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Does a Criminal Defendant Have a Constitutional Right to Compel the Production of Privileged Testimony through Use Immunity

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DOES A CRIMINAL DEFENDANT HAVE A
 CONSTITUTIONAL RIGHT TO COMPEL THE
 PRODUCTION OF PRIVILEGED
 TESTIMONY THROUGH USE
 IMMUNITY?

LOUIS M. NATALI, JR.†

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I. INTRODUCTION

THE purpose of this article is to suggest that there are occasions in criminal trials when statutory and common law privileges that protect important and recognized social relationships should be suspended in order to guarantee the defendant's fourteenth amendment right to a fair trial and sixth amendment right to present evidence in his own behalf.

In criminal cases, the courts have long recognized that grand juries (and ultimately trial juries) have a right to "every man's evidence."¹ While the courts have found this right to be sufficiently important to overcome the fifth amendment right against self-incrimination, and even executive privilege, courts rarely have applied the right to overcome or suspend the non-constitutionally based protection of what I shall call the "communication privileges" of attorney-client, husband-wife, doctor-patient, and other similar relationships. This article attempts to demonstrate that the logic that compels suspension of the fifth amendment privilege applies with equal force to suspend the communication privileges.

The article urges that we can protect the defendant's rights to a fair trial and to present evidence on his own behalf without unduly infringing upon the relationships underlying the communication privileges by carefully applying use immunity to privileged revelations. Under the doctrine of use immunity, privileged

1. This language repeatedly has been employed in cases denying the existence or limiting the application of various privileges. *See, e.g.*, *Trammel v. United States*, 445 U.S. 40, 50 (1980) (limiting application of privilege protecting adverse spousal testimony); *United States v. Nixon*, 418 U.S. 683, 709 (1974) (overruling claim of executive privilege and allowing prosecutor access to tape recordings); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (plurality opinion) (refusing to recognize that reporters have testimonial privilege in grand jury investigations that others do not enjoy). *Cf.* *United States v. Bryan*, 339 U.S. 323, 331 (1950) (recognizing duty to produce records before congressional committee). *Accord* *Blackmore v. United States*, 284 U.S. 421, 438 (1932) (recognizing duty of United States citizen to testify at trial, even though citizen was resident abroad); *Blair v. United States*, 250 U.S. 273, 281 (1919) (recognizing duty to answer grand jury question subject to exceptions and qualifications); *Countess of Shrewsbury's Case*, 2 How St. Tr. 769, 788 (1612).

information is prohibited from being "used" to prosecute or convict the individual who the privilege protects. Thus, use immunity enables the defendant to obtain the evidence needed to defend himself while protecting the privilege holder from the threat of prosecution based on the contents of his privileged communications. In addition, the article suggests that the courts are adequately equipped to protect against privileged information being used to harm the privilege holder's reputation or the relationship underlying the privilege. Where such harm is threatened, however, the article suggests that the harm might be justified by the avoidance of the greater harm to the criminal defendant, which is secured by the limited invasion of the communication privileges.

II. THE PROBLEM: A CONFLICT OF RIGHTS

During a criminal trial it often is necessary for the defendant to call a witness who possesses information that would demonstrate that the defendant did not commit the crime for which he stands accused. Occasionally that witness will invoke one of several constitutional, statutory, or common law privileges. For example, in *Commonwealth v. Wilkinson*,² the defendant, on trial for five murders, sought to call an associate to show that the associate, and not the defendant, had committed the offenses and had advised both his lawyer and the prosecutor of this fact.³ The associate, unable to secure a satisfactory arrangement with the prosecutor, acted on the advise of counsel, and successfully invoked both the fifth amendment privilege against self incrimination and the attorney-client privilege. The associate's attorney also successfully invoked the attorney-client privilege.⁴ The defendant was convicted and sentenced to five life terms.⁵ Only after a newspaper article in the *Philadelphia Inquirer* inspired federal investigation did the associate testify to his participation and exonerate the defendant.⁶

2. No. 788-80 (C.P. Philadelphia County Nov. 1975) (no written opinion). Unless otherwise noted, all information disclosed about this decision is derived from an interview with Steven Laver, Assistant Defender, Philadelphia Defender Association (counsel for witness) (Jan. 28 1985) [hereinafter cited as Laver Interview].

3. Laver Interview, *supra* note 2.

4. *Id.*

5. *Id.* The prosecutor sought the death penalty even though he apparently was aware of the witness' admission. *Id.*

6. *Id.* The newspaper article that appeared in the *Philadelphia Inquirer* strongly suggested that Wilkinson had not been involved in the fatal firebomb-

Wilkinson is but one of many stark examples of the conflict between the rights of criminal defendants and privilege holders.⁷ How can we as a society assure that the truth will emerge in criminal trials? How can we protect and foster the defendant's constitutional rights to produce evidence on his behalf and to a fair trial, while at the same time securing the interests and relationships that the constitutional, statutory, and common law privileges protect? This is a troublesome and serious enterprise. Many scholars, critics, and judges have agonized over these problems and through their efforts, I believe, a solution can be patterned.⁸ The solution begins with an examination and amplification of the theoretical basis of these conflicting rights.

A. *Doctrinal Bases of the Defendant's Constitutional Rights to a Fair Trial and to Offer Evidence on His Own Behalf*

The rights of a defendant to a fair trial and to offer evidence on his own behalf actually involve three separate constitutional rights: the right of compulsory process, the right to confront adverse witnesses, and the right to due process. We will examine these seriatim.

1. *The Compulsory Process Component*

In 1967, the Warren Court breathed life into the dormant compulsory process clause of the sixth amendment. In *Washington v. Texas*,⁹ the United States Supreme Court examined two provisions of Texas statutes preventing a defendant from calling an

ing. Schaffer & Neumann, *Was Justice Done in a Fatal Firebombing?*, Philadelphia Inquirer, Nov. 14, 1976, at 1, col. 1.

7. For a further discussion of this conflict, see *infra* note 47 and accompanying text.

8. See Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741, 762 (1981) [hereinafter cited as Westen, *Dilemmas*]; Westen, *Compulsory Process II*, 74 MICH. L. REV. 191 (1975); Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974) [hereinafter cited as Westen, *Compulsory Process Clause*]; Note, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953 (1967) [hereinafter cited as Note, *Compelled Testimony*]; Note, *Separation of Powers and Defense Witness Immunity*, 66 GEO. L.J. 51 (1977); Note, *A Re-examination of Defense Witness Immunity: A New Use for Kastigar*, 10 HARV. J. ON LEGIS. 74 (1972); Note, *Defense Witness Immunity—A "Fresh" Look at the Compulsory Process Clause*, 43 LA. L. REV. 239 (1982); Note, *Defendant v. Witness, Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges*, 30 STAN. L. REV. 935 (1978); Note, *"The Public has a Claim to Every Man's Evidence": The Defendant's Constitutional Right to Witness Immunity*, 30 STAN. L. REV. 1211 (1978) [hereinafter cited as Note, *Every Man's Evidence*].

9. 388 U.S. 14 (1967).

accomplice as a defense witness.¹⁰ The Court held that the provisions were unconstitutional on the ground that they violated the defendant's fourteenth amendment right to due process of law¹¹ by virtue of their violation of the sixth amendment right to call exculpatory witnesses as guaranteed by the specific language of the compulsory process clause.¹²

The Texas statutory provisions in question in *Washington* excluded an entire class of defense witnesses on the presumption that accomplices would be biased in favor of their confederates.¹³ The Court balanced the state's interests in excluding potentially unreliable evidence against the defendant's interest in procuring exculpatory testimony, and concluded that the greater weight was with the defendant.¹⁴ In so holding, the *Washington* Court permitted a long-recognized state interest to be overridden in order to protect the defendant's compulsory process rights.

It is important to note that the *Washington* Court was not presented with an invocation of the fifth amendment or with any other witness privilege. In fact, the Court recognized that a class of witnesses might be called to provide exculpatory evidence, and that these witnesses, by virtue of various privileges, might be able

10. *See id.* at 16-17 n.4 (citing TEX. PENAL CODE ANN. art. 82 (Vernon 1925) (repealed 1967); TEX. CODE CRIM. PROC. ANN. art. 711 (Vernon 1925) (repealed by implication 1965)). The Court noted that these statutes were repealed by implication, effective after defendant's trial. *Id.* at 17 n.4.

11. *Id.* at 18-19. The Court stated, "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witness to establish a defense. *This right is a fundamental element of due process of Law.*" *Id.* at 19 (emphasis added).

12. *Id.* at 23. The sixth amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ." U.S. CONST. amend. VI. *See also* *Webb v. Texas*, 409 U.S. 95 (1972) (trial judge's gratuitous admonition to defense's only witness violated defendant's due process rights).

13. 388 U.S. at 22-23. The Court pointed out that the Texas rule provided exceptions to the presumption when either the prosecution called the accomplice, or the accomplice had been acquitted at his own trial. *Id.* The Court noted, however, that the accomplice has a greater incentive to commit perjury when the prosecution calls the accomplice. *Id.* at 23.

14. *Id.* at 22-23. The Court commented that the Texas rule "arbitrarily denied [to the defendant] the right to put on the stand a witness." *Id.* at 23. The Court viewed the fact that the statute did not prevent the prosecution from calling an accomplice "absurd" and suggested that the defense should be on an equal footing with those of the prosecution in this regard. *Id.* at 22. The Court commented that an accomplice-witness often has a greater incentive to lie for the prosecution, especially if his trial is pending. *Id.* As the Court wryly pointed out, "To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large." *Id.* at 22-23.

to withhold evidence.¹⁵ Limiting its holding accordingly, the Court explicitly stated that it did not reach the issue of testimonial privileges.¹⁶ Thus, under *Washington* the constellation of interests, privacy rights, and immunities that coalesce in the communication privileges remained beyond the reach of probing defense attorneys.

2. *The Confrontation Clause Component*

Numerous confrontation clause cases have forced the Supreme Court to address serious issues of a witness' right to privacy,¹⁷ but prior to *Davis v. Alaska*¹⁸ the Supreme Court had not dealt with a codified state policy to protect a witness. In *Davis*, the Court considered the applicability of the sixth amendment to a state statute that made the juvenile court records of a prosecution witness confidential.¹⁹ *Davis* involved a burglary trial in which the prosecution's witness was on probation for a prior juvenile adjudication of delinquency for burglarizing two cabins.²⁰ The defense contended that evidence of the witness' criminal record should be admitted to show bias and prejudice on the part of the witness,²¹ but the trial court ruled that the defense could not cross-examine the witness on that point.²²

On appeal, the Supreme Court held that while the purpose of the statute—promoting the rehabilitative process—was laudatory, it nevertheless violated the defendant's sixth amendment right to

15. *Id.* at 23.

16. *Id.* at 23 n.21. The Court noted that testimonial privileges are based on entirely different considerations than are disqualifications for interest. *Id.*

17. *See, e.g.,* *Smith v. Illinois*, 390 U.S. 129, 131-33, (1968) (witness required to reveal legal name and address); *Alford v. United States*, 282 U.S. 687, 693-94 (1931) (witness required to reveal that he was in custody of federal authorities to show bias and interest).

18. 415 U.S. 308 (1974).

19. *Id.* at 309, 315. The Alaska statute provided that evidence of a juvenile adjudication was not admissible "against the minor in any other court." ALASKA STAT. § 47.10.080(g) (1984).

20. 415 U.S. at 310-11. The witness identified the defendant as one of the men he had seen on his stepfather's property near the spot where a stolen safe was recovered. *Id.* at 309-10.

21. *Id.* at 311. Defense counsel asserted that he would not use the witness' record to question the general character of the witness, but would use the evidence only to demonstrate bias and prejudice. *Id.*

22. *Id.* The protective order against introducing evidence of the witness' probation was accomplished by a motion *in limine* made by the prosecution. *Id.* at 310. In addition, during cross-examination the trial court sustained an objection to questioning of the witness pertaining to any prior contact with the police. *Id.* at 313. Thus, defense counsel was effectively denied the opportunity to prove the witness' probationary status.

confront the witnesses against him.²³ The Court balanced the state interest against the defendant's right to demonstrate bias and prejudice on the part of the witness.²⁴ In concluding that the trial court erred, the Court stated, "Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender."²⁵

With regard to the witness' rights to privacy and anonymity, the Court stated, "[W]hatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record . . . is *outweighed* by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness."²⁶ In employing the term "outweighed," the Court indicated that the question of sixth amendment rights vis a vis the rights of witnesses was to be decided by balancing interests and needs.

Although the *Davis* Court did not invalidate any communication privileges, the Court's holding that the privacy interests of a juvenile are outweighed by the defendant's sixth amendment rights lends substantial support to the argument that such privileges should yield to the sixth amendment in certain cases.²⁷ The approach outlined in *Davis* would be of limited use, however, in

23. *Id.* at 319-20.

24. *Id.* The Court characterized the right to cross-examine an adverse witness effectively for bias as a "constitutional right." *Id.* at 320.

25. *Id.* at 319. The Court advised that where the state wants to protect the witness, in the interest of fairness it can choose not to call the witness. *Id.* at 320.

26. *Id.* at 319 (emphasis added).

27. *Cf.* *Salazar v. Alaska*, 559 P.2d 66, 76-79 (Alaska 1976) (defendant should be allowed to call prosecution witness' wife over claim of marital privilege when the privilege is in conflict with defendant's right of confrontation); *State v. Hembd*, 305 Minn. 120, 1126-27; 232 N.W.2d 872, 876 (Minn. 1975) (confrontation right supersedes statutory physician-patient privilege to allow use of medical records to show previous suicide attempt); *In re Kozlov*, 79 N.J. 232, 240-45, 398 A.2d 882, 885-88 (1979) (attorney-client privilege no bar to defendant's right to prove juror misconduct where there is no less obtrusive source); *State v. Roma*, 140 N.J. Super. 582, 592, 357 A.2d 45, 51 (1976) (statutory privilege for communications to marriage counsellor "must yield to the constitutional rights of a defendant to present an adequate defense"), *opinion supplemented*, 143 N.J. Super. 504, 363 A.2d 923 (1976); *Oregon v. Jalo*, 27 Or. App. 845, 850-51, 557 P.2d 1359, 1362 (1976) (rape shield law no bar to cross-examination); *Texas Bd. of Pardons & Paroles v. Miller*, 590 S.W.2d 142, 143-45 (Tex. Crim. App. 1979) (confidential letter in parole records protected by state law privilege is subject to *in camera* review in criminal trial to determine if letter tends to show bias or prejudice by letter writer).

many cases involving communication privileges because it fails to address the problem of protecting the privilege-holder from future investigations or prosecution.

3. *The Due Process Clause Component*

In *Chambers v. Mississippi*,²⁸ the Supreme Court held that Mississippi's common-law rule barring the defendant from impeaching his own witness and from introducing exculpatory out-of-court declarations against penal interest violated the defendant's rights to due process and to compulsory process.²⁹ Again, the Court reached its decision after balancing the purported state interests against the defendant's right to a fair trial, concluding that the defendant's constitutional rights outweighed the state interests at issue.³⁰

In *Chambers*, the defendant, on trial for murder, sought to prove that a witness, McDonald, committed the crime. McDonald, who had confessed to the murder in a signed, sworn statement, was called as a defense witness.³¹ On direct examination, McDonald admitted that he had signed the statement, and it was introduced into evidence.³² On cross-examination, however, McDonald refused to adopt the statement, claiming that he did not commit the crime, and that he had signed the statement only because he had been promised a share in the award that the defendant would get from successfully suing the police department after his acquittal.³³ When defense counsel sought to impeach McDonald on redirect examination, he was prevented from doing so by operation of the voucher rule.³⁴ Chambers sought to call other witnesses to whom McDonald had made statements concerning

28. 410 U.S. 284 (1973).

29. *Id.* at 302. Chambers' request to cross-examine a key witness was denied because under Mississippi common-law, "a party may not impeach his own witnesses." *Id.* at 295. Under this rule there is a presumption that a party who calls a witness "vouches for his credibility." *Id.*

30. *Id.* at 295-98. The Court balanced the defendant's constitutional right to cross-examine against the state "voucher rule," which prohibited a party from impeaching his own witness. *Id.*

31. *Id.* at 291. Defense counsel made a pre-trial motion to declare McDonald an adverse witness since the prosecution would not call McDonald. *Id.* The trial court denied the motion, concluding that while the witness might have been hostile, he was not adverse. *Id.*

32. *Id.* Apparently, defense counsel did not on direct ask McDonald to admit the truth of his confession nor did he ask him to relate the events surrounding the murder. *Id.*

33. *Id.*

34. *Id.* at 291-92. Counsel's pretrial motion to call McDonald as an adverse witness was again denied after the state's cross-examination. *Id.* at 291.

his involvement in the shooting.³⁵ These witnesses also were prevented from testifying because Mississippi did not recognize declarations against penal interest as exceptions to the hearsay rule.³⁶

In graphic language, the Supreme Court reversed Chambers' conviction. The Court held that the isolated and combined effects of the state's evidentiary rules deprived the defendant of his constitutional right to both a fair trial and to compulsory process.

