

3-1989

## Evening the Odds in Civil Litigation:A Proposed Methodology for Using Adverse Inferences When Nonparty Witnesses Invoke the Fifth Amendment

Charles H. Rabon, Jr.

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### Recommended Citation

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# NOTES

## Evening the Odds in Civil Litigation: A Proposed Methodology for Using Adverse Inferences When Nonparty Witnesses Invoke the Fifth Amendment

“While it is the duty of the court to protect the witness in the exercise of his privilege, it is also the duty of the court to see that he does not, under the pretense of defending himself, screen others from justice.”<sup>1</sup>

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1. B. JONES, COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES (The Blue Book of Evidence) § 886, at 342 (1914).

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## I. INTRODUCTION

A nonparty witness who responds to questioning by invoking the privilege against self-incrimination seriously can impair the party against whom the response suggests an unfavorable answer.<sup>2</sup> The possible injury to a party's case is greatest when the invocation occurs unexpectedly at trial, but may cause equal damage when the privilege is relied on during discovery because the deposition of an unavailable witness may be read to the jury.<sup>3</sup> In the past, courts and commentators generally opposed allowing such invocations in the jury's presence based on the belief that invocations lack credible evidentiary value because witnesses can invoke validly for a variety of reasons;<sup>4</sup> and despite some arguable relevance, the highly prejudicial nature of an invocation intolerably taints the fairness of the trial process.<sup>5</sup> Consequently, those who opposed drawing conclusions about witnesses who rely upon the fifth amendment argued that the fact of invocation must be kept from juries, counsel must be prohibited from commenting on invocations that occur in court, and judges must be prevented from acknowledging that inferences may arise from the assertions of privilege. The belief was that the trial process must ignore a fifth amendment invocation regardless of how unfair the result might be.

Prevailing attitudes began to change in 1975 after Congress rejected Article V of the Federal Rules of Evidence.<sup>6</sup> Ten years earlier the

2. One author stated:

[I]f viewed as "evidence," [f]ifth [a]mendment claims, whose impact cannot be ameliorated through cross-examination, will be far more damaging to a defendant than substantive testimony. . . . From a plaintiff's standpoint, therefore, a limited amount of live testimony ostensibly corroborated by [f]ifth [a]mendment claims, with their highly prejudicial impact, is often more effective than, and preferable to, the presentation of conventional evidence.

Hartwell, *The Fifth Amendment in Civil Antitrust Litigation: Procedure and Strategy—The Defendant's View*, 50 ANTITRUST L.J. 847, 848 (1982).

3. FED. R. CIV. P. 32.

4. See *infra* notes 173-88, and accompanying text.

5. See *infra* note 93 and accompanying text.

6. In 1973 the House Committee on the Judiciary eliminated all specific rules on privileges as submitted by the United States Supreme Court. H.R. REP. NO. 650, 93d Cong., 1st Sess. 8 (1973), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7082. When Congress passed the Federal Rules of Evidence in 1974 (effective July 1, 1975), it adopted the House position and deleted all of Article V, which dealt with privileges. In its stead, Congress substituted Rule 501, which states in part:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the

United States Supreme Court had ruled that comment by the prosecutor on a criminal defendant's refusal to take the witness stand violated the defendant's rights under the fifth amendment.<sup>7</sup> By 1976, three years after Congress first rejected the "No Comment" rule of Proposed Federal Rule 513,<sup>8</sup> the Court held that the Constitution did not forbid an adverse inference by the trier of fact when a party to a civil case refused to testify for fear of self-incrimination.<sup>9</sup>

Lower federal courts and commentators, expanding on the Supreme Court's analysis of fifth amendment privilege in the civil context, recently have argued that adversarial fairness often requires permitting the jury to draw a negative inference against a party based upon a non-party's invocation of the privilege.<sup>10</sup> The reported cases largely involve inferences against corporate parties, but use of such inferences could be extended logically and fairly to other contexts.<sup>11</sup>

Plaintiffs, hoping to gain the enhanced remedies available under such acts as the Racketeer Influenced and Corrupt Organizations Act (RICO) and the treble damage provisions of the antitrust laws, increasingly are charging their civil adversaries with the commission of a crime. Defendants (and those in some agency, employment, or conspiratorial relationship with them) are responding more frequently to these taunts by broadly asserting the fifth amendment privilege against self-incrimination.<sup>12</sup> An emerging trend, in turn, suggests that more courts are permitting the factfinder to draw adverse inferences based on these invocations. Despite this liberalization in allowing juries to attach substantive evidentiary weight to nonparty invocations in appropriate circumstances, the possibility of unfair prejudice remains if adverse

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privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. . . .

FED. R. EVID. 501.

7. *Griffin v. California*, 380 U.S. 609, 615 (1965).

8. See Proposed Rule 513 *infra* note 194.

9. *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

10. A typical adverse inference instruction was given in *RAD Services v. Aetna Casualty & Surety Co.*, 808 F.2d 271 (3d Cir. 1986), discussed *infra* notes 226-34 and accompanying text.

The instruction reads:

During the trial you also heard evidence by past or present employees of the plaintiff refusing to answer certain questions on the grounds that it may tend to incriminate them. A witness has a constitutional right to decline to answer on the grounds that it may tend to incriminate him. You may, but you need not, infer by such refusal that the answers would have been adverse to the plaintiff's interests.

*RAD Services*, 808 F.2d at 277.

11. See *infra* notes 218-25, 235-40 and accompanying text.

12. Rakoff, *Taking the 5th in Civil Cases—Perils and Palliatives*, N.Y.L.J., Dec. 8, 1983, at 1, col. 3.

inferences are abused or allowed without sound justification.<sup>13</sup> The use of adverse inferences, therefore, should be limited to situations of necessity after preliminary tests of fairness indicate their need.

This Note addresses the uncertainty of using adverse inferences against parties based on nonparty invocations and proposes a methodology to determine when the inference is fair and justified and how it should be presented to juries. Part II discusses the two principal policies that are at stake when adverse inferences derive from nonparty invocations of the fifth amendment, beginning with an analysis of how the history and policies behind liberal discovery relate to proof obtained from nonparties.<sup>14</sup> The second section of Part II analyzes the fifth amendment privilege against self-incrimination and reviews the policies, scope, abuses, and efforts to control abuses of the privilege.<sup>15</sup> Part III presents the cases in which these issues have clashed in the context of nonparty witness invocations.<sup>16</sup> Part IV sets forth a methodology to gauge whether adverse inferences based on assertions of privilege by nonparties should be permitted in particular cases. The methodology borrows standards from the federal evidence rules and applies broadly to most conceivable situations. If adopted, it would limit the use of adverse inferences to situations of fairness and necessity.<sup>17</sup> This part concludes with a Model Jury Instruction on adverse inferences.<sup>18</sup> Finally, Part V concludes that adverse inferences can assist a party having an apparently meritorious claim after certain witnesses impede that party from reaching the jury by invoking the fifth amendment privilege. Adverse inferences, however, are "strong medicine," so courts must determine with a high degree of certainty that allowing inferences based upon invocations of the fifth amendment are appropriate and necessary on the facts before them.

## II. POLICIES AT ISSUE

### A. *Liberal Discovery*

Modern rules of civil procedure afford such broad investigatory tools in preparing for trial that it is inconceivable that a party would

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13. Professor Victor Gold stated that "[m]ost courts are content to conclude evidence has probative value or is unfairly prejudicial without considering the meaning of those terms. Not surprisingly, many cases do not even attempt to weigh probative value against unfair prejudice or, while purporting to weigh, give no explanation for the result." Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 61-62 (1984) (footnote omitted).

14. See *infra* notes 22-54 and accompanying text.

15. See *infra* notes 55-195 and accompanying text.

16. See *infra* notes 196-252 and accompanying text.

17. See *infra* notes 253-75 and accompanying text.

18. See *infra* notes 276-81 and accompanying text.

proceed to litigation before having engaged in wide-ranging pretrial discovery.<sup>19</sup> Relevant proof in many forms often is obtained from persons and entities not party to the lawsuit.<sup>20</sup> Nonparty invocations of the privilege leading ultimately to adverse inferences against parties to the lawsuit frequently have occurred during discovery depositions.<sup>21</sup> Thus, a brief discussion of the policies and scope of liberal discovery is in order.

### 1. Policies

The days of testimonial disqualification of interested parties<sup>22</sup> have passed and policies favoring liberal proof derived from liberal discovery now are reflected in both the Federal Rules of Civil Procedure<sup>23</sup> and the Federal Rules of Evidence.<sup>24</sup> The opinion of lawyers toward litigation prior to the advent of the Federal Rules of Civil Procedure has been described aptly as the "sporting theory of justice."<sup>25</sup> Not infrequently, victory went to the party with counsel more skillful at playing the game of surprise than to the party rightfully deserving to win on the merits.<sup>26</sup>

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19. See Cutner, *Discovery—Civil Litigation's Fading Light: A Lawyer Looks at the Federal Discovery Rules After Forty Years of Use*, 52 TEMP. L.Q. 933, 944 n.39 (1979).

20. Getman, *Federal "Third-Party" Discovery in the Small Antitrust Case*, 45 BROOKLYN L. REV. 311 (1979) (discussing various factors which support the undertaking of nonparty discovery). The author notes:

A final advantage of nonparty discovery is that the nonparty may be the sole possessor of crucial information. For example, the nonparty may have valuable documents no one else has or that no one else has kept, or may have copies of documents that others have but to which the nonparty has added notations.

*Id.* at 312.

21. See *infra* notes 218-25 and accompanying text. In 1970 the rules were amended extensively and renumbered. The rules governing oral depositions were transferred from Rule 26(a) to Rule 30, and in the process, "the provision of the former rule that depositions may be taken 'for the purpose of discovery or for use as evidence in the action or for both purposes' was omitted," the idea being well understood that a deposition might, in addition, be taken for use at trial. 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2101, at 367 (1970).

22. See C. McCORMICK, *McCORMICK ON EVIDENCE* § 65, at 159 (E. Cleary 3d ed. 1984); Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 450 (1936).

23. Defining the scope of the Federal Rules of Civil Procedure, Rule 1 states that "[t]hey shall be construed to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. Rule 30 begins: "After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination." FED. R. CIV. P. 30.

24. Rule 102 states: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102.

This philosophy is continued in Rule 601, which states in part that "[e]very person is competent to be a witness except as otherwise provided in these rules." FED. R. EVID. 601.

25. This phrase has been attributed both to Professor Wigmore, in Holtzoff, *The Elimination of Surprise in Federal Practice*, 7 VAND. L. REV. 576, 578 (1954) and to Roscoe Pound, in Holland, *The Federal Rules of Civil Procedure: A Policy Evaluation*, 3 LAW. & POL'Y Q. 209, 211 (1981).

26. C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 81, at 541 (1983); see also Holtzoff, *supra*

The Federal Rules of Civil Procedure attempted to halt this practice by throwing discovery wide open.<sup>27</sup> A "fishing expedition" now is allowed if fish are likely to be caught.<sup>28</sup> Broad discovery better serves justice by increasing the probability that factfinders will decide cases on their merits and not on innuendo.<sup>29</sup>

In *Hickman v. Taylor*,<sup>30</sup> decided by the Supreme Court ten years after the Federal Rules became effective, Justice Murphy noted that because of the liberalized rules, federal civil trials "no longer need be carried on in the dark."<sup>31</sup> Eleven years later, the Court stated that federal pretrial discovery and procedures, by disclosing facts and issues as fully as practicable, produce fairer trials and fewer instances of "blind man's bluff."<sup>32</sup> Commentators have articulated three purposes of liberal discovery: (1) to narrow issues so that only genuinely disputed issues remain for trial resolution; (2) to gather and preserve evidence for the hearing; and (3) to procure leads by which additional relevant documentary evidence or knowledgeable witnesses may be ascertained.<sup>33</sup> Professor Charles Wright stated that the "basic philosophy" behind the Rules is that all parties should have access to all relevant non-privileged information before trial, regardless of by whom it is possessed.<sup>34</sup> Thus, the clear intent of the Rules, as affirmed by the Supreme Court, is to maximize the evidence available to all parties, thereby insuring more just and efficient results.

note 25, at 579 (stating that trials "should not be viewed as a melodrama or a mystery play, in which the success of the performance depends upon keeping the denouement secret from the beholders and leaving them in a state of suspense until the end").

27. 8 C. WRIGHT & A. MILLER, *supra* note 21, § 2001, at 15-17.

28. Holtzoff, *supra* note 25, at 577-78.

29. F. JAMES, CIVIL PROCEDURE 184 (1965). Professor James identified several aspects favoring this extensive discovery:

—Discovery tends to narrow the issues to be tried by revealing lack of serious contest on some and by pointing up those likely to be crucial.

—Discovery tends to facilitate the presentation of evidence at the trial by increasing the likelihood that all relevant evidence will be known and analyzed before trial.

—This in turn increases the likelihood that cases will be decided on their actual merits.

—Pretrial discovery gets statements which are fresher in time and less likely to be excessively rehearsed.

—Discovery weeds out groundless claims and defenses, at least where the party who asserts them in his pleadings is not willing or able to engage in effective perjury to back them up.

—Discovery increases the chances of pretrial settlements. As the parties' knowledge about each other's points of strength and weakness increases, uncertainty about the reasonable settlement value of the claim is reduced.

*Id.* (footnote omitted).

30. 329 U.S. 495 (1947).

31. *Id.* at 501.

32. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

33. 8 C. WRIGHT & A. MILLER, *supra* note 21, § 2001, at 15; see also *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 944-46 (1961) [hereinafter *Discovery*].

34. 8 C. WRIGHT & A. MILLER, *supra* note 21, § 2001, at 15.

Though liberal discovery sometimes places burdens on parties and nonparties that are disproportionate to the interests at stake, liberal discovery under the Federal Rules has furthered the goal of procuring more just results and has improved greatly the functioning and administration of the civil justice system.<sup>35</sup> Judge Holtzoff, a member of the Rules drafting committee, believed that federal court litigation had been "completely revolutionized" through liberal discovery.<sup>36</sup> Another commentator, writing in 1939, said that discovery had been "vitalized" by the Rules and had attained a role of great importance in federal litigation.<sup>37</sup>

In addition to furthering justice between the immediate parties to litigation, liberal discovery furthers public confidence in law and society.<sup>38</sup> The public interest lies in achieving fair results in accordance with stated law through courts that are freely accessible to all citizens.<sup>39</sup> These goals are reached when parties and witnesses fulfill their duty to provide the evidence needed to adjudicate controversies justly.<sup>40</sup> The public is benefited by knowing that persons who fail to abide by the law will face liability while those who do abide will not.<sup>41</sup> This public interest benefit of liberal discovery is possible largely because evidence is obtainable so freely in the early stages of the adjudicative process.

## 2. Scope

The discovery rules provide a broader interpretation of relevance than is permitted for evidentiary purposes.<sup>42</sup> The limits on discovery are aimed primarily at the use of the information obtained rather than its acquisition.<sup>43</sup> Liability insurance coverage, for example, is discoverable, but not admissible at trial. Rule 26, which governs the scope of all discovery under the Federal Rules, provides that "[p]arties may obtain discovery of any matter, not privileged, which is relevant to the subject matter involved in the pending action."<sup>44</sup>

Particularly burdensome and intrusive discovery devices may be

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35. *Discovery*, *supra* note 33, at 942.

36. See Holtzoff, *A Judge Looks at the Rules After Fifteen Years of Use*, 15 F.R.D. 155, 164 (1954).

37. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 279 (1939).

38. See Cutner, *supra* note 19, at 934.

39. *Id.*

40. *Id.* at 937.

41. *Id.* at 934.

42. See FED. R. CIV. P. 26(b)(1) (stating that "[i]t is not ground for objection [to discovery] that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence").

43. 8 C. WRIGHT & A. MILLER, *supra* note 21, § 2001, at 15; C. WRIGHT, *supra* note 26, § 81, at 543.

44. FED. R. CIV. P. 26(b)(1).



used only against parties, but the discovery device of preference—the oral deposition—is available against anyone.<sup>45</sup> Parties wishing to depose nonparty witnesses must secure their attendance by subpoena, which may direct the witnesses to bring specific documents.<sup>46</sup> The subpoena may be directed to a corporation, which then nominates a natural person to testify in its behalf.<sup>47</sup> The nonparty deponent may request the court to modify, limit, or quash the subpoena if it is unduly burdensome or beyond relevancy, or move for a protective order providing confidentiality to his testimony.<sup>48</sup> Deposition testimony may be used at trial, as authorized under Rule 32(a)(3), or for any purpose allowed by the Federal Rules of Evidence.

