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CRIMINAL LAW

EVIDENTIARY PRIVILEGES AND THE DEFENDANT'S CONSTITUTIONAL RIGHT TO INTRODUCE EVIDENCE

Welsh S. White*

I. INTRODUCTION

A. THE CONFLICT

When a criminal defendant seeks to introduce relevant evidence barred by an evidentiary privilege,[1] a conflict arises between the defendant's interest in introducing exculpatory evidence and the government's interest in promoting a social policy. One of the primary goals of any trial is to make an accurate determination of the facts.[2] In view of the significance the American system of justice has traditionally attached to the protection of the innocent from erroneous conviction,[3] this goal is especially critical in a criminal trial.

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[1] Evidentiary privileges may be defined as rules that bar the admission of evidence in order to promote a social policy such as safeguarding an individual's privacy or protecting a confidential relationship. *See generally* C. MCCORMICK, EVIDENCE 170-277 (3d ed. 1984) (describing the use of privileges in detail).

[2] *See generally* Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975) (reflecting on how differences in adversarial positions affect the ultimate determination of facts).

[3] *See e.g.*, Ballew v. Georgia, 435 U.S. 223, 234 (1978), *aff'd*, Teague v. Lane, 109 S. Ct. 1060 (1989) (observing that weighing the risk of convicting an innocent person as ten times more serious than the risk of acquitting a guilty person was "perhaps not an unreasonable assumption"); *In re* Winship, 397 U.S. 358, 364 (1970) (holding that in view of the concern for protecting the innocent from erroneous conviction, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). *See generally* Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 198 (1983) (contrasting the theoretical goals of the criminal justice system); Damaska, *supra* note 2, at 1103-04.

When relevant defense evidence is excluded for some purpose other than enhancing the accuracy of fact-finding, the danger of convicting an innocent defendant increases.

On the other hand, evidentiary privileges are designed to promote important values. Some of the privileges are designed to establish a system of justice that will foster accurate fact-finding.[4] Others are designed to promote values such as safeguarding individual dignity[5] or autonomy.[6] Thus, when a defendant's interest in presenting relevant evidence comes into conflict with an evidentiary privilege, a clash of values results. The approach a court adopts towards reconciling this conflict will be significant from a theoretical standpoint because it will reflect, in some measure, its judgment as to the priorities of the American system of justice.[7]

Defining the scope of the defendant's right to introduce evidence barred by an evidentiary privilege has practical significance as well. Although traditional privileges such as the attorney-client privilege,[8] the spousal communications privilege,[9] and the constitutionally based privilege against self-incrimination[10] have existed for generations, concern for protecting the privacy of social or professional relationships has in recent years led to an increase in evidentiary privileges. The privileges enacted by statute in the last two decades include: the newsman's privilege,[11] which protects a reporter against revealing her sources; the rape-shield laws,[12] which protect an alleged rape victim from disclosing her sexual history

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[4] *E.g.*, the attorney-client privilege. For a discussion of how this privilege arguably promotes the accuracy of our system of fact-finding, *see* Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1470-74 (1966).

[5] *E.g.*, the spousal communications privilege. This privilege, which protects confidential communications between spouses, is premised upon the idea that a spouse should not be deterred from making communications to her spouse by knowledge that such communications may later be introduced into evidence against her. *See* C. MCCORMICK, *supra* note 1, at 193.

[6] *E.g.*, the privilege against self-incrimination. In Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (quoting United States v. Grunewald, 233 F.2d 556, 581-82 (1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1956)), the Court stated that one of the values reflected in this privilege is "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.' "

[7] *See infra* notes 211-21, and accompanying text.

[8] *See generally* C. MCCORMICK, *supra* note 1, at 204-42 (describing the attorney-client privilege and its use).

[9] *See generally* C. MCCORMICK, *supra* note 1, at 188-203 (describing the spousal communications privilege and its use).

[10] U.S. CONST. amend. V.

[11] *See e.g.*, N.J. STAT. ANN. § 2A:84A-21, 21A (West Supp. 1988).

[12] *See e.g.*, FED. R. EVID. 412.

when she testifies in a rape case; and a patient treatment facility privilege,[13] which protects employees at a treatment center from disclosing confidential statements made by people seeking treatment for drug or alcohol abuse.[14] This increase in the number of evidentiary privileges makes it more likely that a defendant will seek to introduce evidence protected by a privilege.

Other doctrinal developments have also increased the likelihood that a defendant will seek to introduce privileged evidence. The enactment of use-immunity statutes,[15] for example, has immeasurably increased the chances that a defendant will argue that a defense witness who invokes the fifth amendment privilege against self-incrimination should be granted use-immunity so that she can testify for the defense without fear of self-incrimination.[16]

Moreover, defining the scope of a defendant's right to introduce evidence protected by a privilege affects the defendant's right to discovery as well as her right to introduce evidence at trial. If a privilege bars the defendant from introducing evidence, then the defendant will also be unable to discover evidence protected by the privilege. Conversely, if the privilege may not be applied to preclude the defendant from introducing evidence that meets a certain standard of materiality, then, at least in some circumstances, the defendant must be allowed to discover the evidence.[17] Thus, the means chosen for resolving conflicts between evidentiary privileges

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[13] *See e.g.*, KAN. STAT. ANN. §§ 65-5601 to 5605 (Supp. 1987) (privilege of patient treatment facility not to disclose confidential communications for persons being treated for alcohol, drug abuse, etc.).

[14] For other privileges enacted in the last decade, *see e.g.*, COLO. REV. STAT. § 12-63.5-115 (1985) (absolute privilege for communications made to social worker); ALA. CODE §§ 15-23-40 to 46 (1987) (absolute privilege for communications made to "victim counsellor").

[15] *See, e.g.*, 18 U.S.C. §§ 6001-5 (1982).

[16] *See* Natali, *Does a Criminal Defendant Have a Constitutional Right to Compel the Production of Privileged Testimony Through Use Immunity*, 30 VILL. L. REV. 1501 (1985).

[17] Although the Supreme Court has not clearly developed the relationship between the defendant's right to introduce evidence protected by a privilege and her right to discover such evidence, its decisions in Roviaro v. United States, 353 U.S. 53 (1957) and Pennsylvania v. Ritchie, 480 U.S. 39 (1987), indicate that when the defendant can make a sufficient showing that evidence protected by a privilege is potentially admissible under a constitutional provision such as the confrontation clause or the compulsory process clause, the defendant will have a constitutional right to discover the evidence under the due process clause.

In *Roviaro*, the Court held that evidence protected by the informer's privilege would have to be disclosed directly to the defendant. *Roviaro*, 353 U.S. at 65. After considering the "materiality" of the informer's testimony, the Court concluded that disclosure of the informer's identity was required because it "was highly relevant and might have been helpful to the defense." *Roviaro*, 353 U.S. at 62-63. Thus, the *Roviaro* Court suggests that when a defendant is entitled to introduce evidence protected by a privilege, she will also be entitled to personally examine such evidence if she can make a sufficient

and the defendant's right to introduce evidence will have a profound impact on the administration of criminal trials.

B. AN OVERVIEW OF THE RELEVANT AUTHORITY

As recently as 1961, the leading text on evidence stated without qualification that the defendant's right to compulsory process "does not override and abolish such exemptions and privileges as may be otherwise recognized by common law or statute."[18] As a student commentator observed, "[T]he same assertion might have described the Confrontation clause with equal accuracy."[19] At that time, a defendant's constitutional right to introduce evidence ex-

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showing that the protected evidence meets the standard of materiality requisite for admissibility.

Roviaro involved a somewhat unusual situation. In most cases, a defendant will not be able to show that evidence protected by a privilege is likely to be material to his defense unless he is first granted access to the evidence. Thus, if evidence is to be disclosed to a defendant only upon a showing that it is likely to be material to his defense, the defendant may be caught in a kind of no man's land: evidence that may in fact be material to his defense will be inaccessible to him because, lacking access to the evidence, he will be unable to describe it in sufficient detail to meet the stringent standard required for discovery.

In *Ritchie*, the Court indicated that, at least with respect to some privileges, the defendant will be allowed an intermediate remedy that will reduce the extent to which he will be placed in this untenable situation. *Ritchie*, 480 U.S. at 58. The *Ritchie* Court held that, with respect to the privilege involved in that case, the defendant would be entitled to have the trial judge make an in camera inspection of the evidence protected by the privilege if the defendant could make a preliminary showing that the privileged material "might contain . . . unspecified exculpatory evidence." *Id.* at 44. If the judge determined that the protected evidence was "material to the defense of the accused," it would then be turned over to the defendant. *Id.* at 58.

Although *Ritchie* did not specify when the intermediate remedy of in camera inspection by the trial judge is appropriate, it seems reasonable to hold that the availability of this remedy depends upon the nature of the privilege involved. The focus should be on whether disclosure of protected evidence to the trial judge substantially diminishes the policy behind the privilege. Thus, if the "privilege is destroyed as much by disclosure to a single person—even to a trial judge in camera—as by disclosure to the whole world," the intermediate remedy of in camera inspection should not be available. Westen, *Reflections on Alfred Hill's "Testimonial Privileges and Fair Trial"*, 14 U. MICH. J.L. REF. 371, 385 (1981). In that case, the defendant should not be allowed to destroy the privilege unless she can show that first, protected evidence will be admissible if it meets a certain standard of materiality, and second, the evidence sought is likely to meet that standard of materiality.

As Professor Westen has pointed out, disclosure of privileged evidence to the trial judge in camera does not generally substantially diminish the interest protected by the privilege. *Id.* at 385. Accordingly, as to most privileges, the remedy applied in *Ritchie* is appropriate, provided, of course, that the defendant will have a constitutional right to introduce evidence protected by the privilege once it is determined that it is material to her defense.

[18] 8 J. WIGMORE, EVIDENCE § 2191, at 69 (J. McNaughton rev. ed. 1961).

[19] Note, *Defendant v. Witness: Measuring Confrontation and Compulsory Rights Against Statutory Communications Privileges*, 30 STAN. L. REV. 935, 938 (1978).

cluded by an evidentiary privilege could have been predicated only upon the due process clause of the fifth and fourteenth amendments.[20] Moreover, the due process clause had not been applied to allow a criminal defendant to admit evidence barred by an evidentiary privilege but only to hold that a defendant must be afforded a reasonable opportunity to present a defense.[21]

Since 1967, Supreme Court decisions based on the compulsory process clause,[22] the confrontation clause,[23] and the due process clause[24] have held that in some situations the defendant's right to present relevant evidence in her defense must override evidentiary rules to the contrary. Most of these cases involved situations in which the exclusionary evidence rule was designed to enhance accurate fact-finding[25] rather than to promote a social policy. In *Davis v. Alaska*,[26] however, the Supreme Court directly held that a statutorily created evidentiary privilege could not be applied to prevent the introduction of evidence that tended to show bias on the part of the chief government witness.[27] Further, in *Pennsylvania v. Ritchie*,[28] the Court held that a statutorily created privilege could not be applied to bar the defendant from discovering all evidence protected by the privilege.[29] Moreover, the Court has indicated in dicta that a defendant will also have a constitutional right to discover or introduce evidence protected by a privilege in other situations.[30]

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20 *See In re* Oliver, 333 U.S. 257 (1948); Cook v. United States, 267 U.S. 517 (1925). *See generally* Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 747-56 (1976) (suggesting a federally protected constitutional right of an accused to present a defense).

21 *See Oliver*, 333 U.S. at 274-76; *Cook*, 267 U.S. at 537; Clinton, *supra* note 20, at 750-56.

22 *See* Rock v. Arkansas, 483 U.S. 44 (1987); Washington v. Texas, 388 U.S. 14 (1967).

23 *See* Davis v. Alaska, 415 U.S. 308 (1974).

24 *See* Green v. Georgia, 442 U.S. 95 (1979); Chambers v. Mississippi, 410 U.S. 284 (1973).

25 *Chambers* and *Green* both involved applications of the hearsay rule, a rule that is designed to exclude evidence that is unreliable or may be given too much weight by the jury. *Chambers*, 410 U.S. at 295; *Green*, 442 U.S. at 97. *Washington* and *Rock* both involved evidentiary rules that were designed to exclude categories of evidence considered untrustworthy. *Washington*, 388 U.S. at 19; *Rock*, 483 U.S. at 53. In *Rock*, the Arkansas courts excluded hypnotically recalled testimony, finding that such testimony is likely to be mistaken. *Rock*, 483 U.S. at 47. In *Washington*, the Texas courts had applied the rule that a person convicted of a crime is not competent to testify on behalf of another person charged with the same crime. *Washington*, 388 U.S. at 16. For further discussion of *Washington*, *see infra* notes 99-103, and accompanying text.

26 *Davis*, 415 U.S. at 308.

27 For a detailed discussion of *Davis*, *see infra* notes 125-31, and accompanying text.

28 Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

29 *Id.* at 52.

30 *See infra* notes 82-98, and accompanying text.

The impact of the Court's rulings upon the scope of evidentiary privileges is not clear. Although some lower courts[31] and at least one commentator[32] have interpreted the Supreme Court decisions as holding that a defendant's constitutional right to introduce relevant evidence in her defense must prevail over most, if not all, evidentiary privileges, the cases provide at best only ambiguous support for that conclusion.[33] The Court carefully limited both the *Davis* and *Ritchie* decisions to their facts.[34] Moreover, in cases hold-

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[31] *See, e.g.*, Salazar v. State, 559 P.2d 66, 71 (Alaska 1976) (holding that a defendant had a constitutional right to introduce evidence protected by the spousal communications privilege because the defendant's right under the confrontation clause outweighs the witness's interest in a state communications privilege); Commonwealth v. Two Juveniles, 397 Mass. 261, 266, 491 N.E.2d 234, 238 (1986) (dicta suggesting that in certain circumstances any non-constitutional testimonial privilege would have to "yield at trial to the constitutional right of a criminal defendant to have access to privileged communications"); State v. McBride, 213 N.J. Super. 255, 272, 517 A.2d 152, 159 (1986) (observing that a defendant "may" have a sixth amendment right to evidence protected by statutory psychologist-patient privilege); *In re* Farber, 78 N.J. 259, 277, 394 A.2d 330, 337 (1978), *cert. denied sub. nom.*, New York Times Co. & Farber v. New Jersey & Jascalevich, 439 U.S. 997 (1978) (holding that a defendant has a constitutional right to discover and introduce evidence protected by a statutorily created newsperson's privilege because the defendant's right to introduce evidence under the compulsory process clause overrides the protection created by the privilege); People v. Price, 100 Misc. 2d 372, 388, 419 N.Y.S.2d 415, 426 (1979) (holding that defendant has a sixth amendment right to introduce relevant evidence protected by the statutory privilege of confidentiality afforded probation intake records because "where statute and Constitution collide, the statute must yield").