B. *Privileges in Conflict with the Defendant's Rights*

Washington, Davis, and Chambers established that a defendant possesses a constitutional right to call or to cross-examine witnesses who possess material exculpatory information.³⁷ These decisions indicate that a balancing test is implicated whenever statutes, rules of evidence, or public policy prevent a defendant from exercising either of these rights.³⁸

The communication privileges often prevent defendants from calling or cross-examining witnesses who possess material or exculpatory evidence. Thus, the issue comes to focus: Does the right to offer a defense compel a limited invasion of the communication privileges?

The Supreme Court of the United States has not addressed the conflict between the communication privileges and the defendant's right to present exculpatory evidence. The interests protected by the communication privileges, however, are no more basic or fundamental than are the rights protected by the sixth and fourteenth amendments at issue in *Washington, Davis, and Chambers*.

35. *Id.* at 292-93. Defendant offered three witnesses to testify that McDonald had told them that he had done the shooting; but, the trial court excluded the testimony on hearsay grounds. *Id.*

36. *Id.* at 292-93, 299. The only declaration against interest exception that Mississippi recognized was the declaration against pecuniary interest. *Id.* at 299. The Court concluded:

The testimony rejected by the trial court here bore persuasive assurances of trustworthiness. . . . That testimony was also critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Id. at 302.

37. See generally Westin, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 625 (1978) ("confrontation and compulsory process both entitle a defendant to present a defense by guaranteeing him the right to produce and present evidence through witnesses at trial").

38. See *id.* at 613-28.

In *United States v. Nixon*,³⁹ the Supreme Court denied the President's claim of executive privilege for materials the special prosecutor had subpoenaed for trial.⁴⁰ In holding that the President's executive privilege had to yield, the Court cited the Government's need for "every man's evidence" and the defendants' constitutional rights to compulsory process, confrontation, and due process.⁴¹ As with all privileges, the Court weighed "the importance of the general privilege of confidentiality of Presidential communications . . . against the inroads of such a privilege on the fair administration of criminal justice."⁴² Explaining the balancing process, the Court detailed the procedure for an *in camera* inspection of the subpoenaed material. According to the Court, a district court should, upon a claim of privilege by the President, indulge in a presumption that the material is privileged, and place the burden upon the subpoenaing party to demonstrate that the presidential materials are "essential to the justice of the [pending criminal] case."⁴³ If the subpoenaing party satisfies its burden of demonstrating the essential nature of the subpoenaed material, then the district court should conduct an *in camera* inspection of the material. The court has "a very heavy responsibility to see to it that presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due to the President of the United States. . . . It is therefore necessary in the public interest to afford presidential confidentiality the greatest protection consistent with the fair administration of justice."⁴⁴

Although *Nixon* did not involve a defendant's request for

39. 418 U.S. 683 (1974).

40. *Id.* at 713. The subpoena directed the President to turn over certain tape recordings and documents relating to conversations with his advisors. *Id.* at 686. The President claimed an absolute executive privilege, which the district court rejected. *Id.*

41. *Id.* at 709-11. The defendants in the underlying criminal proceeding were seven associates of President Nixon. The Court commented that "[t]o ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by prosecution or by the defense." *Id.* at 709.

42. *Id.* at 711-12. The Court concluded that the constitutional need for production of evidence was "specific and central to the fair adjudication of a particular criminal case" and outweighed the general executive need for confidentiality of communications. *Id.* at 712-13.

43. *Id.* at 713 (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (C.C. Va. 1807) (No. 14,694)) (brackets added by *Nixon* Court). The Court concluded that the district court had complied with this procedure. *Id.* at 713-14.

44. *Id.* at 714-15. Due to the sensitive nature of presidential communications, the Court repeatedly emphasized the need for confidentiality of all material not relevant to the issues before the Court. *Id.*

privileged materials, the Court nevertheless discussed the claim of executive privilege in the broader context of all privileges and noted, "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."⁴⁵ The Court added that a criminal defendant enjoys similar, constitutional protections, stating, "It is the manifest duty of the courts to vindicate those guarantees [of due process, confrontation, and compulsory process] and to accomplish that it is essential that all relevant and admissible evidence be produced."⁴⁶

Thus, the *Nixon* decision strongly suggests that the constitutional rights of a defendant can compel the admission of even privileged material. Moreover, the procedure for production set forth in *Nixon* can be a model for the review of a privilege holder's request to quash a subpoena.

Another, more frequently litigated privilege is the privilege that inheres in the fifth amendment right against self-incrimination. In these cases, courts typically are confronted with conflicts among the Government's interest in prosecuting coconspirators, the defendant's rights to a fair trial and to offer evidence in his own behalf, and a witness' fifth amendment right against self-incrimination.

To illustrate this conflict, consider the following hypothetical situation. Assume that the Defendant (*D*) called a witness (*W*) who had previously admitted to committing the crime with which *D* is charged. Instead of testifying and either admitting or denying the crime, however, let us assume that *W* invoked his fifth amendment right against self-incrimination. Under the traditional view of immunity, invocation of his fifth amendment privilege would end the matter as neither the defendant nor the court could compel *W* to testify. Assume further that *W* had admitted the crime to his lawyer, his wife, and his psychiatrist. If each of these persons was called as a witness, each would be required to invoke the applicable statutory or common law communication privilege, and would thereby refuse to testify. In contrast, if the Government called *W*, it could immunize *W*, and *W* would be able to testify without fear that the testimony could or would be used against *W*. The defendant, however, lacks the power to immunize a witness, and often must forego the opportunity to call a witness who is protected by a privilege.

45. *Id.* at 710.

46. *Id.* at 711.

What then becomes of the defendant's constitutional right to offer a defense when the defendant is powerless to compel a witness to testify on the defendant's behalf? Under the traditional view of privilege, the defendant's rights would be defeated. In the face of such conflicts, courts have crafted the device of "severance," which allows a defendant to elicit exculpatory evidence from a codefendant, even if the codefendant's testimony would be self-incriminating. The device simultaneously prevents the *use* of such evidence against that particular codefendant-witness by trying the defendant and his codefendant separately.⁴⁷ Through

47. See *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962), *reh'g denied*, 324 F.2d 375 (5th Cir. 1963). In *DeLuna*, the Fifth Circuit stated, in dicta, that if an attorney's duty to his client requires him to draw the jury's attention to a possible inference of guilt from a codefendant's silence, then the trial judge's duty is to order a severance. 308 F.2d at 141. The court concluded that a defendant who exercises his fifth amendment right has the right to be free from prejudicial comments made by the state or by a codefendant's attorney. *Id.* at 152. Essentially, *DeLuna* suggests that a court should order a severance to preserve both codefendants' constitutional rights, when one's right to a fair trial conflicts with the other's right to be free from prejudicial comment. *Id.* at 154-55. The Fifth Circuit subsequently has stated that an attorney's duty to comment on a codefendant's silence arises only where the defenses of the codefendants are antagonistic. *Gurleski v. United States*, 405 F.2d 253, 265 (5th Cir. 1968), *cert. denied*, 395 U.S. 981 (1969).

Some circuits have read the *DeLuna* dicta narrowly or have rejected it completely. See, e.g., *United States v. McClure*, 734 F.2d 484, 490-91 (10th Cir. 1984) (rejecting *DeLuna* dicta and holding that under no circumstances is a defendant's attorney "obligated to comment upon a codefendant's failure to testify"); *United States v. Graziano*, 710 F.2d 691, 694-95 (11th Cir. 1983) (to prevail upon severance claim, defendant must show that he will suffer real prejudice and that unfair trial will result from his attorney's inability to comment on codefendant's refusal to testify; real prejudice occurs only if defenses of codefendants are mutually exclusive and antagonistic), *cert. denied*, 466 U.S. 937 (1984). See also *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970). *Byrd* involved the conflict between codefendants' rights in a joint trial. One codefendant desired to offer exculpatory testimony of another codefendant who had exercised his fifth amendment right to remain silent. *Id.* at 1018. To preserve the defendant's right to a fair trial, the Court concluded that the trial court should have granted severance. *Id.* In determining whether severance was appropriate, the court focused on three factors: (1) the defendant's desire to use the exculpatory testimony of the codefendant; (2) the exculpatory nature and effect of the testimony or the extent of prejudice if the defendant is tried without the codefendant's testimony; and (3) the likelihood that the codefendant will be willing to testify if defendant is tried separately. *Id.* at 1019-21. The court listed but did not reach two other factors to be considered when determining if the codefendant should be tried separately: (4) the demands of effective judicial administration and timeliness of raising the severance question; and (5) the probability that a codefendant will prejudice the defendant by pleading guilty at or just prior to trial. *Id.* Defense witness immunity was never raised by counsel or the *Byrd* court.

Other circuits have adopted severance criteria similar to that established by the Fifth Circuit in *Byrd*. See, e.g., *United States v. Lemonakis*, 485 F.2d 941, 951-53 (D.C. Cir. 1973) (counsel's duty to comment exists only where defenses

severance, the defendant's right to offer a defense can coexist

raised are truly antagonistic, and indicating that duty to comment diminishes as defenses become less antagonistic, but that right to silence without prejudicial comment thereon is not proportionately diluted), *cert. denied*, 415 U.S. 989 (1974); *United States v. Barber*, 442 F.2d 517, 529-30 (3d Cir.) (mere presence of hostility among codefendants is not sufficient grounds for severance), *cert. denied*, 404 U.S. 958 (1971); *United States v. De LaCruz Bellinger*, 422 F.2d 723, 726-27 (9th Cir.) (there is no absolute rule of severance, rather defendant must show he would have benefited from comment on codefendant's refusal to testify), *cert. denied*, 398 U.S. 942 (1970); *United States v. Caci*, 401 F.2d 664, 671-72 (2d Cir. 1968) (*DeLuna* should be applied only in cases where defendant can show "real prejudice" if he is not permitted to comment on silence of codefendant); *United States v. McKinney*, 379 F.2d 259, 265 (6th Cir. 1967) (attorney's comment upon defendant's silence would not be permissible); *United States v. Kahn*, 381 F.2d 824, 840 (7th Cir.) (requiring showing that real prejudice will result from defendant's inability to comment upon codefendant's silence), *cert. denied*, 389 U.S. 1015 (1967); *United States v. Buschman*, 386 F. Supp. 822, 825 (E.D. Wis. 1975) ("inability to comment upon codefendant's refusal to testify compels severance only where defendants have mutually exclusive, antagonistic defenses"), *aff'd on other grounds*, 527 F.2d 1082 (7th Cir. 1976); *United States v. Barber*, 297 F. Supp. 917, 920 (D. Del. 1969) (to the extent *DeLuna* permits counsel to comment upon failure of any codefendant to testify, *DeLuna*, if not an "aberration," is confined to special fact situation not present in case at bar). See also *United States v. Johnson*, 713 F.2d 633, 640-41 (11th Cir. 1983), *cert. denied*, 465 U.S. 1081 (1984); *United States v. Boscica*, 573 F.2d 827, 832 (3d Cir.), *cert. denied* 436 U.S. 911 (1978); *United States v. Becker*, 585 F.2d 703, 706-07 (4th Cir. 1978) (before granting severance, trial judge must determine whether there is "reasonable probability" that exculpatory testimony will be forthcoming, and whether codefendant will waive his fifth amendment right at a separate trial), *cert. denied*, 439 U.S. 1080 (1979); *United States v. Kaplan*, 554 F.2d 958, 966-67 (9th Cir.), *cert. denied*, 434 U.S. 956 (1977); *United States v. Finkelstein*, 526 F.2d 517, 523-25 (2d Cir. 1975), *cert. denied sub nom. Scardino v. United States*, 425 U.S. 960 (1976); *United States v. Echeles*, 352 F.2d 892, 898 (7th Cir. 1965) (addressing court's power to arrange order of trials).

In *Johnson*, the Eleventh Circuit explained that a defendant "must initially prove bona fide need for the testimony, the substance of the desired testimony, the exculpatory effect of the desired testimony, and [that] the co-defendant would indeed have testified at a separate trial." 713 F.2d at 640 (quoting *United States v. Marable*, 574 F.2d 224, 231 (5th Cir. 1978)). The *Johnson* court added that after the defendant satisfies his initial burden of proof, it becomes the court's responsibility to assess the significance of the alleged exculpatory evidence, the potential prejudice that might result without the benefit of the testimony, the concern for judicial economy, and the timeliness of the motion. *Id.* at 641.

The Third Circuit in *Boscica* emphasized the following four factors for determining whether to grant a severance:

- (1) The likelihood of codefendants testifying.
- (2) The degree to which such testimony would be exculpatory.
- (3) The degree to which the testifying codefendants could be impeached.
- (4) Judicial economy.

573 F.2d at 832.

Similarly, in *Kaplan*, the Ninth Circuit offered the following factors for a trial court to weigh:

- (1) The good faith of defendant's intent to have codefendant testify.
- (2) The potential weight and credibility of the predicted testimony.
- (3) The probability that such testimony will materialize.

with the witness' right to invoke a privilege. Thus, where one joint defendant possesses information that will exculpate another joint defendant (for example, where *W* and *D* are joint defendants), but invokes his fifth amendment right to remain silent, a court has the inherent power to grant a severance—thereby protecting both the non-testifying defendant's fifth amendment right and the other defendant's right to present exculpatory evidence. The severance remedy, however, will not enable *D* to reach the testimony of *W*'s spouse, attorney, or psychiatrist. The severance remedy is also inadequate when *W* persists in his refusal to testify.

III. THE THEORY OF USE IMMUNITY

As the courts have the inherent power to grant a severance, they also possess the inherent power to grant use immunity. If the law and logic of use immunity is applied to each privilege, it is clear that the witness, his lawyer, wife, and therapist can be compelled to testify without any real damage to either their privileges or to the underlying relationships. In order to understand how use immunity can apply to privileges, it is necessary to examine the Supreme Court's jurisprudence on use immunity.

In *Kastigar v. United States*,⁴⁸ the Supreme Court considered the constitutionality of a federal statute that authorized the Government to grant use immunity to a witness, and to compel the witness to testify despite an invocation of the fifth amendment.⁴⁹

(4) The economy of a joint trial.

(5) The possibility that the trial strategy of a codefendant, such as pleading guilty, will prejudice the defendant seeking severance.

554 F.2d at 966.

Finally, the Second Circuit in *Finkelstein* found that the relevant criteria include, but are not limited to, the following:

(1) The sufficiency of a showing that a codefendant would testify at a severed trial and waive his fifth amendment privilege.

(2) The degree to which the exculpatory testimony would be cumulative.

(3) The counter-arguments of a judicial economy.

(4) The likelihood that the testimony would be subject to damaging impeachment.

526 F.2d at 525.

48. 406 U.S. 441 (1972). In *Kastigar*, defendants were committed into the custody of the United States Attorney General for failure to answer grand jury questions despite a grant of use immunity. *Id.* at 442. The defendants contended that the court should have granted them transactional immunity so that they would be immune from prosecution for offenses relating to the compelled testimony. *Id.* at 443.

49. See 18 U.S.C. § 6002 (1982). The statute provides, in pertinent part, that "no testimony or other information compelled under the order . . . may be used against the witness in any criminal case." *Id.* (emphasis added).

