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ARTICLES

The Fifth Amendment: If an Aid to the Guilty Defendant, an Impediment to the Innocent One

PETER W. TAGUE*

The fifth amendment's privilege not to answer, critics carp, insulates the guilty defendant from revealing his complicity.¹ While this is true, ironically it also can shackle the innocent defendant from attempting to prove that another person committed the crime. If that other person asserts the fifth amendment in response to questions designed to substitute him for the defendant, the innocent defendant can neither surmount that person's assertion nor benefit therefrom.

Consider this set of facts. A murder is committed. Defendant,² charged with the crime, has evidence that Witness killed the victim. The prosecution believes only one person committed the crime.³ Witness, subpoenaed by the defense to testify during Defendant's trial, informs defense counsel prior to trial that he will assert the fifth amendment and refuse to testify.⁴ In turn, defense counsel notifies the judge of Witness' intent.⁵ The court conducts a hearing to learn whether Witness will exercise the fifth amendment privilege

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1. Many luminaries in the United Kingdom and the United States have criticized or worried about the privilege against self-incrimination. Among them are Bentham, Wigmore, Corwin, Pound, Cardozo, Morgan, and Friendly. See Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 672-74 (1968) (listing citations). For a particularly caustic examination, see the United Kingdom's CRIMINAL LAW REVISION COMMITTEE, ELEVENTH REPORT: EVIDENCE (GENERAL), ¶¶ 28-31 (Cmd. 4991) (1972) [hereinafter ELEV-ENTH REPORT].

2. This article will identify the class of defendants that call a witness who asserts the fifth amendment as "Defendant" and the class of people who assert the fifth amendment as "Witness." When discussing the participants in a particular case or the general class of defendants or witnesses, the word will not be capitalized.

3. The other two common situations in which Witness' assertion of the privilege might thwart Defendant's defense are (1) claims by Defendant-1 that Defendant-2 alone committed the crime, or (2) claims that Defendant-2 would say Defendant-1 did not participate in a multi-culprit crime if he were to testify truthfully. For examples of these three settings, see *infra* Part I.A.

4. In practice, of course, defense counsel is likely to learn of Witness' reluctance to help Defendant in a less structured way: by inferring that intent from Witness' attempt to avoid being subpoenaed or by learning of Witness' intent only when he appears in court in response to a subpoena.

5. If the attorney knows (and arguably if he suspects) that Witness will assert the fifth amendment, he risks acting unethically by calling Witness to testify. See AMERICAN BAR ASSOCIATION, PROJECT ON STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 97, 132 (1974) (neither prosecutor nor defense counsel may call witness who will assert privilege). The prosecutor also risks committing reversible error by calling Witness, although few appellate courts will grant relief. See *United States v. Namet*, 373 U.S. 179, 188-89 (1963) (although prosecutor

not to testify, and to decide whether he may do so. During the hearing, Witness refuses to answer questions, the truthful answers to which, the defense contends, would substitute Witness for Defendant as the culprit. In light of the defense's startling contention and other evidence of Witness' guilt that the defense unwraps, the court understandably accepts Witness' claim that he might incriminate himself if he were to testify truthfully. Thus, the court holds that Witness need not testify.

Blocked by Witness' assertion of the privilege, Defendant implores the prosecution to grant "use plus derivative-use" immunity to force Witness to testify.⁶ Defendant fails to cajole the prosecution or convince the court to compel the prosecution to grant use immunity to Witness.⁷ Thwarted in his attempt to force Witness to testify, defense counsel asks the court to have Witness assert the fifth amendment in front of the jury in response to questions he (and the prosecutor) will pose. Defense counsel also asks for permission to invite the jury in his summation to draw inferences in Defendant's favor from Witness' assertion of the privilege. The court denies these motions.

At trial, the defense introduces evidence which indicates that Witness alone killed the victim. When the court refuses to let Witness appear before the jury, defense counsel fears the jury may infer that Defendant has falsely concocted Witness' existence. To salvage what he can, defense counsel urges the court to instruct the jury that it must draw no inference against either side from Witness' failure to appear.⁸ The court agrees, and so instructs the jury.⁹ The court, of course, permits defense counsel to argue in summation that the jury may draw inferences in Defendant's favor from whatever evidence of Witness' guilt the defense has introduced.

knew of Witness' intent to assert fifth amendment privilege, prosecutor did not deliberately seek to benefit from it).

6. "Use plus derivative-use" immunity protects the witness from the prosecution's use of the testimony or its fruits. *United States v. Kastigar*, 406 U.S. 441, 453 (1972). Given this type of immunity Witness must testify or risk being found in contempt. Use plus derivative-use immunity is constitutional. *See id.* (fifth amendment does not require transactional immunity, which protects the witness from prosecution for any crime he mentions while testifying; "use plus derivative-use" immunity is coterminous with the constitutional privilege). Throughout the remainder of this article, "use plus derivative-use" immunity is shortened to "use immunity."

7. The reasons for this are explained *infra* notes 13-14 and accompanying text.

8. Defense counsel does not want the judge to instruct the jury that neither side can call Witness to testify because he hopes that the jury might infer that the prosecution could (and should), even if the defense could not. And this is accurate: the prosecution could force Witness to testify by granting use immunity to him, a power Defendant lacks.

9. *See Bowles v. United States*, 439 F.2d 536, 545-46 (D.C. Cir. 1970) (en banc) (Bazelon, C.J., dissenting) (when only defense was that Witness and not Defendant committed crime, it was error for trial court to fail to instruct jury that no inference could be drawn from Witness' absence at trial), *cert. denied*, 401 U.S. 995 (1971); *see also* 2 Weinstein's *Evid.* (MB) ¶ 513[02] (1989) (judge may instruct jury that Witness is unavailable and cannot appear).

In this sorry story, three impediments block Defendant from obtaining evidence from Witness. First, Witness has the right to remain silent. Second, the prosecution need not grant use immunity to Witness.¹⁰ Finally, Defendant may neither force Witness to assert the fifth amendment before the jury, nor ask the jury to evaluate why Witness has exercised the privilege. The last impediment is the topic of this article.

The topic arises because of the interplay of the law governing a witness' fifth amendment privilege and the prosecution's monopoly over granting use immunity. Although a nondefendant cannot refuse to be called to testify (as the defendant can), he can invoke the fifth amendment to refuse to answer. If Witness asserts in advance of trial his intention to invoke the fifth amendment, and if the prosecution refuses to grant use immunity, the court will invoke a categorical rule against benefitting from a witness' assertion of privilege. Thus, the court will prevent Defendant from calling Witness before the jury.

Our criminal justice system could have protected witnesses in a different manner. A witness could have been required to testify, but the prosecution prevented from using that testimony and its fruits against him.¹¹ Or, the prosecution could have been required to justify its refusal to grant use immunity to Witness.¹² Instead, except in a few idiosyncratic cases,¹³ courts have

10. For an argument that courts have the constitutional tools to grant immunity or to force the prosecution to grant immunity, see Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 73, 168 (1974). *But cf.* Flanagan, *Compelled Immunity for Defense Witnesses: Hidden Costs and Questions*, 56 NOTRE DAME L. REV. 447, 461-63 (1981) (arguing against grant of immunity at least in multi-culprit crimes because of prosecution's difficulty in eventual prosecution of Witness in proving it gathered evidence apart from Witness' testimony).

11. Canada takes a similar approach. *See* Canada Evidence Act, CAN. REV. STAT. ch. E-10, § 5(1)-(2) (1970) (witness must answer); *id.* ch. E-10, § 5(2) (prosecution cannot use testimonial admissions of a witness who objects that he will incriminate himself by answering). Even a coparticipant must testify, as long as he is charged separately from the defendant. *Re* Regan, 2 D.L.R. 135, 137-38 (N.S. 1939). With respect to the fruits of coerced testimony, Canada does not provide the protection suggested in the text. In contrast to the U.S. approach prohibiting the prosecution from using the fruits of compelled testimony, *see* Counselman v. Hitchcock, 142 U.S. 547, 585-86 (1892), in Canada these fruits are admissible. *See also* REPORT OF THE FEDERAL/PROVINCIAL TASK FORCE ON UNIFORM RULES OF EVIDENCE 429 (1982) [hereinafter TASK FORCE REPORT] (Canadian task force considered and rejected several proposals granting an indicted witness the privilege against self-incrimination).

Also supporting this reinterpretation of witness' rights is the historical evidence that the fifth amendment was intended to protect only the criminally accused. Historically, a witness who had not been charged with a crime had a common law, but not a constitutional, privilege not to testify. *See* Mayers, *The Federal Witness' Privilege Against Self-Incrimination: Constitutional or Common Law?* 4 AM. J. LEG. HIST. 107 (1960).

12. Were the prosecution required to defend its refusal to grant use immunity, the topic of this article would remain important in those cases, predictably few, in which the prosecution succeeded in justifying its refusal.

13. The Third Circuit Court of Appeals has fashioned relief for the defendant in two situations. In the first, the court can order the prosecution to grant use immunity to a defense witness when the

doggedly refused to force the prosecution to grant use immunity to defense witnesses, or to justify their refusal to do so.¹⁴

Not surprisingly, the prosecution, free of a judicial order to grant use immunity, has obdurately refused to extend this protection. As long as Defendant cannot try to profit from Witness' privilege assertion, the prosecution can gain tactically by not granting use immunity to Witness. The jury will never see Witness and never hear him assert the privilege in response to accusatorial questions. Defendant can neither surmount Witness' privilege nor ask the jury to wonder what Witness hides behind it. But, if Defendant could force Witness to assert the privilege before the jury and thereby encourage

prosecution has withheld that grant for the purpose "of distorting the judicial factfinding process." *United States v. Herman*, 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979); *accord* *Virgin Islands v. Smith*, 615 F.2d 964, 968-69 (3d Cir. 1980) (prosecutor with exclusive jurisdiction over juvenile witness whom defendant wanted to call would have granted use immunity as long as the U.S. Attorney agreed; wrong for U.S. Attorney to withhold agreement); *see also* *People v. Shapiro*, 50 N.Y.2d 747, 762, 409 N.E.2d 897, 904, 431 N.Y.S.2d 422, 429 (1980) (error for prosecution to withhold immunity from defense witnesses who asserted fifth amendment only after prosecution threatened to prosecute them for perjury if they testified). Other courts have suggested the same result in dictum or have been reversed for ordering the prosecution to choose between granting use immunity and another sanction. *See* *Earl v. United States*, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966) (suggesting prosecution cannot grant transactional immunity to its witnesses and refuse the same protection for defense witnesses), *cert. denied*, 388 U.S. 921 (1967); *United States v. De Palma*, 476 F. Supp. 775, 781 (S.D.N.Y. 1979) (prosecution's broad grant of immunity for its witness and limited grant for defendant's witness resulted in unfair trial, therefore new trial ordered), *rev'd on other grounds sub nom.* *United States v. Horwitz*, 622 F.2d 1101, 1105-06 (2d Cir. 1980) (conceding it lacked authority to overturn lower court's grant of a new trial, court of appeals disagreed with the district court's order excluding testimony by prosecution witnesses who had received immunity unless the prosecution bestowed use immunity on defense witnesses).

In the second situation, the Third Circuit has held that the court itself can grant use immunity if the defendant is otherwise "prevented from presenting exculpatory evidence which is crucial to his case." *Smith*, 615 F.2d at 969. This situation is obviously much more relevant to Defendant's plight than the first. If Defendant can meet the burden under *Smith*, he ordinarily will not need to resort to trying to benefit from Witness' assertion of the fifth amendment: Witness will testify instead. However, no defendant appears to have met the *Smith* burden, the most important component of which is that he "make a convincing showing that . . . the testimony [of the witness] is both clearly exculpatory and essential to the defendant's case." *Id.* at 972; *see* *United States v. Sampson*, 661 F. Supp. 514, 521 (W.D. Pa. 1987) (none of witnesses for whom defendant sought immunity would have exonerated him). If the defendant can meet that burden, the prosecution can nonetheless withhold immunity if its interests outweigh the defendant's. *Smith*, 615 F.2d at 973.

Other courts have rejected the judicial grant of immunity even when Witness' testimony is crucial to Defendant's case. *See* *United States v. Heldt*, 668 F.2d 1238, 1282-83 (D.C. Cir. 1981) (trial court should not grant immunity to defense witnesses who are actual or potential targets of prosecution). Even if all courts agreed with *Smith*, however, the problem of Witness' assertion of the privilege would not disappear for every Defendant. *Smith* leaves open the problem of drawing inferences from Witness' assertion whenever the prosecution's interests in opposing immunity outweigh the Defendant's interests in granting it. *Smith*, 615 F.2d at 973.

14. *E.g.*, *United States v. Turkish*, 623 F.2d 769, 776-79 (2d Cir. 1980) (trial judge should "summarily reject" requests for immunity when Witness is an actual or potential target of prosecution), *cert. denied*, 449 U.S. 1077 (1981). The military is the only jurisdiction that authorizes the judge either to grant use immunity to a defense witness or to abate the proceedings for time to find an alternate remedy. *See* RULES FOR COURTS-MARTIAL 704(e) (1984).

the jury to speculate about Witness' guilt, the prosecution, one might predict, would suddenly discover the value of granting use immunity to Witness.¹⁵ In this circuitous way, then, juries would hear Witness testify.

Despite these benefits to the prosecution, every court that has considered the issue has rebuffed Defendant's attempt to force Witness to invoke the privilege before the jury. This rebuff is noteworthy in several ways. First, Defendant's claim is not prosaic. Defendant not only proclaims his innocence, but serves up the true (or at least an alternative) culprit.¹⁶

Second, Defendant's request to seek to benefit from Witness' privilege assertion is quite modest in terms of constitutional and evidentiary law. He seeks neither to strip a privilege from Witness, nor to topple a statute designed to exclude supposedly unreliable evidence.¹⁷ In contrast to those more breathtaking demands, he asks only that the court apply to the privilege assertion the evidentiary tests of relevancy and prejudice that are used to judge the admissibility of other evidence.¹⁸ And he asks the court not to use the blunderbuss categorical rule that no litigant can benefit from the assertion of any privilege by any witness.¹⁹

Third, because the prosecution has named Defendant as the culprit, its opposition to Defendant's attempt to benefit seems unjustifiable—especially when the prosecution believes only one person committed the crime. Also, the prosecution can dismantle Witness' privilege by granting use immunity to him, a power Defendant does not have.²⁰ By granting use immunity to Witness, the prosecution can cross-examine him in advance of trial to extract the information that Witness hides behind the privilege. With this information, the prosecution can learn whether Witness' testimony would help or hurt

15. This point assumes that in testifying, Witness would help the prosecution rather than the defense. For discussion of this important assumption, see *infra* note 104 and text beginning at note 102. If, however, Witness were suspected of having participated with Defendant in a multi-culprit crime, the prosecution would worry that by granting Witness use immunity, it would increase its difficulty in prosecuting him. See *Turkish*, 623 F.2d at 775; Flanagan, *supra* note 10, at 456.

16. This distinguishes Defendant from other defendants who have sought to shift responsibility to unidentified people. See *People v. Mendez*, 193 Cal. 39, 223 P. 65 (1924). In *Mendez*, the defendant sought to show that several unidentified migrant workers, who had gone to Mexico after a murder, had an altercation with the victim and thus a motive to kill him. The California Supreme Court upheld excluding much of the defendant's evidence, noting that evidence of motive and threats was inadmissible "unless coupled with other evidence tending to directly connect such other person with the actual commission of the crime." *Id.* at 51, 223 P. at 70. Whether or not the *Mendez* test is too rigorous, Defendant is in a different position, having identified and brought forth the person (Witness) who may be guilty.

17. *Cf.* *Washington v. Texas*, 388 U.S. 14, 22-23 (1967) (statute that declared codefendant incompetent if called by defendant, on ground that codefendant's testimony would be untrustworthy, held to violate sixth amendment's compulsory process clause).

18. See FED. R. EVID. 401 (relevancy), 403 (prejudice).

19. See PROPOSED FED. R. EVID. 513 (1974). To overcome this rule is an impressive step.

20. The prosecution lacks an equivalent counter to all other privileges. The doctor, lawyer, or priest who asserts the appropriate privilege stymies the prosecution as well as the defendant.

Defendant. The prosecution can expose whether Witness and Defendant have colluded in an effort to mislead the jury, or, conversely, can clear an innocent defendant. In sum, by granting use immunity and assuming Witness' truthfulness,²¹ we can avoid the two flaws of convicting an innocent defendant or freeing a guilty defendant.

The state of the law in this area invites several observations about evidentiary and constitutional law. Forbidding Defendant from trying to benefit from Witness' assertion of the fifth amendment is an example of the choice evidence law often makes: to exclude problematic evidence rather than to search for ways to help the jury identify and understand estimation problems. Although the import of Witness' privilege assertion is not pellucid, the court could help the jury more than it does in the typical trial by noting the inferences the jury might draw.²² Alternatively, as this article suggests in Part V, the law might adopt a model of admissibility loosely drawn from discovery rules. Under this model, Defendant (and perhaps any party) could introduce any relevant evidence as long as he shared it with the prosecution far enough in advance of trial to enable the prosecution to investigate. Finally, we need to ask whether Defendant's sixth amendment right to compulsory process includes the right to try to profit from Witness' fifth amendment privilege assertion. Arguably, the sixth amendment topples the categorical rule that no litigant, not even the criminal defendant, can benefit from the assertion of any privilege by any witness.

Efforts to restructure evidence law or to craft constitutional doctrine may be unnecessary if courts have erred in interpreting the evidentiary rules of various jurisdictions. Indeed, this article concludes that, at least in single-culprit crimes, evidence law does not bar Defendant from attempting to convince the jury that the privilege assertion inferentially supports Defendant's claim of innocence. If Defendant is denied the ability to influence the jury in this manner, the risk is great that the jury could convict a factually innocent person. With multi-culprit crimes, in contrast, when Defendant does not seek to substitute Witness for himself, there is reason to prevent Defendant from trying to benefit from Witness' assertion.²³

This article marches in the usual fashion. Part I introduces the topic more thoroughly and examines why Defendant wants Witness to assert the fifth amendment before the jury. Part II explores why courts have uniformly refused to let Defendant try to benefit from Witness' assertion of the privilege. Part III inspects two ways to reduce the possibility that the jury will misesti-

21. However, Witness has an incentive to lie about his complicity even if he has received immunity. For more discussion, see *infra* text beginning at note 102.

22. See *infra* Part II.D.3.

23. The special problem is relevancy, discussed in Part II.C, *infra*.

mate the significance of Witness' assertion. Part IV discusses constitutional issues. Finally, Part V sketches a model for defendant-offered evidence.

I. INTRODUCTORY MATTERS

Before examining why courts refuse to let Defendant try to benefit from Witness' assertion of the fifth amendment, we need to consider two preliminary matters. First, in what instances does Defendant want to call Witness? Second, why does Defendant not share with the prosecution information supporting his belief that Witness is the culprit?

A. WHEN DOES DEFENDANT WANT TO FORCE WITNESS TO ASSERT THE FIFTH AMENDMENT BEFORE THE JURY?

Defendant wants to force Witness to assert the fifth amendment before the jury in three situations. First, when the prosecution believes only one person committed the crime, Defendant seeks to substitute Witness for himself as the culprit. Second, when the prosecution believes two or more people committed the crime, Defendant claims that Witness (often a codefendant or an alleged coparticipant) can exonerate Defendant or at least provide circumstantial evidence of his innocence or lesser culpability.²⁴ Finally, when the prosecution believes two or more people committed the crime, Defendant claims that the codefendant (or an alleged coparticipant, if each one's separate prosecution has not been joined) is alone responsible.

The leading example of the first situation is *Bowles v. United States*.²⁵ Bowles was charged with murdering a soldier with a knife early in the morning of March 14, 1967.²⁶ With no eyewitnesses and no physical evidence yoking Bowles directly to the crime, the prosecution had scant evidence of his guilt. A friend of Bowles' mother, however, testified that Bowles, while visiting his mother after 8:00 p.m. on March 14, spontaneously admitted to his mother and her friend that he had killed a soldier in the location where the victim's body was found. Bowles also showed them the knife he said he had used. Apart from this stark admission, Bowles apparently said nothing more about the murder to his mother or her friend, neither identifying when nor explaining why he had committed the crime.²⁷

24. Cf. *Commonwealth v. Francis*, 375 Mass. 211, 213, 375 N.E.2d 1221, 1223 (1978) (defendant called Sarro, an alleged coparticipant, who had already been found guilty of burglary, claiming that Sarro would testify that defendant joined Sarro only after the burglary; on this theory Sarro's testimony would have made defendant guilty of the lesser charge of receiving stolen property).

25. 439 F.2d 536 (D.C. Cir. 1970) (en banc), cert. denied, 401 U.S. 995 (1971); see also *Commonwealth v. Sims*, 513 Pa. 366, 521 A.2d 391 (1987) (defendant claimed prosecution witness, not he, had killed victim).

26. *Bowles*, 439 F.2d at 538. The opinion does not indicate the time of death more precisely.

27. At trial Bowles debunked his confession, claiming he had not spoken "in earnest," but had confessed "to take credit for a 'big deed.'" *Id.* at 544 n.8 (Bazelon, C.J., dissenting). His character-

The prosecution reinforced Bowles' admission by showing that neither of the other victims whose bodies had been found in alleys over the weekend of March 14 were soldiers, and that both of those crimes had been solved.²⁸ When arrested, five days after the murder, Bowles carried a knife with a four-inch blade.²⁹ The pathologist who performed the autopsy testified that the fatal wound could have been caused by any knife with a five and one-half inch blade.³⁰

In his testimony, Bowles sought to shift responsibility to Raymond Smith. Bowles stated that he met Smith, Neely, and another person at about 11:30 p.m. on March 13, approximately two blocks from where the soldier's body was later found. He said that Smith bragged of killing a man moments earlier and warned he would name Neely as the culprit if caught.³¹ In his testimony, Neely confirmed Bowles' report of Smith's admission and threat. A third defense witness, Royal, added that Smith asked him some time later where he could find Neely. Apparently, Smith intended to threaten Neely who, according to Smith, had breached Smith's order to tell no one of his admission. No evidence suggested that either Neely or Royal had a reason to testify falsely.

Smith, called by the defense as a witness during a hearing out of the presence of the jury, invoked the fifth amendment and refused to answer any questions. The trial court refused to force Smith to assert the privilege in front of the jury, ordered the attorneys not to mention in final argument why Smith had not testified, and failed to explain to the jury why neither side had called Smith to testify. The defense did not ask the prosecution to grant immunity to Smith.

Any attempt to calculate the damage the defense suffered when the jury

ization is consistent with his report to the police that he had heard Raymond Smith admit to having killed a man in the alley where the soldier's body was found. *Id.* at 546 (Wright, J., dissenting). Because Bowles told his mother, after her friend had left the room, that he had confessed in jest and because he "joked a lot," his mother did not think he had told the truth. *Id.* at 544 n.8 (Bazelon, C.J., dissenting).

28. The court of appeals did not mention another possible link between Bowles and the crime: his description of the victim as a "soldier." *Id.* at 538 (majority opinion). Because the victim was not wearing a uniform on the day he was killed, the killer would have had to learn his identity as a soldier in some other way. Neither the majority nor dissenting opinions suggest how Bowles learned, or could have learned, that the victim was a soldier.

29. The knife yielded no direct evidence, like bloodstains. *Id.* at 543 & n.3 (Bazelon, C.J., dissenting). Also, there was no evidence indicating whether Bowles carried the knife on the day of the crime. The friend of Bowles' mother was not asked whether the knife Bowles possessed when he was arrested was the one he had shown them at the time he confessed.

30. *Id.* The length of the knife's blade would seem to disqualify it as the murder weapon. Hence, although the majority wrestled with whether there was sufficient evidence to support the conviction, its conclusion that the wound "could have been inflicted with a hard blow of the knife found on [Bowles] at the time of his arrest" seems wrong. *Id.* at 538 (majority opinion).

31. *Id.* at 541. Why Smith would (or could) have implicated Neely remains unexplained.

did not learn of Smith's refusal to testify is obviously futile, but the amount of damage was probably not insignificant. After all, the prosecution's evidence of Bowles' guilt was so underwhelming that two dissenters on the court of appeals would have reversed on the ground of insufficient evidence.³² The jury might have been deeply affected by the sharp contrast between Bowles' willingness to testify and Smith's refusal to explain the evidence of his guilt presented by Bowles. Indeed, Bowles not only lost the force of this comparison, but he also might have appeared duplicitous to the jury if the jury had expected Bowles to call Smith to testify after he had accused Smith of responsibility.³³

The second situation, in which the prosecution believes that two or more people committed the crime and Defendant claims that Witness (often a codefendant or an alleged coparticipant) would exonerate Defendant if each were tried separately, is illustrated by *United States v. Johnson*.³⁴ Along with Hammond and Perry, Johnson was charged with selling cocaine to an undercover agent. Perry left the automobile where the purchase agreement was struck to obtain the cocaine from one of his three suppliers. He returned with the drugs ten minutes later, accompanied by Johnson. When the agent told Johnson he need not enter the automobile, Johnson said, according to the agent, "I always go where my stuff goes."³⁵

Perry and Hammond, indicted with Johnson, pleaded guilty as the joint trial of all three began. Johnson, now defending by himself, testified that he was walking a dog when he met Perry, who asked him for help finding work. Johnson admitted he accompanied Perry to a car but denied that he entered it or said anything about his "stuff."³⁶ He sought to call Perry as a witness to confirm his testimony. Perry, however, would not cooperate. He intended to assert the fifth amendment, fearing that the prosecution might indict him for conspiring with Johnson on this³⁷ or other sales,³⁸ or that the sentencing judge might learn more about his involvement.³⁹

The third situation, in which one defendant accuses a codefendant (or al-

32. *Id.* at 546 (Bazelon, C.J., dissenting); *id.* (Wright, J., dissenting).

