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LOSING THE RIGHT TO CONFRONT: DEFINING WAIVER TO BETTER ADDRESS A DEFENDANT'S ACTIONS AND THEIR EFFECTS ON A WITNESS

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The American criminal justice system often is criticized for its cumbersome and inefficient nature. The complex network of procedural safeguards designed to protect the constitutional rights of the accused can seem overly formalistic. Explicit constitutional rights of the criminal defendant at trial include the right to an attorney,[1] the right to a jury trial,[2] the right to be free from compelled self-incrimination,[3] and the right to call and confront witnesses.[4] These rights provide the fundamental guarantees of fairness and due process in an adversarial system of criminal justice. Providing such rights, however, entails a great expenditure of resources. As a result, courts can be tempted to find ways to make the exercise of these rights less costly to the state while still affirming their existence.

Waiver is one of the primary methods courts have employed to achieve this paradoxical result. As one commentator has noted, "[i]t is waiver of rights that permits the system of criminal justice to work at all."[5] Courts have determined that criminal defendants are able to waive a number of important rights by pleading guilty,[6] waiving a jury trial,[7] and failing to raise possible defenses.[8] A number of courts have concluded that defendants also may indirectly waive rights, such as the

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1. Gideon v. Wainwright, 372 U.S. 335 (1963).
2. Duncan v. Louisiana, 391 U.S. 145 (1968).
3. Griffin v. California, 380 U.S. 609 (1965); *see also* Baxter v. Palmigiano, 425 U.S. 308, 318–19 (1976) (prohibiting prosecutors from making adverse statements regarding a defendant's refusal to testify).
4. Pointer v. Texas, 380 U.S. 400 (1965).
5. Michael E. Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 8 (1970).
6. Boykin v. Alabama, 395 U.S. 238, 242 (1969); *see also* FED. R. CRIM. P. 11(c)(4) ("[B]y pleading guilty . . . [the defendant] waives the right to a trial.").
7. Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275 (1942); *see also* FED. R. CRIM. P. 23(a) (requiring waiver to be in writing with the approval of the court and consent of the government).
8. FED. R. CRIM. P. 12(f); United States v. Scott, 464 F.2d 832 (D.C. Cir. 1972).

right to be present at trial[9] or the right to confront witnesses,[10] through their own misconduct. This Note examines the manner in which courts have concluded that certain acts of misconduct by a defendant lead to the waiver of the confrontation right.

The notion of waiver of the right to confrontation[11] operating through a defendant's misconduct has existed for some time, and its use recently has become especially prevalent in helping to establish the existence of conspiracies in drug-related cases.[12] Courts and commentators, however, have been unable to arrive at any consensus as to what conduct is sufficient to constitute waiver of the confrontation right. In addition, they have been unable to provide any rigorous analysis of the reasons underlying the conclusion that misconduct can lead to the loss of the right to confront. Their failure to articulate this reasoning has significant implications.

Waiver of any right, especially waiver of a right which operates through a defendant's misconduct, is a way for the courts and the society in which they operate to engage in a type of double gesture. Courts are able to proclaim that they are affording a defendant due process and at the same time avoid the expense of providing full procedural protection. More importantly, waiver operating through the defendant's misconduct allows blame for this procedural short-cut to be placed with the defendant, thereby relieving the person finding waiver of much of the responsibility for that result. This Note argues that courts should not lightly allow the loss of procedural rights as important as the right to confront to occur in such a duplicitous fashion.

Part I of this Note examines the current legal landscape regarding a defendant's waiver of the right to confrontation. This Part explores the justifications courts have provided for finding a waiver of the confrontation right, both through the use of the traditional "intentional relinquishment of a known right" standard and the less precise formulations of waiver found in cases of defendant misconduct. Part II offers a critique of the reasoning courts employ to find waiver of the right to

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

10. *See, e.g.*, United States v. Balano, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980).

11. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

12. *See infra* Part II.

confrontation. In the process, the analysis explores general theories of waiver which have been advanced by other commentators. In so doing, this Note seeks to arrive at a theory of waiver of the confrontation right through a defendant's misconduct which is both descriptive, in that it more accurately characterizes what courts are either doing or attempting to do, and normative, in that it offers an understanding of waiver which, if employed, can better protect the rights of witnesses and defendants. Part III then applies this theory of waiver to the context of child abuse.

Cases of child sexual abuse provide a forum in which a theory of waiver can be tested. Reports of child abuse have increased dramatically in recent years.[13] At the same time, false allegations of abuse have become more common.[14] In this atmosphere, both courts and commentators have noted the importance of carefully considering both the right of the defendant to a fair trial and the right of the victim to not be revictimized by the trial. Moreover, considerations of the defendant's right to a fair trial, and the role of the Confrontation Clause in preserving that right, have been given more attention in the context of child sexual abuse than in the context of drug-related cases where waiver is more frequently and more easily employed.[15]

Despite this heightened concern with defendants' rights in cases of child sexual abuse, prosecutors utilize a number of methods to reduce the trauma of confrontation to the child.

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13. *See, e.g.*, Brian L. Schwalb, Note, *Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining "Confrontation" to Protect Both Children and Defendants*, 26 HARV. C.R.-C.L. L. REV. 185, 185 & n.1 (1991) (citing AMERICAN ASSOCIATION FOR PROTECTING CHILDREN, HIGHLIGHTS OF OFFICIAL NEGLECT AND ABUSE REPORTING 1985, at 3, 18 (1987)).

14. *See* RICHARD WEXLER, WOUNDED INNOCENTS: THE REAL VICTIMS OF THE WAR AGAINST CHILD ABUSE 300–02 (1990) (analogizing false allegations with Salem witch hunts); Alexander Cockburn, *Out of the Mouth of Babes: Child Abuse and the Abuse of Adults*, NATION, Feb. 12, 1990, at 190, 191 (likening recent waves of investigations of "virtual abuse" of children to the communist scare of the 1950s and to Satan hunts); Lee Coleman & Patrick E. Clancy, *False Allegations of Child Sexual Abuse*, 5 CRIM. JUST., Fall 1990, at 15, 15, 18–19; Thomas L. Feher, *The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?*, 14 AM. J. CRIM. L. 227, 239–40 (1988) (suggesting that the use of repetitive questioning techniques undermines the reliability of the victims' testimony). *But see* David P.H. Jones & J. Melbourne McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 J. INTERPERSONAL VIOLENCE 27, 38 (1987) (finding that only eight percent of child sexual abuse cases studied were fictitious).

15. Maryland v. Craig, 497 U.S. 836 (1990) (child sexual abuse); United States v. Mastrangelo, 722 F.2d 13 (2d Cir. 1983) (drug-related case).

Efforts to distance the child from the courtroom, such as the use of closed-circuit television[16] and a screen between the child and the accused,[17] have met with varying success.[18] Yet even these methods presuppose that children can respond in a manner required by the rules of evidence. This can be difficult for children whose responses often lack the cogency, detail, and persuasiveness that the jury may require to establish guilt beyond a reasonable doubt.[19] In addition, the unfamiliar and intimidating courtroom setting and the difficult questions asked during cross-examination can cause a child who originally appeared competent to become unable to testify.[20]

Faced with this dilemma, prosecutors often have attempted to admit children's testimony under one of the hearsay exceptions.[21] The most commonly used are the excited utterance exception[22] and the residual exceptions.[23] Evidence introduced under one of these exceptions must still meet requirements of reliability in order to ensure that the defendant's Confrontation Clause rights have not been violated. The prohibition on the uses of after-the-fact corroboration of a child's statement in determining the statement's reliability[24] has created difficulty for prosecutors who seek to admit threatening statements. It also has resulted in the judiciary's more liberal application of the excited utterance and residual exceptions.[25]

The waiver cases examined in Part I point to an alternative to introducing evidence under these hearsay exceptions and

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16. *Craig*, 497 U.S. at 836.

17. Coy v. Iowa, 487 U.S. 1012, 1020 (1988).

18. In *Craig*, the Supreme Court upheld the use of closed circuit television where necessary to prevent specific trauma to a child witness, *Craig*, 497 U.S. at 856–57, 860, while in *Coy*, the Court overturned the use of a screen separating the victim from the accused where there was no particularized showing of harm to the child witness. *Coy*, 487 U.S. at 1020–21.

19. *See* Schwalb, *supra* note 13, at 187; Judy Yun, Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1751–52 (1983).

20. *See* DEBRA WHITCOMB ET AL., WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS 17–18 (1985); Schwalb, *supra* note 13, at 187.

21. Where the child's statements cannot be introduced under one of these hearsay exceptions, the prosecution may be forced to forego prosecution altogether. Schwalb, *supra* note 13, at 187.

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

23. In the Federal Rules of Evidence the residual exceptions are Rules 803(24) and 804(b)(5). The Rules are identical except that 804(b)(5) requires that the declarant be unavailable at trial. *See infra* note 60.

24. *See* Idaho v. Wright, 497 U.S. 805, 822 (1990).

25. Donald A. Dripps, *The Confrontation Clause and the Sexual Abuse of Children*, TRIAL, May 1991, at 11.

engaging in a convoluted reliability analysis. That alternative entails establishing an indirect waiver or forfeiture of the confrontation right by showing that the defendant intimidated the child witness into not testifying. A carefully crafted theory of waiver can function as a way to more directly address the defendant's acts of intimidation. Rather than distorting hearsay exceptions or the definition of reliability, courts and commentators can focus on the underlying conflict between the defendant's right to confrontation and his actions, if any, in intimidating the witness. Nevertheless, this alternative can possess the same danger as waivers addressed in Part I, namely that it may be used to curtail a defendant's right without providing a convincing rationale for why that right should be restricted. The recently renewed concern with false charges of child sexual abuse illustrates the dangers of an unfocused application of waiver while at the same time tests the theory of waiver formulated in Part II. In this manner, this Note attempts to elicit some general principles regarding how intimidation might be defined to protect the rights of both the alleged victim and the accused.

