

BEATING THE PRISONER AT PRISONER’S  
DILEMMA: THE EVIDENTIARY VALUE OF A  
WITNESS’S REFUSAL TO TESTIFY

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## INTRODUCTION

Not every witness with relevant information is willing to testify. When a witness is recalcitrant, the state has at its disposal a bevy of carrots and sticks designed to elicit or encourage cooperation.<sup>1</sup> Although some recalcitrant witnesses require only moderate pressure from the court, others refuse to cooperate even when faced with a court order backed by the threat of civil or criminal sanctions.

Nonetheless, a witness who absolutely refuses to cooperate with the judicial process—in other words, who attempts to win at the game of “Prisoner’s Dilemma”<sup>2</sup>—may still play an important role in a judicial proceeding. Sometimes prosecutors may use the very fact that a witness chooses not to testify to advance their case against a criminal defendant, introducing that choice as an evidentiary fact at trial.<sup>3</sup> This is a particularly effective strategy when the witness and the defendant are both members of the same criminal conspiracy or organization. In recent years, the strategy of highlighting the non-cooperation of certain witnesses has been actively employed in the fight against organized crime.<sup>4</sup> Not surprisingly, defendants have complained that

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1. The government’s carrots include the ability to arrange plea bargains in exchange for cooperation, see FED. R. CRIM. P. 11, and the power to confer statutory use immunity. See 18 U.S.C. § 6002 (1994); see also Edward R. Korman, *The Use of Testimony Compelled Under a Grant of Use Immunity*, 44 BROOK. L. REV. 935, 935 (1978). For a good overview of the history of use immunity statutes, see David Sugar, Note, *Federal Witness Immunity Problems and Practices Under 18 U.S.C. §§ 6002-6003*, 14 AM. CRIM. L. REV. 275, 275-82 (1976). Prosecutors also have the ability to distribute a wide assortment of other benefits, such as inclusion in the witness protection program, see 18 U.S.C. § 3521, or cash payments, see *United States v. Castleberry*, 642 F.2d 1151, 1153 (1981) (demonstrating that under law, government paid witness money to move, pay his bills, and provided \$700 per month until trial).

These positive incentives are complemented by many powerful sticks, including the power to prosecute non-cooperative witnesses for obstruction of justice, misprision of felony and criminal contempt of court, not to mention the basic discretionary authority to bring substantive criminal charges against individuals for related counts or for unrelated activities. See HARRY I. SUBIN ET AL., *FEDERAL CRIMINAL PRACTICE* § 12.8-12.9 (West 1992) (discussing prosecutor’s options for dealing with reluctant witnesses).

2. See STEVEN M. CRAFTON & MARGARET F. BRINIG, *QUANTITATIVE METHODS FOR LAWYERS* 173 (1994) (describing “prisoner’s dilemma” as a heuristic device invented by game theorists to demonstrate rational and irrational cooperation strategies). In the traditional formulation of the game, two conspirators in an armed robbery are held by the police and kept in separate rooms for interrogation. Each of the prisoners is told that he will receive a short prison sentence if he pleads guilty and testifies against his co-conspirator. If he refuses to cooperate, and his coconspirator testifies against him, he will get a long prison sentence. If both conspirators plead guilty, both will get medium sentences. If neither agrees to testify, prosecutors will be unable to gather enough evidence to convict either suspect, and both will go free. See *id.* at 171. For a good discussion of the strategic complexities of Prisoner’s Dilemma, see ROBERT M. AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

3. See generally *infra* Part II (discussing uses of such evidence at trial).

4. See *infra* notes 42-54 and accompanying text (detailing use of refusal to testify evidence at trial for murder of Columbo and Gambino Crime Family members).

this trial tactic biases juries against them and violates their constitutional rights. Weighing the competing interests at issue is a task that has perplexed many judges.<sup>5</sup>

The strategy of purposefully calling non-cooperative witnesses is effective primarily in two situations. First, prosecutors may use it in multiple defendant trials, where a defendant pleads guilty, or is tried and convicted, and subsequently is called to testify against a remaining codefendant.<sup>6</sup> Second, the strategy is useful in prosecuting organized crime when a member of the same crime family or organiza-

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5. Acknowledging a split among the circuits, two Supreme Court Justices have expressed a desire to consider the question of whether the tactic is permissible when a witness can claim a legitimate Fifth Amendment privilege against self-incrimination, and the government knows that the witness plans to invoke that privilege. See *Lindsey v. United States*, 484 U.S. 934, 934 (1987) (White, J., and Brennan, J., dissenting from denial of certiorari).

6. See *United States v. Cioffi*, 242 F.2d 473, 477 (2d Cir. 1957) (holding that it was not improper for the government to call a witness who had already pled guilty to the indictment, as there was no expectation that witness would invoke the self-incrimination privilege). The Second Circuit has approved the prosecution's elicitation of a refusal to testify in such a situation. In *United States v. Gernie*, 252 F.2d 664 (2d Cir. 1958), the government called Benjamin Harell to the witness stand, an individual who had been observed with one of the defendants and was arrested while in possession of 2.5 ounces of heroin. He had pled guilty to charges of narcotics possession and conspiracy, and was sentenced to five years imprisonment. See *id.* at 669. On the stand, Harell admitted possessing the heroin, but when asked to name his source, he invoked the Fifth Amendment privilege and refused to answer. See *id.* Although the trial judge sustained the witness's invocation of the privilege, the appeals court found that, because the witness had previously pled guilty to charges of narcotics possession and conspiracy, he had no rightful claim to the privilege and could be compelled to testify. See *id.* According to the Second Circuit, "[t]he government had a right to call Harell to testify," even though the government was probably aware that Harell would take the Fifth. See *id.* As the court observed, "[u]nder such circumstances it makes no difference whether the government has reason to believe that the witness will refuse to testify. It has a right to produce the witness and thus show the jury that it is bringing forward such witnesses as may have knowledge bearing on the case." *Id.* (citing *United States v. Romero*, 249 F.2d 371 (2d Cir. 1957); *Cioffi*, 242 F.2d at 477).

The court thus found no error in the trial court's decision to allow the witness to invoke (unlawfully) his Fifth Amendment privilege before the jury, noting that the trial judge had issued a limiting instruction to the jury "that this refusal was not to be taken as evidence against the defendants." *Id.*

Similarly, in *Cioffi*, the government indicted three men on narcotics charges, two of whom pled guilty. See *Cioffi*, 242 F.2d at 474. One of those who pled guilty was subsequently called to testify, and refused to answer questions. See *id.* at 476. Again, the court found no error in calling the witness, for "[i]nasmuch as [the witness] had already pleaded guilty to the indictment he had no obvious reason for invoking the privilege against self-incrimination, and there is no showing that the United States Attorney expected him to invoke the privilege on the stand." *Id.* at 477 (citing *United States v. Hiss*, 185 F.2d 822, 831-32 (2d Cir. 1950)); see, e.g., *United States v. Ortiz*, 84 F.3d 977, 978 (7th Cir.) (allowing immunized co-conspirator's refusal to testify to occur before jury), *cert. denied*, 117 S. Ct. 250 (1996); *United States v. Castleberry*, 642 F.2d 1151, 1153 (9th Cir. 1981) (permitting witness's participation in witness protection program to be brought to jury's attention); *United States v. Spero*, 625 F.2d 779, 780-81 (8th Cir. 1980) (noting that government's case rested largely on testimony of a witness who cooperated in return for inclusion in witness protection program, immunity from prosecution, and large sum of money); *United States v. Provenzano*, 615 F.2d 37, 43 (2d Cir. 1980) (calling former associate of defendant to testify after associate was admitted into witness protection program); *Romero*, 249 F.2d at 375 (finding no error in government's calling of previously convicted and sentenced defendants to testify in prosecution regarding same transaction, even where government had reason to believe one would refuse to testify).

tion is not an appropriate target for independent prosecution (for example, he or she may already be serving a prison sentence), but may possess information regarding the activities of fellow mobsters standing trial.<sup>7</sup> Under the federal use immunity statute, prosecutors may grant immunity to such a witness and then compel the witness to testify.<sup>8</sup> A witness who continues to refuse to testify after having been immunized may be held in contempt of court and is subject to civil and criminal penalties.<sup>9</sup>

This Article argues that the state's interests in presenting relevant information to the jury and the compelling need to diminish the influence of organized crime generally justify allowing the jury to observe this process. Demonstrating to a jury the unresponsiveness of selected witnesses may be necessary to establish certain important evidentiary facts, and might also provide a foundation for relevant inferences that the government may argue legitimately.<sup>10</sup> Because this tactic raises a wide array of constitutional and evidentiary concerns,

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7. See *United States v. Gambino*, 59 F.3d 353, 363 (2d Cir. 1995) (involving prosecution of Gambino crime boss), *cert. denied*, 116 S. Ct. 1671 (1996); *United States v. Versaglio*, 85 F.3d 943, 944 (2d Cir. 1996) (trial of Gambino Crime Family members).

8. See 18 U.S.C. § 6002 (1994). The Use Immunity Statute provides federal prosecutors with the discretionary power to grant a witness immunity against the use of any evidence provided by or resulting from testimony. See *id.* Immunity protects witnesses from prosecution in future state as well as federal proceedings. See *Rowe v. Griffin*, 497 F. Supp. 610, 613-14 (D. Ala. 1980) (noting that doctrine of reciprocal immunity protects witness given immunity in state prosecutions from Federal prosecutions and vice versa), *aff'd*, 676 F.2d 524 (11th Cir. 1982). Use immunity differs from transactional immunity in that a defendant granted transactional immunity can never be prosecuted for the events about which he or she testifies, whereas a defendant testifying under use immunity remains eligible for prosecution as long as the evidence is gathered from separate sources. See *Kastigar v. United States*, 406 U.S. 441, 453 (1972). The scope of immunity under the use immunity statute is coterminous with the scope of the Fifth Amendment privilege. See *United States v. Apfelbaum*, 445 U.S. 115, 127 (1980) (finding that Use Immunity Statute does not deprive a witness of Fifth Amendment privilege). An immunized witness, therefore, has no legal basis for refusing to testify. See *Reina v. United States*, 364 U.S. 507, 514 (1960). When challenged, the use immunity provisions in the Federal Code consistently have been upheld on the grounds that their long and extensive use has become part of the constitutional fabric. See *In re Martin-Trigona*, 732 F.2d 170, 173 (2d Cir. 1984) (holding constitutional the use of immunity provisions in all civil proceedings, including bankruptcy proceedings); *In re Andretla*, 530 F.2d 681, 684 (6th Cir. 1976) (affirming the constitutionality of applying immunity provisions to prospective grand jury witnesses); *In re Food Prods. Investigation*, 462 F.2d 594, 595 (9th Cir. 1972) (upholding constitutionality of federal immunity provisions).