[32] *See* Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 161 (1974) ("No interest protected by a privilege is sufficiently important to outweigh the defendant's right to establish his innocence through the presentation of clearly exculpatory evidence").

[33] Some courts and commentators have suggested that United States v. Nixon, 418 U.S. 683 (1974), supports the principle that evidentiary privileges must sometimes yield to a defendant's constitutional right to introduce evidence. *See, e.g.*, *In re* Farber, 78 N.J. at 272-73, 394 A.2d at 336-37. *See also*, Clinton, *supra* note 20, at 817-18.

This reading of *Nixon* is not correct, however. The issue in *Nixon* was whether, despite the President's claim of executive privilege, the Watergate Special Prosecutor was entitled to have the trial judge at a criminal trial examine in camera confidential statements made to the President by his closest advisors. The Court's basis for holding that the President's claim of executive privilege would not bar the judge's in camera inspection of these statements was that "[t]he President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases." *Nixon*, 418 U.S. at 713. Thus, as Professor Alfred Hill has said,

> [W]hat was overridden was not the President's privilege but rather his claim as to the scope of his privilege. The actual decision, construing the constitutional nature of presidential privilege, seems to have no bearing on whether an unambiguous privilege created by an otherwise competent organ of government—a statutory privilege, for example—must yield when recognition of the privilege would produce substantial detriment for the prosecution or defense.

Hill, *Testimonial Privilege and Fair Trial*, 80 COLUM. L. REV. 1173, 1179 (1980).

[34] In *Davis*, the majority repeatedly stated its holding in association with statements such as "[o]n these facts," and "[i]n this setting." Davis v. Alaska, 415 U.S. 308, 318,

ing that a defendant has a constitutional right to introduce evidence barred by an evidentiary rule designed to promote accurate fact-finding, the Court has repeatedly reserved decision on the question of whether a defendant can present evidence barred by "testimonial privileges, such as the lawyer-client privilege, the husband-wife privilege, or the privilege against self-incrimination."[35]

C. THESIS

This Article's goal is to provide guiding principles that will help resolve the conflict between evidentiary privileges and the defendant's right to introduce relevant evidence in her own defense. These principles will constitute an important first step toward delineating the scope of a defendant's constitutional right to introduce evidence barred by an evidentiary privilege, bearing in mind that a defendant's constitutional right to introduce such evidence, if it exists at all, will only come into effect when the government declines to pursue an alternative remedy.[36] If the defendant is seeking to introduce evidence protected by a privilege as part of her own defense, the government will always have the option of dismissing charges rather than allowing the introduction of protected evidence.[37] Similarly, if the defendant seeks to introduce evidence protected by a privilege to cross-examine a government witness, the government will have the option of striking the witness' testimony rather than allowing the admission of protected evidence.[38]

In developing these principles, the historical antecedents of the

319 (1974). Moreover, in a concurring statement, Justice Stewart emphasized that the Court's holding was limited to the circumstances of the case, saying "the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions." *Id.* at 321 (Stewart, J., concurring). In *Ritchie*, the Court again took pains to limit the scope of its holding. *See infra* notes 104-16, and accompanying text.

[35] Washington v. Texas, 388 U.S. 14, 23 n.21 (1967). *See also*, Rock v. Arkansas, 483 U.S. 44, 55, n.11 (1987) (noting that numerous state procedural and evidentiary rules control the presentation of evidence and do not offend defendant's right to testify). More recently, in Taylor v. Illinois, 108 S. Ct. 646 (1988), a case holding that the sanction of barring a defense witness for defense counsel's willful and blatant failure to disclose the witness in a discovery answer was not in violation of the compulsory process clause, the Court reiterated that a criminal defendant "does not have an unfettered right to offer testimony that is . . . privileged." *Id.* at 653.

[36] *See* Westen, *supra* note 17, at 379-80; Hill, *supra* note 33, at 1174-75. In at least one situation, where the defendant seeks to introduce evidence protected by the military secrets privilege, Congress has provided by statute an additional remedy that may be pursued once it is determined that a defendant has a constitutional right to introduce evidence protected by the privilege. 18 U.S.C. §§ 1-16 (1976 & Supp. 1981).

[37] *See* Hill, *supra* note 33, at 1174.

[38] *See* Hill, *supra* note 33, at 1175.

relevant constitutional provisions—fully explored elsewhere[39]—will be mentioned only in passing. The Article primarily focuses on Supreme Court decisions in the latter half of this century. This Article's objective, however, is not to synthesize the holdings of these cases, but rather to draw from them an underlying rationale that seems consistent with both the core values reflected in the decisions and shared intuitions of fairness.

Thus, the approach will be both descriptive and normative. The theory is descriptive in the sense that it is consistent with the modern Supreme Court decisions bearing upon the defendant's right to introduce evidence barred by an evidentiary privilege. But, in view of the relatively few decisions touching upon this issue, this consistency is hardly surprising.[40] This Article's theory is favored not because it most completely explains the Court's results, but because, in comparison with the realistic alternatives, it provides the fairest and most workable means of resolving the conflict.

Briefly stated, this Article's thesis is that the scope of a defendant's constitutional right to discover or introduce evidence protected by an evidentiary privilege depends in large part upon whether the privilege, either in general or in the context of its specific application, may be properly characterized as one that favors the government. More specifically, the Article maintains that privileges that favor the government should be differentiated from other privileges because of the concern for maintaining a fair adversarial balance between the government and the defendant in criminal cases. Starting with this perspective, the Article develops guiding principles that will be useful in resolving conflicts between evidentiary privileges and the defendant's constitutional right to introduce evidence.

In elaborating the thesis, part II will develop the reasons for differentiating privileges that favor the government from other privileges. Drawing upon these reasons, this part will then develop the guiding principles set out above. Part III will consider the extent to which modern Supreme Court decisions are consistent with these principles. Part IV will consider how a court might use the principles to decide evidentiary issues presented in three hypothetical cases. Part V will then briefly consider two alternative approaches for dealing with cases in which a defendant seeks to introduce rele-

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39 *See* Clinton, *supra* note 20, at 715-39; Westen, *supra* note 32, at 75-108. *See generally* F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1951) (analyzing the history of the sixth amendment).

40 For a brief discussion of some of the theories presented by other commentators, see *infra* notes 200-21, and accompanying text.

vant evidence barred by an evidentiary privilege and part VI will conclude with some general observations.

II. Guiding Principles

A. The Defendant's Constitutional Right to Introduce Evidence

When a defendant seeks to introduce relevant evidence that is barred by an evidentiary privilege, it is difficult to reconcile the conflicting interests at stake. Assuming the privilege is rationally calculated to promote a legitimate social policy, the interests in conflict—the defendant's interest in presenting relevant evidence at a criminal trial and society's interest in advancing a social policy—are so disparate that a court has difficulty determining which should prevail. In contrast to the situation in which defense evidence is excluded to promote accurate fact-finding,[41] here courts must weigh two interests of a very different character. Confronted with this dilemma, courts have a special need for guiding principles that will assist in resolving the conflict.

One possible guiding principle is that a defendant will have a constitutional right to introduce *any* material defense evidence, whether or not it is protected by an evidentiary privilege. This theory, which has been most fully explicated by Professor Peter Westen,[42] has considerable intuitive appeal. Allowing a defendant's interest in presenting relevant evidence to trump the interests protected by all privileges seems consistent with the paramount goal of protecting the innocent from erroneous conviction. Moreover, this principle would avoid the appearance of unequal treatment. Defendants seeking to introduce evidence protected by a privilege would have the evidence evaluated on its own merits without regard to the interests served by the privilege. Finally, the principle would provide a clear guideline that courts could easily apply.

This principle is rejected partly for pragmatic reasons. In 1980,[43] Professor Louis Michael Seidman pointed out that although the Supreme Court's rhetoric "has frequently focused on the need to re-orient the criminal justice system toward a model designed pri-

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[41] When a rule of this type is invoked, a court must simply decide whether the rule, either in general or in the context of its specific application, will enhance or impede accurate fact-finding. While this inquiry may be difficult, the court in making it is at least able to focus on a single value rather than weighing interests that relate to different values. *See* C. McCormick, *supra* note 1, at 540-48.

[42] *See* Westen, *supra* note 32, at 161-77.

[43] Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 Colum. L. Rev. 436 (1980).

marily to achieve accurate factual determinations of guilt or innocence in individual cases,"[44] the Burger Court "has actually deepened our competing commitment to . . . the pursuit of goals outside the process's guilt-determination function."[45] In its recent decisions, the Rehnquist Court has accentuated this trend.[46] Thus, the principle advocated by Professor Westen, while not inconsistent with the modern Supreme Court decisions interpreting the confrontation and compulsory process clauses, would reflect an ordering of priorities that the present Court is unlikely to adopt.

Moreover, from a normative perspective, the assertion that a defendant has a constitutional right to introduce material evidence protected by any privilege is problematic.[47] Westen's theory is premised on untested empirical assumptions as well as debatable value judgments. Accordingly, this Article does not question the traditional assumption that evidentiary privileges may generally be invoked to exclude relevant evidence offered by the defense. Rather, starting with that assumption, this Article seeks to develop principles that will enable courts to identify those situations in which the conflict between an evidentiary privilege and a defendant's right to introduce evidence must nevertheless be resolved in the defendant's favor.

B. PRIVILEGES THAT TILT THE ADVERSARY BALANCE IN THE GOVERNMENT'S FAVOR

1. *The Fair State-Individual Balance*

One of the fundamental premises of the American system of justice concerns the balance of power between the government and the accused. Under the adversary system, it is essential that courts maintain a fair state-individual balance at criminal trials.[48] The reasons for insisting on this principle relate to distrust of government as well as deep empathy for an individual faced with the threat of a criminal sanction.[49] There is not only a concern that the government should not be allowed to use its superior resources to over-

44 *Id.* at 437.

45 *Id.*

46 *See, e.g.*, Tanner v. United States, 483 U.S. 107, 127 (1987) (justifying decision barring testimony by jury members as to drug and alcohol use by jurors during criminal trial in part on the ground that considering such allegations would "seriously disrupt the finality of the process").

47 *See infra* notes 200-11 and accompanying text.

48 *See, e.g.*, Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (dicta); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

49 *See* Goldstein, *supra* note 48, at 1150.

whelm a criminal defendant,[50] but also a sense that the adversary system should incorporate procedural norms that are not tilted against the defendant.[51]

The fair state-individual balance is a normative concept, not a description of the ordinary state of affairs. Nevertheless, there will undoubtedly be some correlation between the ideal fair state-individual balance and the balance of advantage that has been developed in connection with the modern criminal trial. If, as Professor Westen has suggested, "the modern criminal trial has evolved into an adversary procedure that depends for its accuracy on maintaining a certain balance of advantage between the prosecution and the accused,"[52] then the basic elements of that adversary procedure may establish at least a rough bench mark that defines the appropriate balance between the state and the accused.

Acceptance of this bench mark does not mean that either every procedural innovation that enables the government to obtain more convictions will be unacceptable or every procedure that is presently a part of the adversary procedure will necessarily be acceptable. Because the fair state-individual balance is a normative concept, the focus should be on whether a particular procedure, new or old, tilts the adversary process away from the balance of advantage that is reflected in the concept of a fair adversary model.

In determining whether a new procedural or evidentiary rule improperly tilts the adversary balance in the government's favor, one of the important considerations should be whether the new rule was in some sense designed to favor the government. A procedural change that is designed to favor the government at a criminal trial—a rule lowering the government's burden of proof, for example—is likely to change the adversarial balance empirically because it will in fact enable the government to obtain more convictions. More importantly, a change of this type has symbolic significance. Allowing the government to alter the rules at trial so as to favor itself is especially problematic because if such changes are freely allowed, the government will appear to have an inordinate degree of control over criminal defendants' chances of winning at trial. Thus, if the fair state-individual balance is to have any meaning, procedural innovations of this type should be suspect.

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50 *See* Goldstein, *supra* note 48, at 1150-52.

51 *See generally* Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133 (1982) (comparing a trial to a game and theorizing that a game is neither interesting nor fair unless opposing sides are procedurally equal).

52 Westen, *Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense*, 66 CALIF. L. REV. 935, 957-58 (1978).

To some extent, the same analysis applies to traditional procedural or evidentiary rules favoring the government. Some rules that favor the government are not inconsistent with the fair state-individual balance because they offset some compensating advantage to the defense.[53] On the other hand, a traditional rule that appears to be neutral but, upon examination, is found to favor the government may provide the government with an advantage. Providing the government with a hidden advantage of this type contradicts the norms of the adversary process.

Whether a procedural or evidentiary rule was designed to favor the government is not the only factor to consider in determining whether the rule tilts the adversary balance against the defendant. A rule that was not designed to assist the government may tilt the adversary balance in the government's favor because of the way in which it is applied. Moreover, a rule that is neither designed nor applied to assist the government may operate in a particular context so as to skew the procedures of the adversary process against the defendant.

2. *Government Privileges*

Traditionally, government privileges have been identified as one subcategory of evidentiary privileges.[54] But in what way is a government privilege distinguishable from societal privileges or other privileges?[55] If the focus is on the privilege's source, then nearly every privilege is a government privilege because the legislature or the courts created most of them.[56] Moreover, governmental and societal privileges may not be distinguished on the basis that only the latter benefits society: because the government serves the public at large, a privilege that assists the government will ultimately assist society as well.