From the standpoint of a party seeking discovery, the principal limitation of discovery from nonparties is the invocation of privilege.<sup>49</sup> Protective orders exist in part to limit patent abuses of discovery from nonparties. Relevance is construed so broadly, however, that even as to nonparties, courts are likely to err in favor of permitting discovery despite apparently tenuous links to relevancy.<sup>50</sup> Generally, nonparty witnesses cannot avoid discovery by asserting that they do not have relevant information because the discovering party is entitled to test the propriety of their claim.<sup>51</sup>

On the other hand, a properly invoked privilege may insulate otherwise discoverable information. Although the limits of discovery are measured by a broader scope of relevance than would be permitted by the Federal Rules of Evidence, the scope of privilege during discovery is precisely the same as would apply at trial.<sup>52</sup> This identical scope of privilege may cause a nonparty's deposition invocation to have detrimental impact at trial because when the invocation is read to the jury it may suggest the witness's guilt regarding the matter inquired, and the

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45. Holtzoff, *supra* note 36. Judge Holtzoff called oral depositions "the most potent and the most useful of all discovery remedies." *Id.* at 166. Prior to passage of the Federal Rules of Civil Procedure, deposition practice in the federal courts existed solely to preserve evidence. Any resultant discovery was a matter of luck. 8 C. WRIGHT & A. MILLER, *supra* note 21, § 2002, at 21.

46. *Sunbeam Corp. v. Payless Drug*, 113 F. Supp. 31, 46 (N.D. Cal. 1953).

47. FED. R. CIV. P. 30(b)(6).

48. FED. R. CIV. P. 26(c).

49. Professor Wright identifies three principal limitations on broad discovery: (1) Discovery must be relevant to the subject matter; (2) discovery may not extend to matters privileged; and (3) discovery, in general, may not extend to the attorney's work product. C. WRIGHT, *supra* note 26, § 81, at 548-50. The second limitation will have greatest impact on nonparty discovery because costs will limit genuinely irrelevant discovery from nonparties, and the work product doctrine does not apply.

50. See generally 4 J. MOORE, J. LUCAS & G. GROTHEER, MOORE'S FEDERAL PRACTICE ¶ 26.56[1], at 26-101 to -107 (1987) [hereinafter J. MOORE].

51. *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965); C. WRIGHT & A. MILLER, *supra* note 21, § 2037, at 275 n.52.

52. J. MOORE, *supra* note 50, ¶ 26.60[1], at 26-188.

party thereby affected rarely will be allowed to probe the invocation.<sup>53</sup> As with invocations at trial, however, deposition invocations of privilege are construed narrowly,<sup>54</sup> and the burden of proving their existence is on the witness claiming the privilege. The scope and limitations of the privilege against self-incrimination are discussed in the following section and apply to invocations of privilege by parties and nonparties alike.

### B. *The Privilege Against Self-Incrimination*

The privilege against self-incrimination is based upon an ideal of preventing the state from substituting judicially compelled confessions for legitimately obtained proof.<sup>55</sup> The privilege applies equally in civil and criminal actions, protecting both nonparty witnesses and parties to the same extent.<sup>56</sup> Witnesses are entitled constitutionally to assert the privilege broadly—the potential answer needs only to provide the prosecutor with a “link in the chain of evidence” for the invocation to be upheld.<sup>57</sup> In the past few years, however, the Court has retreated to a less liberal interpretation of fifth amendment privilege.<sup>58</sup> This retraction may illustrate Dean Wigmore’s observation that there is no general agreement regarding the policies supporting the privilege against self-incrimination.<sup>59</sup>

Some time ago, Judge Friendly delivered a lecture in which he pro-

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53. See *infra* notes 101-04 and accompanying text. Such invocations usually are edited out when deposition transcripts of unavailable witnesses are read to the jury. Appropriate limits, as suggested in this Note, should reduce the likelihood that courts will expand unreasonably the practice of bringing nonparty invocations to the jury’s attention.

54. J. MOORE, *supra* note 50, ¶ 26.60[1], at 26-188 & n.4 (listing relevant cases).

55. 8 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2263, at 378 (McNaughton rev. ed. 1961). In 1964 Justice Goldberg wrote:

[The privilege] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates “a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,” . . . ; 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,” . . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes “a shelter to the guilty,” is often “a protection to the innocent.”

*Murphy v. Waterfront Comm’n*, 370 U.S. 52, 55 (1964) (citations omitted).

56. *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924).

57. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

58. O’Brien, *The Fifth Amendment: Fox Hunters, Old Women, Hermits, and the Burger Court*, 54 NOTRE DAME L. REV. 26 & n.5 (1978). See generally Note, *Miranda and the State Constitution: State Courts Take a Stand*, 39 VAND. L. REV. 1693 (1986).

59. 8 J. WIGMORE, *supra* note 55, § 2251, at 296.

posed to modify and significantly contract the privilege to its historical intent as envisioned by the framers of the Bill of Rights.<sup>60</sup> Conceding that numerous policy justifications could be proffered in support of the "multifaceted" privilege, Judge Friendly dismissed most of the reasons set forth in Justice Goldberg's "market basket" analysis.<sup>61</sup> Judge Friendly concluded by suggesting an amendment that, under limited safeguards, would permit comment on refusals by defendants to answer questions relevant to criminal investigations.<sup>62</sup>

A contraction of the fifth amendment privilege, though not to the extent proposed by Judge Friendly, has occurred, as illustrated in the discussion below.<sup>63</sup> The reduced availability of the privilege has had particular impact in civil cases; thus, parties must recognize that invoking the privilege is not without consequence. Similarly, under appropriate circumstances a court may permit the jury to burden a party in a civil case with the effect of a nonparty's claim of privilege.

### 1. Policies

A broad range of policies has been offered in support of the privilege against self-incrimination.<sup>64</sup> Many of the policies have been derived from the history of the privilege;<sup>65</sup> however, as Dean Wigmore noted,

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60. Friendly, *The Fifth Amendment Tomorrow: The Case For Constitutional Change*, 37 U. CIN. L. REV. 671 (1968). Friendly stated:

The time has come, I believe, when the nation should face up to the hard task of considering an amendment to the self-incrimination clause that will preserve all the framers said and some of the Supreme Court's extensions, modify others, expunge some altogether, and guard against accretions which seem in the making.

*Id.* at 672. Judge Friendly's amendment proposed to limit the privilege strictly to incriminating oral statements by the accused in criminal trials and would have allowed the judge to comment upon the defendant's previous refusals to answer questions relevant to the crime before judicial officers, grand juries, and other investigatory bodies. *Id.* at 721-22.

61. *See id.* at 695, 698.

62. *See id.* at 721-22.

63. *See infra* note 194 and accompanying text (demonstrating that invocations of the privilege—particularly by parties—are not without consequences); *see also* O'Brien, *supra* note 58, at 26 n.5.

64. A more comprehensive evaluation of the policies behind the privilege is beyond the scope of this Note. This Note, therefore, presents only a brief survey of those policies which generally are considered to provide the soundest justifications for the privilege in modern context. For more thorough treatments of the policies behind the privilege, see generally: L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* (1968); C. McCORMICK, *supra* note 22, §§ 114-18, at 279-88; 8 J. WIGMORE, *supra* note 55, § 2251, at 295; and O'Brien, *supra* note 58, at 33-54.

65. *See* L. LEVY, *supra* note 64, at 332. Professor Levy wrote:

It was, in its origins, unquestionably the invention of those who were guilty of religious crimes, like heresy, schism, and nonconformity, and, later, of political crimes like treason, seditious libel, and breach of parliamentary privilege—more often than not, the offense was merely criticism of the government, its policies, or its officers. The right was associated then with guilt for crimes of conscience, of belief, and of association. In the broadest sense it was a protection not of the guilty, or of the innocent, but of freedom of expression, of political

historical analysis alone does not resolve disagreement over the reasons for the self-incrimination privilege.<sup>66</sup> As debate over the articulated and functional rationales of the fifth amendment continues,<sup>67</sup> courts and commentators have proffered numerous justifications to permit, to contract, or to expand the privilege under various circumstances. No single policy can support all invocations of the privilege.<sup>68</sup> As noted previously, Justice Goldberg set forth seven policies that the Court variously had advanced to support the privilege.<sup>69</sup> Judge Friendly reduced this number to five.<sup>70</sup> More recently, David O'Brien analyzed current jurisprudential bases for the privilege against self-incrimination and concluded that essentially three policies justify the modern privilege. These three fundamental rationales largely explain the privilege as it exists today.<sup>71</sup>

First, the "fox hunter's" rationale posits a norm of fairness by analogizing the privilege to fair treatment of the fox in a hunt: similar to the rules that delimit how hunters may take the fox, rules of privilege and procedure determine fair prosecution of criminal defendants in our accusatorial criminal justice system.<sup>72</sup> Under this analysis historical abuses, illustrated by the Star Chamber, the High Commission, and the Inquisition, are avoided by establishing fairness between the state and the individual—a fair fight between "equals meeting in battle."<sup>73</sup> The

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liberty, of the right to worship as one pleased.

*Id.* Judge Friendly concurred that the privacy rationale supports the privilege when one's beliefs and associations are threatened; but historically, privacy in the sense of wishing merely to conceal one's criminal acts, cannot support invocations of privilege by rapists or murderers. Friendly, *supra* note 60, at 696.

For further discussion of the history behind the privilege, see generally 8 J. WIGMORE, *supra* note 55, § 2250, at 267 and O'Brien, *supra* note 58, at 29-35.

66. 8 J. WIGMORE, *supra* note 55, § 2251, at 295.

67. O'Brien, *supra* note 58, at 26.

68. *See id.* at 53-54.

69. *See supra* note 55. Goldberg's opinion in *Murphy* drew in large measure from Professor Wigmore's treatise on Evidence. *See* 8 J. WIGMORE, *supra* note 55, § 2251, at 297-318.

70. One rationale Judge Friendly accepted posits that the privilege also serves an equal protection function. *See* Friendly, *supra* note 60, at 697-98, 711. This purpose derives implicitly from *Miranda v. Arizona*, 384 U.S. 436 (1966), on the theory that the privilege accords unequal treatment to poor and unsophisticated criminal suspects who, in contrast to wealthier suspects or professional criminals, may not be aware they are permitted legally to remain silent. Because *Miranda* warnings sufficiently fulfill this function, this policy has received scant attention. *But cf.* Thompson, *Judge Friendly's Amendment to the Fifth Amendment: A Comment on a Recent Criticism of the Supreme Court*, 38 U. CIN. L. REV. 488 (1969).

71. O'Brien, *supra* note 58, at 27, 28.

72. *Id.* at 36. Justice Fortas explained this rationale as a product of John Locke's social compact theory of government. Fortas hypothesized that the individual had not yielded to the state the power to "extract evidence of his own guilt." Friendly, *supra* note 60, at 692 (citing Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. B.A.J. 91, 98-100 (1954)).

73. Friendly, *supra* note 60, at 693 (citing Fortas, *supra* note 72). Friendly criticized Justice Fortas in his understanding of Locke's treatise and in his depiction of a criminal trial:

privilege, therefore, exists not as an end in itself, but as a means of securing a balance between the prosecution and the accused, thus ensuring that the state will not abuse its awesome powers.<sup>74</sup>

The second widely accepted policy behind the privilege against self-incrimination is based on society's reluctance to expose individuals to "the cruel trilemma of self-accusation, perjury or contempt"<sup>75</sup> and was described by Jeremy Bentham as the "old woman's reason."<sup>76</sup> Bentham believed this trilemma was a poor excuse for logic. He reasoned that a person naturally would not wish to incriminate himself because that would lead to his punishment; but for a guilty defendant punishment is his due.<sup>77</sup> Despite Bentham's derogation of the old woman's rationale, the cruel trilemma has emerged as an accepted reason for preserving the privilege against self-incrimination. Though in reality the trilemma may be limited to two undesirable choices (self-accusation and perjury),<sup>78</sup> this rationale acknowledges fifth amendment respect for individual moral sanctity as an independent basis for the privilege.<sup>79</sup>

Notwithstanding its acceptance, the cruel trilemma provides at best an imperfect justification for the privilege against self-incrimination. Requiring an individual to give testimony under a grant of immunity diminishes the value of the privilege by interpreting the grant as merely an opportunity not to *incriminate* oneself, rather than a political right not to *accuse* oneself.<sup>80</sup> The privilege thus may become context-dependent, so that the individual, though no longer facing criminal punishment, may be exposed to public humiliation and disgrace while remaining ostensibly on equal footing with the state.<sup>81</sup> Furthermore,

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With all respect, this concept of a criminal trial as a jousting contest where the rules bear equally on both participants and neither is expected to be of the slightest help to the other has no relation to reality. No one . . . would wish it that way. The sovereign state must affirmatively disclose any exculpatory evidence in its possession whereas the not so sovereign individual need not.

*Id.* David O'Brien concurs, noting that while in theory, under the fox hunter's rationale the two sides are "equal," in fact, because the fifth amendment confers only a privilege and not a right, the state can grant the suspect immunity, force him to forfeit "privacy interests when personal disclosures are self-accusatory but not self-incriminating," and jail him for contempt if he refuses. O'Brien, *supra* note 58, at 39-40.

74. See *Baxter v. Palmigiano*, 425 U.S. 308, 335 (1976) (Brennan, J., dissenting).

75. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

76. Bentham, *A Rationale of Judicial Evidence*, in 7 *THE WORKS OF JEREMY BENTHAM* 452 (Bowring ed. 1962).

77. *Id.*

78. Friendly, *supra* note 60, at 695 (stating: "I take it that almost no one would favor confining a man to jail until he takes the stand to testify to his own crime").

Judge Friendly nonetheless noted that the removal of the contempt horn did not remove the problem of other sanctions, for instance, a negative inference or loss of employment. *Id.*

79. See O'Brien, *supra* note 58, at 43.

80. *Id.* at 44.

81. *Id.*

this justification may lead to a paradox: one seeks to withhold information for which nondisclosure runs counter to moral and social norms.<sup>82</sup> This paradox withers when one considers that the privilege against self-incrimination represents the accepted legal norm when confronted in a criminal investigation or at trial.<sup>83</sup>

The third rationale, developed more recently, assumes that confessions procured through grants of immunity are grave encroachments on privacy and must be considered serious.<sup>84</sup> Although Justice Goldberg listed privacy as an important policy supporting the privilege against self-incrimination, there is serious disagreement among commentators regarding the ability of the privilege to safeguard witnesses' privacy.<sup>85</sup> Judge Friendly argued that it was not possible to harmonize the privacy rationale as a principal justification for the privilege against self-incrimination with immunity laws that require defendants to forego their privacy.<sup>86</sup> Judge Friendly further questioned the moral justification that allows a citizen to withhold assistance in resolving a murder, kidnapping, or rape only because the citizen did not wish to be bothered and preferred to remain in his "private enclave."<sup>87</sup> In his criticism, however, Judge Friendly ignored the possibility that absolute noninterference is not essential to reliance on the privacy rationale.<sup>88</sup> The privacy rationale serves to limit and to restrain intrusions by the state through according respect to the moral independence of an individual's thoughts and associations; yet, this rationale is not unqualified. When the policy behind a limited intrusion of privacy is weightier than the moral principles supporting preservation of that privacy, the moral principles must give way.<sup>89</sup>

These policy rationales rarely are independently sufficient to justify the privilege against self-incrimination. Privacy, for instance, often is

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82. See Friendly, *supra* note 60, at 680. Judge Friendly explained:

No parent would teach such a doctrine to his children; the lesson parents preach is that while a misdeed, even a serious one, will generally be forgiven, a failure to make a clean breast of it will not be. Every hour of the day people are being asked to explain their conduct to parents, employers and teachers. Those who are questioned consider themselves to be morally bound to respond, and the questioners believe it proper to take action if they do not.

*Id.* (footnote omitted).

83. See Thompson, *supra* note 70, at 500.

84. O'Brien, *supra* note 58, at 46.

85. Compare Friendly, *supra* note 60, with O'Brien, *supra* note 58, at 45-54.

86. Friendly, *supra* note 60, at 689 (quoting McKay, *Self Incrimination and the New Privacy*, 1967 *Sup. Ct. Rev.* 193, 209).

87. Friendly, *supra* note 60, at 689.

88. O'Brien, *supra* note 58, at 53 (citing Friendly, *supra* note 60, at 689).

89. See *id.* at 53-54; see also *Fisher v. United States*, 425 U.S. 391, 400-01 (1976) (stating: "We cannot cut the [f]ifth [a]mendment completely loose from the moorings of its language and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the [f]ourth [a]mendment").

justifiable only when used to supplement one or both of the other policy rationales; and the privilege is most defensible when all of the policies mentioned lend some measure of support.<sup>90</sup> The privilege serves important policy interests and is worth preserving regardless of the status of the witness claiming it.