9. An uncooperative immunized witness may be held in civil contempt under the federal recalcitrant witness statute, 28 U.S.C. § 1826 (1994) (giving a court the authority summarily to confine an uncooperative witness until the witness agrees to testify, or until the witness's refusal to testify becomes moot or it reaches 18 months), or may face criminal contempt under the criminal contempt provisions of 18 U.S.C. § 401. A judge also retains the power to hold persons within his or her courtroom in summary criminal contempt. See *FED. R. CRIM. P.* 42; *Ortiz*, 84 F.3d at 979 (explaining difference between criminal contempt and summary civil contempt).

10. See *Gambino*, 59 F.3d at 363 (stressing importance of co-conspirator testimony).

however, trial courts must carefully monitor its use and limit it to a particular set of circumstances.

Additionally, permissible evidentiary use of the refusal to testify must be carefully constrained by well-tailored jury instructions.<sup>11</sup> These instructions must respond to the specific context in which the elicited act of non-cooperation occurs. Such instructions should emphasize to the jury the acceptable range of inferences—if any—appropriate to the evidence. Likewise, when the state seeks to capitalize on a witness's unwillingness to testify in order to buttress a clearly speculative theory of the defendant's culpability, such inferential arguments should be prohibited by the court. Monitoring the use of this tactic invariably requires judges to exercise broad discretion over issues of relevance, prejudice, and general trial fairness, but this is a role that judges are wholly accustomed to playing.

Although prosecutors may seek to demonstrate witness non-cooperation in a wide variety of contexts, this Article does not attempt to explore the evidentiary uses of non-cooperative behavior on the part of a defendant's spouse,<sup>12</sup> lawyer,<sup>13</sup> or family members<sup>14</sup> in ordinary criminal trials. Such persons are often called during the course of a trial to testify and occasionally refuse to do so even in the face of a court order. The heavy sanctions available to judges to enforce such orders, however, assure that except in unusual circumstances the witness will eventually cooperate. Additionally, ordinary individuals' reasons for refusing to testify are likely to be so varied and context-specific that any generalized evidentiary rules regarding their conduct inevitably will fail.

Organized crime prosecutions, however, provide a unique set of circumstances in which the tactic of allowing a witness to refuse to testify before a jury may be both relevant and fair. When a witness is a participant in a criminal conspiracy and is suspected of having knowledge about the identity or action of other conspirators, the

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11. See Part V.B (discussing role of jury instructions with refusal to testify evidence).

12. See *In re Grand Jury Subpoena*, 755 F.2d 1022, 1025 (2d Cir. 1985) (invoking spousal privilege and refusing to answer grand jury questions regarding husband's alleged participation in conspiracy), *vacated*, 475 U.S. 133 (1986); *United States v. Clark*, 737 F.2d 679, 681 (7th Cir. 1984) (holding husband in contempt for refusing to take stand against wife and allowing prosecution to comment on refusal).

13. See generally Deborah Stavile Bartel, *Drawing Negative Inferences Upon a Claim of Attorney-Client Privilege*, 60 BROOK. L. REV. 1355 (1994) (criticizing comments to jury on lawyer's invocation of attorney-client privilege).

14. See, e.g., *In re Erato*, 2 F.3d 11, 16 (2d Cir. 1993) (refusing to recognize parent-child privilege and compelling witness to testify against adult child); *Port v. Heard*, 764 F.2d 423, 428-30 (5th Cir. 1985) (concluding Constitution does not preclude compelled incrimination of child); *In re Matthews*, 714 F.2d 223, 224 (2d Cir. 1983) (noting that, other than spousal privilege, there is no privilege that traditionally permits witnesses not to testify against in-laws).

common law has long recognized that the state has a special interest in, and perhaps a special claim on, such testimony.<sup>15</sup> (Indeed, a 1641 English statutory provision banning the use of torture to elicit confessions expressly contained an exemption when a defendant was fully tried, and suspected of possessing information regarding other criminal conspirators.) This is in part because the structure of organized crime raises special problems for prosecutors seeking convictions of high-ranking members of the criminal organization. To get them, prosecutors typically are forced to rely very heavily on the testimony of insiders, cooperators, and accomplices.<sup>16</sup> As one commentator pointed out,

One characteristic of organized crime is that the most culpable and dangerous individuals rarely do the dirty work. Although the organization's leaders are ultimately responsible for its crimes, they

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No man shall be forced by Torture to confess any Crime against himself nor any other unless it be in some Capital case, where he is first fully convicted by clear and sufficient evidence to be guilty, After which if the cause be of that nature, That it is very apparent there be other conspirators, or confederates with him, Then he may be tortured, yet not with such Tortures as be Barbarous and inhumane.

The Body of Liberties, art. 45 (1641), reprinted in 7 OLD SOUTH LEAFLETS 265 (1905) (emphasis added), quoted in Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1101 (1994).

Generally, witnesses have little legal standing to withhold testimony; the obligation to testify has long been recognized in the Anglo-American system. See *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961) (holding defendant's refusal to testify out of fear lacked any merit and affirming "[e]very citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law"); *Ullmann v. United States*, 350 U.S. 422, 439 n.15 (1956) ("[I]t is every man's duty to give testimony . . . unless he invokes some valid legal exemption in withholding it."); *In re Daley*, 549 F.2d 469, 481 (7th Cir. 1977) (citing *Ullmann* and *Piemonte* and finding witness had no basis for withholding testimony once convicted). A common trope holds that "when the course of justice requires the investigation of truth, no man has any knowledge that is rightly private." *In re Grand Jury Proceedings of John Doe*, 842 F.2d 244, 246 (10th Cir. 1988) (quoting 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2192, at 72 (McNaughton rev. 1961)). Transgression of the duty to report information regarding criminal activity has long been characterized as Misprision of Felony and codified at 18 U.S.C. § 4, which provides that:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. § 4 (1994); see also *United States v. Nixon*, 418 U.S. 683, 709 (1974) ("To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (recognizing that the public has a right to the evidence of all people, unless it is protected by a privilege); *Blackmer v. United States*, 284 U.S. 421, 438 (1932) (indicating that unless evidence is protected by privilege, it should be produced in court).

16. See John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1104 (1995) (noting that prosecution witnesses often are not law-abiding citizens themselves).

typically deal through intermediaries and limit their own participation to behind-the-scenes control and guidance . . . . Generally speaking, successful prosecution of organized crime leaders requires the use of accomplice testimony.<sup>17</sup>

But accomplice testimony in this context is extremely difficult to secure. The technique of using the very recalcitrance of coconspirators to incriminate one another as an evidentiary fact provides one way to combat this difficulty. Such an approach to witness non-cooperation is not inconsistent with current features of conspiracy law. As this Article argues, the law of evidence makes special exceptions for admission of evidence against coconspirators; these exceptions provide a foundation for the use of this tactic in multiple-defendant prosecutions generally.<sup>18</sup> In these particular circumstances, the truth-finding value of allowing the prosecutor to present evidence of non-cooperation outweighs its potential for misuse. Of course, this tactical procedure also poses some serious risks to the prosecution.<sup>19</sup> Even if courts are willing to allow the tactic, prosecutors must still weigh carefully their decision to use it, a decision which of course will be influenced by the other advantages it provides in the prosecution of organized crime.<sup>20</sup>

### I. CURRENT LAW: THE UNAVAILABLE WITNESS RULE

At present, there are no specific rules that tell courts how to weigh the evidentiary significance of witnesses' refusal to obey court orders to testify. Federal Rule of Evidence 501 indicates broadly that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United

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17. *Id.*

18. See *infra* Part II.C (describing use of noncooperating witness's testimony to punish members of conspiracies).

19. First, when the government confers immunity on a witness, it becomes extremely difficult to prosecute that individual for any criminal activity discussed during the immunized testimony. See *Kastigar v. United States*, 406 U.S. 441, 461-62 (1972). As the Supreme Court held in *Kastigar*, "[a] person accorded this immunity under 18 U.S.C. § 6002, and subsequently prosecuted," need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources. See *id.* at 460-61; Sugar, *supra* note 1, at 286 ("As a rule . . . a witness once immunized is unlikely to face subsequent prosecution.").

Second, as Judge and former federal prosecutor John Gleeson, one of the pioneers of this strategy, points out, the worst outcome in such a situation is that the witness will not only agree to testify, but will commit perjury in an effort to exonerate the defendant. "[T]he only thing worse (for the prosecution) than a recalcitrant witness is one who has falsely exculpated the defendant under oath." Jeffries & Gleeson, *supra* note 16, at 1113 n.65. Thus, for the tactic to be successful, the government must be aware of the range of potential responses available when it calls a presumably hostile and uncooperative witness, and must also be willing to pursue a perjury prosecution where necessary to ensure that false testimony is not offered lightly.

20. For a discussion of these consequences, see *infra* Parts II-III.A.

States in the light of reason and experience."<sup>21</sup> Rule 501 provides little guidance because the lack of clarity provided by the common law is precisely at issue. Federal Rule of Evidence 804(a)(2), the "unavailable witness" rule,<sup>22</sup> therefore provides a better place to begin analysis.

Because the persistence of a witness in refusing to testify even under court order is not a particularly unusual event, legal rules pertaining to the situation have been codified in the rules of evidence.<sup>23</sup> Typically, the availability of a witness will be litigated when one party seeks to introduce prior statements or prior testimony of the witness at trial, despite the fact that the witness is seemingly available to provide first-hand testimony.<sup>24</sup> According to this hearsay, a declarant is to be considered unavailable if he or she "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so."<sup>25</sup> The Second Circuit has held that an actual order of the court is necessary to trigger the unavailability exception.<sup>26</sup> The exception does not apply, however, when the refusal to testify "is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying."<sup>27</sup>

It is hotly disputed whether witnesses who rightfully invoke the Fifth Amendment privilege, and are under no legal compulsion to testify, should be considered "unavailable" for the purposes of allowing admission of their prior statements.<sup>28</sup> Some have argued that a prosecutor should be forced either to grant such witnesses immunity or to forego use of their testimony altogether, rather than permitting

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21. FED. R. EVID. 501.

22. See FED. R. EVID. 804(a)(2) (stating that unavailability of declarant is exception to general prohibition against admission of hearsay evidence). Rule 804(a)(2) defines one situation of unavailability as when a declarant "persists in refusing to testify . . . despite an order of the court to do so." *Id.*

23. See *id.*

24. See, e.g., *United States v. Doerr*, 886 F.2d 944, 953-55 (7th Cir. 1989) (using FED. R. EVID. 804(b)(5) "unavailable witness" provision to permit admission of grand jury testimony of witness who, having said he would not testify, was called before the jury and persisted in refusing, despite grant of immunity and court order).

25. FED. R. EVID. 804(a)(2).

26. See *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980) (stating that actual court order, rather than mere judicial pressure, is necessary because recalcitrant witness who does not bend to judicial pressure may respond rather than face contempt); see also *United States v. Mathis*, 559 F.2d 294, 298 (5th Cir. 1977) (holding that, without court order to testify, witness's threatened refusal to testify was insufficient grounds for finding of unavailability).