I. CURRENT LEGAL LANDSCAPE

A. Waiver of the Right of Confrontation

The right provided by the Confrontation Clause[26] is a personal right of the accused intended for her benefit.[27] This right, like other federally guaranteed rights, can be waived.[28] Yet a waiver ordinarily is valid only if there is "an intentional relinquishment or abandonment of a known right or privilege."[29] Such an express waiver of the right to confrontation can take a variety of forms. The accused may enter a plea of guilty to the crimes he is accused of committing.[30] The accused may

26. *See supra* note 11.
27. Faretta v. California, 422 U.S. 806, 819 (1975).
28. Brookhart v. Janis, 384 U.S. 1, 4 (1966).
29. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
30. *See, e.g.*, Boykin v. Alabama, 395 U.S. 238, 242–43 (1969) (holding that if the defendant pleads guilty in a manner which is "intelligent and voluntary," this plea results in a waiver of several of the defendant's constitutional rights, including her right to confrontation).

decide not to cross-examine a witness at trial.[31] If the accused stipulates to the admission of evidence, this also will constitute a waiver of the right to confront the source of that evidence.[32] Ordinarily it is possible to analyze these actions under the traditional *Johnson v. Zerbst*[33] standard requiring "an intentional relinquishment or abandonment of a known right or privilege."[34] A trial judge may refuse to accept a guilty plea until convinced that the defendant understands the right she is waiving and that the defendant fully intends to waive that right.[35]

An express waiver, however, is not the only way in which the defendant may waive his constitutional right to confrontation. The confrontation right may be waived indirectly. Examples of indirect waiver include absenting oneself from the trial[36] and engaging in contemptuous behavior which requires removal from the court.[37] Such acts also can be analyzed under the classic *Zerbst* standard of waiver for the prosecution's use of hearsay. For example, a trial judge can inform an unruly defendant that continued disruptive behavior will result in the defendant's removal from the courtroom and waiver of the right to confront witnesses presented against him.[38]

Finally, an accused may waive the right to confrontation by engaging in acts of misconduct that cause a witness to become unavailable to testify. Such acts may include threatening or killing a potential witness after legal proceedings have begun.[39] It is not clear, however, whether other less-drastic acts

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31. *See, e.g., Brookhart*, 384 U.S. at 1 (stating that a defendant's decision not to cross-examine the witnesses results in a waiver of the right to confrontation). In *Brookhart*, the Court failed to find that defendant had waived his constitutional rights because he "neither personally waived his right nor acquiesced in his lawyer's attempted waiver." *Id.* at 8.

32. United States v. Stephens, 609 F.2d 230, 232 (5th Cir. 1980); United States v. Martin, 489 F.2d 674, 678 (9th Cir. 1973), *cert. denied*, 417 U.S. 948 (1974).

33. 304 U.S. 458 (1938).

34. *Id.* at 464.

35. *See* Roger W. Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 NEB. L. REV. 485, 508 (1987).

36. Taylor v. United States, 414 U.S. 17, 20 (1973).

37. Illinois v. Allen, 397 U.S. 337, 343–47 (1970). The Court held that there were "at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant . . . : (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." *Id.* at 343–44.

38. 304 U.S. at 458.

39. *E.g.*, United States v. Thevis, 665 F.2d 616 (5th Cir. Unit B), *cert. denied*, 459 U.S. 825 (1982).

also may result in a waiver of confrontation. First, one must determine whether a finding of waiver by misconduct must meet the classic standard as defined in *Zerbst*.[40] If this standard must be met in all cases where waiver is alleged, then it is likely that a prosecutor would have to prove that a defendant threatened a witness for the explicit purpose of preventing her testimony at trial.[41] If the classic standard is not the only way to find waiver, however, it may be sufficient for the prosecutor to show that the witness is absent due to the defendant's misconduct, without having to show that the defendant intended to keep the witness from testifying.[42] While the Supreme Court has ruled in a number of areas that the classic standard of waiver will be sufficient to allow the prosecution's use of hearsay, it has not explicitly required application of this standard.[43] Lower courts have used this silence to fashion their own standards for waiver when the defendant's misconduct results in the unavailability of a witness.

1. When a Defendant's Misconduct Constitutes Waiver—The Supreme Court first addressed the issue of waiver of the right to confront in *Reynolds v. United States*.[44] In this case, the defendant refused to reveal a witness's location to the process server.[45] The Court found sufficient evidence that the defendant was responsible for the witness's unavailability.[46] Its discussion focused on the waiver which resulted from the defendant's misconduct:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. . . . If, therefore, when absent by [the defendant's] procurement, [the witness's] evidence is supplied in some

40. 304 U.S. at 464.
41. Kirst, *supra* note 35, at 507.
42. *Id.* at 507–08.
43. *See id.* at 507.
44. 98 U.S. 145 (1878).
45. *Id.* at 159–60.
46. *Id.* at 160.

> lawful way, he is in no condition to assert that his constitutional rights have been violated.[47]

Reynolds is of further significance because the hearsay involved was prior testimony of the witness given at an earlier trial of the same defendant on another indictment.[48] The Court could have analyzed the case as involving prior testimony with a prior opportunity to confront, but instead focused on waiver. The Court's waiver analysis is broad enough to cover a wide variety of fact situations where the defendant's misconduct has resulted in the unavailability of a witness, perhaps including misconduct less overt than threats and murder.[49]

In most of the cases in which the Supreme Court has considered allowing a prosecution claim of waiver as a basis for introducing hearsay statements, the Court has applied the classic standard articulated in *Zerbst*. These cases have not involved the defendant's conduct in procuring the unavailability of a witness, but rather involve instances where the defendant has decided to forego a full trial or a personal appearance in court. The Court has held that where a defendant chooses to enter a guilty plea, he waives the right to confront witnesses against him[50] if the record shows an effective waiver under the classic standard.[51] In order to ensure that a defendant is knowingly waiving the right to confront, the judge may refuse to accept the guilty plea until certain that the defendant understands the full import of her decision. In addition, the Court has held that under *Zerbst* the defendant's failure to cross-examine a witness at the preliminary hearing was not a waiver because the defendant did not know that the witness would be absent at the trial or that the state would make no effort to produce the witness at the trial.[52]

Rarely since *Reynolds* has the Court considered waiver of confrontation rights operating through a defendant's misconduct. The Court employed the *Zerbst* standard in *Illinois v.*

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47. *Id.* at 158.
48. *Id.* at 160.
49. *See* Kirst, *supra* note 35, at 507.
50. *E.g.*, McCarthy v. United States, 394 U.S. 459, 466 (1969) ("A defendant who enters [a guilty] plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to a trial by jury and his right to confront his accusers."). *See supra* note 30 and accompanying text.
51. Boykin v. Alabama, 395 U.S. 238, 242–43 (1969); *McCarthy*, 394 U.S. at 466.
52. Barber v. Page, 390 U.S. 719, 725 (1968).

Allen,[53] holding that a defendant's disruptive conduct can result in the waiver of the right to be present to confront witnesses. In order to meet the "intentional relinquishment or abandonment" requirement, the Court ruled that a trial judge can remove an unruly defendant only after warning the defendant that continued disruptions will result in removal.[54] Only once since *Reynolds* has the Court been presented with facts where the defendant's misconduct led to the unavailability of a witness. In *Douglas v. Alabama*[55] the Court implied that waiver of the confrontation right might operate through this type of misconduct by the defendant and thereby allow the prosecution's use of hearsay. It did not decide the issue, however, because there was insufficient evidence to prove that the defendant had acted improperly.[56] As such, the Supreme Court has never ruled on whether a prosecutor must show that the defendant purposely made the declarant unavailable as a witness in order to establish that the defendant has waived his right to confrontation.

Lower federal and state courts have attempted to fill this gap in the doctrine of waiver. There is general agreement among courts that a defendant should not profit from her own misconduct. To state this, however, is to state a conclusion that avoids analyzing why certain acts should qualify as misconduct for purposes of confrontation waiver. An examination of the particular facts in each of the cases in which waiver has been alleged illustrates that the answer to the question of how waiver should be defined is far from clear. In fact, many times the question is not even addressed. It is uncertain whether the standard for waiver by conduct differs from the classic standard for waiver by intentional act, and if it does differ, in what manner. If the misconduct is threatening or killing a witness in order to prevent that witness's testimony at trial, the classic standard of waiver can still be satisfied. Yet courts have found waiver where the acts of the defendant resulted in the unavailability of a witness even where such unavailability seemed not to be the defendant's primary intent. Examining the cases in which courts have found waiver because of the defendant's misconduct is the first step to a better understanding of the principles underlying the doctrine

53. 397 U.S. 337, 343 (1970).
54. *Id.*
55. 380 U.S. 415 (1965).
56. *Id.* at 417.

of waiver of the confrontation right. Such an examination will form the basis for fashioning a theory of waiver that attempts to make some sense out of what courts have done in the past and provide some guidance as to how such questions of waiver might be analyzed in the future.

2. Procuring a Witness's Absence Through Murder or Threats of Violence—It is possible for a defendant to waive the right to confrontation by murdering a witness or threatening a witness into not testifying. A number of cases have addressed the application of waiver where the defendant has engaged in such explicit misconduct. These cases, along with *Reynolds* and *Allen*, form the doctrinal background against which courts have attempted to address the issue of waiver by defendant misconduct. Courts generally claim that in order for the defendant to have waived the right to confrontation through murder or threat, two requirements must be met. First, the defendant must have committed the acts which caused the witness to be unavailable.[57] Second, the defendant must have committed those acts for the purpose of preventing the witness from testifying at trial.[58]

In *United States v. Thevis*,[59] statements of a murdered witness were admitted under the federal residual hearsay exception for an unavailable declarant.[60] The Fifth Circuit, in rather broad language, held that a defendant who causes a witness's unavailability for trial for the purpose of preventing that witness from testifying waives the right to confrontation. The court stated that while the right of confrontation was a fundamental one, the right was not absolute and, at times, had to give way to a stronger state interest.[61] Such a result was

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57. United States v. Thevis, 665 F.2d 616, 633 n.17 (5th Cir. Unit B), *cert. denied*, 459 U.S. 825 (1982). The government must prove these requirements by clear and convincing evidence. *Id.*

58. *Id.*

59. 665 F.2d 616 (5th Cir. Unit B), *cert. denied*, 459 U.S. 825 (1982).

60. *Id.* at 633; *see* FED. R. EVID. 804(b)(5). This subsection reads, in part, as follows:

> (5) Other Exceptions
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> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Id.

61. *Thevis*, 665 F.2d at 632.

required, according to the court, when confrontation was made impossible because of the actions of the person who was asserting the right to confront.[62]

The court claimed it was applying the *Zerbst* standard in finding that the defendant had waived his confrontation right.[63] It reasoned that a defendant who caused a witness's absence to prevent trial testimony "realizes that the witness is no longer available and cannot be cross-examined."[64] Since the defendant operated under such an assumption, the court held he could be found to have "intelligently and knowingly waived his confrontation rights."[65] In such a case, the court concluded, "logic dictates that the right has been waived."[66] To permit a defendant to derive a benefit from murdering a witness against him would "make a mockery of the system of justice that the right was designed to protect."[67]

United States v. Carlson[68] also involved evidence sought to be admitted under the federal residual hearsay exception for an unavailable declarant.[69] The Eighth Circuit ruled that the defendant's right to confrontation was invoked by the admission of grand jury testimony at trial, but did not analyze whether the defendant had been afforded the right of confrontation. Instead, the court proceeded directly to a discussion of waiver of the confrontation right and found that the defendant had intimidated a witness, who had previously testified before the grand jury, into not testifying.[70] The court held that such an action constituted a waiver of the right to confront.[71]

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62. *Id.* at 632–33.
63. *Id.* at 630.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).
69. FED. R. EVID. 804(b)(5).
70. *Carlson*, 547 F.2d at 1352–53. The witness stated "that he did not desire to testify at trial because he feared reprisals." *Id.* at 1352. After a Drug Enforcement Agency officer pointed out that the defendant had not harmed the witness after the witness testified before the grand jury, the witness replied, " 'Yes, I know, but if I don't testify at trial at least I'll have a chance. If I do, it will be over for me.' " *Id.* at 1352–53 (quoting witness). The agent then asked the witness if he realized that his actions were confirming that the defendant had threatened him and the witness responded, "I know. You have got the message." *Id.* at 1353 (quoting witness). When asked if he thought the defendant would kill him if he were to testify, the witness responded that "he did not want to have to find out." *Id.* (quoting witness). Nonetheless, the witness reaffirmed that he had been truthful in his testimony before the grand jury. *Id.*
71. *Id.* at 1358–60.