33. *Id.* (Bazelon, C.J., dissenting) (to prevent the jury from reasoning in this way, the jury should have been instructed that neither side could call Smith; failure to charge was plain error).

34. 488 F.2d 1206 (1st Cir. 1973).

35. *Id.* at 1208.

36. *Id.* at 1208-09.

37. Although the prosecutor said he did not intend to seek a conspiracy indictment, the prosecution had not promised this protection as part of the plea bargain. *Id.* at 1209 n.2. The court of appeals thought the prosecutor might have lacked the authority to bind the prosecution not to prosecute. *Id.*

38. Perry had already been sentenced for transferring cocaine on another occasion. If Johnson had been his supplier, he might have feared being charged with Johnson for conspiracy in connection with that other transfer. *Id.* at 1209.

39. *Id.* at 1208.

leged coparticipant) of sole responsibility, is illustrated by *United States v. Beye*.⁴⁰ Smith (the driver) and Beye (the passenger) were charged with possessing marijuana found by customs officials. The marijuana was discovered in the door panels and under the back seat of Smith's automobile as Smith and Beye returned from Mexico. In his opening statement, Smith's counsel told the jury that Smith would testify that he knew nothing about the marijuana. In addition, Smith's counsel invited Beye's counsel to cross-examine Smith "at great length,"⁴¹ thereby encouraging the jury to infer that Beye was solely responsible. After Smith's counsel finished, the trial judge declared a mistrial as to Smith, severed Smith's prosecution from Beye's, and continued the prosecution of Beye before the same jury that had heard Smith's attorney's objectionable opening statement.⁴²

Despite Smith's counsel's implied accusation of Beye, Beye claimed he did not know the drugs were in the automobile. Beye said he had been apart from Smith only once during their sojourn in Mexico and was able to corroborate his claim that he had not obtained the drugs during that single, nighttime separation. Mimicking Smith's strategy, Beye sought to saddle Smith with sole responsibility and called him to testify. However, Smith did not cooperate. Smith's counsel said that Smith would assert the fifth amendment, and the trial judge refused to let Beye force Smith to do so before Beye's jury. A divided court of appeals agreed with this ruling, relying on *Bowles*.⁴³

In these three situations, Defendant hopes that the jury, if permitted to watch Witness assert the fifth amendment, will infer that Witness' truthful testimony would have supported Defendant's claim of innocence. In the first and third situations, illustrated by *Bowles* and *Beye*, the reasoning is straightforward: Defendant accuses Witness of being the guilty party. In the second situation, illustrated by *Johnson*, Defendant claims that by asserting the privilege, Witness admits knowing that Defendant is not guilty. Before examin-

40. 445 F.2d 1037 (9th Cir. 1971) (per curiam); see also *United States v. LaConture*, 495 F.2d 1237, 1239 (5th Cir. 1974) (defendant wanted to force car's owner to assert fifth amendment before jury to support defense that she knew nothing about drugs); *United States v. De Luna*, 308 F.2d 140, 142 (5th Cir. 1962) (discussed *infra* notes 190-96 and accompanying text).

41. *Beye*, 445 F.2d at 1040 (Ely, J., dissenting).

42. The court of appeals identified neither the party who had sought the mistrial nor the reason why it was granted. The probable reason was the indirect, but nonetheless improper, comment by Smith's counsel on Beye's exercise of his privilege to remain silent. The larger mystery is why the trial judge continued the prosecution of Beye before the tainted jury. One would think that new and separate juries should have adjudicated each defendant's guilt. Because Beye could not call Smith to testify, Beye would want a different jury, untainted by Smith's counsel's implication of his guilt. The prosecution would want Smith tried by a different jury, too, because otherwise it could not call Beye to refute Smith's claim that Beye alone was guilty.

43. In dissent, Judge Ely noted that the panel was circulating draft opinions when *Bowles* was decided. *Id.* at 1039. Rather than examining the fifth amendment issue extensively in its per curiam opinion, the majority apparently chose summarily to rely on *Bowles*.

ing why courts do not let Defendant try to use Witness' assertion to persuade the jury of Defendant's innocence, it is useful to ask why the defense does not share with the prosecution its evidence of Witness' guilt before the trial begins.

B. WHY DOES DEFENDANT NOT TELL THE PROSECUTION
ABOUT WITNESS?

If Defendant cannot force Witness to assert the privilege before the jury, why not share the evidence of Witness' guilt with the prosecution in the hope that the prosecutor will dismiss the charges against Defendant?⁴⁴ Despite the attraction of a dismissal, defense counsel will hesitate to disclose for tactical reasons.⁴⁵ Surprise is always the defense's weapon, and is especially so in this setting. By revealing the evidence of Witness' guilt at a tactically advantageous time during Defendant's trial, defense counsel may derail the prosecution's case. The impact might be even greater if Defendant could try to benefit from Witness' assertion. Although the prosecution can usually anticipate the locus and strength of a defendant's attack, and thus needs little time to prepare to counter it, the prosecution may be startled by Witness' appearance.

Defense counsel will also hesitate to disclose because the likelihood of convincing the prosecution to dismiss the charges, although enticing, is small. After all, the prosecution may dismiss the charges on its own initiative if it lacks convincing evidence of Defendant's guilt.⁴⁶ Although the defense has information (some admissible as evidence, some not) implicating Witness, the information will be less than that needed to prove Witness guilty beyond a reasonable doubt.⁴⁷ With notice, the prosecution could investigate Witness' culpability, perhaps more thoroughly than the defense has (or could),⁴⁸

44. When U.S. Attorneys decide that it is wrong to deny a defendant the testimony of a defense witness who asserts the fifth amendment, they often dismiss the charge rather than grant immunity. See Mykkeltvedt, *United States v. Alessio—Due Process of Law and Federal Grants of Witness Immunity for Defense Witnesses*, 31 MERCER L. REV. 689, 693 (1980) (citing UNITED STATES ATTORNEY GENERAL GUIDELINES RELATING TO USE OF STATUTORY PROVISIONS TO COMPEL TESTIMONY OR PRODUCTION OF INFORMATION (Jan. 14, 1977)).

45. In none of the reported cases was defense counsel said to have notified the prosecutor about Witness. Those defense attorneys faced with this problem with whom the author has spoken have been tempted to disclose, but never have.

46. The prosecutor need have no more than probable cause to charge a defendant. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(a) (1983). Nonetheless, if the prosecutor abhors losing cases—whether out of concern for wasting the resources of his office or for jeopardizing his position—he may demand much more convincing evidence. See Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U.L. REV. 174, 184-85 (1965) (juries evaluate sufficiency of evidence differently with different types of charges).

47. One exception might have been the witness McDonald in *Chambers v. Mississippi*, 410 U.S. 273 (1973). For a discussion of *Chambers*, see *infra* Part IV.A.

48. For example, the defense would have difficulty learning whether Witness refused to speak

and could counter the defense evidence implicating Witness.⁴⁹ Thus, disclosure might actually damage the defense. Moreover, if the prosecution were to speak with Witness (or his attorney), it might inveigle or force him to testify (by granting use immunity).⁵⁰ Defense counsel would fear that if Witness were to testify, he might falsely deny complicity.⁵¹ Although defense counsel could pummel Witness' credibility by introducing evidence of Witness' guilt, the jury might be more likely to draw inferences in Defendant's favor if Witness asserted the fifth amendment than if Defendant attacked Witness' testimonial credibility.

For these tactical reasons, defense attorneys will not rush to tell the prosecutor about Witness unless they have such a combination of striking evidence of Witness' sole complicity and convincing evidence of Defendant's innocence that they think the prosecutor will dismiss the charges.⁵² This combination will not occur frequently.⁵³ As discussed below, Defendant's failure to disclose is not the hinge upon which courts have refused to let Defendant try to benefit from Witness' assertion in single-culprit crimes.

Multi-culprit crimes must be distinguished from single-culprit crimes. In multi-culprit crimes, procedural requirements prevent Defendant from bene-

because he was under investigation in connection with other crimes connected to the crime with which Defendant was charged.

49. Of course, a prosecutor surprised by Witness' appearance probably could obtain a continuance to investigate. *Cf.* *Williams v. Florida*, 399 U.S. 78, 85 (1970) (not unconstitutional to grant continuance to let prosecution investigate alibi).

50. Even if the prosecutor first learns of Witness during the trial, he still might grant use immunity. Yet, the less time the prosecutor has for making this decision, perhaps the less likely it is that he will offer use immunity. This is so because, with limited time, the prosecutor simply cannot unravel whether Defendant or Witness is guilty.

51. Witness has an incentive to lie, in the hope of convincing the jury to convict Defendant. *See infra* Part I.C.

52. Requiring the defense to disclose Witness' intent to invoke the privilege and evidence of Witness' guilt makes sense only if Defendant can try to benefit from the assertion. The point is explored in Part V, *infra*.

53. A professional responsibility issue lurks here if counsel has evidence of Witness' guilt but does not believe that Witness is guilty (and that Defendant is innocent). When counsel cannot suspend judgment (as defense attorneys so often do), the U.S. codes of professional conduct might be stretched to forbid counsel from accusing Witness. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1979) ("assert[ing] a position [or] conduct[ing] a defense" is prohibited only when "it is obvious that such action would serve merely to harass or maliciously injure another"). In the United Kingdom the answer is clearer: the barrister cannot "attribute to another person the crime with which his client is charged unless . . . there are facts or circumstances which reasonably suggest the possibility that the crime may have been committed by the person to whom the guilt is imputed." SENATE OF THE INNS OF COURT AND THE BAR, CODE OF CONDUCT FOR THE BAR OF ENGLAND AND WALES ¶ 146 (3d ed. 1985). Although no explanatory note accompanies ¶ 146, its injunction almost surely stems from the debate spurred by the ostensible attempt of one defending barrister to shift responsibility from the defendant, who had confessed his guilt to the barrister, to another, innocent person. For a discussion of this celebrated case, *Queen v. Courvoisier*, 173 Eng. Rep. 869 (1840), see D. MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 192-94 (1973).

fitting from surprise. In joint trials, one defendant cannot call a codefendant to testify.⁵⁴ To obtain a severance from a codefendant, Defendant must establish that the codefendant would testify favorably for Defendant if he were tried separately. These procedural nettles in multi-culprit crimes, coupled with the more doubtful relevancy of drawing an inference in Defendant's favor from a former codefendant's assertion of the fifth amendment,⁵⁵ suggest that courts will (or should) let defendants in multi-culprit crimes try to benefit from Witness' assertion less readily than defendants in single-culprit crimes. Nonetheless, we need to examine the plight of defendants in each of the *Bowles*, *Beye*, and *Johnson* situations.

II. WHY IS DEFENDANT PROHIBITED FROM ASKING THE JURY TO DRAW INFERENCES IN HIS FAVOR FROM WITNESS' ASSERTION OF THE FIFTH AMENDMENT?

A. INTRODUCTION

Although courts have failed to defend extensively why Defendant cannot try to benefit from Witness' assertion of the fifth amendment, their reasons are clear.⁵⁶ Most important are the evidentiary concerns of relevancy and prejudice. Apart from Witness (and his counsel), no one knows why Witness refuses to testify and what he hides. The jury will not learn Witness' motivations unless Witness receives immunity. Because a person can so easily assert the fifth amendment, Witness may choose to assert it even if he has no information that would implicate himself or exonerate Defendant.

Courts quickly slide from concern about relevancy to concern about prejudice. Even if Witness' assertion were relevant, the prosecution might suffer evidentiary prejudice because the jury might overvalue the significance of the assertion. Enhancing this concern is the prosecutor's inability to cross-examine Witness. Just as Witness' assertion bars Defendant from extracting information he hopes would exculpate him, so it bars the prosecution from

54. See *infra* notes 63-65 and accompanying text.

55. See *infra* Part II.c.

56. There may be reasons that Witness should be forced to assert the privilege before the jury even if Defendant is not allowed to benefit from that assertion. Whenever Witness has refused to speak with the defense, defense counsel will not know to which specific questions Witness will assert the privilege. Moreover, Witness' determination may crumble in the Witness stand and he may decide to answer certain questions. These two reasons do not ordinarily justify testing Witness' resolve before the jury, however, although others have disagreed. See *United States v. Beye*, 445 F.2d 1037, 1041 (9th Cir. 1971) (Ely, J., dissenting); *Commonwealth v. Greene*, 445 Pa. 228, 233-34, 285 A.2d 865, 868 (1971) (Roberts, J., dissenting). Jurors, after watching Witness assert the privilege, may be too tempted to reason the way the court instructs them they may not. Also, in a hearing out of the jury's presence, the court can probe whether Witness may and whether he will assert the privilege. See *infra* Part II.c.3.

eliciting an explanation from Witness about the evidence that links him to the crime and from probing for collusion between Witness and Defendant.

In addition to concerns with relevancy and prejudice, courts voice three other reasons for not allowing Defendant to try to benefit from Witness' privilege assertion. First, Defendant and Witness may have colluded for Witness to lie by claiming that if Witness testifies he might incriminate himself. Because the prosecution cannot cross-examine Witness, it cannot unmask such an attempt to deceive the jury into inferring either that Witness is the true culprit or that he would exonerate Defendant if he answered truthfully. Second, courts hail symmetry as important: if the prosecution cannot ask the jury to draw inferences against a defendant from a witness' assertion of the fifth amendment, then neither should Defendant have the right to try to profit from Witness' assertion. Finally, Witness' interest in not asserting the privilege publicly might outweigh Defendant's interest in having him do so.

In the remainder of Part II, each reason is considered in turn; neither singly nor together do they convince. However, one preliminary matter remains: what is the evidentiary status of Witness' assertion?

B. THE EVIDENTIARY STATUS OF WITNESS' PRIVILEGE ASSERTION

In our story, Witness parries defense counsel's questions by invoking the fifth amendment. If the jury cannot treat a lawyer's argument or questions as evidence,⁵⁷ in what way does Witness' response constitute "evidence"?⁵⁸ One answer to this question is to dispute the importance of the issue; a second is to find parallels with other evidentiary doctrines which suggest that the jury may be warranted in considering Witness' assertion.

Defendant could challenge the importance of the issue in two ways. First, nothing turns on characterizing Witness' assertion as evidence or nonevidence because Defendant has no burden of proof. In contrast, if the prosecution sought to link Defendant with Witness through the latter's assertion of the fifth amendment, the prosecution's proof burden would make it important to characterize the evidentiary status of the assertion. Second, if granted use immunity, Witness would have to testify. It seems unfair to let the prosecution refuse to grant use immunity and simultaneously invoke a technical evidentiary argument to defeat Defendant's attempt to capture some value from Witness' appearance before the jury.⁵⁹

57. *Cf. Brink's, Inc. v. City of New York*, 717 F.2d 700, 716 (2d Cir. 1983) (Winter, J., dissenting) (assertion of fifth amendment by witness wrongly but "inevitably invites jurors to give evidentiary weight to questions rather than answers").

58. *See United States v. Atnip*, 374 F.2d 720, 723 (7th Cir. 1967) ("There surely was a lack of evidentiary value in a witness' refusal to answer questions under the Fifth Amendment privilege. Such a refusal to testify does not have probative relevance on the issue of the defendant's guilt or innocence.").

59. *Cf. Heidt, The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 *YALE*

Defendant, however, need not skirt the question of the evidentiary status of Witness' assertion. Witness' assertion shares features with the refusal by a party to testify or the failure of a party to counter an out-of-court accusation. In those instances, a party's conduct has evidentiary importance in two ways. First, although not literally "evidence," the party's conduct enhances the significance of the evidence the party failed to counter. Second, the party's conduct is treated as an implied admission of the truth of the accusation, and therefore effectively does constitute evidence.

Until *Griffin v. California*,⁶⁰ a factfinder was not constitutionally prohibited from drawing an inference against a criminal defendant from his refusal to testify. Although not treated as evidence, that refusal gave the factfinder a reason to credit whatever evidence of the defendant's guilt the defendant could have refuted or explained.⁶¹ Indeed, the prosecutor was permitted in summation to identify the inferences the factfinder might draw.⁶² If, but for *Griffin*, the defendant's refusal to testify might buttress the prosecution's evidence, there seems to be no reason why Witness' assertion could not buttress Defendant's attack on the prosecution's evidence.

The differences between the defendant's refusal to testify and Witness' refusal to testify reinforce this conclusion. No one—not the court, the prosecutor, nor a codefendant—can call the defendant to testify⁶³ or force him to explain why he will not testify.⁶⁴ These protections that the fifth amendment

L.J. 1062, 1125 (1982) (factfinder in civil case might be allowed to consider defendant's assertion of fifth amendment before trial for procedural reason that assertion might have impeded plaintiff's discovery). The special significance of the prosecution's ability to use immunity to force Witness to testify is considered in more detail *infra* text accompanying note 160.

60. 380 U.S. 609 (1965).

61. The Supreme Court stated in *Adamson v. California*, 332 U.S. 46 (1947), that refusal to testify

does not involve any presumption, rebuttable or irrebuttable, either of guilt or of the truth of any fact . . . [However,] the court can direct the jury's attention to whatever evidence there may be that a defendant could deny and the prosecution can argue as to inferences that may be drawn from the accused's failure to testify.

Id. at 56. English courts treat the defendant's refusal to testify in the same way, although the prosecution is prohibited from commenting. See ELEVENTH REPORT, *supra* note 1, ¶¶ 109-110, at 68-69.

62. See *People v. Modesto*, 62 Cal. 2d 436, 450-53, 398 P.2d 753, 761-63, 42 Cal. Rptr. 417, 425-27 (1965).

63. See *United States v. Housing Foundation of America*, 176 F.2d 665 (3d Cir. 1949) (codefendant cannot call defendant). *But cf.* ELEVENTH REPORT, *supra* note 1, ¶¶ 110, 112, at 68-70 (proposing to allow the judge in England to invite defendant to testify and to permit counsel for the Crown (as well as the judge) to comment on defendant's declination). Those jurisdictions that, before *Griffin*, permitted the prosecution to call the defendant as a witness conditioned that permission on proof by the prosecution of a prima facie case. See *People v. Talle*, 111 Cal. App. 2d 650, 245 P.2d 633 (1952); J. MAGUIRE, EVIDENCE OF GUILT § 2.061, at 49 & n.5 (1959).

64. The United Kingdom's Criminal Law Revision Committee seemed to assume that the defending barrister could tell the jury any non-guilt-related reason why the defendant chose not to

provides for a defendant contrast sharply with the protections it provides for Witness. Witness can choose not to answer questions, but cannot refuse to be asked. Also, the magic incantation that enables Witness to refuse to answer is expressing the fear of self-incrimination. In contrast, because a defendant cannot be asked questions, he need not concede that he will not testify for fear of incriminating himself. There may be reasons a defendant does not testify that are unrelated to his guilt.⁶⁵ Thus, in a single-culprit crime, Witness' assertion of the privilege may say as much (if not more) about his guilt than a defendant's refusal to testify theoretically says about his.

Forcing Witness to assert the privilege before the jury also shares features with the evidentiary rule for adoptive admissions by a party. A party's failure to refute or explain an out-of-court accusation under circumstances in which one would expect him to do so justifies inferring that he could not refute or explain, and is treated as nonhearsay.⁶⁶ Witness is in the same position as the person who may (fortuitously) become a party. In Defendant's "prosecution" of Witness for a single-culprit crime, would we not expect Witness to counter any evidence of his guilt that Defendant had amassed? Moreover, a party, whose pretrial silence is treated as an admission whether he testifies or not, might have had reasons not to speak that had nothing to do with his negligence or culpability: he might have thought it was indelicate or unwise to respond (for fear of upsetting the accuser), or he might have wanted more time to craft a careful response. In contrast, once subpoenaed, Witness has time to ponder whether to testify. Here too, then, the jury might reason that Witness' assertion says more about his guilt than a party's silence says about his.⁶⁷ Hence, the position of Witness parallels rather closely that

testify, thereby softening somewhat the otherwise devastating impact of inviting the defendant to testify and commenting on his refusal. See ELEVENTH REPORT, *supra* note 1, ¶ 110, at 69.

65. See *infra* Part II.C.

66. FED. R. EVID. 801(d)(2)(B) & advisory committee's note; see also *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976) (no difference between refusing to testify at trial and failing to deny a pretrial accusation).

67. Cutting against this observation is the fact that because a party could always testify to explain his pretrial silence, there may be less reason to worry about the accuracy of drawing an inference against him than there is about drawing an inference in favor of Defendant from Witness' assertion. There are two responses to this concern. The first is to observe that the prosecution's inability to cross-examine Witness deserves no special treatment because it is functionally no different from any party's inability to cross-examine a declarant whose hearsay statement is admitted. See MODEL CODE OF EVIDENCE Rule 233 comment, at 172 (1942). Second, the prosecution, unlike a party who cannot directly challenge the hearsay statement from an unavailable declarant, can always grant use immunity to Witness to force him to testify. The power to grant use immunity might change the minds of those who, like Maguire, have opposed letting Defendant try to benefit. Maguire posed the following hypothetical to show why no defendant should be permitted to try to benefit from the assertion of the fifth amendment by someone else: A defendant, charged with the statutory rape of a girl of "previously chaste character," sought to show that another man had, during the defendant's preliminary examination, invoked the fifth amendment when asked whether

of a party under the implied admission doctrine.⁶⁸

C. RELEVANCY

Although occasionally conceding that Witness' assertion carries a modicum of force,⁶⁹ courts nonetheless stamp it as irrelevant. Witness' assertion lacks probative value, it is said, because absent a grant of use immunity, the factfinder does not learn specifically why Witness fears self-incrimination.⁷⁰ It is true, of course, that even in a single-culprit crime the factfinder cannot necessarily infer from Witness' assertion that Witness is guilty and Defendant is not. People who are innocent may assert the privilege and probably do so on occasion.⁷¹

Despite this uncertainty in reasoning about Witness' assertion,⁷² no court using a relevancy test like that of rule 401 of the Federal Rules of Evidence could find Witness' assertion irrelevant. Rule 401 marks as relevant evidence that has "any tendency to make the existence of any fact that is of conse-

he had sexual relations with the girl at a time before the defendant allegedly had done so. Maguire believed that this defendant should not be permitted to show that the other man had invoked the privilege because the prosecution could not effectively cross-examine that man. *J. MAGUIRE, supra* note 63, § 2.061, at 55, 56. Actually, however, if the prosecution had granted use immunity it would have eliminated all obstacles to effective cross-examination.

68. If these parallels are rejected and Witness' assertion is treated as "inarticulate hearsay," *J. MAGUIRE, supra* note 63, § 2.061, at 56, Defendant faces an insuperable burden in finding a hearsay exception through which to introduce Witness' assertion. The only exception that might apply is that for penal interest statements by an unavailable declarant (as Witness would become by asserting the privilege). *See* FED. R. EVID. 804(b)(3). Defendant, however, could rarely satisfy the unique trustworthiness test of that exception. *Id.* (statement tending to expose declarant to criminal liability "not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement"). For a discussion of rule 804(b)(3), see Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 *GEO. L.J.* 851 (1981).

69. *See* *Bowles v. United States*, 439 F.2d 536, 542 (D.C. Cir. 1970) (en banc) ("In reality the probative value of [Witness' fifth amendment assertion] is almost entirely undercut by the absence of any requirement that the witness justify his fear of incrimination and by the fact that it is a form of evidence not subject to cross-examination." (emphasis added)), *cert. denied*, 401 U.S. 995 (1971).

70. *See* *People v. Thomas*, 51 N.Y.2d 466, 472, 415 N.E.2d 931, 934, 434 N.Y.S.2d 941, 944 (1980) (fifth amendment assertion by witness whom defendant sought to substitute for himself as sole culprit "does not, in and of itself, have any real probative significance").

71. Witness might fear his testimony would link him with Defendant in the commission of a different crime. *See* *Williams v. State*, 600 P.2d 1092, 1093 (Alaska 1979). Or, the two might have conspired for Witness to lie by saying he would incriminate himself. For more discussion of collusion, see *infra* Part II.E.

72. Courts and commentators disagree about whether to draw an inference against a person (criminal defendant, civil litigant, or witness) who asserts the fifth amendment. *Compare* *Lakeside v. Oregon*, 435 U.S. 333, 342 (1978) (Stevens, J., dissenting) ("[e]xperience . . . justifies the inference that most people who remain silent in the face of serious accusation have something to hide and are therefore probably guilty") and *J. MAGUIRE, supra* note 63, § 2.061, at 46 ("[s]uspicion springs instantly from the claim of [the fifth amendment] privilege") with *Slochower v. Board of Higher Educ.*, 350 U.S. 551, 557-58 (1956) (innocent witness might assert fifth amendment for fear of being "ensnared by ambiguous circumstances").

quence to the determination of the action more probable or less probable than it would be without the evidence.”