## 2. Scope

### a. General Parameters of the Privilege

The privilege against self-incrimination may be asserted by any witness or party<sup>91</sup> in any civil or criminal proceeding<sup>92</sup> whenever the testimony sought would directly reveal a crime, or would "furnish a link in the chain of evidence."<sup>93</sup> Exposure to civil liability alone, however, will not support an invocation of the privilege.<sup>94</sup> The privilege may be invoked in response to questions at trial<sup>95</sup> or in depositions,<sup>96</sup> or in refusing to answer a complaint<sup>97</sup> or to respond to interrogatories.<sup>98</sup> A witness subpoenaed for documents may assert the privilege when production would authenticate, establish possession or control over, or simply reveal the existence of the documents.<sup>99</sup> Blanket invocations of the privilege, however, generally are not allowed; instead, the witness must invoke question-by-question.<sup>100</sup>

Realistically, if the witness faces at least a remote possibility of prosecution, the claim of privilege will be upheld.<sup>101</sup> The invoking wit-

90. See O'Brien, *supra* note 53, at 53-54.

91. Malloy v. Hogan, 378 U.S. 1, 11 (1964); McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).

92. Kastigar v. United States, 406 U.S. 441, 444-45 (1972); *McCarthy*, 266 U.S. at 40.

93. Hoffman v. United States, 341 U.S. 479, 486 (1951).

94. United States v. Apfelbaum, 445 U.S. 115, 125 (1980).

95. *Kastigar*, 406 U.S. at 444-45.

96. Duffy v. Currier, 291 F. Supp. 810, 815 (D. Minn. 1968).

97. National Acceptance Co. v. Bathalter, 705 F.2d 924, 926-28 (7th Cir. 1983); DeAntonio v. Solomon, 42 F.R.D. 320, 322 (D. Mass. 1967).

98. United States v. Kordel, 397 U.S. 1, 7 (1970); Paul Harrigan & Sons, Inc. v. Enterprise Animal Oil Co., 14 F.R.D. 333, 334 (E.D. Pa. 1953).

99. Fisher v. United States, 425 U.S. 391, 410 (1976). The Court wrote that questions of whether the "tacit averments" of conceding the existence, control, or possession of documents were "testimonial" and "incriminating" for fifth amendment purposes, did "not lend themselves to categorical answers." Compare Abramowitz & Rakoff, *The Fifth Amendment Privilege in Civil Litigation: Assertion, Waiver and Consequences*, 130 P.L.I. LITIGATION & ADMIN. PRAC. SERIES 59, 61-62 (1983) with Litt, *Discovery in Civil RICO Actions, and the Fifth Amendment*, 141 P.L.I. LITIGATION & ADMIN. PRAC. SERIES 183, 190-92 (1986).

For an excellent discussion of the *Fisher* doctrine, see Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1 (1987).

100. National Life Ins. Co. v. Hartford Accident & Indem. Co., 615 F.2d 595, 599 (3d Cir. 1980); Hudson Tire Mart, Inc. v. Aetna Casualty & Sur. Co., 518 F.2d 671, 674 (2d Cir. 1975).

101. See Marchetti v. United States, 390 U.S. 39, 53 (1968); *In re Master Key Litigation*, 507 F.2d 292, 293 (9th Cir. 1974).

ness is not required to reveal his response to the court, even *in camera*, for this would relinquish the protections the privilege is intended to afford.<sup>102</sup> Thus, despite the Court's assertion that the witness's own declaration is insufficient to gain the sanctity of the privilege,<sup>103</sup> it is quite difficult to challenge successfully most invocations.<sup>104</sup>

The privilege is limited to natural persons<sup>105</sup> and normally may not be asserted on another's behalf.<sup>106</sup> If not asserted, the privilege is deemed waived, although there is a strong presumption against waiver of constitutional rights.<sup>107</sup> When the witness is granted immunity, however, he loses the right to assert the privilege for the matter immunized, must respond to those questions that reveal his criminality or invade his privacy, and may face contempt should he refuse.<sup>108</sup>

#### b. *Civil Invocations and the Supreme Court*

The Supreme Court has had numerous occasions to consider the price that may be exacted from one who chooses to invoke the privilege. In criminal cases the Court has held that prosecutors may not comment upon or insinuate that silence or invocation of the privilege by a defendant indicates guilt.<sup>109</sup> When requested, the criminal defendant is entitled specifically to a jury instruction to this effect.<sup>110</sup> In civil cases<sup>111</sup>

102. *Hoffman*, 341 U.S. at 486.

103. *Id.* at 486.

104. The witness asserting the privilege is given the benefit of the doubt. See *Abramowitz & Rakoff*, *supra* note 99, at 67-68; see also *Hoffman*, 341 U.S. at 488 (stating that "[i]n this setting it was not 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate" (emphasis in original) (citation omitted)).

105. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Bellis v. United States*, 417 U.S. 85, 89-90 (1974); *George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 288-89 (1968).

106. See *C. McCORMICK*, *supra* note 22, § 120, at 289.

107. See *Garner v. United States*, 424 U.S. 648, 657 (1976); *United States v. Mandujano*, 425 U.S. 564, 584 (1976); *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 480-81 (1972); *Gardner v. Broderick*, 392 U.S. 273, 276 (1968); *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

108. See *Kastigar v. United States*, 406 U.S. 441 (1972). In *Kastigar* the Court held that grants of immunity that provided protection broader than the fifth amendment privilege were not constitutionally required. Thus, a grant of use immunity (preventing the use of compelled testimony and any evidence revealed therefrom) was sufficient to compel the witness to testify, making it unnecessary to extend transactional immunity (immunity from prosecution of the crimes revealed by the testimony) in many cases. *Id.* at 453.

If a witness is forced erroneously to testify, however, equity demands that the witness be given immunity from subsequent prosecution. Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 *YALE L.J.* 1062, 1100 (1982).

109. *Griffin v. California*, 380 U.S. 609, 612-14 (1965).

110. *Carter v. Kentucky*, 450 U.S. 288, 300 (1981).

111. Though some of these cases are in fact criminal appeals, e.g. *Garrity v. New Jersey*, 385 U.S. 493 (1967), they set forth the law applicable to invocations or waivers resulting from threats of civil liability.



the Court has moved toward allowing substantive consequences to follow when witnesses invoke the privilege in response to non-criminating threats of compulsion.

As a general matter, the Court has ruled that certain burdens are unconstitutional because they make exercise of the privilege too costly. Thus, in *Garrity v. State of New Jersey* police officers forced to choose between waiving the privilege or losing their jobs had their convictions for "fixing" traffic tickets reversed.<sup>112</sup> In *Spevack v. Klein* the Supreme Court held that an attorney under investigation for professional misconduct could not be disbarred because he relied on the privilege in refusing to produce subpoenaed records or to testify at the hearing on the matter.<sup>113</sup>

Following these decisions, the Court in *Gardner v. Broderick* reinstated a police officer who was fired after refusing to waive the immunity to which he would have been entitled if forced to testify despite his privilege.<sup>114</sup> Justice Fortas noted, however, that if the officer had not been forced to waive his immunity against prosecution, yet persisted in refusing to answer specific questions relating directly to his duties as an officer, then the privilege would not have barred his dismissal.<sup>115</sup>

Justice Harlan, concurring in *Gardner*, lauded this procedure by which those who invoke the privilege, but are not forced to choose between some benefit such as their employment and their fifth amendment privilege, constitutionally may face reasonable consequences. Judge Friendly later criticized the Court for acting in an *ad hoc* fashion in these cases, rather than setting forth uniform principles to guide the

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112. *Id.* at 497 (reasoning that "[t]he option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent").

113. *Spevack v. Klein*, 385 U.S. 511, 516 (1967) (holding that "[t]he threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege").

The dissenters in each of these five-to-four plurality opinions argued that these waivers were not involuntary in any real sense. The states' threatened sanctions did not amount to compulsion because the logical consequences were constitutionally permissible, and without such sanctions, other important public values would be harmed. Justice Harlan stated:

The Court has not before held that the Federal Government and the States are forbidden to permit any consequences to result from a claim of the privilege; it has instead recognized that such consequences may vary widely in kind and intensity, and that these differences warrant individual examination both of the hazard, if any, offered to the essential purposes of the privilege, and of the public interests protected by the consequence.

*Id.* at 525 (Harlan, J., dissenting).

114. *Gardner v. Broderick*, 392 U.S. 273 (1968).

In *Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 280 (1968), decided the same day as *Gardner*, the Court reversed the Second Circuit which had upheld dismissal of sanitation department employees investigated for diverting the fees charged to private cartmen for use of city landfill facilities. The employees were presented the same job-or-privilege option faced by the officers in *Gardner*.

115. *Gardner*, 392 U.S. at 278.

lower courts.<sup>116</sup> Judge Friendly argued that, realistically, the threat of lost government employment or professional standing was undoubtedly more compulsive than light criminal penalties. These cases, however, indicated a willingness to allow non-criminating costs to accompany the privilege, so long as they did not attach automatically.<sup>117</sup> Three subsequent decisions affirmed this analysis.<sup>118</sup>

In the most important of these decisions, *Baxter v. Palmigiano*,<sup>119</sup> the Court held that a prisoner's exercise of his privilege against self-incrimination at a disciplinary proceeding could be used inferentially against him by the Disciplinary Board.<sup>120</sup> The Court noted that the state had not sought to use Palmigiano's silence against him criminally, nor were any such proceedings pending. The *Baxter* Court distinguished the *Garrity-Lefkowitz* line of cases by noting that in each case threats of significant economic retaliation followed automatically upon invocation of the privilege.<sup>121</sup> In contrast, Palmigiano's silence did not trigger a finding of guilt automatically, nor could his silence alone sustain the Board's decision.<sup>122</sup> The majority concluded that inferences are allowed by the fifth amendment in civil cases in which the privilege is asserted by a party.<sup>123</sup>

Particularly significant in *Baxter* was the dissent written by Justice Brennan and joined by Justice Marshall. They dissented from the hold-

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116. Friendly, *supra* note 60, at 707.

117. C. McCORMICK, *supra* note 22, § 121, at 294-95.

118. See *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (in which a statute that automatically divested a political party officer of his post and further disqualified him for five years upon refusal to appear before a grand jury and waive immunity for later prosecution concerning conduct in office was held unconstitutional); *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (in which a prisoner's refusal to testify at a disciplinary hearing raised an inference that factfinders could consider, among other factors, in assessing guilt); *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (in which a New York statute requiring contractors to waive immunity and furnish possibly incriminating testimony or face automatic disqualification as public contractors was held unconstitutional).

119. 425 U.S. 308 (1976).

120. The Court's decision depended upon its implicit holding, right or wrong, that these were not criminal proceedings and therefore would not run afoul of the No-Comment rule of *Griffin v. California*, 380 U.S. 609 (1965). The *Baxter* majority stated that "[d]isciplinary proceedings in state prisons, however, involve the correctional process and important state interests other than conviction for crime." *Baxter*, 425 U.S. at 319. In any event, whether or not the Court should have extended the *Griffin* rule to prison disciplinary cases is not essential to its holding on adverse inferences in civil cases.

121. *Baxter*, 425 U.S. at 316-17.

122. *Id.* at 317-18. Additionally, the Court pointed out that "as far as this record reveals, his silence was given no more evidentiary value than was warranted by the facts surrounding his case." *Id.*

Subsequent to *Baxter*, the Eighth Circuit noted in affirming the discharge of a postal service employee, "the disciplinary action, whatever it may be, may not be based exclusively on the employee's failure to testify but it must be demonstrated by independent evidence that it is warranted." *Book v. United States Postal Serv.*, 675 F.2d 158, 160 n.4 (8th Cir. 1982).

123. *Baxter*, 425 U.S. at 318 (citing 8 J. WIGMORE, *supra* note 55, § 2272, at 439).

ing that inferences could be drawn against prisoners in favor of the Government, regardless of whether any criminal charges were pending.<sup>124</sup> Justice Brennan chastised the majority for what he regarded as a failed attempt to distinguish the *Garrity-Lefkowitz* line of cases, focusing first on the severity of the sanctions and second, on the fact that the Government was the party which put Palmigiano to the Hobson's choice.<sup>125</sup> According to Justice Brennan, the penalty facing Palmigiano, although not automatic, was as much a threat to the prisoner as those burdens faced in prior cases, such as in *Garrity*.<sup>126</sup> Justice Brennan stated later in the opinion, however, that he "would have difficulty" finding the inferences impermissible in civil litigation not involving the Government as a party.<sup>127</sup> Thus, even Justices Brennan and Marshall would allow inferences to befall private civil litigants because the Government would not be a party.

Despite Justice Brennan's criticism that the *Baxter* majority dealt insufficiently with earlier precedent, the Supreme Court nonetheless affirmed its distinction between automatic and permissive sanctions in non-criminal matters.<sup>128</sup> Thus, in determining civil culpability, the fifth amendment does not prohibit the factfinder from drawing adverse inferences about the party who invokes the privilege in response to relevant questions.<sup>129</sup> The factfinder must have discretion to reject the inference, and a verdict unfavorable to the invoking party must be supported by other evidence. In civil cases, permissive adverse inferences only have a slight effect on the privilege against self-incrimination,<sup>130</sup> thus reflecting the Court's implicit judgment that, in some circumstances, allowing adverse inferences will increase the probability of fair trials and advance justice.<sup>131</sup>

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124. *Id.* at 327.

125. *Id.* at 328-36. Palmigiano faced a downgrade in classification and 30 days in punitive segregation. *Id.* at 331.

126. *Id.*

127. *Id.* at 334.

128. *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). The Court stated:

*Baxter* did no more than permit an inference to be drawn in a civil case from a party's refusal to testify. Respondent's silence in *Baxter* was only one of a number of factors to be considered by the finder of fact in assessing a penalty, and was given no more probative value than the facts of the case warranted; here, refusal to waive the Fifth Amendment privilege leads automatically and without more to imposition of sanctions.

*Id.* at 808 n.5.

129. See C. McCORMICK, *supra* note 22, § 121, at 295.

130. *Id.* The inference does not force a witness to incriminate himself. Because the Court has held that exposure to civil liability alone cannot sustain the privilege, any impairment is not of constitutional dimension.

131. Daskal, *Assertion of the Constitutional Privilege Against Self-Incrimination in Federal Civil Litigation: Rights and Remedies*, 64 MARQ. L. REV. 243, 263 (1980).

### 3. Abuses of the Privilege

The privilege is susceptible to abuse because it is pleaded so easily. Despite an often remote chance of prosecution, settled policy choices render erosion of the privilege in the criminal arena unlikely.<sup>132</sup> On the civil side, however, even when there is little chance of prosecution, claims of privilege may function to frustrate discovery, or worse, to block altogether the ability to prove one's case.<sup>133</sup> One commentator has noted that in civil matters involving only private parties, present fifth amendment interpretation sacrifices the search for truth, the policies behind broad discovery, and the "vindication of public and private rights" to an extent few comprehend.<sup>134</sup>

In addition to the broad range of invocations noted above that may frustrate a plaintiff in a civil suit, employees or officers of a corporate defendant may invoke the privilege individually and, thereby, conceal information belonging to the corporation from the other parties. If the corporation is not penalized somehow for failing to disclose this information, the effect is to give the corporation a privilege it does not have.<sup>135</sup> When the corporation, despite its efforts to do so, cannot find an agent or employee who can respond to discovery without incriminating himself, the plaintiff may be without remedy.<sup>136</sup>

Thus, tactics that enable witnesses to invoke the privilege can be "potent weapon[s]" for defendants.<sup>137</sup> Not only can these tactics cause increased expense and delay to plaintiffs, they ultimately may result in

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132. The switch from transactional to use immunity illustrates one change; but the policies behind the privilege discussed above, particularly the fox hunter and cruel trilemma policies, render such cutback on the *Griffin* No-Comment rule unlikely.

133. See Heidt, *supra* note 108, at 1066 (stating that "[t]he privilege may be used even if the invokers realize, as a practical matter, that they would not be prosecuted for the conduct they would otherwise be forced to reveal").

In *SEC v. Musella*, 578 F. Supp. 425 (S.D.N.Y. 1984), the court drew adverse inferences against two defendants in the context of a preliminary injunction against further violations of the Securities and Exchange Act. Here, a law firm administrator had tipped two bond traders, among others, as to pending takeovers. In drawing the negative inferences against the traders, the court noted:

In instances of insider trading, where the nature of the violation makes the proof inherently difficult to obtain, assertion of the privilege may lead to a complete failure of proof. . . . [S]uch a defense strategy clearly cripples plaintiff's efforts to conduct meaningful discovery and to marshal proof in an expeditious fashion, if at all.

*Id.* at 429; see also *In re Master Key Litigation*, 507 F.2d 292, 293 (9th Cir. 1974).

134. Heidt, *supra* note 108, at 1064.

135. *In re Anthracite Coal Antitrust Litig.*, 82 F.R.D. 364 (1979).