27. FED. R. EVID. 804(a).

28. See Rita Werner Gordon, Comment, *Right to Immunity for Defense Witnesses*, 20 CONN. L. REV. 153, 153 (1987) (discussing historical development of concept of immunity and whether witnesses should be compelled to testify in conjunction with grants of immunity or witnesses' prior hearsay statements should be admissible once witnesses invoke the Fifth Amendment).



use of the hearsay which prevents the defendant from cross-examining the witness.<sup>29</sup> Others have gone so far as to suggest that defendants themselves should have the power to compel the prosecutor to immunize witnesses who possess information potentially exculpatory to them but refuse to testify due to fear of self-incrimination.<sup>30</sup> Courts that have considered the question have uniformly denied defendants any such far-reaching right to compel immunity for defense witnesses.<sup>31</sup> Such a policy, if allowed, would transfer tremendous power to the hands of a defendant to constrain the prosecutorial discretion of the state.<sup>32</sup>

Although the "unavailable witness" rule clearly establishes that the non-privileged, contemptuous witness justifies an exception to the prohibition on hearsay evidence, it does not resolve the principal question raised here: Can the jury be made aware that witnesses are actively refusing to make themselves available to the judicial process?<sup>33</sup> Because presenting that fact to the jury does not involve any attempt to admit hearsay statements, the unavailable witness rule fails to resolve the problem. Certainly, Rule 804(a)(2) leaves open the

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29. See *id.* at 153 & n.3 (stating that five federal circuit court decisions have held that, under certain circumstances, criminal defendant has right to compel exculpatory testimony which is otherwise privileged, thus making immunity necessary in such circumstances (citing *United States v. Todaro*, 744 F.2d 5, 9 (2d Cir. 1985); *United States v. Drape*, 668 F.2d 22, 26 (1st Cir. 1982); *Virgin Islands v. Smith*, 615 F.2d 964, 970 (3d Cir. 1980); *United States v. Klauber*, 611 F.2d 512, 517-19 (4th Cir. 1979); *United States v. Alessio*, 528 F.2d 1079, 1081-82 (9th Cir. 1976))).

30. See *Gordon*, *supra* note 28, at 189-91 (arguing that, when witness who would supply exculpatory testimony on behalf of defendant cannot do so due to a reasonable fear of self-incrimination, state may have obligation under Compulsory Witness Clause of the Sixth Amendment, to immunize them in order to make them "available"); see also *Alessio*, 528 F.2d at 1080-82 (recognizing right to defense witness immunity if required by fairness).

31. See *United States v. Paris*, 827 F.2d 395, 399 (9th Cir. 1987) (rejecting obligation to grant immunity to secure availability of witness); see also *Earl v. United States*, 361 F.2d 531, 534 (D.C. Cir. 1966) (characterizing immunity as prosecutorial tool not intended for use by defense after defendant attempted to compel prosecutor to grant immunity to witness).

32. See *Alessio*, 528 F.2d at 1082 ("To interpret the Fifth and Sixth Amendments as conferring on the defendant the power to demand immunity for co-defendants, potential co-defendants, or others whom the government might in its discretion wish to prosecute would unacceptably alter the historic role of the Executive Branch in criminal prosecutions."). Although such a power transfer would fundamentally alter the current allocation of prosecutorial authority, it undeniably enhances a defendant's Sixth Amendment right to compel witnesses on his behalf. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI. Such power might be mandatory if a defendant is to receive a fair trial, when witnesses with potentially exculpatory information invoke their Fifth Amendment privilege against self-incrimination.

33. Federal courts have had some opportunity, however, to consider the question. See *United States v. Deutsch*, 987 F.2d 878, 883-84 (2d Cir. 1993) (holding defense witness could not assert Fifth Amendment privilege against self-incrimination in front of jury and thus excluding witness); see also *Johnson v. United States*, 318 U.S. 189, 196-97 (1943) (stating that assertions of Fifth Amendment privilege in front of jury may have disproportionate effects on its deliberations).

question of whether the jury can or should be made aware of the reasons why a particular witness is unavailable.

## II. PURPOSES OF ELICITING A WITNESS'S REFUSAL TO TESTIFY

In order to present any evidence, a party must demonstrate that the subject is materially relevant to proving the issue at hand.<sup>34</sup> Depending on the particular facts of the case, presentation of a non-cooperative witness may be relevant for one or more of the following reasons: to fill gaps in a party's case, to provide "auxiliary evidence," or to provide the state with an additional retributive tool.

### A. "Gap Filling"

The defendant, by arguing a version of events which makes the testimony of a particular witness important—and the absence of that witness's testimony therefore especially noteworthy—may create a context in which the non-testimonial presence of the witness at trial undermines the credibility of the defendant's account of the facts.<sup>35</sup>

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34. See FED. R. EVID. 402 (stating that relevant evidence is admissible and evidence that is irrelevant is not admissible). "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. As the Advisory Committee explained, the prohibition on irrelevant evidence is "a presupposition involved in the very conception of a rational system of evidence." Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 217 (1972) (quoting THAYER, PRELIMINARY TREATISE ON EVIDENCE 264 (1898)). A mere showing of relevance, however, is not sufficient to guarantee that evidence will be deemed admissible. Many kinds of evidence, such as a coerced confession or evidence resulting from an unconstitutional search and seizure, may be relevant to the matter at hand, yet inadmissible at trial. See *Miranda v. Arizona*, 384 U.S. 436, 498-99 (1966) (holding that defendant must be advised of his constitutional rights to remain silent and have counsel present when he is in custody and subject to interrogation, and concluding that confessions obtained without these safeguards may not be used as evidence against defendant); *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (holding that fruits of unconstitutional search and seizure are inadmissible in both state and federal courts). At a minimum, the government must demonstrate that the fact that a witness refuses to testify is relevant to proving the charges against the defendant. Accord FED. R. EVID. 402 (stating that relevant evidence is admissible and evidence that is not relevant is not admissible).

35. Such was the case in *Seyle v. State*, 584 P.2d 1081 (Wyo. 1978), where the defendant was accused of murdering his two-year-old stepson. In *Seyle*, the prosecution attempted to prove a first-degree murder charge by presenting evidence indicating that the defendant had physically abused the decedent, a two-year-old child. See *id.* at 1083-84 (stating that physicians testified to multiple bruises and abrasions on decedent). Denying the allegations of abuse, the defendant testified that the child sustained the injuries when, while both he and the child were in the bathroom, the child had a seizure and fell to the floor. See *id.* at 1083. According to the defendant's own account, the defendant's wife was present in the bathroom and witnessed the entire event. The defense, however, never called the wife to testify. See *id.* at 1084. Accordingly, the defendant's failure to call his wife to corroborate the story raised an inference that the wife's testimony would have been adverse to the defendant. See *id.* at 1085-86. The wife's potential claim of a marital privilege does little to lessen the relevance of the fact that she did not testify. If she actually had exculpatory testimony to provide, her legal right not to testify does not explain why she would refuse to do so. Even if her testimony were protected by a marital privilege, in such circumstances, a prosecutor might find it particularly useful to call the witness to

In organized crime trials, circumstances frequently establish the relevance of this kind of evidence. Take, for instance, a recent trial of two members of the Colombo Crime Family for the murder of Colombo consigliere James Angellino.<sup>36</sup> In that case, the government accused two defendants of acting as accomplices in the murder.<sup>37</sup> One defendant allegedly drove the victim from his place of work in Manhattan to a drop-off point in New Jersey, and another helped dispose of the body afterwards.<sup>38</sup> As part of their defense these two defendants claimed that Benny Aloï, a high-ranking member of the Colombo family, planned Angellino's murder and ordered others to carry it out.<sup>39</sup> The defendants, however, never indicated any intention to call Aloï as a witness on their behalf.<sup>40</sup> Instead, the government served a subpoena on Aloï, who was already in jail serving a lengthy prison sentence on an unrelated conviction.<sup>41</sup> Aloï informed the court that he would refuse to testify.<sup>42</sup> The government then conferred use immunity on Aloï pursuant to 18 U.S.C. § 6002. Aloï nonetheless persisted in refusing to testify and was cited for civil contempt. The government sought to compel Aloï to make this refusal in the presence of the jury, primarily to underscore the lack of substantiation of the defendants' account.<sup>43</sup>

Besides pointing directly to holes or gaps in the defendant's story, as calling Aloï to the stand was intended to do, the government's act of calling available but knowingly uncooperative material witnesses demonstrates its willingness to present those witnesses who are in a position to know best what happened to the jury. As one court held,

In view of the fact that [the witness] had intimate knowledge of the

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the stand and force her to refuse to testify before the jury in order to reinforce the potentially damning nature of her testimony. See FED. R. EVID. 501 (stating that privileges of persons shall be governed by common law except in actions in which state law provides rule of decision). At common law, spousal or marital privilege generally refers to marital communications between a man and woman who are legally married when the communications are made; these communications are protected from involuntary disclosure based on the rationale that confidential communication between spouses should be encouraged to protect marital relations. See PAUL R. RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE § 9.01(A)(1) (3d ed. 1996).

36. See *United States v. Legrano*, 93 CR 1231 (ARR); *United States v. Delucia & Legrano*, 1997 WL 616006 (2d Cir.) (Oct. 7, 1997) (affirming convictions of Delucia & Legrano).

37. A "consigliere" is third in command in the hierarchy of a mob family, and part of the family's "administration." For a brief description of the administrative structure of La Cosa Nostra, see *United States v. Brady*, 26 F.3d 282, 285 (2d Cir. 1994).

38. See *Legrano*, 93 CR at 1231.

39. See *id.*

40. See *id.*

41. See *United States v. Gigante*, 94 F.3d 53, 55-56 (2d Cir. 1996) (affirming sentence of 200 months for extortion conviction).

42. See *id.*

43. See *id.* The presiding judge refused to allow Aloï to take the contempt in front of the jury. See *id.*

transactions upon which the prosecution was based, [by not calling the witness] the government ran the risk of argument to the jury by defense counsel that the government's failure to call an available witness raised the inference that his testimony would be unfavorable to the government's case.<sup>44</sup>

By calling Aloï, the government sought to show the jury that it had no fear of the testimony he would provide. Not only does this technique point to weaknesses in the defense's case, it also provides the government with the opportunity to project to the jury a confident, aggressive, and open prosecutorial style that more fully reveals the underlying complexities of an organized crime prosecution. Thus, even if the defense is willing to stipulate that it will not mention the government's failure to call such witnesses, the government has a separate and significant interest in actively demonstrating its zeal to the jury.<sup>45</sup>

### B. Auxiliary Evidence

A party's right to provide auxiliary evidence when appropriate is a second important ground of relevance for calling witnesses whom the government knows will refuse to testify.<sup>46</sup> The purpose of auxiliary evidence is not to provide evidence probative of a central issue, but rather to shore up the evidence or testimony that is under attack or impeachment.<sup>47</sup> Presenting evidence of witness non-cooperation as auxiliary evidence helps to inoculate the prosecution against a standard defense strategy of impeaching the character of witnesses who testify under cooperation agreements.<sup>48</sup> Auxiliary evidence of other

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44. *United States v. Romero*, 249 F.2d 371, 375 (2d Cir. 1957) (explaining that, because witness had intimate knowledge of transactions upon which prosecution was based, defense could make argument that failure to call witness demonstrated likelihood that witness's testimony would have been unfavorable to government).