In analogous settings, the factfinder may draw an inference against a party in civil litigation⁷³ and even against the criminal defendant⁷⁴ when either refuses to testify or to adduce evidence. Even more instructive is the evolution of judicial thinking over whether to authorize the jury to infer the defendant's guilt from his refusal to testify. As mentioned earlier, not until 1965 in *Griffin v. California* did the Supreme Court say that the Constitution forbids the jury from inferring guilt from the defendant's silence⁷⁵ (as a Canadian jury may do⁷⁶) or from hearing that it may draw an inference from his silence⁷⁷ (as an English jury may hear⁷⁸). As early as 1893, however, in *Wilson v. United States*,⁷⁹ the Supreme Court held that comment on the defendant's refusal to testify would contravene a congressional statute that simultaneously gave defendants the right to testify and forbade the factfinder from drawing an inference against a defendant who remained silent.⁸⁰ While not grounding its decision on the lack of relevancy of the defendant's refusal

73. An extreme example is a case in which the jury may draw an inference against the employer from the assertion of the privilege by former employees over whom the employer has no control. *See Brink's, Inc. v. City of New York*, 717 F.2d 700, 707-10 (2d Cir. 1983). Even if the civil litigation may lead to a criminal prosecution, the factfinder may draw an inference against the defendant who does not testify. *See Baxter v. Palmigiano*, 425 U.S. 308, 316-20 (1976).

74. The factfinder may draw an inference against the criminal defendant who refuses on cross-examination to answer questions related to his answers on direct examination, *see United States v. Hearst*, 563 F.2d 1331, 1338-44 (9th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 1000 (1978); who fails to adduce ostensibly favorable evidence within his control, *see United States v. Viera*, 839 F.2d 1113, 1116 (5th Cir. 1988); or who does not disclose exculpatory information to the police, but discloses only at trial, *see Jenkins v. Anderson*, 447 U.S. 231, 235-41 (1980).

75. The Court had previously held that as a statutory matter, a federal jury could draw no inference. *See Bruno v. United States*, 308 U.S. 287, 294 (1939).

76. *See TASK FORCE REPORT, supra* note 11, at 342 nn.47-48, 50 & 53 (citing cases indicating that although judge cannot tell jury not to draw inferences against defendant, neither may judge order jury not to draw inferences; the second instruction would be unfair to the Crown).

77. *See Twining v. New Jersey*, 211 U.S. 78, 113-14 (1908) (holding fourteenth amendment's due process clause does not include fifth amendment; Court declined to decide whether fifth amendment forbade the prosecutorial comment that New Jersey had authorized).

Indeed, until *Griffin* the Court consistently held that the states could force the defendant to testify. *See Adamson v. California*, 332 U.S. 46, 54 (1947) (“[f]or a state to require testimony from an accused is not necessarily a breach of a state's obligation to give a fair trial”).

78. Although the English statute authorizing the defendant to testify forbade the prosecution from commenting on his decision not to testify, Criminal Evidence Act, 1898, 61 & 62 Vict., ch. 36, § 1(b), the statute was quickly interpreted not to bar comment by the judge. *See The Queen v. Rhodes* [1899] 1 Q.B. 77 (1898). To balance any adverse comment, the judge is required to note that the defendant need not testify and that reasonable inferences may be drawn from his silence other than that the defendant is guilty. *See J. ARCHBOLD, PLEADING, EVIDENCE PRACTICE IN CRIMINAL CASES* § 4-431, at 496 (42nd ed. 1985).

79. 149 U.S. 60 (1893).

80. *Id.* at 65-70 (interpreting Act of Mar. 16, 1878, Ch. 37, 20 Stat. 30 (codified as amended at 18 U.S.C. § 3481 (1982))).

to testify, the Court defended Congress' choice in a way that smacked of a relevancy analysis. It noted that "[e]xcessive timidity [and] nervousness when facing others [while] attempting to explain transactions of a suspicious character" might so "confuse and embarrass" the defendant that, even if innocent, he would decline to testify.⁸¹

The Court's image of a befuddled, cowering defendant seems quaint, parentalistic, and unconvincing.⁸² Of those defendants who do not testify, the bulk remain silent, one suspects, because they would condemn themselves by testifying truthfully. Nonetheless, there are cogent reasons for an innocent defendant not to testify, whether or not he is poised and articulate. He can hide from the jury his commission of other dreadful crimes only at the cost of not testifying.⁸³ The defendant may prefer to present his defense through other witnesses, with whose memories he disagrees sufficiently to worry about revealing those inconsistencies through his testimony.⁸⁴ Finally, the defendant may worry that his testimony would lead the jury to ignore the burden of proof, and do no more than compare his story and credibility with that of the prosecution's witnesses.⁸⁵

Despite these understandable reasons why the defendant would not tes-

81. *Id.* at 66. In England, too, the refusal before 1898 to permit the defendant to testify had been defended as necessary to protect the defendant from gestural quirks, halting speech, or a demonstrated lack of acuity that would discredit his truthful testimony. See G. WILLIAMS, *THE PROOF OF GUILT* 47 (3d ed. 1963) (discussing debate before enactment of Criminal Evidence Act, 1898, 61 & 62 Vict., ch. 36).

82. Although no historical link apparently exists, might this image of the innocent defendant have been crafted to counter Bentham's savage criticism of the privilege not to testify as "the very first" rule criminals would "establish[] for their security"? *Id.* at 53 (quoting Bentham). Or, might the Court in *Wilson* have described defendants in this way because, without the right to appointed counsel, indigent defendants would have no one to help them prepare their testimony?

83. The prosecution, however, might be able to introduce evidence of his earlier criminal conduct as substantive evidence. See FED. R. EVID. 404(b).

In deciding whether to testify, a defendant in England is not burdened by an atrocious criminal record in the way a defendant in America usually is. The defendant in England can be impeached by being forced to reveal his commission of other crimes only if he introduces evidence of his own good character or attacks the character of a witness called by the Crown. See Criminal Evidence Act, 1898, 61 & 62 Vict., ch. 36 § 1(f). Hence, with less to risk, the defendant in England has more reason to testify. Perhaps this explains why in England the jury may draw inferences against the defendant from his decision not to testify. Earlier American evidence codes argued for the same exchange: the jury could draw inferences against a defendant who did not testify, but, in testifying, the defendant had to reveal his criminal record only if he introduced evidence of his credibility. See MODEL CODE OF EVIDENCE Rules 106(3), 233 (1942); UNIFORM RULES OF EVID. 21, 23(4) (1953).

84. Perhaps this tactical opportunity should be eliminated by requiring the defendant to testify first or not at all, as England has done. See Police and Criminal Evidence Act, 1984, ch. 60, § 79 (accused must testify first unless court decides otherwise); *Lord Justice Davies v. Smith*, 52 Crim. App. 224, 225 (1968) (correct practice is for accused to give evidence before other witnesses). In *Brooks v. Tennessee*, 406 U.S. 605 (1972), however, the Court struck down a state statute that barred the defendant from testifying unless he was the first defense witness.

85. Or, the defendant might be able to deny or explain certain incriminating evidence but not all of it. See J. MAGUIRE, *supra* note 63, § 2.061, at 52.

tify,⁸⁶ no one argues that his decision to remain mute is irrelevant.⁸⁷ Defendants were granted the right to testify in the latter part of the nineteenth century when jurisdictions decided that it was wrong to prevent innocent defendants from trying to counter the prosecution's evidence.⁸⁸ Courts assumed that an innocent defendant, once permitted to testify, would scramble to the witness stand to exonerate himself.⁸⁹ By not testifying, the defendant impliedly signaled his guilt,⁹⁰ and the jury could therefore infer guilt from his silence.⁹¹ The right to testify, then, became a trap for the guilty defendant.⁹² The guilty defendant had to choose how to suffer: risk that the jury would infer guilt if he did not testify, risk damning himself if he testified truthfully, or risk being charged with perjury if he testified falsely.⁹³ Before *Griffin*, the Supreme Court offered no constitutional help to the defendant, whether guilty or innocent, who chose not to testify.⁹⁴ The due process command that any conviction had to be based on credible evidence was not undercut if the prosecutor or the judge commented on the defendant's refusal to testify, or if the jury, whether or not aided by comment, drew an inference against

86. Of course, none of these reasons would explain why Witness asserts the fifth amendment.

87. We might, as a result, require the defendant to explain why he chose not to testify, as a condition of barring judicial comment. In this way we would consider each defendant, not defendants as a class.

88. Maine was the first state to let the criminal defendant testify. See Act of March 25, 1864, Me. Laws ch. 280, at 214 (codified as amended at ME. REV. STAT. ANN. tit. 15, § 1315 (1964)); *State v. Cleaves*, 59 Me. 298, 300 (1871); 8 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 2272(a), at 421 (3d ed. 1940).

89. See *Cleaves*, 59 Me. at 300.

90. *Id.*

91. One court thought the defendant, whether innocent or guilty, should not testify because juries would not believe him. *State v. Cameron*, 40 Vt. 554, 565-66 (1868) ("The very fact that he testifies as if with a halter about his neck . . . is enough to usually deprive his testimony of all weight in his favor, whether it be true or false. . . . [T]he true application of the statute [permitting the defendant to testify] is only to those rare cases, when a word from the prisoner, and him only, will manifestly dispose of what otherwise seems conclusive against him.").

92. The prohibition against testifying had helped guilty defendants. Defense counsel could assure the jury that "were his client's mouth not shut he might [have been] able to put an entirely different complexion upon the evidence adduced against him." Barry, *A Note on the Prisoner's Right to Give Evidence in Victoria*, 6 RES JUDICATAE 60, 62 (1952) (footnote omitted) (citing summation given by a barrister at a time before the defendant could testify). Preventing the barrister from making this sort of argument when he knew (or supposedly knew) that the defendant was guilty might be one reason behind England's adoption of the rule that a barrister may not claim the defendant is innocent if he knows otherwise. See *supra* note 53.

93. This predicament did not bother everyone. See *Cleaves*, 59 Me. at 301 ("The embarrassment of the prisoner, if embarrassed, is the result of his own previous misconduct, not of the law.").

94. Many states, however, beginning with Massachusetts in 1866, forbade comment on the defendant's refusal to testify and forbade the jury to draw an inference against the defendant. Even Maine changed its position by statute in 1879. For the history of state legislation prohibiting comment, see Reeder, *Comment Upon Failure of Accused to Testify*, 31 MICH. L. REV. 40, 41-44 (1932). By the 1950s, six states still permitted comment or let the jury draw an inference. See Noonan, *Inferences from the Invocation of the Privilege Against Self-Incrimination*, 41 VA. L. REV. 311, 338 (1955) (California, Connecticut, Iowa, New Jersey, Ohio, and Vermont).

the defendant from that decision.⁹⁵

In *Griffin*, the Supreme Court conceded that the defendant's refusal to testify was relevant to assessing his guilt.⁹⁶ Like those states that had earlier forbidden the jury to draw an inference from the defendant's silence,⁹⁷ however, the Court thought that comment by the prosecutor would wrongly penalize the defendant's exercise of a constitutional right.⁹⁸

The discussion so far has involved drawing an inference against a criminal defendant or a party in civil litigation. Why, if it is relevant to draw an inference in the prosecution's favor when a defendant refuses to testify, is it irrelevant to draw an inference in Defendant's favor when Witness asserts the fifth amendment? Courts have refused to allow Defendant to benefit because, in part, Witness can so easily meet the test to assert the fifth amendment. The ease with which the assertion can be made has led courts not to examine studiously on a case-by-case basis the reasons that Witness might choose not to testify.

A witness can invoke the fifth amendment if an answer might provide a "link in the chain of evidence" that would be useful in prosecuting him.⁹⁹ Just as a defendant can refuse to be questioned, so a witness can refuse to answer, even when he knows he is innocent. Courts readily defer to the witness who frets that he risks incriminating himself, on instruction from the Supreme Court not to reject the privilege claim unless it is "perfectly clear" that the witness would risk nothing by answering.¹⁰⁰ Although there is no

95. See *Adamson v. California*, 332 U.S. 46, 57-58 (1947). Concurring, Justice Frankfurter scoffed at the relevancy objection:

Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and right-minded men do every day violates the "immutable principles of justice" as conceived by a civilized society is to trivialize the importance of "due process."

Id. at 60 (Frankfurter, J., concurring). The defendant's failure to testify was compared with the hearsay exception for a party's failure to have countered a pretrial accusation. See *Parker v. State*, 61 N.J.L. 308, 313-14, 39 A. 651, 653-54 (1898).

96. After paraphrasing Justice Frankfurter's evaluation of the privilege assertion in *Adamson*, Justice Douglas, writing for the majority, said: "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." *Griffin*, 380 U.S. at 614.

The Court did not explain whether the defendant's silence was itself evidence or instead provided support for the prosecution's other evidence. See *supra* Part I.B.

97. See J. WIGMORE, *supra* note 88, § 2272, at 412 n.2 (listing cases). For those states that permitted comment or inference, see *supra* note 94.

98. *Griffin*, 380 U.S. at 613-15.

99. *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (citation omitted).

100. *Id.* at 488. The test was not always so generous. See Noonan, *supra* note 94, at 322 n.63 (tracing evolution of privilege's protections to *Hoffman*, from earlier interpretations of facts that were elements of a crime, or facts that would provide clues to criminal conduct). Those who fought disclosing subpoenaed documents on the ground of self-incrimination once had to give the docu-

model for courts to follow in deciding whether to let the witness remain silent, courts must determine if the witness will assert the fifth amendment privilege and whether he may properly do so. In making this determination, courts often shrink from forcing a witness to identify precisely the risk he believes he might run by answering, demanding no more than that the witness (through his attorney) adumbrate the risk the witness would run.¹⁰¹ Were courts to inspect closely the facts of the case, they could identify the inferences a rational juror might draw from Witness' privilege assertion.¹⁰² They would see that the reasons that might impel an innocent defendant to remain silent do not apply to Witness. The circumstances in which Defendant calls Witness to testify are not ambiguous. Witness doubtlessly realizes, at least in a single-culprit crime, that he might one day be prosecuted if Defendant is acquitted.¹⁰³ The critical factual assumption is that self-interest impels Witness to testify, at least in a single-culprit crime, that he is innocent. Because the prosecution has selected Defendant as its candidate for the culprit, Witness risks prosecution only if Defendant is acquitted. Witness can help himself only by testifying. If innocent, Witness can truthfully explain why Defendant's evidence of Witness' guilt either does not exist or does not support the inference Defendant desperately wants the jury to draw. If

ments to the court for an *in camera* inspection of the merits of the claim. *See* *Brown v. United States*, 276 U.S. 134 (1928). Were the witness to carry the burden of demonstrating the risk, courts would probably compel more witnesses to testify. *See* E. CLEARY, *MCCORMICK ON EVIDENCE* § 139 (3d. ed 1984).

101. Typically, the court expects the witness only to

allude in very general, circumstantial terms to the reasons why he feels he might be incriminated by answering a given question. The judge examines him only far enough to determine whether there is reasonable ground to apprehend danger to the witness from his being compelled to answer. If the danger *might* exist, the court must uphold the privilege without requiring the witness to demonstrate that a response *would* incriminate him, the latter inquiry being barred by the privilege itself.

United States v. Melchor Moreno, 536 F.2d 1042, 1046 (5th Cir. 1976) (emphasis in original).

102. In a related area, the Supreme Court has vacillated in considering the relevancy of a defendant's silence before and after he has received the *Miranda* warnings. Once the Court thought the defendant's silence at arrest, even without the warnings, might be "inherently ambiguous." *Doyle v. Ohio*, 426 U.S. 610, 618 n.8 (1976). More recently, however, the Court has said the state could impeach the defendant with his post-arrest silence as long as he had not been given the *Miranda* warnings. *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (per curiam).

103. In other contexts, like a congressional committee inquiry or a grand jury investigation, the subpoenaed witness may not know the subject matter of the investigation or the role the body suspects he might have played. Consequently, the witness might understandably assert the fifth amendment. *See* E. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 29-30 (1955) (congressional committee inquiry). In such cases, no inference can be drawn against him from the assertion. *See* *United States v. Grunewald*, 353 U.S. 391, 421 (1957). U.S. Attorneys are instructed, however, to inform a person subpoenaed to testify whether he is considered a "witness" (no criminal exposure), a "subject" (possible exposure), or a "target" (exposure). DEP'T OF JUSTICE, *UNITED STATES ATTORNEY'S MANUAL* § 9-11,250 (1979).

guilty, Witness has an incentive to lie to contest the evidence of his guilt.¹⁰⁴ Although not quite a zero-sum game,¹⁰⁵ Witness wins if Defendant loses. As a consequence, when Witness pleads the fifth amendment, one inference is ineluctable: Witness is guilty, and refuses to lie about his guilt to seal Defendant's conviction.

*Chambers v. Mississippi*¹⁰⁶ illustrates this factual assumption. Chambers, charged with murdering a police officer as a crowd fought to prevent the officer from arresting another man, sought to shift responsibility to McDonald. On four occasions, McDonald had confessed to having killed the officer, including a sworn confession that he had given to Chambers' attorneys. McDonald had admitted shooting the officer, fleeing after the crime, and jettisoning the gun (the same type as the murder weapon) that McDonald admitted he had used. Indeed, the evidence of McDonald's guilt was so strong that he had once been charged with the crime. A court had dismissed that charge at McDonald's preliminary hearing after he repudiated the confession he had given to Chambers' attorneys. He claimed he had falsely confessed based on the assurance of a Reverend Stokes that McDonald would share in the booty that Chambers would recover from a lawsuit Chambers would file against the city.¹⁰⁷

The defense called McDonald to testify at Chambers' trial. McDonald again repudiated the confession he had given to Chamber's attorneys and explained that he had connived to confess.¹⁰⁸ Our reason for reviewing *Chambers* here is not to consider how a jury might have evaluated McDonald's testimony. Rather, it is to suggest that McDonald acted as one would have expected a guilty (or innocent) person to do if accused of having com-

104. If this assumption is correct, one might expect the prosecution to begin to grant use immunity to Witness if courts allowed the jury to draw an inference in Defendant's favor from Witness' refusal to testify. With use immunity, Witness would be emboldened to tell the truth if he were innocent or to lie if he were guilty, because the risk of being prosecuted for perjury would be small. Defendant might therefore prefer to have Witness assert the fifth amendment rather than testify under a grant of use immunity. Defendant risks less if Witness asserts the privilege, even if Defendant would achieve more if Witness were to testify truthfully that he rather than Defendant was solely responsible. Of course, Defendant's risk assessment should not control whether Witness asserts the fifth amendment or is ordered to testify. The prosecution should have the choice of imposing use immunity on Witness or risking inferences against it from Witness' privilege assertion.

105. Even if Defendant were acquitted, the prosecution might not prosecute Witness for the same crime.

106. 410 U.S. 284 (1973). In *Chambers*, the Supreme Court held for the first time that the due process clause overrides state evidentiary exclusionary rules to justify introducing hearsay offered by the defense. *Id.* at 302-03.

107. McDonald claimed that Reverend Stokes had persuaded him to speak with Chambers' attorneys. *Id.* at 291. The Court did not elaborate on the details of this alleged scam.

108. McDonald must have intended to imply that the connivance involved Chambers, too, although the Court does not say so. The possibility of collusion between defendants and witnesses like Chambers and McDonald worried the State, *id.* at 301 n.21, and today, continues to worry courts, *see infra* Part II.E.

mitted the crime with which Defendant was charged. McDonald could better protect himself by testifying than by asserting the fifth amendment. Had he remained silent, the State might have resurrected its prosecution of him if Chambers had been acquitted. Of course, McDonald might have testified truthfully in denying his guilt and explaining why he had confessed. But, regardless of the truthfulness of his testimony, his interest lay in helping to convince the jury to convict Chambers. Had he asserted the fifth amendment, McDonald might have worried that Chamber's jury would have thought his refusal to repudiate or explain his confession supported Chambers' accusation.

Let us return to *Bowles*, *Johnson*, and *Beye*, our illustrations of the three situations in which Defendant seeks to call Witness. Why, in each of those cases, might Witness have decided not to testify? Recall that in *Bowles*, the defendant sought to shift blame for the murder from himself to Smith (Witness). One can imagine the type of accusatory questions Bowles' attorney would have hurled at Smith concerning his purported connection to the crime, had Smith appeared before the jury. Among the questions might have been the following:

"At (place) and (time) did you tell Neely and Bowles that you had just killed a man?"

"Did Neely lie in reporting that you had said you murdered the soldier?"

"On (the date of the murder), did you own a knife that had a blade of five inches or so?"

"Were you in the alley where the victim's body was found around (the time of the murder)?"

"You killed the man whom Defendant is charged with having murdered?"¹⁰⁹

109. Leading questions such as these may help the jury better understand the relevancy of Witness' assertion. They also fit better with the view that Witness' assertion of the fifth amendment privilege resembles an implied admission. See *supra* Part II.B. But there are two problems with leading questions. First, the jury may be unduly influenced by counsel's provocative language and accusatory tone. Orchestrating Witness' appearance before the jury might ameliorate this problem. See *infra* Part II.C.3. Second, as long as counsel believes that Witness will assert the privilege to any question, counsel can fashion questions that assume the existence of certain evidence when counsel has no basis to believe that such evidence exists. This seems unfair. Counsel could therefore be required to have some, perhaps even a reasonable, basis to believe Witness would confirm the existence of the evidence if he were to testify truthfully. Cf. *Commonwealth v. Sims*, 531 Pa. 366, 379, 521 A.2d 391, 397 (1987) (Hutchinson, J., concurring) (as a condition of allowing the defendant to force a prosecution witness to assert the attorney-client privilege before the jury, defense counsel must have a "reasonable belief that a material privileged discussion took place before cross-examining a witness on communications with that witness's attorney").

Under that requirement, defense counsel in *Bowles* could have asked Smith whether Smith told Neely, Bowles, and a third person that he had killed someone; Neely could be called to testify that Smith had made this admission. In contrast, if counsel had no information that Smith owned a knife of the type that could have inflicted the wound, he could not have asked about such a knife

With questions as focused as these, neither Witness nor the jury could mistake the possible explanations for Witness' refusal to answer. Three inferences are plausible. First, Smith was guilty and Bowles was not. Second, Smith and Bowles colluded for Smith to lie in claiming that he risked incriminating himself, in the hope that the jury would erroneously infer Smith's guilt and Defendant's innocence. Finally, Smith might have feared that by admitting the existence of circumstantial evidence of his guilt—say, that he carried a knife that could have been the murder weapon, or that he had been in the alley where the victim was murdered—the state could prosecute him, even though he was innocent, if the jury acquitted Defendant or if the prosecution believed he was a coparticipant.¹¹⁰

To believe that Smith's assertion is irrelevant is to use a relevancy test different from that of rule 401, or to use relevancy as a mask for other policy objectives. In *Bowles*, the first inference would support Defendant's claim that Smith, not Bowles, was the true culprit. The third inference would also support this defense if the jury inferred that Smith had a knife like the murder weapon, was in the alley, and so on—all circumstantial evidence from which the jury might decide that Smith was the culprit or, equally important for Bowles, that the prosecution had not met its burden of proving Bowles' guilt. In drawing either inference, then, a juror could reasonably reevaluate the evidence of Defendant's (and of Witness') guilt. The second inference—that Smith and Bowles had colluded—would also encourage a juror to reassess the other evidence. This time, of course, by inferring that the two had colluded, the juror could infer that Bowles was guilty.

In multi-culprit crimes, in contrast, the relevancy to Defendant's guilt of the assertion of the privilege by a former codefendant or a suspected coparticipant is somewhat problematic. If in a single-culprit crime like *Bowles* we can assume that Witness could best protect himself by testifying, then in cases like *Beye* and *Johnson* the reverse is true: Witness can protect himself in most instances by asserting the privilege. Nonetheless, the assertion is arguably still relevant, although the jury would doubtlessly discount its significance, if not dismiss it altogether.

Recall that in *Beye*, the defendant (*Beye*) argued that Smith (his former codefendant whose case had been severed) had alone possessed the marijuana

(another advantage of such a good faith test is that it might spur defense counsel into conducting more factual investigations). On the other hand, Smith, by answering that he did not own such a knife, would not have incriminated himself (assuming his answer was truthful), and he would not have waived his fifth amendment right not to answer the other questions about the crime. Hence, why would Smith refuse to say he did not own a weapon that could have been the murder weapon unless he in fact did own such a weapon?

110. In this third possibility, Witness still could answer truthfully that he had not killed the victim. Whether by answering that ultimate question Witness might be held to have waived the privilege not to answer more detailed questions is difficult to say.

found inside Smith's car. Supporting that claim was Smith's assertion of the privilege when called to testify by Beye. A divided court of appeals, without discussing the issues and relying exclusively upon *Bowles* (which had recently been decided), held that Beye could not try to benefit from Smith's assertion.¹¹¹ In dissent, Judge Ely identified four inferences that could be drawn from Smith's assertion.¹¹² If guilty, Smith had reason to assert the privilege whether he had acted by himself or with another person and whether that second person was Beye or someone else. If innocent, Smith might also have asserted the privilege whether or not he knew of Beye's guilt, for fear that in testifying he might reveal circumstantial evidence linking him to Beye or to the crime.¹¹³ Because two of these inferences supported Beye's claim of innocence, Judge Ely argued that the assertion was relevant and the trial court should have forced Smith to assert the privilege before Beye's jury.¹¹⁴

Smith's assertion is relevant, but its relevancy is exceedingly marginal. It is marginal because self interest could impel any codefendant or suspected coparticipant, whether guilty or not, to assert the privilege.¹¹⁵ For such a person to testify to exonerate another borders on a supererogatory act. If guilty, the codefendant (Witness) would necessarily provide evidence of his guilt in exonerating Defendant. Even if innocent, Witness would fear revealing evidence that might be useful in prosecuting him.¹¹⁶ After all, for his testimony to help Defendant, he must know something about the crime and Defendant's complicity. Moreover, by testifying, Witness would lock himself into that version of the facts, a version he could change only at the risk of

111. 445 F.2d 1037, 1038 (9th Cir. 1971).

