang and Street Crime," and the provision creating the forfeiture hearsay exception and declaring contumacious witnesses unavailable, "PROTECTION AND SUPPORT FOR VICTIMS." Proponents have learned that simply framing their initiatives as anti-crime measures enhances their likelihood of voter

252. See CAL. CONST. art I, § 28(d).

253. [Http://ag.ca.gov](http://ag.ca.gov) (search "Safe Neighborhood Act"; follow link). As will be discussed, "The Victims' Bill of Rights," an anti-crime initiative approved by the electorate in 1982, also requires amendments to the initiative to be approved by a super majority of the Legislature.

254. Editorial, *The Wrong Initiative*, SAN DIEGO UNION TRIB., Oct. 6, 1990, at B.

approval considerably.

Embedded in anti-crime measures, such as Proposition 8 and the Safe Neighborhood Act, is a dangerous artificial dualism. These measures reflect an “us versus them” mentality that is pointedly missing from the Bill of Rights. Surely, criminals were no more loved at the adoption of the Constitution than they are today. Yet, one cannot help but sense that the Founders were thinking about themselves, not just muggers, rapists, child abusers, batterers, and murderers, when contemplating the rights that all of us should enjoy when our freedom is threatened by the state. They understood the need to grant the state a virtual monopoly on lawful violence, including the curtailment of freedom and the imposition of death, but in turn, the Founders appreciated the need to place strict limits on that “awe full” power.

The Founders’ sense that “we” too can be fair game in the state’s quest for order appears to have been largely lost. In the uncertainties unleashed by the 1960s generational conflict, Richard Nixon hit pay dirt in the 1968 campaign trail with his “law and order” theme. Politicians know a good thing when they see it. They still play the theme today. Regrettably, deliberately playing to the public’s fears can impede the kind of measured discourse urgent societal problems require. In the field of criminal law and evidence, an “us versus them” mentality not only obscures what needs to be done to make us safer again, but can lead to ill thought-out measures that threaten hard-won rights and liberties all of us should cherish.

ADDENDUM

A. Forfeiture Hearsay Exception

In its study of a forfeiture hearsay exception, the California Law Revision Commission considered the following possibilities:

- Repeal California’s existing provision on forfeiture by wrongdoing and replace it with a provision that tracks the constitutional minimum as articulated by the California Supreme Court.
- Replace the existing provision with one similar to the federal rule.
- Broaden the existing provision to some extent.
- Leave the law alone.²⁵⁵

The Commission did not consider Assembly Bill 268. As a matter of poli-

255. CAL. L. REVISION COMM., MISCELLANEOUS HEARSAY EXCEPTIONS: FORFEITURE BY WRONGDOING 52-53 (2008), *available at* <http://www.clrc.ca.gov/pub/Printed-Reports/RECp-K600-Forfeiture.pdf>.

cy, the Commission does not comment on pending legislation.²⁵⁶

Of the four possibilities, the last would simply allow prosecutors to use existing hearsay exceptions whenever a judge overrules the defendant's confrontation objection on forfeiture grounds.

The third would enhance prosecutors' chances of introducing the declarant's extrajudicial statements by relaxing the restrictions of Evidence Code Section 1350. This section creates a forfeiture hearsay exception.²⁵⁷ But, as has been pointed out,²⁵⁸ Section 1350 contains a number of limitations. Among them are: the exception may be used only in prosecutions charging a serious felony, the declarant must be unavailable on account of death or kidnapping, the declarant's unavailability must have been knowingly caused by, aided by, or solicited by the defendant, the prosecution must prove the elements of the exception by clear and convincing evidence, the extrajudicial statement must be memorialized prior to the declarant's death or kidnapping.²⁵⁹ Under the Commission's proposal, some of these limitations could be eliminated or relaxed.²⁶⁰ For example, the serious felony limitation could be modified so that the section would apply in any case, civil or criminal.²⁶¹

The second possibility considered by the Commission would replace Section 1350 with a provision similar to Federal Rule of Evidence 804(b)(6). This approach would require the prosecution to prove that the defendant "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."²⁶² A virtue of this approach is that it would not undermine California provisions prohibiting a judge from finding a witness to be unavailable simply because the witness fears the defendant. Proving that the defendant procured the witness's unavailability would necessarily preclude

256. Under its governing statute, "No employee of the commission and no member appointed by the Governor shall, with respect to any proposed legislation concerning matters assigned to the commission for study pursuant to Section 8293, advocate the passage or defeat of the legislation by the Legislature or the approval or veto of the legislation by the Governor or appear before any committee of the Legislature as to such matters unless requested to do so by the committee or its chairperson. In no event shall an employee or member of the commission appointed by the Governor advocate the passage or defeat of any legislation or the approval or veto of any legislation by the Governor, in his or her official capacity as an employee or member." See CAL. GOV'T CODE § 8288.

257. See CAL. EVID. CODE § 1350.

258. See *supra* text accompanying note 90.

259. See *id.*

260. See CAL. L. REVISION COMM., MISCELLANEOUS HEARSAY EXCEPTIONS: FORFEITURE BY WRONGDOING 69-70 (2008), available at <http://www.clrc.ca.gov/pub/Printed-Reports/REC-K600-Forfeiture.pdf>.