45. See Robert H. Stier, Jr., *Revisiting the Missing Witness Inference—Quieting the Loud Voice from the Empty Chair*, 44 MD. L. REV. 137, 160-66 (1985) (discussing implications of failure to call obvious witness in criminal cases).

46. See FED. R. EVID. 104 (stating that evidence may be admitted subject to subsequent evidence fulfilling necessary condition and evidence regarding weight or credibility of other evidence is relevant); see also FED. R. EVID. 403 (stating that relevant evidence may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues," time considerations or probability of misleading jury).

47. See *De Camp v. United States*, 10 F.2d 984, 985 (D.C. Cir. 1926) (ruling permissible the exclusion of certain auxiliary evidence of manufacturing processes to disprove prosecution's assertions in course of mail fraud trial). If an opposing party has made no effort to challenge admitted evidence, auxiliary evidence may be deemed cumulative or not relevant and may properly be excluded. See John McArthur Maguire & Robert C. Vincent, *Admissions Implied from Spoliation*, 45 YALE L.J. 226, 235-36, 247-49 (1935) (arguing that spoliation evidence should be used primarily for impeachment purposes).

48. See David Crump, *On the Uses of Irrelevant Evidence*, 34 HOUS. L. REV. 1, 1-5 (1997) (discussing various reasons for introducing evidence that is relevant only in its relationship to other evidence's weight or credibility).

witnesses' refusal to testify starkly reveals why the prosecution must base its principal case on the testimony of sometimes shockingly unsavory characters.<sup>49</sup>

In organized crime trials, the government often relies heavily on the testimony of one or more cooperating witnesses.<sup>50</sup> These witnesses tend to be fellow members of the organized crime family whom the government has persuaded to plead guilty and cooperate rather than stand trial themselves.<sup>51</sup> Often such witnesses have criminal records as bad as or worse than the defendants against whom they are testifying.<sup>52</sup> For example, the eyewitness testimony of Gambino family underboss Sammy "The Bull" Gravano was pivotal in the government's case against Gambino boss John Gotti and a large number of lesser figures.<sup>53</sup> Without Gravano's cooperating testimony, it is significantly less likely that the government would have secured convictions.<sup>54</sup>

As part of their plea agreements, cooperators are required to confess to the government their entire histories of criminal activity.<sup>55</sup> No significant omissions are tolerated. If evidence later turns up indicating that cooperators have lied or concealed their role in any significant criminal activity, the agreements may be torn up and the cooperators prosecuted for any and all of the crimes that they have already reported to the government.<sup>56</sup> Cooperators thus have strong incentives to be truthful about their misdeeds from the beginning of

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49. See David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1116 (1986) (stating government is most likely to seek information about crimes from criminals).

50. See Karen Anderson & Megan Bertron, *Federal Criminal Conspiracy*, 34 AM. CRIM. L. REV. 617, 635 (1996) (discussing federal rules of evidence regarding admissibility of co-conspirator statements).

51. See *United States v. Salerno*, 505 U.S. 317, 317 (1992) (describing fraud and racketeering case where prosecution granted prosecution immunity to two witnesses, but after witnesses testified before grand jury, prosecution uncovered new evidence against witnesses, and witnesses then refused to testify at trial by invoking their Fifth Amendment privileges); *United States v. Gotti*, 171 F.R.D. 19, 21-22 (E.D.N.Y. 1997) (indicating that witness entered into plea agreement with government to testify against two defendants).

52. See *Gotti*, 171 F.R.D. at 26 (acknowledging that evidence was produced tying witness to various murders and criminal activities after he began his cooperation with government).

53. See *United States v. Gambino*, 59 F.3d 353, 363 (2d Cir. 1995) (noting that bulk of government's case came from Gravano's testimony and circumstantial evidence obtained from electronic surveillance), *cert. denied*, 116 S. Ct. 1671 (1996).

54. See *id.* (commenting that Gravano's persuasive testimony tended to connect only Thomas Gambino to loansharking, and tended to exonerate Giuseppe Gambino; noting that jury acquitted Giuseppe but convicted Thomas).

55. See Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 95-97 (1995) (discussing nature of plea agreements and what cooperators must agree to do).

56. See *id.* at 91-98 (indicating circumstances under which plea agreements may be voided by either prosecutor or defendant).

their tenure of cooperation.<sup>57</sup> Although the existence of these often extensive criminal records inoculates the government against charges that the cooperators are concealing their own role in criminal activities, it can also cut against the prosecution, because the substance of the plea agreement is available to defense counsel for impeachment purposes.<sup>58</sup> Gravano, for instance, personally confessed to participation in the murders of nineteen individuals.<sup>59</sup> In such cases, an obvious and often effective defense strategy is to attack the credibility of cooperating witnesses so relentlessly as to impeach both the witnesses and the character of the entire government case in the eyes of the jury.<sup>60</sup>

In order to diffuse the force of this argument, the government must rely on two responses. First, it can point out that regardless of the unsavory character of its witnesses, the structure of the cooperation agreement creates powerful incentives for cooperators to tell the truth.<sup>61</sup> Second, it can argue that individuals of more upstanding character are simply not in a position to know anything about the inner workings of organized crime, thus making cooperation with these unsavory characters a practical necessity of evidence gathering in prosecutions against organized crime figures.

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57. See FEDERAL SENTENCING GUIDELINES MANUAL § 5K1.1 (1994) (providing that, under circumstances set forth in 18 U.S.C. § 3553(e) (1994) and 28 U.S.C. § 994(n) (1994), government may make a motion (known as a "5K motion") asking the sentencing judge to depart downward from the Guidelines when defendant "has provided substantial assistance in the investigation or prosecution of another person who has committed an offense"). Such assistance may justify a sentence below the statutorily required minimum sentence. See *id.*

58. See *United States v. Mizell*, 88 F.3d 288, 293-94 (5th Cir.) (describing defense's 5K motion to introduce plea bargain into evidence suggesting that prosecution's witness had selective memory about elements of crime that were necessary to get him plea bargain), *cert. denied*, 116 S. Ct. 620 (1996); *United States v. Cobbins*, 749 F. Supp. 1450, 1462 (E.D. La. 1990) (observing that where government acts in bad faith in not making 5K motion, defendant has right to detail cooperative efforts at sentencing hearing, and court has independent obligation to consider such evidence).

59. See *Gambino*, 59 F.3d at 366 ("Defense counsel referred to Gravano in his opening statement as a 'serial killer' who had 'participated in the slaughter and deaths of nineteen human beings.'").

60. See *id.* at 366-68 (noting that prior criminal acts impeached Gravano's credibility and enabled defense to suggest that government had abusively targeted and investigated Gambino for years with little success prior to Gravano's cooperation).

61. See *United States v. White*, 869 F.2d 822, 828-29 (5th Cir. 1989) (explaining that Federal Sentencing Guidelines aim to assist courts in imposing appropriate sentences and are not "rigid, mechanical requirements"). The courts, rather than the prosecution, control the final sentencing outcome imposed on the cooperating witness, presumably ensuring that a witness will not be rewarded for providing falsely inculpatory testimony in order simply to please the government. See *id.* The government is limited to making a 5K motion or providing a 5K letter indicating the government's satisfaction with the cooperation of the witness, and recommending a downward departure. See *id.* The actual sentence imposed remains in the discretion of the sentencing judge who must be satisfied as to the veracity of the cooperator's testimony. See *id.*

Although these arguments might hold some logical appeal to the average juror, they are far from perfect foils to the typical impeachment spectacle, in which defense counsel leads a cooperating accomplice witness through a grueling recapitulation of crimes for hours, and sometimes days. Such a process undoubtedly creates a strong impression of witness "taint" that the prosecution cannot easily rebut by mere logical argument.

But the government has a logical response. Calling predictably unresponsive witnesses who clearly could give relevant testimony powerfully demonstrates why the government's case must rely so heavily on cooperative witnesses with "deals" rather than on more conventional witnesses. As the jury learns, those witnesses simply refuse to testify.<sup>62</sup> When the defense depends substantially on the impeachment of cooperating witnesses, auxiliary evidence presented through use of the tactic is highly relevant.

### C. Incapacitative and Retributive Function

A third and more controversial reason to call uncooperative witnesses to testify is to provide the state with additional means to incapacitate criminal enterprises and punish their members. In this way, the tactic serves less an evidentiary than a retributive function. The device secures retributive ends in two ways. First, it punishes those who renounce their duty as citizens to cooperate with the authorities and to report felonies. Misprision-of-felony statutes, long a part of the criminal law, are based on the assumption that all citizens share in this duty.<sup>63</sup> Second, the ability to levy criminal contempt charges against organized crime figures who refuse to cooperate or who lie on the stand provides the government with an additional tool to incarcerate or to increase the amount of jail-time served by such figures: "between perjury prosecutions and contempts, the . . . process can produce the incarceration of significant parts of the criminal enterprise."<sup>64</sup> For instance, in *United States v. Conte*,<sup>65</sup> prosecutors pursu-

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62. See *United States v. Mena*, 863 F.2d 1522, 1533-34 (11th Cir. 1989) (permitting defense counsel's comment on silence of six codefendants because comment was relevant in explaining lack of corroboration to defendant's story).

63. See CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 572 (15th ed. 1996) (remarking that misprision of felony at common law has become obsolete in America, but is still recognized by federal statute and occurs when a person knows of commission of felony and conceals offense from authorities).

64. Jeffries & Gleeson, *supra* note 16, at 1115 (arguing that prosecuting perjurers and citing witnesses for contempt provides additional criminal sanctions for criminals in addition to prosecuting them for their substantive crimes).