In specifically rejecting a claim that the fifth amendment required transactional immunity, the Court explained that the fifth amendment privilege never was viewed as protecting its holder from *all* prosecution.⁵⁰ The Court reasoned that the fifth amendment affords its holder protection only from the *use* as compelled testimony or evidence derived directly and indirectly therefrom.⁵¹ The Court noted that use immunity prohibits the prosecutorial authorities from using compelled testimony “in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.”⁵² Thus, the Court concluded that use immunity “is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege.”⁵³

The *Kastigar* Court noted that its previous decision in *Murphy v. Waterfront Commission*⁵⁴ had tacitly approved of use immunity.⁵⁵ In *Murphy*, the Court held that a state has authority to confer immunity on a witness, and that this protects the witness from the use of his testimony in a *federal* prosecution.⁵⁶ In both *Murphy* and *Kastigar*, the Court implicitly acknowledged that, by granting use immunity, a prosecutorial authority in one jurisdiction (state or federal) possesses the power to tie the hands of a prosecutor in another jurisdiction, without any advance approval.⁵⁷ Thus, in

50. 406 U.S. at 453. The Court indicated that the purpose of the fifth amendment was not to grant to an individual full immunity from prosecution, but only to protect him from the infliction of penalties on the basis of the compelled testimony. *Id.*

51. *Id.*

52. *Id.* The Court explained that the Government bears the burden of proving that evidence was derived “from a legitimate source wholly independent of the compelled testimony,” whenever the Government seeks to offer evidence against a witness who previously was compelled to testify after being granted use immunity. *Id.* at 460. Thus, the use of the compelled testimony for “investigatory leads,” and the use of “any evidence obtained by focusing investigation on a witness as a result of his compelled testimony for “investigatory leads,” and the use of “any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures” is proscribed. *See id.* at 460 (citing *Alberston v. Subversion Activities Control Bd.*, 382 U.S. 70, 80 (1965)). For a discussion dealing with the prosecution’s difficult burden to show an independent source, see Flanagan, *Compelled Immunity for Defense Witnesses: Hidden Costs and Questions*, 56 NOTRE DAME LAW. 447, 457-461 (1981).

53. 406 U.S. at 453.

54. 378 U.S. 52 (1964).

55. 406 U.S. at 457-58. The Court indicated that prior to *Kastigar* it had never squarely confronted the question of the sufficiency of use immunity in the context of compelled testimony and fifth amendment rights. *Id.*

56. 378 U.S. at 77-78.

57. *See id.* at 79; *Kastigar*, 406 U.S. at 456-57. In *Murphy*, the defendants refused to answer questions because although they were granted immunity from

both cases, the Court went to some lengths to save the immunity statute at issue by *judicially* expanding the effect of the immunity granted therein.⁵⁸

The Supreme Court also has permitted the Government's need for testimony to overcome a defendant's claim of spousal immunity. In *Trammel v. United States*,⁵⁹ the Court held that while the government could neither compel nor prevent testimony from the defendant's spouse, the government could immunize a spouse who was willing to testify about non-confidential communications and acts that occurred in the presence of third persons, despite the defendant spouse's claim of spousal immunity.⁶⁰ The Court relied on the public's right to every man's evidence, noting that "a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace."⁶¹

state prosecution they were not granted immunity from federal prosecution in the event their answers incriminated them under federal law. 378 U.S. at 53-54. The defendants were thereupon held in contempt of court. *Id.* at 54. The Supreme Court reversed, holding "the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." *Id.* at 79. In order to implement the rule, the Court held that once the state has granted a defendant immunity, the Federal Government is prohibited from using the testimony. *Id.* Similarly, federal witnesses granted immunity from federal prosecution are protected from state prosecution as well. *Kastigar*, 406 U.S. at 456-57.

The *Murphy* holding was reaffirmed in *Kastigar*. *Id.* at 460. Furthermore, in *Kastigar* the Court reaffirmed that once a person is accorded use immunity, "the prosecution has the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony. *Id.*

58. See 18 U.S.C. § 6002 (1982) (federal statute in question in *Kastigar*); N.J. STAT. ANN. § 32:23-86(5) (West 1963 & Supp. 1984-1985) (statute implicated in *Murphy*). The *Murphy* Court held that "the Federal Government must be prohibited from making any such use of compelled testimony in a state proceeding and its fruits." 378 U.S. at 79 (also quoted in *Kastigar*, 406 U.S. at 457).

59. 445 U.S. 40 (1980).

60. *Id.* 51-53.

61. *Id.* at 50, 52. In *Trammel*, the defendant claimed that the district court committed reversible error in admitting his wife's adverse testimony despite his objections. *Id.* at 43. Trammel claimed that this testimony was barred by the *Hawkins* rule, which prevented one spouse from testifying adversely against the other. *Id.* at 46 (citing *Hawkins v. United States*, 358 U.S. 74 (1958)). The Court in rejecting the *Hawkins* rule held that the "contemporary justification for affording an accused such a privilege [marital harmony] is . . . unpersuasive." *Id.* at 52. The Court noted that because the Government is unlikely to grant the defendant's wife immunity if it knows she cannot testify adversely against him, the rule is more likely to undermine the marital relationship. *Id.* at 52-53. After all, "[i]t hardly seems conducive to the preservation of the marital relation to

This brings us to the question of whether a court possesses authority to bind a prosecutor by the creation of use immunity.

A. *The Authority of Courts to Grant Witnesses Use Immunity*

In *Kastigar*, the Supreme Court interpreted legislation authorizing a member of the executive branch to apply to a court for immunity for an individual appearing before an agency of the United States.⁶² It has been widely held that a court's role upon receiving such a request from the prosecution is ministerial in nature.⁶³ When a defendant seeks to obtain an immunity grant for a witness, however, he is faced with the dilemma of asking the prosecution to immunize his witness—thereby disclosing his case to the prosecutor—or not calling the witness at all.⁶⁴ The issues thus arise: May defense counsel apply directly to the court for assistance and, if so, does the court have the power to create immunity?

In *Simmons v. United States*,⁶⁵ the Supreme Court created the functional equivalent of use immunity for a defendant who was required to establish standing to suppress illegally seized evidence. In order to establish standing, a defendant in *Simmons*, Garrett, testified at a suppression hearing that a seized suitcase belonged to him.⁶⁶ At the subsequent trial, the government introduced the suppression hearing testimony, and it was admitted against Garrett.⁶⁷ On appeal, however, the Supreme Court concluded that the evidence was inadmissible.

The Court held that a criminal defendant could not be placed in a constitutional dilemma, requiring him to sacrifice one consti-

place a wife in jeopardy solely by virtue of her husband's control over her testimony." *Id.* at 53.

62. 406 U.S. at 441. See 18 U.S.C. § 6003 (1982). Section 6003 provides that the order for immunity is granted at the request of the United States Attorney. *Id.*

63. See *Ullman v. United States*, 350 U.S. 422, 431-34 (1956) (district court has no discretion in granting immunity under Immunity Act of 1954); *Herman v. United States*, 589 F.2d 1191, 1200-02 (3d Cir. 1978) (judicial review of a federal prosecutor's decision to grant immunity is barred by statute), *cert. denied*, 441 U.S. 913 (1979).

64. See *United States v. Berrigan*, 482 F.2d 171, 190 (3d Cir. 1973) (court has no authority to grant immunity or demand prosecution to seek immunity for defense witnesses).

65. 390 U.S. 377 (1968).

66. *Id.* at 381. The district court denied the motion to suppress the suitcase. *Id.*

67. *Id.* Prior to *Simmons*, the majority of the federal courts of appeals had held that suppression hearing testimony was admissible at trial if the motion to suppress failed. *Id.* at 392 & n.16.

tutional right in order to assert another right.⁶⁸ The Court reasoned that in such circumstances it is “intolerable that one constitutional right should have to be surrendered in order to assert another.”⁶⁹ It ruled “that when a defendant testifies in support of a motion to suppress evidence on fourth amendment grounds, *his testimony may not thereafter* be admitted against him at trial on the issue of guilt.”⁷⁰

While the *Simmons* Court never used the term “immunity,” it is clear that the effect of its holding was to create use immunity.⁷¹ This remedy was created to protect the fourth amendment right without sacrificing the fifth amendment right. *Simmons* is a classic example of the Court using its inherent authority in aid of constitutional protections. This aid was necessary because constitutional protections have developed more rapidly than the evidentiary rules surrounding a trial. Because of this lag in the development of the rules of evidence, it was necessary for the Court to use its inherent power to prevent an obvious disadvantage to one side in criminal trials.⁷² *Simmons* thus represents a judicial solution to an otherwise insoluble constitutional dilemma.⁷³ The Court’s power to fashion the use immunity remedy was hardly noticed and the criminal justice system learned to work with the new rule to the extent that it subsequently abolished the need for an independent inquiry into a defendant’s standing to challenge the legality of a search where the defendant is charged with possessory offenses.⁷⁴

Simmons provides a helpful analytic tool for a defendant requesting a court to immunize a defense witness, but few courts have applied the rationale of *Simmons* outside of the standing con-

68. *Id.* at 394. The Court concluded that a defendant must not have to choose between the privilege against self-incrimination and the right against illegal searches and seizures. *Id.*

69. *Id.*

70. *Id.* (emphasis added).

71. See Westen, *Dilemmas*, *supra* note 8, at 763 (“*Simmons* itself involved the granting of use immunity by the courts . . .”).

72. See Natali, Green, Dutton and Chambers: *Three Cases in Search of a Theory*, 7 RUT.-CAM. L.J. 43, 44 (1975). See also *Burgett v. Texas*, 389 U.S. 109 (1967) (courts must suppress evidence of prior conviction obtained without benefit of counsel).

73. For a critical discussion of the casual use of the term “constitutional dilemma,” see generally Westen, *Dilemmas*, *supra* note 8.

74. See *Rawlings v. Kentucky*, 448 U.S. 98, 104-06 (1980) (no separate inquiry into standing to challenge legality of “search” is required; test is simply whether defendant had any expectation of privacy in the goods).

text.⁷⁵ In addition, the lower courts have refused to grant immu-

75. See, e.g., *United States v. Lenz*, 616 F.2d 960, 962 (6th Cir. 1980) (rejecting defendant's request for use immunity for witnesses as part of his compulsory process right), *cert. denied*, 447 U.S. 929 (1980). California courts, however, have long recognized the necessity to grant use immunity. See *Byers v. Justice Court*, 71 Cal. 2d 1039, 458 P.2d 465, 80 Cal. Rptr. 553 (1969) (statute which compels hit and run driver to reveal certain information does not involve risks of self-incrimination), *rev'd on other grounds sub nom. California v. Byers*, 402 U.S. 424 (1971). In *Byers*, the California Supreme Court upheld its hit-and-run statute against a fifth amendment challenge, holding that any person who did stop and report his involvement was immunized from the use of his statements rendered at the time of the stop. 71 Cal. 2d at 1056, 458 P.2d at 477, 80 Cal. Rptr. at 565. The court noted that providing use immunity would not "unduly hamper criminal prosecutions." *Id.* at 1054, 458 P.2d at 475, 80 Cal. Rptr. at 563. This principle found wide recognition in civil cases. See *Daly v. Superior Court*, 19 Cal. 3d 132, 560 P.2d 1193, 137 Cal. Rptr. 14 (1977). In *Daly*, the court held that a private party in a civil action could request use immunity in order to discover information in a deposition. *Id.* at 151, 560 P.2d at 1205, 137 Cal. Rptr. at 26. The *Daly* court required the party requesting the grant of immunity to notify the prosecuting agency of the proposed immunity, and stated that the agency was entitled to object on the grounds such use would unduly hamper future prosecution. *Id.* at 148, 560 P.2d at 1203-04, 137 Cal. Rptr. at 24. In addition, the court concluded that an objection by the prosecuting agency would conclusively establish that the immunity order would hamper criminal prosecution. *Id.* at 148, 560 P.2d at 1204, 137 Cal. Rptr. at 25. Section 2019 of the California Code of Civil Procedure, from which the *Byers* court derived its power in part, permits the California courts to make any order "to protect the party or witness from annoyance, embarrassment or oppression." CAL. CIV. PROC. CODE § 2019(b)(1) (West 1983 & Supp. 1986). See *Gonzalez v. Superior Court*, 117 Cal. App. 3d 57, 178 Cal. Rptr. 358 (1980) (answers to interrogatories in civil paternity suit were immunized to prevent use of criminal proceedings); *Rysdale v. Santa Barbara Superior Court*, 81 Cal. App. 3d 280, 146 Cal. Rptr. 633 (1978) (in civil proceeding preceding criminal action, if city grants immunity from prosecution to any of eight defendants to obtain testimony, then all defendants must be granted use immunity with respect to such compelled testimony and evidence derived therefrom); *Tarantino v. Superior Court*, 48 Cal. App. 3d 465, 122 Cal. Rptr. 61 (1975) (statutory power to order competency examination implies power by authorizing court to grant use immunity for answers given to psychiatrists). See also *DeCamp v. First Kensington Corp.*, 83 Cal. App. 3d 268, 147 Cal. Rptr. 869 (1978) (although defendant is required to verify his answer in civil suit, he is entitled to use immunity for his answer in any criminal prosecution). See generally *Note, Every Man's Evidence*, *supra* note 8, at 1217 n.31.

While California courts consistently have granted use immunity to defense witnesses in civil cases, in criminal cases the courts have not followed *Byers*. In fact, the California courts consistently have denied requests to grant use immunity to defense witnesses. See, e.g., *People v. DeFreitas*, 140 Cal. App. 3d 835, 189 Cal. Rptr. 814 (1983); *People v. Traylor*, 23 Cal. App. 3d 323, 332, 100 Cal. Rptr. 116, 121 (1972) (court rejected defendant's equal protection argument that since right to grant immunity is afforded to prosecution, it must be afforded to defendant).

The *De Freitas* court considered § 1324 of the California Penal Code, which speaks only in terms of transactional immunity. 140 Cal. App. 3d at 839, 189 Cal. Rptr. at 817 (citing CAL. PENAL CODE § 1324 (West 1983)). Deeming itself bound by earlier California authority, the court refused to expand § 1324 to grant immunity to defense witnesses. 140 Cal. App. 3d 841, 189 Cal. Rptr. at 818.

nity, relying on the substantive ground of separation of powers⁷⁶ or the procedural ground of insufficiency of the request.⁷⁷

The denial of use immunity on the ground of separation of powers rests on the rationale that the granting of immunity to a witness is an executive function, and that courts should not tread upon the prosecutorial discretion of the executive branch.⁷⁸ The major decision in this regard is *Earl v. United States*,⁷⁹ written by then circuit Judge Warren Burger. *Earl* has been mechanically, almost blindly, followed,⁸⁰ but it should be discarded for the following reasons:

- (1) *Earl* was decided prior to *Simmons*, which provided that courts could immunize defense witnesses in order to protect constitutional rights;⁸¹
- (2) *Earl* was decided before *Kastigar* approved of use immunity as the only type of immunity constitutionally required by the fifth amendment;⁸²

76. See, e.g., *United States v. Turkish* 623 F.2d 769, 776 (2d Cir. 1980) ("confronting the prosecutor with a choice between terminating prosecution of the defendant or jeopardizing prosecution of the witness is not a task congenial to the judicial function"), cert. denied, 449 U.S. 1077 (1981). For a list of cases where the court denied immunity on the ground of separation of powers, see *infra* note 107.

77. See, e.g., *United States v. Wright*, 588 F.2d 31, 35-36 (2d Cir. 1978) (grant of immunity refused on ground that defendant failed to make showing both that he desired the witness' testimony and that witness would not testify without immunity), cert. denied, 440 U.S. 917 (1979).

78. *United States v. Turkish*, 623 F.2d 769, 776 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981). The *Turkish* court recognized, however, that trial courts can "accord use immunity" without usurping a function of the Executive Branch. *Id.* Nevertheless, the Second Circuit held that the trial court must first assess the implications that a judicial grant of immunity will have on the Executive Branch. *Id.*

79. 361 F.2d 531 (D.C. Cir. 1966), cert. denied, 388 U.S. 921 (1967). In *Earl*, then Judge Burger wrote, "What Appellant asks this Court to do is command the Executive Branch of Government to exercise the statutory power of the Executive to grant immunity in order to secure relevant testimony. This power is inherent in the Executive and surely is not inherent in the judiciary." *Id.* at 534.

80. See, e.g., *Pillsbury Co. v. Conboy*, 459 U.S. 248, 261 (1983) ("[n]o court has the authority to immunize a witness" since that responsibility is peculiarly an executive one); *United States v. Lenz*, 616 F.2d 960, 962 (6th Cir.) (courts have no inherent power to grant immunity), cert. denied, 447 U.S. 929 (1980); *United States v. Allstate Mortgage Corp.*, 507 F.2d 492, 494-95 (7th Cir. 1974) ("While the Congress may have the power to grant appellants a right comparable to the right granted to the government, the judicial creation of such a right is beyond the power of the courts."), cert. denied, 421 U.S. 999 (1975).

81. For a discussion of *Simmons*, see *supra* notes 65-75 and accompanying text.

82. For a discussion of *Kastigar*, see *supra* notes 48-56 and accompanying text.

- (3) *Earl* did not anticipate the rapid development of the defendant's right to produce evidence in his own defense—a development taking place almost entirely in the Burger Court with the *Davis* and *Chambers* decisions;⁸³ and
- (4) The *Earl* reasoning did not anticipate the Supreme Court's decision in *Wardius v. Oregon*,⁸⁴ which held that the due process clause requires reciprocity of discovery rights between prosecution and defense.⁸⁵

Irrespective of these four reasons for discarding *Earl*, the separation of powers argument is erroneous because it ignores the court's inherent power to guarantee a defendant's constitutional right. The Third Circuit recognized this in *Government of Virgin Islands v. Smith*.⁸⁶

1. *The Smith Decision*

After several feints in the direction of granting defense witness immunity in response to prosecutorial misconduct,⁸⁷ the

83. For a discussion of *Davis* and *Chambers*, see *supra* notes 18-36 and accompanying text.

84. 412 U.S. 470 (1973).