Like the Fifth Circuit, the Eighth Circuit defined waiver using the traditional *Zerbst* standard of an "intentional relinquishment of a known right."[72] While the court stated that Carlson did not explicitly manifest his consent to a waiver of the confrontation right, such consent was not required if it could be shown that the waiver was voluntary.[73] One way to accomplish this would be by killing the witness.[74] But the court made clear that the defendant need not go so far before it would hold that the defendant waived the right to confront. If the defendant "achieves his objective of silencing a witness by less drastic, but equally effective, means," the defendant will still be unable to claim the protection of the Sixth Amendment.[75] In an often quoted passage the court stated that "[t]he Sixth Amendment does not stand as a shield to protect the accused from his own misconduct or chicanery."[76]

Similarly, the Tenth Circuit has held that admission of hearsay evidence under the federal residual hearsay exception for an unavailable declarant[77] does not impinge on the right to confront where a defendant threatens to kill a potential witness.[78] By threatening a potential witness the defendant waives his right to confrontation.[79] Rather than invoking the federal constitutional test of *Zerbst*, the court relied on the common law principle that "one should not profit from his own wrong" in concluding that "coercion can constitute voluntary waiver of the right of confrontation."[80] Use of such principles of common law, often employed even in cases claiming to apply the *Zerbst* test, forms a basis from which courts can broaden the definition of procuring the absence of a witness and thereby more readily find that a defendant has waived the right to confront.

3. A Broader Definition of Procuring a Witness's Unavailability—The Sixth Circuit, in *Steele v. Taylor*,[81] held that misconduct sufficient to establish a defendant's waiver of

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72. *Id.* at 1358 (quoting *Zerbst*, 304 U.S. at 464).
73. *Id.* at 1358, 1360.
74. *Id.* at 1359.
75. *Id.*
76. *Id.* (citing Diaz v. United States, 223 U.S. 442, 458 (1912)).
77. FED. R. EVID. 804(b)(5).
78. United States v. Balano, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980).
79. *Id.* at 630. The defendant's threat was quite explicit. He told the witness: "Well, you know, we could get somebody killed if any statements were made regarding the matter." *Id.* at 629 (quoting defendant).
80. *Id.*
81. *Id.*

the right to confront is not limited to the use of force and threats.[82] Waiver also may be found through such actions as "persuasion and control [of a witness] by a defendant, the wrongful nondisclosure of information, and a defendant's direction to a witness to exercise the fifth amendment privilege."[83] In *Steele* there was no direct evidence of specific threats by the defendants.[84] There simply was evidence that the defendants had attempted to conceal the crime and prevent the testimony of the witness by obtaining a lawyer for her who then advised her to refuse to testify and thereby place herself in contempt.[85]

The court advanced two possible rationales for its holding. The first was a theory of implicit waiver of the right to confrontation.[86] In a footnote, however, the court noted that the concept of waiver is not strictly applicable to cases where a defendant has procured a witness's absence. In such cases, to speak of a knowing, intelligent waiver is a mere legal fiction. Rather, the defendant has engaged in misconduct that has legal consequences which she may or may not foresee. "The connection between the defendant's conduct and its legal consequence under the confrontation clause is supplied by the law and not by a purposeful decision by the defendant to forego a known constitutional right."[87]

The reasoning the court ultimately offered was the common law principle that the hearsay rule should be relaxed when the defendant wrongfully causes the witness's unavailability, to prevent the defendant from profiting from his own wrongdoing. The court stressed the important "public policy [of] protecting the integrity of the adversary process" and compared it to the principle of reciprocity underlying the equitable doctrine of "clean hands."[88] Under such a theory, while the law prefers live testimony to hearsay, a defendant cannot profit from this preference while at the same time repudiating it by creating the condition that prevents the preference.[89]

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82. 684 F.2d 1193 (6th Cir. 1982), *cert. denied*, 460 U.S. 1053 (1983).
83. *Id.* at 1201.
84. *Id.* at 1203.
85. *Id.*
86. *Id.* at 1201.
87. *Id.* at 1201 n.8.
88. *Id.* at 1202.
89. *Id.*

Both the Second and Eleventh Circuits have offered similarly broad examples of what actions by a defendant may constitute procurement of a witness's unavailability. In *United States v. Mastrangelo*,[90] the Second Circuit held that prior knowledge of another's plan to murder a witness coupled with failure to warn authorities was sufficient to constitute a waiver of the right to confront.[91]

The Eleventh Circuit addressed waiver of the right to confrontation in a case where the defendant shot and mortally wounded a law enforcement agent as that agent and several others were attempting to arrest him.[92] At trial, the court allowed the agent's supervisor to testify, under the federal residual hearsay exceptions, to statements of the agent which incriminated the defendant.[93] Specifically, the statements related to a meeting where a sale of drugs was negotiated. This meeting took place approximately two weeks before the killing.[94] The Eleventh Circuit held that the admission of this testimony did not violate the defendant's confrontation right because the defendant had "waived his right to cross-examine [the agent] by killing him."[95] The only support cited by the court was *Carlson*'s broad statement that the confrontation right does not "protect the accused from his own misconduct or chicanery."[96] The court offered no further reasoning for its holding that a defendant's action in committing a crime could be used as proof that he had waived the right to confront.

Yet not all courts have found such a broad category of actions sufficient to constitute waiver of the right to confrontation. In a recent case dealing with the issue of waiver by misconduct,[97]

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90. 722 F.2d 13 (2d Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984).

91. *Id.* at 14. At the trial, Chief Judge Weinstein stated:

> It just is inconceivable . . . that this radical step to aid Mastrangelo, who is the only person that could have been helped by killing this witness, would have been taken without his knowledge, acquiescence, or orders. And that, it seems to me, is the clearest situation of a finding of manifest necessity that you can get.

United States v. Mastrangelo, 662 F.2d 946, 951 (2d Cir. 1981) (quoting the lower court's statement at argument), *cert. denied*, 456 U.S. 973 (1982).

92. United States v. Rouco, 765 F.2d 983, 985 (11th Cir. 1985), *cert. denied*, 475 U.S. 1124 (1986).

93. *Id.* at 993.

94. *Id.* at 994.

95. *Id.* at 995.

96. *Id.* (quoting United States v. Carlson, 547 F.2d 1346, 1359 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977)).

97. United States v. White, 838 F. Supp. 618 (D.D.C. 1993).

a federal trial court in Washington, D.C. held that "[m]ere failure to prevent the murder, or mere participation in the alleged drug conspiracy . . . [is] insufficient to constitute waiver."[98] The court explicitly disagreed with the broad sweep of the Second Circuit's holding in *Mastrangelo*. It reasoned that to hold that a defendant's action in committing a crime constituted waiver would rob the Confrontation Clause of its purpose.[99]

4. Patterns of Conduct as a Basis for Waiver—A few courts have provided some guidance as to how meaning might be given to the notion of a defendant exercising persuasion or control over a witness. For example, the Eighth Circuit was able to elaborate on its *Carlson* decision in the cases of *Black v. Woods*[100] and *Olson v. Green*.[101] Both cases arose out of the same murders of a woman and her two infant children. The murders were committed by a woman named Link and a man named Olson acting on orders of an inmate named Black. The court found that Black had intimidated Link into not testifying, thereby waiving his right to confront her. Moreover, this intimidation went beyond specific threats regarding her testimony at his trial for the murders; it included a "pattern of conduct" where Black would physically abuse Link and threaten to kill her if she did not obey his orders.[102] The court quoted approvingly the Minnesota Supreme Court's language that Black's involvement in the murder for which he was charged was " 'the most graphic and explicit threat possible.' "[103] Such evidence of prior threatening behavior toward the witness, coupled with the defendant's order to commit the crime, were sufficient to justify a finding of waiver.

Regarding a waiver by Olson, the Eighth Circuit found no evidence in the record that indicated Black acted with Olson or on Olson's behalf in threatening Link. As such, the threats made by Black could not be attributed to Olson for the purpose of finding that Olson had waived the right to confront Link.[104]

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98. *Id.* at 623.
99. *Id.*
100. 651 F.2d 528 (8th Cir.), *cert. denied*, 454 U.S. 847 (1981).
101. 668 F.2d 421 (8th Cir.), *cert. denied*, 456 U.S. 1009 (1982).
102. Black v. Woods, 651 F.2d at 531. For example, once the witness visited the home of the victim but failed to kill her as Black had ordered. Black had a man beat her and tell her that if she did not do what Black had asked, the man would "make sure that his next trip was his last." State v. Black, 291 N.W.2d 208, 214 (Minn. 1980).
103. Black v. Woods, 651 F.2d at 532 (quoting State v. Black, 291 N.W.2d at 214).
104. *Olson*, 668 F.2d at 429.

The court rejected the Minnesota Supreme Court's reasoning that because the murdered woman, like Link, was a potential witness, Olson's participation with Link in the murder was itself a threat against Link. The court reasoned that Olson's involvement in the murders was the issue at trial and his acts there were directed at persons other than Link. Participation in the commission of a crime is insufficient to waive the right to confront and finding a waiver in such cases would destroy the right to confrontation. "Involvement in the crime itself can form the basis for waiver only if the evidence indicates that the defendant directed the crime against the witness or otherwise procured the witness' absence."[105]

In *United States v. Papadakis*, the Southern District of New York employed an approach similar to that used in *Black*, focusing on patterns of intimidation.[106] In *Papadakis* the court noted that the witness suffered a general fear for the safety of himself and his family. This was due in part to the witness's and defendant's intimate friendship and their membership in a rather close community of former Greek nationals. This created a background of mental anguish against which subsequent acts of intimidation had to be judged.[107] Thus, while the defendant never explicitly threatened the witness with violence, his actions imploring the witness to leave the country could nonetheless constitute waiver of the right to confront.

B. Burden of Proof for Finding Waiver by Misconduct

Once a court determines that it is possible for a defendant to lose the right to confront through misconduct and attempts to define what actions of a defendant will qualify as misconduct, it must then delineate what standard of proof needs to be met before waiver is found. Only one court, the Fifth Circuit, has required that the prosecution prove by clear and convincing evidence that the defendant procured the absence

105. *Id.* at 429–30.

106. 572 F. Supp. 1518 (S.D.N.Y. 1983).