136. Heidt, *supra* note 108, at 1068. Professor Heidt writes that "[h]ow often such a case arises is unclear." *Id.* at n.27. *But cf.* *Casson Constr. Co., Inc. v. Armo Steel Corp.*, 91 F.R.D. 376 (D. Kan. 1980) (in which a default judgment was granted against a corporation whose employees asserted the fifth amendment in response to interrogatories and which asserted that no employee could be nominated who could respond without incriminating himself).

137. Heidt, *supra* note 108, at 1065.

the inability of plaintiffs to prove valid claims.<sup>138</sup> Even without overt collusion between a party and a witness with whom that party may be associated, the result of these invocations of privilege may be to thwart the adverse party in gaining relief.<sup>139</sup> The ultimate objectionable consequence of such abuse is the substantial denial of access to justice<sup>140</sup> and doubtlessly was beyond the framers' intent in drafting the privilege. This abusive conduct is reminiscent of the maligned "sporting theory" of justice disposed of by the Federal Rules of Civil Procedure.

Little was done in the past to curb abusive invocations by defendants because they are in court involuntarily,<sup>141</sup> but recent trends indicate that civil defendants will face consequences more often when they invoke the privilege. Until recently, many courts also responded inadequately to invocations of the privilege by plaintiffs.<sup>142</sup> The Ninth Circuit in *Lyons v. Johnson*<sup>143</sup> dismissed the plaintiff's civil rights action because she refused to cooperate with discovery by invoking the fifth amendment.<sup>144</sup> Approaching the problem differently, the Fifth Circuit in *Wehling v. Columbia Broadcasting System*<sup>145</sup> agreed with the Ninth Circuit that the plaintiff could not use the fifth amendment as both a shield and a sword, but held that the denial of legal process to pursue a valid claim was too great a price for exercising a constitutional right.<sup>146</sup> The *Wehling* court held that the plaintiff had due process rights to ad-

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138. *Id.* at 1082.

139. Frequently, nonparty corporate employees represented by the company's lawyers, or whose legal expenses are reimbursed by their employer, are advised to assert their privilege broadly.

140. Heidt, *supra* note 108, at 1082.

141. Kaminsky, *Preventing Unfair Use of the Privilege Against Self-Incrimination in Private Civil Litigation: A Critical Analysis*, 39 BROOKLYN L. REV. 121, 144 (1972); *see also* Comment, *Penalizing the Civil Litigant Who Invokes the Privilege Against Self-Incrimination*, U. FLA. L. REV. 541, 549 (1972).

142. *See, e.g.*, Daskal, *supra* note 131; Note, *Toward A Rational Treatment of Plaintiffs Who Invoke the Privilege Against Self-Incrimination During Discovery*, 66 IOWA L. REV. 575 (1981).

143. 415 F.2d 540 (9th Cir. 1969), *cert. denied*, 397 U.S. 1027 (1970).

144. *Id.* at 542. The court stated:

[Plaintiff's] obtaining of this shield, however, could not provide a sword to her for achieving assertion of her claims against the defendants without having to conform to the processes necessary to orderly and equal forensic functioning. . . . The scales of justice would hardly remain equal in these respects, if a party can assert a claim against another and then be able to block all discovery attempts against him by asserting a Fifth Amendment privilege to any interrogation whatsoever upon his claim. If any prejudice is to come from such a situation, it must, as a matter of basic fairness in the purposes and concepts on which the right of litigation rests, be to the party asserting the claim and not to the one who has been subjected to its assertion. It is the former who has made the election to create imbalance in the pans of the scales.

*Id.*

145. 608 F.2d 1084 (5th Cir. 1979).

146. *Id.* at 1087.

judicate his civil claims in a court of law<sup>147</sup> and that forcing the plaintiff to choose between those due process rights and the fifth amendment was "constitutionally impermissible."<sup>148</sup> After stating that the defendant had no absolute right to dismissal whenever the plaintiff invoked the privilege and that the plaintiff had no absolute right both to his claim of privilege and to his suit, the court opted for a balancing approach. The court found that the proper remedy in this case was a protective order to stay discovery until the statute of limitations ran on the potential prosecution.<sup>149</sup>

Parties are not alone in flouting the policies and purposes behind liberal discovery and the privilege against self-incrimination. Nonparty witnesses also may invoke the privilege and similarly defeat the quest for truth that is at the core of civil litigation. When a nonparty invocation of the privilege is seriously detrimental to a party, such that it threatens the party's ability to reach the jury, remedies should be afforded to strike a balance of interests among the invoking witness, the plaintiff, and the defendant to the lawsuit, yet provide assistance to the litigant whose case is "stymied" by the privilege.<sup>150</sup> Various alternatives exist to overcome the effects of nonparty invocation of the privilege, but as with party invocations of the privilege, the adverse inference is emerging as a particularly useful solution. When appropriately and wisely used, adverse inferences can negate the stone wall erected by abusive invocations of the privilege. Adverse inferences, however, are not the panacea to rectify all invocations of the privilege. In some instances, fairness simply dictates that claims of privilege be kept from the jury. The following section surveys possible remedies when nonparties invoke the privilege<sup>151</sup> and concludes with an examination of the adverse inference remedy.

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147. *Id.* at 1087-88.

148. *Id.* at 1087.

149. *Id.* at 1089. According to the Fifth Circuit, the district court never suggested that the length of the statute was important to ruling on the motion for a stay. The appellate court noted that "a three-year hiatus in the lawsuit is undesirable from the standpoint of both the court and the defendant," but that implementing this option was preferable to forcing the plaintiff to elect between his lawsuit and his constitutional privilege. *Id.*

In addition, the court noted that should this remedy compromise the defendants' ability to defend the lawsuit, other appropriate remedies could be fashioned. *Id.*

150. Heidt, *supra* note 108, at 1087. If the witness is closely aligned with a party, as for instance a corporate officer or employee, it is not unfair to charge that party with sanctions as if the party itself had invoked the privilege. *Id.*

151. Many of these same remedies are used when parties invoke the privilege, but the emphasis here is their use to remedy nonparty invocations.

#### 4. Efforts to Control Abuses of the Privilege

Commentators disagree widely over what, if anything, should be done when nonparty witnesses assert the fifth amendment privilege in civil suits and cause one side's case to suffer.<sup>152</sup> Determining the proper remedy for a particular case depends on context, and because no solution can serve all cases, a range of alternatives must be available.<sup>153</sup> Most attempts to blunt the effects of present or anticipated invocations of the privilege lie, logically enough, between the extremes of doing nothing or dismissing a case due to equitable considerations or failure of proof. Despite their differing approaches to resolving nonparty invocations of the privilege, commentators are in agreement that the least severe alternatives that account for the interests of all involved should be preferred.<sup>154</sup>

Initially, because the government is not involved in private civil litigation, most remedial measures to counter the effects of nonparty invocations of the privilege will not upset the policies underlying the fifth amendment.<sup>155</sup> The pre-eminent concern of an invoking nonparty witness is likely to be his ability to avoid the cruel trilemma; and, on this basis alone, the full scope of the privilege must be preserved for the witness.<sup>156</sup> If after careful consideration the equities in a case dictate using a remedy that nonetheless seems unfair given the usual expectations of the adversary system, one must remember that the defendant is alleged to have unjustifiably injured his opponent.<sup>157</sup>

Professor Robert Heidt correctly urges rejection of a number of remedies proposed to avert the effects of civil invocations of the privilege. First, Heidt suggests that courts should avoid raising the *Hoffman*

152. Swagart, *The Fifth Amendment Privilege in Corporate Litigation*, 7 LITIGATION 22 (Summer 1981). The author writes of discovery invocations, but the damage is certainly as great when witnesses invoke the privilege before the trial jury.

153. Daskal, *supra* note 131, at 269; Kaminsky, *supra* note 141, at 153.

154. See, e.g., O'Brien, *Judicial Responses When a Civil Litigant Exercises a Privilege: Seeking the Least Costly Remedy*, 31 ST. LOUIS U.L.J. 323 (1987); see also Daskal, *supra* note 131, at 267; Hartwell & Kenyon, *Reconciling Fifth Amendment Claims and the Factfinding Process in Civil Antitrust Litigation*, 26 ANTITRUST BULL. 633, 646 (1981); Kaminsky, *supra* note 141, at 153; Note, *supra* note 142, at 595.

155. Heidt, *supra* note 108, at 1084; see also Kaminsky, *supra* note 141, at 127, 148; cf. *Hughes Tool Co. v. Meier*, No. C71-72 (D. Utah Mar. 28, 1978) (LEXIS, Genfed library, Dist file). In a suit in which the court drew an adverse inference against the defendant based on an assertion of privilege, the *Meier* court noted: "This lawsuit involves purely private parties and seeks personal liability against an individual. And even though there may well have been significant criminal activity on the part of defendant Meier relating to the transaction out of which this action arises, this is not the concern of this court." *Id.*

156. Heidt, *supra* note 108, at 1087.

157. Kaminsky, *supra* note 141, at 148. Such reasoning applies equally well when the effect of some remedy seems unfair against the plaintiff, such as when he is pressing a bad claim or is acting as a counterclaim defendant.

threshold either by denying the privilege to witnesses who cannot show a realistic probability of prosecution, or by requiring the invoker clearly to demonstrate how responses would incriminate him if in fact he were prosecuted. If the invoker testifies after a prior grant of use immunity, the burden of proving no use of the compelled responses in a later prosecution is nearly impossible; yet, if a court compels answers under these circumstances, functionally it is granting use immunity without approval by the prosecutor.<sup>158</sup> Judges rarely can predict with confidence that the chance of prosecution is so remote as to be disregarded,<sup>159</sup> or that prosecution would not be sought for other crimes revealed by a compelled response.<sup>160</sup>

Similarly, requiring a clearer presentation of how the invoker's compelled response would assist a prosecutor disregards the fifth amendment's firmly rooted recognition of the need to protect broadly against incriminating responses. Requiring the invoker to demonstrate to some relative, undefined extent just how incriminating his response might be would necessitate replacing certainty with a loose, nebulous standard. The *Hoffman* standard, by comparison, was marked by consistency: the invoker almost always prevailed in his privilege.<sup>161</sup>

Second, Heidt maintains that protective orders are incapable of providing the remedy needed to counter effects of invocations of the privilege because they cannot ensure protection equivalent to the privilege itself. The premise of this remedy is that by granting an order sealing discovery from disclosure to the Government, the witness will be induced to give testimony. The fallacy behind a protective order's effectiveness is apparent when reminded that the order does not compel responses, and when facing a genuine threat of prosecution, a witness is still likely to rely on the privilege. Furthermore, despite the order, the likelihood that prosecutors will gain access to the information is strong.<sup>162</sup> At best this solution provides temporary protection to incriminating testimony and is not available for invocations of the privilege at trial.<sup>163</sup>

A third solution proposed when fair trials are impeded by invoca-

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158. Heidt, *supra* note 108, at 1091.

159. *Id.*

160. *Id.* at 1092.

161. *Id.* at 1094.

162. See *In re Grand Jury Subpoena*, 836 F.2d 1468 (4th Cir.) (stating that a Grand Jury subpoena preempted a civil protective order insulating transcripts of third party deponents, irrespective of the deponents' insistence that, but for the order, they would have asserted the fifth amendment privilege and refused to give testimony), *cert. denied*, 108 S. Ct. 2914 (1988).

163. See Heidt, *supra* note 108, at 1095. Professor Heidt states: "The court can hardly hold all proceedings—including the trial and the appeal—in secret, seal all records indefinitely, and prevent all participants from supplying information to the government." *Id.*



tions of privilege is for the court to grant the invoker use immunity and thereby remove the threat of prosecution. Superficially, this option is appealing and is required when witnesses are compelled erroneously to respond despite their assertions of privilege.<sup>164</sup> Such attempts by trial courts to force testimony, however, are clear encroachments into the executive branch prerogative to prosecute.<sup>165</sup> Heidt points out that when courts grant immunity without a legislative grant to do so, the private litigants are benefited but the public may be disserved.<sup>166</sup>

Another possible remedy, not mentioned by Heidt, would be to follow the Fifth Circuit's approach in *Wehling v. Columbia Broadcasting System*.<sup>167</sup> In *Wehling* discovery was stayed until the plaintiff no longer faced the threat of prosecution. Although this option may be proper when parties invoke the privilege during discovery and the statute of limitations is close to expiration, it would be an undesirable remedy for trial invocations or invocations by nonparties. This remedy would cause increased expense to the parties and delay, perhaps by years, their day in court. For these reasons no court in a reported decision has stayed litigation to counterbalance the effects of invocation of the privilege by a nonparty witness.<sup>168</sup>

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164. *Id.* at 1100.

165. *Id.* at 1100-02; Baylson, *The Fifth Amendment in Civil Antitrust Litigation: Overview of Substantive Law*, 50 ANTITRUST L.J. 837, 841 (1982).

166. Heidt, *supra* note 108, at 1100-02. Professor Heidt terms the fourth option that he rejects the "Prospective Taint Fantasy." Parties desiring testimony from witnesses previously granted use immunity have argued that the prior immunization "taints" the witnesses' testimony because the parameters and areas of inquiry in the civil examination were products of the immunity, thus preventing prosecutorial use of the later civil responses. Because the present testimony cannot be used criminally, the witness should be compelled to respond. The appeal behind the argument is strong because the prior decision to immunize renders rather slim the chance of a later prosecution. Nonetheless, because this possibility remains, the Supreme Court in *Pillsbury v. Conboy*, 459 U.S. 248 (1983), definitively rejected this argument to compel the invoker to respond. *But see* Comment, *Constitutional Law—Fifth Amendment: Civil Deposition Testimony Not Automatically Immunized and Hence May Not Be Compelled Over Deponent's Valid Assertion of Fifth Amendment Privilege—Pillsbury v. Conboy*, 103 S. Ct. 608 (1983), 14 SETON HALL L. REV. 417, 430 (1984) (arguing that by refusing to compel use-immunized witnesses to testify in later civil cases, the Court "has closed off the litigants' major avenue to obtain evidence").

167. 608 F.2d 1084 (5th Cir. 1979).

168. One further remedy suggested when witnesses rely on the privilege in refusing to cooperate with discovery, only to waive invocation and attempt to testify at trial, is to continue proceedings until the previous invoker can be deposed. Belated discovery, however, often is inadequate or even impossible, and lengthy delays between the act sued upon and the trial can render this "solution" nearly worthless. Such delays generally are much more beneficial to defendants than plaintiffs. When the "midnight witness" is a party, solutions range from precluding his testimony to striking pleadings that relate to the invocation to entering judgment against the party, depending on the egregiousness of the conduct. An alternative response when the witness, party, or corroborated nonparty elects to testify on the eve of trial, after previously asserting the privilege, is to inform the factfinder of this strategy and permit it to weigh the reasons. *See* Heidt, *supra* note 108, at 1130-32; Kaminsky, *supra* note 141, at 149-51. In light of cases such as *Wehling*,

The privilege against self-incrimination often has a negative impact in civil litigation. Unexpected invocations of privilege may "send shock waves" through a trial.<sup>169</sup> As noted, the ranks split over the correct response, but the most notably effective and equitable remedy to more serious impairments of a fair trial is informing the factfinder and allowing that body to draw such inferences as are suggested in light of all the proof by the invocation of the privilege.

In a significant article written over thirty years ago, John Noonan stated that not only were the policies of the privilege not offended whenever inferences drawn against a witness's invocation of the privilege were used for purposes other than criminal conviction,<sup>170</sup> but also that if a witness invoked the privilege to avoid an incriminating answer, he implied an inculpatory response.<sup>171</sup> Had the witness's response been exculpatory, it would not have provided the link in the chain of evidence required by *Hoffman*.<sup>172</sup>

Noonan's interpretation of invocations of privilege that seek to

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permitting this adverse inference, which allows consideration of sincerity and credibility, is the arguably better response.

169. Swagart, *supra* note 152, at 22.

170. Noonan, *Inferences From the Invocation of the Privilege Against Self-Incrimination*, 41 VA. L. REV. 311, 319 (1955).

171. *Id.* at 322.