112. *Id.* at 1042-43 (Ely, J., dissenting).

113. *Id.* Two other inferences could also be drawn. First, the defendants might have colluded for Smith to invoke the privilege in the hope of misleading the jury into thinking that Smith alone was guilty, when either he was not guilty or both he and Beye were guilty. For more discussion of the possibility of collusion, see *infra* Part II.E.. Second, Smith might have asserted the privilege for fear of disclosing the commission of a separate crime, say of using the car to smuggle drugs on another occasion.

114. 445 F.2d at 1042-43 (Ely, J., dissenting). Indeed, Judge Ely thought the trial judge should have forced Smith to appear before the jury to test his resolve in asserting the privilege. *Id.* at 1041. This seems unnecessary. The trial judge can determine Smith's resolve in a way less likely to tempt the jury to draw the forbidden inference. See *infra* Part II.D.3. The court should not let Witness appear before the jury if it finds that Witness will assert the privilege and if it will not allow Defendant to benefit from the assertion.

115. Evidence is irrelevant if it is as likely to exist whether or not the proposition for which it is offered is true. R. LEMPERT & S. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 159 (2d ed. 1982).

116. Because the prosecution usually controls the order of prosecution (at least in jurisdictions with master calendars), a defendant who succeeds in the difficult task of obtaining a severance may nonetheless fail to persuade his former codefendant to testify if the latter's prosecution has not ended. The prosecution could even use its control as a tactical matter to ensure that the former codefendant would refuse to testify. For an argument that a defendant has a constitutional right to severance to call a former codefendant, see Westin, *supra* note 10, at 145-46.

being impeached in his own prosecution or of being charged with perjury.¹¹⁷ At the least, he would provide the prosecution with the unusual opportunity to investigate the truth of what he said he had done and knew.

A former codefendant would equally hesitate to testify if he had been convicted or acquitted by the time he was called by Defendant to testify. A convicted defendant who protests his innocence might worry about disclosing information that would be useful in reprosecuting him were he successful in overturning his conviction on appeal.¹¹⁸ A defendant who pleaded guilty, like one of the codefendants in *Johnson*, might nonetheless invoke the privilege for fear of being prosecuted for conspiracy, for another drug sale,¹¹⁹ or by another jurisdiction (in that case, by the State).¹²⁰

In summary, in a single-culprit crime like *Bowles*, Witness has an interest in testifying rather than in asserting the fifth amendment (unless, of course, he is guilty and does not want to lie in denying complicity). Witness will escape prosecution as long as Defendant is convicted. He has an incentive to testify to counter whatever evidence of his sole guilt Defendant has gathered. In contrast, codefendants like Smith in *Beye* and Perry in *Johnson* have an incentive to invoke the privilege even if they feel impelled to help a defendant whom they know is innocent. By testifying, they increase, not decrease, their risk of being prosecuted and convicted. Thus, invoking the privilege in a case like *Bowles* is relevant; doing so in cases like *Beye* and *Johnson* is at best marginally relevant.¹²¹ As a result, from this point we will focus principally

117. Because Witness' counsel may not know whether his client is guilty or innocent (or at least how a jury would regard the evidence of guilt), counsel will probably stress this reason in trying to convince his client to assert the privilege.

118. Courts have taken different positions about when a convicted defendant's fifth amendment privilege ends concerning that conviction. For a review of the various positions, see *Ellison v. State*, 65 Md. App. 321, 329-31, 500 A.2d 650, 654-56 (1985), *aff'd*, 310 Md. 277, 528 A.2d 1271 (1987).

119. Because Perry had told the agent he had three sources of narcotics, the court of appeals thought he might have worried he would disclose other drug transactions, especially on cross-examination. *United States v. Johnson*, 488 F.2d 1206, 1209 (1st Cir. 1973). The court of appeals could speculate with freedom because Johnson's attorney had neither pinpointed the subjects nor revealed the questions he wanted to ask. Had Johnson's attorney restricted his and the prosecutor's questions to the sale with which Johnson was charged, one wonders whether Perry should have been ordered to testify. The prosecutor promised not to charge conspiracy. Even if that promise did not bind the prosecution, as the court of appeals doubted that it did, *id.* at 1209 n.2, the prosecution still could not have used Perry's compelled testimony in prosecuting him for conspiracy. *Cf. PROPOSED FED. R. EVID.* 511 (1974) (no waiver of privilege when testimony is erroneously compelled).

120. In contrast, without permission from the Attorney General, federal prosecutors do not prosecute a person who has been successfully prosecuted by a state for substantially the same acts that sparked federal interest. *See Petite v. United States*, 361 U.S. 529, 531 (1960) (*per curiam*).

121. Nonetheless, in the converse setting, in which the prosecution wants the jury to draw an inference against the defendant from an alleged accomplice's assertion of the fifth amendment privilege to questions designed to tie him and the defendant to the crime, courts have not found that assertion to be irrelevant. *See United States v. Maloney*, 262 F.2d 535, 537 (2d Cir. 1959) ("[s]uch refusals to testify [by witnesses who allegedly participated with the defendant] have been uniformly held not to be a permissible basis for inferring what would have been the answer, although logically

upon the plight of Defendant in a single-culprit crime.

D. EVIDENTIARY PREJUDICE

Even after holding that Witness' privilege assertion is irrelevant, courts hurry to add that letting Defendant try to benefit would unfairly prejudice the prosecution. Judicial analysis of the prejudice the prosecution allegedly would suffer has been summary and unsatisfactory. Rather than closely inspecting the facts of the case, courts posit that the prosecution will suffer because the jury will surely overestimate the significance of Witness' privilege assertion. Witness need not spell out why he fears incriminating himself and (without granting use immunity) the prosecution cannot cross-examine him to extract the information he fights to keep hidden. By ruling in this summary manner, courts have not needed to consider a third possible source of misestimation by the jury—careful orchestration of Witness' appearance before the jury.¹²²

Were courts to apply Federal Rule of Evidence 403, the rule concerning evidentiary prejudice, they could not find prejudice so easily.¹²³ Rule 403 authorizes, but does not require, the judge to exclude relevant evidence of which the "probative value is substantially outweighed by the danger of unfair prejudice . . . or misleading the jury, or by [the] consideration[] of . . . needless presentation of cumulative evidence."¹²⁴ After estimating the probative value of the evidence to the proponent and the probable harm to the opponent, the judge must determine whether the harm substantially outweighs the benefit. With this three-step test, rule 403 roots the determination of evidentiary prejudice in the facts of the case. The analysis is quintessentially discretionary and ad hoc. Under rule 403, then, courts would err in excluding Witness' assertion by using, as they have, a generalization about fact (juries will overvalue the assertion) or a categorical rule (the prosecution cannot cross-examine Witness).¹²⁵ By placing the burden of persuasion on the opponent, rule 403 also slants the inquiry toward admitting rather than excluding evidence. Indeed, this slant implies that the court should search

they are very persuasive"). The defendant's sixth amendment right of confrontation, not the evidentiary law of relevancy, blocks the prosecution from attempting to benefit from this witness' assertion. See *Douglas v. Alabama*, 380 U.S. 415, 418-20 (1965).

122. Another reason courts might exclude Witness' assertion is that it might be cumulative evidence in light of the other evidence of Witness' guilt and Defendant's innocence. For discussion of this point in a constitutional context, see *infra* note 260.

123. In apparently no reported case has a court discussed rule 403 or its state counterpart.

124. Rule 403's other grounds for excluding ("confusion of the issues . . . undue delay, waste of time") do not apply.

125. The prosecution's inability to cross-examine Witness seems germane to the danger that the jury might be misled, but courts often seem to treat this as an independent reason for forbidding Defendant from attempting to benefit from Witness' assertion. The inability to cross-examine probably does not fit within any of rule 403's other categories. See *supra* note 124.

for a way to help the jury understand the possible value of, and problems with, the evidence.¹²⁶ As discussed below, the court could provide this assistance by orchestrating Witness' appearance and by commenting on the reasons why Witness might have invoked the privilege. Following the structure of rule 403, we first consider Defendant's interest in introducing Witness' assertion, followed by the harm to the prosecution if it is introduced, and finally whether the harm outweighs the benefit.

1. The Value of Witness' Assertion to Defendant

In calculating the benefit to the proponent, the court should consider the proponent's need to introduce the evidence and its probative significance.¹²⁷ *Bowles* helps us to explore the probative value to Defendant of Witness' privilege assertion. In that case, there appeared to be almost as much evidence of Witness' (Smith's) guilt as there was of Defendant's (Bowles') guilt. Each had confessed. Bowles testified that he was innocent and explained why he had falsely implicated himself;¹²⁸ Smith, of course, did neither. Additionally, Smith had provided circumstantial evidence of his guilt by searching for one of Bowles' witnesses, apparently to warn him not to repeat Smith's admission. There was no reason to suspect that the defense witnesses who reported Smith's confession or threat had a reason to lie to help Bowles. The prosecution's pathologist said only that the knife Bowles carried upon arrest could have been used to cause the mortal wound, not that it did cause the wound.¹²⁹ Neither side introduced direct evidence about the murder or the murderer's identity.

One suspects that Smith's assertion of the fifth amendment might have had an explosive effect upon Bowles' jury. There appeared to be no danger of collusion.¹³⁰ When Bowles testified that he was innocent and Smith publicly refused to deny his guilt when he could have done so without risk,¹³¹ the jury might have leapt upon the inference that Smith had impliedly confirmed defense counsel's accusations.

This example demonstrates that forcing Witness to assert the privilege before the jury highlights that Defendant is prosecuting as he is being prosecuted. In the morality play of a criminal trial,¹³² Defendant will almost

126. Cf. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 245-50 (1976) (discussing less intrusive alternatives to exclusion).

127. See C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5214, at 269-71 (1978).

128. For his explanation, see *supra* note 27.

129. Recall that the expert's opinion was perplexing. See *supra* note 30.

130. There was no evidence that Bowles and Smith even knew each other.

131. The prosecution was neither prosecuting nor considering prosecuting Smith.

132. It is nothing new to say that criminal trials involve moral judgments by the factfinders. See Jackson, *Questions of Fact and Questions of Law*, in *FACTS IN LAW* 97 (W. Twining ed. 1983);

surely need to testify, even if by not testifying he could keep secret his odious criminal record.¹³³ Defendant will contrast his eagerness to explain his position with Witness' unwillingness to do so. Moreover, if Witness is not forced to assert the privilege before the jury, the jury may believe that the defense merely fabricated the evidence implicating Witness. In *Bowles*, when Smith did not appear as a witness to confirm or deny the defense's accusation of him, the jury might readily have concluded that the defense witnesses had either concocted "Smith's" existence or misreported what Smith had said, or that Smith had spoken as reported but for a reason other than to admit culpability.¹³⁴ An instruction by the court that neither side can call Witness to testify will in theory snuff out the first concern,¹³⁵ but not the other two. In cases like *Bowles*, then, Defendant would benefit from having Witness assert the privilege before the jury.

In single-culprit cases, the court could extract enough information through a conventional evidentiary hearing to establish the importance of letting Defendant try to benefit from Witness' assertion. To receive a hearing, defense counsel would inform the court and the prosecution that he intends to call a person whom he believes will assert the fifth amendment at trial to questions designed to substitute him for Defendant as the culprit. The hearing itself would be in effect a dress rehearsal for Witness' appearance before the jury. Defense counsel and the prosecutor would question Witness as they would were Witness to appear at trial. Defense counsel would present every scrap of information the defense had about Witness' culpability, including inadmissible information such as a relevant trait of Witness' character, the opinions of others that Witness was the culprit, or evidence that the police had once suspected Witness before deciding to charge Defendant.¹³⁶ Witness, or his attorney, would explain why Witness fears incriminating himself in answer to each question.

The defense may balk at disclosing this information, however, for tactical and constitutional reasons. The defense undeniably gains a tactical advantage by not informing the prosecution until a dramatic point in the trial that it will call Witness. If that announcement will surprise the prosecution,¹³⁷ it

McCabe, *Discussions in the Jury Room: Are They Like This?*, in *BRITISH JURY SYSTEM* 23-26 (N. Walker ed. 1975).

133. See FED. R. EVID. 609 (permitting use of prior convictions to impeach witnesses, including defendant-witnesses on cross-examination under certain defined circumstances).

134. Of course, undue prejudice and orchestration of Witness' appearance remain as sources of jury error even if Smith does assert the privilege before the jury.

135. In *Bowles*, the court of appeals thought that the trial judge should have given this instruction, had either side asked for it. 439 F.2d at 542.

136. In deciding admissibility questions, the judge may consider inadmissible evidence. FED. R. EVID. 104(a).

137. The prosecution might receive a mid-trial continuance to investigate Witness' culpability, but by delaying disclosure the defense can increase the prosecution's difficulty in investigating.

will startle the jury. Nonetheless, the court will surely rule against Defendant if defense counsel mulishly refuses to disclose this information in the hope of gaining surprise. *People v. Thomas*¹³⁸ is an illustration.

The defendant in *Thomas*, charged with robbery, was arrested driving the escape car. He defended by claiming that he had borrowed the car from its owner, Whitlock, and that Whitlock had committed the robbery by himself. Whitlock's hearsay statement that he alone had committed the crime was admitted into evidence. Whitlock would not testify and asserted the fifth amendment when called as a witness by the defense. Defense counsel stubbornly refused to tell the court the questions he wanted to ask Whitlock, claiming that the defense had an absolute right to call any person as a witness and to question that person without disclosing the questions in advance.

The court of appeals, agreeing with the trial court's refusal to force Whitlock to assert the privilege before the jury, worried that the assertion would create a "very real danger that the jury would infer" that Whitlock was "guilty of a particular crime."¹³⁹ Drawing the inference would have been wrong because Whitlock might have asserted the privilege for reasons "wholly unrelated to the crime at issue in the instant trial."¹⁴⁰ As unconvincing as this reasoning is, defense counsel freed the court of appeals to speculate about theoretical crimes when he spurned the trial court's request to list the questions he wanted to ask. Moreover, counsel should have supplied the answers that he expected Witness would give if he answered truthfully and pinpointed the role the privilege assertion would play in the defense case.

In addition to the tactical reasons that Defendant might not want to share with the prosecution his information implicating Witness, disclosing this information also creates a constitutional issue. With notice, the prosecution might be able to convince or force Witness to testify against Defendant. Disclosure would then help the prosecution add evidence to its case-in-chief and might conflict with Defendant's personal fifth amendment privilege.¹⁴¹ Defendants are often required to disclose other sorts of information in advance

138. 51 N.Y.2d 466, 415 N.E.2d 931, 434 N.Y.S.2d 941 (1980).

139. *Id.* at 472, 415 N.E.2d at 934, 434 N.Y.S.2d at 944. The court of appeals' vague observation must have meant the robbery with which the defendant was charged, because the defense would call Whitlock only to substitute him for the defendant.

140. *Id.*

141. In a related context, some commentators have suggested that a defendant must disclose in a pretrial hearing his intent to introduce the penal interest statement of an unavailable declarant. See 4 Weinstein's Evid. (MB) ¶ 804(b)(3)[03] (1988). Because the declarant must be unavailable, the prosecution may have trouble finding him and thus will find no evidence to undercut the force of the declarant's statement. Yet, to satisfy the exception's corroboration requirement, the defendant may need to reveal information that the prosecution could use in its case-in-chief. Thus, this disclosure requirement, like one that would involve Witness, may impinge on the defendant's fifth amendment right.

of trial.¹⁴² But, obligating Defendant to disclose the information about Witness differs from obligating him to disclose other sorts of information. Although a defendant is required to disclose the identity of an alibi or psychiatric witness, he only comes under this obligation because he expects the witness to testify on his behalf. In contrast, in many cases the defense does not know what Witness would say if he were to testify truthfully, because it is in Witness' interest not to talk with the defense or to lie if he does talk. Disclosure without this advance knowledge involves a high risk. If the defense knew in advance that Witness would testify favorably for the prosecution, it would not call Witness, it would avoid the need to disclose to the prosecution, and it would only introduce the evidence of Witness' guilt that it had found. Nonetheless, even if requiring Defendant to disclose clashes with his fifth amendment protection,¹⁴³ Defendant should waive the objection and embrace the risk that Witness would help the prosecution as a welcome cost of gaining the opportunity to benefit from Witness' assertion of the fifth amendment privilege.

Defendant might accept that exchange—disclosure in exchange for the opportunity to benefit—for several reasons. The need to disclose counsel's questions and the expected answers at a hearing would spur defense counsel to search thoroughly for evidence to support its claim about Witness. Moreover, as long as courts remain reluctant to override Witness' desire to assert the fifth amendment, they are not apt to inspect closely the relevancy of Witness' assertion unless Defendant spreads before them evidence of Witness' complicity. During an evidentiary hearing, defense counsel should be freed of the restriction that he have a good faith belief that Witness, if he answered truthfully, would confirm the existence of any evidence about which counsel asked.¹⁴⁴ This would allow counsel to probe deeply Witness' complicity.¹⁴⁵

142. Defendants are sometimes required to disclose certain defenses (i.e., alibi, state of mind), physical evidence, and the names, addresses, and statements of defense witnesses. *See generally* W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 19.4 (1985). These requirements are said to affect only the time when the defendant will disclose, because he must inevitably disclose at trial if he decides to assert the defense or introduce the evidence. *See Williams v. Florida*, 399 U.S. 78, 85 (1970). Supporting this view is the fact that if, after disclosing, the defendant decides to forego the defense or not to introduce the evidence, that shift in defense tactics cannot be used against him. *See* FED. R. CRIM. P. 12.1(f) (alibi), 12.2(e) (insanity or mental disease).

143. Although a person is not normally required to disclose damaging evidence, there are exceptions. *See Fisher v. United States*, 425 U.S. 391, 413 n.12 (1976) (defendant must disclose subpoenaed material unless disclosure would constitute the only way for the prosecution to authenticate the material); *Commonwealth v. Stenhach*, 306 Pa. Super. 5, 21-22, 514 A.2d 114, 119 (1986) (defense counsel must disclose physical evidence in his possession even if evidence incriminates the client).

144. *See supra* note 109.

145. For example, counsel should be able to ask a witness like Smith in *Bowles* whether at the time the crime was committed he owned a knife like the murder weapon, even if counsel does not know the answer. The court can advise Witness that he will not incriminate himself if he can

With this information, the court could determine more accurately the inferences one could draw from Witness' assertion and thus the significance of the assertion.¹⁴⁶ The court could also decide how to choreograph Witness' appearance before the jury, and thus further reduce the likelihood that the jury will overestimate the meaning of Witness' assertion.

The hearing would have an effect on the prosecution as well. The prosecution would need to give the defense any information it obtained in investigating Witness that supported Defendant's claim that Witness either is the culprit or has exculpatory information.¹⁴⁷ Also, with the opportunity to investigate why Witness might be asserting the privilege, the prosecution's claim of evidentiary prejudice would lose strength. Most importantly for Defendant, the prosecution might decide to dismiss the charge against Defendant after reviewing the information about Witness.

In summary, if defense counsel identifies the questions he wants to ask Witness, the answers he expects to be offered if Witness testifies truthfully, and the importance to the defense of having the assertion made before the jury, the court will be in a position to evaluate the probative value of Witness' assertion. Having made this evaluation, the court's next step under rule 403 is to calculate the prejudice the prosecution might suffer if the jury were permitted to consider why Witness asserted the privilege.

2. The Prejudice to the Prosecution

Courts worry that the prosecution will suffer evidentiary prejudice because the jury will overvalue the importance of Witness' assertion. This worry is enhanced by the prosecution's inability to cross-examine Witness. The first ground seems overblown; the second is one the prosecution can eliminate. A

truthfully deny that he owned such a knife. If Witness then asserts the privilege, the court can infer that Witness implicitly confirmed that he does own such a knife.

The good faith restriction discussed in this context is drawn from the good faith belief counsel must have in cross-examining a character witness or in challenging a witness' character for truthfulness. *See* FED. R. EVID. 404, 405, 608. The good faith test substitutes for counsel's inability to introduce extrinsic evidence to prove his contention. *See* FED. R. EVID. 405, 608.

146. As part of this effort, the court could determine whether Witness would assert the privilege and whether he could properly do so. To that end, the court should explain to Witness how to evaluate his exposure, and Witness should have time to decide whether to assert the privilege. In *Bowles*, for example, if Smith had been asked for the first time before the jury whether he had possessed a knife of the sort that was used to kill the victim, he might reflexively have asserted the fifth amendment even if he had no knife. In contrast, during a hearing, the court could describe the evidence both sides had collected of Smith's guilt, and thus could explain the relevance of each question.

147. *Cf.* *Brady v. Maryland*, 373 U.S. 83, 86 (1963) (prosecution's suppression of extrajudicial confession by defendant's confederate was denial of due process). Indeed, one could condition Defendant's disclosure upon the prosecution's disclosure of all of its evidence of Witness' culpability. This exchange would parallel the discovery of objects and tests in federal prosecutions. *See* FED. R. CRIM. P. 16.

third possible source of misestimation—orchestrating Witness' appearance before the jury—is one that the courts have not considered because all have found prejudice from the first two grounds. This third ground is reviewed in Part II.D.3 below.

There is reason to fear that the jury will overvalue Witness' assertion.¹⁴⁸ Witness' dramatic assertion of the fifth amendment will rivet the jury's attention. Yet, because Witness will not disclose (even to the court, *in camera*¹⁴⁹) the information he hides, and because he can so easily satisfy the test to assert the privilege, it is possible that Witness, were he to testify, would say nothing that would help Defendant. But, this problem of estimation infects all evidence. Few blanch at drawing an inference of a defendant's guilt from his refusal to testify,¹⁵⁰ even though a defendant's decision not to testify is probably more often prompted by reasons unconnected with his guilt than is Witness'.¹⁵¹ Moreover, by closely inspecting the evidence of Witness' (and of Defendant's) guilt, the court can identify the inferences a jury could draw from Witness' assertion. Perhaps the court could then help the jury to rank each inference as a possible explanation of Witness' decision.

Rather than rooting their discussion of misestimation in the facts of the particular case,¹⁵² courts have summarily concluded that the privilege assertion is so marginally relevant and yet so potentially dramatic that the jury will inevitably overvalue its significance. Again, *People v. Thomas*¹⁵³ provides an example. Did Thomas or did Whitlock rob the station attendant and escape in the stolen car? Evidence linked each man to the crime. Thomas was stopped as he drove the escape car, about thirty minutes after the robbery. In searching him, the police found approximately forty-five single dollar bills, a few more than those taken in the robbery. Yet, in searching Thomas and the car, the police did not find the gun that the culprit had used. The victim's identification of Thomas during the trial might have been erroneous, as his pretrial identification had been excluded because the police had

148. The jury might also undervalue the importance of the assertion, if, for example, it did not learn of some inadmissible information Defendant had that linked Witness to the crime.

149. For details of such an *in camera* hearing, see the proposal *infra* Part III.B and note 236.

150. See *supra* notes 74-95 and accompanying text. Recall also that when a witness called by the prosecution asserts the privilege to questions connecting him to the defendant and the crime, that assertion is considered relevant to the defendant's guilt. See *supra* note 121; see also MODEL CODE OF EVIDENCE Rule 233 (1942) (permitting judge and parties to comment on, and trier of fact to draw inferences from, assertion of any privilege).

151. Compare *supra* text accompanying notes 83-85 (defendant's reasons to not testify) with *supra* text accompanying notes 103-05 (witness' reasons to testify).

152. Judge Ely, in his *Beye* dissent, stands alone in having identified the inferences one might reasonably draw from Witness' exercise of the fifth amendment. See *supra* note 113 and accompanying text.

153. 51 N.Y.2d 466, 415 N.E.2d 931, 434 N.Y.S.2d 941 (1980). For an earlier discussion of *Thomas*, see *supra* text accompanying notes 138-39.

used suggestive procedures.¹⁵⁴ Thomas had two alibi witnesses. He also testified that Whitlock, a friend, had loaned him the car at a time after the robbery had occurred and shortly before he was stopped by the police. Whitlock, at some later point while in jail on an unrelated matter, admitted to another inmate who apparently had no ties to Thomas, that he alone had committed the crime. Had Whitlock been forced to assert the fifth amendment before Thomas' jury, his refusal to testify would have supported Thomas' "prosecution" of him.