261. *Id.* at 68.

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

the prosecution from relying solely on the witness's fear of the defendant.²⁶³

Another virtue of this provision is that it would mirror the holding of *Giles v. California*. In the case of "testimonial" hearsay, a provision eliminating the intent to silence requirement would be of no benefit to prosecutors since they would have to prove that mental state in order to convince the judge to overrule the defendant's Sixth Amendment objection. Such a provision, moreover, would impose the requirement even if the hearsay offered by the prosecution does not qualify as "testimonial." Imposing such a requirement as a matter of state law would prevent prosecutors from bypassing other hearsay exceptions that place important reliability restrictions on statements by crime victims.

The first possibility would replace Section 1350 with a new forfeiture hearsay exception consisting of the elements of the *People v. Giles* prima facie case.²⁶⁴ In most respects, this possibility would mirror the provisions of AB 268.²⁶⁵ Accordingly, my criticisms of AB 268 would apply with equal force to a forfeiture exception modeled on *People v. Giles*, especially the failure to require the prosecution to prove the defendant's intent to silence the declarant. Moreover, a forfeiture hearsay exception based on *People v. Giles* exacerbates another problem and creates new ones.

Unlike AB 268, *People v. Giles*' prima facie case does not include a provision expressly subjecting the hearsay to be admitted to the multiple hearsay rule.²⁶⁶ Under the Evidence Code, a party may not use admissible hearsay to prove another hearsay statement unless that statement also falls within an exception.²⁶⁷ As has been discussed, it is unclear whether AB 268 precludes the use of multiple hearsay where the declarant's statement implicitly incorporates another hearsay statement.²⁶⁸ *People v. Giles*' failure to include a specific provision forbidding the use of multiple hearsay makes it even less certain whether the general prohibition applies to this situation.

Far more serious is that a forfeiture hearsay exception modeled on *People v. Giles* fails to take into account the United States Supreme Court's decision in *Giles v. California*. If as a matter of Sixth Amendment jurisprudence a criminal defendant does not lose his right to object on confrontation grounds unless the prosecution convinces the judge that the defendant engaged in wrongdoing that was designed to prevent the hearsay declarant from testifying, then any statuto-

263. For a discussion of how creating a new hearsay exception might undermine California law disfavoring finding a witness to be unavailable on the basis of the witness's fear of the defendant, see *supra* text accompanying note 148.

264. See CAL. L. REVISION COMM., *supra* note 260, at 28-34.

265. See *supra* text accompanying note 70.

266. See CAL. EVID. CODE § 1201.

267. *Id.*

268. See *supra* text accompanying note 122.

ry forfeiture hearsay exception that imposes a lesser burden would be of no value to the state since the prosecution has to meet the higher constitutional burden in order to take advantage of the exception. This is true, however, only where the prosecution offers “testimonial” hearsay under an exception. If the hearsay does not qualify as testimonial, then the defendant may not object on Sixth Amendment grounds. So unless the exception imposes the intent to silence limitation, any non-testimonial hearsay would be admissible against the defendant even if the defendant is unable to cross-examine the declarant and was not given an opportunity to do so prior to the trial. Moreover, a model based on *People v. Giles* compounds the unreliability problems because it would admit hearsay bereft of any circumstantial guarantees of trustworthiness.

A related problem in the case of non-testimonial hearsay stems from the kind of criminal act that results in forfeiture under *People v. Giles*. *People v. Giles* requires the declarant’s unavailability to be “caused by the defendant’s intentional criminal act.”²⁶⁹ “Intentional,” however, is an ambiguous term. Does the California Supreme Court mean that the act must be a crime requiring purpose as the mental state or merely that the defendant’s purpose was to commit the actus reus of the crime, irrespective of the crime’s mens rea? If the former, then crimes requiring only recklessness or a lower mental state would not qualify as the “intentional criminal act.” Such an approach would exclude reckless offenses, such as implied malice murder, and offenses predicated on negligence or strict liability. If the court means merely that the defendant intended to engage in the conduct constituting the actus reus of the crime, then the definition could include negligent or even strict liability offenses. Negligent homicide, for example, does not require proof that the defendant was aware of the homicidal risk; with respect to the risk element, conviction requires only proof that the defendant was aware of engaging in the conduct creating the risk.²⁷⁰ Vehicular manslaughter while intoxicated does not require proof that the defendant was aware of the homicidal risk created by driving while intoxicated or even that the defendant was aware that he was intoxicated. So long as the defendant was aware that he was driving, a jury can convict him of this offense if in addition it finds that the defendant was intoxicated and that his driving in that state created a homicidal risk that would have been apparent to a reasonable, sober person.²⁷¹ Because no mental state attaches to the intoxication element, strict liability is its basis.

The Chair of the California Senate Judiciary Committee asked the Commission to undertake a study of a forfeiture hearsay exception in August

269. *People v. Giles*, 152 P.3d 433, 446 (Cal. 2007).