65. 93 CR 85 (ILG); see also *United States v. Versaglio*, 96 F.3d 637 (2d Cir. 1996) [hereinafter *Versaglio II*]; *United States v. Versaglio*, 85 F.3d 943 (2d Cir. 1996) [hereinafter *Versaglio I*] (explaining circumstances of *United States v. Conte*, 93 CR 85 (ILG)).

ing a multi-count RICO case against members of the Gambino Crime Family called to the stand two members of the family who were already serving time on other charges. Outside the presence of the jury, the witnesses invoked their Fifth Amendment privilege and were immunized. The witnesses then were questioned before the jury and, despite the grant of immunity, continued to refuse to answer. The witnesses were held in civil contempt and, following the trial, were prosecuted for and convicted of criminal contempt.<sup>66</sup>

Similarly, in a trial against Thomas Gambino on charges that he gave false, evasive and misleading testimony to a grand jury, prosecutors immunized fellow Gambino family member George Remini and sought to compel his testimony.<sup>67</sup> Despite the immunity order, Remini refused to testify, and although Gambino was acquitted, Remini was subsequently sentenced for criminal contempt.<sup>68</sup> Although the main target of the prosecution was not convicted, the tactic at least succeeded in securing the incarceration of one member of the criminal enterprise.<sup>69</sup>

Purposefully calling uncooperative witnesses attacks one of the fundamental bonds that sustains organized crime: the code of silence, or, as it is known among Mafia members, *omerta*.<sup>70</sup> By placing members of the organization in the difficult position of having either to break the code or face certain coercive state sanctions, the tactic increases the costs of membership in the criminal conspiracy. Membership alone, which is not in itself a criminal offense but is nonetheless a prerequisite for the commission and sustenance of organized crime, can then become a collateral target of attack by the state.<sup>71</sup>

For the purposes of meeting the Rule 401 relevance requirement, the first two justifications for calling such witnesses, highlighting noteworthy gaps in the defense case and rebutting impeachment of cooperating witnesses, provide a sufficient basis for admission in most

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66. See *Conte*, 93 CR 85; see also *United States v. Cefalu*, 85 F.3d 964 (2d Cir. 1996); *United States v. Cefalu & Versaglio*, 94 CR 94 & 95 (ERK) (unreported case).

67. See *United States v. Remini*, 967 F.2d 754, 755 (2d Cir. 1992) (describing defendant's claim that immunity order was inadequate).

68. See *id.* at 756 (reciting trial court's sentence of sixteen months imprisonment, \$30,000 fine, three years supervised release, and \$50.00 "special assessment").

69. See *id.* at 760 (dismissing defendant's arguments and affirming lower court's contempt conviction); see also *Versaglio I*, 85 F.3d at 945 (discussing sentencing under Federal Sentencing Guidelines of Gambino Crime Family member convicted of criminal contempt after refusing to testify despite grant of immunity).

70. See 1 LEON RADZINOWICZ & MARVIN E. WOLFGANG, *CRIME AND JUSTICE: THE CRIMINAL IN SOCIETY* 335-36 (1971) (discussing code of silence in Mafia).

71. See *Versaglio I*, 85 F.3d at 944 (describing appellant's contempt conviction after refusing to testify against member of Gambino Crime Family in trial that ended in mistrial); *Remini*, 967 F.2d at 755 (describing appellant's prosecution for contempt despite acquittal of individual appellant was to testify against).



circumstances. The third justification suggested here, incapacitating criminal enterprises and punishing their members, is also a legitimate government purpose, but that purpose in itself cannot justify the admission of evidence that is not relevant in the case against the accused.<sup>72</sup>

### III. BEYOND "GAP FILLING": PERMISSIBLE INFERENCES

Thus far, this Article has identified two primary evidentiary uses of witness non-cooperation: to reveal significant gaps in the defendant's case,<sup>73</sup> and to illustrate the difficulty that the state encounters in finding willing witnesses with relevant information, explaining to the jury the need to negotiate deals with indisputably unsavory characters.<sup>74</sup> For these purposes, calling witnesses that the state knows will refuse to testify is relevant and falls within the bounds of fair play.<sup>75</sup>

There is, however, another much more controversial evidentiary use of witness non-cooperation. Employed most aggressively, the fact of witness non-cooperation could provide the basis for a whole range of *inferences* about the factual substance of the case that the prosecution can suggest at trial and, perhaps, even argue in closing argument.<sup>76</sup> Prosecutors may seek to draw these inferences in situations both where the non-cooperating witness retains a Fifth Amendment privilege, and where the witness lacks the privilege. This Article argues that the presence or absence of the privilege is a critical factor in determining when witness non-cooperation should be admitted as evidence against a defendant.<sup>77</sup>

#### A. *Inferences and the Fifth Amendment Privilege*

To date, the Supreme Court has been much more concerned with the protection of the Fifth Amendment privilege than with the evi-

72. See FED. R. EVID. 401 ("Relevant evidence" means evidence having any tendency to make the existence of any fact *that is of consequence to the determination of the action* more probable or less probable than it would be before the occurrence.") (emphasis added).

73. See *supra* Part II.A (discussing 'gap-filling' function of calling uncooperative witnesses).

74. See *supra* Part II.B (discussing use of non-cooperating witnesses as auxiliary evidence to shore up testimony of other coconspirators).

75. See *Namet v. United States*, 373 U.S. 179, 189 (1963) (rejecting argument of prosecutorial misconduct after government called witnesses knowing that they would invoke their Fifth Amendment rights in response to questions).

76. See *United States v. Robinson*, 485 U.S. 25, 30-31 (1988) (affirming conviction where prosecutor referenced defendant's invocation of Fifth Amendment right during closing arguments).

77. See Martin D. Litt, Note, *Commentary by Co-Defendant's Counsel on Defendant's Refusal To Testify: A Violation of the Privilege Against Self-Incrimination?*, 89 MICH. L. REV. 1008, 1008-09 (1991) (identifying split between Federal Courts of Appeals regarding propriety of allowing co-defendant's counsel to comment on defendant's silence and difficulty of fashioning appropriate test to evaluate practice).

dentiary significance of witness non-cooperation. In the landmark Fifth Amendment case of *Griffin v. California*,<sup>78</sup> the Supreme Court held that any mention by the government of the defendant's decision to take the Fifth unconstitutionally burdens the privilege and is therefore impermissible.<sup>79</sup> The Court has never resolved the question, however, of whether it is likewise impermissible to call the jury's attention to the use of the privilege when the person invoking the privilege is not the defendant but rather a third-party witness.<sup>80</sup>

The circuit courts are split on the question.<sup>81</sup> As one commentator observes, "some courts require the privilege to be invoked in the factfinder's presence while others consider this to be prejudicial error."<sup>82</sup> Both the Eighth and the Ninth Circuits have found the practice impermissible.<sup>83</sup> The majority of the circuits considering the question have indicated that, even if admission of such evidence is not necessarily constitutional error, the trial judge possesses the discretion to

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78. 380 U.S. 609 (1965).

79. See *id.* at 615 (holding that prosecutor's closing arguments referencing defendant's failure to testify violated defendant's Fifth Amendment right). State courts have energetically followed the Supreme Court's lead. As one Pennsylvania court stated, "[I]f the prosecuting attorney or the judge makes the slightest reference to the fact that the accused failed to reply to the accusations ringing against him, and a verdict of guilt follows, a new trial is imperative." *Commonwealth v. Dravec*, 227 A.2d 904, 906 (Pa. 1967); see also *Carter v. Kentucky*, 450 U.S. 288 (1981) (holding that defendant has a right to have jury instructed not to draw an inference against defendant based on defendant's failure to testify).

80. Over the dissenting opinion of two Supreme Court Justices, the Court denied a petition for certiorari in a case raising the issue. See *Lindsey v. United States*, 484 U.S. 934, 934-35 (1987) (White, J., dissenting to denial of certiorari) (describing split among circuits and arguing that Court should grant certiorari to resolve dispute). In the pre-*Griffin* period, when the Model Code of Evidence was drafted, the drafters assumed that comment on witnesses' taking a privilege was acceptable. See MODEL CODE OF EVIDENCE Rule 233 (1942) ("There can be no weighty objection on the ground that the comment will lessen the value of the privilege."). In civil cases, the Supreme Court has ruled that adverse inferences based on the privilege are permissible. See *Baxter v. Palmigiano*, 425 U.S. 308, 317-18 (1976) (holding that adverse inferences may be drawn from inmate's silence during disciplinary hearing); see also *LiButti v. United States*, 107 F.3d 110 (2d Cir. 1997).

81. See *Lindsey*, 484 U.S. at 934-35 (White, J., dissenting to denial of certiorari).

82. Bartel, *supra* note 13, at 1356.

83. See *United States v. King*, 461 F.2d 53, 57 (8th Cir. 1972) (reversing conviction where "[n]o useful purpose was served by calling these witnesses other than in forcing them to take the privilege in a manner obviously prejudicial to the defendant"); *United States v. Beye*, 445 F.2d 1037, 1038 (9th Cir. 1971) (refusing defendant's request that witness be made to take Fifth in jury's presence). Many circuits have held that a witness should not be made to claim the privilege before the jury. See, e.g., *United States v. Deutsch*, 987 F.2d 878, 882 (2d Cir. 1993) (denying defendant's request to call witness before jury knowing that witness would invoke Fifth Amendment privilege); *United States v. Gomez-Rojas*, 507 F.2d 1213, 1220 (5th Cir. 1975) (remanding case after trial judge accepted witness's claim of Fifth Amendment privilege without determining if claim was appropriate); *United States v. Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973) (stating that neither party has right to inferences jury might draw by allowing witness to testify knowing that witness will take Fifth); *United States v. Coppola*, 479 F.2d 1153, 1160 (10th Cir. 1973) (reversing conviction because of prosecution's extensive questioning of witness in front of jury with prior knowledge that witness would take Fifth).

bar such witnesses from testifying.<sup>84</sup> Still, the practice continues to be used, with judicial sanction, in some circuits. In the Sixth Circuit's view:

Government counsel need not refrain from calling a witness whose attorney appears in court and advises court and counsel that the witness will claim his privilege and will not testify. However, to call such a witness, counsel must have an honest belief that the witness has information which is pertinent to the issues in the case and which is admissible under applicable rules of evidence, if no privilege were claimed. It is an unfair trial tactic if it appears that counsel calls such a witness merely to get him to claim his privilege before the jury to a series of questions not pertinent to the issues on trial or not admissible under applicable rules of evidence.<sup>85</sup>

Although the Sixth Circuit has allowed such witnesses to be called for the purposes of invoking the privilege before the jury, it also has warned that the practice is "so imbued with the 'potential for unfair prejudice' that a trial judge should closely scrutinize any such request."<sup>86</sup> The Sixth Circuit has reversed in one instance where the prosecutor persisted in questioning the witness extensively after the privilege was invoked;<sup>87</sup> nevertheless, the Sixth Circuit continues to allow the practice in general.<sup>88</sup> Accordingly, it found no reversible error when a trial court permitted a witness to invoke the privilege before the jury and gave the jury a cautionary instruction not to consider the incident unfavorably against the defendant.<sup>89</sup>

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84. See *United States v. George*, 778 F.2d 556, 562-63 (10th Cir. 1985) (finding defendant's Sixth Amendment rights were not violated by judge's refusal of defendant's request to call witness who had already stated his intention to invoke his Fifth Amendment privilege); *United States v. Harris*, 542 F.2d 1283, 1298 (7th Cir. 1976) (rejecting defendant's claim that trial judge should have examined basis of witness's claims of Fifth Amendment privilege where defendant earlier requested judge to recuse himself because of his extensive knowledge of witness's alleged criminal activities); *United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir. 1974) (holding that witness's taking of Fifth may not be made known to jury or commented on by defense counsel); *Bowles v. United States*, 439 F.2d 536, 541-42 (D.C. Cir. 1970) (affirming trial court's rejection of defendant's request to have witness classified as "missing witness" after judge refused to allow witness to testify when it became clear that witness would invoke the Fifth Amendment).