107. *Id.* at 1524–25. The court stated that the defendant's threatening behavior included the insistence that the witness leave the court's jurisdiction by going to Greece and the defendant's offer to the witness of a quarter of a million dollars if he returned to Greece. *Id.*

of a witness.[108] In so doing, the court distinguished between the reliability and the admissibility of evidence. A preponderance of the evidence standard is sufficient for judicial determinations of the admissibility of evidence under the exclusionary rule, because the rule is meant to deter police misconduct and normally does not relate to the reliability of evidence.[109]

Waiver of the confrontation right is different, however. While the Supreme Court has not addressed the issue directly, it has held that testing the reliability of evidence is one of the central purposes behind the confrontation right.[110] In cases where the right is waived, admission of the hearsay statement is based on the reliability of evidence of intimidation by the defendant. The court's inquiry focuses on which manner of evidence, hearsay or direct testimony, is more reliable. According to the Fifth Circuit, the use of the clear and convincing standard is required where admissibility hinges on constitutional requirements going to the reliability of the evidence because the right of confrontation is so integral to the accuracy of the fact-finding process and the search for truth.[111] Furthermore, since the waiver of constitutional rights is generally disfavored, requiring clear and convincing evidence of intimidation ensures that close cases are resolved in favor of the defendant.[112]

Whatever the merits of this analysis, it has not found support in other cases. A number of courts have held that the government need only prove that a defendant procured a witness's absence by a preponderance of the evidence.[113] The

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108. United States v. Thevis, 665 F.2d 616 (5th Cir. Unit B), *cert. denied*, 459 U.S. 825 (1982).

109. *Id.* at 631. United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982) (involving the murder of a key witness), *cert. denied*, 467 U.S. 1204 (1984) (citing Stone v. Powell, 428 U.S. 465, 486–87 (1976); United States v. Brookins, 614 F.2d 1037, 1046–47 (5th Cir. 1980)); *see also* Lego v. Twomey, 404 U.S. 477 (1972) (involving the voluntariness of a confession).

110. Ohio v. Roberts, 448 U.S. 56, 64 (1980).

111. *Thevis*, 665 F.2d at 631; *see also* United States v. Wade, 388 U.S. 218, 240 (1967) (finding that the government must "establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect"); *Mastrangelo*, 693 F.2d at 273–74 (reviewing previous decisions and holding that a trial judge should make findings under the clear and convincing standard).

112. *Thevis*, 665 F.2d at 633 n.17.

113. United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992); *Mastrangelo*, 693 F.2d at 273; Steele v. Taylor, 684 F.2d 1193, 1202 (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. White, 838 F. Supp. 618, 624 (D.D.C. 1993); State v. Gettings, 769 P.2d 25, 29 (Kan. 1989); State v. Sheppard, 484 A.2d 1330, 1348 (N.J. Super. Ct. Law Div. 1984); State v. Frambs, 460 N.W.2d 811, 814 (Wis. Ct. App. 1990).

reason often cited for employing such a standard is that "waiver by misconduct is an issue distinct from the underlying right of confrontation."[114] This point is illustrated by analogizing waiver by misconduct to preliminary findings of fact on the admissibility of extra-judicial statements under the co-conspirator exception.[115] Questions of admissibility of co-conspirator statements have been held to be equivalent to a ruling on their admissibility under the Confrontation Clause thereby requiring proof only by a preponderance of the evidence.[116] A preponderance of the evidence standard, therefore, would seem sufficient for other extra-judicial statements such as those used to make preliminary findings on procurement of witness unavailability.

Courts also have reasoned that a preponderance of the evidence standard protects the balance between a defendant's right to confrontation and the public interest in ensuring that a defendant does not profit from his own misconduct.[117] Too high a burden of proof would tip the balance toward the defendant, increasing the temptation for a defendant to abuse the procedures meant to protect his constitutional rights.[118] Furthermore, claims of waiver by misconduct are unlike traditional waiver in that they are not disfavored by the law. Courts have reasoned that threatening a witness is often accompanied by tangible evidence such as the disappearance or murder of a key witness. As such, these courts have found that there is little reason to increase the burden of proof on the prosecution.[119]

C. Waiver of the Confrontation Right as Waiver of Evidentiary Objections

Once a court determines that a defendant has waived the right to confrontation, the question remains as to whether a defendant still may challenge the evidence sought to be

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114. *Mastrangelo*, 693 F.2d at 273.

115. *Steele*, 684 F.2d at 1202–03 (citing United States v. Enright, 579 F.2d 980 (6th Cir. 1978)); *White*, 838 F. Supp. at 624 (citing United States v. Beckhan, 968 F.2d 47 (D.C. Cir. 1992)).

116. *See* United States v. Nixon, 418 U.S. 683, 700–01 (1974); Dutton v. Evans, 400 U.S. 74 (1970).

117. *White*, 838 F. Supp. at 624.

118. *Id.*

119. *Mastrangelo*, 693 F.2d at 273.

admitted under an evidentiary objection. A number of courts have held that waiver of the right to confront is *a fortiori* a waiver of the right to raise certain evidentiary exceptions.[120] While some courts have limited the waiver of evidentiary objections to those involving hearsay,[121] it is not clear that this is the limit to the scope of evidentiary objections waived along with the confrontation right.[122]

The reason courts most often provide for holding that a waiver of the right to confront also operates as a waiver of any hearsay objection is that the Confrontation Clause and the hearsay rule function to protect similar values.[123] Both seek to guarantee accurate, reliable evidence.[124] While interests may be balanced differently under each, the interests being weighed do not change when one moves from the Confrontation Clause to the hearsay rules.[125] Both seek to balance the state's interest in acquiring relevant probative evidence against the defendant's interest in testing the accuracy of that evidence.[126] Since the defendant's interest in confrontation is the key interest offsetting the need for evidence, once that interest is removed, the balance necessarily favors the need for evidence.[127]

Even if a court determines that hearsay objections are waived along with the confrontation right, presumably the hearsay statements must still be sufficiently reliable and their probative value must outweigh their prejudicial impact, in order to satisfy due process requirements.[128] It is not clear, however, that these evidentiary concerns weigh heavily on

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120. United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992); United States v. Thevis, 665 F.2d 616, 630 (5th Cir. Unit B), *cert. denied*, 459 U.S. 825 (1982).

121. Steele v. Taylor, 684 F.2d 1193, 1202 (6th Cir. 1982), *cert. denied*, 460 U.S. 1053 (1983) (finding the statement admissible if the statement would have been admissible had the witness testified); *Thevis*, 665 F.2d at 630; *White*, 838 F. Supp. at 621.

122. *See, e.g.*, *Aguiar*, 975 F.2d at 47 ("A defendant who procures a witness's absence waives the right of confrontation for all purposes with regard to that witness, not just to the admission of sworn hearsay statements."); United States v. Balano, 618 F.2d 624, 626 (10th Cir. 1979) (stating that "[a] valid waiver of the constitutional right [to confrontation] is *a fortiori* a valid waiver of an objection under the rules of evidence."), *cert. denied*, 449 U.S. 840 (1980).

123. *Thevis*, 665 F.2d at 632 (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

124. *Roberts*, 448 U.S. at 65–66.

125. *Thevis*, 665 F.2d at 632.

126. *Id.*

127. *Id.* at 632–33.

128. *Steele*, 684 F.2d at 1202 (holding that a statement is admissible against a defendant who procured a witness's absence if the statement would have been admissible had the witness testified); *White*, 838 F. Supp. at 625.

courts once a finding of waiver has been established.[129] Once again, the finding of waiver can simply function to affirm the right in the abstract while robbing it of any value in the case in which it is being applied. Waiver of the confrontation right can become all the more attractive when it also may be used to circumvent an analysis of whether certain evidentiary objections have been waived.

II. FASHIONING A THEORY OF WAIVER OF THE RIGHT TO CONFRONTATION THROUGH A DEFENDANT'S MISCONDUCT

The difficulty courts have experienced in formulating a more precise notion of waiver has existed for some time. The most well-known definition of waiver is usually attributed to *Johnson v. Zerbst*,[130] a 1938 Supreme Court decision involving the waiver of the right to counsel. The *Zerbst* Court, however, was simply restating the standard common law definition of waiver, an "intentional relinquishment of a known right."[131] The primary difficulty involves explaining how a waiver can be inferred from one's actions and still meet the *Zerbst* requirement that the relinquishment be intentional and the right be known.[132] As has been shown, waiver of even a fundamental constitutional right such as that of confrontation can be inferred from action. Yet such a notion of waiver is inconsistent with the view that waiver is an "intentional relinquishment of a known right."[133] The

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129. *See, e.g., Balano*, 618 F.2d at 626–27 (applying a theory of waiver in a situation where a defendant, accused of being an accessory after the fact to the interstate transportation of stolen goods, was held to have waived his right to confrontation by threatening the life of a grand jury witness).

130. 304 U.S. 458, 464 (1938).

131. *See, e.g.*, Clark v. West, 86 N.E. 1, 5 (N.Y. 1908) (citing an "intentional relinquishment of a known right"); Cowenhoven v. Ball, 23 N.E. 470, 471 (N.Y. 1890) (citing a "voluntary relinquishment of some right"); 2 HENRY M. HERMAN, COMMENTARIES ON THE LAW OF ESTOPPEL AND RES JUDICATA § 825, at 954 (1886) (citing an "intentional relinquishment of a known right").

132. Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 481 (1981).

133. *Id.* at 482 n.29. As Rubin points out, courts recognized this inconsistency even before *Zerbst's* holding. *Id.* (citing United States v. Gale, 109 U.S. 65, 72 (1883); State v. Kaufman, 2 N.W. 275 (Iowa 1879)).

analysis of waiver that follows examines how courts have addressed or failed to address this apparent inconsistency.

As one commentator has stated, "[t]he key to any good descriptive theory of waiver rules is a plausible view of the purposes of the entitlements that may be waived."[134] One way to define the purpose of an entitlement is to determine whom the entitlement seeks to benefit and how it is to provide the benefit. Such inquiries form a starting point for addressing the issues at the heart of a finding of waiver operating through a defendant's misconduct, namely "how rights can be taken away and how they can be given up."[135]

Under traditional analysis, one of the major benefits of waiver is that it permits parties to minimize costs. A right is not always beneficial to the person who possesses it, and waivers allow persons "to reach informal agreements that avoid the expense of asserting their rights."[136] This rationale is complicated in cases of waiver by misconduct. It is not immediately clear how waiver operating through misconduct fits into this traditional analysis. The defendant is not making a conscious, intelligent choice to avoid the expense of the procedural rights of confrontation. While it is true that a defendant who procures a witness's absence is trying to avoid the expense of a procedural right, what he is trying to prevent is a witness's testimony and not his own confrontation of that testimony.