In view of the concern for maintaining a fair state-individual balance, a government privilege may be defined as one that is designed to assist the government in performing one of its essential

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53 For example, the author views the advantage that the prosecutor gains from being permitted to make the final closing argument in a criminal case as designed to compensate for the defendant's advantage with respect to the heavy burden of proof placed on the prosecutor.

54 *See, e.g.*, Hill, *supra* note 33, at 1190-94; Westen, *supra* note 32, at 161-66.

55 Professor Westen divides privileges into three categories: government privileges, private privileges, and the privilege against self-incrimination. *See* Westen, *supra* note 32, at 161-77. Other commentators simply distinguish government privileges from all other privileges. *See* Hill, *supra* note 33, at 1190-94; Note, *supra* 19, at 982-83.

56 The most important exception, of course, is the fifth amendment privilege against self-incrimination. U.S. CONST. amend. V.

functions.[57] Based on this definition, a government privilege is different from other privileges not only because the privilege is likely to be invoked by either the prosecutor[58] or some other representative of the government,[59] but also because the government as an entity has a distinct interest in having it invoked. As this Article will show, the invocation of a government privilege to exclude defense evidence poses a greater threat to the fair state-individual balance than the invocation of a non-government, or societal, privilege.

At first blush, this assertion may seem anomalous. A government privilege differs from a societal privilege only in that the former is intended to benefit the government as well as society. The informer's privilege, for example, is intended to benefit the government's interest in law enforcement by protecting the anonymity of informers. But society also has a stake in effective law enforcement. Why should a privilege create greater problems for the adversarial system simply because it is designed to assist the government as an entity as well as society?

In considering this question, an empirical observation is pertinent. A privilege designed to assist the government in performing one of its essential functions is likely to favor the government at criminal trials as an empirical matter because, given the privilege's purpose, the prosecution is far more likely than the defense to invoke it. To illustrate, the military secrets privilege,[60] which has the purpose of protecting national security, will almost always be invoked to exclude evidence sought to be discovered or introduced by a criminal defendant, not evidence sought to be introduced by the prosecution. The newsman's privilege,[61] on the other hand, is apparently equally likely to be invoked on behalf of either the prosecution or the defense. Thus, the former privilege, unlike the latter will

[57] In view of the inevitable disagreement as to the scope of the government's responsibilities, providing a precise definition of the government's essential functions is probably impossible. In general, however, a privilege designed to assist the government in performing one of its essential functions is one that has either a significant purpose or the goal of assisting the government in performing one of its required tasks. Examples of required tasks include law enforcement, conducting foreign policy, protecting national security, and executing federal laws. *See infra* notes 190-93 and accompanying text.

[58] The informer's privilege, for example, is invoked by the prosecutor at or prior to trial. *See, e.g.*, Roviaro v. United States, 353 U.S. 53 (1957).

[59] The national security or military secrets privilege must be invoked by the government official who has authority over the specific information that the defendant is seeking to discover or introduce. *See* United States v. Reynolds, 345 U.S. 1 (1953).

[60] *See, e.g.*, *id.* For further discussion of the military secrets privilege, see *infra* note 91 and accompanying text.

[61] *See, e.g.*, *In re* Farber, 78 N.J. 259, 394 A.2d 330 (1978).

have the overall effect of assisting the prosecution. If this privilege may be freely invoked, the cumulative impact of its application at criminal trials will disadvantage the defense.

This is not intended to suggest that this empirical point should in itself be decisive. An evidentiary rule does not essentially alter the balance of advantage in criminal cases just because its frequent application may lead to more convictions. Similarly, a privilege should not be suspect simply because its invocation at criminal trials will empirically favor the government more often than it does the defense. If the privilege is not designed to favor the government and can be invoked by both the prosecution and defense, we should be willing to let the chips fall where they may.

However, when the government's association with the privilege conjoins with the empirical point, other considerations begin to emerge. First, the government's special stake in the privilege makes one suspect that the government will invoke the privilege in order to further its immediate interest in obtaining an advantage at the criminal trial. When the government invokes the informer's privilege at a criminal trial, it protects the anonymity of government informers, but it simultaneously promotes its interest in winning a specific case. Similarly, if the government invokes the military secrets privilege to exclude material defense evidence, the government will not only promote its interest in protecting national security, but also enhance its chances of winning a particular criminal trial.

The government's special access to information relating to the applicability or need of a privilege[62] gives rise to a concern that the government will manipulate government privileges to its own advantage. When the government invokes the military secrets privilege, for example, a court has difficulty determining whether invocation of the privilege is really necessary to protect a military secret[63] and whether the military secret really needs protection. Similarly, when the prosecutor invokes the informer's privilege at a criminal trial, a court may have difficulty determining whether dis-

62 Even when a government privilege is applicable, the government might have no real need to invoke it. In the case of the informer's privilege, for example, the informer might be dead, his identity might already be known to the defendant, or he might be an undercover police officer about to discontinue undercover work. In any of these cases, the informer's privilege would apply but disclosure of the informer's identity would jeopardize neither the informer's safety nor the interests of law enforcement.

63 When the military secrets privilege is invoked, the judge must determine the applicability of the privilege without examining the specific information that the government claims is privileged. *See* United States v. Nixon, 418 U.S. 683, 710-11 (1974) (dictum); United States v. Reynolds, 345 U.S. 1, 10 (1953). Thus, it will be particularly difficult for a court to determine whether the claim of privilege is well grounded.

closure of the informer's identity will jeopardize either the particular informer involved or law enforcement in general.[64] Thus, the government has considerable control over the extent to which government privileges will be applied to benefit the prosecution at criminal trials.

Moreover, quite aside from the problem of government manipulation, when the government invokes a privilege designed to assist it in performing one of its essential functions, in order to disadvantage the defense at criminal trials, the government is essentially applying the privilege so that it will benefit at the expense of criminal defendants. Requiring criminal defendants to bear the burden of vindicating a privilege that is designed to assist the government as an entity seems contrary to the principle of maintaining a fair state-individual balance. A criminal defendant's rights, in this case her right to introduce evidence at trial, should not vary depending on the government's needs.[65]

Based on this analysis, the free invocation of a privilege designed to assist the government in performing one of its essential functions will improperly tilt the adversary balance in the government's favor, if the free invocation of the privilege has the cumulative effect of disadvantaging the defense.

Of course, no clear line distinguishes privileges that have the purpose of assisting the government in performing one of its essential functions from other privileges. Privileges that are designed to assist law enforcement or to protect national security are paradigm cases—other cases are more difficult.[66] Moreover, when we move

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64 When the informer's privilege is invoked, the cases indicate that the trial judge has discretion to demand that the prosecutor disclose the identity of the informer to the judge or even to produce the informer so that the judge may interrogate her in chambers. *See, e.g.*, United States v. Fixen, 780 F.2d 1434 (9th Cir. 1986); People v. Darden, 34 N.Y.2d 177, 356 N.Y.S.2d 582, 313 N.E.2d 49 (1974), *aff'd* People v. Smith, 59 N.Y.2d 454, 465 N.Y.S.2d 896, 452 N.E.2d 1224 (1983). In practice, however, trial judges do not often exercise this discretion and the few cases that have considered the issue have held that the failure to exercise such discretion is not an abuse of discretion. *See, e.g.*, *Fixen*, 780 F.2d at 1440. Moreover, even if the judge were to question the informer in chambers, she would not often be in a good position to determine whether invocation of the informer's privilege was in fact necessary either to protect the safety of the informer or to promote the interests of law enforcement.

65 If they did, then the government would be provided with a very substantial opportunity to diminish defendants' rights through the simple expedient of creating new legitimate government needs.

66 In *Davis*, for example, the privilege at issue protected the secrecy of juvenile records. Davis v. Alaska, 415 U.S. 308 (1974). The government argued that protecting such records promotes the interest of rehabilitating juvenile offenders. *Davis*, 415 U.S. at 319. While protecting juvenile offenders' privacy clearly promotes a societal interest, rehabilitating juvenile offenders arguably pertains to one of government's essential

away from the paradigm cases, the relationship between the extent to which the privilege assists the government and the probability that it will operate to favor the prosecution as an empirical matter becomes more tenuous. Some privileges that may, to some extent, be designed to assist the government in performing one of its essential functions will not tilt the adversary balance against defendants because they will in fact be invoked to exclude prosecution evidence as often as they are invoked to exclude defense evidence.

Although the ultimate concern is to avoid having privileges operate to tilt the adversary balance in the government's favor, a court might have difficulty determining on a privilege-by-privilege basis whether application of a particular privilege in criminal cases will likely have that effect. There exists a fair correlation between the extent to which a privilege has the purpose of assisting the government in performing one of its essential functions and the likelihood that excluding all evidence protected by that privilege from criminal trials will tilt the adversary balance against criminal defendants. In order to safeguard the fair state-individual balance at criminal trials, some limitation must be imposed upon the prosecution's right to invoke such privileges.[67]

3. The Principle of Evenhandedness

If the concern is to avoid tilting the state-individual balance in the government's favor, some attention must also be given to the actual application of evidentiary privileges. A privilege that does not have the ostensible purpose of assisting the government may still be applied to favor the government. Thus, in addition to ascertaining whether a privilege has the purpose of assisting the government in performing one of its essential functions, a court should also examine whether a privilege is being applied evenhandedly. There may exist some instances in which there is a compelling reason for allowing the government to invoke a privilege to exclude defense evidence even though the defendant would not be allowed to invoke that same privilege to exclude comparable government evidence. In view of the concern for maintaining a fair state-individual balance, however, these instances should be rare.

When a privilege is not applied evenhandedly, the application of the rules at trial, an integral part of the adversary process, plainly disfavors the defendant. In this situation, the tilt toward the govern-

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functions in that it relates to both law enforcement and rehabilitation. For further discussion of this aspect of the *Davis* case, see *infra* note 98.

[67] For an elaboration of this standard of materiality, *see infra* note 74 and accompanying text.

ment is even more obvious than it is in a case in which the government invokes a privilege designed to assist it in performing one of its essential purposes to exclude defense evidence. Barring unusual circumstances, then, a privilege should not be invoked to exclude evidence offered by the defense unless it could also be invoked to exclude comparable evidence offered by the prosecution.

4. The Defendant's Right to Effective Cross-Examination

Under the adversary system, cross-examination is considered the principal means of testing the credibility of an adverse witness.[68] If a government witness testifies and then invokes an evidentiary privilege that will eliminate or drastically reduce cross-examination, the government is permitted to make affirmative use of the witness' testimony without having it subjected to the traditional scrutiny of the adversary process. For example, a prosecution witness testifies that he observed the defendant commit a burglary. The witness then refuses, on the basis of his fifth amendment privilege, to answer all questions asked on cross-examination.[69] Admitting the witness' testimony against the defendant is unfair because the defendant did not have a sufficient opportunity to test the truthfulness of the witness' testimony.

In this instance, the adversary balance would be tilted improperly in the government's favor not because the privilege invoked favors the government, but rather, because the defendant was denied an adequate opportunity to test a government witness' credibility. Indeed, the same problem would arise regardless of why the witness refused to answer questions on cross-examination. The point is that, because of the concern for preserving a fair state-individual balance, the government should not be permitted to use the testimony of a witness when the defendant is deprived of an opportunity to effectively cross-examine that witness. Thus, if a government witness' invocation of an evidentiary privilege deprives the defendant of an opportunity for effective cross-examination,[70] the court should

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[68] *See, e.g.*, 5 WIGMORE, *supra* note 18, § 1367 at § 2 (characterizing cross-examination as the "greatest legal engine ever invented for the discovery of truth").

[69] In fact, the witness would not have a valid fifth amendment privilege in this situation because the testimony given on direct examination would constitute a waiver of the privilege, at least with respect to cross-examination within the scope of his direct testimony. *See* C. MCCORMICK, *supra* note 1, at 323.

[70] Witnesses would only rarely be able to invoke a valid privilege that would deprive the defendant of effective cross-examination. As in the example cited above, the witness' testimony on direct examination would often constitute a waiver of privileges that might otherwise be asserted in response to questions asked on cross-examination. *See supra* note 69 and accompanying text.

either overrule the privilege, thereby requiring the witness to answer the questions posed on cross-examination, or strike the witness' testimony from the case, instructing the jury to ignore it.[71]

C. THE STANDARD OF MATERIALITY

While invoking privileges to exclude defense evidence will sometimes improperly tilt the adversary balance in the government's favor, it does not follow that these privileges may never be invoked to exclude relevant defense evidence. Presumably, the limitation on the privilege's application will only come into effect when the defense evidence to be excluded by the privilege is sufficiently material that its exclusion will improperly tilt the adversary balance in the government's favor. Thus, the requisite standard of materiality may vary depending upon why the invocation of a privilege to exclude defense evidence threatens to tilt the adversary balance improperly in the government's favor.

With respect to government privileges, the critical question is whether the standard of materiality should be relevance or some higher standard. When defense evidence, protected by a privilege that is designed to assist the government in performing one of its essential functions, is relevant but not likely to change the outcome of the criminal trial, invoking the privilege to exclude the evidence promotes a legitimate government interest while only marginally decreasing the chances of an individual criminal defendant. Thus, the exclusion of the evidence does not appear to seriously alter the fair state-individual balance. Accordingly, it might seem logical to hold that the defendant's constitutional right to introduce evidence protected by a government privilege should only include the right to introduce evidence that is reasonably likely to have an effect on the outcome of the criminal trial.[72]

The problem with this type of standard stems from the difficulty in giving content to the phrase "reasonably likely to have an effect on the outcome." In applying this standard, the focus should be on whether the evidence in question will so significantly alter the nature of the case presented to the jury that the jury's verdict might change. Determining whether defense evidence meets this standard of materiality will be particularly difficult because a judge will generally not be able to determine whether the evidence might have an

[71] In practice, striking the witness' testimony and instructing the jury to ignore it might not often suffice as a remedy. In that case, the defendant would also be entitled to a mistrial. *See* C. McCormick, *supra* note 1, at 12.