85. *United States v. Compton*, 365 F.2d 1, 5 (6th Cir. 1966).

86. *United States v. Vandetti*, 623 F.2d 1144, 1147 (6th Cir. 1980) (quoting *United States v. Maffei*, 450 F.2d 928, 929 (6th Cir. 1971)).

87. See *United States v. Mayes*, 512 F.2d 637, 650 (6th Cir. 1975) ("In short [the government] went too far and exceeded the reasonable bounds which might have been necessary to test the privilege.").

88. See *id.*

89. See *United States v. Lewis*, Nos. 86-5377, 86-5379, 1987 U.S. App. LEXIS 5183, at \*10-12 (6th Cir. Apr. 17, 1987) (affirming defendant's conviction despite prosecutor's reference in closing arguments to witness taking the Fifth); see also *Vandetti*, 623 F.2d at 1147 (finding no error in "merely permitting" previously convicted co-defendants to be called as witnesses). State courts also are split regarding the practice. In *Commonwealth v. Sims*, 521 A.2d 391, 395 (Pa. 1987), the court found a proper basis for allowing the privilege to be invoked before the

### 1. *Adverse inferences and the Fifth Amendment*

The permissibility of an inference is strongly dependent on the potential array of reasons that might motivate a particular witness to refuse to cooperate. Although the government may rightfully be able to compel a witness to invoke a privilege before the jury, few circumstances would justify permitting the state to then ask the jury to draw adverse inferences against the defendant based on the witness's invocation of the privilege. As one commentator has noted, "[p]lainly, the inference may not ordinarily be made against a party when a witness for that party claims a privilege personal to the witness, for this is not a matter under the party's control."<sup>90</sup> Thus, in the vast majority of cases where the government has been permitted to call such witnesses, the trial judge promptly instructs the jury not to make any inferences adverse to the defendant based on the privilege.<sup>91</sup>

There are three main reasons generally offered for adhering to this prohibition. First, as noted above, the invocation of the privilege, or more generally, the refusal to testify, is not directly within the control of the defendant.<sup>92</sup> It would be unjust, it is argued, to penalize the defendant for independent decisions made by a party not on trial.<sup>93</sup> The flaw in this argument, however, is that defendants generally lack control over the nature of evidence admitted against them at trial. The defendant can neither choose whom the government calls to testify as a witness, nor control the nature of the testimony provided by such witnesses. It is not at all evident that drawing inferences based on nontestimonial evidence over which the defendant lacks control is any more damaging to the defendant's case than allowing inferences to be drawn from other evidence offered against the defendant.<sup>94</sup>

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jury because it provided important information for evaluating the testimony of the government witnesses' credibility and reliability. See *Stringer v. State*, 500 So. 2d 928, 940 (Miss. 1986) (holding that prosecutor's comments during closing argument regarding defendant's refusal to testify did not amount to error and violated defendant's fundamental right to a fair trial). *But cf. Stanger v. Gordon*, 244 N.W.2d 628, 632 (Minn. 1976) (reproving plaintiff for "adverse comment on the proper assertion of privilege in the presence of the jury").

90. EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE, § 74.1, at 177 (3d ed. 1984) (discussing inferences that may be drawn from witness's refusal to testify due to privilege).

91. *But see infra* notes 115-23 (discussing *Namet*).

92. See CLEARY ET AL., *supra* note 90, at 296-97 (describing inherent unfairness of drawing negative inferences against defendant because of witness's failure to testify).

93. See *id.* (arguing against negative inferences made when witness refuses to testify, describing such inferences as denying witness "the protection which, for public purposes, the law affords him, and utterly tak[ing] away a privilege" (citing *Wentworth v. Lloyd*, 10 H.L. Cas. 589, 591 (1864))).

94. See *United States v. Maloney*, 262 F.2d 535, 537 (2d Cir. 1959) (describing difficult position courts are in when deciding whether to allow comment on witnesses' failure to testify because either way, one of the parties may be hurt).

A second reason often suggested for not allowing adverse inferences to be drawn from a witness's invocation of the privilege is that such inferences demean or diminish the privilege itself.<sup>95</sup> In *Grunewald v. United States*,<sup>96</sup> Justice Black's concurring opinion argued that placing constraints on, or punishing the appropriate use of the right to refrain from testifying by making such use costly undermines the privilege's actual value.<sup>97</sup> As Justice Black noted, "[t]he value of constitutional privileges is largely destroyed if persons can be penalized for relying on them."<sup>98</sup> Although this argument makes sense in the case of the defendant's own decision to 'take the Fifth,' such logic has significantly less force in the case of non-party witnesses.<sup>99</sup> Inferences made against the defendant based on the witnesses' use of privileges burden the right against self-incrimination only to the extent that the witnesses' own consciences chaff when they fail to provide material testimony out of self-interest.

A third and much more powerful reason to disfavor inferences based on witnesses' invocation of the privilege is the inherent ambiguity of such inferences. When witnesses are asked a question the answer to which is potentially damaging to the defendant, and the witnesses refuse to answer it on Fifth Amendment grounds, the jury cannot know whether the witnesses' withheld testimony would have inculpated or exculpated the defendant. All that the jury can infer from such a refusal is that the witnesses might have perceived the answer to be potentially incriminating to themselves.<sup>100</sup>

Further, if unchecked, the government could seriously misuse such a tactic. Although much evidence by itself may be ambiguous, thus requiring counsel to contextualize it and thereby imbue it with meaning, it is possible that by using this technique the government could create an aura of culpability around a defendant by arguing highly speculative inferences, without presenting any truly probative evidence. Were the government to call a series of witnesses, initiating in each case a line of suggestive questioning implicating the defendant, and were each witness to invoke the privilege in response, it would be

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95. See *Grunewald v. United States*, 353 U.S. 391, 425 (1957) (Black, J., concurring) (arguing that impeachment of witness is never justified based on witness's use of constitutional privilege).

96. See *id.* at 391.

97. See *id.* at 425-26.

98. *Id.* at 425.

99. See *Maloney*, 262 F.2d at 538 (holding that witnesses may be called to stand with knowledge that they will invoke their Fifth Amendment rights only if judge admonishes jury not to draw inferences from lack of testimony).

100. See *CLEARY ET AL.*, *supra* note 90, at 318-19 (describing judges' inability to supervise fact-finder's decisionmaking process).

difficult for the defendant to dispel the resulting cloud of suspicion. This practice, which seeks to prove the criminality of the defendant by demonstrating association with "suspicious" persons, is a nearly definitional illustration of prejudicial evidence.<sup>101</sup> On the other hand, the government's failure to call witnesses who obviously could contribute information to the government's case under the "gap-filling" function could, if left unexplained, seriously damage the government's ability to make its case.<sup>102</sup>

The Supreme Court set forth the primary test to determine when drawing inferences based on the non-cooperation of a privileged witness in a criminal trial is impermissible in *Namet v. United States*.<sup>103</sup> In *Namet*, three defendants were charged with violating federal wagering tax laws, and all pleaded not guilty.<sup>104</sup> On the day of the trial, however, two of the defendants changed their pleas to guilty and were called to testify against the remaining defendant.<sup>105</sup> Their lawyer warned the court that they were likely to claim the privilege because they had pled guilty on the principal charges, but remained subject to an IRS investigation.<sup>106</sup> At trial, the government called both witnesses; both answered some questions, but invoked the privilege in order to avoid answering certain questions they deemed self-incriminating.<sup>107</sup> At the close of the trial, the judge instructed the jury that no inference should "be drawn against [the defendant] because the [witnesses] refused to testify, unless it would be a logical inference that would appeal to you as having a direct bearing upon the defendant's guilt."<sup>108</sup>

While noting the potential for abuse inherent in forcing a witness to invoke the privilege before a jury, the Supreme Court concluded that neither the instruction nor the government's decision to call the witnesses violated any substantial rights of the defendant.<sup>109</sup> Examin-

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101. One commentator describes prejudicial evidence as that which "has a tendency to cause the trier of fact to commit an inferential error." Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 498-99 (1983) (describing vagueness and ambiguities surrounding unfairly prejudicial evidence rule).

102. More specifically, the failure or inability of the prosecution to call witnesses whom it knows will "take the Fifth" may shift the negative inference onto the prosecution's case. See *Maloney*, 262 F.2d at 537 (describing government's argument for allowing prosecution to call witnesses it knew would refuse to answer questions on grounds of the privilege against self-incrimination).

103. 373 U.S. 179 (1963).

104. See *id.* at 180.

105. See *id.*

106. See *id.* at 181.

107. See *id.* at 181-82, 184-85 (describing opposition of witnesses' attorneys to requiring witnesses to take the Fifth on the stand).

108. *Id.* at 185.

109. See *id.* at 190-91 (holding that, even if instruction was wrong, it did not affect defen-

ing lower court decisions on the question, the Court noted two principal theories for finding reversible error in such circumstances.<sup>110</sup> One theory requires a court to inquire whether "the Government ma[de] a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege."<sup>111</sup> According to this theory, examined further in the next section, reversible error exists where malicious intent rises to the level of prosecutorial misconduct.<sup>112</sup> Alternatively, grounds for reversal may exist where "inferences from a witness's refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant."<sup>113</sup> This raises issues under the Sixth Amendment's Confrontation Clause,<sup>114</sup> which this Article discusses in Part IV.

## 2. *The prosecutorial misconduct theory*

Underlying the prosecutorial misconduct theory discussed in *Namet v. United States* is a view that misconduct occurs when the state "makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege."<sup>115</sup> In *Namet*, however, the Court refused to find reversible error under this theory, in part because even though the trial court compelled the witnesses to invoke their privilege before the jury, the prosecutors had a good-faith basis for believing that the witnesses had no lawful right to claim the privilege.<sup>116</sup> As the Court noted, "certainly the prosecutor need not accept at face value every asserted claim of privilege, no matter how frivolous."<sup>117</sup> As the Court recognized, without some judicial supervision, the unjustified invocation of the privilege could severely

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dant's substantial rights and therefore would not be reversible error).

110. See *id.* at 186-87 (citing prosecutorial misconduct theory from *United States v. Maloney*, 262 F.2d 535 (2d Cir. 1959), and the theory that witnesses invoking privilege in front of jury unfairly prejudices jury).

111. *Id.* at 186.

112. See *id.* (describing government attempt "to build its case out of inferences arising from use of the testimonial privilege" as reversible error).

113. *Id.* at 187 (citing *Maloney*, 262 F.2d at 536-37).

114. U.S. CONST. amend. VI.

115. *Namet*, 373 U.S. at 186 (implying that prosecutorial misconduct may have occurred had witnesses not possessed relevant, non-privileged information important to prosecution's case). "It is an unfair trial tactic if it appears that counsel calls such a witness merely to get him to claim his privilege before the jury to a series of questions not pertinent to the issues on trial or not admissible under applicable rules of evidence." *United States v. Lewis*, Nos. 86-5377, 86-5379, 1987 U.S. App. LEXIS 5183, at \*11-12 (6th Cir. Apr. 17, 1987).