Furthermore, the dangers presented by waiver are intimately related to its benefits. While waiver presents an alternative to the costs of the formal decision-making process, it also functions as an alternative to the protection that such formal procedures involve. Once waiver of a right is possible, the ability of one party effectively to assert that a right has been waived may leave a weaker party in the same position as if that party never possessed the right in the first place.[137] Such dangers are magnified in cases of a defendant's misconduct when waiver often operates not by a knowing, intelligent choice of a defendant, but instead through the use of a legal fiction. The incentive to avoid the complex and lengthy Confrontation Clause analysis that many waiver cases otherwise would entail

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134. William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 769 (1989).

135. Rubin, *supra* note 132, at 483. Rubin sees the latter question as the focal point for examining the law of waiver. *Id.*

136. *Id.* at 488.

137. *Id.* at 490.

is an excellent example of both the costs to be avoided by asserting waiver and the temptations that can lead to a hasty finding of waiver.

The pervasive use of waiver to justify the loss of procedural rights, including the right to confrontation, has resulted in a doctrine notable mostly for its flexibility and vagueness. The unclear standards which current waiver theory employs permit courts to use waiver to justify a large number of failures to follow constitutionally required procedures. The undisciplined use of waiver has enabled courts to affirm certain procedural rights in the abstract while avoiding the costs that such rights would impose in particular instances.[138] This results, in large part, from the unwillingness of courts to address these difficult issues head-on. Instead, courts rely on waiver to reach a desired result while avoiding a comprehensive examination of the implications of their actions. The remainder of this Part explores possible theoretical explanations for the actions that courts have taken in finding waiver through a defendant's misconduct and how the assumptions underlying courts' actions might be analyzed more explicitly.

A. Waiver versus Forfeiture

Distinguishing between waiver and forfeiture is one way to attempt to explain the difference between the requirements of the classic standard of waiver and the courts' practice of finding waiver in cases where a defendant causes a witness's unavailability. This distinction can be made by separating from traditional waiver analysis questions regarding whether a procedural right should be defined so as to be available to the defendant and whether the defendant could be regarded as having utilized the proper means of implementing such a right. Only a conscious choice to forego the exercise of a separately defined right would be properly considered a waiver.[139] Questions regarding the scope of a particular right and the procedures that a defendant must use to reap the benefits of that right would be evaluated under the rubric of forfeiture.[140]

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138. *See* George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 194–95 (1977).

139. *Id.* at 196.

140. *Id.*

Under such a formulation, forfeiture differs from waiver in that a defendant can forfeit a right without ever making a deliberate and informed decision to relinquish that right.[141] Reliance on waiver concepts in instances where a defendant has intimidated a witness into not testifying obscures the conceptual and theoretical bases which guide a court in reaching a given outcome.

Professor Westen examines the context of guilty pleas to develop a theory of forfeiture of constitutional defenses that more directly addresses the scope of the right in question and the procedures required for the right to be exercised.[142] His approach focuses on the overriding interests of the state and the balance between those interests and the interests of an individual defendant.[143] In the case of constitutional defenses in criminal procedure, the balance is between "the interest of the defendant in asserting the values protected by the particular constitutional defense at issue [and] the interest of the state in preserving its opportunity to obtain a conviction at trial."[144] A claim of waiver by the prosecution will be invalidated where it "places the state in no worse a position with respect to its ability to obtain a valid conviction against the defendant . . . than it occupied before entry of the plea."[145] In other words, the prosecution must show that "it relied to its detriment" on the defendant's waiver.[146] This analysis creates a distinction focusing on rights that are outweighed by a state interest and those that are not because they do not conflict with any interest.[147] One must identify the nature of both the state's and the defendant's interests and strike a balance between the two by considering the alternative methods to achieve the goals that each interest is designed to promote.[148]

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141. Peter Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1214 (1977).

142. *Id.*

143. *See id.*

144. *Id.* at 1238.

145. *Id.* at 1235.

146. *Id.* at 1237. For example, the prosecution cannot claim to have relied upon a defendant's waiver (a guilty plea) in cases of incurable errors because those errors invalidated the state's case from the beginning; the defendant's waiver does not operate to put the state in any worse of a position than it occupied before that waiver. As regards a curable guilty plea, however, the state can argue that had the error been brought to its attention before it relied on the error, it could have cured the error and not lost the opportunity to gather and present a successful case. *Id.*

147. *Id.* at 1238–39.

148. *Id.* at 1239.

This forfeiture analysis is especially helpful in elucidating the rationale behind one area where a defendant may lose rights through misconduct—behavior in the courtroom. In *Illinois v. Allen*,[149] the Supreme Court ruled that a defendant had waived his right to be present in the courtroom because of his misconduct.[150] Despite his disruptive actions, the defendant insisted throughout the proceeding that he wished to remain in the courtroom. As with cases of misconduct consisting of threats to witnesses, it is difficult to explain the holding in *Allen* by relying on traditional notions of waiver.[151] The right was not lost through the consent of the defendant, but the Court did not provide guidance on how to determine when a nonconsensual loss of a constitutional right was justified. In effect, the Court in *Allen* converted waiver into a punitive sanction but applied the *Zerbst* standard to avoid setting down any new rules or standards.[152] Using a forfeiture analysis to balance the rights of the defendant against the rights of the state, it is possible to conclude that the defendant's constitutional right to be present in the courtroom was outweighed by the state's interest in being able to conduct the trial in an orderly manner.[153] Such a conclusion is reached, however, through a more precise analysis of the right in question and the manner in which it must be exercised.

By separating forfeiture from waiver analysis it becomes apparent that the controlling factor in waiver of the confrontation right through misconduct "is not the defendant's state of mind, but the effect his decision has on the interests of the state."[154] Thus, waiver functions as "a doctrine that defines the outer limits of constitutional rights"[155]—the area past which an individual's interests are outweighed by the state's. This has severe implications, for it means that the state must provide "a legitimate and persuasive reason for limiting [a defendant's] constitutional defenses"[156] instead of merely relying on the

149. 397 U.S. 337 (1970).

150. *Id.* at 343.

151. *See* Tigar, *supra* note 5, at 11; Westen, *supra* note 141, at 1239 n.50.

152. Tigar, *supra* note 5, at 11.

153. Of course this raises questions about how to define orderly courtroom procedures and to what extent such procedures further certain state interests. Nevertheless, exploration of these questions more directly addresses the implications of removing defendants from courtrooms as a result of their misconduct.

154. Westen, *supra* note 141, at 1260.

155. *Id.* at 1261.

156. Sambo's Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686, 692 (6th Cir. 1981).

notion that because the defendant has engaged in misconduct he has made a decision not to assert his constitutional right.[157] Distinguishing between forfeiture and waiver may force courts to examine the interests underlying both the defendant's and the state's position and allow more thorough and thoughtful resolutions of cases where the defendant has engaged in misconduct.

B. Unworthy Defendants and Intended Beneficiaries

One legitimate and persuasive reason for holding that a defendant may not claim the protection of a certain right is that the defendant is not part of the class of persons that the right is intended to benefit. Such a view of waiver operates on the assumption that certain rights are intended to protect third parties and not the interests of the defendant who is asserting them.[158] This notion rings most true in Fourth Amendment search and seizure doctrine, where the Supreme Court has repeatedly stated that the defendants who claim the amendment's protection are not its intended beneficiaries. Rather, defendants are able to exclude inculpatory evidence in order to deter police from invading the privacy of innocent third parties.[159] Many other constitutional protections can be seen as extending to the guilty "primarily as a means of protecting the innocent."[160]

A theory that centers on determining the intended beneficiary of a right can be used to explain the differing approaches courts take to waiver of constitutional rights. Where the right is one that protects only the person asserting that right, courts employ a protective waiver doctrine such as that advanced by *Zerbst*. Such a doctrine aims to protect the interests of a defendant asserting the right by ensuring that the defendant understands the consequences of relinquishing that right.

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157. Westen, *supra* note 141, at 1261.

158. Stuntz, *supra* note 134, at 765.

159. *E.g.*, United States v. Leon, 468 U.S. 897, 906 (1984); Stone v. Powell, 428 U.S. 465, 486–89 (1976). For a general discussion of the Fourth Amendment's protections against unreasonable searches and seizures, see Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983).

160. Stuntz, *supra* note 134, at 766.

Hence, the traditional *Zerbst* standard demands (1) that the waiver be knowing and intentional, and (2) that there exists a heavy presumption against waiver.[161] The *Zerbst* standard, then, apparently requires a theory of waiver that is designed generally to advance the interests of the waiving party.[162]

This, however, is not the only permissible view of waiver. Certain rights may be construed to protect persons other than the class that is claiming their protection in criminal cases or to protect all rightholders from some narrow kind of harm.[163] These rights, although asserted by the defendant, protect something other than the defendant's rational self-interest, namely the rights of third parties.[164] In these cases waiver will be allowed only to protect third party beneficiaries' interests.[165] In such circumstances, the central task of waiver analysis is to distinguish "unworthy" defendants from the intended beneficiaries of those rights where such differentiation is possible. Employing this reasoning, a waiver doctrine that tends to produce waivers from defendants guilty of witness intimidation but not from defendants innocent of such intimidation might be acceptable or even desirable.[166] The goal of a certain waiver regime then may be seen as developing procedures able to effectively differentiate between guilty and innocent holders of a certain right.

Under such a view, waiver rules would permit and perhaps even encourage the state to take advantage of a defendant's misconduct in intimidating a witness, because a person who engages in such misconduct is not the intended beneficiary of the Sixth Amendment right to confront. Yet to allow the state to act in such a way, courts must insure that there is a high correlation between those defendants who a court determines to be unintended beneficiaries of the confrontation right and those defendants who actually have threatened a witness into not testifying. One way to accomplish this would be to require the state to offer legitimate and persuasive reasons when it seeks waiver of the right to confront. Such a requirement,

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161. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

162. Stuntz, *supra* note 134, at 777.

163. For example, the Fifth Amendment privilege against self-incrimination can be seen as protecting rightholders against the specific harm caused by police abuse during interrogation. *See id.* at 840.

164. *Id.* at 784.

165. *Id.* at 779.

166. *Id.* at 781.

perhaps implemented through a higher burden of proof, would insure that due process protection was strictly applied to any attempt to differentiate between guilty and innocent right-holders.

C. Waiver as a Functional Equivalent of Due Process

In the case of waiver of confrontation rights by misconduct, courts often have applied a less demanding standard of waiver than the traditional *Zerbst* standard used in other areas of criminal procedure.[167] Under the traditional test, a court will judge the validity of a waiver in two ways: (1) the right alleged to have been waived must be known by the defendant and (2) the relinquishment of that right must be intentional, that is, voluntary and without compulsion.[168] In cases of defendant misconduct, waiver must still be intentional, but the defendant need not have known of the right that she was waiving. Instead, the right to confrontation may be waived by an action inconsistent with the exercise of the right in question.[169] In deciding whether a defendant voluntarily intended to waive a right, courts traditionally have judged voluntariness through a "totality of the circumstances" approach.[170] Such a standard, however, has resulted in the possible inclusion of almost anything as relevant to the inquiry of voluntariness while providing little guidance on the relative weight to be given to

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167. The strict standard for waiver was applied in the *Zerbst* case itself dealing with the right to counsel and was applied to other contexts in subsequent decisions. Johnson v. Zerbst, 304 U.S. 458 (1938); *see, e.g.*, Boykin v. Alabama, 395 U.S. 238 (1969) (right to trial); Adams v. United States, 317 U.S. 269 (1942) (right to trial by jury); Turner v. United States, 325 F.2d 988 (8th Cir.) (right to formal indictment before trial), *cert. denied*, 377 U.S. 946 (1964).