172. *Id.* at 323. Though overstated, there is logic here. A criminal defendant needs only motives to refuse to testify, ranging from fear of exposing prior criminal behavior to protection of friends to avoidance of prejudicial impressions due to physical or mental defects such as "his hang-dog physiognomy, speech or language defect, stupidity, timidity, or unattractiveness." *Id.* at 320. On the other hand, a nondefendant witness must have legal justifications for invoking. *Id.* Admittedly the Court set a low standard by indicating that an innocent person might invoke the privilege when suspicious circumstances could misguide a prosecutor into bringing charges against him. See *Slochower v. Board of Higher Ed.*, 350 U.S. 551, 557-58 (1956). The *Slochower* Court stated that "a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Id.*; see *Carter v. Kentucky*, 450 U.S. 288 (1981) (stating that if requested, a criminal trial judge has a constitutional obligation to give a "no adverse inference" instruction to reduce the possibility that jurors will infer guilt from the defendant's silence); *Grunewald v. United States*, 353 U.S. 391, 421-22 (1957) (stating that an invocation of privilege before a grand jury is wholly consistent with an assertion of innocence at trial—"one of the basic functions of the privilege is to protect innocent men" (emphasis in original)). *But cf.* *Telian v. United States ex rel. Shott*, 382 U.S. 406, 415 (1966). In declining to give retroactive effect to the *Griffin* No-Comment rule, the Court stated that "the basic purposes that lie behind the privilege . . . do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.'" *Id.*

Though Judge Friendly stated that this "protection of the innocent" rationale "has been repudiated by the Court" and implied that the need for expanding the scope of privilege, illustrated by decisions such as *Slochower*, had waned (having been timely responses to McCarthyism), it remains that some witnesses still invoke the privilege, legitimately, for this reason. Friendly, *supra* note 60, at 671, 695. Juries, recognizing that the numbers of these invocations are quite few, tend to associate all invocations with culpable conduct. See V. HANS & N. VIDMAR, *JUDGING THE JURY* 144 (1986).

avoid incrimination may be partly accurate, but his interpretation is entirely incorrect when an innocent person invokes the privilege fearing prosecution because of suspicious circumstances. Because the witness may be interrogated only within a very limited scope about why he is invoking the privilege, many commentators insist that any invocation of the privilege is ambiguous and therefore meaningless as evidence. Further, if the witness is not a party, it seems unfair to allow the judge or jury to draw a negative inference against one of the litigants. These issues illustrate the two principal evidentiary objections to permitting the use of adverse inferences based on nonparty invocations of the privilege.

Numerous commentators have asserted that because invocations of the privilege cannot be cross-examined rigorously, they are ambiguous, speculative, and noncommunicative of facts and therefore should be excluded on grounds of relevancy and prejudice.<sup>173</sup> Although many of these commentators admit that invocations of the privilege hinder discovery and often handicap the parties at trial,<sup>174</sup> these commentators would ignore such consequences and opt for avoiding mention of the invocation, regardless of the effect. For instance, in a leading article taking this position, Ray Hartwell notes the serious effects of invocations of the privilege on litigation, but discounts the invocations' legal relevancy, even when made by agents and employees of a party.<sup>175</sup> Assuming that fifth amendment claims may have "some probative value,"<sup>176</sup> Hartwell argues that any relevance is grossly offset by prohibitive confusion and prejudice should the claims be admitted as evidence.<sup>177</sup>

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173. See E. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE (J. Weinstein ed. 1976); Hartwell, *supra* note 2; Hartwell & Kenyon, *Reconciling Fifth Amendment Claims and the Factfinding Process in Civil Antitrust Litigation*, 26 ANTITRUST BULL. 633 (1981); Morrison, *Commentary, Availability of Fifth Amendment Privilege Against Self-Incrimination and the Permissibility of Drawing Adverse Inferences: Alternative Perspectives*, 48 ANTITRUST L.J. 1421 (1980); Note, *Non-Party Witnesses' Invocation of the Privilege Against Self-Incrimination in a Civil Case: Rosebud Sioux Tribe v. A & P Steel, Inc.*, 18 CREIGHTON L. REV. 1243 (1985) [hereinafter Note, *Rosebud*]; Note, *Adverse Inferences Based on Non-Party Invocations: The Real Magic Trick in Fifth Amendment Civil Cases*, 60 NOTRE DAME L. REV. 370 (1985) [hereinafter Note, *Magic Trick*]; Comment, *Third Circuit Court of Appeals Holds Evidence Admissible as Substantive Evidence of Fact that Non-Party Witnesses Exercised Fifth Amendment Privilege Against Compelling Self-Incrimination at Deposition: RAD Services*, 31 TRIAL LAW. GUIDE 134 (1987).

174. See, e.g., Hartwell & Kenyon, *supra* note 173, at 634 (stating that "fifth amendment assertions by witnesses may impede or even preclude discovery on important issues, making proof of the plaintiff's claims more difficult").

175. *Id.* at 649.

176. *Id.* at 658. Hartwell later characterizes the value of invocations as "dubious." *Id.* at 659.

177. *Id.* If the questions that trigger a claim of privilege are relevant to the case, it would strain credibility for one to argue that such invocations are meaningless and ambiguous. Clearly, they are not. The ambiguity argument usually seeks only to suppress evidence which would result

In many cases, Hartwell's argument far overstates the prejudice to the party affected negatively by the inference, while all but ignoring the often more serious damage to the party stymied by the privilege when the alternative to such an inference is to disregard the substantive effect of invocation. Realistically, all of one's evidence should advance one's position and hurt one's opponent. Prejudice, therefore, requires more than simply showing that the evidence "hurts."<sup>178</sup> Trials are held to achieve fair adjudications on accurate facts, and probative value measures the ability of evidence to advance this ideal.<sup>179</sup> The evidentiary value of evidence to a jury, however, is measured by usefulness in the context of all the evidence offered, not simply by the "intrinsic logical worth" of one piece of prejudicial evidence.<sup>180</sup> Ambiguity, likewise, is a function of what the evidence indicates in light of the case as a whole.<sup>181</sup>

Hartwell notes correctly that if proof of the issue to which the witness invokes the privilege is available elsewhere, or if it simply is not necessary to determining liability, then no adverse inferences should be drawn from the invocation.<sup>182</sup> On the other hand, if a party's ability to prove his case is placed at risk because a witness invokes the privilege, the jury should be instructed and trusted to consider the invocation's significance in the context presented.<sup>183</sup>

Another objection to adverse inferences based upon nonparty invocations of the privilege is lack of control. Opponents of nonparty adverse inferences argue that because only parties are obliged to come forward with evidence to establish or to defend legal claims, witnesses

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in losing the case. The real argument, which may be appropriate in some but not all adverse inference situations, is similar to the policies behind Rule 404 of the Federal Rules of Evidence, which keeps out character evidence in proof of conduct. One author explains "[i]t is not that the jury will use [this evidence] the wrong way. They will use it for exactly the right purpose. The danger is that they may give it too much weight, so we keep it out." McElhaney, *Arguing Relevance*, 13 LITIGATION 57 (Winter 1987).

178. McElhaney, *supra* note 177, at 50; see also 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 403[03], at 403-29 (1988) (explaining that "[v]irtually all evidence is prejudicial or it isn't material. The prejudice must be 'unfair'").

179. Gold, *supra* note 13, at 65.

180. *Id.* at 74.

181. See *id.* at 79. Professor Gold stated:

The ability of twelve laypersons to interject human sensibilities into a proceeding otherwise dominated by the cold logic of the law may embody the true worth of the jury system. This ability can add to rather than detract from accurate factfinding by advancing the jury's empathic understanding of how and why the participants acted a particular way.

*Id.*

182. Hartwell & Kenyon, *supra* note 173, at 650.

183. Gold, *supra* note 13, at 74. Gold considers the relevancy context to include, among other factors "the presence of other evidence that establishes the disputed fact, the relative strength of the offeror's case, the difficulty of proving the fact in question, the importance of the fact in the offeror's case, and the evidence offered by the opponent." *Id.* at 75 (footnotes omitted).

who are beyond the parties' control and who independently decide to invoke the privilege should not cause negative consequences to inure to the parties.<sup>184</sup> Lawyers recognize that a corporation's ability to control agent and employee decisions to invoke the privilege ranges from "very limited"<sup>185</sup> to "nonexistent."<sup>186</sup> By taking a narrow view of corporate accountability, these opponents seek to avoid the consequences of employee invocations by ignoring the fact that corporations can act only through agents and employees.<sup>187</sup> Indeed, tactics have been proposed to disassociate those connected with a corporate party in an effort to avoid the logical and sometimes necessary inferences.<sup>188</sup>

The control argument has merit insofar as the invoker is a truly independent, man-off-the-street type witness with no relationship or connection to the party implicated by the inference. On the other hand, if the witness can be identified or associated fairly with a party, close consideration should be given to allowing the jury to draw inferences from his invocation of the privilege. Though Professor Heidt notes that factors indicating "some loyalty" to an employer defendant are useful in reducing the possibility that a vindictive witness will lie and claim that he has committed criminal acts for which the defendant is responsible,<sup>189</sup> the absence of such factors should not necessarily bar the inference.<sup>190</sup> One commentator suggests that permissive inferences may be warranted when nonparty witnesses invoke the privilege regarding issues directly relating to liability,<sup>191</sup> while another commentator, focusing on the witness-party relationship, approves invocation-based inferences when nonparty witnesses may be classified as a corporate officer, employee, managing agent, or designee under Rules 30(b)(6) or

184. Morrison, *supra* note 173, at 1425.

185. Hartwell, *supra* note 2, at 849 (present employees).

186. *Id.* (former employees).

187. See Florida Power & Light Co. v. Mid-Valley, Inc., 763 F.2d 1316, 1322 (11th Cir. 1985).

188. See Hartwell, *supra* note 2, at 849 (recommending a four step plan to avoid inferences through invocations by employees); Swagart, *supra* note 152, at 24 (setting forth five similar suggestions).

189. Heidt, *supra* note 108, at 1119-20 n.214. The concern is for avoiding revengeful invocations that seek to saddle a defendant with liability by insinuation, particularly where the chance of prosecution of the witness is slim. See also Note, *Magic Trick*, *supra* note 173, at 386 (implying that vindictive ex-employees might invoke to discredit their ex-employers).

190. *But see* Rubin v. General Tire & Rubber Co., 18 F.R.D. 51 (S.D.N.Y. 1955). The court stated:

[T]he employee should be a person who can be expected to identify himself with the interests of the corporation rather than with those of the other parties. This requirement is necessary because the testimony of a managing agent can be used by the other parties for any purpose at the trial, and the corporation should not be bound by the testimony of persons who may not be loyal to its interests.

*Id.* at 56.

191. Kaminsky, *supra* note 141, at 152.

31(a) of the Federal Rules of Civil Procedure.<sup>192</sup> Still another commentator suggests that inferences based on co-conspirator invocations might be allowed.<sup>193</sup>

Despite contrary assertions by the Advisory Committee to the Federal Rules of Evidence, lower courts have allowed adverse inferences against party invokers for a long time,<sup>194</sup> and there is authority suggesting the same from older treatises.<sup>195</sup> When witnesses who are non-

192. Swagart, *supra* note 152, at 23.

193. Baylson, *The Fifth Amendment in Civil Antitrust Litigation: Overview of Substantive Law*, 50 ANTITRUST L.J. 837, 844 (1982).

194. See Proposed Rule 513, reprinted in 2 J. WEINSTEIN & M. BERGER, *supra* note 178, ¶ 513, at 513-1 (1982). Proposed Rule 513 states:

(a) Comment or inference not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

*Id.* The Advisory Committee's Note to subdivision (a) states that "the present subdivision forbids comment upon the exercise of a privilege, in accord with the weight of authority." *Id.* at 513-2. Several states have codified the Proposed Rule in their evidence codes. *Id.* ¶ 513[03], at 513-7. By specific modification, however, Maine expressly forbids any adverse inference to accrue from invocations by nonparty witnesses. MAINE R. EVID. 513(b), reprinted in WEINSTEIN'S EVIDENCE, *supra*, at 513-8.

Lower courts allowing adverse inferences based on party invocations include *Paynes v. Lee*, 362 F. Supp. 797 (M.D. La. 1973), *aff'd*, 487 F.2d 1307 (5th Cir. 1974); *In re De Gottardi*, 114 F. 328 (S.D. Cal. 1902); *Morris v. McClellan*, 154 Ala. 639, 45 So. 641 (1908); *Olin Corp. v. Castells*, 180 Conn. 49, 428 A.2d 319 (1980); *Ralph Hegman Co. v. Transamerica Ins. Co.*, 293 Minn. 323, 198 N.W.2d 555 (1972); *Marine Midland Bank v. John E. Russo Produce Co.*, 50 N.Y.2d 31, 405 N.E.2d 205, 427 N.Y.S.2d 961 (1980); *Molloy v. Molloy*, 46 Wis. 2d 682, 176 N.W.2d 292 (1970); *Grognet v. Fox Valley Trucking Serv.*, 45 Wis. 2d 235, 172 N.W.2d 812 (1969); see also *Morgan v. Kendall*, 124 Ind. 454, 24 N.E. 143 (1890); *Andrews v. Frye*, 104 Mass. 234 (1870).

For federal post-*Baxter* cases, see: *Arthurs v. Stern*, 560 F.2d 477 (1st Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *Pagel, Inc. v. SEC*, 803 F.2d 942 (8th Cir. 1986); *SEC v. American Bd. of Trade, Inc.*, 1986 Fed. Sec. L. Rptr. (CCH) ¶ 93,044 (S.D.N.Y. 1986); *United States v. Ianniello*, 646 F. Supp. 1289 (S.D.N.Y. 1986), *aff'd*, 824 F.2d 203 (2d Cir. 1987); *SEC v. Tome*, 638 F. Supp. 629 (S.D.N.Y. 1986); *Penfield v. Venuti*, 589 F. Supp. 250 (D. Conn. 1984); *Fidelity Bankers Life Ins. v. Wedco*, 586 F. Supp. 1123 (D. Nev. 1984); *SEC v. Musella*, 578 F. Supp. 425 (S.D.N.Y. 1984); *Winterland Concessions Co. v. Sileo*, 528 F. Supp. 1201 (N.D. Ill. 1981); and *In re Crabtree*, 39 Bankr. 718 (Bankr. E.D. Tenn. 1984).

195. See B. JONES, COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES § 891, at 359-60 (1914). Professor Jones stated:

The question of the making of a *bona fide* claim to privilege is entitled to great consideration by reason of its moral effect upon the jury. It has frequently been held that, in order to make the privilege of any value, *no unfavorable inference should be drawn from the refusal of a witness to answer a question because it may tend to criminate him, and that it is not a proper subject of comment by counsel before the jury. Nor should it be taken into consideration by the jury in determining the weight to be given to the witness' testimony. These remarks are limited to a bona fide claim and the subject is fair matter for comment where the claim is not*

captioned parties invoke the privilege regarding central issues and there is evidence to corroborate some present or past association with a party, the only fair thing to do may be to present the situation to the jury and let the jury decide. This extension is logical after *Baxter v. Palmigiano* removed any doubts about the constitutionality of invocation-based adverse inferences against parties in civil cases. The following section discusses recent decisions in which courts have applied these principles.

### III. FEDERAL NONPARTY ADVERSE INFERENCE CASES

A number of post-*Baxter* courts have turned to adverse inferences to alleviate the hardships resulting from invocations by nonparty witnesses that fatally disrupt a party's claim or defense. Though often achieving apparently fair results, many courts have provided little more legal analysis than "ritualistic incantations"<sup>196</sup> of Federal Rule of Evidence 403. Adverse inferences should be used sparingly because of their prejudicial nature, illustrated by the virtual impossibility of probing a witness's reasons for invoking the privilege. When possible, less drastic alternatives should be used. Disregarding this advice, some courts permit adverse inferences in apparently unnecessary situations.<sup>197</sup> Other courts neglect adverse inferences when the facts of a case recommend their use.<sup>198</sup> Judges on two courts that considered adverse inferences raised important questions in dissent that merit close attention in deciding whether adverse inferences should be allowed and how that information should be presented to a jury. The following discussion looks chronologically at cases in which adverse inferences based on nonparty invocations of the privilege played a significant role.

#### A. Circuit Court Decisions

In *Lionti v. Lloyd's Insurance Company*<sup>199</sup> the plaintiffs sued their insurance carrier after it denied their claim for fire insurance proceeds

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made in good faith or the witness is not entitled to the indulgence sought. They are also limited to witnesses *who are not parties*. A party offering himself as a witness in his own behalf stands differently in this respect from a third person brought into court to testify in a case in which he has no interest.

*Id.* (emphasis in original).

196. *United States v. Alessi*, 638 F.2d 466, 476 (2d Cir. 1980).

197. See *infra* note 247 and accompanying text.

198. *Farace v. Independent Fire Ins.*, 699 F.2d 204 (5th Cir. 1983). In *Farace* the insured sued to collect homeowner's fire insurance proceeds. Despite motive and conclusive physical proof of arson, which the Fifth Circuit conceded was "arguably relevant evidence," the court declined to find an abuse of discretion in the trial judge's refusal to admit evidence of insured's refusal to cooperate with arson investigators. *Brenner v. World Boxing Council*, 675 F.2d 445 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982) (see discussion of *Brenner* *infra* note 215).