116. See *Namet*, 373 U.S. at 188.

117. See *id.*

impede the government's ability to secure witnesses to testify in criminal trials.<sup>118</sup>

Moreover, even where the prosecutor knows that the witness both has a right to invoke the privilege and plans to do so, merely calling the witness has been held not to violate the *Namet* misconduct theory, at least where the prosecutor has "an honest belief that the witness has information which is pertinent to the issues in the case and which is admissible under applicable rules of evidence, if no privilege were claimed."<sup>119</sup> The Sixth Circuit noted that such a procedure is presumptively reasonable "where the prosecution's case would be seriously prejudiced by a failure to offer him as a witness."<sup>120</sup>

The primary reason such behavior has been dubbed "misconduct" is because of its inherent ambiguity. For a witness who fears self-incrimination, the decision to withhold testimony may have nothing to do with the culpability of the defendant, but rather may be motivated solely by the witness's own desire to protect himself.<sup>121</sup> The inferences that arise from such invocation, however, may be powerfully incriminating to the defendant.<sup>122</sup> The ambiguity as to the motivation for the refusal to testify thus makes any inferences drawn from the invocation of the privilege inherently untrustworthy. A prosecutor who seeks to manipulate this inherent ambiguity in such a way that it appears to inculcate the defendant is acting in bad faith, and the misconduct theory of *Namet* appropriately mandates exclusion of the evidence.<sup>123</sup>

### 3. *No Fifth, no problem: adverse inferences in the absence of the privilege*

When faced with a witness who hides behind the Fifth Amendment, however, the government's hands are far from tied. Because it possesses the ability to immunize,<sup>124</sup> the government can waive its right to prosecute the individual in exchange for an obligation to tes-

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118. See *id.* (reasoning that government may challenge a witness's intention to claim privilege if there is "independent and quite proper reason" for calling witness).

119. *Lewis*, 1987 U.S. App. LEXIS 5183, at \*12.

120. *Id.* (quoting *United States v. Kilpatrick*, 477 F.2d 357, 360 (6th Cir. 1973)).

121. See *Slochow v. Board of Higher Educ.*, 350 U.S. 551, 557 (1956) ("[A] witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing.").

122. As Judge Learned Hand pointed out, "[w]hen a witness claims his privilege, a natural, indeed an almost inevitable, inference arises as to what would have been his answer if he had not refused." *United States v. Maloney*, 262 F.2d 535, 537 (2d Cir. 1959).

123. See *Namet*, 373 U.S. at 188 (finding "planned or deliberate attempts by government to make capital out of the witness's refusal to testify" would be inadmissible evidence).

124. See 18 U.S.C. § 6002 (1994); see also *supra* note 1 and accompanying text (describing government's ability to use immunity statutes and other benefits such as cash payments and witness protection programs).



tify if the testimony of a particular witness is of sufficient importance to the state.<sup>125</sup>

A witness can no longer legitimately fear self-incrimination where immunity has been conferred, or where they have already pled guilty or been convicted.<sup>126</sup> Under such circumstances, the most plausible motivations behind a witness's refusal to testify, even in the face of a court order, are those that justify an adverse inference against the defendant. Although the government should resist "consciously and flagrantly" using a witness's invocation of a valid privilege to draw adverse inferences against a defendant, by no means should the concern of protecting the privilege when self-incrimination is no longer an issue obscure the broader goals at stake in conspiracy and organized crime prosecutions.<sup>127</sup>

The reasons for non-cooperation might be as numerous as there are witnesses, but reasons powerful enough to compel a witness to suffer the heavy sanctions resulting from citation for civil contempt and criminal contempt or both are more limited.<sup>128</sup> In most cases when a witness refuses to testify despite lacking a legitimate fear of self-incrimination,<sup>129</sup> non-cooperation is likely to stem from one of four main reasons.<sup>130</sup>

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125. See 18 U.S.C. § 6002.

126. See *supra* note 8 and accompanying text.

127. See FBI, "A Banner Year" for Mob Prosecutions, CHI. TRIB., Jan. 2, 1991, at 14 [hereinafter *FBI*] (discussing FBI's successful tactics targeting heads of crime families and breaking down their hierarchies).

128. See *supra* note 9 and accompanying text (providing for confinement of "recalcitrant witnesses" upon refusing to testify). Though these motivations obviously are impossible to categorize exhaustively, it is possible to identify some of the predominant motivations for non-cooperation within the organized crime and conspiracy context. If other reasons exist for witness non-cooperation, counsel always remains free to argue them to the jury. See *Crowley v. Winans*, 920 F.2d 454, 454 (7th Cir. 1990) (pointing out that nature of permissive presumption is that it allows trier of fact to draw an inference but does not require trier of fact to draw an inference). Their plausibility, therefore, like a broad range of other issues implicating the credibility of witnesses and other evidence, is an issue of fact that counsel should be forced to address at trial. See *id.*

129. A large number of cases involving an immunized witness's refusal to cooperate stem from claims of incomplete privilege. A witness may argue that, though he or she has been granted some kind of limited immunity, or has already been convicted of the crimes stemming from the incident about which he is testifying, the collateral consequences of testifying might nonetheless work to his or her disadvantage. See, e.g., *Mikutaitis v. United States*, 478 U.S. 1306 (1986) (fear of foreign prosecution). For instance, some witnesses have been called to testify after conviction, but prior to sentencing. See, e.g., *United States v. Giraldo*, 822 F.2d 205, 208 (2d Cir. 1987) (upon retracting cooperation, judge sentenced witness to forty years with no chance of parole; witness then cooperated and judge reduced sentence to four years with parole). Federal prosecutors have immunized others, but the witnesses nonetheless remain liable for prosecution in another forum. This Article only considers witnesses to be lacking a privilege if such collateral harms cannot realistically befall them.

130. See 28 U.S.C. § 1826(a) (1994) (allowing contemnor to refuse to testify for just cause). Individuals have successfully refused to testify under this provision by claiming that the questions propounded to the defendant were based on illegally gathered evidence, see *Gelbard v.*

First, a witness might refuse to testify in fear of the defendant.<sup>131</sup> Although understandable, such refusal is not legally cognizable, and the witness will still be subject to civil or criminal contempt charges.<sup>132</sup> If a witness's fear of a defendant is sufficient to compel that witness to violate a court order and place himself in contempt of court, an adverse inference would seem especially warranted. It would be perverse for a defendant's coercive threats to allow the defendant to escape punishment while the victim of that coercion, the witness, goes to jail. The Federal Rules of Evidence already provide for admission of hearsay statements where the unavailability of a witness results from the coercive or obstructive efforts by the defendant.<sup>133</sup> Thus, where a legitimate fear of violent retaliation motivates the witness's refusal to testify, there seems to be ample justification for drawing adverse inferences based on the witness's behavior.

Second, a witness may refuse to testify out of a desire to adhere to a code of silence. The force of the code of silence, or *omerta*, may spring from internal assimilation of a set of values adverse to the duties imposed by the criminal justice system.<sup>134</sup> It also may be enforced from without by other members of the criminal organization seeking to quiet 'squealers,' perhaps with extreme threats of force and violence.<sup>135</sup> If the fear stems from other members of the criminal or-

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United States, 408 U.S. 41, 44 (1972), and that some procedural right of the witness has been violated, *see* United States v. Di Girolomo, 393 F. Supp. 997, 1000 (W.D. Mo. 1975), *aff'd*, 520 F.2d 372 (8th Cir. 1975). In order to make a showing of just cause, however, a witness will need to make an affirmative showing to the court. *See, e.g.*, United States v. Buckley (*In re* Grand Jury Proceedings), 860 F.2d 11, 13 (2d Cir. 1988) (stating that 28 U.S.C. § 1826(a) places burden of establishing just cause for refusal to testify on witness); *In re* Pantojas, 628 F.2d 701, 703 (1st Cir. 1980) (acknowledging that burden to show just cause rests on witness refusing to testify under court order); *In re* Bianchi, 542 F.2d 98, 100-01 (1st Cir. 1976) (finding that 28 U.S.C. § 1826 requires witness to show just cause for failure to comply with court order).

131. *See, e.g.*, Slochhower v. Board of Higher Educ., 350 U.S. 551, 554-55 (1996) (fearing that if he testified, plaintiff would incriminate himself and give cause for defendant to dismiss him from employment). In addition, while the law allows duress to be used as a defense for crimes other than murder, the defense is not available if a defendant negligently or recklessly places himself in a position where he is likely to be subject to duress. *See* MODEL PENAL CODE § 2.09(2) (1962); *see also* Stuart Mass. Note, *The Dilemma of the Intimidated Witness in Federal Organized Crime Prosecutions: Choosing Among the Fear of Reprisals, the Contempt Powers of the Court, and the Witness Protection Program*, 50 FORDHAM L. REV. 582, 598 (1982) (indicating that, at common law, one was able to claim duress as defense if individual had negligently, recklessly or intentionally put himself in situation in which duress to commit crime was probable).

132. *See, e.g.*, *In re* Grand Jury Proceedings, 877 F.2d 849, 851 (11th Cir. 1989) (holding that district court did not abuse its discretion by failing to accept witness's fear of retaliation as just cause for refusing to testify); United States v. Damiano, 579 F.2d 1001, 1004 (6th Cir. 1978) (stating "fear for the safety of one's self or others is not ground for refusing to testify"); United States v. Patrick, 542 F.2d 381, 388 (7th Cir. 1976) (indicating that "[f]ear, by itself, will not legally justify or excuse witness's refusal to testify"); United States v. Gates, 176 F.2d 78, 80 (2d Cir. 1949) (declaring that fear of economic reprisal is not sufficient basis for refusal to testify).

133. *See* FED. R. EVID. 804(a).

134. *See* E. REID, *MAFIA* 40-47 (1952) (discussing *omerta*).

135. *See id.*

ganization, an agency theory subjecting each member of the conspiracy to liability for all the other members justifies a finding that the defendant is at least derivatively responsible for suborning the contemptuous act of the witness. As argued below, it is reasonable and consistent with the evidentiary rules to allow inferences adverse to the defendant to be derived from the witness's refusal in this context.

The fact that the refusal springs not from a realistic threat of retaliation, but rather from the witness's own internalized acceptance of the code against cooperation, does not significantly alter the logic of the argument. Fear that the testimony may diminish the esteem in which a witness is held in his or her community, or may affect the witness's status, is not a legally cognizable basis to withhold testimony.<sup>136</sup> If the witness and defendant both mutually participate in a shared "culture of conspiracy" that valorizes criminal behavior and demonizes cooperation with legal authorities, the defendant should share responsibility for the creation and maintenance of the ethic against cooperation. While punishing a defendant for participation in a particular culture goes against the grain of a criminal justice system constructed to punish individual culpability, it does not eliminate altogether the doctrine of individual autonomy.<sup>137</sup> In a multicultural society such as urban America,<sup>138</sup> the choice to join and strengthen the culture of conspiracy reflects the autonomous decision of the organization's participants.