168. Rubin, *supra* note 132, at 491. The knowledge requirement can be satisfied either subjectively, where the defendant must have actual knowledge of the right being given up, or objectively, where a reasonable person in such circumstances would be aware that such an action constituted waiver. Intent is a more complicated concept, involving both the notion of voluntariness and knowledge. To be voluntary, the waiver must not be the product of compulsion. Like knowledge, intent can be judged either subjectively or objectively. *Id.* at 492–93.

169. Similarly, a criminal defendant may waive the right to raise objections of defenses by failing to do so at the appropriate time, regardless of whether the defendant has knowledge of the right. *See* FED. R. CRIM. P. 12(f); Davis v. United States, 411 U.S. 233 (1973) (failure to object); United States v. Scott, 464 F.2d 832 (D.C. Cir. 1972) (failure to raise defenses); Rubin, *supra* note 132, at 496–97.

170. Culombe v. Connecticut, 367 U.S. 568, 602 (1961).

different factors.[171] This piecemeal analysis allows courts to conclude that a waiver was voluntary without addressing, in any focused manner, the significance of that finding to the exercise or definition of the right in question.

Courts also employ different measures of intent, which result in further distinction between the traditional standard for waiver and the less demanding standard often used in cases of defendant misconduct. Under the traditional test, a judge will employ a subjective standard and examine the defendant's state of mind to ensure that he is aware of his rights and waives them voluntarily. Under the approach most often used in cases of waiver by procurement of a witness's absence, judges employ an objective method of proof to justify a finding of waiver. Using such an objective approach, a judge can hold a defendant to have waived the right to confront even if the accused did not know that her threats to the witness constituted waiver of that right. While such a result may be merited, no court has provided a general rule for distinguishing between these differing standards of waiver.[172]

This contrast between the objective and subjective standards of intent points to a distinction that can easily be obscured in cases of indirect waiver through misconduct: the difference between the loss of rights through waiver and the loss of rights by adjudication. It is possible to classify waiver by misconduct as waiver by inconsistent action. Such classification supports the notion that traditional waiver analysis is sufficient in the case of defendant misconduct because the defendant has taken an action directly related to the right, and his action supports the conclusion that he has decided not to assert the right. Thus, the loss of the right can be classified as waiver. At the same time, however, in cases of waiver by misconduct the connection between the defendant's action and its legal consequence often is supplied by the court during the adjudicatory process. Thus, the loss of the right can be classified as occurring through adjudication.

In order to preserve the distinction between loss of rights through waiver and loss of rights through adjudication, one could require that waiver result from a decision that is directly related to the right in question and that waiver require a

171. Dix, *supra* note 138, at 200.

172. *See* Rubin, *supra* note 132, at 497–98. Furthermore, commentators generally have not viewed the absence of such a general rule as worthy of much concern. *See id.* at 498.

judicial determination that the defendant's misconduct constitutes a decision not to assert that right. If one is to define waiver in this way, that is, in relation to the right in question, then waiver can only occur during the process in which the right is being asserted.[173] Use of this standard will prevent findings of waiver in situations where the connection between the defendant's misconduct and its legal consequence was supplied by the trial judge. This, in turn, prevents judges from using waiver to avoid addressing the issue of whether their decisions to deprive defendants of the right to confrontation violate standards of due process.[174]

One way to construct the approach described above is to employ what one commentator has labeled a "functional equivalent of due process."[175] Under a functional equivalent approach, a waiving party receives "the functional equivalent of due process protection if his waiver reaches the type of result that a court could have reached had the issue been submitted to it for adjudication."[176] To ensure that this occurs, a court must determine the nature of the right being waived, the protection afforded by that right, and that the substituted proceedings utilizing defendant's waiver provide the same due process protection as a full hearing. Since waiver is a method of structuring relationships between individuals in legally significant actions, particularly between the party who waives the right and the party who obtains that waiver and relies upon it, waiver cannot eliminate the rights of a defendant, but can only alter their form.[177] The key element to be considered is the "degree of equivalence between the result of the waiver and the plenary adjudication."[178]

The difficulty with such an approach is that it largely fails to consider threats which occur outside of the adjudicatory

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173. *Id.* at 484–86.
174. *Id.* at 486.
175. *Id.* at 539.
176. *Id.*
177. *Id.* at 536–37.
178. *Id.* at 540. The question then becomes whether the waiver changes the basic structure of the trial or, rather, represents a choice within the context of an ongoing trial. Professor Rubin's examples of when the more lenient standard would be applicable include cases where the defendant "is tried in a district distant from the one where the crime occurred, fails to appear at a trial, fails to raise a defense or objection, or testifies on his own behalf." *Id.* at 546–47. Waivers which alter the basic structure of the trial would include waiver of a jury trial, waiver of counsel, and waiver of the right to a trial through a plea of guilty. *Id.*

process, but which are nonetheless meant to effect that process. Often a defendant will realize long before formal proceedings have commenced that testimony by a certain witness may have devastating results. There may be good reason for limiting a defendant's right to confrontation because of actions to prevent a witness from testifying even before the beginning of formal proceedings. Nevertheless, the procedure for limiting a defendant's confrontation right in such a way must be carefully constructed to ensure that the defendant's due process rights are not violated.

D. Synthesizing a Theory of Waiver

Each of the theories that this Note has examined supports the conclusion that the controlling factor in a court's analysis of waiver of the confrontation right due to a defendant's misconduct is not the defendant's state of mind, but rather the interests of the state and the manner in which those interests interfere with the defendant's rights. As such, the traditional standard for determining waiver formulated in *Johnson v. Zerbst*—an intentional relinquishment of a known right—is of little help. A determination of waiver should not be made using undefined notions of a voluntary relinquishment of a known right, but rather should focus on the degree of equity between the result to be reached by finding waiver and the result to be reached through adjudication had the witness testified. Waiver should only be employed where both its underlying rationale and the impact of its use have been carefully analyzed. To accomplish this, courts must address how the defendant's actions affect the availability of the witness and hence, how they impact the defendant's due process rights.

The type of interest balancing inherent in such an approach to waiver is vulnerable to a criticism leveled against more traditional formulations of waiver, namely that courts are hostile to certain constitutional rights of criminal procedure, but are unwilling to admit that hostility. Instead, courts create broad classes of rights but allow those rights to be waived relatively easily.[179] A court may make a conclusory appeal to

179. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 655–60 (1984) (justifying a public safety exception to *Miranda* in terms of interest-balancing); *see also* Charles J.

interest-balancing as easily as it makes a finding of waiver.[180]

Courts would be able to challenge such a critique through implementation of the steps outlined in the preceding analysis. First, courts must acknowledge that waiver of the confrontation right through misconduct is a legal fiction. The connection between the defendant's actions in threatening a witness and the loss of the confrontation right is provided by a court and justified by the interests of the state, regardless of whether the defendant made a deliberate and informed decision to relinquish the right. Second, courts must insist on a high degree of accuracy in any attempt to segregate those who are intended beneficiaries of the confrontation right from those who, by virtue of their actions in intimidating a witness, are not intended beneficiaries of the right. This can be accomplished by requiring the state to provide legitimate and persuasive reasons when it seeks a waiver of the right to confront. Finally, even after a defendant has been held to have waived the right to confront, courts must ensure that he receives due process in the form of the functional equivalent of the trial that he would have received had the witness testified.

III. APPLICATION OF THE THEORY OF WAIVER OF THE CONFRONTATION RIGHT THROUGH MISCONDUCT TO CASES OF CHILD SEXUAL ABUSE

Child sexual abuse cases present unique problems for the rules of evidence regarding hearsay; problems that stem from the conflict between the rights of the child witness and those

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Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1839–42 (1987) (arguing that the Supreme Court's use of a balancing test instead of bright line rules has resulted in a defendant's interest being undervalued vis-a-vis those of the state); Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U. L.Q. 11, 19–21 (1988) (stating that the Supreme Court's balancing process is biased in favor of the state); Stuntz, *supra* note 134, at 783 (noting that interest balancing allows the Supreme Court to be hostile to individual rights without justifying that hostility).

180. *See generally* T. Alex Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 1002–04 (1987) (discussing potential alternatives to balancing, including focused examination of items such as text, structure, precedent, consequences, history, intent, and notions of fundamental values).

of the accused. Such tension between the rights of the child witness and the accused provides a useful forum in which to test a theory of waiver.

Statements of a nontestifying witness which the prosecution seeks to admit must meet both the necessity and reliability requirements for admitting hearsay. It is necessary to admit children's hearsay statements in cases of sexual abuse because, in many cases, this is the only evidence that the crime occurred. There are often no witnesses other than the perpetrator, since this person is likely to be close to the child and have opportunity to be alone with the child. In addition, physical evidence is rare both because of the nonviolent nature of many of the offenses and the delay in reporting or visiting a doctor.[181] Finally, a child's memory tends to fade quickly, making the account given closest to the event the most reliable.[182] The question of the reliability of children's out-of-court statements has provoked much controversy. Some commentators have argued that it is unlikely children will consistently lie to authority figures about sexual abuse and that regardless, children do not have enough information about sexual matters to construct effective lies.[183] Others have pointed out that children have a tendency to tell stories and are susceptible to suggestion; hence their statements cannot be held reliable without further investigation.[184] Neither experts nor empirical data agree about the emotional consequences of testifying in court on a child witness.[185]

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181. *See* Schwalb, *supra* note 13.

182. *See* Yun, *supra* note 19, at 1750.

183. *See* Roland Summit, M.D., *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983); Yun, *supra* note 19, at 1751.

184. *See* WEXLER, *supra* note 14, at 300–02; Mary Ann King & John Yuille, *Suggestibility and the Child Witness, in* CHILDREN'S EYEWITNESS MEMORY 24 (S. Ceci et al. eds., 1987) (finding that historically, legal authorities distrusted the testimony of children because of their inability to distinguish fact from fiction); Cockburn, *supra* note 14, at 190–91 (1990) (criticizing the admission of testimony by two-year old children in sexual abuse cases without physical evidence or corroboration by adults); Coleman & Clancy, *supra* note 14, at 17–19 (claiming that children are prone to "suggestibility" because of their "intellectual and emotional immaturity and dependence on adults").

185. Gail D. Cecchettini-Whaley, Note, *Children as Witnesses After* Maryland v. Craig, 65 S. CAL. L. REV. 1993, 2005 (1992).