85. *Id.* at 475-76. In *Wardius*, the Court held that an Oregon alibi notice statute was constitutionally infirm because the statute did not require the prosecution to reveal the identity of its rebuttal witnesses. *Id.* at 479 (citing OR. REV. STAT. § 135.455 (1985) (formerly § 135.875)). The Court reasoned that such a statute skewed "the balance of forces between the accused and the accuser." *Id.* at 474-75. The Court concluded that "[i]t is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the state." *Id.* at 476. See also *Ash v. United States*, 413 U.S. 300, 314 (1973) (because line-up resembles "a trial-like confrontation," counsel was needed to render assistance in counterbalancing any "overreaching by the prosecution"); *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) ("The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.").

86. 615 F.2d 964 (3d Cir. 1980). For a further discussion of *Smith*, see *infra* notes 88-106 and accompanying text.

87. See *United States v. Hermann*, 589 F.2d 1191, 1213 (3d Cir. 1978) (courts have power to review United States Attorney's discretionary refusal to grant defense witness immunity), *cert. denied*, 441 U.S. 913 (1979); *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976) (due process requires that Government grant defense witness use immunity when prosecutorial misconduct results in defendant's principal witness refusing to give testimony because of fear of self-incrimination). See also *United States v. DePalmer*, 476 F. Supp. 775, 781 (S.D.N.Y. 1979) (unfair to deny defense witness immunity where Government's case was built on a "far-reaching immunity grant"), *rev'd sub nom.* *United States v. Horowitz*, 622 F.2d 1101 (2d Cir. 1980) (remanded for trial court to determine if case was "one of those rare situations in which the government's refusal

United States Court of Appeals for the Third Circuit, in *Smith*, squarely decided that a court has inherent power to grant a defense witness immunity in order to guarantee a defendant's due process and sixth amendment rights to present evidence.⁸⁸ The *Smith* court was faced with a direct request for immunity by three defendants charged with assault and robbery. Sanchez, the witness who the defendants sought to immunize, previously had made a statement to the police in which he implicated himself as one of the assailants along with a fourth defendant, while implicitly exculpating the three defendants who were requesting immunity.⁸⁹ When called as a defense witness, however, Sanchez invoked the fifth amendment. The defense requested that the prosecutor grant immunity to Sanchez, but the prosecutor refused, and the exculpatory evidence never was presented to the jury.⁹⁰ On appeal, the Third Circuit reversed and remanded for an evidentiary hearing to determine if Sanchez should be immunized.⁹¹

The court of appeals discussed the circumstances under which a court could grant immunity without statutory authorization:

Immunity granted in these circumstances differs from the statutory immunity . . . in two respects. First, the need for "judicial" immunity is triggered, not by prosecutorial misconduct or intentional distortion of the trial process, but by the fact that the defendant is prevented from presenting exculpatory evidence which is crucial to his case. Second, the immunity granted is a *court decreed* immunity; it is not achieved by any order directed to the executive, requiring the executive to provide statutory immunity.⁹²

to immunize a defendant's witnesses raises serious due process considerations"), *cert. denied*, 449 U.S. 1076 (1981).

88. 615 F.2d at 974.

89. *Id.* at 966-67.

90. *Id.* at 967. Sanchez was a minor, and was under the exclusive jurisdiction of juvenile authorities who consented to immunity subject to approval by the United States Attorney. *Id.* The United States Attorney withheld his approval without explanation, and all four defendants consequently were convicted. *Id.*

91. *Id.* at 974.

92. *Id.* at 969-70 (emphasis in original). In addition to discussing the inherent power of a court to grant immunity, the court of appeals stated that statutory immunity is available if the defendant shows "prosecutorial misconduct." *Id.* at 968.

The court went on to explicate the theory underlying its ability to grant witness immunity. Relying on the groundwork laid in its prosecutorial misconduct cases,⁹³ the court drew a favorable comparison between *Smith* and *Chambers v. Mississippi*,⁹⁴ observing that “[i]n this case the *prima facie* due process violation revealed by the record, *i.e.*, the denial of exculpatory evidence to which Sanchez could testify, is not different in substance than the violation found in *Chambers*.”⁹⁵ The court also drew heavily on the well settled principles of *Roviaro v. United States*,⁹⁶ and *Brady v. Maryland*,⁹⁷ to find that “the essential task of a criminal trial is to search for truth, and that [the] search is not furthered by rules which turn the trial into a mere ‘poker game’ to be won by the most skilled tactician.”⁹⁸

The *Smith* court explained that it was not creating a new right, but prescribing a new *remedy*—unique and affirmative in nature—to protect an established right.⁹⁹ Thus, the Third Circuit found that the Constitution allowed, indeed required, the court to create the remedy of judicial use immunity when there was cause

93. *Id.* at 968 (citing *United States v. Hermann*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979)). The Third Circuit noted that it had previously held that where prosecutorial misconduct toward a witness occurred the court could acquit the defendant if the Government refused to obtain use immunity so that the witness could testify. *Id.* (citing *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976)). In *Hermann*, the Third Circuit expanded the *Morrison* holding and stated that “under certain circumstances due process may require that the government afford use immunity for a defense witness.” *Id.* The *Hermann* court recognized that a court can order the Government to grant statutory immunity where the defendant has shown that the Government’s decision not to provide immunity was a decision made “with the deliberate intention of distorting the judicial factfinding process.” *Id.*

94. For a discussion of *Chambers*, see *supra* notes 28-36 and accompanying text.

95. 615 F.2d at 970. The Court commented that Sanchez’s statement tended to incriminate him while exculpating the three defendants, much like the confession in *Chambers*. *Id.*

96. 353 U.S. 53, 60-61 (1957) (under its supervisory power, federal court can direct Government to produce prosecutor’s informer or suffer dismissal of prosecution if disclosure of identity is relevant and helpful to defense).

97. 373 U.S. 83 (1963) (finding violation of defendant’s due process right to present effective defense after Government suppressed the identity of actual killer in murder prosecution where state was seeking death penalty for two defendants).

98. 615 F.2d at 971.

99. *Id.* The court noted that the right involved—the right to present a defense—was the same right involved in *Chambers* and *Brady*. *Id.* However, the court noted that it is unlikely that a new trial such as that provided in *Brady* and *Chambers* would cure the constitutional defect. *Id.* This is because a retrial would be meaningless unless the evidence necessary to present an effective defense could be compelled. *Id.* In a case such as *Smith*, compulsion can only be achieved by granting immunity to a defense witness. *Id.*

to believe the defendant would be deprived of due process as a result of the infringement of his core sixth amendment right.¹⁰⁰ The court relied on *Chambers* to create the following safeguards to guarantee that the new remedy is used only in appropriate cases:

- (1) An application must be made to the district court, naming the witness and the details of his testimony;
- (2) The witness must be available to testify;
- (3) The defendant must make a sufficient showing to satisfy the court that the forthcoming testimony is clearly exculpatory;
- (4) The defendant must show that the testimony is essential to the defendant's case; and
- (5) There must be no strong countervailing governmental interest against a grant of immunity.¹⁰¹

Judge Garth, the author of the *Smith* decision, took great pains to explain that use immunity—as contrasted with transactional immunity—could protect both the defendant and the Government, which has a weighty interest in prosecuting a wrongdoing witness.¹⁰² Judge Garth decreed that use immunity was “virtually costless to the government,”¹⁰³ reasoning that under *Kastigar* the witness still might be prosecuted from evidence derived from sources independent of his testimony.¹⁰⁴

Smith represents the logical extension of *Chambers*, *Davis*, and *Washington*, which require the court to admit exculpatory evidence.¹⁰⁵ *Smith* also is a logical extension of *Simmons* and *Kastigar*, as it employs use immunity to accomplish the result required by the due process clause and the sixth amendment.¹⁰⁶ What makes *Smith* unique is the Third Circuit's willingness to fuse the reasoning of both lines of cases to grant the defendant both a substantive right and a procedural remedy. *Smith* involved only the fifth

100. *Id.* at 971-72.

101. *Id.* at 972. The court indicated that immunity will be denied if the testimony is “ambiguous, not clearly exculpatory, cumulative or if it is found to relate only to the credibility of the government's witnesses.” *Id.*

102. *Id.* at 973 (citing *Kastigar v. United States*, 406 U.S. 441 (1972)).

103. *Id.*

104. *Id.* Judge Garth commented that the prosecution could assemble all the evidence necessary to prosecute the witness prior to his testimony. *Id.* The judge also suggested that the prosecution could “sterilize” the testimony of the witness. *Id.*

105. For a discussion of *Chambers*, *Davis*, and *Washington*, see *supra* notes 9-36 and accompanying text.

106. For a discussion of *Simmons* and *Kastigar*, see *supra* notes 48-73 and accompanying text.

amendment right of a witness, however, and in one sense the decision did no more than place the defendant's rights on an equal footing with the Government's rights acquired in *Kastigar*. But do the due process clause and the sixth amendment require more? May defendants reach the testimony of persons who possess exculpatory information, but whose testimony is protected by a communication privilege? Recall our hypothetical. *Smith* would enable the defendant to compel *W* in the hypothetical to testify in the face of *W*'s fifth amendment right. Assume *W* refused to testify, however, and that he was held in contempt or died. Can the *Smith* rationale be expanded to require *W*'s attorney, wife, and psychiatrist to testify in the face of their claims of privilege?

Few federal courts have been inclined to follow the Third Circuit's decision in *Smith*,¹⁰⁷ and of that minority willing to consider judicially granting witness immunity, most courts have found factual¹⁰⁸ and evidentiary¹⁰⁹ arguments for denying immu-

107. The majority of the circuits have declined to follow the *Smith* standard and have denied use immunity to defense witnesses, generally on the ground of separation of powers. See, e.g., *United States v. Pennell*, 737 F.2d 521, 527-28 (6th Cir. 1984) (separation of powers doctrine denies federal courts power to immunize defense witnesses), *cert. denied*, 105 S. Ct. 906 (1985); *United States v. Taylor*, 728 F.2d 930, 934 (7th Cir. 1984) (use immunity is statutory creation and "Congress was delegated the authority to grant use immunity solely to the executive branch of government"); *Autry v. Estelle*, 706 F.2d 1394, 1401 (5th Cir. 1983) (rejecting judicial immunization, in absence of governmental abuse, as not being "a task congenial to the judicial function"); *United States v. Frans*, 697 F.2d 188, 191 (7th Cir.) (Congress has conferred power to seek use immunity exclusively upon executive branch), *cert. denied*, 464 U.S. 828 (1983); *United States v. Heffington*, 682 F.2d 1075, 1081 (5th Cir. 1982) (declines to follow minority Third Circuit view as serious intrusion into realm of executive branch), *cert. denied*, 459 U.S. 1108 (1983); *United States v. Hunter*, 672 F.2d 815, 818 (10th Cir. 1982) (rejecting *Smith* standard; holding that "courts have no power to independently fashion witness use immunity under the guise of due process"); *United States v. D'Apice*, 664 F.2d 75, 77 (5th Cir. 1981) (court has no independent authority to bestow use immunity on defense witnesses in absence of claim that refusal to grant immunity would violate rights to fair trial and compulsory attendance); *United States v. Herbst*, 641 F.2d 1161, 1168 (5th Cir.) (declining to follow *Smith* because it is minority view and trial record failed to show any constitutional violation), *cert. denied*, 459 U.S. 851 (1981); *United States v. Kember*, 648 F.2d 1354, 1371 (D.C. Cir. 1980) (grants of immunity are made largely at discretion of executive and legislative branches); *Grochulski v. Henderson*, 637 F.2d 50, 52 (2d Cir. 1980) (circumstances where prosecutor might be obligated to grant use immunity are "extremely narrow"), *cert. denied*, 450 U.S. 927 (1981); *United States v. Turkish*, 623 F.2d 769, 771-79 (2d Cir. 1980) (explicitly rejecting *Smith* and refusing to find requirement in due process clause that courts must order defense witness immunity), *cert. denied*, 449 U.S. 1077 (1981); *United States v. McMichael*, 492 F. Supp. 205 (D. Colo. 1980) (power to grant immunity is strictly limited to executive branch).

108. While both the Third and Ninth Circuits follow the *Smith* standard for immunization of defense witnesses, immunity has been refused in most cases in these circuits because the request has been unsupported by facts sufficient to

nity. An increasing number of state courts, however, have allowed defendants to compel testimony to support their defense in spite of the fifth amendment or other witness privileges or privacy interests.¹¹⁰ The witness' status and the potential for granting him use immunity rarely are discussed because in most instances the witness or privilege-holder simply does not request immunity. May *Chambers* be extended not only to compel testimony from a witness who might have committed the crime but from another in whom the witness has confided? While neither *Washington*, nor *Chambers*, nor *Smith* compel such a result, when read in conjunction with *Davis v. Alaska* these cases suggest a comprehensive defense right to reach not only the witness but the information

meet *Smith's* "clearly exculpatory" and "essential evidence" requirements. See *United States v. Brutzman*, 731 F.2d 1449, 1452 (9th Cir. 1984) (refusal to order prosecutor to immunize defense witness was not error where testimony sought was cumulative or not exculpatory); *United States v. Bazzano*, 712 F.2d 826, 840 (3d Cir. 1983) (immunity denied where defendant failed both to identify proposed defense witnesses and to specify exculpatory nature of their testimony), *cert. denied*, 465 U.S. 1070 (1984); *United States v. Steele*, 685 F.2d 793, 808 (3d Cir.) (proffered testimony ambiguous and not clearly exculpatory as required by *Smith*), *cert. denied*, 459 U.S. 908 (1982). But see *United States v. Lord*, 711 F.2d 887, 891-92 (9th Cir. 1983) (no absolute right to immunity, but prosecutorial misconduct that causes defense witness to refuse to testify warrants acquittal if prosecutor refuses to grant subsequent immunity).

109. See *United States v. Carducci*, 557 F. Supp. 531, 534-35 (W.D. Pa. 1983) (refusing to extend *Smith* to immunize defendant's own testimony at retrial where government has legitimate interest in preserving its ability to prosecute defendant for perjury); *United States v. Nolan*, 523 F. Supp. 1235, 1240 (W.D. Pa. 1981) (generality of defendant's statement of proffered testimony failed to meet *Smith* requirements); *United States v. Lowell*, 490 F. Supp. 897, 905 (D.N.J. 1980) (defense witness immunity refused where proffered testimony was not "clearly exculpatory" and where government had legitimate interest against granting immunity), *aff'd*, 649 F.2d 950 (3d Cir. 1981); *United States v. Stout*, 499 F. Supp. 605, 606-07 (E.D. Pa. 1980) (proffered testimony failed to meet "clearly exculpatory and essential evidence" requirements of *Smith* because statements were conclusory); *United States v. Shober*, 489 F. Supp. 412, 415-16 (E.D. Pa. 1980) (although courts may confer immunity on defense witness prior to close of Government's case, court was unable to determine at time of defendant's motion whether proffered testimony was "clearly exculpatory"). Other circuits have refrained from expressly rejecting *Smith* or articulating any opinion regarding the power of the courts independently to grant immunity to defense witnesses. While ostensibly applying the *Smith* standards, most of these cases have lacked facts sufficient to justify granting of the *Smith* remedy. See *United States v. Flaherty*, 668 F.2d 566, 583 n.* (1st Cir. 1981) (although leaving open question whether due process ever requires immunization of defense witnesses, court found defendant's proffered testimony not clearly exculpatory); *United States v. Davis*, 623 F.2d 188, 192-93 (1st Cir. 1980) (testimony of defense witness went to credibility of Government witness and was not clearly exculpatory).