199. 709 F.2d 237 (3rd Cir.), *cert. denied*, 464 U.S. 995 (1983).

on their burned restaurant. The insurer pleaded arson. The evidence conclusively indicated that the fire had been set intentionally, but there was no direct proof that the plaintiffs were responsible. Circumstantial evidence, however, clearly pointed to the plaintiffs.<sup>200</sup>

The plaintiffs' theory of the case was that a disgruntled former employee who allegedly had threatened to destroy the restaurant had committed the arson. Prior to taking the stand, the employee told counsel for the insurer that he had nothing to do with setting the fire. Before this conversation, however, he told the insurance investigator that the plaintiffs had asked him how to start a fire to destroy the restaurant. Yet, on the stand, he invoked the fifth amendment in response to questions on these subjects, thereby possibly suggesting that he, and not the plaintiffs, had burned the restaurant. Over hearsay objections, the insurance company was permitted to question the investigator about the ex-employee's earlier remarks to show that those comments were inconsistent with the witness's later invocation of the fifth amendment. The plaintiffs argued that admitting the investigator's testimony was reversible error and that a later instruction to disregard the employee's invocation of the privilege was too little too late.<sup>201</sup> The majority held that admission of the investigator's hearsay testimony was harmless error in view of other overwhelming evidence, noting further that the trial court had instructed the jury to give no evidentiary weight to the employee's invocation of privilege.

In dissent, Judge Stern wrote that the majority made a "muscular attempt" to escape becoming the initial court of appeals to decide whether evidentiary value exists in a nonparty's invocation of the privilege in a civil case.<sup>202</sup> Judge Stern disagreed with the majority's implicit affirmative answer to this question, arguing instead for limiting *Baxter* inferences to parties. Though Judge Stern was less than accurate in stating that juries are left only with "rank speculation" from which to draw any inferences, he recognized the confusion over adverse infer-

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200. *Id.* at 239. Restaurant sales had declined severely over the previous year, and an audit presented at trial projected a \$26,000 cash flow shortage. On September 11 Lioni's mortgagee gave notice of its intent to call due a \$392,000 loan and foreclose on the security interests. After orally arranging a stay with the lender by agreeing to place the business up for sale, Lioni failed to appear to sign the necessary documents on September 19, and the restaurant was destroyed by fire the next day. Finally, within ten days of the fire, Lioni's son unsuccessfully tried to insure the restaurant with an additional \$500,000 in coverage, and his daughter uncharacteristically prepaid three months' premiums on the policy that was litigated. *Id.*

201. *Id.* at 241-42. Lioni also objected to testimony by the investigator that the employee had offered to give testimony favorable to the insurer for payment. The court allowed the investigator to testify, over objection, that the employee told him that his information "would 'wrap the case up for the insurance company and the Liontis were not dumb and they would be willing to make a deal.'" *Id.*

202. *Id.* at 244.



ences and consequently the need for a sounder methodology.<sup>203</sup>

In *Brink's, Inc. v. City of New York*<sup>204</sup> the plaintiff sued the City for damages after the City cancelled its contract to collect coins from New York's parking meters because the City believed that a ring of the plaintiff's employees were stealing some of the monies.<sup>205</sup> The City counterclaimed, contending that the plaintiff breached the contract through negligent supervision of its employees, resulting in substantial thefts of the meter collections. The plaintiff in turn filed a third-party complaint against its collectors involved in the scheme. After the City won a large jury verdict the plaintiff appealed alleging that the trial court erroneously allowed the City to rely in closing argument on the invocations of privilege by the plaintiff's ex-employees as circumstantial evidence and that the court also erred by instructing the jury that it could infer responses adverse to the witnesses' interests from those refusals.

Beginning with the Federal Rules of Evidence, the *Brink's* court acknowledged that although Congress rejected Rules 501-13 as promulgated, Proposed Rule 513<sup>206</sup> provided a good starting point to analyze the adverse inference question. This proposed rule prohibits comment upon claims of privilege, evidencing a policy of strengthening the privilege.<sup>207</sup> The court noted, however, that if this policy remains viable, it is only in the criminal arena because *Baxter* made a distinction between civil and criminal cases and only allowed adverse comment about invocations in civil cases. The court cited Professor Heidt to support its holding that the employees' invocations of the privilege qualified as vicarious admissions against the plaintiff.<sup>208</sup> On the facts in the record, the court held that these fifth amendment claims were both competent and admissible because the Constitution does not require their exclusion.<sup>209</sup> Next, the majority considered whether the adverse inferences were unfairly prejudicial under Federal Rule of Evidence 403,<sup>210</sup> concluding that the trial judge correctly determined that although damaging, the inferences were not "prejudicial in the sense of being

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203. *Id.* at 245. In light of the overwhelming evidence pointing to Lioni, it is doubtful that such speculation would have been "rank."

204. 717 F.2d 700 (2d Cir. 1983).

205. *Id.* at 702. Before the suit was filed by *Brink's*, seven of their collectors had been arrested, five of whom were charged and convicted for the thefts. *Id.*

206. *See supra* note 194.

207. *Brink's*, 717 F.2d at 708.

208. *Id.* at 709-10 (citing Heidt, *supra* note 108, at 1119-22).

209. *Id.* at 710 (citation omitted).

210. FED. R. EVID. 403. Rule 403 reads: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

inflammatory.”<sup>211</sup>

Judge Winter raised several important points in dissent. First, Judge Winter argued that by allowing the examining lawyer to ask increasingly damaging, fact-specific questions once it was clear the witness would invoke broadly the majority endorsed a strategy inviting the jury to attach evidentiary value to questions, not answers.<sup>212</sup> Under the liberal *Hoffman* standard the invocations were permissible whether the real answer was “yes” or “absolutely not;” yet by continuing to press such pointed questions, the City’s obvious intent was to insinuate incriminating responses.<sup>213</sup> Second, Judge Winter maintained that opposing counsel essentially was denied the right to cross-examination and was unable to rebut the inevitable negative inferences. This “evidence” was analogous to hearsay statements plainly not admissible under the Federal Rules of Evidence.<sup>214</sup> Judge Winter wrote that the effect of the inferences on the plaintiff was “devastating,” and concluded that the majority had created a standard “utterly without precedent.”<sup>215</sup>

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211. *Brink’s*, 717 F.2d at 710. The majority considered that although the inferences were damaging to Brink’s in their claims against the City, they benefited Brink’s on their claims against the culpable third-party defendants. One commentator criticized this as “makeweight,” because the employees would be insolvent for the amounts involved. Note, *Magic Trick*, *supra* note 173, at 383.

212. *Brink’s*, 717 F.2d at 716. On direct examination, after two of the five witnesses made it plain that “they would not testify in the conventional sense,” the City’s lawyer continued by asking specific questions phrased to suggest incriminating responses to the jury. *Id.* at 715. Judge Winter argued that the only way Brink’s could attempt to rebut the suggested inferences on cross-examination was to engage in the “mindless exchange” of phrasing the identical questions in reverse. *Id.* at 716.

213. *Id.*

214. *Id.* at 716-17.

215. *Id.* at 717. Judge Winter distinguished *Baxter* on the basis that it involved party invocations: “[T]he issue is not whether adverse inferences may be drawn against a party who asserts the fifth amendment in a civil action, but whether adverse inferences may be drawn against a party because a witness (whether or not another party) asserts the fifth amendment,” concluding that they may not. *Id.* at 718 (emphasis in original).

Both majority and dissent ignored their earlier opinions in *Brenner v. World Boxing Council*, 675 F.2d 445 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982). In *Brenner* a promoter sued the Council and its president, alleging an illegal conspiracy and group boycott to prevent him from promoting WBC title fights. The key players were Brenner, the WBC and its president Jose Sulaiman Chagnon, and Don King, a competing promoter who was not named a defendant. The Second Circuit affirmed dismissal of the complaint because Brenner failed to prove a reasonable inference of conspiracy. On appeal Brenner argued that the district court erred by allowing Don King to invoke the fifth amendment and compounded that error by not instructing the jury that it might draw an adverse inference based on King’s invocation of privilege. The court rejected these claims, noting:

We also find no merit in Brenner’s claim[] . . . that the district court erred in refusing to instruct the jury that it might draw an adverse inference against appellees from King’s invocation of his Fifth Amendment privilege. . . . [S]ince King was a non-party witness, no adverse inference against appellees could have been drawn from his refusal to testify.

*Id.* at 454 n.7. In light of this, the Second Circuit’s decision in *Brink’s* would appear to mean one of two things: First, that it overruled this point of *Brenner*, *sub silentio*; second, and more likely,

Judge Winter discussed significant unresolved issues. One commentator writing on the *Brink's* opinion agreed with Judge Winter's observation that such interrogation indeed would constitute illicit lawyer testimony if not constricted in some manner not yet articulated by any court.<sup>216</sup> Adverse inferences, however, may help restore the equities between parties sometimes upset when nonparties invoke the privilege, if properly safeguarded so that Judge Winter's concerns are addressed.<sup>217</sup> If sufficient indicia of trustworthiness were established, perhaps Judge Winter would find the circumstances to be similar to a *Baxter*-type party invocation.

The Eighth Circuit in *Rosebud Sioux Tribe v. A & P Steel, Inc.*<sup>218</sup> reversed denial of the Rosebud Sioux Tribe's (Tribe) motion for a new trial, in part because the trial court had refused to allow the Tribe to call a witness who intended to invoke the privilege and then argue adverse inferences from the invocation. No adverse inference case can be regarded as typical, but the facts of this case demonstrate the type of situation in which adverse inferences would be justified. Michael Strain, the attorney for Tribal Land Enterprises (TLE), a separate entity from the Tribe, assisted the Tribe in securing a large government grant for an irrigation project. The Tribe, through its chairman Edward Driving Hawk, then negotiated and contracted with A & P Steel (A & P) for construction of the system. Strain planned to embezzle money from the project and did two things to accomplish this goal. First, he hired himself out as a "consultant" to A & P on the project, and second, he formed a shell corporation to launder a small portion of the kickbacks to Driving Hawk and Richard Lone Dog, Chairman of TLE.<sup>219</sup>

About one year into the contract, the Tribal Counsel, suspecting fraud and corruption, sued A & P for fraud, conspiracy, and breaches of warranty and contract. At his deposition, Lone Dog was represented by Strain, who counselled him to answer falsely.<sup>220</sup> Lone Dog's trial counsel then advised him to invoke the fifth amendment. A & P successfully objected to the Tribe's attempt to call Lone Dog to the stand to force

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that the invocations by Brink's employees were vicarious admissions of their employer and that the witnesses were nonparties only in a technical sense. Had the evidence of conspiracy involving Don King in the *Brenner* case been of such quality reasonably to prove that conspiracy, the court should have instructed the jury that it could draw the inference against the WBC. See also Heidt, *supra* note 108, at 1119-22.

216. Brodsky, *The Fifth Amendment in Civil Cases*, N.Y.L.J., Oct. 3, 1984, at 1, col. 1.

217. Rakoff, *supra* note 12.

218. 733 F.2d 509 (8th Cir.), *cert. denied*, 469 U.S. 1072 (1984).

219. *Id.* at 512. Payment by A & P to Strain for his "services" totalled over \$173,000. Of this amount, Strain paid Driving Hawk and Lone Dog about \$26,000. *Id.*

220. *Id.* at 514. "Lone Dog's deposition testimony flatly contradicted the allegations contained in the Tribe's complaint." *Id.*

him to invoke the privilege in front of the jury. Ironically, the trial judge allowed A & P to read Lone Dog's perjured testimony into the record over the Tribe's objection, finding Lone Dog to be an unavailable witness under Federal Rule of Evidence 804(a)(1). The Tribe was unable to prove the conspiracy among A & P, Strain, and tribal officers Lone Dog and Driving Hawk beyond circumstantial evidence, nor could it satisfactorily establish that Lone Dog had lied at his deposition. The Tribe lost both on its complaint and on A & P's counterclaim. In a subsequent criminal case against attorney Strain, Lone Dog testified to the conspiracy before a federal grand jury, clearly exposing his false deposition testimony. Based on the newly discovered evidence, the Tribe moved for relief from judgment, but its motion was denied.<sup>221</sup>

On appeal, the Eighth Circuit initially held that the Rule 60(b) motion should have been granted based on the newly discovered proof of the conspiracy revealed by Lone Dog's grand jury testimony. The court then addressed the propriety of challenged jury instructions. Lastly, the court held that the Tribe should have been permitted to rebut the unfair manipulation of the evidence rules which obscured the truth by calling Lone Dog as a witness and by arguing to the jury the adverse inference that should attach to his invocation. The unanimous majority found support for this result in *Baxter*, stating that the policies behind invoking the privilege are implicated less when inferences are drawn from nonparty invocations than from party invocations.<sup>222</sup> Additional support was gathered from Federal Rule of Evidence 501, expressing Congress's intent to afford the courts flexibility with the rules of privilege.<sup>223</sup>

The most significant aspect of *Rosebud* was the Eighth Circuit's willingness to allow the adverse inference despite incomplete proof of the conspiracy. From the court's perspective, the Tribe presented evidence calling into doubt the truthfulness of Lone Dog's deposition, yet not sufficiently strong to surmount the deposition's effect on the jury. After the deposition was admitted, it was essential to counter A & P's undue advantage by allowing the Tribe to call Lone Dog, despite his intent to invoke the privilege.<sup>224</sup> *Rosebud Sioux Tribe* thus correctly

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221. The appeal from the denial of the motion was then consolidated with the appeal from the judgment of the action.

222. *Id.* at 521.

223. *Rosebud*, 733 F.2d at 522. The court noted:

In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis" and to leave the door open to change.

*Id.* at 522 (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)).

224. *Id.*

supports a flexible approach in using adverse inferences.<sup>225</sup> The Eighth Circuit purported to limit its holding to the unique facts of the case, but the decision clearly provides authority for this remedy in related circumstances. For example, the adverse inference remedy could be used in situations in which the legal proof of control is wanting, yet fairness demands that something be done.

In *RAD Services, Inc. v. Aetna Casualty & Surety Company*<sup>226</sup> the Third Circuit affirmed a judgment against the plaintiff rendered by a jury which had been instructed to consider the invocations of privilege by the plaintiff's nonparty agents. RAD, a waste management company, embarked on a business venture to manufacture a fertilizer additive from waste "fly ash" generated in steel mill pollution control devices. RAD had warehoused two to three thousand tons of the ash when it discontinued producing the additive because of a shrinking market. Unable to sell the accumulated ash and facing penalties for improper storage, RAD sought to dispose of the material, but was unwilling to pay the estimated five to six hundred thousand dollar cost of a legitimate disposal program. The company attempted unsuccessfully to sell the ash to a chemical broker for reprocessing. Ultimately, RAD officials arranged to have the waste dumped into a Kentucky strip mine and a Tennessee farm and doctored records to show lawful disposal. State officials caught RAD's contractor dumping the ash and, when faced with a 10,000 dollar per day fine, RAD paid for proper disposal. RAD then filed a claim with its general liability carrier for reimbursement. Aetna denied coverage because the illicit scheme fell under a policy exclusion that insured events must be "*neither expected nor intended*" by the insured.<sup>227</sup> RAD then sued Aetna on the policy.

At trial Aetna successfully defended by showing that the insured's agents intended the dumping. RAD argued on appeal that the court erred by admitting the depositions of two RAD agents who responded to questions regarding their employment by invoking the privilege, and then aggravated this error by allowing the jury to draw adverse inferences from these invocations.<sup>228</sup>

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225. Commentators critical of the adverse inference approach nonetheless agree that the *Rosebud* court reached the proper result. See, e.g., Brodsky, *supra* note 216, at 30, col. 1; see also Note, *Rosebud*, *supra* note 173, at 1264-65. They, however, would have refused initially to allow Lone Dog's testimony to be read to the jury. This viewpoint fails to acknowledge that in some cases—perhaps this one—adverse inferences may be the only solution available to equalize the parties after an invoking witness hinders presentation of evidence.

226. 808 F.2d 271 (3rd Cir. 1986).

227. *Id.* at 273 (emphasis in original).

228. *Id.* at 277. The jury was instructed:

During the trial you also heard evidence by past or present employees of the plaintiff refusing to answer certain questions on the grounds that it may tend to incriminate them. A witness

The *RAD Services* court acknowledged the *Griffin-Baxter* distinction that forbids adverse inferences in criminal cases, but allows them in civil cases, noting that this difference arises in part from the search for truth that justifies the adversary system.<sup>229</sup> Under the facts of this case, wrote the court, the policies that condone informing factfinders when parties invoke the privilege likewise permitted the jury to consider these nonparties' refusals to answer.<sup>230</sup>

RAD argued that the invocations were inadmissible because there was no proof that these witnesses had any loyalty to the company, and because RAD was unable to cross-examine them to ferret out their possible attempts to discredit RAD. The Third Circuit held that a witness intent on damaging his ex-employer would probably give directly incriminating testimony, rather than rely on a potential inference. Furthermore, the trial judge would screen truly frivolous claims of privilege, and counsel might persuade the jury that the invocation was without probative value. Finally, approving the opposite rule would give corporations the power to stonewall discovery by firing ostensible corporate wrongdoers. Thus, nothing favors withholding a dismissed employee's invocation of privilege from the jury.<sup>231</sup>

The *RAD Services* court approvingly cited the concerns raised by Judge Winter in his *Brink's* dissent. The Third Circuit maintained that the trial judge, through his authority to control the manner by which juries learn of nonparty invocations, must guard against the unfair prejudice that may result when a lawyer, assured that the witness will invoke the privilege broadly, badgers the witness on direct examination with highly fact-specific questions simply to evoke damaging insinuations.<sup>232</sup> The *RAD Services* court was satisfied that these "sharp practices" had been avoided. The court concluded by noting that RAD was not disadvantaged unfairly through its inability to cross-examine the witnesses, nor had Aetna caused its adversary undue prejudice.<sup>233</sup> Under the circumstances it was not error to admit the nonparty invocations, or to allow the jury to draw negative inferences therefrom.