A. Traditional Methods of Introducing Hearsay in Cases of Child Sexual Abuse

Hearsay evidence in child sexual abuse cases often is admitted under the excited utterance exception, the hearsay exception for medical diagnosis or treatment, or a residual hearsay exception.[186] Individual states also have adopted statutes to address the problem of children testifying in an adversarial setting in which procedures are designed by adults to protect adults. This section briefly explores the difficulties of each of these traditional approaches, and attempts to apply the theory of waiver of the confrontation right which was developed in Part II to cases of child sexual abuse. In so doing, it highlights both the benefits and potential dangers that can result from applying such a theory of waiver in the context of child sexual abuse. What is gleaned from the application of waiver in the context of child sexual abuse may then be used to inform the theory of waiver which was developed in Part II.

1. Hearsay Exceptions for Excited Utterances and for Statements Made in the Course of Receiving Medical Care—The hearsay exception for excited utterances[187] often has been used by prosecutors in attempts to have a child's hearsay statements admitted into evidence.[188] The exception has three requirements. First, there must be a startling occurrence that produces shock in the declarant. Second, the statement must be made before the declarant is able to reflect upon it. Third, the statement must be related to the startling event. The primary justification for this exception is that the startling event produces a shock in the declarant that prevents "reasoned reflection" or fabrication.[189] The statement is thought to be

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186. Most states pattern their rules of evidence on the Federal Rules of Evidence.

187. FED. R. EVID. 803. The rule states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> . . . .
>
> (2) Excited utterance
>
> A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Id.

188. Yun, *supra* note 19, at 1753.

189. *See generally* 2 MCCORMICK, EVIDENCE § 272 (John W. Strong ed., 1992) (summarizing the bases of the "spontaneous statements" exception and applying it

reliable even though it is hearsay because the declarant is in a state where it is unlikely he will distort the information.[190] The hearsay exception for statements made during the course of medical treatment[191] also is used by prosecutors to admit a child's hearsay statements.[192] The rationale for admitting such statements is based on the belief that persons making statements to a doctor are unlikely to lie.[193]

The Supreme Court in *White v. Illinois*[194] went a long way toward increasing the attractiveness to prosecutors of the excited utterance and the medical diagnosis hearsay exceptions. The Court held that the two exceptions were well established and satisfied the evidentiary requirements for admission. Therefore, statements introduced under one of these two exceptions per se meet the requirements of the Confrontation Clause. In addition, the Court held that the prosecution did not have to show that the declarant was unavailable to testify before such hearsay evidence could be admitted.

In their zealousness to convict perpetrators of child sexual abuse, prosecutors have argued for, and judges often have indulged in, an extension of the excited utterance and medical diagnosis exceptions. For example, judges have admitted hearsay statements made days after the alleged event occurred under the rubric of the excited utterance.[195] Fitting the

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to sexual abuse cases); 6 WIGMORE, EVIDENCE § 1747 (Chadbourn rev. 1961) (describing how external events can sufficiently surprise individuals so that their statements are particularly trustworthy).

190. *See* Gross v. Greer, 773 F.2d 116, 120 (7th Cir. 1985).

191. FED. R. EVID. 803. The rule states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (4) Statements for purposes of medical diagnosis or treatment
>
> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Id.

192. *See* Myrna S. Raeder, White's *Effect on the Right to Confront One's Accuser*, CRIM. JUST., Winter 1993, at 2, 54.

193. Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257, 257 (1989).

194. 502 U.S. 346 (1992).

195. *See, e.g.*, State v. Smith, 337 S.E.2d 833, 841–43 (N.C. 1985) (employing a "broad and liberal" interpretation of the excited utterance exception when applied to young children); State v. Logue, 372 N.W.2d 151, 158–59 (S.D. 1985) (holding that

testimony of victims of child sexual abuse into traditional hearsay exceptions, therefore, often involves a strained interpretation of those exceptions.[196] *White* encourages such action by allowing prosecutors to evaluate whether a child's hearsay statements are sufficient to obtain a conviction without justifying the child's absence from trial.

Prosecutors also experience difficulties when relying on the excited utterance doctrine. The requirement of spontaneity and limits on the lapse of time make it difficult to admit many child hearsay statements, even in courts that interpret evidentiary rules favorably to the prosecution.[197] Further, mere expansion of judicial discretion does not address the problem of an excited utterance doctrine that may not take into account the different psychological and behavioral patterns of children.[198]

The use of the medical treatment exception may be limited because some states have not liberalized their rules for such hearsay to the extent of the Federal Rules of Evidence. The traditional exception was limited to statements of present or past symptoms.[199] The current federal rule allows statements relating to medical history and the condition's causation.[200] In addition, it is not clear whether the rule encompasses children who are too young to understand the importance of providing a doctor with accurate information.[201] A number of states have barred statements made by children during the course of medical treatment where it was shown that the child did not understand the importance of being truthful with a doctor.[202]

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a mere lapse of time alone does not disqualify a child's hearsay statement as an excited utterance).

196. *See* Mike McGrath & Carolyn Clemens, *The Child Victim as a Witness in Sexual Abuse Cases*, 46 MONT. L. REV. 229, 234–35 (1985).

197. JoEllen S. McComb, Comment, *Unavailability and Admissibility: Are a Child's Out-of-Court Statements About Sexual Abuse Admissible if the Child Does Not Testify at Trial?*, 76 KY. L.J. 531, 557 (1987–1988).

198. Yun, *supra* note 19, at 1755 (explaining that the excited utterance exception treats children as if they were adults because it is premised on the psychology, behavior, and experience of adults and assumes children will react in the same manner as adults).

199. Raeder, *supra* note 192, at 54.

200. FED. R. EVID. 803(4).

201. Raeder, *supra* note 192, at 54.

202. *See, e.g.*, People v. Meeboer, 484 N.W.2d 621, 633 (Mich. 1992) (holding that a four-year-old victim of sexual abuse did not fully understand the need to speak truthfully); W.C.L. v. People, 685 P.2d 176, 181 & n.8 (Colo. 1984) (finding that statement by four year old victim to physician, not for purposes of medical treatment, but rather as a step in law enforcement proceedings, was not admissible under the hearsay exception).

2. Residual Hearsay Exceptions and State Statutory Exceptions—At times it is possible for a child's hearsay statement to be admitted under a residual exception to the hearsay rule.[203] Statements admitted under one of the residual exceptions must possess the same "circumstantial guarantees of trustworthiness" as a statement "admitted under one of the traditional hearsay exceptions."[204] The residual exceptions set out five requirements for the admission of hearsay—trustworthiness, materiality, probativeness, satisfaction of the interests of justice, and notice to the adverse party.[205] The residual exceptions have resulted in expanded judicial discretion but have provided no firm guidance for judges to rely on in exercising that discretion.[206] For example, some commentators have argued that the criteria established by the rules are overly formalistic and that the courts are justified in reading the requirements rather broadly.[207] Others have criticized what they perceive to be the courts' distortion of the residual exceptions to provide trial judges with broad discretion as to a statement's admissibility.[208]

In addition to general hearsay exceptions, a number of states have enacted statutes dealing specifically with the prosecution of child sexual abuse.[209] Like the residual exceptions, hearsay

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203. *See, e.g.*, United States v. Dorian, 803 F.2d 1439, 1443–46 (8th Cir. 1986) (holding that hearsay testimony by the foster mother of a child's statements was admissible under FED. R. EVID. 803(24)).

204. *See* FED. R. EVID. 803(24), 804(b)(5); Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 531 (1988).

205. *See* FED. R. EVID. 803(24), 804(b)(5).

206. *See generally* Thomas Black, *Federal Rules of Evidence 803(24) & 804(b)(5)—The Residual Exceptions—An Overview*, 25 HOUS. L. REV. 13 (1988) (examining opinions of federal courts applying the residual exceptions and analyzing whether any patterns have emerged in the application of the exceptions).

207. *See* Edward J. Imwinkelried, *The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence*, 15 SAN DIEGO L. REV. 239 (1978) (maintaining that the residual exception should not be limited to hearsay statements of extremely high probative value); Glen Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse*, 18 J. MARSHALL L. REV. 1, 8 (1984) (arguing that the residual exceptions are too strict for sexual abuse cases); Ray Yasser, *Strangulating Hearsay: The Residual Exceptions to the Hearsay Rule*, 11 TEX. TECH L. REV. 587 (1980) (claiming that residual exceptions should create a broad exception to the hearsay rule); Joseph W. Rand, Note, *The Residual Exceptions to the Federal Hearsay Rule: The Futile and Misguided Attempt to Restrain Judicial Discretion*, 80 GEO. L.J. 873, 873–74 (1992) (arguing that Congress was mistaken in its desire, articulated in the residual exceptions, to limit the common law discretion of judges).

208. *See, e.g.*, David A. Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867 (1982) (arguing that courts have been inconsistent in interpreting and applying the residual exceptions).

209. *See, e.g.*, ALASKA STAT. § 12.40.110 (1993) (providing an exception where the declarant is under 10 years old, the circumstances surrounding the statement indicate

admitted under these statutory exceptions for child sexual abuse must posses circumstantial guarantees of trustworthiness equivalent to hearsay statements admitted under traditional hearsay exceptions.[210] The Supreme Court has identified a number of factors which, while not exclusive, should be considered in determining whether a child's hearsay statement is reliable. Such factors include spontaneity and consistent

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reliability, additional evidence is introduced to corroborate the statement, and the child either testifies at the grand jury proceeding or is available to testify at trial); ARIZ. REV. STAT. ANN. § 13-1416 (1993) (statement by a child under 10 years old which describes sexual abuse is admissible if court finds the content of the statement and the circumstances surrounding the statement reasonable and the child testifies at trial or before a grand jury); CAL. EVID. CODE § 1228 (West Supp. 1994) (statements by a child under age 12 which describe sexual abuse are admissible where law enforcement officials or county welfare employees include the child's statements in their written reports, the child makes the statement before the defendant's confession which is memorialized by a law enforcement officer, the child is unavailable to testify, and other circumstances are present which indicate reliability); GA. CODE ANN. § 24-3-16 (Michie 1993) (statement by child under 14 about any sexual contact or physical abuse is admissible through testimony of person with whom the child discussed the incident(s) where the court finds sufficient indicia of reliablity); 725 ILL. COMP. STAT. 5/115-10 (1994) (for prosecutions of perpetrators of sexual acts on children under 13 years old, admissible evidence includes the child's testimony or out of court statements about the act or any element of the offense for which the defendant is being prosecuted, where the court finds evidence of reliability, and the child either testifies or there is evidence corroborating the child's statement); 42 PA. CONS. STAT. ANN. § 5986 (Purdon 1994) (a child's statement regarding sexual abuse which is not otherwise admissible is admissible in a dependency proceeding if the court finds the content and circumstances reliable); TEX. CRIM. PROC. CODE. ANN. art. 38.072 (West Supp. 1994) (statements about general abuse by a child under 12 years old is admissible through testimony of first adult to whom the child made such statements where the court finds indicia of trustworthiness and where the child testifies); WASH. REV. CODE ANN. § 9A.44.120 (West Supp. 1993) (statement by child under 10 years old which describes sexual abuse is admissible if court finds content and circumstances reliable). The Washington statute was the first to be implemented and served as the model for many other states. Its constitutionality was upheld in State v. Ryan, 691 P.2d 197 (Wash. 1984). For a discussion of these and other similar statutes, see Paula S. Coons, Note, *The Revision of Article 38.071 After* Long v. State: *The Troubles of a Child Shield Law in Texas*, 40 BAYLOR L. REV. 267 (1988); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806 (1985); Yun, *supra* note 19.