[72] The Supreme Court has applied this standard of materiality in other contexts. *See infra* notes 74-75 and accompanying text.

impact on the outcome unless she is aware of all the other evidence that both prosecutor and defendant will introduce. Defense evidence that seems relatively insignificant may become more significant when considered together with the other defense evidence presented. Moreover, even relatively insignificant defense evidence could turn the balance in a close case.

In view of the exceptional difficulties of applying this kind of standard, a rule that the defendant has a constitutional right to introduce all relevant evidence protected by a government privilege might seem more appropriate. In contrast to the more stringent standard of materiality set out above, the relevance standard is familiar[73] and may be easily applied by trial judges.

In this particular context, however, adopting a relevance standard would appear to be inconsistent with Supreme Court authority in an analogous area of law. In dealing with the defendant's constitutional right to receive exculpatory evidence in the possession of the government, the Court held in *Bagley v. United States*[74] that the government has an obligation to disclose such evidence "only if there is a reasonable probability" that disclosure of the evidence would affect the outcome at trial.[75] The government's interest in preventing the introduction or discovery of evidence protected by a government privilege would seem to be at least as strong as its interest in not disclosing potentially exculpatory evidence that is not protected by a privilege.[76] Accordingly, as a matter of federal constitutional law,[77] the standard of materiality applied in *Bagley* should also apply when the defendant seeks to introduce evidence

[73] *See, e.g.*, FED. R. EVID. 401. *See generally* C. MCCORMICK, *supra* note 1, at 540-48 (describing the basic standard of relevancy).

[74] 473 U.S. 667 (1985).

[75] *Id.* at 682 (dictum). In its statement of the test, the Court focused on whether the evidence "would have" affected the outcome at trial because the prosecutor failed to disclose exculpatory evidence to the defense. *Id.* Trial judges must apply the test prior to conviction, however, so they must necessarily focus on whether there exists a "reasonable probability" that disclosure of the evidence would affect the outcome at trial. In *Bagley*, the Court added that a " 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

[76] When a privilege is involved, the government clearly has a legitimate reason for opposing the disclosure or introduction of the evidence. On the other hand, when the government's obligation to disclose exculpatory evidence is involved, the government's only interest in non-disclosure relates to maintaining its adversary position. *See* Babcock, *supra* note 51, at 1136-63.

[77] Under a state constitution, a state court could, of course, impose a lower standard of materiality. *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (arguing that state constitutions should provide greater protections than the federal Bill of Rights). In view of the difficulties associated with applying the *Bagley* standard, the relevance standard would be an appropriate standard

protected by a privilege that is designed to assist the government in performing one of its essential functions.

When the principle of evenhandedness is involved, the standard of materiality should be less stringent. Under this principle, the government will not ordinarily be allowed to invoke a privilege to exclude defense evidence unless the defendant would be allowed to invoke the same privilege to exclude comparable evidence offered by the prosecution. Thus, when a court determines that invoking a privilege to exclude defense evidence violates the principle of evenhandedness, the court should simply ignore the privilege. The court would then admit relevant defense evidence protected by this privilege unless excluded by some other evidentiary rule, such as the rule that the evidence's potential for unfair prejudice outweighs its probative value.[78]

When the issue involves defendant's right to effective cross-examination, the appropriate standard of materiality depends upon the meaning of effective cross-examination. Arguably, cross-examination will not be truly effective unless the jury is exposed to all evidence that might have a bearing on the witness' credibility. Based on this line of analysis, the standard of materiality applied in this situation would be the same as that applied when evidence is excluded by a privilege that is designed to assist the government in performing one of its essential functions. If the government witness' testimony will be introduced, the defendant must have the right to introduce on cross-examination any evidence that is reasonably likely to have an effect on the outcome of the trial.[79]

On the other hand, the reason for holding that the defendant has a right to effectively cross-examine a government witness relates to the fundamental concern that the government should not be able to introduce testimony that has not been tested by the safeguards of the adversary process. A witness' credibility may be thoroughly tested on cross-examination even though the defendant is not able to introduce all evidence that would likely have an impact on the outcome.

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for a state court to adopt as a matter of state constitutional law. *See supra* note 73 and accompanying text.

[78] *See* C. McCormick, *supra* note 1, at 544-48.

[79] Arguably, the defendant's right to introduce evidence on cross-examination should extend even further. In order to effectively cross-examine the witness, the defendant could claim the right to introduce any evidence reasonably likely to have an effect on the witness' credibility. If the witness' testimony was so insignificant that it could not affect the trial's outcome, however, it would seem that excluding evidence impeaching the witness' credibility could not possibly tilt the adversary balance in the government's favor.

Thus, when a defendant asserts the right to introduce evidence protected by a privilege in order to preserve her right to effective cross-examination, the standard of materiality should be high. In this situation, the defendant should not be allowed to introduce the evidence, or be provided with the alternative remedy of having the witness' testimony struck, unless she can show that, in the absence of the evidence, the fact finder would not have an adequate basis for evaluating the witness' credibility. This standard will not be met unless the privilege prevents the cross-examiner from presenting evidence that not only has an important bearing on the witness' credibility, but also is of the type that would be expected in view of the norms of the adversary process.[80]

D. SUMMARY

Based on the foregoing analysis, the three guiding principles relating to the defendant's constitutional right to introduce evidence protected by an evidentiary privilege may be stated as follows: 1) the defendant should have a constitutional right to introduce evidence that is protected by a privilege designed to assist the government in performing one of its essential functions when the evidence is reasonably likely to affect the outcome at trial; 2) barring extraordinary circumstances, the defendant should have a constitutional right to introduce evidence that is protected by a privilege when the privilege would not exclude comparable evidence offered by the government; and 3) no privilege should be invoked to deprive the defendant of an opportunity to effectively cross-examine a government witness, where effective cross-examination is defined as the type of cross-examination that is expected in view of the norms of the adversary process.

If these principles are accepted, they will also, of course, have an important bearing on the scope of the defendant's right to discover evidence protected by an evidentiary privilege.[81]

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[80] Under the adversary procedure, the party's opportunity to cross-examine a witness in certain areas, such as memory, character, and bias, provides the jury with an adequate basis for evaluating the witness' credibility. If the defendant's cross-examination is curtailed so that one or more of these areas may not be adequately explored, then, in relation to the norms of the adversary process, the fact finder's expectations relating to cross-examination have been defeated. On the other hand, if the defendant explores all of the areas that are normally viewed as essential to testing the credibility of a witness, then the exclusion of additional evidence that might bear importantly on the witness' credibility will not defeat the fact finder's expectations relating to cross-examination because cross-examination will have fulfilled its function of allowing the jury an adequate basis for evaluating the witness' credibility.

[81] Defining the precise standard to be applied when the defendant seeks to discover evidence protected by a privilege exceeds the scope of this Article. In view of the

III. The Supreme Court Cases

A. Government Privileges

The Supreme Court began to establish the basis for the defendant's constitutional right to present evidence protected by an evidentiary privilege in a case decided in the 1950s, nearly a decade before the decisions recognizing a defendant's right to introduce evidence under the compulsory process and confrontation clauses. In *Roviaro v. United States*,[82] the defendant was charged with the illegal sale and transportation of heroin. Although the defendant was charged with selling the heroin to John Doe, a confidential informer,[83] the prosecution at trial relied entirely on the testimony of investigative officers.[84]

The defendant requested that the prosecution disclose the identity of the confidential informer.[85] The prosecution refused on the basis of the government's privilege to withhold the identity of persons who furnish information to law enforcement officers.[86] Although not disputing that the informer's privilege promoted an important public policy, the Court concluded that on the facts presented, "the privilege must give way."[87]

In requiring disclosure, the Court did not assess the strength of the government's interest in non-disclosure, but focused instead exclusively on the potential value of the informer's testimony to the defendant.[88] This analysis indicates that once the defendant makes

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Supreme Court's decisions relating to the defendant's right to discover such evidence, however, it seems probable that, if the guiding principles adumbrated above are accepted, the defendant will generally be allowed to have an in camera inspection of evidence protected by a privilege upon a showing that there is a reasonable basis for believing that the evidence may be sufficiently material to mandate a finding that the defendant has a constitutional right to admit it under one of the three principles. *See supra* note 17.

[82] 353 U.S. 53 (1957).

[83] *Roviaro*, 353 U.S. at 55.

[84] One of the officers, Bryson, testified that he hid in the trunk of the informer's Cadillac. *Id.* at 56. Other officers testified that they followed the Cadillac and observed it drive to a location where the defendant entered it and took a seat beside the informer. *Id.* at 57. When the Cadillac drove to a new location, one of the officers observed the defendant leave the car, walk a few feet to a nearby tree, pick up a small package, return to the car, make a motion as if depositing the package in the car, wave to the informer, and walk away. *Id.* Subsequent tests determined that the package found in the car contained opium. *Id.* at 57-58.

[85] *Id.* at 56.

[86] *Id.* at 55.

[87] *Id.* at 61.

[88] "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Id.* at 60-61.

a sufficient showing that the informer's testimony will likely assist the defense, the defendant's interest in presenting material defense testimony will prevail over the government's interest in non-disclosure.

The Court did not explain why the informer's privilege could not be invoked to bar the defendant from obtaining material defense evidence. The informer's privilege was designed to promote the important social policy of safeguarding those who inform the government as to the wrongdoing of others.[89] The Court certainly had no basis for concluding that this policy would not be advanced in *Roviaro*; moreover, it did not assert that the defendant's interest in discovering and introducing material evidence in his own defense would outwiegh the government's interest in advancing this policy.

The most reasonable explanation for the Court's constitutionally based holding[90] is that the Court considered it unfair for the government to be able to prevent the defendant from obtaining material evidence by invoking a privilege that was especially designed to make it easier for the government to obtain convictions. By protecting the identity of those who inform on others, the informer's privilege encourages informers and thereby makes it easier for the government to obtain evidence for criminal prosecutions. Thus, the Court's holding is consistent with a judgment that an evidentiary privilege designed to assist the government in obtaining convictions may not be applied to tilt the advantage at trial in the government's favor.

Roviaro could be limited to situations in which the privilege is designed to assist law enforcement. Dicta in other Supreme Court cases, however, suggest that privileges that are designed to assist the government in other respects will be subject to the same limitation. In the 1953 decision of *Reynolds v. United States*,[91] the Court, in reference to the military secrets privilege, stated that "it is unconscionable to allow [the government] to undertake prosecution and then invoke its governmental privilege to deprive the accused of

89 The Court said,

> [t]he purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Id. at 59.

90 Although *Roviaro* was decided on the basis of the Court's supervisory power over the federal courts, the Court later recognized that the principle established in that case is constitutionally based. *See* United States v. Valenzuela-Bernal, 458 U.S. 858, 870 (1982).

91 345 U.S. 1 (1953).

anything which might be material to his defense."[92]

More recently, in *United States v. Valenzuela-Bernal*,[93] the Court stated that the rule articulated in *Roviaro* would apply when potential defense witnesses were deported by the government pursuant to its faithful execution of the congressional policy of promptly deporting illegal aliens.[94] From the defendant's perspective, the situation in *Valenzuela-Bernal* is functionally equivalent to one in which the government invokes a privilege designed to assist it in performing one of its essential functions to bar a witness from testifying. The Court's treatment of the issue presented in *Valenzuela-Bernal* as analogous to the one presented in *Roviaro*[95] indicated that, at least for the purpose of deciding the issue before it, the Court was willing to adopt this perspective.[96]

Thus, the Court's statements in *Reynolds* and *Valenzuela-Bernal* indicate that *Roviaro*'s holding has been extended beyond the situation in which the privilege has the purpose of assisting law enforcement. These cases are consistent with the principle that a defendant will have a constitutional right to introduce material evidence—that is evidence reasonably likely to effect the outcome at trial[97]—protected by any privilege that has the purpose of assisting the govern-

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92 *Id.* at 12 (dictum).

93 458 U.S. 858 (1982).

94 *Id.* at 870 (dictum).

95 *Id.*

96 In a later case, however, the Court intimated that the situation in *Valenzuela-Bernal* could also be viewed as analogous to one in which the government lost or destroyed evidence in good faith. *See* Arizona v. Youngblood, 458 U.S. 858 (1988), *reh'g denied*, 109 S. Ct. 885 (1989) (citing *Valenzuela-Bernal* as support for the principle that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law").

97 In *Roviaro*, the Court at one point intimated that evidence protected by the informer's privilege would have to be disclosed to the defendant upon a showing that such evidence "may be relevant and helpful to the accused's defense." Roviaro v. United States, 353 U.S. 53, 62 (1957). In its analysis of the facts, however, the Court emphasized that under the circumstances the informer's testimony was "highly relevant," thus suggesting that the standard of materiality applied in that case might be higher than a standard of relevance. *Id.* at 63.