Nonetheless, the court of appeals deplored the possibility that the jury might have drawn an inference in Thomas' favor. The court ignored the facts, preferring instead to hypothesize that Whitlock could have refused to testify for reasons unconnected to the robbery.¹⁵⁵ This sort of specious hypothesizing about the harm the prosecution might suffer is not what rule 403 permits courts to do. Instead, courts must demand that the prosecution identify the locus of possible jury overvaluation. Just as Defendant must identify how he would be helped by Witness' assertion, the prosecution must try to identify reasons unrelated to Defendant that Witness might refuse to testify.¹⁵⁶ If the prosecution fails to do this, it has not met its burden.

The prosecution's ostensible inability to cross-examine Witness is also said to be a source of prejudice. Rather than treating this inability as an independent source of evidentiary damage,¹⁵⁷ let us consider it in connection

154. *Thomas*, 51 N.Y.2d at 475 n.3, 415 N.E.2d at 934 n.3, 434 N.Y.S.2d at 946 n.3. The court of appeals did not indicate whether the victim had ever said Whitlock was not the robber.

155. See *supra* text accompanying note 139. Whitlock might have invoked the privilege to avoid disclosing possession of the stolen car rather than his commission of the robbery. Possessing the car, however, would itself have constituted important circumstantial evidence linking him to the robbery and supporting Thomas' explanation of how he had gotten the car.

156. Illustrating the effect that this disclosure may have upon the prosecution is an example from the tentative draft of a rule in the Model Code of Evidence. This rule would have authorized the judge and the parties to comment on anyone's assertion of a privilege and would have allowed the jury to draw any inferences from that assertion. During the defendant's trial for murder, the victim's butler asserts the fifth amendment when asked by the prosecution whether he had left the pantry window unlocked on the night of the crime. When the prosecution reveals that the butler is being prosecuted for the unrelated crime of assisting a thief in stealing the victim's silver, the court has discretion to forbid the prosecution from arguing that the butler is shielding the defendant and the defendant from arguing that the butler killed the victim by himself. MODEL CODE OF EVIDENCE Rule 225 (Tent. Draft No. 1, 1940).

157. The prosecution's inability to cross-examine Witness does not justify finding prejudice under rule 403, for hearsay evidence is often admitted without being tested by cross-examination. Indeed, the Model Code of Evidence justified drawing inferences from assertions of any privilege by drawing a parallel with hearsay. See MODEL CODE OF EVIDENCE Rule 233 comment (1942) ("By further examination [the opponent] might develop facts which would destroy all basis for [an inference against him from assertion of a privilege]. He has no means of testing the truth of the inference This is to say that some of the objections applicable to hearsay are applicable to the comment. If hearsay statements by persons whose direct testimony is unavailable are to be received, then the comment [upon assertion of a privilege] should be permitted.").

Nonetheless, there is a difference between drawing an inference from Witness' privilege assertion

with whether Witness' privilege assertion might mislead the jury. If able to cross-examine Witness, the prosecution could uncover Witness' connection to the crime and knowledge about Defendant's (and his own) guilt. But by asserting the privilege, Witness blocks the prosecution as well as Defendant. Moreover, the prosecution might fear that questioning Witness in front of the jury might exacerbate the damage to its case from the assertion. In *Bowles*, for example, the prosecutor might have worried about asking the inverse of the sorts of questions defense counsel would have asked.¹⁵⁸ The jury might expect that Witness, having been attacked by the defense during direct examination, would view the prosecutor as his savior. Witness, by not answering the prosecutor's questions and denying the defense's accusations, might make the jury more comfortable in inferring that Witness had implicitly conceded Defendant's attack.¹⁵⁹

The prosecution, however, can sweep away this dilemma by granting Witness use immunity. No court has asked whether the prosecution's ability to eliminate the alleged source of evidentiary prejudice itself warrants finding that it has suffered no prejudice. A party should not be able to invoke rule 403 to exclude evidence when it (and it alone) has the power to eliminate the basis of its objection.¹⁶⁰

and admitting hearsay. A type of hearsay qualifies for class exemption only if it is reliable in the run of cases, even if the result is to admit hearsay whose reliability appears suspect in the particular case. Inferring Defendant's innocence from Witness' assertion of the privilege might appear less accurate than inferring the truth of a class-exempted hearsay statement. Yet, by carefully examining the context in which Witness asserts the privilege, the court should be able to satisfy itself of the probative value of the assertion. Indeed, if the court is worried that the evidence points to Witness as the true culprit, it might grant Defendant's motion for acquittal.

158. See *supra* text accompanying note 109. Examples of the questions the prosecutor might ask include: "You never had a knife of the sort that could have caused the fatal wound?" "You never told Neely or Bowles that you had killed a man, as they say you did?"

159. Cf. *Bowles v. United States*, 439 F.2d 536, 542 n.6 (D.C. Cir. 1970) (en banc) (as a tactical matter, Defendant might not call Witness in hope that jury would expect prosecution to call Witness to refute Defendant's accusation, and would hold it against prosecution when it did not), *cert. denied*, 401 U.S. 995 (1971).

Of course, the court could mollify this problem by telling the jury that Witness would waive the protection of the privilege were he to answer any question that might tend to incriminate him. This point, however, does not undercut the prosecutor's concern over asking any questions.

160. Two other examples are relevant to this issue. Could a party simultaneously refuse to stipulate to proof of a relevant fact while invoking rule 403 to challenge the evidence the proponent wishes to introduce to prove that fact? Cf. *United States v. Diozzi*, 807 F.2d 10, 13 (1st Cir. 1986) (reversing conviction when prosecution refused to accept stipulation concerning facts and instead insisted upon calling defendants' attorneys to testify to those facts). Could the prosecution establish that a witness was unavailable to introduce his hearsay statement and to satisfy the confrontation clause if the cause of unavailability was the witness' assertion of the fifth amendment? Might not the prosecution be required to grant immunity to that witness to force him to testify? Cf. *United States v. Leonard*, 494 F.2d 955, 985 n.79 (D.C. Cir. 1974) (Bazelon, C.J., concurring in part) (suggesting that if the prosecution could introduce against the defendant the hearsay statement of an alleged coparticipant whose prosecution had not been joined with the defendant's, the prosecution had to grant that hearsay declarant (coparticipant) use immunity to appear in defendant's trial

This point is especially telling in single-culprit crimes, in which the prosecution has no substantive reason to refuse to grant use immunity to Witness. In multi-culprit crimes, however, the prosecution may understandably decry granting use immunity to Witness. In those instances, Witness (the former codefendant) and Defendant must be prosecuted separately.¹⁶¹ In the separate trial of Witness (now a defendant), the prosecution might have trouble showing that it was not using against Witness the testimony that Witness gave in Defendant's trial.¹⁶²

Only in multi-culprit crimes, however, does granting Witness use immunity threaten to disrupt or damage Witness' prosecution. This problem does not arise in single-culprit crimes because the prosecution, having decided to prosecute Defendant, has no need to protect its ability to gather evidence of Witness complicity independently from his testimony.¹⁶³ Indeed, the prosecution refuses to grant use immunity to Witness in order to achieve a tactical advantage over Defendant (by denying him Witness' testimony) rather than to ensure that it can prosecute Witness in case Defendant is acquitted. Given Defendant's present inability to try to benefit from Witness' invocation of the privilege, the prosecution's refusal to grant use immunity can hamper, if not cripple, Defendant's attempt to shift responsibility to Witness. As a result, the jury may more easily convict Defendant.¹⁶⁴

3. Has the Prosecution Met its Burden Under Rule 403?

As the preceding section reveals, the fear of jury misestimation is exaggerated. What little legitimate concern that exists can be diffused by the prosecution's granting use immunity to Witness (in single-culprit crimes). Also, rule 403, which is slanted toward admitting evidence, seems to obligate the

as long as the defendant could make a "substantial showing that the declarant's testimony [was] necessary to rebut the effect of the alleged statement").

161. If the prosecutions were joined, use immunity would not provide a codefendant with protection coextensive with the fifth amendment's protection. In assessing the codefendant's guilt, realistically the jury could not ignore the testimony that the codefendant gave under the grant of immunity.

162. Commentators disagree over the cost and effectiveness of procedures the prosecution can use to satisfy the demands of use immunity. Compare Flanagan, *supra* note 10, at 463 (the problems are significant) with Westen, *supra* note 10, at 169-70 (the problems are not significant).

163. This point is reinforced if courts conduct a hearing of the sort described in Part II.D.1, *supra*. If it were to prosecute Witness after Defendant was acquitted, the prosecution could add the evidence of Witness' guilt that Defendant had found to whatever it had obtained before Witness testified under use immunity.

164. The irony of not granting use immunity to Witness in a single-culprit crime is that his testimony would increase the chance the jury would convict Defendant. If he were innocent, Witness could truthfully counter the evidence of his guilt. If he were guilty, Witness would have an interest in lying in the hope that his lies might also sway the jury to convict Defendant. In lying, Witness would run almost no risk of being charged with perjury. To charge him with perjury, the prosecution would have to concede that it had relied on perjurious testimony in convicting Defendant.

court to search for ways to reduce the possible prejudice and to admit the challenged evidence. There are at least two ways the court could do this: (1) by orchestrating Witness' appearance before the jury, and (2) by commenting on the possible significance of Witness' assertion of the privilege.

The court will want to diminish the drama of Witness' appearance before the jury. It could begin to do this by explaining to the jury, at the time Witness is called to testify, how easy it is for a witness to invoke the fifth amendment privilege and how difficult it is to determine the significance of that invocation.¹⁶⁵ The court might also forbid defense counsel from asking leading questions that drip with accusation. It could decide during the pre-trial hearing which questions would be permissible, and then have a clerk read them to Witness. Or, the court might describe to the jury the topics about which Witness would refuse to answer questions.¹⁶⁶ With either approach, the need for Witness to appear before the jury might be eliminated, but Witness should probably appear to confirm that he would invoke the privilege.¹⁶⁷

To help the jury grapple with the meaning of Witness' assertion,¹⁶⁸ the court could also identify the inferences the jury might draw and suggest the weight each inference deserved.¹⁶⁹ The court could do this either after Wit-

165. The court might add that it would be wrong to infer that Witness had necessarily conceded that he was guilty by asserting the privilege, let alone that he would reveal information that incriminated himself by answering the questions truthfully.

166. In *Bowles*, for example, the jury could learn that Witness would answer no questions about his possession of a knife like the murder weapon. That information would be less explosive, but no less telling, than having Witness assert the privilege before the jury in response to a loaded question such as: "You had a knife like the one the killer used, didn't you?"

167. Witness might also unexpectedly decide to answer certain questions. Moreover, Witness should be required to make at least a cameo appearance when the culprit's identification is in issue. The jury should be made to compare the physical appearance of both Defendant and Witness with the description of the culprit given by the eyewitnesses.

168. It would be folly to presume that the jury could evaluate the meaning of Witness' assertion without specific assistance from the court. Nonetheless, in other contexts courts take similar leaps of faith. See, e.g., *Opper v. United States*, 348 U.S. 84, 95 (1954) ("unfounded speculation" that jury would not follow instruction prohibiting it from considering codefendant's statement against defendant); *Drew v. United States*, 331 F.2d 85, 91 (D.C. Cir. 1964) (severance of counts not necessary when jury can distinguish evidence relevant to each).

169. As an example of the sort of instruction a judge might give, consider *Beye*, our illustration of a multi-culprit crime in which each defendant says that the other was alone responsible. In *Beye*, the judge could identify both the most plausible and the most implausible reason why Smith (Witness) had asserted the privilege. The most likely reason would be self interest: by testifying, Smith would have helped the State to prepare its prosecution of him. Extremely unlikely, on the other hand, would be the possibility that the two had colluded for Smith to mislead the jury into thinking that he alone had committed the crime. Although courts worry about collusion in multi-culprit crimes, to show how the two might have colluded would require quite labored reasoning. First, the two would have needed to understand that their prosecutions had to be severed as a condition for *Beye* to call Smith to testify, because no defendant can call a codefendant to assert the privilege. Next, Smith would have had to convince his attorney that he was innocent and that he would testify accordingly. Otherwise, Smith's counsel never would have baited *Beye* to contest Smith as counsel

ness had testified or when the jury was instructed. In contrast to the English trial judge's often caustic, disparaging evaluation of the defendant's or the prosecution's evidence,¹⁷⁰ American judges hesitate to summarize or to comment upon the evidence.¹⁷¹ They probably hesitate out of concern that the jury may unblinkingly adopt the judge's evaluation, when the judge herself might have erred.¹⁷² Yet, even if, as we might expect, judges are skeptical (if not derisive) about the importance of Witness' exercise of the privilege, defendants would probably welcome judicial evaluation in exchange for the opportunity to try to benefit from Witness' refusal to testify.

This analysis suggests that if courts take rule 403 seriously, they should overrule the prosecution's prejudice objection, at least in single-culprit crimes like *Bowles*. This is especially so if one interprets rule 403 to mean that the objection fails whenever the objecting party has the opportunity to overcome the source of the prejudice (here, by granting use immunity), or if the court has ways other than excluding evidence to diffuse the prejudice (here, by staging Witness' appearance and by comment). Courts, however, have taken the opposite approach. Rather than search for ways to reduce the

did in the opening statement. Moreover, Smith and Beye would have had to assume that the opening statement by Smith's counsel would prompt the court to declare a mistrial, as it did. If the court had not granted a mistrial, the two would have been in trouble. In their joint trial, Smith would have had to testify that he was innocent or risk that the jury would infer that he was guilty from his failure to fulfill his attorney's promise that he would testify. But, if Smith did testify, his testimony would have damned Beye because, consistent with his attorney's promise in the opening statement, he would have had to say that he was innocent and Beye was guilty. However, Beye would not be happy to accept that result and might well have retaliated by testifying that he was innocent and that Smith was guilty. This conflict in their testimony might have led the jury to convict both. Colluding in this way, then, would require more insight and luck than defendants often have. Hence, a court could readily instruct the jury that collusion had probably not prompted a former codefendant like Smith to assert the privilege when called by Defendant to testify.

170. Typical examples culled from the instructions the author heard one judge give in a murder prosecution include: "There is not a shadow of doubt that the blood in this terrible scene was that of the victim—but that is for you [the jury] to decide . . ." In discussing the sequence of wounds, the judge, after identifying the choices, added: "This is a matter entirely for you, but this [i.e., the judge's] interpretation may be one you choose to accept." In commenting on the defendant's claim he had been hoodwinked by the police into confessing, the judge asked rhetorically: "Do you [the jury] think this defendant has the intelligence to understand what the police asked him to do?" After a dramatic pause, he added, "You must decide."

171. In deleting from the Federal Rules of Evidence the proposed rule 105, authorizing federal judges to summarize and comment on the evidence, Congress did not intend to strip that authority from the judiciary. HOUSE COMM. ON THE JUDICIARY, REPORT ON THE FEDERAL RULES OF EVIDENCE, H.R. REP. NO. 650, 93d Cong., 2d Sess. 5 (1973), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7078-79. State court judges, however, do not always have this authority. See R. LEMPERT & S. SALTZBURG, *supra* note 115, at 1079 & n.37.

172. Also, jurisdictions rather naively claim that the jury should decide factual guilt, as if the jury might ignore other influences, like the arguments and conduct of the attorneys. R. LEMPERT & S. SALTZBURG, *supra* note 115, at 1079. Commentators continue to criticize judicial comment and evaluation. See Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1 (1978).

possible prejudice of having Witness assert the privilege before the jury, they bar Witness' appearance and seek other ways to help Defendant. The usual way is for the trial judge to explain to the jury that neither side may call Witness to testify, without explaining why.¹⁷³ This method, ostensibly neutral, is doubly wrong. The jury can infer that the prosecution has no interest in calling Witness because its case is against Defendant, not Witness. Yet, the jury may expect Defendant to call Witness. When he does not, the jury, despite the instruction, may hold this failure against Defendant. Second, the instruction misleads the jury because the prosecution can call Witness by granting him use immunity.

If the prosecution's prejudice objection is overruled, Defendant has surmounted another hurdle. However, rule 403 is not a rule of admission. Other evidentiary barriers remain for Defendant to overcome, such as the fear of collusion and the perceived need for symmetry.

E. WITNESS LIES IN CLAIMING TO INCRIMINATE HIMSELF

Haunting courts is the fear that Witness will try to help a guilty Defendant by falsely claiming that he would incriminate himself if he testified truthfully.¹⁷⁴ The fear is that if Witness were to testify honestly, he would neither implicate himself nor exonerate Defendant, nor even provide evidence of use to the defense. How realistic is this fear, and are there ways to reduce the risk of this sort of deception while allowing Defendant to try to benefit from Witness' assertion? Postponing for a moment the possibility of collusion in a multi-culprit crime, consider this script in a single-culprit crime in which the prosecution believes Defendant killed the victim. Witness, when questioned

173. In *Bowles*, for example, the court of appeals, in dictum, noted that this instruction would "undoubtedly" have been given had defense counsel so requested. *Bowles v. United States*, 439 F.2d 536, 542 (D.C. Cir. 1970) (en banc), cert. denied, 401 U.S. 995 (1971).

174. See Hill, *Testimonial Privileges and Fair Trial*, 80 COLUM. L. REV. 1173, 1181 (1980) (describing "danger of collusion" as "serious," but not giving examples of its occurrence); J. MAGUIRE, *supra* note 63, § 2.061, at 54 (suggesting Witness who asserted privilege when asked if he had sexual relations with girl prior to Defendant's alleged statutory rape might "deliberately have sought to aid defendant"). Those courts that worry over collusion have not pegged it to an evidentiary rule. Collusion probably would come under rule 403's test of prejudice.

The same fear has stopped courts from creating a hearsay exception for defense-offered statements against penal interest when the defendant seeks to shift sole responsibility to the declarant. See Respondent's (State of Mississippi) Brief at 7 n.3, *Chambers v. Mississippi*, 410 U.S. 284 (1973) (No. 71-5908) (detailing how defendant could collude with declarant for declarant falsely to implicate himself to witnesses who would unwittingly report his alleged penal interest statements). The concern that a defendant could induce a witness falsely to make a penal interest statement is much more real than the concern that Defendant could collude with Witness. Because admission of a penal interest statement is conditioned upon the hearsay declarant's unavailability, it is impossible to learn why he spoke and whether he honestly incriminated himself. In contrast, in our setting the prosecution could always grant Witness use immunity to force him to disclose what he knew and whether he committed the crime.

by defense counsel, invokes the privilege.¹⁷⁵ The jury, impressed and misled by Witness' refusal to testify, erroneously acquits Defendant, having incorrectly inferred that Witness has implicitly admitted that he, and not Defendant, was the killer. The incensed prosecutor then charges Witness for the murder.¹⁷⁶ Witness (now the defendant) does not testify in his own trial, but Defendant (now the witness) testifies and truthfully admits that he alone committed the crime. The jury in Witness' trial, not learning that Witness had asserted the fifth amendment in Defendant's trial or that Defendant had been acquitted of the same charge, properly acquits Witness.

The prosecutor appears stymied. The double jeopardy clause insulates Defendant from being reprosecuted for the murder charge. Nor can he be prosecuted for perjury: he did not testify at his own trial and he told the truth in admitting guilt while testifying in Witness' trial. Witness is probably also protected from being charged with perjury for falsely having invoked the privilege in Defendant's trial because it is so easy to justify asserting the privilege.¹⁷⁷

Although the possibility of collusion of this sort is troubling, the risk that it might occur is so unlikely and, when the risk exists, its existence so obvious, that the worry is exaggerated.¹⁷⁸ Likely candidates for collusion are Defendant's spouse, relative, or friend. Yet, these relationships, reeking of the incentive for collusion, are ones no juror would ignore in assessing the significance of the assertion. If an innocent defendant's brother were honorable, the jury might reason, Defendant would not have been prosecuted because the brother would have admitted his guilt to the police. The jury would thus deeply discount the importance of the assertion by such a person, especially if the court told the jury that Witness suffers no legal detriment from the assertion.¹⁷⁹

If no close relationship exists between Defendant and Witness, the likelihood of collusion shrinks considerably. This is so because the risks to Defendant and Witness from colluding rise sharply. First, they would need to recruit other conspirators, thereby increasing the risk of discovery.¹⁸⁰ Sec-

175. Defendant and Witness must also deceive defense counsel because professional responsibility rules prohibit counsel from introducing false evidence. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(4) (1981). Indeed, if counsel learns of the deception, he is obligated to notify the court of the fraud. *Id.* DR 7-102(B)(2).

176. The prosecution could use against Witness the evidence that Defendant had introduced to shift responsibility to Witness, coupled with whatever evidence it could find independently.

177. This is especially so if Defendant introduced evidence that implicated Witness.

178. In no reported case has there been a hint of collusion.

179. This information might be part of the instructions the judge would give the jury about how to evaluate the assertion. For other instructions and a discussion of prejudice, see *supra* Part II.D.3. Alternatively, the judge could allow the prosecutor to make the point during final argument.

180. In *Bowles*, for example, Bowles and Smith would have had to mislead or inveigle the other

ond, Defendant would almost surely need to testify during the trial. If all criminal trials are morality plays,¹⁸¹ Defendant must sharply contrast his credibility with that of Witness. The defense wants the jury to believe that only a person who desperately wants to hide his guilt would remain silent when challenged by defense counsel's accusatory questions. Witness, were he innocent, would forthrightly counter the incriminating information of his guilt to help the jury convict the guilty Defendant. By not testifying, Defendant would weaken the force of his "prosecution" of Witness.¹⁸² But by testifying, he opens himself to the risks noted above.¹⁸³

Defendant and Witness run a third risk: being prosecuted for obstructing justice or conspiring to obstruct justice. To demonstrate the relevancy of Witness' privilege assertion, Defendant must have evidence to support his claim that Witness is solely responsible. Moreover, to persuade the jury of his accusation, Defendant may need more evidence of Witness' guilt than that needed to establish the relevancy of Witness' assertion.¹⁸⁴ Because Witness is innocent and Defendant is guilty, the two may need to fabricate evidence of Witness' guilt to satisfy the judge and then the jury. By enlarging the collusion in this way, they increase the risk of being charged with obstructing justice. This risk is further increased if the defense must disclose the evidence supporting Defendant's claim about Witness' guilt in a hearing before the trial begins.¹⁸⁵ With notice, the prosecution may uncover this second fabrication. Evidence that the two had fabricated false evidence of Witness' guilt would damn Defendant in the jury's view.

Ironically, Witness runs a different risk if this second fabrication succeeds in misleading the jury into acquitting Defendant. The prosecution may decide to prosecute Witness, and to use against him the false evidence that the

witnesses who testified about Smith's admission of guilt into joining the conspiracy. In *Thomas, Whitlock* (Witness) would either have had to deceive Whitlock's cellmate into thinking that he had honestly implicated himself or include him in the conspiracy.

181. See *supra* note 132.

182. This point has its basis in tactics, not in the cases. Because no Defendant has been permitted to try to benefit from Witness' assertion of the privilege, none has had to decide whether to testify to contrast his openness with Witness' silence. Defendants have nonetheless testified (for example, Bowles).

183. Compare *Adams v. United States*, 287 F.2d 701, 702 (5th Cir. 1961) (defendant convicted of perjury for his alibi testimony in his earlier robbery prosecution) with *United States v. Nash*, 447 F.2d 1382, 1385 (4th Cir. 1971) (double jeopardy clause prevented prosecution of defendant for committing perjury in her earlier mail theft prosecution because jury must have resolved conflicting stories in her favor).

184. Inadmissible evidence, such as other acts committed by Witness or Witness' bad character, might convince a court of the relevancy of the privilege assertion. See FED. R. EVID. 404(b) (other acts), 405 (bad character), 608 (bad character).

185. The defense may need to disclose to overcome an evidentiary objection based on prejudice, see *supra* Part II.D., or as part of a new model of admissibility, see *infra* Part V.

two had created. Witness risks being erroneously convicted of the substantive charge.

If these risks do not drain Defendant and Witness' interest in fabricating evidence, the prosecution can uncover any collusion by granting use immunity to Witness and forcing him to testify. The prosecution has no reason to withhold immunity if it suspects collusion. If Witness testifies truthfully once immunized, Defendant is undone. If he lies in claiming sole responsibility, he risks being charged with perjury.¹⁸⁶ Also, by lying, Witness sharpens the prosecution's interest in prosecuting him for the substantive crime if the jury eventually acquits Defendant.

The possibility of collusion in a single-culprit crime is thus nothing but a specter. Nor is it a problem in multi-culprit crimes. A person who is charged with or suspected of having committed the crime with which Defendant is charged does not choose to assert the fifth amendment because of collusion with Defendant. He does so because of self interest.¹⁸⁷ If such a person is guilty, his admissions would ensure his conviction in his own trial; if innocent, his testimony would likely reveal circumstantial evidence that would be useful to the government in its prosecution of him. Even if acquitted prior to Defendant's trial, Witness has reason to assert the privilege to limit the risk of further prosecution.¹⁸⁸

Although it is possible for coparticipants to collude, it is improbable that they will do so. If they do collude, each will imply sole responsibility for the crime when asserting the privilege in the other's separate trial. Defendant-1, for example, will claim that he is innocent and that Defendant-2 is guilty. Underscoring this claim will be Defendant-2's assertion of the privilege when called by Defendant-1 in the latter's trial. This scheme obviously depends upon obtaining a severance. Defendant-2 will never agree to let Defendant-1 accuse him of sole responsibility if the two are being prosecuted together: that accusation would help Defendant-1 but would doom Defendant-2. With their prosecutions severed, however, Defendant-1 can call (former) Defendant-2 with the expectation that Defendant-2 will invoke the privilege rather than counter Defendant-1's accusation. Defendant-1, acquitted in his trial when the jury exaggerates the importance of Defendant-2's assertion, will return in Defendant-2's trial to testify that he is guilty and that Defendant-2 is not.