110. For citations to state court decisions allowing defendants to compel a witness' testimony over the witness' legitimate claims of privilege, see *supra* note 27 & *infra* note 142.

itself.¹¹¹

The separation of powers argument misconstrues the source of witness immunity. As Judge Garth explained in *Smith*, the immunity flows from the court's interpretation of the Constitution—not from any statute.¹¹² In *Simmons*, the Supreme Court was not substituting its view for that of the executive; it was employing its constitutional power to enforce a defendant's fourth and fifth amendment rights.¹¹³ Moreover, in *Roviaro v. United States*¹¹⁴ the Court arguably exercised an executive function when it ordered the Government either to supply the identity of an eyewitness-informer or to dismiss the indictment.¹¹⁵ No one seriously questioned the Court's supervisory power to exact this form of relief. Finally, the courts have just as much, or more, interest in reliable and effective fact finding as does the Executive Branch of the Government.¹¹⁶ It also is patently ridiculous to argue that the separation of powers doctrine prevents judicial intervention to preserve and protect constitutional rights.¹¹⁷ One would have thought that the Court's entrance into the political thicket of reapportionment,¹¹⁸ the legislative thicket of determining congres-

111. See Westen, *Compulsory Process Clause*, *supra* note 8, at 166-170. For a discussion of *Davis*, see *supra* notes 18-27 and accompanying text.

112. See *Smith*, 615 F.2d at 969-70. The *Smith* court indicated that judicial immunity is "triggered . . . by the fact that the defendant is prevented from presenting exculpatory evidence which is crucial to his case." *Id.* at 969.

113. For a discussion of *Simmons*, see *supra* notes 65-70 and accompanying text.

114. 353 U.S. 53 (1957). In *Roviaro*, the prosecution refused to reveal the identity of "John Doe," who had a material role in the case against the defendant. *Id.* at 55.

115. *Id.* at 65 & n.15.

116. See *id.* at 60-61. See also *Hampton v. United States*, 425 U.S. 484, 489-90 (1976) (acknowledging continuing vitality of Court's power to supervise due process violations of protected rights); *United States v. Russell*, 411 U.S. 423, 431-32 (1973) (conduct of law enforcement may be so outrageous that due process would bar use by government of judiciary to obtain convictions); *Smith*, 615 F.2d at 971-74. See also Westen, *Dilemmas*, *supra* note 8, at 766-67.

117. See *United States v. Nixon*, 418 U.S. at 707-09 ("primary constitutional duty of the Judicial Branch [is] to do justice in criminal prosecutions"). See also Westen, *Dilemmas*, *supra* note 8, at 765 ("the constitutional issue of testimonial immunity bears as heavily on the integrity and efficacy of the judicial branch as on the executive branch").

118. Compare *Colegrove v. Greene*, 328 U.S. 549 (1946) (it is beyond Court's competence to declare invalid Illinois law governing congressional districts) with *Baker v. Carr*, 369 U.S. 186 (1962) (cause of action for fair apportionment is justiciable issue under equal protection clause). See also *United States v. Saylor*, 322 U.S. 385 (1944) (conspiracy to stuff ballot box violates right to have vote honestly counted); *United States v. Classic*, 313 U.S. 299 (1941) (right to vote in primary election is guaranteed by Constitution); *United States v. Mosley*, 238 U.S. 383 (1915) (conspiracy to prevent official ballot count in congressional

sional membership credentials,¹¹⁹ or the educational thickets of busing¹²⁰ and separate but equal facilities¹²¹ would have laid this specious reasoning to rest. It is obvious that a criminal trial conducted without the benefit of testimony by a witness who has admitted committing the crime is less reliable, and, thus, *less fair* than a trial in which such a witness has testified. All of the prosecutorial naysaying and rationalization cannot change that fact. Courts should come to their senses and remove the hypocritically imposed barriers that deny defendants a fair trial.¹²²

B. *The Prosecution's Interests—The Danger of Fabrication*

Recall that the Third Circuit reassured in *Smith* that the granting of use immunity is “virtually costless to the government.”¹²³ As noted above, the court reasoned that the Government’s ability to prosecute the witness is not impaired by a conferral of use immunity.¹²⁴ The *Smith* court recognized, however, that the Government does have a legitimate interest in preventing a guilty defendant from escaping conviction by virtue of contrived or fabricated testimony, but the court found this concern to be inapplicable to the facts before it in *Smith*.¹²⁵

In *Chambers*, the State of Mississippi suggested a hypothetical situation in which a witness (*W*) would make a declaration against

election infringes on constitutional rights); accord *Ex parte Siebold*, 100 U.S. 371 (1879).

119. See *Powell v. McCormack*, 395 U.S. 486 (1969) (Congress cannot refuse to seat duly elected member who has met standing requirements set forth in Constitution).

120. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

121. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954). See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury”).

122. See e.g., FED. R. EVID. 804(b)(3) (allowing admission of declaration against penal interest in civil case without corroboration *but* requiring corroboration in criminal case when it is used to exculpate defendant). See also *United States v. Harris*, 403 U.S. 573, 584 (1971) (allowing uncorroborated statements that were against declarant’s penal interest as basis for meeting probable cause for search warrant); J. MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW 133 (1947) (questioning whether dying declarations should be admitted over hearsay objection).

123. 615 F.2d at 1973.

124. *Id.* If the Government wishes to delay prosecuting a defendant in order to investigate the witness granted use immunity, it can easily obtain a continuance. See *id.* If such options are available to the prosecutor, the court concluded that there are no governmental interests that outweigh defendant’s due process rights. *Id.*

125. *Id.* at 973-74.

penal interest and then flee the jurisdiction. Thereafter the defendant (*D*), could introduce the declaration at his trial and gain an acquittal. Upon *W*'s subsequent prosecution for murder, *D* would testify that he, and not *W*, committed the murder, and *W* also would gain an acquittal. Moreover, neither *W* nor *D* could be prosecuted for perjury since *W* never testified, and *D* told the truth.¹²⁶ The *Chambers* Court refused to consider the state's hypothetical because the witness, McDonald, was present and available for cross-examination,¹²⁷ and because his statements were corroborated by other evidence.¹²⁸

One can conjure up similar scenarios to argue against witness immunity, including a witness hiring a lawyer, inaccurately advising the lawyer that he committed the crime, and then fleeing the jurisdiction. Such scenarios, however, should not dissuade courts from accepting use immunity as a means to resolve the conflict created when a communication privilege prevents a witness from providing evidence that might exculpate a defendant. To be sure, such scenarios rarely will occur. Assuming they do, however, the mere fact that the device of use immunity of defense witnesses might be abused is insufficient to overcome a defendant's constitutional rights.¹²⁹ In addition, while it might be true that *W* is not guilty of perjury, if he intends to subvert justice in *D*'s trial, he clearly is guilty of obstruction of justice.¹³⁰ Moreover, the prosecution, juries, and the courts are fully capable of distinguishing a spurious defense from a legitimate one.

The state is fully able to cross-examine a witness and investi-

126. See *Chambers*, 410 U.S. at 301 n.21.

127. *Id.*

128. *Id.* at 300. The independent corroboration included a sworn confession, eyewitness testimony, proof of prior ownership of a gun, and a number of independent confessions. *Id.*

129. Cf. *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972) (invalidating state law requiring defendant to testify prior to presenting any other witnesses); *Washington v. Texas*, 388 U.S. 14, 21-23 (1967) (possibility that accomplice would perjure himself held to be too remote and general to justify statutory bar against his testimony).

The Pennsylvania Supreme Court has refused to follow *Smith* because of the problem of fabrication. See *Commonwealth v. Johnson*, 507 Pa. 27, 487 A.2d 1320 (1985). In a poorly reasoned opinion that ignored the reasoning of *Smith* the court held that the dangers of fabrication were too great to permit a defendant to use the remedy of use immunity. *Id.* at 37, 487 A.2d at 1325. The Court also ignored its own decision in *Commonwealth v. Negri*, which held that it was bound to accept and follow a decision of the Third Circuit as the "ultimate forum in Pennsylvania." *Id.* at 35-36, 487 A.2d at 1324. See *Commonwealth v. Negri*, 419 Pa. 117, 213 A.2d 670 (1965).

130. See generally 18 U.S.C. § 1512 (1982).

gate the truth of his testimony, and juries are expected to evaluate and understand many types of harmful evidence and to place it in perspective,¹³¹ especially with the aid of the court's instructions.¹³² In fact, the Wigmorean reliance on the effectiveness of cross-examination¹³³ and instructions, which has influenced the erosion of rigid and archaic competency rules, should apply here with equal force.

The courts too are equipped to evaluate and weigh the reliability and genuineness of such evidence. When there exists a real concern about the reliability of evidence, a court can hold an *in limine* hearing to weigh all of the factors surrounding the admission of *W*'s declaration. Courts considering the reliability of an unavailable witness' out-of-court statements against penal interest made in a privileged context would look for corroboration of the details of the statement. Corroborating factors would include the following:

- (1) Other evidence connecting *W* to the crime or crime scene.¹³⁴
- (2) Other out-of-court statements made in non-privileged contexts.¹³⁵
- (3) The circumstances of the statement in the privileged context, e.g., was it made near the time of the

131. See, e.g., *Dutton v. Evans*, 400 U.S. 74, 88-89, 90-93 (1970) (four Justices who reviewed statement made by coconspirator in prison after the conspirators were arrested and about to stand trial were satisfied that it was properly admitted under coconspirator exception to hearsay rule and as spontaneous utterance; three Justices viewed admission as harmless error).

132. See *Nelson v. O'Neil*, 402 U.S. 622, 629-30 (1971) (where court gives limiting instruction, admission of coconspirator's out-of-court statement implicating defendant did not violate defendant's rights because declarant testified in favor of defendant at trial). But see *Bruton v. United States*, 391 U.S. 123, 137 (1968) (admission of coconspirator's out-of-court confession in joint trial violated defendant's right to cross-examine despite judge's limiting instructions).

133. See 5 J. WIGMORE, EVIDENCE § 1367, at 32 (Chadbourn rev. ed. 1974) ("[Cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth.").

134. See, e.g., *Chambers*, 410 U.S. at 300-01. Other doctrines require the prosecution to meet a certain evidentiary standard before certain out-of-court statements are deemed admissible. See *Krulwitch v. United States*, 336 U.S. 440, 443-45 (1949) (out-of-court coconspirator statements must be made in furtherance of the charged conspiracy); *Opper v. United States*, 348 U.S. 84, 89-90 (1954) (extra-judicial admission of guilt by defendant after he has been charged must be corroborated); *Smith v. United States*, 348 U.S. 147, 154-55 (1954) (requirement of corroboration of out-of-court admissions is applicable to tax evasion case where admission embraces vital element of Government's case). See also *Wong Sun v. United States*, 371 U.S. 471, 489-90 (1963) (conspirator's unsigned confession is not competent corroborative evidence).

135. See *Chambers*, 410 U.S. at 300-01.

event or near the time of the trial.¹³⁶

- (4) The reason why *W* consulted a lawyer (in the case involving an attorney-client privilege).¹³⁷
- (5) The reason for *W*'s absence from the trial court's jurisdiction.¹³⁸

In the absence of specific factual findings demonstrating a lack of reliability, the declarations made in confidence should be admitted.

Finally, the very reason why such statements are reliable in the first place seems to mandate their admission into evidence. People simply do not go around admitting to crimes that they did not commit.¹³⁹ In *Chambers*, the Court pointed to the assurances of reliability surrounding a statement that is in essence an admission of guilt.¹⁴⁰ The same assurances would apply even if the witness-client was unavailable for cross-examination because of flight, death, lack of memory, or a contemptuous refusal to testify.¹⁴¹

C. *The Interest of the Privilege-Holder—The Need to Balance*

As previously noted, the cases compelling the revelation of a confidential communication¹⁴² do not always articulate the *Smith*

136. *See id.* at 300. In *Chambers*, McDonald's confessions were made spontaneously shortly after the murder. *Id.*

137. For instance, was *W* about to be arrested, indicted, or subpoenaed to a grand jury; or, on the other hand, was *W*'s consultation with a lawyer and his attendant admission gratuitous?

138. For example, was it because of flight or some other immaterial or unrelated reason? *Cf. Mancusi v. Stubbs*, 408 U.S. 204 (1972).

139. *See* FED. R. EVID. 804(b)(3) advisory committee note.

140. 410 U.S. at 300-01.

141. *See id.* Although McDonald was available for cross-examination in *Chambers*, none actually occurred due to operation of the voucher rule in that case. *Id.* at 291-92. It was the high degree of corroboration that convinced the Court of the reliability of McDonald's out-of-court declaration against interest. *Id.* at 300-01. For a further discussion of *Chambers*, see *supra* notes 28-36 and accompanying text.

142. For citations to cases compelling the revelation of confidential communications, see *supra* note 27. *But see* *Durr v. Cook*, 589 F.2d 891, 893 (5th Cir. 1979) (due process right to fair trial can overcome juror privilege upon sufficient showing of possibility of prejudice); *Hammarlay v. Superior Court*, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979) (newsman's statutory privilege must be compromised to guarantee defendant's due process and compulsory process rights); *In re Kozlov*, 79 N.J. 232, 398 A.2d 882 (1979) (attorney-client privilege is no bar to defendant's right to produce evidence of juror misconduct if such evidence cannot be obtained from less intrusive source); *In re Farber*, 78 N.J. 259, 394 A.2d 330 (neither first amendment nor newsman's statutory privilege protects reporter from production of relevant notes for impeachment use by defendant in criminal trial if notes were material and could not be obtained in less intrusive

rationale. Nor do such cases address the needs of the privilege holder subsequent to his or her disclosure. Thus, there is a need for a method that provides protection to both the defendant and the privilege-holder. The reasoning of *Simmons*, *Kastigar*, and *Chambers* must be followed to its logical conclusion. While at least one commentator has glibly dismissed the interest of the witness and privilege-holder,¹⁴³ it seems quite obvious that there is potential for a disruption of the relationships that the communication privileges are designed to protect if a court has the constitutional power to compel any witness' testimony. It certainly would be disturbing for counsel to be faced with the prospect of advising a client that the attorney-client privilege might not relieve either client or attorney from the duty to testify in order to exculpate a criminal defendant.¹⁴⁴ The creation of such a duty would similarly create a significant danger that one of the major purposes of the attorney-client privilege may be defeated. If a client faces the possibility that his counsel might be compelled to disclose the client's confidence, the risk exists that the client might make incomplete or inaccurate disclosures to his at-

way), *cert. denied*, 439 U.S. 997 (1978); *Cohen v. Jenkintown Cab Co.*, 238 Pa. Super. 456, 357 A.2d 689 (1976) (interests of justice require disclosure of communications to attorney).

143. See Westen, *Dilemmas*, *supra* note 8, at 770 (witnesses are indifferent as to responding by silence or testifying under a grant of immunity). See also Keshishian v. State, 386 A.2d 666 (Del. 1978) (right of compulsory process overrides witness' interest in avoiding emotional harm).

144. Letter from Benjamin Lerner, President, National Legal Aid and Defender Association, to Professor Louis Natali, Jr. (Feb. 12, 1985). The letter provides:

Dear Professor Natali:

On behalf of the National Legal Aid and Defender Association I want to respond to your interesting proposal of providing use immunity for defense witnesses, including the immunization of privileged conversations. I am opposed to such a proposals on two grounds. First, the ability to compel disclosure of client-attorney conversations and files would seriously chill the Constitutional rights of individuals. Too often our constituency is unable to obtain counsel for consultations. Your proposal would make it even more difficult for our member agencies to perform their role. Secondly, clients' distrust of appointed attorneys often creates real barriers to communication. If it became widely known that a court-appointed attorney could be compelled to reveal client confidences there would be an even greater breakdown of client confidence. While I think your proposal would occasionally assist a defendant at trial in producing exculpatory testimony, the damage to the overall attorney-client relationship would be of greater significance. I can, however, support the obligation of a court to grant use immunity to the witness who stands behind his fifth amendment privilege. I hope that these comments are of assistance to you.

Benjamin Lerner
President

torney. Such a risk, in turn, would create the further risk that counsel would be unable to perform effectively. Similarly, if a spouse can be compelled to disclose the substance of communications revealed by his or her mate, their marital relationship might be endangered. The same reasoning applies to support the doctor-patient, priest-penitent, and other communication privileges. In order to understand how use immunity can be used to protect the relationships underlying the various communication privileges, it is necessary to examine fully the theoretical basis for use immunity as it applies to the privilege-holder, and to clarify a number of tangential issues in the event of a subsequent prosecution of a witness.

While privileges generally have withstood the scholarly onslaught waged against them in law reviews,¹⁴⁵ monographs,¹⁴⁶ and the popular media,¹⁴⁷ there has been a growing middle ground of accommodation. This view does not treat the privileges as blanket per se rules of exclusion, but rather as attempts to engage in an ad hoc balancing test. The goals of the balancing test are twofold: first, to determine the purpose of the privilege, and second, to ask how that purpose will be served vis a vis the larger needs of society.¹⁴⁸ The balancing test accepts the risk of exclusion of truthful evidence when the purpose to be served by the privilege is greater than the benefit attained by invading the privilege. At the same time, however, the balancing test requires the relaxation of a privilege if the potential harm that will occur therefrom can be avoided or is outweighed by the harm which will result from excluding truthful evidence.