In *RAD Services* the Third Circuit answered the question it had

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has a constitutional right to decline to answer on the grounds that it may tend to incriminate him. You may, but you need not, infer by such refusal that the answers would have been adverse to the plaintiff's interests.

*Id.*

229. *Id.* at 274.

230. *Id.* at 275. The court also noted that the record was "replete with circumstantial evidence" that the two invoking witnesses were involved in the purported plan to dump the toxic waste. *Id.* at 277.

231. *Id.* at 276.

232. *Id.* at 277-78.

233. *Id.* at 280.

avoided in *Lionti*. It is uncertain whether allowing the adverse inference was decisive, as arguments can be made each way.<sup>234</sup> *RAD Services*, however, points out circumstances under which adverse inferences might be abused and illustrates that a methodology for determining their use would be helpful.

Finally, in *Cerro Gordo Charity v. Fireman's Fund American Life Insurance Co.*<sup>235</sup> the Eighth Circuit reiterated its willingness to permit adverse inferences based on nonparty invocations of the privilege. Leonard Richards, cab driver, ordained minister, and management consultant, instituted a fraudulent scheme over many years whereby he insured his ill half-sister, May Wilson, with numerous hospital income protection policies. Approximately 700,000 dollars was paid on these policies to certain trusts that Richards controlled. When the insurance companies began protesting coverage, Richards switched to death and dismemberment policies amounting to more than 3.5 million dollars in coverage on May Wilson upon her death, with the benefits payable to the trusts, including Cerro Gordo. In 1982, May was found murdered, and the scene had been altered to suggest a possible sexual assault.

Cerro Gordo, controlled at the time by Richards, sued to collect as beneficiary of the policies after voluntary payments were refused. Following a lengthy trial the jury returned a verdict for the defendants, finding that Richards had murdered his half-sister to collect the insurance money. The charity raised several points on appeal, including trial error in permitting the defendants to call Richards as a witness solely to have the jury hear him invoke the fifth amendment. The Eighth Circuit reviewed its decision in *Rosebud* and agreed that, using a case-by-case approach, the instant facts justified the inference.

Though not involved officially with the charity at the time of trial, Richards had full control of Cerro Gordo when the suits were filed, so there was reason to assume some loyalty to the plaintiff.<sup>236</sup> As other evidence of a design to defraud the companies was presented, the court disagreed that the adverse inferences made Richards' invocations too

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234. *Id.* at 274. RAD obviously thought that the adverse inferences were the critical difference between losing and winning, as their appeal rested solely on two aspects of this issue. *Id.* On the other hand, the Third Circuit reviewed the proof and found enough other evidence supporting the verdict to hold, alternatively, that any error on the issue was harmless. *Id.* at 280.

235. 819 F.2d 1471 (8th Cir. 1987).

236. *Id.* at 1481.

[T]he Second and Third Circuits, [in *Brink's* and *RAD Services*,] respectively held that it was permissible to allow the invocation of the privilege to be made known to the jury when it is invoked by a nonparty who was a former employee of a company a party to the litigation. Richards, as a former member of Cerro Gordo, stands in a position similar to the non-party ex-employees in those cases. Moreover, any concerns that Richards would invoke the privilege solely for the purpose of harming Cerro Gordo are not present here.

*Id.*

costly.<sup>237</sup> In addition, as Richards was a "key figure" in the suits, whose conduct provided the basis for the defense of fraud, the inferences served to dispel any idea implied by his absence that Richards' testimony would damage the insurance companies' case.<sup>238</sup> Finally, the evidence did not unfairly prejudice Cerro Gordo. Evidence only needs to make it more likely than not that an alleged fact exists to be admissible.<sup>239</sup> The inferences did just this, without more, and were not emphasized excessively in light of the other evidence, nor did it appear that the jury rested its decision on the invocations alone. The other exceptions were without merit and the court affirmed.

The adverse inference in this case based on Richards' fifth amendment claim of privilege against self-incrimination was a justified and correct response to vitiate his sordid plan. These equities did not go unnoticed by the Eighth Circuit;<sup>240</sup> but even if they had, the inference could still have been sustained under *Baxter* on the theory that Richards was the real party in interest, or alternatively that he was the alter ego of Cerro Gordo Charity.<sup>241</sup> *Cerro Gordo* supports piercing the corporate veil to see whether denying inferences based on invocations by noncaptioned parties can be reconciled equitably with precedent allowing consequences to inure to parties who invoke the privilege.

### B. District Court Decisions

In addition to the three circuit courts that have approved adverse inferences based on nonparty invocations, several district courts have also examined the issue. A Minnesota federal district court in *E. H. Boerth Company v. LAD Properties*<sup>242</sup> held in post trial motions filed by the defendant that nonparty adverse inferences were permissible. In this case a land developer, his wholly owned construction contracting firm, and the real estate limited partnership of which he was the sole

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237. *Id.* at 1482. "The fact that Richards chose to invoke the privilege was only one of a number of factors that the jury had to consider in determining whether a fraud had been committed. There was other evidence presented at trial that Richards sought to perpetrate a fraud on the insurance companies." *Id.* (citation omitted).

238. *Id.* The court stated:

If anyone knew whether there was an intent to commit a fraud, it was Richards. Hearing Richards invoke the privilege informed the jury why the parties with the burden of proof, i.e. the insurance companies, resorted to less direct and more circumstantial evidence than Richards' own account of what had occurred.

*Id.*

239. *Id.*

240. *Id.* at 1474. "For all the gambits, legal and otherwise, that this case has produced, however, overshadowing all is the stark reality of the murder that the jury found had been committed and the motive that resulted in May Wilson's death." *Id.*

241. See *In re Crabtree*, 39 Bankr. 718 (Bankr. E.D. Tenn. 1984).

242. 82 F.R.D. 635 (D. Minn. 1979).



general partner were sued after the venture collapsed by the underwriter hired to sell the partnerships.<sup>243</sup> The plaintiff was awarded damages to compensate for its efforts to sell the securities. At trial a witness involved in the financial affairs of the partnership and the construction company invoked the fifth amendment in response to specific questions about the project's financing. The court reviewed the standard espoused in *Baxter* and concluded that it was reasonable and fair for the jury to draw inferences against the defendant from its employee's claim of privilege.<sup>244</sup>

In *Poplar Grove Planting and Refining Company, Inc. v. Bache Halsey Stuart Inc.*<sup>245</sup> a brokerage firm was sued after its employee made several unauthorized trades for the plaintiff's account, resulting in large losses. The Louisiana federal district court noted that when the responsible employee was questioned at trial, no objection was raised to the characterization of his actions as illegal. The court eventually found liability on the theory of *respondeat superior* and stressed the presence of significant circumstantial evidence. The court felt compelled to draw adverse inferences because the witness all but refused to testify, relying extensively on the fifth amendment.<sup>246</sup>

In cross motions for summary judgment, an Oklahoma federal district court in *Financial Federal Savings & Loan Association v. Savings Investment Corp.*<sup>247</sup> found that adverse inferences drawn from the deposition invocations of a former defendant, excused from the litigation by virtue of the automatic stay in bankruptcy, could be used derivatively against the remaining thirteen defendants.<sup>248</sup> The court went on

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243. By the time the developer's empire collapsed, for among other reasons, his diversion of construction funds intended for the limited partnership project to other projects and overdishurment on the project itself, the companies were about \$1 million short of funds to complete construction of the limited partnership venture. This was revealed to the underwriter, and the decision was made to obtain permission from the state securities office to withdraw the offer. The plaintiff sued to recover commissions it would have obtained from subscribers had the deal gone through. *Id.* at 640.

244. *Id.* at 645.

245. 465 F. Supp. 585 (M.D. La. 1979).

246. *Id.* at 591. The court explained that "[s]ince few, if any, of the questions posed to Ghio were answered, this Court has no choice but to draw the inference from his refusal to testify that he was responsible for the unauthorized acts complained of. Such inference may be drawn in civil trials." *Id.* (citing *Paynes v. Lee*, 362 F. Supp. 797, 799 (M.D. La. 1973), *aff'd*, 487 F.2d 1307 (5th Cir. 1974) (stating that "[w]hile ordinarily a person is not to be penalized for invoking this constitutional protection, nevertheless, the Fifth Amendment does not guarantee that a person who invokes it will not be subject to any unfavorable inference").

247. 1987 Fed. Sec. L. Rptr. (CCH) ¶ 93,190 (W.D. Okla. 1986).

248. *Id.* *Accord* *Young Sik Woo v. Glantz*, 99 F.R.D. 651, 653 (D.R.I. 1983) (stating that "[i]f such an inference can be drawn at trial, there is no substantial reason to forbid it in the paper trial contemplated by Rule 56") (dicta). *But cf.* *National Acceptance Co. v. Bathalter*, 705 F.2d 924 (7th Cir. 1983) (refusing to draw an adverse inference at the summary judgment stage against a defendant who asserted the fifth amendment privilege in response to a plaintiff's complaint).

to hold, however, that this complex case, which arose from a loan participation and servicing agreement for a Utah resort and involved fourteen defendants and eight causes of action, was inappropriate for summary judgment. This ruling should not preclude withholding the fact of invocation of the privilege from the factfinder if it would be unnecessary to a fair adjudication.

Finally, in an SEC action against a securities underwriter, defendants in *SEC v. First Jersey Securities, Inc.*<sup>249</sup> sought a stay of civil discovery pending resolution of the parallel criminal investigation of certain of its officers, agents, and directors.<sup>250</sup> The defendants asserted that they faced the objectionable choice of waiving the privilege or facing adverse inferences if they invoked. The magistrate refused to allow the corporate defendant to assert vicariously the privilege claims of its employees, and refused to stay discovery based on the invocation of the privilege by the company's former chairman, also a defendant, because he was not then under investigation.<sup>251</sup> Any adverse inferences based on the employees' invocations were permissible because, as nonparties, the witnesses did not risk losing the case.<sup>252</sup>

It is evident, particularly from the last two cases, that some courts may be allowing adverse inferences when it is inappropriate to do so, perhaps confusing the standards for nonparties with those for adverse inferences against parties. In *Financial Federal* it would appear unnecessary, in light of the large number of litigants and the transaction records, to permit adverse inferences based on the nonparty invocations of the privilege. The reported opinion, however, is too scant to determine whether this was unfairly prejudicial. In *First Jersey Securities* the magistrate considered the chairman's assertion of privilege "premature" because he was not at that moment compelled to testify. As a party defendant, however, he was entitled to assert the privilege as early as in his answer, if by responding he could provide testimony usable at a later criminal trial. The magistrate correctly decided that the nonparty invocations could be used against First Jersey, but, in the posture of a motion for stay, did not indicate whether allowing the infer-

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249. 1987 Fed. Sec. L. Rptr. (CCH) ¶ 95,954 (S.D.N.Y. 1987).

250. *Id.*

251. The Magistrate distinguished a stay of discovery in a similar case, *Brock v. Tolkow*, 109 F.R.D. 116 (E.D.N.Y. 1985), on the grounds that in *Brock*, inferences would have been drawn on party invocations, while here they would be drawn based on the invocations of the nonparty employees. *Contra SEC v. Musella*, 578 F. Supp. 425, 431 (S.D.N.Y. 1984) (stating that while it was "loathe" to draw an adverse inference against a party who was also a criminal defendant in a parallel proceeding, it did not hesitate to draw the inference when the invoker was merely under grand jury investigation, but not facing trial).

252. *First Jersey Securities*, 1987 Fed. Sec. L. Rptr. (CCH) ¶ 95,958. The Magistrate cited *Brink's* for this proposition.

ence would be unfairly prejudicial at trial. These decisions indicate the value of a methodological approach to determine whether to permit inferences based on nonparty invocations of the privilege.

#### IV. PROPOSED METHODOLOGY

##### A. Preliminary Questions

Rule 403<sup>253</sup> overarches the entire analysis of witness invocation of the fifth amendment: whether parties who anticipate that a witness will invoke should be allowed to elicit that response at trial, and if so, how the effect of the invocation should be presented to lay factfinders. Focusing on the outcome, this means deciding whether a particularly virulent form of prejudicial evidence will reach the jury.<sup>254</sup> The purpose of a methodology is to provide structure in making a difficult decision. Simplistic balancing or conclusory allegations that the Rule 403 test is met are not sufficient for dealing with adverse inferences. All the above courts might have engaged in the necessary analysis, but by neglecting to articulate how this was applied, the message may be sent inadvertently to lower courts to allow adverse inferences broadly.

This consequence ought to be avoided. Issues of relevancy and materiality, for instance, should be looked at more critically. If a court approaches the matter casually, permits continuous questioning of a witness who continuously invokes the privilege and then later decides that no meaning should attach to the invocations, the court faces the impossible task of "unringing the bell."

The methodology that follows gives form and procedure to resolving the question of permitting adverse inferences based on nonparty invocations. It seeks to address the objections raised by Judge Winter and several commentators. The analysis contains enough flexibility to support its use in most cases and self-adjusts for the quality of the other proof in an effort to avoid the futility of a restrictive rule that attempts to govern every circumstance.<sup>255</sup> Efforts such as this proposed methodology necessarily contain trade-offs. The *quid pro quo* for providing a response to invocations that stifle apparently valid claims is to permit

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253. For the text of Rule 403, see *supra* note 210. One commentator has implied "that the limits of Rule 403 discretion are ultimately definable only in terms of good sense and an intuitive grasp of fairness." Gold, *supra* note 13, at 64.

254. So potent, in fact, that in no decision located by this Author in which the jury was permitted to draw the adverse inference, did the party thereby advantaged ever lose.

255. See, e.g., *United States v. Local 560, Int'l Bhd. of Teamsters*, 780 F.2d 267, 292 n.32 (3rd Cir. 1985) (noting that in RICO actions brought by the government to purge a union of mob domination, it was harmless error for the trial court to draw an adverse inference against the defendants based on a nonparty's invocation because the evidentiary foundation to connect the witness with the conspiracy was insufficient), *cert. denied*, 476 U.S. 1140 (1986).

adverse inferences and comment if after working through the methodology the equities against allowing the inference remain unswayed. Each question is threshold to the next; if any hurdle is not cleared, further analysis terminates, and the court should disallow questions soliciting the witness to invoke the privilege.<sup>256</sup>

The relevancy of evidence is measured by a low standard.<sup>257</sup> Rule 403 places limits on this broad definition: the character of the harms implicated in this Rule suggest that its unarticulated goal is to attain "truth through procedural fairness."<sup>258</sup> With this in mind, the adverse inference analysis begins with Rule 104, which directs the court to determine preliminarily the admissibility of the invocation.<sup>259</sup> The party seeking proof from a witness whom he knows likely will invoke the privilege against self-incrimination must inform the court if he wishes later to gain the adverse inference benefit.<sup>260</sup> The court then hears the offer of proof outside the presence of the jury on all proposed questions to be asked. This offer involves a straightforward application of Rule 103<sup>261</sup> and is especially important when invocations are considered evidentially. If the court fails to engage in this analysis and then instructs the jury to disregard the invocations to which it was exposed, the jury will probably (at least subconsciously) disregard the instruction.<sup>262</sup>

Next, the party seeking the testimony from the witness must introduce any evidence it possesses of: (a) an expired Statute of Limitations; (b) any immunity granted to the witness;<sup>263</sup> (c) a previous waiver of the

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256. In many instances, this means the witness will not be called to testify.

257. See FED. R. EVID. 401. Rule 401 states: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

258. Gold, *supra* note 13, at 65.

259. FED. R. EVID. 104(a). Rule 104(a) states in part: "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court." *Id.*

260. Counsel should know this well in advance of trial from discovery depositions and from talking with the witness. If the witness invokes unexpectedly on the stand, the court should interrupt to ask counsel at sidebar whether he intends to seek evidentiary value from the invocation. If so, the jury is excused while the court proceeds through the adverse inference methodology.