In *Valenzuela-Bernal*, the Court stated that in order to establish a constitutional claim the defendant would have to make "some showing that the evidence lost would be both material and favorable to the defense." 458 U.S. at 873. The context of the Court's discussion, including its reference to *Roviaro* as a case in which the evidence sought by the defense was "highly relevant," suggests that it used the term "material" to establish a standard higher than relevance. *Id.* at 870. This is consistent with the Court's later decision in *Bagley* in which material evidence was defined as evidence "reasonably likely" to have an affect on the outcome. *See supra* note 75 and accompanying text. *Cf.* Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987) (applying the same or similar standard of materiality when defendant seeks to discover evidence privileged by statute protecting confidentiality of Children and Youth Services records).

ment in performing one of its essential functions.[98]

B. THE PRINCIPLE OF EVENHANDEDNESS

The principle of evenhandedness finds support in Supreme Court cases as well as other sources. In *Washington v. Texas*,[99] the first modern case to hold that a defendant has a constitutional right to introduce evidence barred by an evidentiary rule,[100] the Court concluded that exclusion of vital defense evidence by an arbitrary rule of evidence violates the compulsory process clause.[101] In condemning a Texas rule of incompetency as arbitrary, the Court emphasized that the Texas rule did not apply to government evidence in the same way as it did to defense evidence.[102] In his concurring

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98 Arguably, the *Davis* case also provides support for the principle that a privilege that assists the government in performing one of its essential functions will be afforded less respect than other privileges. Davis v. Alaska, 415 U.S. 308 (1974). In *Davis*, a state statute precluded the defendant from showing that the chief prosecution witness was on probation at the time he testified against the defendant. *Id.* at 310. *See infra* notes 125-27 and accompanying text. In one part of its opinion, the Court referred to the prosecution's argument that the Alaska statute was designed to serve an important governmental interest in that "exposure of a juvenile's record of delinquency would likely cause impairment of the rehabilitative goals of the juvenile corrective procedures." *Davis*, 415 U.S. at 319. In apparent response to this argument, the Court said, "[T]he State cannot, consistent with the right of confrontation, require the [defendant] to bear the full burden of vindicating the State's interest in the secrecy of juvenile records." *Id.* at 320.

At least one commentator has read this language as reflecting the Court's reluctance to allow a "government privilege" to be applied in a way that will materially assist the prosecution at a criminal trial. *See* Note, *supra* note 19, at 982. The problem with this reading of *Davis* is that the privilege enacted by the Alaska statute was designed primarily to protect juvenile offenders' privacy, not to assist the government in performing one of its essential functions. *Davis*, 415 U.S. at 319. Based on the Court's language referred to above, *Davis* could nevertheless be read as a broad application of the principle that any privilege that is designed to assist the government may not be invoked to exclude material defense evidence. However, the principle that a defendant may not be deprived of the opportunity to effectively cross-examine a government witness provides a more appropriate explanation for the result in *Davis*. *See infra* notes 128-44 and accompanying text.

99 388 U.S. 14 (1967).

100 In *Washington*, relevant defense evidence was excluded pursuant to a rule of incompetency. *Washington*, 388 U.S. at 16-17. Texas statutes provided that persons convicted of a crime could not testify on behalf of other defendants charged with the same crime, although there was no bar to their testifying for the government. *Id.* Applying this rule, the Texas courts held that the defendant's alleged accomplice would not be permitted to testify that he alone was responsible for shooting the victim. *Id.* at 16.

101 *Id.* at 22.

102 *Id.* at 22-23. The Court said,

> The absurdity of the rule is amply demonstrated by the exceptions that have been made to it. For example, the accused accomplice may be called by the prosecution to testify against the defendant. Common sense would suggest that he often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing.

Id. at 22.

opinion, Justice Harlan specifically stated that he would make this discriminatory aspect of the statute the sole basis of his decision.[103]

The same concern with evenhandedness appears in *Pennsylvania v. Ritchie*.[104] In *Ritchie*, the defendant was charged with the rape of his thirteen year old daughter.[105] The victim claimed that her father had sexually assaulted her two or three times per week over a period of years.[106] The girl reported the incidents to the police, and the matter was then referred to the CYS, a state agency charged with investigating the suspected mistreatment and neglect of children.[107] A state statute provided that all CYS records must remain confidential subject to specified exceptions,[108] including one authorizing disclosure to a "court of competent jurisdiction pursuant to a court order.' "[109]

Prior to trial, the defendant sought to discover CYS records relating to his daughter.[110] Invoking the state statute, the prosecutor claimed that the records were privileged.[111] The trial judge upheld the claim of privilege.[112] The Supreme Court held that under the due process clause the defendant had the right to have the CYS file reviewed by the trial court to determine whether it contained "information that probably would have changed the outcome of his trial."[113] The predicate for this conclusion was that "the Pennsylvania Legislature contemplated some use of CYS records in judicial proceedings."[114] In a footnote, the Court reserved decision as to whether the result would have been different if the statute had "protected the CYS files from disclosure to *anyone*, including law-enforcement and judicial personnel."[115]

The Court's emphasis upon the fact that the legislature contemplated some use of the CYS records in judicial proceedings probably relates to a concern for evenhandedness. Under the Pennsylvania statute, the trial judge could obtain access to the CYS records pur-

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103 *Id.* at 24 (Harlan, J., concurring).

104 480 U.S. 39 (1986).

105 *Ritchie*, 480 U.S. at 43.

106 *Id.*

107 *Id.*

108 The Court noted that "[a]t the time of trial the statute only provided five exceptions to the general rule of confidentiality, including the exception for court-ordered disclosure." *Id.* at 44 n.2.

109 *Id.* (quoting PA. STAT. ANN. tit. 11, § 2215(a)(5) (Purdon Supp. 1986)).

110 *Id.* at 43.

111 *Id.*

112 *Id.*

113 *Id.* at 58.

114 *Id.*

115 *Id.* at 57 n.14 (emphasis in original).

suant to a court order.[116] Thus, if the prosecutor could persuade the judge to issue a court order, the records could be disclosed to the judge and, presumably, relevant portions of the records could be introduced into evidence, thereby enhancing the government's case. The Court's assertion that it was basing its decision on this aspect of the statute probably demonstrates that it was unwilling to allow a privilege to bar the defendant from presenting material evidence when it would not necessarily preclude the government from doing so.

The principle that an evidentiary rule should be applied evenhandedly also draws support from other sources. Professor Westen's account of the historical antecedents of the compulsory process clause indicates that one of the underlying concerns that led to the enactment of that clause was that the defendant should have the same right to present evidence as the prosecution.[117] In light of this history, interpreting the defendant's right to compulsory process as the right not only to subpoena defense witnesses but also to introduce evidence on the same terms as the government seems reasonable. Under this interpretation, a state cannot nullify the effect of the compulsory process clause by first allowing a defendant to subpoena witnesses and then barring their testimony by rules of evidence that apply only to defense witnesses.

Moreover, in dealing with the due process clause's application to rules of discovery, the Court has explicitly recognized the principle of evenhandedness. In *Wardius v. Oregon*,[118] a unanimous Court struck down a state alibi-notice provision providing that notice of a defense alibi be disclosed to the prosecution without providing for reciprocal discovery to the defense.[119] The Court held that "discovery must be a two way street."[120] It stated that, in the absence of a compelling governmental interest,[121] the government may not apply one discovery rule for the prosecution and a more stringent one for the defense.[122]

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116 PA. STAT. ANN. tit. 11, § 2215(a)(5) (Purdon Supp. 1986)

117 *See* Westen, *supra* note 32, at 78-90.

118 412 U.S. 470 (1973).

119 *Id.* at 472 n.3 (citing OR. REV. STAT. § 135.875 (1968)).

120 *Id.* at 475.

121 The Court held that "in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street." *Id.* Moreover, the court noted that "the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor." *Id.* at n.9.

122 The Court said, "[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.

As previously indicated,[123] rules of discovery and admissibility are inextricably connected because a primary objective of discovery rules is to enable the parties to obtain evidence that they might introduce at trial. Thus, it would be anomalous to hold that a state must apply its discovery rules evenhandedly but may apply its evidentiary rules so as to favor the prosecution. If the defendant is entitled to an equal opportunity to discover evidence, she should also be entitled to an equal opportunity to introduce it at trial.

Thus, the principle stated and applied in *Wardius*, as well as the Court's holdings in *Washington* and *Ritchie* and the historical antecedents of the compulsory process clause, provide considerable support for the principle of evenhandedness. In view of the caveat expressed in *Wardius*,[124] that principle could be restated as follows: unless the government can establish an extraordinary justification, an evidentiary privilege may not be applied to either exclude evidence offered by a criminal defendant or deny access to evidence sought by a criminal defendant unless the rule would also apply to exclude or deny access to comparable evidence offered or sought by the prosecution.

C. THE DEFENDANT'S RIGHT TO EFFECTIVE CROSS-EXAMINATION

The Court's decision in *Davis v. Alaska*[125] provides considerable support for the principle that no privilege may be invoked to deprive a defendant of the opportunity to effectively cross-examine a government witness.[126] The issue in *Davis* concerned whether the defendant, charged with burglary, could cross-examine Richard Green, the principal witness against him, as to his juvenile record for the purpose of showing the witness' bias.[127] Applying a state statute designed to protect juvenile offenders' privacy, the Alaska courts held that the defense would not be permitted to cross-examine Green as to his juvenile record.[128]

The Court reversed on the ground that application of the

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[123] *See supra* note 17 and accompanying text.

[124] *See supra* note 121 and accompanying text.

[125] 415 U.S. 308 (1974).

[126] *See* Hill, *supra* note 33, at 1178.

[127] Green testified that he saw the defendant at the scene of the burglary with something like a crowbar in his hand. *Davis*, 415 U.S. at 310. The defense sought to bring out on cross-examination that Green was on probation after having been adjudicated a delinquent for burglarizing two cabins. *Id.* at 311. The defense claimed that this impeachment evidence was especially important because it related to Green's bias, showing that a possible motive for Green's accusation of the defendant was to shift suspicion from himself. *Id.*

[128] *Id.*

Alaska statute to the facts of this case violated the confrontation clause.[129] Near the end of its opinion, the Court explicitly stated that the defendant was "denied the right of effective cross-examination,"[130] a denial which it characterized as a " 'constitutional error of the first magnitude . . . .' "[131] While the *Davis* decision also has language that is subject to other interpretations,[132] this language certainly suggests that, once the prosecution introduces the testimony of a witness, it will not then be permitted to invoke any privilege that will deprive the defendant of an opportunity to effectively cross-examine that witness.

Moreover, this reading of Davis is consistent with other authority. In both *Smith v. Illinois*[133] and *Olden v. Kentucky*,[134] the Court held that under the confrontation clause a criminal defendant must be afforded the right to conduct effective cross-examination.[135] In *Smith*, this right was violated when the defendant was denied the opportunity to cross-examine an important government witness as to his name and address.[136] In *Olden*, it was abridged when the defendant in a rape case was not allowed to cross-examine the victim as to the identity of the person she lived with at the time of trial.[137]

Although neither case involved a situation in which the witness refused to answer the questions on the basis of an evidentiary privilege,[138] in each case the Court's analysis suggested that the witness' basis for refusing to answer might not have affected the result. In *Smith*, the Court simply emphasized that under the confrontation

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[129] *Id.* at 315.

[130] *Id.* at 318.

[131] *Id.* (quoting Brookhart v. Janis, 384 U.S. 1, 3 (1966) (quoting Smith v. Illinois, 390 U.S. 129, 131 (1968))).

[132] *See supra* note 98 and *infra* notes 210-14 and accompanying text.

[133] 390 U.S. 129 (1968).

[134] 109 S. Ct. 480 (1988).

[135] *See Olden*, 109 S. Ct. at 481; *Smith*, 390 U.S. at 131.

[136] *Smith*, 390 U.S. at 131. The Court concluded that the defendant in *Smith* was deprived of an opportunity for effective cross-examination because "when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives." *Id.* (citing Pointer v. Texas, 380 U.S. 400, 404 (1964)).

[137] The defendant claimed that the prosecutor's motive for charging him with rape was to protect her relationship with Russell, a black man with whom she was having a relationship at the time that the alleged rape occurred. *Olden*, 109 S. Ct. at 482. The defendant wanted to show that the prosecutor was living with Russell at the time of trial in order to show the depth of her commitment to that relationship. *Id.*

[138] In *Smith*, the prosecutor did not state any specific ground for his objection to the defense's cross-examination. *See Smith*, 390 U.S. at 131 n.6. In *Olden*, the state court sustained the prosecutor's objection to cross-examine Russell and the prosecutrix's living arrangements on the ground that "its probative value was outweighed by its possibility for prejudice." *Olden*, 109 S. Ct. at 482.

clause the defendant must be afforded the right effectively to cross-examine the witnesses against him.[139] In *Olden*, it stated that the limitation imposed on the defendant's right to conduct effective cross-examination "was beyond reason."[140] The Court did not consider in either case the reason for limiting the scope of the defendant's cross-examination.[141] Thus, the analyses in these cases are at least consistent with the *Davis* principle: if the invocation of an evidentiary privilege deprives the defendant of an opportunity for effective cross-examination, either the privilege must be overruled or the witness' testimony on behalf of the government must be struck.

Lower court decisions lend further support to this principle.[142] Circuit court cases have stated that when a government witness refuses to respond to cross-examination on the basis of a proper invocation of his fifth amendment privilege, "all or part of that witness' testimony must be stricken if invocation of the privilege blocks inquiry into matters which are 'direct' and are not merely collateral."[143] The dicta of these cases not only support the principle that no privilege may be invoked to deprive the defendant of an opportunity to effectively cross-examine a government witness, but also provide some indication of how that principle might be applied in at least one specific situation.[144]

IV. Applying the Principles to Decide Evidentiary Issues

The principles this Article has developed should provide some

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139 *Smith*, 390 U.S. at 131.

140 *Olden*, 109 S. Ct. at 483.

141 The *Olden* Court's statement that the limitation imposed on cross-examination was "beyond reason," could be interpreted to mean that the scope of the defendant's right to effective cross-examination will vary depending on the strength of the government's justification for restricting it. *See supra* note 140 and accompanying text. Thus, the limitation in *Olden* was "beyond reason" because the state's justification for imposing it was relatively insignificant. If this reading of *Olden*'s terse and somewhat cryptic per curiam opinion is correct, the scope of the defendant's right to effective cross-examination will vary depending on the circumstances. But even if this is so, the defendant may still have a fundamental right to effective cross-examination that cannot be abridged under any circumstances.

142 *See infra* note 143 and accompanying text.

143 United States v. Seifert, 648 F.2d 557, 561 (9th Cir. 1980) (citing United States v. Williams, 620 F.2d 697, 702 (9th Cir. 1980)). For cases applying this rule, *see, e.g.*, United States v. Martino, 648 F.2d 367, 389 (5th Cir. 1981), *cert. denied*, Russello v. United States, 456 U.S. 943 (1982); United States v. Brierly, 501 F.2d 1024, 1027 (8th Cir. 1974), *cert. denied*, 419 U.S. 1052 (1974). *See* C. McCormick, *supra* note 1, at 347 n.17.