Several points make it improbable that two defendants could collude suc-

186. Use immunity does not foreclose prosecution for perjury. *See* 18 U.S.C. § 6002 (1982).

187. *See supra* Part II.c.

188. *United States v. Johnson*, 488 F.2d 1206 (1st Cir. 1973), discussed *supra* in text accompanying notes 119-20, presented the inverse of this point: there, the Witness had pleaded guilty but could still assert the privilege.

cessfully in the way described. First, it is not easy to obtain a severance,¹⁸⁹ and without a severance the defendants would act foolishly in accusing one another. Second, even if their prosecutions were severed, it is far from certain that one could force the other to assert the fifth amendment in the first's trial. *De Luna v. United States*¹⁹⁰ provides one of the few glimmers of hope for these defendants. The defendants in that case were charged with possessing a packet of marijuana that Gomez had thrown out of an automobile window. In his testimony at their joint trial, Gomez placed the blame solely on de Luna by claiming he had not known the contents of the package that de Luna had handed to him for disposal.¹⁹¹ Gomez's attorney did not call de Luna to testify, but tried in summation to buttress his client's defense by contrasting Gomez's willingness to testify with de Luna's refusal. Gomez was acquitted; de Luna, convicted.

De Luna's conviction was reversed when the court of appeals unanimously held that the fifth amendment forbade comment by anyone on a defendant's decision not to testify. Almost parenthetically, two of the judges added that Gomez's sixth amendment right of confrontation authorized his attorney to comment on de Luna's silence.¹⁹² The court's solution to this constitutional impasse was to sever the prosecutions. Although the majority in *De Luna* did not explicitly say that if the prosecutions had been severed, Gomez could have forced de Luna to assert the privilege before Gomez's jury, this is surely the implication of the decision.¹⁹³ In later decisions, courts have grudgingly

189. Under rule 14 of the Federal Rules of Criminal Procedure, Defendant-1 must show, among other things, that Defendant-2 would testify if their prosecutions were severed, that Defendant-2's testimony would exculpate him, and that he needs Defendant-2's testimony. See W. LAFAVE & J. ISRAEL, *supra* note 142, § 17.2(c); C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE: CRIMINAL* § 225 (2d ed. 1982); see generally *Joinder and Severance*, in Project, *Eighteenth Annual Review of Criminal Procedure*, 77 GEO. L.J. 774-85 (1989) (by M. Yost). Moreover, to demonstrate that Defendant-2 would exculpate Defendant-1, Defendant-1 must show that Defendant-2 had made such a statement "before there was a motive to offer it . . . for the purpose of obtaining a severance . . . or for the purpose of obtaining judicially granted immunity." *United States v. Stout*, 499 F. Supp. 605, 607 (E.D. Pa. 1980) (citations omitted). Ironically, if Defendant-1 could truly satisfy that burden, he would not need to try to benefit from Defendant-2's assertion because Defendant-2 would testify in Defendant-1's trial.

190. 308 F.2d 140 (5th Cir. 1962).

191. Reciprocating in final argument, de Luna's attorney claimed that Gomez alone was guilty because the police saw Gomez pitch the package but did not see de Luna touch it. *Id.* at 142.

192. *Id.* at 143 (Brown & Wisdom, JJ.). A defendant's right of compulsory process provides better support for this conclusion, unless the majority thought that the accusation by de Luna's attorney meant that Gomez had a right to "confront" de Luna.

Concurring in the result, Judge Bell disagreed with the majority's belief that a defendant could adversely comment on a codefendant's failure to testify. However, he did think that an attorney could comment favorably on his client's decision to testify. *Id.* at 155 (Bell, J., concurring specially).

193. In rejecting a motion for rehearing, the majority noted that a "co-defendant's right to comment is not tangential but is an essential, if complicating, element in the problem" of how to protect the codefendant. *De Luna v. United States*, 324 F.2d 375, 376 (5th Cir. 1963) (per curiam). It

accepted the premise in *De Luna* that one defendant can comment on the refusal of another to testify. But, they have limited the right to comment to facts closely resembling those in *De Luna*. A defendant has no right to comment simply because he testifies and his codefendant does not.¹⁹⁴

If codefendants do obtain a severance, other problems remain. Despite *De Luna*'s implicit holding that Defendant-2's assertion of the privilege is relevant, other courts may disagree and not allow Defendant-2 to appear.¹⁹⁵ More importantly, Defendant-1, who calls Defendant-2 to assert the privilege, risks being charged with perjury. Defendant-1 almost surely must testify that he is innocent at his own trial, as Gomez did in *De Luna*. This would create a vivid contrast between the willingness of the two to testify. If Defendant-1 lies in testifying that he is innocent, he probably could be prosecuted for perjury.¹⁹⁶ Defendant-2 runs the same risk in his later trial if he testifies and Defendant-1 asserts the privilege. Moreover, if Defendant-1 asserts the privilege at Defendant-2's trial, the prosecution could unmask any collusion and damn Defendant-2 by granting use immunity to Defendant-1. Granted use immunity, Defendant-1 must repeat his accusation from his own trial that Defendant-2 was the sole culprit or risk being charged with perjury in this second way. If Defendant-1 does not testify in his own prosecution and nonetheless somehow convinces the jury to acquit, he can testify in Defendant-2's trial that he alone was responsible. With this dramatic confession by Defendant-1, Defendant-2 may choose not to testify, and thus would not risk being charged with perjury. But if Defendant-1 lies in claiming that he acted alone, he could risk being charged with perjury in yet another way.

F. THE UNIMPORTANCE OF SYMMETRY

No inference may be drawn against a defendant when a prosecution witness invokes the fifth amendment to questions designed to chain the defendant to the crime. The reason is not the irrelevancy of the witness'

recognized that a "procedural difficult[y] inherent in [its] decision" was the problem we are discussing: the possibility that codefendants would conspire "to promote a mistrial by having one of them comment upon the failure of another co-defendant to testify." *Id.*

194. The positions of the defendants must be "mutually exclusive." *United States v. Kahn*, 381 F.2d 824, 841 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967) (no right to severance or to comment when Defendant-1 claims he was the innocent dupe of Defendant-2, and the latter claims he acted in good faith); *United States v. De La Cruz Bellinger*, 422 F.2d 723, 727 (9th Cir.) (same result when Defendant-1 claimed alibi, and Defendant-2, caught with the contraband, claimed no knowledge), *cert. denied*, 398 U.S. 942 (1970).

Thus, *De Luna* might help a Defendant in a case like *Beye*, in which each accused the other of sole complicity, but not in a case like *Johnson*, in which Defendant claimed Witness would exonerate him.

195. *See supra* Part II.c.

196. *See supra* note 183.

assertion,¹⁹⁷ but the defendant's inability to cross-examine. This rule was constitutionally enthroned in 1965 when, in *Douglas v. Alabama*,¹⁹⁸ the Supreme Court shook awake the defendant's slumbering sixth amendment right to confrontation.¹⁹⁹ Because the defendant has this protection, should the prosecution similarly have it when Defendant calls Witness? Courts sometimes imply that as a formal matter, the prosecution should be treated the same way as the defendant,²⁰⁰ and thus protected from having an inference drawn in Defendant's favor. But if symmetry is pleasing elsewhere (as, say, in Palladian architecture), it is inappropriate in this context.²⁰¹

Courts do not identify, let alone justify, why we need to shackle Defendant as *Douglas* shackles the prosecution. There are several possibilities; however, none is convincing. The first is a deduction from the global rule that no party in any litigation can benefit from the assertion of any privilege by any-

197. See *supra* note 121 and accompanying text.

198. 380 U.S. 415 (1965).

199. *Id.* at 418 (through the ruse of trying to refresh witness' recollection, prosecutor questioned him about confession during which he had implicated defendant).

Although courts threaten to reverse convictions after the prosecutor has called a witness with the intent of benefitting from the assertion of the fifth amendment, see *United States v. Namet*, 373 U.S. 179, 186-87 (1963), they have not tethered the prosecution as tightly as one might expect. The courts have rather casually inspected whether the prosecution knew the witness would assert the privilege, and have been quick to find that any constitutional error was harmless. See generally Annotation, *Prejudicial Effect of Prosecution's Calling as Witness, to Extract a Self-Incrimination Privilege, One Involved in Offense with which Accused is Charged*, 86 A.L.R.2d 1443 (1962). An example is *Busby v. Holt*, 771 F.2d 1461 (11th Cir. 1985) (per curiam), *withdrawn in part*, 781 F.2d 1475 (11th Cir.) (per curiam), *cert. denied*, 474 U.S. 1068 (1986). The witness had been charged in a separate indictment with helping the defendant kill the defendant's husband. Contending it was a "close question" whether he could force the witness to assert the privilege before the defendant's jury, the prosecutor claimed he could do so to forestall the defense from arguing that the jury could draw an inference in the defendant's favor from the prosecution's failure to call that witness. *Id.* at 1465 n.5. Of course, it was not a "close question": one could easily find that the prosecutor had committed "misconduct" by "conscious[ly] and flagrant[ly] attempt[ing] to build its case out of inferences arising from the use of the testimonial privilege." *Namet*, 373 U.S. at 186. In *Namet*, too, the Court did not reverse even though the prosecutor knew the witnesses would invoke the fifth amendment to certain questions he asked. The prosecutor in *Busby* misunderstood or misconstrued the law. The court of appeals found that having this witness assert the privilege to questions linking him, and implicitly the defendant, to the murder, was constitutional error. Nonetheless, it used the conviction-saving device of harmless error because it thought the error was in the defendant's inability to cross-examine the witness, not in the prosecutor's misconduct. 781 F.2d at 1476.

Cases like *Busby* demonstrate the need to establish a way to review what should be done when a person wants to assert the fifth amendment (or any privilege, for that matter) regardless of which side calls that person as a witness. For a model approach to take, see *supra* Parts II.C. and II.D (balancing relevancy and prejudice).

200. See *United States v. Belleci*, 184 F.2d 394, 398 (D.C. Cir. 1950) (no inference can be drawn from a witness' assertion of the fifth amendment privilege). In *Bowles*, the majority also noted this general rule, and reinforced it by adding the reasons of relevancy, prejudice, and collusion. 439 F.2d at 541-42.

201. See *Commonwealth v. Green*, 445 Pa. 228, 233, 285 A.2d 865, 868 (1971) (Roberts, J., dissenting) (criticizing majority for using the "hobgoblin of symmetry" to deny defendant the right to call witness).

one. Proposed rule 513 of the Federal Rules of Evidence would have created such a blunderbuss rule.²⁰² To defend this proposed rule, the Standing Committee of the Judicial Conference built upon *Griffin v. California*,²⁰³ in which the Supreme Court held that adverse comment by the prosecutor (or by the judge) constitutes a cost that the defendant should not be required to consider in deciding whether to testify. Inflating the Court's analysis of a constitutional fifth amendment right,²⁰⁴ the Standing Committee applied this cost analysis to every privilege. All privileges, the Standing Committee observed, are "founded upon important policies and are [thus] entitled to maximum effect."²⁰⁵

Whether one agrees with the cost analysis or not, in our context the concern over cost is irrelevant. Defendant invokes no privilege; he merely wants Witness to testify (or at least to invoke the privilege before the jury).²⁰⁶ Indeed, Defendant will incur a cost only if Witness does not appear before the jury and the jury, puzzled by why Witness does not testify, discounts Defendant's evidence of Witness' guilt. Witness, the privilege holder, suffers no legal harm by invoking the privilege before the jury, as a criminal defendant would if the jury were invited to draw inferences against him from his refusal to testify.²⁰⁷ Thus, comment by Defendant on Witness' assertion does not "cut[] down on the privilege by making its assertion costly."²⁰⁸ The cost concern is irrelevant and overbroad in our context.

A second possible basis for applying a no-inference rule to Defendant involves extending to the prosecution *Douglas v. Alabama's* protection for the criminal defendant. The prosecution, like the defendant, is entitled to a "fair trial," as courts have baldly and shrilly announced.²⁰⁹ Yet, to say that there

202. PROPOSED FED. R. EVID. 513(a) (1974) ("The claim of a privilege . . . is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.").

203. 380 U.S. 609 (1965).

204. *Id.* at 614.

205. PROPOSED FED. R. EVID. 513(a) advisory committee's note (1974).

206. Perhaps it is more accurate to say that Defendant ostensibly wants Witness to testify. Rather than risking that Witness would truthfully or falsely explain evidence that circumstantially incriminates Witness, Defendant might prefer that Witness assert the fifth amendment. We can ignore this sort of tactical assessment, however. *See supra* note 104.

207. *See infra* Part II.G.

208. *Griffin v. California*, 380 U.S. 609, 614 (1965), *quoted in* PROPOSED FED. R. EVID. 513(a) advisory committee's note (1974).

209. *See People v. Dikeman*, 192 Colo. 1, 555 P.2d 519 (1976). In overturning a decision that had permitted Defendant to force Witness to assert the privilege before the jury, *O'Chiato v. People*, 73 Colo. 192, 214 P. 404 (1923), the court in *Dikeman* announced that

[i]t is a rudimentary proposition of law that a criminal trial must be a fair trial not only for a defendant but also for the People. Neither the prosecution nor the defense therefore has the right to deliberately and unfairly benefit from any speculative inferences the jury might draw simply from a witness' assertions of the [fifth amendment] privilege.

192 Colo. at 4, 555 P.2d at 521.

“is no reason [to distinguish] *Douglas* on the basis that the party calling the witness [is] the government,”²¹⁰ suggests a failure to examine closely the respective positions of Defendant and the prosecution.

The defendant cannot supersede any person's privilege and force that person to testify. However, the prosecution can dismantle Witness' fifth amendment protection by granting him use immunity. If the prosecution does not grant use immunity to Witness, it deprives the factfinder of evidence in the same way as a defendant does by not calling his spouse to testify,²¹¹ or by persuading a witness to invoke a personal privilege.²¹² Yet, in these latter situations, the jury can draw an inference for the prosecution based on the defendant's decision to silence the witness' voice.²¹³ Thus, when the prosecution does not strip Witness of his fifth amendment protection, why cannot the jury have the option of drawing an inference for Defendant? The question may be more easily answered affirmatively now that the prosecution has the power to grant use immunity and no longer needs to grant transactional immunity.²¹⁴ Unlike use immunity, which protects Witness from the use by the prosecutor of the testimony or its fruits, transactional immunity protects the witness from prosecution for any crime he mentions in testifying.²¹⁵ But, even extending the greater protection of transactional immunity to Witness hurts the prosecution only in multi-culprit crimes in which the prosecutor wants to prosecute both Defendant and Witness.²¹⁶ This concern does not

210. *State v. Smith*, 74 Wash. 2d 744, 750, 446 P.2d 571, 581 (1969) (en banc), *overruled*, 85 Wash. 2d 758, 539 P.2d 680 (1975).

211. *See Commonwealth v. Spencer*, 212 Mass. 438, 451-52, 99 N.E. 266, 271-72 (1912) (defendant's failure to call wife to testify in his favor is proper subject for comment by prosecutor; however, if called she could have refused to testify and no comment or inference could have been made against defendant).

212. *See State v. Harper*, 33 Or. 524, 527, 55 P. 1075, 1076 (1899) (in absence of collusion, it is improper for prosecution to argue that jury can draw inference against defendant from witness' refusal to testify), *overruled sub nom. State v. Abbot*, 275 Or. 611, 552 P.2d 238 (1976).

213. If the defendant does not control whether the witness testifies, no inference can be drawn against him. *See Spencer*, 212 Mass. at 452, 99 N.E.2d at 272 (dictum) (wrong to draw inference against defendant when spouse invoked the husband-wife communication privilege).

214. *United States v. Kastigar*, 406 U.S. 441, 443 (1972).

215. *Id.*

216. Nonetheless, the prosecution has offered transactional immunity even to a co-indictee to extract his testimony against the defendant. *See Washburn v. State*, 164 Tex. Crim. 448, 299 S.W.2d 706 (1956). In the unlikely event that in a multi-culprit crime, Witness might want to testify to exculpate Defendant, the threat of prosecution may terrorize him into invoking the privilege instead. This threat poses no problem when the prosecution is already prosecuting Witness, as may happen in multi-culprit crimes in which Witness is suspected of having participated with Defendant. But the prosecution could induce Witness to invoke the fifth amendment by manipulating its charging authority. For example, it might refuse to include in a plea bargain all of the indictments in which Witness is charged. It might not dismiss the remaining counts in an indictment when Witness pleads guilty to one charge. *Cf. United States v. Roberts*, 503 F.2d 598, 600 (9th Cir. 1974), *cert. denied*, 419 U.S. 113 (1975) (codefendant who pleaded guilty to one count asserted fifth amendment because five counts remained against him). Or, the prosecution might refuse to promise

apply in single-culprit crimes, because the prosecution has selected Defendant as its candidate for the culprit.

Indeed, the prosecution's monopoly over granting immunity exposes the irony of valuing symmetry so as to prevent Defendant from benefitting from Witness' assertion simply because the prosecution cannot benefit in the inverse setting. The prosecution has refused every defendant's demand that it grant use immunity to a defense witness; it has done this by successfully arguing that its burden of proof and its responsibility to decide whom to prosecute justify letting it alone decide when to grant use immunity.²¹⁷ Yet, the prosecution should not have it both ways—able to grant use immunity to its witnesses and withhold use immunity from defense witnesses. There is reason, then, to treat Defendant differently from the prosecution.

The strident judicial language about the need for symmetry also masks an important assumption about the relation between the defendant's right to confrontation and his right to introduce evidence through the compulsory process and due process clauses. The defendant's right to introduce evidence, the courts seem to assume, is a function of the prosecution's ability to introduce evidence. The defendant can introduce whatever evidence the prosecution can, but no more. Conversely, the prosecution can exclude any evidence the defendant offers that the confrontation clause would prevent it from introducing.

Such a model of the defendant's two sixth amendment rights is irrelevant and inaccurate. It is irrelevant because, as noted earlier, there is an imbalance in the ability to obtain testimony from a witness who invokes the fifth amendment: the prosecution can force the witness to testify by granting use immunity; the defendant lacks that power. The model is inaccurate because it underestimates the defendant's ability to exclude and admit evidence. Wielding the confrontation clause, the defendant may be able to exclude hearsay evidence that is otherwise admissible through a hearsay exception fashioned by the particular jurisdiction.²¹⁸

not to seek new charges against Witness for his participation in the event about which Defendant wishes him to testify. Cf. *Commonwealth v. Francis*, 375 Mass. 211, 212-13, 375 N.E.2d 1221, 1222-23 (1978) (codefendant who pleaded guilty to substantive count asserted fifth amendment for fear prosecution might indict him for conspiring with Defendant).

217. See *United States v. Turkish*, 623 F.2d 769, 774-75 (2d Cir. 1980) (substantial burdens and restrictions assumed by prosecution, such as burden of proof, unanimous verdict requirement, inability to compel defendant to testify, inability to exclude exculpatory evidence, and inability to retry defendant after acquittal, justify the asymmetrical power to grant use immunity), *cert. denied*, 449 U.S. 1077 (1981).

218. Thus, the defendants could use the hearsay exception whereas the prosecution could not. The confrontation clause also enables a defendant to surmount evidentiary exclusionary rules to obtain evidence that the prosecution cannot. See *Davis v. Alaska*, 415 U.S. 308, 319 (1974) (confrontation clause enables defendant to overcome a privilege protecting a juvenile, called as a witness by the prosecution, from revealing his criminal record and current probationary status).

To satisfy the confrontation clause, the prosecution must establish that the hearsay declarant is unavailable and that the hearsay is reliable.²¹⁹ In our context, assuming that the confrontation clause's requirements apply when the prosecution calls a witness who will assert the fifth amendment,²²⁰ the prosecution would fail to meet the unavailability test, and probably the reliability test as well.

By asserting the fifth amendment, a witness becomes unavailable.²²¹ But the witness is only nominally unavailable; the prosecution, with its authority to grant use immunity, controls whether the witness remains unavailable. It is senseless to permit the prosecution simultaneously to claim that the witness is unavailable and refuse to bestow use immunity upon him.

An assertion of the fifth amendment by a prosecution witness in a suspected multi-culprit crime probably also flunks the reliability test. Even assuming that the witness' assertion of the privilege is relevant to the defendant's guilt,²²² the confrontation clause demands that the evidence be reliable, not simply relevant. Because the witness will himself be suspected of having participated in the crime, the witness will be anxious to assert the privilege whether or not he is guilty or knows of the defendant's complicity.²²³ Thus, inferring that such a witness has confirmed the defendant's guilt by asserting the fifth amendment is not accurate enough to satisfy the confrontation clause's reliability test.

Furthermore, the defendant's right to introduce evidence through the compulsory process and due process clauses enables him to trump evidentiary exclusionary rules that bar the prosecution from introducing the same sort of evidence.²²⁴ The confrontation clause protects the defendant, not the

219. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

220. Assertion of the fifth amendment might be treated as hearsay on the assumption that the witness has implicitly "asserted" that by answering the questions truthfully, he would link the defendant and himself to the crime. See J. MAGUIRE, *supra* note 63, § 2.061, at 49. Whether the assertion is treated as hearsay or not, the requirements of the confrontation clause seem to apply because the defendant cannot cross-examine the witness who asserts the privilege, just as he cannot cross-examine an unavailable hearsay declarant.

221. See FED. R. EVID. 804(a)(1) ("unavailability" includes situations in which the witness is exempt from testifying on grounds of privilege).

222. See *supra* note 121; see also J. WIGMORE, *supra* note 88, § 2272, at 410 ("The inference, as a mere matter of logic, is not only possible but inherent, and cannot be denied."). *But cf.* *Beach v. United States*, 46 F. 754 (N.D. Cal. 1890) (seemingly not relevant).

223. Although the point is so obvious that illustration seems unnecessary, consider *Busby v. Holt*, 771 F.2d 1461 (11th Cir. 1985) (per curiam), *withdrawn in part*, 781 F.2d 1475 (11th Cir.) (per curiam), *cert. denied*, 474 U.S. 1068 (1986) (discussed *supra* note 199). In that case, the alleged coparticipant whom the prosecution called to testify asserted the fifth amendment to questions asking no more than whether he knew the defendant.

224. See *Chambers v. Mississippi*, 410 U.S. 284, 298-303 (1973) (due process clause enables defendant to introduce unavailable declarant's hearsay statement against penal interest when State has no exception for that sort of hearsay).

In *Chambers*, the Court noted that the hearsay bore "persuasive assurances of reliability." *Id.* at

prosecution.

For all these reasons, the rights of the prosecution and the defendant to introduce and to exclude evidence are simply not symmetrical. The rule against drawing an inference from the assertion of a privilege in favor of a party is therefore overinclusive as it applies to Defendant.

G. THE WITNESS' INTEREST

A final evidentiary issue is whether Witness has a legal interest that must be considered in deciding whether to let Defendant try to benefit from Witness' assertion of the fifth amendment. When Witness is a codefendant (or a suspected coparticipant), he has such a legal interest: the fifth amendment protects him from being called as a witness by any party and from having his refusal to testify be the subject of comment by any party.

In a single-culprit crime, however, Witness has no legal interest that warrants evaluation. Publicly asserting the fifth amendment in Defendant's trial will no doubt embarrass Witness, and may affect other aspects of his life.²²⁵ Yet, Witness is hapless: if properly subpoenaed, he must appear to testify and must assert the privilege in the arena that the judge chooses (in or out of the presence or hearing of the jury). Here, Witness' legal protections are limited to: (1) the right to remain silent,²²⁶ and (2) the right to prevent the prosecution from using his assertion against him as substantive evidence or as a basis to impeach him were he later to testify at his own prosecution (if Defendant were acquitted and Witness prosecuted for the same crime).²²⁷

H. SUMMARY

This analysis of the evidentiary issues indicates that we should let Defendant try to benefit from Witness' exercise of the privilege, at least in single-culprit crimes. Through a pretrial hearing, the court can determine whether Witness' assertion is relevant. With advance notice of Defendant's intent to call Witness, the prosecution will have the opportunity to investigate Wit-

300. Whether a defendant must demonstrate that the evidence bears "persuasive assurances of reliability" remains unclear. In *Chambers*, the Court might have wanted to erect a high threshold because at that time few jurisdictions, including the federal courts, had adopted a hearsay exception for statements against penal interest. Moreover, statements against penal interest may constitute a special sort of evidence demanding closer inspection than other types of hearsay, as suggested by the uniquely high corroboration requirement included in the federal exception. *See* FED. R. EVID. 804(b)(3). Thus, with other sorts of evidence, the courts might either impose a lower reliability burden or, as argued in Part V, *infra*, permit the defendant to introduce evidence as long as the prosecution has the opportunity to investigate its reliability.

225. One attorney told the author that his client feared being fired from his work if his employer learned he had asserted the privilege. Conversation with attorney in Washington, D.C. (1984).

226. In contrast, the prosecution in Canada can force Witness to testify, although it cannot use his testimony against him. *See supra* note 11.