The United States Supreme Court took just such a pragmatic approach in limiting the ancient rule of spousal incompetency in *Trammel v. United States*,¹⁴⁹ where the Court permitted a wife to testify as to the nonconfidential acts and statements of her husband concerning a conspiracy to import drugs into the United States.¹⁵⁰ The *Trammel* Court observed that the privilege of one

145. See, e.g., Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464 (1977).

146. See, e.g., 5 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 300-50 (1827).

147. See, e.g., Gest, *Guilty Secrets are Still Safe with Lawyers*, U.S. NEWS & WORLD REP., Feb. 2, 1983, at 84.

148. See *Cohen v. Jenkintown Cab Co.*, 238 Pa. Super. 456, 462, 357 A.2d 689, 692 (1976) (attorney-client privilege is no bar to disclosure where client's rights cannot be adversely effected and where disclosure is in interest of justice).

149. 445 U.S. 40 (1980).

150. *Id.* at 53. Defendant's wife had been granted use immunity by the

spouse to silence another from testifying as to nonconfidential statements had outlived both its theoretical foundation and its usefulness.¹⁵¹ The Court held that pursuant to its interpretation of rule 501 of the Federal Rules of Evidence,¹⁵² only the witness-spouse, and not the defendant-spouse, possesses the privilege to refuse to give adverse testimony.¹⁵³ The Court reasoned that if the marriage continued to provide a significant basis for remaining silent, the witness-spouse was in as good a position as the defendant to so determine. The Court stated, "In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace."¹⁵⁴

Trammel represents simply another balancing of the purpose of the privilege against the harm to be done by revelation or nonrevelation.¹⁵⁵ *Trammel's* reasoning and language are equally applicable to our hypothetical, in which, if use immunity is granted, the testimony would be used not to incriminate the privilege-holder but to exculpate an innocent defendant.¹⁵⁶ In fact, the Superior Court of Pennsylvania in *Cohen v. Jenkintown Cab Co.* held that the attorney-client privilege does not bar revelation of disclosures made to the attorney "where, in context, the client's rights or interests cannot be adversely affected thereby."¹⁵⁷ The

Government after she agreed to cooperate with the Government. *Id.* at 42-43. The district court ruled that defendant's wife could not testify as to confidential communications with her husband. *Id.* at 43.

151. *Id.* at 51-53. The Court stated the exclusionary rules accepted "only to the very limited extent [the notion] that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Id.* at 50 (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

152. FED. R. EVID. 501. Rule 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted by the court of the United States in the light of reason and experience." *Id.* (emphasis added).

153. 445 U.S. at 53. The Court concluded that its modification permitted continued adherence to the underlying purpose of the husband-wife privilege—marital harmony—"without unduly burdening legitimate law enforcement needs." *Id.*

154. *Id.* at 52.

155. *Id.* at 52-53. See *Blau v. United States*, 340 U.S. 332 (1951) (upholding defendant's right not to reveal wife's location in grand jury hearing because it was protected as confidential communication); *Wolfe v. United States*, 291 U.S. 7 (1934) (marital privilege only permitted when there is no other reasonable way to preserve marital confidence).

156. See *supra* text preceding note 47.

157. 238 Pa. Super. 456, 462, 357 A.2d 689, 692 (1976) (emphasis added). The *Cohen* court focused on the following factors: the client was dead; he was not a party to the action; the privileged conversation was not scandalous to the

“context” was a personal injury action against the client’s former employer, where the client was dead and had no estate. Prior to his death, the client informed his attorney that he had hit the plaintiff and fled the scene of the accident. The client also had given false testimony at an arbitration hearing.¹⁵⁸ The *Cohen* court found “there is now no possibility that [the client] or his heirs could realize any liability over to the cab company as a result of disclosure of his conversation with [his attorney]; and, of course, the death of [the client] precludes the possibility of his being prosecuted for perjury or false swearing.”¹⁵⁹ Noting that there were no other eyewitnesses to the accident, the court balanced the necessity for revealing the substance of the privileged conversation against “the unlikelihood of any cognizable injury to the rights, interests, estate or memory” of the client and concluded that “the privilege must fail.”¹⁶⁰ The privilege, the court noted, “exists only to aid in the administration of justice, and when it is shown that the interests of the administration of justice can only be frustrated by the exercise of the privilege, the trial judge may require that the communication be disclosed.”¹⁶¹ The essence of the court’s reasoning is that the privilege only protects the client when he either is on trial or could be prosecuted as a result of the revelation of his confidence.

Such a balancing approach should be available equally to both the Government and a defendant. Once a defendant makes the showing required by *Smith*, the court is in an informed position to balance the competing interests of the defendant and the privilege-holders.

IV. EVALUATION OF THE RISK OF INVASION OF PRIVACY TO THE PRIVILEGED RATIONSHIP

While it is certain that justice will be frustrated by allowing invocation of a communication privilege where doing so will deprive a defendant of his constitutional rights, is it equally certain

client; and there was a strong need for the testimony. *Id.* at 462-64, 357 A.2d at 692-93.

158. *Id.* at 458-59, 357 A.2d at 690-91.

159. *Id.* at 464, 357 A.2d at 693.

160. *Id.* at 463-64, 357 A.2d at 693. The court found nothing “impertinent or scandalous” in the admission of the evidence, even though it proved the client’s perjury for which the statute of limitations had passed. *Id.* at 463, 357 A.2d at 693.

161. *Id.* at 464, 357 A.2d at 693-94. The attorney had revealed the client’s statements in a deposition in which the parties agreed to reserve all objections until trial. *Id.* at 458-59, 357 A.2d at 691.

that the relationship underlying a privilege will not be damaged if use immunity is granted to its holder? The attorney, wife, and psychiatrist might be able to exonerate the defendant, but will their testimony be used against the holder of the privilege in any subsequent prosecution?

Conferring use immunity on family and professional revelations raises other problems. Since use immunity would not protect the witness from all prosecution or public disclosure of deleterious information, it seems necessary to ask whether more is required to protect the confidential relationships and the communications flowing from these relationships. While *Kastigar* furnishes the theory for use immunity,¹⁶² it must be understood that the fifth amendment right against self-incrimination necessarily involves different rights and concerns than do the communication privileges. A witness' invocation of his fifth amendment rights ordinarily does not involve any confidential relationship or communication. Indeed, the compulsion to testify goes directly to the witness and involves his acts rather than his revelations to someone else which would trigger a communication privilege. Moreover, neither *Kastigar* nor the general right of the Government to every man's testimony has been extended to justify the *Government's invasion* of the confidential communication privileges.¹⁶³ Although *Trammel* does permit limited invasion of the privilege against adverse spousal testimony providing that the testifying spouse is willing to aid the Government, confidential communications still are protected.

The communication privileges spring from a complex array of relationships that, while not necessarily protected by the Constitution, are deeply rooted in basic notions of privacy. These interests are variously viewed as sacred,¹⁶⁴ fundamental,¹⁶⁵ or constitutional.¹⁶⁶

162. For a discussion of *Kastigar*, see *supra* notes 48-56 and accompanying text.

163. See, e.g., *Blau v. United States*, 340 U.S. 332-34 (1951) (Government is not able to compel revelation of information protected by marital communication privileges).

164. *Boyd v. United States*, 116 U.S. 616, 630 (1886) (the essence of claimed constitutional offence "is the invasion of his indefeasible right to personal security, personal liberty and private property, . . . of this sacred right"); *Stein v. Bowman*, 38 U.S. (13 Pet.) 209, 223 (1839) (marital communication privilege is necessary to "protect the sanctities of husband and wife").

165. See Note, *supra* note 145, at 464-74. See also *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

166. See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (right to marry is

The following sections of this article examine the dangers to these interests in detail. The dangers from revelation appear to be (1) the danger of subsequent prosecution; (2) the danger of social stigma or obloquy; and (3) the chilling effect on communications and erosion of underlying relationships.

A. *Danger of Prosecution*

What happens after the immunized witness, his lawyer, or his wife testifies, and reveals the privilege-holder's participation in a crime? Certainly the prosecutor will engage in some inquiry. While in many cases, as in *Smith*, the prosecution will be aware of the privilege-holder's involvement prior to the testimony, there is also a class of cases where the prosecution may know nothing or very little about the privilege-holder prior to the testimony. Use immunity does not and can not prevent the prosecution from investigating the privilege-holder. Use immunity does, however, protect the privilege-holder against the direct or indirect testimonial in-court use of the immunized testimony. Moreover, recall that under *Kastigar*, in order to provide complete protection, the burden of proof will be on the prosecution to establish an independent source for any subsequent prosecution and for any supporting evidence utilized therein.¹⁶⁷

In the relatively rare case where the privilege-holder is unknown to the prosecution, there are additional protections that the court can impose. For example, the court can conduct an ex parte *in camera* hearing, thereby preventing the prosecution from learning the privilege-holder's identity.¹⁶⁸ But should the privilege-holder receive any greater protection simply because he previously was unknown to the prosecution? The only other possible protection is transaction immunity. This is too far-reaching a remedy, however, and outstrips any possible theoretical justification for it. The privilege-holder, though unknown to the prosecution, is known to the defense, which is free to advocate that the Government investigate by any legal method—including grand jury subpoena. If the prosecutor, following such a lead, chooses to immunize the privilege-holder for grand jury purposes, then the Government can satisfy its burden of showing an independent

part of "right of privacy" implicit in fourteenth amendment's due process clause).

167. 406 U.S. at 460. The *Kastigar* Court indicates that this protection was "commensurate with that resulting from invoking the privilege itself." *Id.* at 461.

168. See *Nixon v. United States*, 418 U.S. 708, 714-16 (1974).

source and the privilege-holder has no enforceable right whatsoever. Certainly a defendant who meets the stringent *Smith* test¹⁶⁹ ought to be able to persuade the Government to undertake at least some minimal investigation. Since this is possible in every case, judicially created use immunity to enforce a defendant's rights poses no greater prosecutorial threat to a privilege-holder.

In addition, it should be noted that no constitutional provision, statute, or common law development confers upon an individual a right to suppress evidence obtained from out-of-court revelations made by a spouse, attorney, or other person in a relationship giving rise to a communication privilege.¹⁷⁰ The *Trammel* Court recognized that such a right does not exist when it held that neither its earlier decision in *Hawkins v. United States*,¹⁷¹ which reaffirmed the rule excluding adverse spousal testimony, nor any other decision, barred the Government from seeking incriminating information from one spouse to use against the other.¹⁷² The Court reasoned that neither *Hawkins*, nor any other privilege, prevents the Government from enlisting one spouse to give information concerning the other or to aid in the other's apprehension. *It is only the use of a spouse's testimony in the courtroom that is prohibited.*¹⁷³

The only real distinction is that while we readily recognize the Government's right to compel an immunized witness to incriminate himself, we only grudgingly accept the defendant's right to do so. If justice is to be served, parties must be on an equal footing.¹⁷⁴ The principle that the Government is entitled to

169. For a discussion of the *Smith* test, see *supra* note 101 and accompanying text.

170. See, e.g., *United States v. Lefkowitz*, 618 F.2d 1313 (9th Cir.) (wife's information was the basis for affidavit supporting search warrant), *cert. denied*, 449 U.S. 824 (1980). See generally Note, *Confidential Relationships: Does the Law Require Silence Outside the Courtroom?*, 6 UTAH L. REV. 380 (1959).

171. 358 U.S. 74 (1958) (overruled by *Trammel*, 445 U.S. 40). In *Hawkins*, the Court refused to permit a wife to voluntarily testify against her husband on the ground that permitting such testimony would destroy most marriages. 358 U.S. at 77-79. The *Hawkins* Court refused to accept the truth of the prosecutor's contention that if the wife was willing to testify, the marriage already was in trouble. *Id.* at 77-78.

172. 445 U.S. at 52-53.

173. *Id.* at 52 n.12.

174. See, e.g., *Wardius v. Oregon*, 412 U.S. 470, 474 (1972) (due process requires balance of forces between accused and accuser).

It is suggested that if the Government is required to inform the defense of the identity of its alibi and rebuttal witnesses after a court imposes an alibi notice requirement on the defense, the Government should not be permitted to immunize witnesses while denying such a right to the defense. See *Smith*, 615 F.2d at 972-73. See also Note, *Every Man's Evidence*, *supra* note 8, at 1232-33.

every man's evidence should apply equally to ensure that the defendant attains every man's evidence.

B. *Danger of Social Stigma, Obloquy, or Ostracism*

Assuming that a witness is adequately protected from prosecution by virtue of use immunity, we must ask whether a witness who possesses information protected by a communication privilege should be permitted to withhold that information on the ground that disclosure of the contents of the privileged communication might subject the privilege-holder, and possibly his family, to public obloquy and social ostracism. The answer to this question should be a resounding "No"! In the first place, such an adverse consequence of invading the communication privileges arguably is irrelevant, because the protection of the communication privileges should extend no further than that of the fifth amendment. Second, even if the protection of the communication privileges does extend beyond that of the fifth amendment, the courts are adequately equipped to protect even against harm to such interests as the privilege-holder's reputation. Finally, in the rare case where a privilege-holder's reputation is harmed as a result of the court's invasion of a communication privilege, such harm clearly is outweighed by the harm which otherwise would result from permitting the communication privilege to defeat the defendant's constitutional rights to a fair trial and to present evidence on his own behalf. The following three subsections of this article present a more detailed elaboration of these three arguments against permitting the defendant's constitutional rights to be defeated in order that the reputation of the holder of a communication privilege be preserved.

1. *The Protection of the Communication Privileges Does Not Extend to the Privilege-Holder's Reputation*

Do the communication privileges exist solely to protect their holders from potential prosecution, or do they exist to protect their holders from public revelation of their misdeeds, crimes, juvenile records, mental and sexual backgrounds, and other information that might tend to cause members of the privilege-holder's community to hold him in lower esteem? More succinctly stated: Do the communication privileges protect the privilege-holder's privacy interests as well as providing protection against criminal prosecution? The answer to this question can be found by examining the history of the privileges.

The communication privileges developed in Elizabethan England as absolute bars against the revelation of confidential communications.¹⁷⁵ Initially, the communication privilege applied only to lawyers; later, by judicial or legislative extension, the privilege was applied to other relationships and professions.¹⁷⁶

The *raison d'être* for the privileges has changed, however, as the nature of society has changed. In the seventeenth and eighteenth centuries the theoretical foundation of the attorney-client privilege evolved from one of "oath and honor" to one of "servant."¹⁷⁷ The nineteenth century saw the development of an instrumentalist rationale, which focused on the necessity of insuring full disclosure so that the client could receive proper legal advice.¹⁷⁸ More recently, civil libertarians have asserted that the attorney-client privilege flows from the fifth amendment right against self-incrimination and the sixth amendment right to counsel.¹⁷⁹

In *Ullman v. United States*,¹⁸⁰ the Supreme Court of the United States held that the fifth amendment does not protect an immunized witness from "loss of job, expulsion from labor unions, state registration and investigation statutes, passport eligibility and general public opprobrium."¹⁸¹ Rejecting the claim of privilege in *Ullman*, the Court held that the "sole concern" underlying the privilege is "as its name indicates, with the danger to a witness

175. The term "privilege" derives from an amalgam of the Latin "privata lex" or "private law." See *Allred v. State*, 554 P.2d 411, 413 (Alaska 1976); *Berd v. Lovelace*, Cary 21 Eng. Rep. 33 (Ch. 1577); Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 181 (1960) (phrase "privata lex" means prerogative given to person or class of persons). Thus, privilege originally was a private law applicable only to a specific group or profession. See 8 J. WIGMORE EVIDENCE § 2290, at 542-45 (McNaughton rev. ed. 1961).

176. See 8 J. WIGMORE, *supra* note 175, § 2286, at 528-37.

177. *Id.* § 2290, at 543.

178. See Note, *supra* note 145, at 465-66.

179. *Id.* at 485. Without the attorney-client privilege, a client would have to waive his right against self-incrimination to enjoy his right to counsel and vice versa. *Id.* at 485-86. See *Keker v. Proconier*, 398 F. Supp. 756, 764-66 (E.D. Cal. 1975) (prison practice requiring prisoner who desires to meet with attorney to do so in room separated by glass, via telephone, and under continual guard, violates sixth amendment rights). *But cf.* *United States v. Liddy*, 509 F.2d 428, 442-43 (D.C. Cir. 1974) (fact that client consulted lawyer after Watergate break-in is not privileged), *cert. denied*, 420 U.S. 911 (1975).