261. FED. R. EVID. 103(2)(b). Rule 103(2)(b) reads: "The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. *It may direct the making of an offer in question and answer form.*" *Id.* (emphasis added).

262. Allen, *When Jurors Are Ordered to Ignore Testimony, They Ignore the Order*, Wall St. J., Jan. 25, 1988, at 31, col. 6. This article concludes by explaining how Judge James L. McCrystal of Erie County, Ohio has claimed to solve the problem. McCrystal videotapes witness testimony, and edits out inadmissible testimony before playing it back to the jury. "Otherwise, [notes McCrystal] 'it's like spitting in milk—(afterward) you can't separate it out.'" *Id.*

263. This immunity must be coextensive with the protection against self-incrimination provided by the fifth amendment itself. Some states provide statutory immunity to facilitate private civil enforcement of their unfair trade practices laws. Tennessee, for example, compels officers,

privilege for the matters at issue; or (d) a double jeopardy bar to later prosecution.<sup>264</sup> The objecting party must then be permitted to reply to this proof. If one of these exceptions apply, the danger of self-incrimination has been removed, and the witness then is compelled to testify, facing contempt sanctions if he refuses. The court, satisfied that the witness will invoke the privilege in response to a particular line of relevant questioning and that the testimony cannot be compelled, should next ask whether the proof sought by adverse inference relates to a central issue in the case.<sup>265</sup> Wigmore, in fact, argued this in 1891 when he proposed abolishing the privilege and substituting instead certain limiting exceptions, including a prohibition against incriminating questions immaterial to the main issue.<sup>266</sup> Invocations of privilege have never been viewed as an independently sufficient substitute for proof;<sup>267</sup> thus if the questions that would trigger invocation do not relate to a central issue, the analysis ends and Rule 403 mandates that the party be instructed not to elicit invocations in front of the jury.

When, on the other hand, the answer that the witness probably would give, but for the privilege, is central to the claim, the court must decide whether the proof can be provided through other means or other witnesses. Fairness counsels avoiding borderline prejudicial evidence when adequate substitutes exist. Numerous commentators advocate this approach.<sup>268</sup> It is, however, the most subjective decision the judge undertakes in this methodology. The party seeking the inference likely will argue that no other source provides an equivalent substitute for the evidence. The party seeking to avoid the inference is placed in a quandary: to argue that other similar proof exists, he must point to evidence

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stockholders, and agents to provide testimony and produce documents in these actions, but grants them immunity against use of the testimony and evidence in any subsequent criminal action. TENN. CODE ANN. § 47-25-107 (1988). Similarly, in the general immunity provision of its Criminal Procedure Act, North Carolina purports to grant immunity from prosecution "in any criminal case," except perjury or contempt, when the invoking witness is ordered to testify pursuant to the article. N.C. GEN. STAT. § 15A-1051 (1988). In many instances, however, dual sovereignty prevents these grants of immunity from compelling the responses that are sought. *See, e.g., Rhode Island v. Cardillo*, 592 F. Supp. 655 (D.R.I. 1984) (despite double jeopardy bar of state prosecution, threat of federal prosecution still existed; therefore, responses could not be compelled over valid claims of privilege).

264. *See, e.g., C. McCORMICK, supra note 22, § 121, at 290; Baylson, supra note 193, at 837-38.*

265. In the context of a different remedy (dismissal), one author wrote that this would "require the court to ask if the information withheld will compromise the trier of fact's ability to make a fair determination of the controversy." Note, *supra note 142, at 598.*

266. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 87 (1891).

267. *United States v. Rylander*, 460 U.S. 752 (1983); *National Acceptance Co. v. Bathalter*, 705 F.2d 924 (7th Cir. 1983); *In re Sterling-Harris Ford, Inc.*, 315 F.2d 277 (2d Cir. 1963); *Sahn v. Pagano*, 302 F.2d 629 (2d Cir. 1962).

268. *See, e.g., Daskal, supra note 131, at 263; Hartwell & Kenyon, supra note 173, at 650-51.*

against himself. This decision must be made by the court with close attention to factors such as overall strength of the offeror's case, the testimony and demeanor of other witnesses, the demeanor of the invoking witness, the detriment likely to result from the absence of the inference, and the legal standard of proof required for the various claims.<sup>269</sup> If it is clear that other proof would suffice, the methodology again terminates; however, if the indicated answer is "No," or is too close to call, the judge proceeds to the next stage.

Exceptions to the hearsay rule are allowed, in general, because they possess some indicia of trustworthiness.<sup>270</sup> Adverse inferences have been criticized strongly because the invocations lack similar reliability and cannot be subjected to rigorous cross-examination. If no circumstantial showing of trustworthiness can be made, it would be unfair indeed to permit negative inferences against parties based on nonparty invocations. The cases, however, implicitly point to the tool needed to provide corroboration and to reduce the hearsay dangers inherent in adverse inferences. The judge should determine whether the nonparty can be fit

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269. See Note, *supra* note 142, at 598-99. (stating that "as the evidence withheld becomes more probative, the detriment caused by its absence increases correspondingly"). Unless somehow corroborated, however, the mere fact that evidence is made more valuable *because* its absence threatens to disrupt the factfinder's ability to make an accurate decision of the case does not make the evidence more *reliable*. Cf. Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786 (1980). This author explains:

[W]here much other evidence or far more credible evidence is available, there is no need to let in hearsay that may mislead the jury. The very existence of other or better evidence, however, implies that, even if the jury's error in evaluating the hearsay is large, its error in deciding the case will be small since that decision reflects its consideration of all the other evidence in combination with the hearsay. By contrast, . . . where there is little or no other evidence probative of the issue, the evidence is most valuable to the case as a whole. Assume that a significant reliability gap initially exists. Since that gap arises from the jury's overvaluation of the evidence in question, one would expect significant error to remain in the jury's determination of the ultimate issue because no other information intervened in its decision process. It is precisely when the unreliable evidence is highly probative and little other evidence is available that the greatest danger appears. Thus, the greater the need, the greater the danger, and the less the need, the less the danger.

*Id.* at 1801 (footnotes omitted). The dichotomy between the need for the evidence and reliability appears logically unresolvable. On appellate review, however, jury verdicts are given the benefit of all reasonable inferences that may be derived from the facts, so clearly inferences in general are permitted. Thus, in the context of nonparty witnesses, if some level of corroboration is established, adverse inferences can be justified. This Note attempts to define that minimum level of corroboration with an objective standard.

270. FED. R. EVID. 803(24). Under the residual hearsay rules, the judge can admit:

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

*Id.*; see also FED. R. EVID. 804(b)(5).

into one of the following Rule 801(d)(2) categories: (1) a person authorized to speak for the party; (2) an agent or employee who invokes as to questions within the scope of his agency or employment; or (3) a co-conspirator. Each invoking witness in the reported cases can be recharacterized fairly into one or more of these three categories. The Supreme Court recently indicated a broader view of which employees may fall within the scope of the attorney-client privilege relationship in the context of corporate litigation.<sup>271</sup> If the questions prompting the invocation of the privilege against self-incrimination relate to the time such a relationship existed, this decision supports finding sufficient corroboration to justify nonparty adverse inferences in the fact that these relationships do or did exist. With Rule 801(d)(2) standards providing guidance, the party seeking the inference must produce some initial circumstantial evidence of such a relationship.<sup>272</sup> If the party cannot adduce this evidence, once again the analysis terminates. When such evidence is produced, however, the burden of production for the corroboration issue shifts to the party seeking to avoid the inference to show that no relationship exists.<sup>273</sup>

At this juncture, if the party seeking to avoid the inference cannot meet the burden of showing that no relationship exists, the judge should allow the party seeking the inference to question the witness before the jury, despite the witness's intention to invoke the privilege. Before actual questioning begins, however, the judge must require that party to establish a factual basis for the questions asked to prevent possible abuse.<sup>274</sup> Depending on the quality of this showing, together with other factors such as strength of the case and circumstantial corroboration of these questions by testimony from other witnesses, the court should exercise strict control over counsel's mode of questioning as provided under Rule 611(a).<sup>275</sup> When the questions posed are more

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271. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

272. A simple way to accomplish this would be to subpoena corporate employment records.

273. For a discussion of shifting burdens of production, see *Commercial Molasses Corp. v. N.Y. Tank Barge Corp.*, 314 U.S. 104 (1941). See generally *Bridge, Burdens Within Burdens at a Trial Within a Trial*, 23 B.C.L. Rev. 927 (1982) (discussing shifting burdens of proof on preliminary questions as functions of policy, fairness, and efficiency, then analyzing important provisions of the Federal Rules of Evidence in light of these criteria).

Because arriving at this stage means having answered the previous threshold questions successfully, this Note suggests that the party seeking to avoid the inference prove the no-relationship question by at least clear and convincing evidence.

274. This factual basis may be established through arrest records, grand jury indictments, pending criminal charges, documentation that the witness gave pertinent testimony in a previous criminal trial, target letters (if obtainable), and the like.

275. FED. R. EVID. 611(a). Rule 611(a) states: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless con-

strongly corroborated, the court should allow more specific questions. When corroborated to a lesser degree, the court might even require counsel to question as if on direct, allowing no leading questions.

Taken together, these measures should assist in determining whether to allow invocations purposefully to reach the jury and, if so, how that might be accomplished. The methodology establishes a framework within which to make this decision, thereby avoiding amorphous balancing under Rule 403. Further, by incorporating corroborative measures and by advocating latitude on the part of the judge in controlling the mode of questioning, the hearsay dangers raised by Judge Winter and others receive adequate attention. The final section proposes a Model Jury Instruction for use when nonparty witness invocations of the privilege are offered to the jury.

### B. Model Jury Instruction

In the decisions previously discussed, no party favored by an adverse inference instruction based on a nonparty invocation lost the case; therefore, fair presentation of the charge is essential. Special effort should be made to keep the instruction as balanced as possible in order to take the "sting" out of its presentation. The court must make it plain to the jury that it may consider the invocation as it might other evidence, but only if reliable.

It has been argued that these inferences should not be permitted because lay juries, unaware of the broad grounds on which a witness may properly invoke the privilege, naturally assume the most damning reasons.<sup>276</sup> Still others have argued that the adverse inference derives not from the invocation but from the witness's silence.<sup>277</sup> These objections to adverse inference jury instructions are "unduly apologetic and contrived"<sup>278</sup> and are insufficient to prevent instructing the jury on adverse inferences once fairness indicates their use. The jury can be informed of the broad scope of proper invocations. Attempting to instruct the jury to draw the inference from the witness's silence rather than his invocation is useless. Separating the two conceptually is possible for analytical minds, but in practical effect accomplishes nothing. The following model instruction seeks to account for the necessary factors and presents, in as balanced a fashion as possible, the option to consider inferences that may be drawn from the privilege:

During the trial, you heard [a][certain] witness[es] refuse to answer questions

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sumption of time, and (3) protect witnesses from harassment or undue embarrassment." *Id.*

276. See Hartwell & Kenyon, *supra* note 173, at 655; Rakoff, *supra* note 12, at 2.

277. Daskal, *supra* note 131, at 272; Hartwell & Kenyon, *supra* note 173, at 653, 661.

278. Kaminsky, *supra* note 141, at 448.



on the ground that to do so may tend to incriminate them. The fifth amendment gives every witness the right to refuse to give testimony which might be used against him in a criminal trial, even if the testimony would only reveal clues about his alleged crime. Witnesses may claim their fifth amendment privilege for many reasons; claiming the privilege does not necessarily mean they committed any crime. For instance, if suspicious circumstances make it appear that the witness is guilty of some crime, but in fact he is not, he has a constitutional right to refuse to answer questions that might imply his involvement. Also, if the witness fears that he may be prosecuted for perjury, he has a perfect legal right to claim the privilege for this reason alone, and may be entirely innocent of any act implied by the questions. So, the privilege may be asserted for several different reasons.

You must decide, based on all the evidence presented to you, what those assertions of privilege mean. Evidence was presented of a relationship between the witness[es] and the [plaintiff/defendant], and the lawyers for both the plaintiffs and the defendants argued in their closing statements what you should infer from the witness[es]' assertions. You may choose to give those assertions the evidentiary weight you believe is justified in light of all the other evidence, but no more. If you decide that the assertion of privilege has some value as evidence, that evidence can only be considered against that witness and the party with whom there was proof of a relationship. You may not render your verdict based solely on a witness' refusal to testify; your verdict must be supported by other evidence independent from the inferences you may draw from any such refusal.

On the other hand, you may choose to give the claim of privilege no evidentiary value at all. If you believe that the witnesses' assertion of privilege does not indicate anything one way or the other regarding the question that prompted him to invoke, then you should infer nothing from his claim of privilege. Again, your verdict must be based on substantial evidence, altogether apart from any significance you may attach to an assertion of privilege.<sup>279</sup>

Although lengthier than the instruction given in *RAD Services*,<sup>280</sup> the model instruction endeavors to use plain language in an attempt to be easier to understand.<sup>281</sup> By incorporating examples of legal standards that support valid invocations, jurors are made aware that invoking the privilege can be consistent with innocence and are reminded to consider that possibility. Though some might consider this charge a "milk and cookies" attempt at balancing that which cannot be balanced, this charge strikes a fair medium by giving neither a favorable nor an unfavorable emphasis to drawing the inference.

## V. CONCLUSION

When nonparty witnesses assert the fifth amendment privilege in civil litigation, two important policy interests collide. The Supreme Court has decided that until all threats of prosecution are removed, the

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279. A similar instruction was given in the *In re Corrugated Container Antitrust Case*, No. M.D.L.-310 (S.D. Tex. Apr. 1980). The instruction is reprinted in Baylson, *supra* note 193, at 846.

280. *RAD Services v. Aetna Casualty & Sur. Co.*, 808 F.2d 271 (3rd Cir. 1986); see *supra* note 10 for jury charge.

281. See generally Higginbotham, *Helping the Jury Understand*, 6 LITIGATION 5, 6 (Summer 1980); Schwarzer, *Communicating With Juries: Problems and Remedies*, 69 CALIF. L. REV. 731 (1981).

witness is entitled constitutionally to claim the protection that the privilege affords from the "cruel trilemma" of self-accusation, perjury, or contempt. From the perspective of the party seeking testimony from the witness, these invocations of privilege can thwart his effort to obtain relief if the privilege blocks access to essential, irreplaceable evidence. Conversely, if the invocation is admitted substantively, the party against whom an unfavorable inference would operate faces the task of rebutting hearsay dangers of evidence that cannot effectively be cross-examined.

For years, the standard response of courts was to screen invocations of privilege from juries and to instruct against any adverse inference arising from invocations which came to the jury's attention. In the mid-1970s federal courts began to permit factfinders to draw adverse inferences against claims of privilege by parties. Civil liability creates no risk of self-accusation, so adverse inferences and comment do not encroach impermissibly upon the important policies behind the privilege. More recent courts, attempting to right the scales thrown out of kilter when certain nonparty witnesses invoke the privilege, also have permitted adverse inferences against the parties.

When a relationship sufficient to muster exception to the hearsay rules exists between a party and a nonparty witness, allowing adverse inferences does not eviscerate the policies and purposes of the privilege because the witness is not compelled to convict himself. On the other hand, allowing nonparty invocations of the privilege that unfairly hinder discovery or proof to go unchecked, mocks the goals of liberal discovery and hearkens back to the time when masquerading one's case was considered sporting. Inferences drawn from nonparty invocations, however, are not the ultimate solution, nor should they be viewed as such. Witnesses can invoke the privilege broadly, and the privilege can protect innocent persons caught in dubious circumstances. The relationships between parties and nonparty witnesses should be scrutinized with care. When viewed as one response among many, including preclusion of the witness's testimony if unfair prejudice outweighs any possible gain rendered from its use, the adverse inference can be useful in countering the negative effects that may result from the invocation of privilege, particularly when the benefited party's adversary is a corporation because it can only act through its agents and employees.

This Note has defined the interests at stake and surveyed the policies at issue. Courts that have faced the nonparty adverse inference issue have demonstrated the need for a more structured decisionmaking tool. The methodology in the last section of this Note seeks to fill that void by measuring the necessity and reliability of the inference in question. Lastly, when the choice is made to go forward with the adverse

inference option, the Model Jury Instruction presents the matter to lay factfinders in a proper, balanced form. Adverse inferences are likely to grow in popularity among the courts as more litigants bring suit under quasi-criminal statutes. As more courts are faced with the issue of finding remedies to counterbalance nonparty invocations of the privilege, they should choose their options carefully with attention to the interests of all involved. The decision to permit adverse inferences should be made sparingly because, in all likelihood, the party against whose interests an inference is drawn will lose the case.

*Charles H. Rabon, Jr.\**

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\* The Author wishes to thank the Honorable William J. Haynes, Jr., United States Magistrate, United States District Court, Middle District of Tennessee, for his helpful comments and suggestions in the development of this Note.