144 The distinction drawn between matters that are "direct" and those that are merely "collateral" suggests that restrictions that block inquiry into matters that would routinely be examined on cross-examination will not be permitted. For an elaboration of this distinction, see C. McCormick, *supra* note 1, at 347.

assistance to courts confronted with specific situations in which defendants seek to discover or introduce evidence protected by a privilege. The following part will show how the principles might be used to structure a court's analysis of hypothetical cases in which a defendant seeks to introduce evidence protected by three different evidentiary privileges.

A. THE DEFENDANT'S RIGHT TO COMPELLED IMMUNITY FOR DEFENSE WITNESSES WHO INVOKE THE FIFTH AMENDMENT PRIVILEGE

A defendant's interest in presenting relevant evidence clashes with a witness' fifth amendment privilege quite frequently.[145] When the conflict occurs, the defendant will claim that the witness should be granted use-immunity so that he will no longer be able to invoke the fifth amendment privilege. Hypothetical one sets out a typical case.

Hypothetical One

Defendant and Fowler are both indicted for murder. Prior to trial, Fowler stated to the police that he and the defendant had been involved in an altercation with the victim but the defendant left the scene before Fowler shot the victim in self-defense.[146] The prosecution is trying the defendant first. The defendant calls Fowler as a witness but Fowler invokes his fifth amendment privilege. The defendant requests that Fowler be granted use-immunity.

The majority of lower courts considering this type of situation have held that the defendant would have no right to have either the prosecutor or the court immunize the testimony of a witness under indictment.[147] The leading case, *United States v. Turkish*,[148] laid down the rule that "trial judges should summarily reject claims for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution."[149] Under this rule, the defendant would obviously not be able to obtain a

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145 *See, e.g.*, United States v. Pennell, 737 F.2d 521, 526-27 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985); Government of Virgin Islands v. Smith, 615 F.2d 964, 969 (3d Cir. 1980); United States v. Herman, 589 F.2d 1191, 1200 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979); Natali, *supra* note 16, at 1521-28.

146 This hypothetical is suggested by the facts in Washington v. Texas, 388 U.S. 14 (1967).

147 *See, e.g.*, United States v. Todaro, 744 F.2d 5, 9 (2d Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985); Grochulski v. Henderson, 637 F.2d 50, 52 (2d Cir. 1980), *cert. denied*, 450 U.S. 927 (1981); United States v. Horwitz, 622 F.2d 1101, 1105 (2d Cir. 1980), *cert. denied*, 449 U.S. 1076 (1981).

148 623 F.2d 769 (2d Cir. 1980).

149 *Id.* at 778.

grant of use-immunity for Fowler because of Fowler's indictment as a co-defendant.

Following the Third Circuit's decision in *Gov't of Virgin Islands v. Smith*,[150] some courts might hold that in limited circumstances the defendant would have a right either to have Fowler granted immunity, or at least to require the prosecutor to choose between granting the witness immunity and dismissing prosecution.[151] However, the defendant would have to show that, in refusing to grant Fowler immunity, the prosecutor was deliberately intending to disrupt the fact-finding process,[152] or that once immunized, Fowler could testify to vital exculpatory evidence and the government had no strong interest in withholding use-immunity.[153] But even under the latter, more liberal prong of the *Smith* test, defendants have rarely been able to obtain a grant of immunity for a defense witness.[154]

Under the principles developed in this Article, the focus in the hypothetical would be on whether the evidentiary privilege invoked by the witness in some sense favors the government. The fifth amendment privilege does not have the purpose of assisting the government; rather, the privilege is designed to protect the person who asserts it. Moreover, because the defense rather than the prosecution is seeking to introduce Fowler's testimony, the privilege is not being invoked to deprive the defendant of an opportunity to effectively cross-examine a government witness. Thus, the first and third guiding principles relating to a defendant's right to introduce evidence protected by an evidentiary privilege are not applicable in this situation.

The defendant does have an argument based on the principle of evenhandedness. If the prosecutor called Fowler as a witness at the defendant's trial and Fowler invoked his fifth amendment privilege, the prosecutor would be able to grant Fowler use-immunity so

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150 615 F.2d 964 (3d Cir. 1980).

151 *Id.* at 974.

152 *Id.* at 969.

153 *Id.* at 974.

154 In cases dealing with this issue, courts have generally found that the defendant failed to meet the second prong of the *Smith* test by failing to demonstrate that the proffered testimony constituted vital exculpatory evidence. *See, e.g.*, United States v. Tindle, 808 F.2d 319, 325-26 (4th Cir. 1986); United States v. Bazzano, 712 F.2d 826, 840 (3d Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984); United States v. Lowell, 649 F.2d 950, 965 (3d Cir. 1981). Aside from the *Smith* case itself, only one other court remanded for an evidentiary hearing to determine whether immunity should be granted to a defense witness under either prong of the *Smith* test. *See* United States v. Lord, 711 F.2d 887, 891 (9th Cir. 1983) (remanding for an "evidentiary hearing on whether the prosecutor intentionally distorted the fact-finding process by deliberately causing [the defense witness] to invoke his fifth amendment privilege").

that he would no longer be able to invoke the privilege.[155] Under current law, this option is not available to the defendant. Thus, in this hypothetical, the discretion to negate the fifth amendment privilege by immunizing the witness who claims it is available to the prosecution but not the defense.

Applying the principle of evenhandedness to this case is difficult. Given the different situations of the defendant and the prosecution, it would be unfair to hold that a defendant has the same right to obtain immunity for a defense witness as the prosecutor does to grant immunity to a government witness. In fact, prosecutors grant immunity to government witnesses sparingly because "washing a witness in an immunity bath"[156] often makes it much more difficult to prosecute the witness.[157] Defendants, on the other hand, have everything to gain and nothing to lose by having the court grant immunity to defense witnesses.[158]

Although the defendant should not be afforded the same opportunity to present immunized testimony as the prosecutor, under the principle of evenhandedness he should be allowed to have the testimony of a defense witness immunized if it appears that the prosecutor would have exercised her discretion to immunize a comparable witness testifying for the prosecution. Of course, it is very difficult for a court to apply this standard. There are no clear guidelines as to when the prosecutor will immunize a government witness. Moreover, even if there was, a court would not be in a good position to apply them.

In general, a prosecutor will immunize a government witness who claims the fifth amendment privilege when she believes that the benefits of the increased possibility of convicting the defendant that result from the witness' testimony outweigh the detriments of the increased difficulty in prosecuting the witness that result from the grant of use-immunity. But in making this judgment, the prosecutor must weigh intangibles, such as: the likelihood of convicting the defendant without the witness' testimony; the importance of convicting the defendant; the likelihood that the witness will be prosecuted;[159] and the extent to which granting immunity to the witness will increase the difficulty of convicting him.

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155 *See* Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972); Kastigar v. United States, 406 U.S. 441 (1972), *reh'g denied*, 408 U.S. 931 (1972).

156 Note, *supra* note 19, at 981.

157 *See* Flanagan, *Compelled Immunity for Defense Witnesses: Hidden Costs and Questions*, 56 NOTRE DAME L. REV. 447 (1981).

158 *Id.* at 456-57.

159 Apparently, most witnesses immunized by the prosecution are not later prosecuted. *Id.* at 461-62.

If a court were to apply a comparable standard in a case in which the defendant seeks the immunization of a defense witness, the appropriate standard would presumably be whether the value of the immunized testimony to the defendant's case would outweigh the detriment to the prosecution of the increased difficulty in prosecuting the witness as a result of the grant of use-immunity. In making this judgment, the court would have to weigh the same type of intangibles as those iterated above. Moreover, the difficulty of making the judgment would be compounded by the fact that the interests weighed are not strictly comparable. Instead of merely weighing interests relating to law enforcement, the court would also have to make a value judgment concerning whether the benefit of introducing evidence favorable to the defense outweighs the detriments to law enforcement resulting from the witness' immunization.

Courts are ill-equipped to make judgments of this sort because they will know less than the prosecutor about either the needs and priorities of law enforcement or the facts relating to the specific case under consideration. For this reason, some courts[160] and commentators[161] have argued that courts should not become involved in judgments as to whether defense witnesses invoking the fifth amendment privilege should be granted use-immunity, and, therefore, defendants should generally have no right to have defense witnesses granted immunity.[162]

This solution is unsatisfactory, however. If the principle of evenhandedness is accepted, we cannot abandon the effort to ensure that an evidentiary privilege will apply in the same way to both defense and prosecution evidence merely because it is difficult for a court to determine when a defendant's interest in having an immunized defense witness is comparable to the prosecution's interest in having an immunized prosecution witness. That would be equivalent to refusing to give the defendant any slice of the pie because it is impossible to ensure that she will receive the same sized slice as the prosecution. Recognizing the difficulties involved, courts should do the best they can to devise rules that will enable the defense to receive immunized testimony in situations that are comparable to those in which the prosecution is allowed to receive immunized testimony.[163]

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160 *See, e.g.*, United States v. Turkish, 623 F.2d 769, 776-77 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981).

161 *See, e.g.*, Flanagan, *supra* note 157, at 463-72.

162 *See Turkish*, 623 F.2d at 778; Flanagan, *supra* note 157, at 467-68.

163 If it is really impossible for a court to weigh the interests involved, it might seem appropriate to hold that, once a defendant is able to make a clear showing that an immu-

In fact, a court could fashion guidelines for determining when a defendant's interest in immunizing a defense witness is comparable to the prosecutor's interest in immunizing a prosecution witness. A prosecutor will not likely seek immunity for a government witness unless it appears that the witness can testify to evidence that might reasonably make a difference in the outcome of the trial.[164] Thus, as a prerequisite to obtaining immunity for a defense witness, the defendant should be required to meet this basic standard of materiality.[165] While the *Smith* standard, requiring a showing that the defense witness can testify to exculpatory evidence vital to the defense,[166] seems too strict, the defendant should be required to demonstrate: first, that the witness is likely to testify in a way that will favor the defense;[167] and second, that this testimony is reasonably likely to affect the outcome of the trial.[168]

Assuming the defendant is able to meet this standard, the next inquiry should relate to whether the harm caused to the government's interest in prosecuting the witness outweighs the benefit of receiving the witness' testimony.[169] In some instances, it should not be difficult for a court to make this judgment. If, as in the hypothetical, the witness has already been indicted for the crime as to which he is to testify, the prosecutor's interest in obtaining additional evidence against the witness is insubstantial because the indictment signals the beginning of the adversarial process—[170]the point at which the prosecutor believes she has amassed sufficient evidence against the witness to obtain a conviction. Thus, if the prosecutor is only concerned about prosecuting the witness for the crime in-

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nized defense witness would be able to testify to facts that are highly material to the defense, the prosecutor should be required to immunize the defense witness. The prosecutor has discretion to determine the order in which defendants will be tried. Thus, if she believed that immunizing the defense witness would make it more difficult to prosecute that witness, she would generally have the option of postponing the trial of the defendant until after she had first tried the defense witness. However, postponement of defendant's trial could lead to speedy trial problems in some situations. *See* Barker v. Wingo, 407 U.S. 514 (1972).

164 A prosecutor would be unlikely to take the trouble involved in obtaining an immunity grant if it did not appear to be reasonably likely that the immunized testimony would make a difference in the outcome.

165 *See supra* note 70 and accompanying text; note 97 and accompanying text.

166 *See supra* note 154 and accompanying text.

167 In other words, the defendant should have to establish that the immunized defense witness' testimony is likely to be exculpatory. In practice, defendants often find it difficult to surmount this barrier. See the cases cited in *supra* note 155.

168 *See supra* note 165 and accompanying text.

169 *See supra* note 159 and accompanying text.

170 *See, e.g.*, Massiah v. United States, 377 U.S. 201, 205-06 (1964).

volved in the indictment, she should have no substantial basis for opposing a grant of use-immunity.

Similarly, if the prosecution has completed the investigation of the criminal transaction without having indicted the defense witness, the prosecutor has apparently decided to forgo prosecution of the witness. In this situation, the grant of immunity will not seriously interfere with the government's interest in prosecuting the witness because that interest has been shown to be inconsequential. The court should not take into consideration the fact that the defendant's offer of proof relating to the witness' testimony might lead the government to reevaluate its decision not to prosecute the witness,[171] because such evidence becomes available to the government only as a result of the defendant's attempt to gain use-immunity for the witness.[172]

If the defense witness is the subject of an unfinished investigation, then the prosecutor may have a substantial interest in prosecuting the witness, and the grant of immunity could result in significant harm to the prosecution. In this situation, the prosecutor should be allowed an opportunity to show that the interests of justice do not justify a grant of use-immunity to the witness. In order to make this showing, the prosecutor should have the burden of demonstrating that: it is investigating the witness for the purpose of prosecution; immunizing the witness will make it more difficult subsequently to prosecute him;[173] and the crime for which the witness is being investigated is at least potentially as serious as the one with which the defendant is charged.[174] When the prosecutor establishes these facts, the court should generally deny the grant of use-immunity, accepting that it is ill-equipped to make a precise judgment as to the strengths of the conflicting government and defense interests.

In the unusual situation in which the defendant presents clear evidence that the immunized defense testimony will vitally affect the defense,[175] this rule is insufficient because it fails to take account of

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171 *See* United States v. Turkish, 623 F.2d 769, 779 (2d Cir. 1980) (Lombard, C.J., concurring).

172 Moreover, the witness' immunized testimony itself cannot be used to affect the decision concerning whether to prosecute the witness because that would be contrary to the rule that the prosecutor cannot use immunized testimony for any purpose. *See* Kastigar v. United States, 406 U.S. 441, 460 (1972).

173 Generally, this could be established by showing that the investigation of the witness is not yet completed. *See* Flanagan, *supra* note 157.