180. 350 U.S. 422 (1956). In *Ullman*, petitioner refused to testify before a grand jury after an order under the Immunity Act of 1954 was granted by the district court directing the petitioner to testify. *Id.* at 423-25.

181. *Id.* at 430. The Court concluded that immunity need only protect the witness from testimony that might expose him to a criminal charge. *Id.* at 430-31.

forced to give testimony leading to the infliction of 'penalties affixed to the criminal acts.'"¹⁸² Thus, under *Ullman*, the fifth amendment privilege ceases once the danger of incrimination ceases. This reasoning should be applied with equal force to the communication privileges.

With respect to the marital privilege we note a similar philosophical progression from the unity of husband and wife¹⁸³ which led to a rule of total spousal incompetency,¹⁸⁴ through the suggestion of a constitutional right to privacy,¹⁸⁵ and, finally, to the view of spousal equality expressed in *Trammel*.¹⁸⁶ If the *Trammel* Court is correct that the spousal privilege does not prevent the Government from gaining information from one spouse about the other, then certain implications flow therefrom. Certainly, the Court's use of the term, "in the courtroom" must be read to mean "against the spouse as a defendant." If the marital privilege protects only against "the spouse's testimony in the courtroom," it arguably follows that there is no general right to prevent the revelation of incriminating and embarrassing information in another courtroom where the spouse is not on trial. Therefore, *Trammel* indicates that the mere fact that a spouse may reveal sordid or embarrassing details of the relationship in a public setting is insufficient to compel his or her silence.

The point is not that legal justifications for the privileges are unclear or poorly reasoned, but that they change to accommodate

182. *Id.* at 439 (quoting *Boyd v. United States*, 116 U.S. 616, 634 (1886)).

183. *See, e.g., Moy v. United States*, 254 U.S. 189, 195 (1920) (in criminal prosecution, wife is not competent to testify for her husband either generally or by contradicting incriminating testimony); *Graves v. United States*, 150 U.S. 118 (1893) (wife of person accused of crime is not competent to testify either on his own behalf or on behalf of government); 8 J. WIGMORE, *supra* note 175, § 2227.

184. *See Trammel*, 445 U.S. at 44; J. MAGUIRE, *supra* note 124, at 78-92. *See also Stein v. Bowman*, 38 U.S. (13 Pet.) 209, 220-23 (1839). It was not until 1933 that federal courts allowed one spouse to testify in favor of the other spouse. *See Funk v. United States*, 290 U.S. 371 (1933).

185. *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (marital relationship gives rise to "penumbral" constitutional right of privacy); *Poe v. Ullman*, 367 U.S. 497, 539 (1960) (Harlan, J., dissenting) (law prohibiting use of contraceptives by married couple violates right of privacy).

186. 445 U.S. at 52. The *Trammel* Court summarized the extinction of the rationale underlying the old rule of marital privilege:

The ancient foundations for so sweeping a privilege have long since disappeared. Nowhere in the common-law world—indeed in any modern society—is a woman regarded as a chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being.

Id.

different societal perceptions and demands.¹⁸⁷ Part of the reason for this change is a change in the way we interpret our constitutional rights. For example, twenty-five years ago no one seriously would have argued that a defendant testifying at a suppression hearing was entitled to immunity. Now such a concept is so universally accepted that the Supreme Court in the United States has employed it to change the rules of standing in order to prevent what in the view of the majority would be over-application of the fourth amendment.¹⁸⁸ Similarly, *Washington, Davis, and Chambers* compel us, in the face of the suppression of evidence of a defendant's innocence, to question the traditional rationale behind the privileges themselves.

In order to enforce a criminal defendant's constitutional rights to a fair trial and to present evidence in his own behalf, we must recognize that, whatever the historical basis of the communication privileges might be, their only valid contemporary basis is that of protecting the privilege-holder against the evil of prosecution based on the contents of a privileged communication. As use immunity protects a privilege-holder from just that evil, there is no valid contemporary justification for permitting a holder of a communication privilege to withhold information that might tend to exculpate a criminal defendant.

2. *The Courts Are Adequately Equipped to Protect the Privilege-Holder's Reputation*

Even if the communication privileges should be recognized

187. For example, society now recognizes a therapist-client privilege. See Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731, 734 (1957) (all six states that have granted psychologist's clients privilege of confidential communication have granted it status equivalent to attorney-client privilege). This newly recognized privilege even has been exalted above the traditional physician-patient privilege. *Id.* But cf. 8 J. WIGMORE, *supra* note 175, § 2380(a), at 828-32 (three of Wigmore's four factors for determining the existence of privilege are unsatisfied by the doctor-patient relationship).

188. See *United States v. Salvucci*, 448 U.S. 83 (1980). The *Salvucci* Court held that, in view of the *Simmons* decision, automatic standing is no longer constitutionally necessary. *Id.* at 95. For a discussion of *Simmons*, see *supra* notes 65-77 and accompanying text. In striking down the automatic standing rule in *Salvucci*, Justice Rehnquist, writing for the majority, stated: "The doctrine now serves only to afford a windfall to defendants whose fourth amendment rights have not been violated. We are unwilling to tolerate the exclusion of probative evidence under such circumstances . . ." 448 U.S. at 95 (emphasis in original). See also *Rakas v. Illinois*, 439 U.S. 128 (1978). In *Rakas*, the Court declared, "Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected." *Id.* at 137.

as continuing to provide protection to their holders' reputations, it does not necessarily follow that an occasional invasion of the privileges will result in such harm. Just as a court can employ *in camera* hearings to protect a witness from threat of future prosecution, the court can employ such hearings to ensure that the contents of privileged communications are not publicly disclosed. In addition, the court can employ other procedures to preserve the witness' reputation, including sealing the record of the witness' testimony, clearing the courtroom during the witness' testimony, and imposing limitations on counsel's right to make comments concerning the testimony outside the courtroom.¹⁸⁹ While some of the options available to the court arguably curtail cherished first amendment liberties, our first amendment jurisprudence approves the use of such drastic remedies when the need for such protection is shown to be "overriding," and the use of the remedy is limited.¹⁹⁰

3. *The Defendant's Constitutional Rights Outweigh the Interests of the Privilege-Holder*

Even if the limited invasion of the communication privileges advocated should result in harm to the reputation of the privilege-holder, the harm that non-disclosure would inflict upon a defendant, who is thereby deprived of his constitutional rights, clearly outweighs any privacy concerns favoring strict adherence to the privileges. Privacy concerns simply are insufficient to override defendants' constitutional rights.

In *Davis v. Alaska*,¹⁹¹ the Supreme Court recognized that "embarrassment" to the privilege-holder "or his family" by disclosure was outweighed by the defendant's right to probe the bias of a crucial witness against him.¹⁹² Admittedly, the situation of the communication privilege-holder in our hypothetical is distin-

189. See, e.g., *United States v. Hernandez*, 608 F.2d 741, 747 (9th Cir. 1979) (sixth amendment right to public trial does not preclude trial judge from limiting public access to courtroom during testimony of witness where such exclusion was necessary to protect witness and family from harm).

190. See, e.g., *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (right of access to criminal trials is of constitutional stature, but not absolute); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) ("[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public"); *Gannett Co. v. DePasquale*, 443 U.S. 368, 393 (1979) (suppression hearing can be closed when right to access is outweighed by defendant's right to fair trial).

191. 415 U.S. 308 (1974). For a discussion of *Davis*, see *supra* notes 18-27 and accompanying text.

192. 415 U.S. 319.

guishable from that of the prosecution's witness in *Davis* in that the *Davis* witness already had involved himself in the defendant's trial, whereas, the communication privilege-holder in our hypothetical is uninvolved in the defendant's trial, and desires to remain uninvolved. This distinction, however, should be insufficient to tilt the balance in favor of the privilege-holder.

In 1904, Professor Wigmore laid down the now universally accepted test of when a privilege might be recognized. His test involves a classic balancing of interests:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) The element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.¹⁹³

Unfortunately, by the time Wigmore wrote, the American courts were mechanically applying rules of privilege to bar testimony. While the overwhelming majority of courts claim to accept the Wigmore test,¹⁹⁴ the elements rarely are applied to the facts. In particular, courts consistently fail to balance the factors of injury and benefit.¹⁹⁵ When balancing does occur, the question usually is framed in terms of the existence or nonexistence of the privilege rather than in terms of balancing the injury against the benefit. To avoid this balancing, the courts have developed a number of elaborate fictions to defeat claims of privilege. For example, courts have held that the attorney-client privilege does not

193. 8 J. WIGMORE, *supra* note 175, § 2285, at 527. See also Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101 (1956). Professor Louisell states that "it may be that Wigmore, despite his monumental contribution to the law of privileges, has conduced to the current confusion by his emphasis on strictly utilitarian bases for the privileges—bases which are sometimes highly conjectural and defy scientific validation." *Id.* at 111.

194. For cases purporting to follow these guidelines, see 8 J. WIGMORE, *supra* note 175, § 2285, at 527 n.2.

195. See Note, *supra* note 145, at 467-68. Courts rarely engage in any balancing because the privilege requires certainty of application to avoid chilling privileged communications. *Id.*

apply to advice about future criminal acts or intentional torts,¹⁹⁶ the client's identity,¹⁹⁷ or the client's whereabouts.¹⁹⁸

Perhaps the reason underlying the American courts' consistent failure to apply the Wigmorean balancing analysis lies in the courts' perception of strong public policy grounds that support the general conclusion that the injury caused by recognizing the existence of a communication privilege in certain circumstances is always greater than the benefit gained thereby. For example, no matter how strict the confidence or how important the relationship, the courts have found that it simply is against public policy to protect client disclosure to their lawyer about crimes the client intends to commit.¹⁹⁹ Thus, summoned before a grand jury, a lawyer receiving information of his client's future criminal intent can be compelled to reveal the confidence in the face of any claim of privilege.

Even if it is recognized that all of the fears rejected in *Davis* and *Ullman* may materialize after compelled disclosure in a criminal case, the direct harm to the privileges still must be viewed as

196. See, e.g., *IT&T v. United Tel. Co.*, 60 F.R.D. 177, 180 (M.D. Fla. 1973) (exception to privilege where communication is made to assist in commission of crime or fraud); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(3) (1982) (lawyer may reveal client's intention to commit crime or information necessary to prevent crime); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (Proposed Final Draft 1981); ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Opinion 314 (1965); *Id.*, Opinion 202 (1940); Note, *supra* note 145, at 467, 471-73.

197. See ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Opinion 150 (1963). *But see* *Tillotson v. Boughner*, 350 F.2d 663, 666 (7th Cir. 1962) (in tax case, attorney was not required to disclose client's name because disclosure would lead to disclosure of client's motive for seeking advice); *Baird v. Koerner*, 279 F.2d 623, 629-30 (9th Cir. 1960) (attorney was not required to disclose client's name to Internal Revenue Service).

198. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(2) (1982); ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Opinion 155 (1936). See also *United States v. Woodruff*, 383 F. Supp. 696 (E.D. Pa. 1974) (communications between lawyer and client with respect to time of trial are not privileged). *But see* *Brennan v. Brennan*, 281 Pa. Super. 362, 422 A.2d 510 (1980). The *Brennan* opinion elevated mechanistic reasoning to an art form by holding that the whereabouts of a client who removed himself and his children after a temporary custody order was privileged despite the fact that the client was frustrating the issuance of a final order by defeating the court's jurisdiction. *Id.* at 357-77, 422 A.2d at 516-17. The court did give plaintiff the chance, on record, to demonstrate that the interests of justice clearly would be frustrated by upholding the privilege. *Id.* at 377, 422 A.2d at 517. In dissent, Judge Price argued that the administration of justice had been impeded because one year had passed since the filing of the complaint. *Id.* at 381-82, 422 A.2d at 520 (Price, J., dissenting).

199. It has been suggested that the public policy which the courts purport to advance is a judicial creation. See D. KAIRYS, *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 10, 14 (1982).

slight in relation to the corresponding harm that would result to the defendant if the privileges are unconditionally honored. In the first place, the percentage of cases is slight in which defense counsel can request immunity. In addition, the case law under *Smith* indicates that the number of cases in which immunity is granted are fewer still.²⁰⁰ Moreover, application of Wigmore's fourth criterion favors infringement upon the privilege where the benefit to be gained outweighs any injury that may inure to the privilege-holder. Acquittal of the innocent is, and ought to remain, one of the highest priorities of our judicial system. Certainly a majority of the Supreme Court has applied the converse of this principle of balancing with a vengeance in dealing with the fourth and fifth amendments' exclusionary rule.²⁰¹ Do not the due process clause and the sixth amendment compel an equivalent result in criminal trials?

The communication privileges have been long recognized as evidentiary exclusionary rules.²⁰² Their interrelationship with a defendant's rights, however, has been ignored or overlooked because privileges generally work to prevent the prosecution or conviction of the privilege-holder rather than the acquittal of a third person. While society has tolerated such a result in the past, the time has come for the courts to recognize that society no longer is content with a strict adherence to the communication privileges where they jeopardize the constitutional rights of a criminal defendant.

C. *Danger of Chilling the Relationship Underlying the Privilege*

The final question that must be addressed is whether the fear of potential disclosure of privileged communications will chill the underlying relationships that the communication privileges protect. Many scholars and practicing attorneys have argued that the

200. See *supra* notes 108-09.

201. See *Brewer v. Williams*, 430 U.S. 387, (Burger, C.J., dissenting). Chief Justice Burger lamented:

[T]oday's holding fulfills Judge (later Mr. Justice) Cardozo's grim prophecy that someday some court might carry the exclusionary rule to the absurd extent that its operative effect would exclude evidence relating to the body of a murder victim because of the means by which it was found.

Id. at 416 (Burger, C.J., dissenting). See also *Stone v. Powell*, 428 U.S. 465, 496-97 (1976) (Burger, C.J., concurring); *Schneekloth v. Bustamonte*, 412 U.S. 218, 242 (1973); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 412-13 (1971) (Burger, C.J., dissenting); *Linkletter v. Walker*, 381 U.S. 618, 637-38 (1965).

202. See *Trammel*, 445 U.S. at 50; 5 J. BENTHAM, *supra* note 146, at 300-50.

confidential relationships protected by the various privileges should be free of any conditions that might tend to chill the relationship.²⁰³

1. *The Attorney-Client Privilege*

Many commentators argue that the attorney-client relationship exists to permit the attorney to represent the client, and to give advice effectively within the limits of the law. The privilege, they contend, facilitates complete revelation of all relevant information necessary for the attorney to render effective advice and representation.²⁰⁴ If, the argument runs, there is a possibility that an attorney might be compelled to breach the privilege, the client might withhold potentially damaging information.²⁰⁵ It is further argued that if clients withhold information, attorneys cannot possibly render effective advice or representation. This argument carries great weight with respect to the attorney-client privilege, where the disclosures a court is likely to compel often form the basis for why the client consulted the attorney in the first instance. Even if not the primary reason for such consultation, the communication of such information flows from the essence of the relationship.

While the fear that the limited invasion of the communication privileges advocated in this article might tend to have a chilling effect upon the relationships underlying such privileges cannot be dismissed casually, it is suggested that the fear is both greatly exaggerated and largely theoretical. In criminal cases, the overwhelming majority of clients hire attorneys or have them appointed after being indicted or charged with a criminal offense. An attorney is infrequently retained, and rarely appointed, to give advice to uncharged clients in the criminal context.²⁰⁶ Thus,

203. See 8 J. WIGMORE, *supra* note 175, § 2290, at 522; Note, *supra* note 145, at 465-66; Letter from Benjamin Lerner to Louis Nateli, *supra* note 144.

204. Note, *supra* note 145, at 465-66.

205. Public defenders argue that client distrust of appointed lawyers already is high because many clients feel that public defenders do not render effective representation because, *inter alia*, they work for the state. The public defenders who espouse this opinion argue that a general recognition that the attorney-client privilege may be invaded effectively will end any significant revelation of incriminating secrets. See Letter from Benjamin Lerner to Louis Natali, *supra* note 144.

206. Statistics from a large public defender office reveal that of over 40,000 client contacts annually, fewer than 1% of all requests were for the purpose of obtaining legal advice before being formally charged. Interview with Robert Arthur, Chief Archivist, Defender Association of Philadelphia (Feb. 2, 1985). Such requests were so infrequent that there was no separate archival category for

when a client consults with an attorney in a criminal context, the client generally faces a direct danger of prosecution, and reveals confidences and secrets to his attorney in order to assist the attorney in the defense of a particular charge. There are, however, occasions where a client will reveal information to his attorney about another crime with which he is not then charged. This is precisely what happened in the *Wilkinson* case, where a client who was charged only with a car firebombing admitted to his attorney that he had committed a house firebombing and a murder as well.²⁰⁷ It hardly seems that the client's secondary revelation was "necessary" to the relationship for which the attorney was appointed or retained. Nor can it be said that a hesitancy or refusal to seek advice about the uncharged case would have hampered the attorney's representation of the client.