270. See CAL. PENAL CODE § 192(b).

271. See CAL. PENAL CODE § 191.5.

2007²⁷² and the Commission began its study shortly thereafter. In January 2008 the United States Supreme Court granted Giles' petition for certiorari.²⁷³ Although the Commission considered a number of background studies and tentative recommendations,²⁷⁴ at its February 2008 meeting the Commission voted to recommend to the Legislature deferring any action on enacting a forfeiture hearsay exception until after the Court decided *Giles v. California*.²⁷⁵

B. *The Contumacious Witness*

As part of its study, the Commission also reviewed the need to add a new ground of unavailability for the contumacious witness.²⁷⁶ Subject to some minor revisions, the Commission approved a final recommendation for submission to the Legislature.²⁷⁷

The Commission opted to recommend a provision modeled on Federal Rule of Evidence 804(a)(2). The Rule defines as unavailable a declarant who "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so."²⁷⁸ Under the Commission's recommendation, Subdivision 240(a) of the Evidence would be amended to include as an unavailable witness a declarant who is "(6) [P]resent at the hearing but persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so."²⁷⁹

Because of its policy regarding pending legislation, the Commission did not comment on AB 268's contumacious witness provision. Under Subdivision 240(a)(6) an unavailable witness would include a declarant who "refuses to testify, notwithstanding imposition of sanctions, and the statement is offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did procure the unavailability of the declarant as a witness." As has been discussed, one problem with AB 268's forfeiture hearsay exception is that if it can be construed as creating its own unavailability grounds, a party relying on that exception would not have to comply with Subdivision 240(a)(6) or with

272. See *supra* text accompanying note 5.

273. See *supra* text accompanying note 53.

274. The latest and most comprehensive is *Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing*, 37 CAL. L. REV. COMM'N REPORTS 443, 496-517 (2007), available at <http://www.clrc.ca.gov/pub/Printed-Reports//REC-K600-Forfeiture.pdf>.

275. [Http://www.clrc.ca.gov](http://www.clrc.ca.gov) (search "Forfeiture Hearsay Minutes February 2008"; follow link).

276. See *Miscellaneous Hearsay Exceptions*, *supra* note 274, at 465.

277. [Http://www.clrc.ca.gov](http://www.clrc.ca.gov) (search "Forfeiture Hearsay Minutes February 2008"; follow link).

278. FED. R. EVID. 804(a)(2)

279. See *Miscellaneous Hearsay Exceptions*, *supra* note 274, at 521.

existing provisions that forbid a California judge to find a witness to be unavailable solely on the witness's claimed fear of the defendant.²⁸⁰

The federal approach prevents a judge from using the forfeiture hearsay exception to find as unavailable a crime victim who refuses to testify out of fear of his or his family's safety. Although the Federal Rule's contumacious witness provision allows a judge to declare such a witness unavailable if the witness defies the judge's order to testify,²⁸¹ the prosecution may not use the forfeiture hearsay exception to offer the victim's extrajudicial statements without first convincing the judge that the victim's refusal to testify was the result of misconduct undertaken by the defendant for the purpose of silencing the witness.²⁸²

Enacting a broad contumacious witness provision, without linking it to a forfeiture hearsay exception requiring proof of the defendant's intent to silence the witness, risks allowing a victim's fear of the defendant to serve as a basis for introducing the victim's hearsay statements. Existing California law diminishes this risk in two ways. First, Section 1350, the current forfeiture hearsay exception, requires the prosecution to prove that the victim's unavailability "was knowingly caused by, aided by, or solicited by the [defendant] for the purpose of preventing [his] arrest or prosecution." Second, where the prosecution relies on another hearsay exception, the prosecution must convince the judge that more than just fear accounts for the victim's refusal to testify. Under California decisional law, a party seeking to establish a witness's unavailability on Subdivision 240(a)(3)'s ground of "existing physical or mental illness or infirmity"²⁸³ must in addition use expert testimony to persuade the judge that the trauma resulting from the crime has caused such mental or physical harm that the victim cannot testify without suffering substantial additional trauma.²⁸⁴ The expert testimony limitation is now incorporated into the Evidence Code Subdivision 240(c).²⁸⁵

Focusing exclusively on the Commission's contumacious witness provision could allow a judge to declare witnesses to be unavailable if on account of their fear of the defendant they defy the judge's order to testify. In its recommendation, the Commission sought to address this problem by striking Subdivision 240(c)'s reference to Subdivision 240(a)(3). The Commission's purpose was to extend the expert witness requirement to the new contumacious witness provision. If the Legislature adopts the Commission's recommendation, it

280. *See supra* text accompanying note 148.

281. FED. R. EVID. 801(a)(2).

282. FED. R. EVID. 801(b)(6).

283. CAL. EVID. CODE § 240(a)(3).

284. *Id.*

285. CAL. EVID. CODE § 240(c).

should consider eliminating any uncertainty about this point by making it clear in the legislation or its comment that reliance on the new contumacious witness provision is not intended to excuse compliance with Subdivision 240(c) when witnesses refuse to testify out of their fear of the defendant.