174 In evaluating the seriousness of a crime, the precise charge will not, of course, always be determinative.

175 This was the standard applied in Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980). *See supra* note 154 and accompanying text.

the defendant's very important interest in receiving the witness' testimony. In that rare case, the court should make an effort, based on the data submitted by the prosecutor as well as arguments by both the government and the defense, to determine whether the prosecutor would grant immunity to the witness if the witness were able to give vital testimony for the government.[176] If the court finds that the harm to the government's interest in prosecuting the witness would be insufficient to deny the grant of use-immunity in that situation, it should grant use-immunity to the defense witness.

Under this approach, the result in hypothetical one would probably not be difficult to determine. Based on the statement made by Fowler to the police, it appears that Fowler's testimony will favor the defendant and his testimony would likely affect the outcome. Moreover, because Fowler had already been indicted as a co-defendant, the prosecutor could not legitimately claim that a grant of use-immunity would make it more difficult to prosecute him for that crime.[177]

The prosecutor's only possible basis for opposing the grant of immunity would be that immunizing Fowler would make it more difficult to prosecute him for some other equally serious crime as to which he was then being investigated.[178] Because Fowler's offered testimony relates to a particular killing and not to an ongoing pattern of criminal activity, it is unlikely that the prosecutor could make this showing.[179]

B. THE DEFENDANT'S RIGHT TO DISCOVER OR INTRODUCE EVIDENCE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE

In the few cases in which defendants have sought to introduce evidence protected by the attorney-client privilege, courts have invariably excluded the evidence.[180] Hypothetical two, which is based

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[176] Rather than make this very difficult judgment, the court should perhaps simply grant the witness immunity, recognizing that the prosecutor probably has the option of delaying the defendant's trial until she has first tried the defense witness. *See supra* note 164. The problem may be somewhat academic because prior experience indicates that defendants will be able to make the requisite showing only in rare situations. *See supra* note 158 and accompanying text.

[177] *See supra* note 171 and accompanying text.

[178] *See supra* notes 174-75 and accompanying text.

[179] In the unlikely event that the prosecutor could make this showing, the court would then be required to deny Fowler immunity unless it determined that his testimony was vital to the defense, in which case it would base the decision concerning whether Fowler should be granted immunity upon whether the prosecutor would grant such immunity if Fowler were testifying to vital evidence on behalf of the government.

[180] *See, e.g.*, Valdez v. Winans, 738 F.2d 1087, 1089-90 (10th Cir. 1984); Myers v. Frye,

on an actual case,[181] provides an illustration of the context in which this issue is likely to arise.

Hypothetical Two

Defendant is charged with murder. The prosecutor's chief witness, Hilton, testifies under a grant of immunity that he saw the killing take place in his apartment. According to Hilton, the defendant was buying drugs from the victim when the two had an argument, with the result that the defendant shot and killed the victim. The defendant claims that Hilton killed the victim. Prior to the defendant's trial, Hilton was in fact charged with the killing and was represented by an attorney before the charges were dropped at the preliminary hearing.

In the course of his preparation for trial, defendant's attorney contacted the attorney who had represented Hilton at the time when the latter was charged with the killing. Defendant's attorney asked Hilton's attorney what, if anything, Hilton had told him about the defendant. After looking through his file, Hilton's attorney responded that the defendant's name did not appear anywhere in his file.[182] Based on this information, the defendant seeks leave at trial to cross-examine Hilton as to communications made by him to his attorney during the time he was represented. He also seeks leave to examine the attorney as to the same communications. Hilton objects on the basis of the attorney-client privilege.

In hypothetical two the first two principles developed in this Article are clearly inapplicable. The attorney-client privilege does not have the purpose of assisting the government in performing one of its essential functions; rather, it is designed to protect confidential communications between a client and his attorney. Moreover, the principle of evenhandedness does not apply because the attorney-client privilege applies to evidence offered by the prosecution in the same way as it does to evidence offered by the defense.

401 F.2d 18, 21 (7th Cir. 1968); Commonwealth v. Sims, 513 Pa. 366, 370, 521 A.2d 391, 395 (1987).

181 *Sims*, at 366, 521 A.2d at 391.

182 The actual case illustrates the somewhat ambiguous nature of this type of information. In Hilton's first statement to the police, he did not refer to the defendant by name but said the crime was committed by two men, identified only as "Dirt" and "Junior." Subsequently, he told the police that "Dirt" was the defendant. *Id.* at 370, 521 A.2d at 392-93. Thus, if Hilton made the same statement to his attorney as he did to the police, the defendant's name would not appear in the attorney's file; but this fact in itself would not provide a basis for assailing Hilton's testimony as a recent fabrication. The record in the case does not indicate whether defendant's attorney asked Hilton's attorney whether the name "Dirt" appeared in his file. *Id.* at 398.

The application of the third guiding principle is more problematic. The defendant will argue that statements protected by the attorney-client privilege are needed to effectively cross-examine Hilton. In particular, if it can be shown that Hilton never said anything about the defendant to his attorney, his testimony concerning defendant's involvement in the crime can be assailed as a recent fabrication. Arguably, this type of evidence will be just as vital to assessing Hilton's credibility as the evidence of Green's bias in *Davis*.[183]

As this Article has indicated,[184] however, the question of whether a defendant has been deprived of an opportunity for effective cross-examination should not be determined solely on the basis of whether the particular evidence sought has an important bearing on the government witness' credibility: the defendant should also be required to show that, in view of the norms of the adversary process, cross-examination relating to the protected evidence would be expected.[185]

With respect to this latter point, *Davis* and hypothetical two are distinguishable. In assessing a government witness' credibility, the fact finder would certainly expect to be informed as to any special relationship between the government and the witness. In *Davis*, however, the privilege dictated that facts material to this relationship would be absolutely inaccessible to the fact finder.[186] Because of the privilege, the jury in *Davis* could never learn that Green's status as a probationer gave him a motive to perjure himself in order to avoid further problems with the government.

On the other hand, in assessing a witness' credibility, the fact finder would not expect to be informed of every prior inconsistent statement made by the witness. A privilege that prevented the defense from inquiring into any of a witness' prior inconsistent statements would indeed deprive the defendant of effective cross-examination because the elimination of this means of assessing the witness' credibility would contradict the norms of the adversary process. In hypothetical two, however, the defendant is permitted to use the witness' prior inconsistent statements for the purpose of impeachment, but is barred from using prior inconsistent statements that stem from one particular source. In contrast to *Davis*, this limited restriction of evidence bearing on the witness' credibility

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183 *See supra* note 127 and accompanying text.

184 *See supra* note 80 and accompanying text.

185 For an elaboration of this standard, *see supra* note 80.

186 Davis v. Alaska, 415 U.S. 308, 311 n.1 (1974).

should not be sufficient to deprive the defendant of effective cross-examination.

Based on this analysis, then, the third principle developed in this Article is also inapplicable. Accordingly, a court following the framework of analysis developed in this Article would probably not allow the defendant in hypothetical two to discover or introduce evidence protected by the attorney-client privilege.[187]

C. THE DEFENDANT'S RIGHT TO DISCOVER OR INTRODUCE EVIDENCE PROTECTED BY A RAPE SHIELD LAW

Rape shield statutes, enacted in most jurisdictions, establish an evidentiary privilege by providing that, when a defendant is on trial for rape, the defendant may not ordinarily introduce the alleged victim's prior sexual conduct into evidence.[188] Quite frequently, defendants charged with rape claim that they have a constitutional right to introduce evidence protected by the privilege. Hypothetical three, based on an actual case,[189] offers an example.

Hypothetical Three

Defendant is charged with rape of a ten year old girl. He claims that the girl falsely accused him of rape because of her fear that he would tell her parents that she had been having sex with the defendant's son. The defendant wants to have his son testify that he had sex with the girl on several occasions and told the defendant about these sexual encounters. In addition, the defendant himself wants to testify that he told the girl that he thought her parents should be informed as to her sexual relationship with his son. The prosecutor objects to the admission of this testimony on the basis of the rape shield statute.

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[187] As indicated, however, the guiding principles developed here are not intended to establish a complete model of analysis. Accordingly, if a judge were to find, for example, that the evidence protected by the attorney-client privilege in hypothetical two would be very likely to exonerate the defendant, the principles developed in this Article would not preclude her from considering that factor when ruling on the evidentiary issue presented in that case.

[188] Arguably, the exclusionary rules enacted by the rape shield statutes may be viewed as designed to enhance accurate fact-finding rather than to promote a social policy. The exclusion of evidence of a rape victim's prior sexual conduct is designed to promote accurate fact-finding because the victim's sexual conduct is generally of marginal relevance, and introducing this evidence may divert the jury from considering the critical issues that relate to the defendant's guilt or innocence. Nevertheless, the statutes are also intended to promote social policies in that they are intended to protect the victim's sexual privacy and to assist law enforcement. *See infra* notes 190-92 and accompanying text.

[189] *See* State v. Jalo, 27 Or. App. 845, 853-56, 557 P.2d 1359, 1364-66 (1976).

Using the principles developed in this Article, a court would first determine whether the privilege at issue has the purpose of assisting the government in performing one of its essential functions. In the present case, that inquiry is particularly difficult because rape shield statutes, by design, serve several purposes. Most obviously, they protect the victim's sexual privacy and they protect her from undue harassment.[190] As Professor Vivian Berger has said, "In line with these goals, they encourage the victim to report the assault and assist in bringing the offender to justice by testifying against him in court."[191] In addition, they are intended to enhance accurate fact-finding by excluding evidence of marginal relevance that may distract or prejudice the jury.[192] Of these purposes, only the second may be viewed as assisting the government. Encouraging rape victims to report rapes serves the government's interest in prosecuting suspected rapists.

One approach would be to hold that the privilege does not have the purpose of assisting the government unless providing such assistance is the central purpose of the privilege. Under this approach, if it were determined that the primary purpose of the rape shield statutes is to safeguard rape victims' sexual privacy, then the privilege would be treated in the same way as the attorney-client privilege: the defendant would not be allowed to discover or introduce evidence protected by the privilege on the basis of a showing that such evidence is material to his defense.

This approach seems inappropriate, however. The underlying basis for distinguishing between government privileges and private privileges is that the government should not be permitted to apply a privilege that alters the balance of advantage in criminal cases. Under this rationale, it should not matter whether the primary purpose of the privilege is to assist the government in performing one of its essential functions or one of its significant purposes is to do so. In either case, application of the privilege in a criminal case is likely to benefit the government and to tilt the balance of advantage against the defendant.[193] Thus, an evidentiary privilege should be

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190 *See* Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 54-55 (1977).

191 *Id.* at 54.

192 *Id.*

193 This is certainly true in the case of the rape shield statutes. The statutes will only be invoked to exclude evidence offered by the defendant, not evidence offered by the prosecution. Moreover, since one of the statutes' purposes is to assist law enforcement, the effect of the statutes is to require rape defendants to reduce their chances of acquittal in order to promote the government's interest in bringing successful rape prosecutions.

viewed as a government privilege whenever assisting the government in performing one of its essential functions is one of its significant purposes.

Under this test, the rape shield statutes should clearly be viewed as enacting a government privilege. The statute's primary purpose may have been to protect rape victims' sexual privacy, but they were also enacted to assist law enforcement. In fact, Professor Harriet Galvin's account of legislative history indicates that law enforcement groups "joined forces with women's groups" to obtain the statutes' passage.[194]

But should a privilege that provides some assistance to the government be treated in the same way as one that is solely designed to assist the government? Arguably, the privilege enacted by the rape shield statutes should be differentiated from the informer's privilege because the former privilege, unlike the latter, is not solely or even primarily designed to assist law enforcement. Thus, while in both cases there is a concern that the privilege is intended to tilt the adversary balance against the criminal defendant, that concern is less in the case of the rape shield privilege. Accordingly, a defendant should be afforded less right to introduce evidence barred by the rape shield statutes than he would be to introduce evidence barred by privileges that are primarily or exclusively designed to assist the government in performing one of its essential functions.

This approach would lead to substantial administrative problems however. In determining whether a defendant will have a constitutional right to introduce evidence protected by an evidentiary privilege, a court needs clear guidelines, not a sliding scale. Thus, it seems appropriate at least to start with the proposition that all privileges that significantly assist the government will be treated in the same way. If a court were to make distinctions between privileges that primarily or exclusively assist the government and those that significantly assist the government but also serve other purposes, such as protecting individual privacy, it would soon be lost in a morass.

Treating all privileges that assist the government in the same way also has its shortcomings. In the case of the rape shield privilege, the statute's purpose of protecting the victim's sexual privacy is not given weight because the statute also has the purpose of benefitting law enforcement. In selecting a rule to be applied in these cases, a court must strike a balance between selecting one that is

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[194] Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 768 (1986).

administratively feasible and one that will take the fullest possible account of the relevant interests at stake.[195]

In this area, courts must have a rule that provides relatively clear guidelines. Thus, utilizing the guiding principles developed in this Article, a defendant's constitutional right to introduce evidence protected by an evidentiary privilege should be interpreted to include the right to introduce evidence material to her defense[196] whenever the evidentiary privilege invoked is one that is designed in significant part to assist the government in performing one of its essential functions.

Under this test, the result in hypothetical three is clear. Taken in context, the alleged victim's prior sexual conduct tends to establish bias because it provides her with a motive for falsely accusing the defendant. In this context, as in *Davis*,[197] evidence tending to establish bias on the part of a critical government witness is very likely to have an impact on the result. Since the basic standard of materiality is met, the defendant in hypothetical three should be permitted to introduce the evidence protected by the rape-shield statute.

This does not mean, of course, that defendants will generally be permitted to discover or introduce evidence protected by a rape shield statute. The defendant in hypothetical three, for example, would not be permitted to discover or introduce instances of the complainant's prior sexual conduct simply for the purpose of impeaching the complainant's credibility. Even if a judge were to adhere to the discredited common law view that a person's lack of chastity relates to her truthfulness,[198] a finding that such evidence would be material in the sense that it would be reasonably likely to affect the outcome would be clearly erroneous.