210. *See generally* Sheryl K. Peterson, Comment, *Sexual Abuse of Children—Washington's New Hearsay Exception*, 58 WASH. L. REV. 813 (1983) (discussing Washington's hearsay exception which applies in criminal prosecutions for sexual abuse of children). Peterson states that in determining the reliability of a child's hearsay statement courts should consider the time lapse between the alleged act and the child's report of that act, "whether the statement was made in response to a leading question," whether either the witness or the declarant had any bias against the defendant, whether the statement was made while the child was upset, whether the language used by the child was likely to be that used by a child of a similar age, and whether any event which occurred between the alleged abuse and the child's statement could have accounted for the contents of the statement. *Id.* at 827.

repetition, the mental state of the declarant, the use of terminology unexpected of a child of the declarant's age, and the lack of a motive to lie.[211]

As with the traditional hearsay exceptions, prosecutors often are able to admit initial, spontaneous statements regarding sexual contact under these state statutes. Statements later made to police or social workers usually are not admitted, however, because they lack the required circumstantial guarantees of trustworthiness. This is because such statements generally are given during the course of investigative interviews where the interviewer has knowledge of the child's previous incriminating statements and may ask leading or suggestive questions.[212] A further difficulty arises from the prohibition of using after-the-fact corroboration of the child's statement in determining its reliability.[213] Thus, it is not clear whether these statutes specifically addressing child sexual abuse provide a greater level of procedural protection to either the defendant or his alleged victim.

B. Application of Waiver to Child Sexual Abuse Cases

1. Loss of the Right to Confront a Child Witness—An alternative to the traditional methods of admitting hearsay statements of child witnesses in cases of sexual abuse is to establish that the defendant has waived the right of confrontation. This alternative has not been explored to any great extent, however, largely due to the courts' hostility to such waiver arguments on the rare occasion that they are raised in the context of child abuse. This hostility often is based on a distinction courts employ in child sexual abuse cases between threats made during the commission of a crime and those made after judicial proceedings have commenced. Only threats made after formal proceedings have begun may properly be considered in determining waiver. Finding an implied waiver through threats uttered during the commission of the crime or before ajudication would rob the Confrontation Clause of much of its

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211. Idaho v. Wright, 497 U.S. 805, 821–22 (1990) (citations omitted).

212. Graham, *supra* note 204, at 537.

213. *Wright*, 497 U.S. at 821; *see also* Dripps, *supra* note 25, at 11 (stating that the use of corroborating statements allows "bootstrapping" of otherwise inadmissible hearsay).

force by bootstrapping almost any hearsay statement into admissible evidence.[214]

In many cases, however, this is a false dichotomy. A defendant's threats, while not made during judicial proceedings, are nonetheless made at times other than during the commission of a crime, with the intent of preventing the witness from testifying in court. As cases in other areas of the law have demonstrated, it is possible to employ concepts of waiver to cause a defendant to lose the right to confront not only in cases of direct threats, but also in cases where the defendant persuades or controls a witness or even engages in a pattern of conduct that has the effect of intimidating a witness.[215]

In fact, a theory of waiver, when precisely defined and carefully applied, can provide greater protection to both defendants and witnesses than the more commonly used hearsay exceptions. Waiver addresses more directly the issue at the heart of many child sexual abuse cases—the scope of the defendant's right to confront a child witness and the procedures which a defendant must follow in order to obtain the full scope of that right. Once the scope of the right and the procedures that must be followed to obtain it are determined, one can then focus on the scope of the right when a defendant's actions do not meet the level required for full exercise of the right. In this way a court is able to analyze more directly the defendant's actions and the effect of those actions on a child witness.

As Part II illustrates, this process of analysis cannot be limited to the traditional waiver analysis employed by courts. Rather, it is necessary to focus on the scope of the confrontation right and the manner in which it should be applied to the defendant. A defendant who procures the absence of a child witness through threats is not making a deliberate and informed decision to relinquish the confrontation right. Instead, the court is providing the link between the defendant's actions and their legal consequences. The court provides this link in order to protect the interest of the state in shielding the child witness from harm and preventing the defendant from profiting by his own wrongdoing. Courts should be explicit about the assumption which underlies a finding of waiver in this manner, namely that the state's interests outweigh those of a defendant

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214. *See, e.g.*, State v. Jarzbek, 529 A.2d 1245, 1252 (Conn. 1987) (holding that threats made to a child during the commission of an alleged act of child abuse are insufficient to establish a waiver of the right to confrontation).

215. *See supra* Part I.A.2–4.

who procures a child witness's absence because such a defendant is not an intended beneficiary of the confrontation right.

To act fairly on this assumption, however, courts must ensure that there is a high correlation between those defendants who a court determines to be unintended beneficiaries of the confrontation right and those who actually have threatened a child witness. Courts should not lightly find waiver of a right as important as the right to confront and should require the state to provide legitimate and persuasive reasons when it seeks to establish a waiver of this right. One way to accomplish this is by requiring clear and convincing evidence that a defendant has threatened a witness.

Once this determination has been made, the Constitution mandates that the defendant's due process rights still be protected. Due process requires that the defendant receive the functional equivalent of the trial he would have received had the witness testified. This can be accomplished by admitting the statements of an absent, threatened witness only to the extent that those statements would have been admissible had the witness testified.

2. Burden of Proof—Only one court has held that the government must prove by clear and convincing evidence that the defendant is responsible for the witness's absence.[216] Other courts have analogized waiver by misconduct to preliminary findings of fact on the admissibility of extra-judicial statements and have required proof of intimidation only by a preponderance of the evidence. A preponderance of the evidence approach, however, undervalues the connection between the right to confrontation and the accuracy of the fact-finding process. Courts should not lightly deprive a defendant of a primary means of testing the reliability of the evidence against him. This would be true under the strict theory of waiver found in the *Zerbst* test. It is equally true of the more flexible model of waiver that has been employed by courts in confrontation waiver cases and further elaborated in this Note.

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216. United States v. Thevis, 665 F.2d 616, 631 (5th Cir. Unit B), *cert. denied*, 459 U.S. 825 (1982). The court rejected both the "reasonable doubt" standard and the "preponderance" standard. *Id.* at 630–32; *see also* Judd Burstein, *Admission of an Unavailable Witness' Grand Jury Testimony: Can It Be Justified?*, 4 CARDOZO L. REV. 263, 278 (1983) (commenting that "*Thevis* contains a principled and compelling argument" in support of the clear and convincing standard). In addition, the court in *Mastrangelo* was even more tentative in this regard: "[B]ecause I remain in doubt as to the appropriate burden of proof in respect to waiver in this case, in prudence I will await the findings of the court below on remand." United States v. Mastrangelo, 693 F.2d 269, 274 (2d Cir. 1982) (Oakes, J., concurring), *cert. denied*, 467 U.S. 1204 (1984).

As has been shown, waiver of the confrontation right operates as a legal consequence resulting from a defendant's misconduct and not from an intelligent relinquishment of a known right. To obtain the benefit of this legal consequence that is so devastating to the defendant, the prosecution should be required to prove by clear and convincing evidence that the defendant engaged in the procurement of a witness's absence. Such a requirement will make it more likely that the state will provide legitimate and compelling reasons to support its claim of waiver.

3. Waiver of the Confrontation Right as a Waiver of Evidentiary Objections—A number of courts have held that waiver of the confrontation right is *a fortiori* a waiver of the right to raise certain evidentiary exceptions.[217] A waiver of the confrontation right may constitute a waiver of any evidentiary requirement that the declarant be subject to cross-examination to the extent that the original admissibility was predicated on the declarant's availability. Yet it does not necessarily follow that other evidentiary requirements which are not dependent on the availability of the witness should also be held to be waived.

Whether or not a court has determined that defendant's misconduct has resulted in a witness's unavailability, the statement should still meet "the evidentiary requirements that the residual hearsay have circumstantial guarantees of trustworthiness, that it be more probative than other evidence reasonable available, that it be offered as evidence of material fact, and that pretrial notice be given."[218] If such requirements are not met, waiver essentially penalizes a defendant who procures a witness's absence by in effect allowing as evidence any statement made by the unavailable declarant.

Waiver constructed in such a way would not merely alter the form of the defendant's right to test the reliability of prosecution testimony, it would eliminate that right altogether. Such a result conflicts with the requirement that a defendant who waives the confrontation right receive the functional equivalent of due process. Waiver of the confrontation right therefore should lead only to waiver of hearsay objections regarding a particular statement to the extent that the statement would

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217. *E.g.*, United States v. Balano, 618 F.2d 624, 626 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980).

218. Edward D. Holmes, *The Residual Exceptions: A Primer for Military Use*, 94 MIL. L. REV. 15, 91 n.333 (1981).

have been admissible had the witness testified.[219] This limitation will prevent a defendant from profiting from misconduct while not penalizing a defendant or creating a greater temptation for the prosecution to attempt to establish waiver where it does not exist.

CONCLUSION

Waiver of the confrontation right has been employed in a number of instances to introduce hearsay statements of witnesses who have been intimidated by a defendant into not testifying at a trial. The manner in which waiver has been employed in the past has resulted in a doctrine notable mostly for its lack of precision and clarity. This has enabled courts to reaffirm the right to confrontation in the abstract, while avoiding the difficult analysis which application of the right entails in particular settings.

The damage this can do to a defendant's consitutional rights is great. Such damages can be minimized through the careful application of waiver that acknowledges that waiver of the confrontation right as a result of witness intimidation is a legal fiction employed by courts to balance the competing interests of the defendant and of the state. Waiver, when employed in this manner, can be used in child sexual abuse cases to better address the acts of a defendant in intimidating a witness. As case law has illustrated, intimidation for the purpose of preventing a witness from testifying can begin long before trial. Such intimidation need not go unchecked, provided the defendant possesses sufficient safeguards to ensure that waiver is not merely used to avoid the difficult analysis which examination of the confrontation right entails.

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219. Steele v. Taylor, 684 F.2d 1193, 1202 (6th Cir. 1982), *cert. denied*, 460 U.S. 1053 (1983). For example, a declarant should not be able to testify to what a third party told the threatened witness (absent an applicable hearsay exception) because this would be hearsay even if the threatened witness had testified.