227. *See* *United States v. Grunewald*, 353 U.S. 391 (1957).

ness' complicity and the possibility that Witness and Defendant have colluded. The court can position the jury to evaluate the significance of Witness' assertion by staging Witness' appearance before the jury and by comment. The prosecution's evidentiary objections should therefore be rejected.

Yet, the analysis is not at an end. Courts may reject one of the linchpins of the analysis—that they must closely inspect the facts of the case, that they should not use a categorical rule forbidding the factfinder from drawing any inference from the assertion of privilege, that they should overrule the prosecution's prejudice objection if the prosecution has had the opportunity to investigate Witness' assertion, or that they should help the jury as extensively as has been proposed in Part II.D. As a result, Part IV examines whether Defendant has a constitutional right to try to benefit from Witness' assertion. Given the uncertain constitutional outcome, Part V explores whether to adopt a new model of evidentiary admissibility for the criminal defendant. Before these inquiries, however, we need to ask whether there is another way to prod Witness to testify.

III. LEARNING WHAT WITNESS HIDES BEHIND THE PRIVILEGE

The inference that Witness is guilty and that Defendant is not is almost irresistible when the crime was committed by only one person and Witness asserts the fifth amendment. Yet, a rational juror could also draw other inferences from that assertion. And, if forced to testify, Witness might staunchly deny culpability while simultaneously confirming the existence of circumstantial evidence of his sole guilt. The jury's inability to learn the reasons for Witness' assertion could lead it to err in concluding that Defendant is innocent and that Witness is probably guilty.

To improve the factfinding process beyond the use of the hearing described in Part II.D, Witness should testify. Witness will not testify, however, unless the pursuit of some tactical advantage leads the prosecution to grant use immunity. Given this dilemma, there are two ways to increase the likelihood that the information Witness hides behind the assertion would benefit Defendant if known. First, in a radical move, the court could strip Witness of his fifth amendment protection and force him to testify. More modestly, Witness could be required to answer questions about his complicity in an *ex parte*, *in camera* hearing.

A. FORCING WITNESS TO TESTIFY

Perhaps surprisingly, forcing Witness to testify before the jury and protecting him from use of his testimony is not at odds with the current interpreta-

tion of the fifth amendment.²²⁸ If the fifth amendment ever created a “private enclave”²²⁹ from which the government could not force us to venture, it no longer does so. Instead, the Supreme Court has been marching toward the position that the prosecution can coerce one to disgorge physical evidence as long as this is not the only way to authenticate that evidence,²³⁰ or to testify as long as that testimony and its fruits cannot be used as evidence against the witness.²³¹ A witness desperate to remain silent risks being held in contempt for rejecting the prosecution’s munificent grant of use immunity. Thus, Witness is not harmed, at least in the constitutional sense, by being forced to testify.

The prosecution is harmed if the court grants use immunity only in multi-culprit crimes. In prosecuting a witness who has testified under a grant of use immunity, the prosecution must obtain its evidence independently of the witness’ testimony. This burden is irrelevant in a single-culprit crime because the prosecution does not need to protect its right to prosecute Witness if Defendant is acquitted.²³² This burden is important in multi-culprit crimes, however, because Witness shares billing with Defendant as a codefendant or as a possible coparticipant yet uncharged. Satisfying that burden might be difficult if the prosecution wants to try Defendant before it tries the coparticipant, or if it has not yet completed its investigation of the coparticipant by the point when he is to testify at Defendant’s trial.²³³ Thus, granting use immunity to a coparticipant might cripple, or at least disrupt, the prosecution’s effort to convict all of the culprits.²³⁴

228. It is also the approach taken in Canada. *See supra* note 11.

229. *United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting), *rev’d*, 353 U.S. 391 (1957). For the Court’s other metaphors of place to describe the fifth amendment’s protection, *see, e.g.*, *United States v. Couch*, 409 U.S. 322, 327 (1973) (“private inner sanctum of individual feeling and thought”); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“zone of privacy”).

230. *See United States v. Doe*, 465 U.S. 605, 613-15 (1984). In *Andresen v. Maryland*, 427 U.S. 463 (1976), and *Fisher v. United States*, 425 U.S. 391 (1976), the Court had left open the slim possibility that the fifth amendment protected against disclosure of private papers. Although in *Doe* the Court did not explicitly eliminate this possibility, Justice O’Connor in her concurring opinion said that it had been eliminated by implication. 465 U.S. at 618 (O’Connor, J., concurring).

231. *See Kastigar v. United States*, 406 U.S. 441, 461 (1972).

232. If the prosecution does choose to prosecute Witness, it can use against him the evidence collected by Defendant. The prosecution can also resurrect any evidence of Witness’ guilt that it had collected before deciding to prosecute Defendant. *Cf. Chambers v. Mississippi*, 410 U.S. 284, 288 (1973) (State prosecuted Chambers only after its prosecution of McDonald (Witness) had been dismissed at preliminary examination stage).

233. Filing a list of its evidence under seal with the court would not help. *See United States v. Turkish*, 623 F.2d 769, 775 (2d Cir. 1980) (defendant’s request to have immunity granted to defense witness denied when prosecution had not completed its investigation of that witness).

234. Nonetheless, after learning why the prosecution opposed forcing Witness to testify, one could balance its interests against Defendant’s need for Witness’ testimony. *Cf. RULES FOR COURTS-MARTIAL* 704(e) (1984) (court can order grant of use immunity or can abate proceedings if

At least in single-culprit crimes, then, courts should override Witness' privilege assertion to force him to testify. However, there is scant chance that courts will do this. The argument that they should is disingenuous because it hides the critical point: if courts were to override Witness' privilege assertion, they would do what they have doggedly refused to do—grant use immunity to a witness over the prosecution's objection. Curtly claiming to lack inherent authority to grant immunity,²³⁵ courts reason that only the legislature has the authority to grant it, and that legislatures have transferred their authority to the office of the prosecutor in the executive branch.²³⁶

B. FORCING WITNESS TO DISCLOSE IN AN EX PARTE, *IN CAMERA* HEARING

Rather than adopting the more radical approach of forcing Witness to testify before the jury, courts could conduct an *ex parte*, *in camera* hearing, with only Witness and his counsel present, to learn why Witness refuses to testify. The defense and prosecution would prepare questions for the judge to ask Witness.²³⁷ If Witness incriminated himself, the judge could readily find that his assertion of the privilege before the jury would be relevant. If Witness did not incriminate himself, the judge could force him to testify before the jury. In either event, the judge would seal the record of the hear-

Defendant can prove that Witness' testimony "would be of such central importance to the defendant's case that it is essential to a fair trial").

235. *United States v. L'Hoste*, 640 F.2d 693, 695 (5th Cir. 1981).

236. *Id.* at 695. Nor have courts interpreted the defendant's sixth amendment and due process rights to include a right to override privileges. See Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741, 770 (1981). Overriding a witness' fifth amendment privilege makes more sense than overriding other privileges because the former does not protect the witness from being forced to testify, only from the use of that testimony. For arguments on both sides of the constitutional issue, compare Westen, *Confrontation and Compulsory Process: A Unified Theory for Criminal Cases*, 91 HARV. L. REV. 567, 581 n.38 (1978) [hereinafter Westen, *Unified Theory*] (Defendant's sixth amendment right to compulsory process empowers court to conduct *in camera* hearing and to force prosecution to choose between overriding privilege (although perhaps not the fifth amendment) or dropping prosecution) with Hill, *supra* note 174, at 1185-90 & n.65 (neither case law nor policy supports forcing witness to disclose privileged information *in camera*). Siding with Professor Westen, I would go further and override the witness' fifth amendment privilege as well. His reservation about overriding the fifth amendment privilege seems to stem from concern that the witness' disclosures would leak from the *in camera* hearing and that the prosecution would as a result have difficulty establishing the independence of its evidence. See Westen, *Unified Theory, supra*, at 581 n.38. However, the prosecution's interest in protecting its evidence for use against Witness is insignificant, at least in single-culprit crimes.

237. Although defense counsel might want to attend and participate in the hearing, counsel's submission of a list of questions should suffice to enable the court to question carefully and adequately. Cf. *United States v. Melchor Moreno*, 536 F.2d 1042, 1049 (5th Cir. 1976) (in the absence of defense counsel, the court conducted a hearing with a witness and learned that his fear of incriminating himself was not properly based). The prosecution would want to avoid attending the hearing to reduce its burden of showing that it had gathered its evidence of Witness' guilt, if it chose to prosecute him, independently of his statements to the judge.

ing to protect Witness (and the prosecution, were it later accused of using the information to prosecute Witness).

This proposal will draw fire, too, even though courts conduct similar hearings to determine whether others sorts of privileges apply.²³⁸ Its effect would be a judicial grant of use immunity to Witness in the rare event that his disclosures leaked from the hearing, a grant we know courts resolutely oppose. More importantly, as long as courts believe they lack the institutional or constitutional authority to grant use immunity, they would not want to learn what Witness would say. What could the judge do if, in an *in camera* hearing, Witness brazenly or tearfully conceded that he and not Defendant had committed the crime? Motivated to reveal Witness' stunning admission, the judge would lack a way to disclose. Defendant has no right to strip a privilege from Witness.²³⁹ Nor is Witness' fifth amendment privilege the sort that permits the court to learn the privileged information while fashioning a remedy for the nondisclosure of the information.²⁴⁰ As a result, it is unlikely that courts will adopt this ostensibly modest proposal to decide whether Defendant or Witness is guilty.

Because courts will not prod Witness into testifying, we must consider whether Defendant has a constitutional right to try to benefit from Witness' assertion. If that too fails, we must explore whether to adopt a different model of evidentiary admissibility for the criminal defendant.

IV. A CONSTITUTIONAL ARGUMENT

If evidence law is properly interpreted, Defendant will not need to resort to constitutional law to try to benefit from Witness' assertion, at least in a single-culprit crime. Nonetheless, dredging constitutional doctrine becomes important if courts remain unpersuaded by analysis of evidence law in Part II. Defendant can jerry-build a constitutional argument.²⁴¹ Convincing courts to accept it is another matter, in no small part because the Supreme

238. See *United States v. Nixon*, 418 U.S. 683 (1974) (executive privilege); *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970) (attorney-client communications), *cert. denied*, 401 U.S. 974 (1971); see also PROPOSED FED. R. EVID. 509 (1974) (secrets of state), 510 (identity of informant).

239. See *Commonwealth v. Sims*, 513 Pa. 366, 374-75, 521 A.2d 391, 394-95 (1987) (defendant cannot overcome attorney-client privilege to force client to testify).

240. See PROPOSED FED. R. EVID. 509(e) (1974) (if the prosecution invokes its "secrets of state" privilege, the court can strike the testimony of a witness, declare a mistrial, or dismiss the action), 510(c)(2) (prosecution may be forced to choose between dismissing the prosecution and revealing the identify of an informant).

241. There is a better-built model than the one discussed in the text. On this model, the due process clause would give a defendant the right to introduce relevant evidence (and to exclude irrelevant evidence). As a constitutional matter, evidence is relevant unless it is "so inherently unreliable that it cannot rationally be evaluated." Westen, *supra* note 10, at 157. The compulsory process clause would require the state to help the defendant try to find evidence. See Westen,

Court has failed to explain the content of the defendant's right to introduce evidence under the due process and compulsory process clauses, or the relation between these two clauses.²⁴² Nonetheless, the Court seems to say that a jurisdiction cannot arbitrarily exclude defense evidence that is relevant, material, and trustworthy, whether the source of this rule is the due process or compulsory process clause.²⁴³ Of these requirements, the stumbling block for Defendant will be establishing that Witness' assertion is trustworthy, if trustworthiness is in fact a separate test.

A. ARBITRARY EXCLUSION

A jurisdiction acts arbitrarily in adopting "rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* characterizations that presume them unworthy of belief."²⁴⁴ In our context, courts act arbitrarily by using the no-inference rule, by insisting upon symmetry in the introduction of evidence by the prosecution and the defense, and by unreflectively holding that Witness' assertion is irrelevant, prejudicial, and collusive.

A jurisdiction can save its rule by demonstrating that the rule excludes unreliable evidence. Unfortunately, the Court has not explained how a jurisdiction can satisfy that burden. Must the trial court inspect defense-offered evidence excluded by the rule to determine whether the purpose of excluding that type of evidence (unreliability) applies to the defendant's evidence? Or (and?), must the trial court search for ways to protect the jurisdiction's interest other than by excluding the evidence?

Under the first interpretation of arbitrariness in the context of the confrontation clause, the trial court must scour the facts of the case before permit-

Unified Theory, *supra* note 236, at 589. The compulsory process clause, however, would not add to the test of relevancy a separate test of reliability as a condition of introducing evidence.

On this model, Defendant could force Witness to assert the privilege before the jury. Witness' assertion is relevant and the court could help the jury to understand Witness' assertion in the ways discussed *supra* in Part II.D.3. The rub, of course, is that the Supreme Court has not accepted this model and is content instead to muddle along without building a model of these two constitutional doctrines.

242. For example, in one recent case, *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the Court said the compulsory process clause provided no greater protection than the due process clause, but chose not to discuss the former because its meaning remained "unsettled." *Id.* at 56.

243. See *Rock v. Arkansas*, 483 U.S. 44, 54-56 (1987). In other cases, the Court has characterized the nature of the evidence as "critical" or "vital" to the defense. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("critical"; due process clause analysis); *Washington v. Texas*, 388 U.S. 14, 16 (1967) ("vital"; compulsory process clause analysis).

244. *Washington*, 388 U.S. at 22 (under compulsory process clause, a rule barring a defendant from calling a coparticipant as a witness, while permitting the State to call such a witness, is unconstitutional); see also *Rock*, 483 U.S. at 56 (arbitrary to bar from testifying defendant whose memory had been hypnotically refreshed "in the absence of clear evidence . . . repudiating the validity of all posthypnosis recollections"); *Chambers*, 410 U.S. at 302 (wrong to apply hearsay rule "mechanistically" to exclude trustworthy hearsay).

ting the prosecution to introduce evidence or to utilize a presumption.²⁴⁵ In like fashion, there is support for Defendant's claim that the trial court must also closely inspect the facts of his case.²⁴⁶ Although there may be reason for not permitting Defendant to try to benefit from Witness' assertion,²⁴⁷ by changing one fact in *Chambers v. Mississippi*,²⁴⁸ one can demonstrate that such a categorical ban is overbroad.

Assume that McDonald asserted the fifth amendment rather than testifying as he did when called as a witness by Chambers. Might the Supreme Court have refused to permit Chambers to force McDonald to assert the privilege before the jury? McDonald's assertion would have been relevant because a rational juror could have inferred that by refusing to answer, McDonald had conceded that he had accurately confessed that he had a weapon like the murder weapon, had fled after the crime, and so on.

The one difference between *Chambers* and our reconstruction of its facts is that unless the prosecution were to grant use immunity to McDonald under the changed facts, it could not meaningfully examine him. The State in *Chambers* scored in its cross-examination of McDonald: he recanted the confession he had given to Chambers' attorneys. But we know from the confrontation clause cases that the ability to cross-examine is not a condition of admitting evidence. A finding that the challenged evidence is reliable is a substitute for cross-examination.²⁴⁹ Thus, at least as long as the inference of Witness' guilt or Defendant's innocence seems accurate enough, the categori-

245. Unless the unavailable declarant's hearsay statement fits within a "firmly rooted" exception, the prosecution must prove that the statement is reliable to satisfy the confrontation clause. See *Ohio v. Roberts*, 448 U.S. 56, 66 & n.8 (1980). The court must also examine the facts when a presumption helps the prosecution. If the factfinder must consider all of the evidence before it can find that the presumed fact exists, the court must find that the presumed fact follows from proof of the basic facts by a preponderance of the evidence. See *County Court of Ulster County v. Allen*, 442 U.S. 140, 166 (1979). Presumptions that permit the jury to find the presumed fact from proof of the basic fact without regard to other evidence in the case must satisfy a higher burden: examined on their face, the presumed fact must follow from proof of the basic fact beyond a reasonable doubt. *Id.* at 167.

246. See *Rock*, 483 U.S. at 65 (Rehnquist, C.J., dissenting) (complaining that the majority seemed to expect the trial judge to determine whether the concerns posed by hypnotized testimony applied to the particular defendant).

Congress might have adopted the catch-all hearsay exceptions, FED. R. EVID. 803(24) & 804(b)(5), out of a similar concern that the hearsay rule was overbroad in excluding certain hearsay statements that fit within no exception.

247. An obvious reason is the efficiency of using a rule that seems to apply to the run of cases, even if use of the rule would appear overbroad if the time were taken to examine its fit to a particular case.

248. 410 U.S. 284 (1973). For a discussion of the facts of *Chambers*, see *infra* notes 106-08 and accompanying text.

249. See *Ohio v. Roberts*, 448 U.S. 56 (1980). Indeed, as long as the hearsay comes within a "firmly rooted" exception, neither cross-examination nor a determination of specific reliability is required. *Id.* at 66 n.8 (the "firmly rooted" exceptions are those for dying declarations, prior cross-examined testimony, and business or public records).

cal rule prohibiting Defendant from trying to benefit seems arbitrary and therefore unconstitutional. Having rent the per se bar, we must wait until the discussion of materiality and trustworthiness to learn how large a tear we have made.

The second version of arbitrariness asks whether the jurisdiction could assuage its concern over jury misestimation in a way other than by excluding the evidence.²⁵⁰ As explored in Part II.D, the trial court can employ a variety of methods to help the jury assess Witness' assertion. It can leech the drama from Witness' assertion by identifying ahead of time the topics that Witness will refuse to discuss and forbidding counsel from asking pointed questions. The court can explain how easy it is for Witness to meet the test to assert the privilege. It can also identify and rank the inferences that the jury might draw.

Safeguards such as these might destroy every exclusionary rule that prevents a defendant from introducing evidence.²⁵¹ One safeguard that would not, and that applies specifically to Defendant's plight, is the grant of use immunity by the prosecution (or the court). Although courts have refused to force the prosecution to grant use immunity, this second version of arbitrariness suggests that the prosecution should be forced to choose between granting use immunity and letting the jury puzzle over the significance of Witness' assertion.²⁵² Forcing the prosecution to make that choice would roughly protect its interests, and perhaps Defendant's as well.²⁵³ By choosing to grant use immunity, the prosecution could eliminate the drama created by Witness' assertion, smoke out any collusion between Witness and Defendant, and let the jury learn whether Witness would incriminate himself and exonerate Defendant. This point applies especially to single-culprit crimes; in

250. The Supreme Court has occasionally implied that we should simply leave to the jury the job of evaluating the credit and weight of relevant evidence. *See* *Washington v. Texas*, 388 U.S. 14, 22 (1967) (best to "leav[e] the credit and weight of . . . testimony [by a coparticipant] to be determined by the jury or by the court") (quoting *Rosen v. United States*, 245 U.S. 467, 471 (1918)). Perhaps the Court's broadest leap of faith about juries is its belief that they understand and will follow judicial instructions. *See* *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979).

The requirement that courts find other ways to reduce the risk of jury misestimation has support in *Rock v. Arkansas*, 483 U.S. 44 (1987). In that case, the Court, in the course of finding it unconstitutional to forbid from testifying a defendant whose memory had been hypnotically refreshed, suggested a number of safeguards a jurisdiction could adopt to protect against the dangers of testimony of that sort. 483 U.S. at 60-61.

251. Nonetheless, Part V, *infra*, discusses whether to adopt a variant of this model of arbitrariness.

252. *See* *People v. Sapia*, 41 N.Y.2d 160, 166, 359 N.E.2d 688, 692, 391 N.Y.S.2d 93, 97 (1976) (dictum) (if witness was an active participant in criminal transaction, prosecution must choose between granting immunity or dismissing the prosecution), *cert. denied*, 434 U.S. 823 (1977).

253. Of course, the jury may not assess the information Witness provides under a grant of immunity in the same way as it will assess his assertion of the privilege. With immunity, Witness may or may not exculpate Defendant. If he asserts the privilege, the jury may undervalue or overvalue the significance, thus hurting Defendant or the prosecution.

multi-culprit crimes, by contrast, granting use immunity might impede the prosecution's ability to convict Witness by requiring it to show that it had obtained its evidence of Witness' guilt independently from his immunized testimony.

In summary, courts' categorical refusal to let Defendants try to profit from Witness' assertion seems, at least in single-culprit crimes, to be wrong under either interpretation of arbitrariness.

B. WITNESS' ASSERTION MUST BE RELEVANT AND MATERIAL

As discussed in Part II.B, Witness' assertion in a single-culprit crime is almost certainly relevant. Whether it is material is another matter.²⁵⁴ Rather than using the term "materiality" in its evidentiary sense,²⁵⁵ the Supreme Court employs it to test whether to reverse a conviction if the defendant did not receive information from the prosecution²⁵⁶ or was not permitted to introduce evidence.²⁵⁷ In those contexts, evidence is material, the Court says, "if there is a reasonable possibility that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."²⁵⁸

Whether Witness' assertion is material probably depends upon whether one accepts the factual assumption that in a single-culprit crime, Witness' interest lies in testifying, not in asserting the privilege. The rational juror, having accepted that assumption, might be influenced by Witness' assertion, depending upon the type and quantity of other evidence suggesting that Witness is guilty or that Defendant is not. The more evidence of Witness' complicity, the easier it will be to understand why Witness asserts the privilege. Paradoxically, however, one might also argue that the more evidence Defendant has of Witness' guilt, the less need Defendant has to try to benefit from Witness' assertion.²⁵⁹ Forcing Witness to assert the privilege before the

254. Sometimes the Court describes the importance of the defense evidence differently. See *Chambers*, 410 U.S. at 302 ("critical"); *Washington*, 388 U.S. at 16 (relevant, material, and vital). However, the Court probably has not tried to create a test for the defendant that embodies these descriptions. In *Washington*, for example, the Court noted in its holding that the defendant had been denied the right to "obtain[] witnesses . . . whose testimony would have been relevant and material to the defense." 388 U.S. at 23 (citation omitted).

255. Rule 401 of the Federal Rules of Evidence merges materiality and relevancy into the single term "relevancy." See FED. R. EVID. 401 advisory committee's note.

256. *Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58 (1987).

257. *Washington*, 388 U.S. at 22-23.

258. *United States v. Bagley*, 473 U.S. 667, 682 (1985). Of late, the Court has discarded earlier versions of materiality. See *United States v. Agurs*, 427 U.S. 97, 112-13 (1976).

259. A problem arises in evaluating inadmissible information that points to Witness' guilt. For example, Witness might have spoken in a way that provides circumstantial evidence of his guilt, but that statement may not be admissible under any hearsay exception. Although the court can consider inadmissible information in deciding admissibility issues, see FED. R. EVID. 104(a), it should

jury might therefore be cumulative evidence.²⁶⁰ Without studies indicating how jurors would react to hearing Witness assert the privilege, claims that Witness' assertion would have either an explosive or marginal impact on the jury probably provide little more than a clue to the claimant's evaluation of jury error.²⁶¹

C. IS WITNESS' ASSERTION RELIABLE?

It is not clear whether a defendant must also show that the evidence meets some test of trustworthiness to supersede the jurisdiction's exclusionary rule. Although the Supreme Court in *Chambers* stressed that McDonald's out-of-court admissions appeared reliable in light of the other evidence implicating him, its analysis seemed more descriptive than evaluative. Nonetheless, demanding that Defendant establish the reliability of Witness' assertion would create a burden similar to that which the prosecution must meet to rebuff a defendant's hearsay objection under the confrontation clause.²⁶² Although *Chambers* could have met such a burden if McDonald had asserted the fifth

not use that information in deciding whether Witness' assertion was cumulative evidence unless it also lets the jury consider that information.

260. See *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982) (if evidence the prosecution withholds is "merely cumulative to the testimony of available witnesses," it is not material).

One commentator argues that Witness' assertion would be cumulative evidence. See Hill, *supra* note 174, at 1181-83. According to Professor Hill, Defendant's constitutional challenge should fail if Defendant has enough other evidence of Witness' guilt to establish that the assertion is relevant and that the two have not colluded. *Id.* at 1181-82. Defendant would need "to make a substantial and specific showing, based on something more than [Defendant's] own assertions, that the [W]itness' testimony, if given, would tend to be exculpatory." *Id.* at 1182. Hill believes that so much evidence of Witness' guilt would exist if Defendant could satisfy this formidable test that Defendant would only benefit "increment[ally]" if the jury were to learn that Witness had asserted the privilege or if the jury observed Witness making the assertion. *Id.* at 1182-83. As a result, because the prosecution cannot cross-examine Witness, Defendant should fail in the attempt to benefit from Witness' assertion. *Id.*

Several observations are in order. First, Professor Hill surely inflates the test of relevancy. Second, by disagreeing with his factual premises—that the prosecution would be considerably damaged and Defendant would be aided only marginally if the jury learned of Witness' assertion—one evaluates the issue differently. Professor Hill does not explore whether the prosecution should be required to protect itself by granting use immunity, nor does he examine the ways in which the court can help the jury evaluate the assertion.

261. For what it is worth, I would find the assertion "material" and, indeed, "vital" (*Washington*) or "critical" (*Chambers*).