Similarly, a defendant claiming consent would not be allowed to discover or introduce instances of the victim's prior sexual relations on the dubious theory that a person who consents to sexual relations with one is more likely to consent to such relations with

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195 For a discussion of the advantages and disadvantages of decisionmaking pursuant to rules that are relatively clear and easy to follow as opposed to decisionmaking that is designed to escape the rigidity imposed by rules, *see* Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

196 Based on the earlier discussion of the standard of materiality, evidence material to the defendant's defense should be defined as evidence that is reasonably likely to affect the outcome in the defendant's favor. *See supra* notes 72-76 and accompanying text.

197 *See* Davis v. Alaska, 415 U.S. 308, 317, 318 (1974).

198 *See, e.g.*, Brown v. State, 291 Ala. 789, 280 So. 2d 177 (1973); 3A WIGMORE, *supra* note 18, at § 9245; Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90, 120 (1977).

another.[199] Without deciding whether the evidence has some marginal relevance to the issue of consent, the court could exclude it on the ground that it fails to meet the more stringent standard of materiality.

V. Alternative Approaches

Among the various criticisms that might be levelled against the guiding principles developed here, two seem particularly worthy of consideration. First, some might object that the principles do not go far enough: a defendant should be afforded the right to introduce material evidence protected by a privilege in all situations, not just in cases in which the privilege favors the government. Second, some might object that the principles are too rigid: assuming the defendant will have the right to introduce material evidence protected by some but not all privileges, it is arbitrary to differentiate the privileges on the basis of whether they favor the government rather than determining the question of admissibility through a more comprehensive assessment of the values served by each privilege in the context of each particular case. The merits of these two objections will be briefly considered.

A. Granting the Defendant a Constitutional Right to Introduce Material Evidence Protected by Any Privilege

In *Ritchie*,[200] the Court stated in dicta that criminal defendants have "the right to put before a jury evidence that might influence the determination of guilt."[201] That dicta could reasonably be interpreted to establish a clear constitutional principle: no privilege may prevent a defendant from introducing material evidence either as part of her own defense or for the purpose of cross-examining a government witness. Although dicta in a case decided one year af-

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[199] *See, e.g.*, People v. Johnson, 106 Cal. 289, 39 P. 622 (1895); People v. Collins, 25 Ill. 2d 605, 186 N.E.2d 30 (1962), *cert. denied*, 373 U.S. 942 (1963); Ordover, *supra* note 198, at 97-102.

[200] 480 U.S. 39 (1987).

[201] *Id.* at 56. The *Ritchie* Court talks specifically in terms of the defendant's right to introduce evidence under the compulsory process clause. If the defendant has a right to introduce material evidence as part of her own case under the compulsory process clause, she should also have a right to introduce material evidence for the purpose of cross-examining a government witness under the confrontation clause. *See generally* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567 (1978) (advocating an integrated vision of the confrontation and compulsory clauses of the sixth amendment).

ter *Ritchie*[202] failed to recognize this principle, the modern cases decided by the Court are not inconsistent with it. Since 1967, the Court has never held that any privilege may be applied to exclude material evidence offered by the defendant.

This principle would establish clearer guidelines than the ones developed in this Article. The focus would be exclusively upon the issue of materiality. If the defendant could establish that evidence protected by a privilege was reasonably likely to affect the outcome at trial,[203] she would have a constitutional right to introduce or discover the evidence.[204] Because this right would not vary depending on the privilege involved, a court would not have to engage in the sometimes difficult process of determining whether the evidentiary privilege at issue was one that favored the government.

This principle could be justified on the basis of the value attached to the defendant's interest in introducing material evidence. When the defendant is seeking to offer material evidence in her defense, the interest at stake is not simply promoting accurate fact-finding but protecting the innocent from erroneous conviction, an interest that Anglo-American society has traditionally considered to be of paramount significance.[205] Arguably, accepting the principle suggested in *Ritchie* dicta would simply reflect a judgment that the interest in protecting the innocent from erroneous conviction is more important than the interests that are served by the application of any evidentiary privilege.

One difficulty with this argument is that the value of protecting the innocent from erroneous conviction cannot so easily be separated from the values that underlie certain evidentiary privileges. Some evidentiary privileges, the attorney-client privilege, for example, have traditionally been viewed as designed to promote a system of fact-finding that will provide maximum protection for the innocent.[206] If these privileges in fact serve that function, then even if the value of protecting the innocent from erroneous conviction is viewed as paramount, the question arises as to whether the benefits of reducing the chances of an erroneous conviction in one case out-

202 Rock v. Arkansas, 483 U.S. 44, 55 n.11 (1987).

203 For discussion of the standard of materiality, *see supra* notes 72-77 and accompanying text.

204 Even if the defendant failed to meet this standard of materiality, she should in some circumstances have the right to have the protected material examined in camera by the trial judge for the purpose of determining whether it would be likely to be sufficiently material to affect the outcome in the defendant's favor. *See supra* note 17 and accompanying text.

205 *See supra* note 3.

206 *See* 8 WIGMORE, *supra* note 18, at § 2291, at 552; Freedman, *supra* note 4, at 170-74.

weigh the detriments that a weakening of the privilege may cause to possibly innocent defendants in other cases.

Of course, it may be argued that defeating a privilege only when the defendant seeks to introduce material exculpatory evidence need not harm particular individuals who make confidential communications. The individual's communication will be disclosed only at the defendant's trial and measures may be taken to insure that it is not later used to adversely affect the legal interests of the individual who made it.[207] Nevertheless, confidential communications, such as those protected by the attorney-client privilege, are privileged not merely to protect the communicator from adverse legal consequences but also to protect the privacy of the communication. Since privileges are often justified on the assumption that they are needed to encourage confidential communications,[208] it may be assumed that the communicator's knowledge that her privileged communications would in some situations be admissible in a criminal case would sometimes deter her from making the communication.[209] Thus, when a privilege is designed to provide maximum protection for the innocent, even admitting material evidence protected by the privilege only on behalf of criminal defendants may have the overall effect of reducing the protection afforded to the innocent.

This point suggests a broader problem with the argument in favor of allowing criminal defendants to introduce material evidence regardless of whether it is protected by a privilege. There is no empirical basis for determining the extent to which defeating a privilege in a limited class of cases will deter people from making

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[207] The principal measure that could be taken would be a grant of use-immunity, under which the individual's communication could not be used against him in any subsequent proceeding. For an explanation of how this type of use-immunity doctrine might work in practice, see Natali, *supra* note 16, at 1554.

[208] *See, e.g.*, Natali, *supra* note 16, at 1540; Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 465-66 (1977).

[209] In a letter to Professor Natali, Benjamin Lerner, President of the National Legal Aid and Defender Association, opposed Natali's proposal of a rule that would sometimes compel disclosure of attorney-client communications in exchange for a grant of use-immunity. Mr. Lerner stated:

> [C]lients' 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 over-all attorney-client relationship would be of greater significance.

Natali, *supra* note 16, at 1532 n.144. See also Note, *supra* note 19, at 979-80, which states:

> Even if a particular communication exposes an individual to criminal liability, the privacy interests and social values that lie at the heart of communications privileges . . . would be destroyed by forced disclosure under a use immunity grant.

communications protected by the privilege.[210] If it will often deter such communications, then, even though the value of admitting the privileged evidence in a particular case may far outweigh the harm to the person protected by the privilege, in the long run the harm of admitting the evidence may clearly outweigh the benefit, because admission may substantially diminish the extent to which such communications will be made in the future. Thus, even if the value of protecting the innocent is viewed as paramount, the extent to which that value may be advanced by the admission of privileged evidence in a particular case may be outweighed by the harm to some other value that occurs as a result of the disclosure of the protected evidence.

These considerations indicate that whether a defendant should be afforded a constitutional right to introduce material evidence protected by all privileges is one that depends upon difficult empirical judgments as well as value judgments. Traditionally, a constitutional right of this scope has not been recognized. Until the Court provides a less ambiguous signal than the dicta in *Ritchie*, accepting the principle implicitly stated in that case seems inappropriate.

B. A BALANCING APPROACH

Both *Roviaro* and *Davis* contain language that suggests that a defendant's right to introduce evidence protected by a privilege depends on a balancing of interests.[211] Drawing upon one or both of these cases, some courts[212] and commentators[213] have suggested that the admissibility of evidence protected by a privilege should be determined by a balancing test under which the importance of the evidence offered by the defendant should be weighed against the interests to be served by the privilege. Professor Robert Clinton, for example, has argued that "a balancing or accommodation of the governmental interests in reliability and judicial regularization with the constitutional interests in fairness to the accused . . . must be made in each case."[214] The balancing approach is arguably superior

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210 *But cf.* Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Pyschotherapist-Patient Privilege*, 60 N.C.L. REV. 893, 924-25 (1982) (empirical study concluding that the presence or absence of a psychotherapist-patient privilege seemed to have no direct effect on patients' willingness to be candid with their psychotherapist once they are in therapy). *See* Weisberg & Wald, *Confidentiality Laws and State Efforts to Protect Abused or Neglected Children: The Need for Statutory Reform*, 18 FAM. L.Q. 143, 182-91 (1984).

211 Davis v. Alaska, 415 U.S. 308, 319 (1974); Roviaro v. United States, 353 U.S. 53, 62 (1957).

212 *See, e.g.*, United States v. Smith, 780 F.2d 1102, 1107-10 (4th Cir. 1985).

213 Clinton, *supra* note 20, at 797-801; Note, *supra* note 19, at 976-90.

214 Clinton, *supra* note 20, at 800-01.

to the one this Article has proposed in that it allows for consideration of all relevant factors relating to the privilege in question, not just those factors that relate to whether the privilege, either in general or in the context of its specific application, may be properly characterized as one that favors the government.

Clearly, factors that have no bearing on whether the privilege favors the government are germane to the question of whether the privilege should be invoked to exclude relevant defense evidence. Professor Robert Weisberg's thoughtful analysis of the problem[215] suggests that in some situations another consideration is the extent to which introducing evidence protected by a privilege will defeat a particular witness' expectation of privacy. Rather than focusing on one particular aspect of the problem, why would it not be more appropriate to devise principles that seek to take into account the full range of interests involved?[216]

One problem with a balancing approach is that it is apt to provide insufficient guidance for the courts. If, as Professor Clinton suggests,[217] a court is really required to make a comprehensive assessment of the interests served by a privilege in each case, then no one decision will establish a clear precedent to be followed in future cases. In each case, the interests served by the privilege will be slightly different because, as Professor Weisberg indicates,[218] the court will have to consider not only the purposes served by the privilege in general but also the privacy interest of the particular individual protected by the privilege.

This problem need not be insurmountable. By assessing the conflicting interests on a privilege-by-privilege basis, rather than a case-by-case basis, a court could develop workable guidelines. If a court were to conclude, for example, that the interests served by the attorney-client privilege are generally sufficient to outweigh a defendant's interest in introducing material evidence, it could hold that a defendant will not be permitted to introduce material evidence protected by that privilege. Thus, with respect to each evidentiary privilege, courts could develop a general rule. Moreover, in order to ensure flexibility, narrow exceptions to such rules could be established on the basis of special considerations. This approach would still allow for a more complete assessment of relevant factors than one that focuses entirely on whether the evidentiary privilege favors the government.

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215 *See* Note, *supra* note 19, at 972-73.
216 Professor Weisberg devised such principles. *See* Note, *supra* note 19, at 958-90.
217 *See* Note, *supra* note 19 and accompanying text.
218 *See* Note, *supra* note 19, at 972-73.

A further difficulty with this approach relates to a court's institutional competence. It may be possible for a court to conclude that a particular privilege is arbitrary in the sense that it is not rationally calculated to protect any legitimate interest. In that case, the court should invalidate the privilege on the basis of the principle enunciated in *Washington*.[219] But once a privilege is shown to protect a legitimate interest, on what basis may a court conclude that that interest is entitled to less consideration than some other interest? In theory at least, courts are not so well-equipped as legislatures either to determine the validity of the value judgments involved in creating particular privileges[220] or to assess "empirically . . . the general harm that overriding a privilege may cause privilege holders."[221]

Thus, the proposed approach is superior to a balancing approach not only because it may lead to more workable guidelines but also because a court is better equipped to apply it. In deciding whether a privilege operates to favor the government, a court may have to make some difficult judgments; but, at least its primary function will not be to make the type of empirical assessments and value judgments that have traditionally been left to the legislature.

VI. Conclusion

The thesis of this Article is that the scope of a defendant's constitutional right to introduce relevant evidence barred by an evidentiary privilege depends in large part upon whether the privilege, either in general or in the context of its specific application, may be properly characterized as one that favors the government. Based on this thesis, this Article has developed principles that courts may use to determine whether a defendant has a constitutional right to discover or introduce evidence protected by a privilege.

These principles need not be interpreted so as to construct a rigid model of analysis. A court could accept the basic principles presented in this Article and still draw on alternative principles for dealing with specific situations that create special problems. Thus, without accepting one of the versions of the balancing approach, a court might take into account the fact that application of a privilege in a particular situation does not seem to promote any strong societal interest. Similarly, a court could reject the principle that a defendant has a constitutional right to introduce material evidence whether or not it is protected by a privilege and still hold in a partic-

219 *See supra* notes 100-102 and accompanying text.
220 *See* Hill, *supra* note 33, at 1189.
221 Note, *supra* note 19, at 971.

ular case that the defendant must be afforded a constitutional right to introduce vital defense evidence that is privileged. The proposed principles are not intended to preclude the exclusion of these factors but to provide a framework of analysis that will generally be useful in determining the scope of a defendant's constitutional right to discover or introduce evidence protected by a privilege.

Even if the Supreme Court embraces the proposed principles, applying them to specific situations in which a defendant is seeking to introduce evidence protected by a privilege will sometimes be difficult. Accordingly, this Article has attempted not only to justify the adoption of the principles but also to apply them in several concrete situations. The discussion of these hypothetical cases will provide some basis for determining whether the principles can yield both workable guidelines for the courts and results that accord with our shared sense of fairness.