Bentham, a fierce opponent of all privileges, argued that the attorney-client privilege should not prevent revelation of client secrets. He discussed the potential chill upon the right to counsel in a rather archaic but cogent manner:

But if such confidence, when reposed, is permitted to be violated, and if this be known, (which, if such be the law, it will be), the consequence will be, that no such confidence will be reposed. Not reposed?—Well: and if it be not, wherein will consist the mischief? The man by the supposition is guilty; if not, by the supposition there is nothing to betray: let the law adviser say everything he has heard, everything he can have heard from his client, the client cannot have any thing to fear from it. That it will often happen that in the case supposed no such confidence will be reposed, is natural enough: the first thing the advocate or attorney will say to his client, will be,—remember that, whatever you say to me, I shall be obliged to tell, if asked about it. What, then, will be the consequence? That a guilty person will not in general be able to derive quite so much assistance from his law adviser, in the way of concerting a false defen[s]e as he may do at present.²⁰⁸

them; instead they were maintained with requests for return of property and extension of time to pay fines. *Id.*

207. For a further discussion of *Wilkinson*, see *supra* notes 2-7 and accompanying text.

208. 5 J. BENTHAM, *supra* note 146, at 303-04. See also Comment, *Functional Overlap Between the Lawyer and Other Professions: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1261-63, 1269-77 (1962).

Although Bentham's simplistic arguments have been rebuffed by many lawyers, judges, and scholars,²⁰⁹ the arguments retain value for their recognition of the practical problems inuring in the attorney-client relationship. It is suggested that Bentham's analysis of the solution to these problems is both naive and inaccurate, but he does identify the problem faced by an attorney counseling a client, when the client desires to disclose information about an offense for which someone else has been charged.

If we join in the colloquy used by Bentham we might imagine the following:

Client: I am charged with the crime of murder, if I tell you what happened would you ever be compelled to reveal it?

Attorney: No.

Client: But what about this defense witness immunity rule as set out in *Smith*?

Attorney: That would only apply if you possessed information that *you* committed a crime and *not someone else* who happened to be so charged. If you have such information and tell me, I could, under some circumstances, be compelled to reveal it.

Assuming the client did possess information which might exculpate another defendant, and that the client desired to keep that information secret, the client's next response would take one of the following forms: "I have no such information and let's get on with the defense of my case" or "Yes, I have such information but I will not tell you because I want to avoid a *Smith* scenario."

While the actual wording is somewhat fanciful and contrived, the underlying realities are well founded. A client, desiring to avoid public disclosure of his secrets, very well may withhold information from his attorney. But does this impermissibly chill the relationship? The answer seems to be that the relationship will be chilled, but such chill or limitation is socially desirable. The danger of chill to the relationship is outweighed by the greater harm that will be suffered by a defendant who is prevented from presenting exculpatory evidence as a result of the recognition of a privilege.

Of course there is another group of clients, a small but still legally significant minority, who do seek advice from attorneys

209. See generally 8 J. WIGMORE, *supra* note 175, § 2291, at 551-54.

in anticipation of arrest or indictment. Many of these cases involve coconspirators who have not yet been charged, and some probably involve situations, like that in *Wilkinson*, where a client seeks the advice of an appointed or retained attorney about an unrelated offense. Such clients have a recognized and legitimate need to obtain legal advice and counsel, but if their attorney can be compelled to disclose client confidences, these clients might choose to forego legal assistance in such matters. Are these not the clients who will ask, "If I possess information about a crime with which another is charged, is it possible you will be compelled to testify in that case?"

It seems that the answer, "Yes, but it cannot be used against you" will be of little comfort. Certainly, the client will desire to avoid placing himself in a position where his attorney's compelled revelations will start the prosecution looking in his direction,²¹⁰ and might carry the potential for loss of employment, severe disruption of family life, and social disgrace.²¹¹ Let us assume two possibilities: (1) The client does not disclose the information; or (2) the client does disclose the information to his attorney and obtains appropriate advice.

In the first situation, the client will be harmed by his failure to disclose the information only if the information would aid his attorney in properly representing the client's interests. While there are conceivable situations where a client might be harmed by his failure to make a complete disclosure to his attorney about uncharged crimes, such situations will rarely exist. For the most part, the client's disclosure or lack of disclosure of information tending to implicate the client in a crime other than that for which he is charged will neither aid nor hinder the client's attorney in rendering proper representation. In fact, if any harm occurs at all from the client's failure to disclose such information, it is more likely to occur from the fact that the client's attorney will be unable to aid an innocent defendant who might have the misfortune to be charged with the crime committed by the attorney's client. Similarly, in the situation in which the client does disclose to his attorney, no harm will come to the client because the chances are that the attorney never will be required to divulge the content of the client's disclosure. Moreover, even where the attorney is re-

210. For a discussion of why such a fear is illusory, see *supra* notes 206-09 and accompanying text.

211. For a discussion of how the courts can protect a party from the realization of such fears, see *supra* notes 207-08 and accompanying text.

quired to make such a disclosure, justice still will be served for the reasons discussed throughout this article.

2. *Other Privileges*

None of the other privileges has achieved anything like the mechanistic crystallization of the attorney-client privilege. Professor Wigmore did not recognize the doctor-patient privilege,²¹² and he only grudgingly agreed that his fourth criteria was satisfied by the husband-wife privilege.²¹³

While these privileges spring from various privacy concerns, it hardly can be said that the primary purpose of any was the exclusion of confidential information in a trial of someone other than the privilege-holder. Rather, their purpose is to prevent the in-court use of the privilege-holder's secrets against the privilege-holder. In most instances the confidences are revealed for reasons such as a need for medical or psychiatric treatment, a religious need to confess one's sins, or simply because the privilege-holder desires to share his or her secrets with his or her spouse. These relationships will not cease nor will they suffer any serious effect if the due process clause and the sixth amendment infrequently require discharge of a confidence. Since the benefit gained by acquitting the innocent is enormous, and the potential injury to the relationship is virtually impossible to calculate, revelation always should be required. Secondary effects or injuries may flow, but these rarely will alter the underlying relationship. People will not stop marrying or stop confiding in their spouses because of the possibility that use immunity may be conferred on one or the other. Moreover, if a wife receives some awful confi-

212. 8 J. WIGMORE, *supra* note 175, § 2380(a), at 828-32. Professor Wigmore cogently argued that the first, second and fourth of his criteria are "emphatically" not met in the case of the physician-patient relationship, stating:

Of the kinds of ailments that are commonly claimed as the subject of the privilege, there is seldom an instance where it is not ludicrous to suggest that the party cared at the time to preserve the knowledge of it from any person but the physician. From asthma to broken ribs, from influenza to tetanus, the facts of the disease are not only disclosable without shame, but are in fact often publicly known and knowable by everyone—by everyone except the appointed investigators of truth.

Id. at 830. For Wigmore's four criteria, see *supra* text accompanying note 193. See also Morgan, *Forward to MODEL CODE OF EVIDENCE* at 28 (1942). Professor Morgan also centers his analysis on lack of expectation or knowledge of the privilege, stating, "[The patient] has no idea whether communication to a physician is or is not privileged." *Id.* See generally Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 *YALE L.J.* 607 (1943).

213. 8 J. WIGMORE, *supra* note 175, § 2332, at 642-43.

dence from her husband, it would seem that if the underlying facts themselves do not destroy the relationship, in-court disclosure (often years later) will do little additional damage.²¹⁴ There is also a strong argument that marital communications take place without any knowledge or expectation of a privilege.²¹⁵ It is difficult to explain the difference in treatment between husband-wife confidences, which are protected, and parent-child and sister-brother confidences, which are not. The damage to family harmony is no different in any of the cases, but the law chooses to protect only the former.²¹⁶

Similarly, people consult psychiatrists and therapists for purposes of treatment and cure. Doctors rarely are required to share a confidence in the practice of their craft,²¹⁷ but often treatment of mental problems only will occur after revelation of some dark secret.²¹⁸ Will the possibility of disclosure chill the therapeutic

214. See Hutchins and Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 675-77 (1929).

215. *Id.* at 682, 686. The authors point out that there is no evidence that lawyers—because they are aware of the privilege—enjoy great domestic harmony. *Id.* at 682. But see Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CALIF. L. REV. 1353, 1374-78 (1973) (asserting that increase in law suits and media coverage has increased public awareness of husband-wife privilege); see also W. FAULKNER, *Was in GO DOWN MOSES 3* (Vintage ed. 1973) (fictional account of loveable bootlegger who marries to close the mouth of the entire family).

216. Family privilege has been recognized in the following cases: *People v. Fitzgerald*, 101 Misc. 2d 712, 422 N.Y.S.2d 309 (1979) (holding that parent-child privilege exists in New York); *In re A. and M.*, 61 A.D.2d 426, 403 N.Y.S.2d 375 (App. Div. 1978) (communication by minor to parent within family relationship may be privileged). The privilege was rejected in the following cases: *In re Kinov*, 326 F. Supp. 400 (S.D.N.Y. 1970) (denying existence of parent-child privilege); *In re Terry W.*, 59 Cal. App. 3d 745, 130 Cal. Rptr. 913 (1976) (rejecting judicially created parent-child privilege). See generally Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599 (1970); Note, *Questioning the Recognition of a Parent-Child Testimonial Privileges*, 45 ALB. L. REV. 142 (1980); Comment, *From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate Parent-Child Privilege?*, 1978 B.Y.U. L. REV. 1002; Comment, *The Child-Parent Privilege: A Proposal*, 47 FORDHAM L. REV. 771 (1979); Comment, *Recognition of a Parent-Child Testimonial Privilege*, 23 ST. LOUIS U.L.J. 676 (1979); Comment, *Confidential Communication Between Parent and Child: A Constitutional Right*, 16 SAN DIEGO L. REV. 811 (1979).

217. See 8 J. WIGMORE, *supra* note 175, § 2380(a), at 829.

218. See Louisell, *supra* note 187. Professor Louisell commented: Implicit in the nature and processes of psychodiagnosis and psychotherapy is a profound prying into the most hidden aspects of personality and character, a prying often productive of disclosure of secrets theretofore unknown even to the conscious mind of the patient himself. Sometimes the processes are aided by hypnosis or drugs, temporarily putting beyond control of the patient all deliberate choice as to the extent, continuation or termination of the inquiry. Obviously disclosure

process? Historically, there is no basis for such an argument. Prior to the 1950's the psychologist or psychiatric privilege rarely was recognized in criminal cases or in civil cases.²¹⁹ There is no evidence, however, that the absence of a bar to in-court disclosure has prevented anyone from seeking psychodiagnosis or that the profession somehow was hampered in its mission. Not only is there no evidence to support the chill theory, there also is no evidence that the enactment of statutory protection created a thaw which impelled an avalanche upon the analyst's couch.²²⁰

Pragmatically, there also is no support for arguing that infrequent disclosure will restrict treatment.²²¹ The courts have required therapists to warn the intended victim of a patient's threat if there is a reasonable belief that the patient will carry it out,²²² and to answer depositions concerning the mental history of a patient where it is relevant.²²³ Such disclosures do not appear to have caused any chilling effect upon therapist-client relationship. The possibility of compulsion to therapist is no greater a threat to the process than the imposition of that liability on the practitioner

at large of data thus procured might have the most significant consequences for the reputation and status of the patient, and typically he is well aware of the potentialities of disclosure. It is hard to see how the psychodiagnostic and psychotherapeutic functions adequately can be carried on in the absence of a pervading attitude of privacy and confidentiality.

Id. at 745. See also *Taylor v. United States*, 22 F.2d 398, 401 (D.C. Cir. 1955) ("a psychiatrist must love his patient's confidence or he cannot help him"); GROUP FOR ADVANCEMENT OF PSYCHIATRY, REPORT NO. 45, at 92 (1960).

219. See, e.g., 8 J. WIGMORE, *supra* note 175, § 2286, at 534 n.23 (collecting state statutes from the 1950's which granted the same type of privilege to psychologist-client communications as was granted to attorney-client communications).

220. See Comment, *supra* note 208, at 1265-69.

221. See *Whalen v. Roe*, 429 U.S. 589, 602-03 (1977) (state data bank containing names and addresses of persons obtaining prescription drugs is constitutional even if some patients are deterred from seeking appropriate treatment because of fear of stigmatization); *In re Lifschutz*, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970) (requiring psychotherapists to answer questions on limited basis at deposition concerning treatment of patient who was litigant). See also *Planned Parenthood v. Danforth*, 428 U.S. 52, 79-81 (1976) (state requirement of record keeping of abortions performed is not constitutionally impermissible); *H.L. v. Matheson*, 450 U.S. 398, 411 (1981) (upholding statute requiring doctor to notify parents before performing abortion on unemancipated minor). *But see id.* at 439 n.25 (Marshall, J., dissenting) (citing medical authorities who claim that reporting requirements deter or delay patients from seeking abortion thus increasing health risks).

222. *Tarasoff v. Regents of the Univ. of Cal.*, 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1973) *rev'd in part on reh'g*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

223. *In re Lifshutz*, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

for failure to protect a person from impending harm. Application of Wigmore's test also suggests that the benefit to be gained by nondisclosure is slight but that the danger of improper disposition of the litigation is great.

When we move to other privacy interests there is even less justification for silence. The courts already have defined the contours of the newsmen's²²⁴ and rape counselor's privileges²²⁵ and it is clear that a defendant's need to exculpate himself prevails over these interests.²²⁶

V. PROCEDURE FOR BALANCING RIGHTS

Once a request is made for use immunity to the witness privilege-holder or to the other party to the privilege, the court should employ the procedure detailed in *Nixon v. United States*.²²⁷ The court should indulge the presumption that the testimony is privileged, shifting the burden to the requesting party to demonstrate that the testimony is essential to the justice of the pending case.²²⁸ In applying this test the requesting party also should satisfy the *Smith* standard that the testimony is "clearly exculpatory."²²⁹ This last requirement would serve to ensure that the privilege is not irresponsibly invaded. *In camera* inspection and testimony should be employed to determine overbroad claims and to protect other privileged matters; and production of cumulative or collateral evidence should not be permitted in the face of a claim of privilege. Again, a court should recognize, through *Washington, Davis, and Chambers*, the testimony which clearly shows that someone other than the defendant committed the charged crime, or which directly impeaches a witness against the defendant, is critical. Invasion of the privilege should be allowed in those cases.²³⁰

224. See *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Hammarley v. Superior Court*, 89 Cal. App. 3d 888, 159 Cal. Rptr. 608 (1979); *In re Farber*, 78 N.J. 259, 394 A.2d 330, cert. denied, 439 U.S. 997 (1978). But see *New Jersey v. Boiardo*, 82 N.J. 446, 414 A.2d 414 (1980).

225. *In re Pittsburgh Action Against Rape*, 494 Pa. 15, 428 A.2d 126 (1981).

226. See generally *Tanford & Bocchino, Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980).

227. 418 U.S. 683, 710-713 (1974). For a discussion of *Nixon*, see *supra* notes 39-46 and accompanying text.

228. *Nixon*, 418 U.S. at 713 (requiring that prosecutor demonstrate that presidential material was essential to criminal case) (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (No. 14,692 (C.C. Va. 1807))).

229. *Smith*, 615 F.2d at 972. For a discussion of *Smith*, see *supra* notes 88-106 and accompanying text.

230. See C. McCORMICK, EVIDENCE § 74.2, at 1278-80 (3d ed. 1984).

VI. CONCLUSION

A defendant's due process and sixth amendment rights to present exculpatory evidence via cross-examination or direct examination mandate that courts employ the remedy of use immunity. Defense witnesses are entitled to protection from prosecution, but should not be allowed to remain silent when the alternative is conviction of the innocent. Moreover, the courts possess the power to immunize defense witnesses when the prosecutor refuses to do so.

Use immunity completely protects the witness by prohibiting his testimony and its fruits from being used against him. If the witness is fully protected, it follows that the witness' declaration against penal interest made in confidence may also be compelled. If these revelations may not be *used* against the witness in court he should not be heard to complain.

While the communication privileges have different, privacy-based foundations, there is no legal right to prevent revelation as opposed to in-court use against the privilege-holder. Indirect injury to a privileged relationship, or social disability, are not protected by legal privileges. Finally, while there is some danger that such relationships could be chilled, with the attendant dysfunction, this threat is slight and is justified by the benefit to society flowing from revelation. In sum, the right to everyman's evidence includes the right to invade privileges to protect a criminal defendant's sixth amendment rights.