262. To satisfy the confrontation clause, when introducing hearsay, the prosecution must establish that the hearsay fits within a "firmly rooted" exception or that it bears "indicia of reliability" in the context of the case. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). If the Court created a burden for a defendant by noting in *Chambers* that McDonald's admissions "bore persuasive assurances of trustworthiness," 410 U.S. at 302, that burden would appear to exceed the "indicia of reliability" test the prosecution must meet. In one way, this imbalance seems sensible because the effect of the confrontation and compulsory process clauses is not symmetrical. The confrontation clause works to exclude hearsay that is otherwise admissible through an exception. The compulsory process (or due process) clause enables the defendant to override an evidentiary exclusionary rule to introduce evidence that the prosecution cannot. Despite this imbalance in the defendant's favor, we could slant

amendment, it would stymie most Defendants who, like Chambers, claim to have found the real culprit. In few cases—not even in *Bowles*—will there be as much evidence of Witness' guilt as in *Chambers*.

In *Dutton v. Evans*,²⁶³ another confrontation clause case, the Court flirted with adopting a test that would be easier for Defendant to meet. The ambiguous, out-of-court statement of an alleged coparticipant allowed the jury to infer that the defendant had participated in the grisly murder of three police officers.²⁶⁴ In one of its muddier attempts to explain the confrontation clause, the Court rejected the defendant's claim that introducing this hearsay statement would be unconstitutional.²⁶⁵ For our purposes, Justice Stewart made two interesting points in his plurality opinion. First, he noted that the "mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" ²⁶⁶ Assuring that the factfinder has "a satisfactory basis for evaluating the truth of the prior statement" is not the same as determining that the hearsay (or, in our case, Witness' assertion) is reliable. The plurality seemed to say that as long as the jury can spot the problems with the evidence, we should trust the jury's evaluation of it. Justice Stewart supported that interpretation of the confrontation clause by observing that the hearsay declarant's statement "carried on its face a warning to the jury against giving the statement undue weight."²⁶⁷

Nonetheless, Justice Stewart immediately coupled this observation with the dubious claim that there was no reason to doubt the reliability of the alleged coparticipant's implication of the defendant.²⁶⁸ In other cases involving the confrontation clause, however, the Court has expected the hearsay to bear "adequate 'indicia of reliability.'" ²⁶⁹ Thus, the Supreme Court has not clearly ruled whether Defendant must demonstrate that Witness' assertion is reliable.

admissibility even more in the defendant's favor by demanding no more, and perhaps even less, proof of trustworthiness from him than we do from the prosecutor.

263. 400 U.S. 74 (1970).

264. *Id.* at 76-78 (plurality opinion).

265. *Id.* at 88-89.

266. *Id.* at 90 (quoting *California v. Green*, 399 U.S. 149, 161 (1969)). Justice Stewart did not note that in *Green*, the Court added that the hearsay was admitted because it "possesse[d] other indicia of 'reliability.'" *Green*, 399 U.S. at 161.

267. *Dutton*, 400 U.S. at 74.

268. The coparticipant reportedly said: "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." *Id.* at 78. According to Justice Stewart, the coparticipant spoke spontaneously and against his penal interest. *Id.* at 89. Yet, the statement would have been inadmissible under the excited utterance exception, FED. R. EVID. 803(2), and the penal interest exception, FED. R. EVID. 804(b)(3).

269. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972).

If Defendant must establish that Witness' assertion is reliable, it is not clear what he must do. If Defendant must show that he did not collude with Witness, he might meet that burden by demonstrating that their relationship does not smack of collusion. If Defendant also must show that Witness risks self-incrimination, he needs evidence to support his accusation of Witness. Defendant will always have some information supporting that inference—otherwise, he would be unable to satisfy the relevancy test. How much information he needs, and whether it must be admissible as evidence, remain as questions. Surely, in a case like *Bowles*, the defendant has amassed enough.

V. AN ALTERNATIVE APPROACH

If neither the current rules of evidence nor constitutional law permits Defendant to try to benefit from Witness' assertion, we might recast evidence law to allow Defendant, indeed any party, to introduce relevant but otherwise inadmissible evidence as long as that party discloses the evidence to his opponent far enough in advance of trial to enable his opponent to investigate.²⁷⁰ Although the Federal Rules of Evidence generally allow parties to admit more evidence than did the common law, that codification remains slanted to exclude evidence that does not meet certain conditions of reliability.²⁷¹

It would be unnecessary for our purposes to relax the law of evidence for all parties. First, even though the Federal Rules of Evidence do not distinguish between criminal and civil litigation, we could retain the exclusionary rules in civil cases to limit the amount of resources a civil litigant would need to spend to investigate the otherwise inadmissible evidence his opponent had disclosed. Second, in a criminal prosecution, we could relax the rules only for the defendant. After all, we do not write on a completely clean slate: the confrontation clause bars extending this proposal to include the prosecution.

270. The provision for generous discovery in civil cases makes this suggestion less appealing in civil litigation. See FED. R. CIV. P. 26(b).

271. This slant became more pronounced as the proposed rules were handed from one reviewing body to the next. The Advisory and Standing Committees of the Judicial Conference ratcheted the admissibility burden higher as they released each new draft. As one example, in the first published draft, the class hearsay exceptions were treated as illustrations of the general rule that hearsay was not excluded "if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness . . ." PROPOSED FED. R. EVID. 8-03(a) (Prelim. Draft 1969). By the second draft, those illustrations had been hardened into the only exceptions. *Id.* rule 803 (Revised Draft 1971); see generally Tague, *supra* note 68, at 871-72.

The Subcommittee of the House Judiciary Committee, a group that played a pivotal role in shaping the rules, often seemed interested in enacting each member's understanding of the common law in his or her own jurisdiction, as a review of the Subcommittee's markup sessions suggests. Again, one example must suffice. The Subcommittee, worried about adopting a hearsay exception for penal interest statements, added a collaboration requirement for the criminal defendant to meet. See Tague, *supra* note 68, at 886-89.

The imbalance in resources between defendants and the prosecution also supports relaxing the rules only for the defendant. Defendants lack the resources to investigate otherwise inadmissible evidence that the prosecution would disclose, and jurisdictions are not apt to give defendants the money they would need to investigate.

Many will recoil at the prospect of relaxing the evidentiary restrictions that apply to the criminal defendant. There is a palpable worry that the criminal defendant may fabricate or spoil evidence to escape conviction. Our Defendant's plight is only one of many examples. The criminal defendant can discover only a small amount of the trove of information that the prosecution has amassed.²⁷² The defendant's obligation to disclose his intent to defend on the ground of alibi rests on the fear he will concoct the defense.²⁷³ Of special concern is the defendant, like our Defendant, who seeks to shift responsibility to another person. Not until the enactment of the Federal Rules of Evidence could a defendant in federal court introduce a declarant's hearsay statement that exculpated the defendant. Yet, in enacting a hearsay exception for penal interest statements, Congress so worried about fabrication that it imposed upon the defendant a burden to establish the trustworthiness of the statement that is unique in the law of evidence.²⁷⁴ The possibility of fabrication by the defendant could be significantly lessened by conditioning any expansion of the defendant's ability to introduce otherwise inadmissible evidence upon his disclosure, far in advance of trial, of whatever evidence he intended to introduce. Notification would help the prosecution in several ways. It would give the prosecution time to judge the weight of the evidence and to search for ways to counter the anticipated impact upon the jury that the evidence might have. In learning where the defendant intended to mount his attack, the prosecution could move to reinforce its position at that point. With the burden of giving away its tactical advantage through disclosure, defendants would not disclose unless they believed the evidence would withstand scrutiny by the prosecution.

272. The discovery rules in many jurisdictions are parsimonious. The prosecution's constitutional obligation to disclose exculpatory evidence is narrow. *See United States v. Bagley*, 473 U.S. 667, 682 (1985) (appropriate to reverse for failure to disclose "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"). Under the *Bagley* test, the prosecution risks few reversals by not disclosing, especially because the defendant has great difficulty learning what he did not receive.

273. *See Williams v. Florida*, 399 U.S. 78, 81 (1970) ("[g]iven the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate"). Other disclosure obligations seem to turn more on the prosecution's need to investigate than on concerns about the reliability of the defendant's evidence. *See* FED. R. CRIM. P. 12.2(b) (disclosure of intent to introduce evidence of mental state).

274. FED. R. EVID. 804(b)(3) (provides in part that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement"). For a discussion of this imposing burden, see Tague, *supra* note 68, at 980-89.

This proposal differs sharply from the present rules of evidence, even though the Federal Rules of Evidence contain provisions that are superficially similar. Those provisions include the two catch-all hearsay exceptions, rules 803(24) and 804(b)(5), and the rule for summaries of documents, rule 1006. Like the proposal, those rules require the offering party to notify the opponent of the evidence as a condition of introducing it. But those rules, unlike the proposal, say that although disclosure is necessary, it is an insufficient condition for admitting the evidence. All three rules also require the court to find that the evidence is reliable before admitting it.²⁷⁵

This proposal is also superficially similar to the discovery requirement that the criminal defendant notify the prosecution of his intent to introduce certain evidence.²⁷⁶ Just as our proposal requires Defendant to disclose his intent to call Witness, the Federal Rules of Criminal Procedure require a defendant who intends to call an alibi witness or to defend on the ground of a mental defect to identify the witnesses whom he will call.²⁷⁷ But our Defendant would be helped considerably more by disclosing his intent to call Witness than other defendants are helped by satisfying current discovery disclosure rules. Through disclosure, Defendant could surmount the evidentiary exclusionary rule barring him from forcing Witness to assert the privilege before the jury. In contrast, although disclosing the identity of an alibi witness enables the defendant to call that person to testify,²⁷⁸ that witness' testimony remains subject to every evidentiary objection. Offsetting the greater benefit Defendant would receive through disclosure, however, is the often greater risk he runs by disclosing. Consider first the risk a defendant runs in disclosing his intent to call an alibi witness. This defendant does not need to reveal what the witness will say, nor must he deliver a copy of any statement that the witness has given to the defense.²⁷⁹ In interviewing the witness, the prosecution might gather information to challenge the defend-

275. The catch-all hearsay exceptions condition admissibility upon a judicial finding, *inter alia*, that the statement has "circumstantial guarantees of trustworthiness" that are "equivalent" to the guarantees in other hearsay exceptions. Applying this test, of course, is problematic because hearsay under certain exceptions (for example, the business record exception, FED. R. EVID. 803(6)) appears to be more reliable on average than under other exceptions (such as the so-called dying declaration, FED. R. EVID. 804(b)(2)).

A summary may be introduced under Federal Rule of Evidence 1006 only if the underlying documents are themselves admissible. *Paddock v. Dave Christen, Inc.*, 745 F.2d 1254, 1259-61 (9th Cir. 1984). If those documents contain hearsay, the offeror must convince the court that they are reliable by finding an applicable hearsay exception.

276. See *supra* note 142.

277. See FED. R. CRIM. P. 12.1 (alibi), 12.2 (mental defect).

278. Cf. *Taylor v. Illinois*, 484 U.S. 400 (1988) (not unconstitutional to forbid defendant from using testimony of alibi witness when defendant, in violation of state law, failed to notify prosecution of intent to call that witness).

279. A defendant who defends on the ground of mental defect needs to give the report of any defense expert to the prosecution, but only if he has asked the prosecution to disclose certain infor-

ant's defense. The prosecution is not likely to obtain useful information, however, because if the defense thought that the prosecution might be helped, it would not use the witness and thus would not need to disclose his identity. The defense has no duty to disclose the identity of a person whose story would conflict with the story of those witnesses he intends to call and whose identities he does disclose. Moreover, if after disclosure the defendant learns that the witness would say something inconsistent with the planned defense, the defendant can withdraw the defense without harm. The jury will never learn that the defendant had withdrawn the defense and thus can draw no inference against the defendant from that change of position.

In contrast, our Defendant would incur great risk in disclosing Witness' intent to assert the privilege and the evidence supporting his claim that Witness is the true culprit. In investigating Defendant's startling claim, the prosecution could find other evidence of Defendant's guilt. It might, for example, persuade Witness to testify by promising not to prosecute him or by giving him immunity. In either instance, Witness might testify before a grand jury, testimony that Defendant would not learn about until Witness testified at Defendant's trial.²⁸⁰ Thus, Defendant would not learn how Witness intended to counter whatever evidence of Witness' guilt Defendant had amassed. And, if Witness is guilty and lies to protect himself and inculcate Defendant, then Defendant, through disclosure, will have contributed to his own conviction.

The risk Defendant takes by disclosing parallels the risk a defendant runs by asking the prosecution for discovery under rule 16 of the Federal Rules of Criminal Procedure. Rule 16 constitutes an interesting bridge between the defendant's fifth amendment protection not to disclose evidence and his sixth amendment right to discover only exculpatory evidence.²⁸¹ Rule 16 creates a system of reciprocal discovery that only the defendant can institute. The defendant can trigger the government's obligation to disclose certain non-exculpatory information, including documents, tangible objects, and reports of examinations and tests, by asking for any of those sorts of items. However, the defendant must then disclose all similar items in his possession. For the defendant who has documents or reports of experts or the like, disclosure

mation pursuant to rule 16 of the Federal Rules of Criminal Procedure. For further discussion, see *infra* text accompanying note 281.

280. Under the Jencks Act, the government need not disclose the statement of a witness it calls in a criminal trial until his direct examination is completed. 18 U.S.C. § 3500(a) (1982). This Act magnifies Defendant's problem because, in calling Witness to testify, Defendant could not discover what Witness had said in testifying before the grand jury. *See* FED. R. CRIM. P. 26.2(a). However, the government might be able to use Witness' grand jury testimony in attempting to impeach Witness' claim that he would incriminate himself by testifying before the jury.

281. *See* *Wardius v. Oregon*, 412 U.S. 470, 487-89 (1973) (finding unconstitutional an Oregon statute that did not provide for reciprocal discovery; defendant could not be compelled to reveal alibi witness if prosecution did not give defendant opportunity to discover State's rebuttal witness).

poses the risk that he will alert the prosecution to the nature of his defense and give the prosecution time to evaluate the probative value of his evidence. The defendant must compare the potential damage from disclosure against the benefit of obtaining the sorts of evidence he predicts he will receive.

This comparison resembles the assessment that Defendant must make under our proposal. Each defendant runs the risk that the prosecution might obtain information that could mortally damage his defense. Yet, the risks differ somewhat because disclosure by our Defendant might enable the prosecution to use the information in its case-in-chief. As noted above, with notice the prosecution might inveigle or compel Witness to testify against Defendant. In contrast, a defendant, in responding to the prosecution's disclosure under rule 16, will rarely reveal information that the prosecution can use in its case-in-chief. If the defendant thought that were possible, he would not trigger the provisions of rule 16. Notwithstanding the enhanced risk that our Defendant faces, disclosure would not impinge upon his personal fifth amendment protection because he would disclose by choice and not by legal compulsion.²⁸²

In a single-culprit crime, therefore, Defendant would probably disclose only if he had evidence of Witness' guilt. Although the court would not evaluate the trustworthiness of Witness' assertion as a condition of letting Defendant try to benefit, there are other checks for reliability. Unlike an unavailable declarant whose hearsay statement exonerates the defendant, Witness can be interviewed by the prosecution (by being subpoenaed if necessary). Also, ethical and tactical considerations would combine to lead defense counsel not to try to force Witness to assert the privilege before the jury if he is worried that Defendant and Witness have colluded.²⁸³

Does disclosure pose such a special risk for Defendant that his plight calls for a unique solution? Or, should *any* defendant be able to introduce any otherwise inadmissible but relevant evidence that he discloses in advance of trial, as long as other procedural safeguards (like comment by the judge upon the evidence) are used? The second, broader question is best considered in connection with hearsay. By giving notice, may a defendant introduce hearsay that fits no exception without regard to its trustworthiness? Proposals to let the defendant introduce additional hearsay focus more on the unavailable than the available declarant.²⁸⁴ Excluding defense-offered hearsay from an

282. This point assumes, of course, that Defendant has no constitutional right to force the prosecution to grant use immunity to Witness or to try to profit from Witness' assertion.

283. The ethical reason is counsel's obligation not to adduce fraudulent evidence; the tactical reason is the fear that the jury, smelling collusion, might convict Defendant more readily.

284. There is no reason to consider at length whether to eliminate the barriers to the admission of hearsay from an available declarant. The preference for live testimony probably condemns such a possibility. See *United States v. Mathis*, 559 F.2d 294, 299 (5th Cir. 1977) (trial court erred in admitting hearsay under rule 803(24) of the Federal Rules of Evidence when declarant was avail-

unavailable declarant sometimes seems wrenchingly unfair. To exclude a declarant's admission that he committed the crime²⁸⁵ or that the defendant did not²⁸⁶ presents the disturbing possibility that the defendant is in fact innocent. These defendants can grasp the exceptions for statements against penal interest, dying declarations, or the catch-all exceptions to introduce some hearsay. Yet, no one of these exceptions will always apply.

Some commentators would scrap the hearsay exceptions and convert the issue of admissibility into one that the trial judge would consider, ad hoc, in each case.²⁸⁷ Others would go further and eliminate all barriers to admissibility,²⁸⁸ at least as long as admissibility is surrounded with procedural protections like disclosure²⁸⁹ and judicial comment about the hearsay's significance.

Letting Defendant try to profit from Witness' assertion would be in line with these relaxed approaches to hearsay. The same procedural devices suggested by our proposal could substitute for a judicial finding that the hearsay evidence is reliable. Notice of the intent to introduce hearsay would provide the opponent with the opportunity to investigate whether the unavailable declarant spoke as reported and why.²⁹⁰ By sharing his evaluation with the

able to testify). Moreover, the defendant would gain no tactical advantage from such an approach. If the defendant did not call an available declarant to testify, the jury might infer that the declarant would dispute that he had spoken as reported or would reject what he had said. If, in fact, the declarant would have done either in testifying, the defendant could always have used his out-of-court statement to impeach him. With no burden of proof, the defendant is indifferent to the treatment of a prior inconsistent statement as substantive or as impeaching evidence.

285. See, e.g., *State v. Larsen*, 91 Idaho 42, 49-50, 415 P.2d 685, 691-92 (1966) (witness admitted to three people that he and not defendant had killed the victim; statement excluded to prevent possible trend of defendants from falsely claiming that unavailable declarants had exonerated them).

286. See *State v. Chandler*, 178 La. 7, 14-15, 150 So. 386, 388-89 (1933) (deceased told a doctor moments after suffering injury that he had shot himself; statement excluded).

287. See Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 338-39 (1961).

288. See MODEL CODE OF EVIDENCE Rule 503(a) (1942); Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 922 (1937) (arguing for admission of hearsay from unavailable declarant offered by any party other than prosecution, when proposal might encounter confrontation clause problems).

289. A problem is whether requiring the defendant to disclose would clash with his fifth amendment right. By assuming that a clash would occur, the Advisory Committee dismissed whatever interest it had in relaxing the hearsay ban for defendants. See The Advisory Committee [on the Federal Rules of Evidence], Memorandum 19, at 22 (undated) (copy on file at *The Georgetown Law Journal*). In that memorandum, Professor Cleary, the reporter to the Advisory Committee, worried whether the fifth amendment would protect the defendant from disclosing hearsay about which he would testify, even if he could be made to disclose other hearsay. *Id.* If the defendant could defeat a disclosure obligation by invoking the fifth amendment, Professor Cleary thought it unwise to eliminate hearsay restrictions because otherwise the defendant could "choose his own rules of admission and exclusion." *Id.* We can escape Professor Cleary's concern by conditioning admissibility of hearsay upon disclosure by the defendant. If the defendant chose not to disclose in advance of trial, he would need to satisfy a hearsay exception.

290. In each setting—Witness' assertion of the fifth amendment and the admission of hearsay—

jury, the trial judge could spread before the jury the reasons why it might credit or discount the hearsay. Depending upon one's evaluation of jury error, as long as the jury was informed of the problems with the hearsay, it could be trusted to discern the evidence satisfactorily.²⁹¹

There is a major difference, however, between letting Defendant try to benefit from Witness' assertion and eliminating the hearsay barrier to the admission of a statement from an unavailable declarant. Disclosure and judicial comment reduce, but do not eliminate, the troubling feature of admitting the hearsay statement of an unavailable declarant—the opponent's inability to cross-examine that declarant. In contrast, Witness is only nominally unavailable. The prosecution can force him to testify by bestowing use immunity. Thus, one distinctive feature of the hearsay statement from an unavailable declarant—the opponent's inability to cross-examine him—applies only superficially to Witness. This difference suggests that we should allow Defendant to try to utilize Witness' assertion even if we do not eliminate the barriers that now prevent a defendant from introducing the hearsay of an unavailable declarant.

Of course, many Defendants would prefer not to disclose before trial or endure a withering judicial analysis of Witness' assertion. Those who have colluded would risk having their conspiracy unmasked. All would lose the drama of unexpectedly calling Witness to assert the privilege before the jury.²⁹² But our proposal would test the good faith of Defendant in calling Witness. Defendants should welcome this proposal if it constitutes the only way of convincing the courts to let them try to benefit from Witness' assertion.

VI. CONCLUSION

No Defendant has succeeded in forcing Witness to assert the fifth amendment before the jury in the hope that the jury will infer from the assertion that Defendant is innocent. At least in single-culprit crimes, an innocent Defendant may therefore fail to convince the jury that the prosecution has

we could treat the defendant differently from the prosecution because of the imbalance in resources. With its resources, the prosecution could benefit from the time to investigate that disclosure would provide. In contrast, time to investigate will not be especially beneficial to the indigent defendant unless he is given resources to investigate. It is not likely that jurisdictions will give more resources to defendants in exchange for relaxing the hearsay ban on the prosecution. Hence, we could relax the admission requirements for defendants while keeping them for the prosecution.

291. For expressions of belief (and disbelief) in the jury's ability to evaluate hearsay, see Swift, *Abolishing the Hearsay Rule*, 75 CALIF. L. REV. 495, 497 n.1 (1987) (citing articles expressing confidence and lack of confidence in a jury's ability to evaluate hearsay).

292. Of course, neither the attorney for the defense nor for the prosecution is supposed to call a witness whom he knows will invoke the fifth amendment. See *supra* note 5. Yet, because many of the cases discussed in this article postdate adoption of that ethical prohibition, attorneys are either unaware of the rule or choose to ignore it.

not met its burden of proof. To bar Defendant in this way is unfair. It is also wrong in terms of evidentiary law and arguably constitutional law. One purpose of this article has been to explore how to help Defendant. Another, broader purpose has been to use this subject as a way to explore whether courts can reduce the problems that ordinarily lead them to exclude evidence, and whether, having done so, they should then admit challenged evidence.

The sensible solution to Defendant's plight is twofold. In single-culprit cases, Witness should be forced to testify through a grant of use immunity. In those few cases in which the prosecution can justify not granting use immunity to Witness, the jury should watch Witness assert the fifth amendment and assess what that assertion might mean. No court has taken either approach. Courts almost uniformly say that the prosecution alone can decide whether to grant immunity.²⁹³ Our primary purpose has not been to challenge this judicial position (although that has been a secondary goal). Instead, our purpose has been to explore one consequence of not giving immunity to Witness.

Should Defendant be permitted to try to benefit from Witness' assertion of the fifth amendment? To prevent the jury from considering Witness' assertion on relevancy grounds seems indefensible. For example, if Witness, when asked whether he committed the crime with which Defendant is charged, responds by asserting the fifth amendment, one inference is inevitable: Witness believes that by answering truthfully, he will provide damning information that the prosecution could use to substitute him for Defendant. Witness' assertion is relevant, as the court must have indirectly found in deciding that Witness might incriminate himself by testifying.

Courts have resorted to other arguments to bar Defendant from trying to benefit. Most notably, they fear either that the jury will overvalue the assertion of the privilege or that Defendant and Witness have colluded. The difficulty the jury would face in wrestling with the meaning of the assertion is exaggerated. The jury's problem could be reduced by judicial comment and eliminated by prosecutorial grant of use immunity. Courts could also reduce the problem of collusion by conditioning Witness' appearance upon advance disclosure by Defendant of the evidence supporting Defendant's claim that Witness' assertion is relevant. This exchange is an extreme step. The prosecution may find information that it could employ in its case-in-chief against Defendant. But this is a risk Defendant should accept if disclosure is the only way to convince the courts to let him force Witness to assert the privilege before the jury. Courts should also accept this exchange. With notice,

293. See *supra* note 13.

the prosecution can prepare to test the significance of Witness' assertion, thereby eliminating any need for courts to worry about prejudice.

This exchange—disclosure in return for admissibility—opens the possibility of letting the criminal defendant surmount other evidentiary restrictions by disclosing in advance of trial the otherwise inadmissible evidence. Such an exchange warrants more examination than the cursory exploration it has received in this article. Nonetheless, it is important to recognize that rejecting such a change in evidence law does not mean that Defendant's attempt to benefit from Witness' assertion must also be rejected. The fact that Witness could be made to testify through a grant of use immunity is the key difference.

One probable result of letting Defendant try to benefit is that the prosecution will choose to grant use immunity in situations in which it currently will not. In this indirect way, then, the jury will learn what Witness seeks to hide about his and Defendant's complicity. However, regardless of the prosecution's decision on the grant of use immunity, courts should force Witness to assert the fifth amendment in front of the jury, at least in single-culprit crimes. If they do, those Defendants (hopefully rather few in number) who claim they are innocent and who produce the person they say is the culprit will properly have a better chance of convincing the jury to acquit.