Third, a witness may refuse to testify out of fear that he or she may at a later date be prosecuted for perjury. Although the witness has no immediate fear of self-incrimination, he or she could be subjected to criminal prosecution for lying on the stand.<sup>139</sup> The witness might

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136. See *In re Williams*, 152 S.E.2d 317, 324 (N.C. 1967) (affirming contempt citation of minister refusing to testify in rape prosecution on grounds that such testimony would ruin his reputation in community).

137. See Richard S. Murphy, Comment, *The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303, 1308 (1988) (discussing basis of retribution theory of criminal punishment is holding individual accountable for his actions).

138. For a discussion of racial and ethnic diversity in American Cities, see generally J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993 (1995).

139. See 18 U.S.C. § 1621(1) (1994). 18 U.S.C. § 1621 states, in pertinent part:

Whoever (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify . . . truly . . . willfully and contrary to such oath states . . . any material matter which he does not believe to be true . . . is guilty of perjury and shall . . . be fined . . . or imprisoned not more than five years, or both.

*Id.*; see, e.g., *United States v. Winter*, 70 F.3d 655, 659 (1st Cir. 1995) (dismissing defendant's argument that because government "always knew he would refuse to testify, they sought his immunity for the vindictive purpose of 'setting him up' to commit perjury"); *United States v. De Salvo*, 20 F.3d 1216, 1222 (2d Cir. 1994) (discussing necessity of immunity grant where de-

therefore argue that the Fifth Amendment privilege should prevent him or her from providing the grounds for incrimination. Although this argument is made frequently in criminal contempt proceedings, it obviously does not withstand scrutiny.

First, no witness has a right to invent testimony with impunity.<sup>140</sup> Second, because the witness has been immunized, truthful testimony cannot provide any basis for incrimination,<sup>141</sup> and the witness cannot be prosecuted for prior perjured testimony based on contradictory testimony later given under oath.<sup>142</sup> Any remaining incentive to lie must spring, therefore, not from the witness's own fear of self-incrimination, but from reluctance to implicate a coconspirator. If that reluctance fuels the defendant's desire to avoid testifying, the adverse inference is again justified.

Finally, the witness simply may have a powerful desire not to incriminate the defendant. It is, of course, this last reason that provides the strongest basis both for allowing the witness's refusal to testify to occur before the jury, and for an adverse inference to be drawn against the defendant. If the witness has no real fear of self-incrimination, the willingness to suffer what appears to be the comparatively minor penalty of criminal contempt in hopes of preventing a coconspirator from receiving a long criminal sentence is rational as an organizational or conspiratorial strategy.<sup>143</sup> The tactic of making the witness refuse to testify in front of the jury should be permitted in order to undermine this strategy.

In short, although the ambiguous evidentiary value of a witness's rightful invocation of the privilege makes that evidence less probative of the defendant's culpability, the problem of ambiguity is substantially reduced when the witness no longer possesses the right to refuse to testify.<sup>144</sup> While giving testimony that implicates the witness in

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fendant has legitimate fear of perjury prosecution, but noting that grant of immunity in such cases removes basis for refusing to testify).

140. See *Nix v. Whiteside*, 475 U.S. 157, 169 (1986) (rejecting constitutional right to commit perjury in one's defense).

141. See 18 U.S.C. § 6002 (protecting witnesses from criminal prosecution based on statement given under immunity).

142. See *id.* (detailing available uses of immunized testimony in perjury prosecutions). Section 6002 has been interpreted to mean that accurate testimony given under a grant of immunity cannot be used for perjury prosecutions for prior false statements, but may be used in perjury prosecutions for false statements made while under immunity. See *In re Grand Jury Proceedings*, 625 F.2d 767, 770 n.2 (8th Cir. 1980).

143. Criminal contempt is punishable by fine, imprisonment or both. See 42 U.S.C. § 1995 (1994). The fine may not exceed one thousand dollars and the prison term may not exceed six months. See *id.* Compare this with the term of imprisonment for felonies, which range from one to five years for minor crimes to life imprisonment or the death penalty for serious offenses. See *id.*

144. See 28 U.S.C. § 1826(a) (1994) (allowing imprisonment of individual who refuses to

criminal activity may be embarrassing to the witness, the refusal to testify in the face of a court order is unlikely to be motivated by mere embarrassment. The removal of this fundamental ambiguity dramatically transforms the underlying context and restructures the logical inferences that naturally flow from the act of non-cooperation.

Some courts, in sorting out the circumstances under which the forced invocation of the privilege can be sanctioned, have distinguished between the "ordinary witness" and those witnesses who are "so closely connected with the defendant by the facts of the case, the pleadings, or relationship, that the inferences of the witness's guilt would likely be imputed to the defendant."<sup>145</sup> While forcing witnesses who fall into the latter category to invoke their privilege before the jury might unavoidably prejudice the defendant, "it may well be proper in some cases to have the proceeding in the presence of the jury where the government is dealing with" witnesses of the more ordinary variety.<sup>146</sup> This approach seems logical when the witness invokes a Fifth Amendment privilege, because the very certainty that accompanies the invocation is likely to taint the defendant.<sup>147</sup> If the witness has no right to invoke a privilege, the logic is reversed. When a defendant has no justifiable fear of self-incrimination, the close relationship with the defendant creates a powerful inference that the witness is refusing to testify in order to protect the defendant. An adverse inference therefore becomes much more appropriate. In contrast, "ordinary witnesses" who lack such a relationship with the defendant, yet refuse to testify, are much more likely to have other reasons for refusing to cooperate aside from protecting the defendant.

Indeed, this logic has long been accepted when a witness who cannot claim a legitimate privilege refuses to testify. Subject to certain important limitations, such inferences have commonly been allowed in civil trials, and occasionally in criminal trials, under what is known as the "missing witness doctrine."<sup>148</sup>

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comply with court order to testify); see also *In re Grand Jury Investigation*, 600 F.2d 420, 428 (3d Cir. 1979) (upholding district court's civil contempt imprisonment under § 1826(a) of immunized witness).

145. See *United States v. Ritz*, 548 F.2d 510, 518 (5th Cir. 1977) (quoting *San Fratello v. United States*, 340 F.2d 560, 565 (5th Cir. 1965)).

146. See *id.* at 520.

147. See *supra* Part III.A.1 (exploring ambiguities created by invocation of Fifth Amendment rights).

148. See *Graves v. United States*, 150 U.S. 118 (1893) (establishing "missing witness doctrine").

### B. *The Missing Witness Doctrine*

It is a standard component of the law of evidence that adverse inferences<sup>149</sup> may be drawn against a party based on its omissions.<sup>150</sup> Similarly, when a party destroys evidence, an adverse inference may be drawn against it.<sup>151</sup> An unfavorable inference may be drawn against a party not only for destroying evidence, but for the mere failure to produce witnesses or documents within its control.<sup>152</sup> The classic articulation of the missing witness doctrine appears in *Graves v. United States*,<sup>153</sup> where the Supreme Court held that, "if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable."<sup>154</sup> Such an inference does not require the jury to speculate as to the substance of the witness's unheard testimony, but rather only to infer that the witness's testimony would have been adverse to the defendant.<sup>155</sup>

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149. See *In re Braycovich*, 314 P.2d 767, 771 (Cal. Dist. Ct. App. 1957) (noting that an inference is a reasonable deduction made by the fact-finder drawn from proven facts, and an adverse inference is one that disadvantages one of the parties).

150. See 2 JOHN HENRY WIGMORE, EVIDENCE §§ 285-288 (James H. Chadbourn rev., 1979).

151. See CLEARY ET AL., *supra* note 90, § 74.1, at 177.

152. See *id.* § 272, at 804-05.

153. 150 U.S. 118 (1893).

154. See *id.* at 121; see also *United States v. Basic*, 587 F.2d 577 (3d Cir. 1978) (following *Graves* ruling that allows jury to draw adverse inference against party failing to call available witness), *rev'd on other grounds*, 446 U.S. 398 (1980). But see *Burgess v. United States*, 440 F.2d 226, 233 (D.C. Cir. 1970) (interpreting *Graves* as allowing exceptions to the presumption). The court in *Burgess* stated, "Not every absent but producible witness who can be held to have some knowledge of the facts need by reason of *Graves* be made the subject of the 'presumption.'" *Id.* at 233. Since *Graves*, courts have interpreted the missing witness doctrine to permit a permissible inference rather than a presumption. See *Mammoth Oil Co. v. United States*, 275 U.S. 13, 52 (1927) (stating that presumption "is to be cautiously applied"); see also *In re Williams*, 190 F.2d 728, 732-33 (1956) (explaining that Federal Circuit only permits "adverse inferences" when a witness is missing in three circumstances); *Fleet Nat'l Bank v. Anchor Media Tele., Inc.*, 831 F. Supp. 16, 31 (D.R.I. 1993), *aff'd*, 45 F.3d 546 (1st Cir. 1995) (stating that there is no basis for adverse inference if missing witness is equally available to both parties and not "favorable disposed" to the nonproducing party).

155. See *Felice v. Long Island R.R. Co.*, 426 F.2d 192, 195 (2d Cir. 1970) (determining that jury should not decide verdict by speculating as to content of lost, missing witness testimony). In many instances, this may amount to the same thing. If the witness's testimony is relevant only because he or she allegedly could answer a simple question such as whether the defendant was at the scene of the crime, a refusal to answer, interpreted adversely to the defendant, could only translate into an affirmative one. testify in a manner adverse to the defendant must assume that he or she would have answered in the affirmative. Two states, Minnesota and Rhode Island, expressly disallow missing witness instructions in criminal trials. See Stier, *supra* note 45, at 163; see also *United States v. Tucker*, 552 F.2d 202, 210 (7th Cir. 1977) (explaining development of missing witness rule as permissive inference rather than presumption). This reluctance springs perhaps from a recognition that more complicated scenarios might make an adverse inference rule based on a refusal to answer more difficult to implement. For instance, where a defendant is alleged to have committed some specific act in furtherance of a conspiracy, and a potential witness is alleged to have assumed a planning role in the conspiracy but refuses to

Applicability of the missing witness doctrine hinges on the active failure of a party to produce a material witness.<sup>156</sup> Not only must such a witness be material, the witness must be uniquely under the control of the party against whom the adverse inference is sought.<sup>157</sup> The requirement that the witness be "under the party's control" is critical to any attempt to transpose the missing witness rule to cases of coconspirator witness non-cooperation.<sup>158</sup> Though such a witness may be material, the government must demonstrate that the coconspirator is at least constructively under the defendant's control.<sup>159</sup> In addition, the missing witness doctrine only applies when the testimony of a witness is expected to be favorable to the defendant, given the defendant's account of the facts or the context of the situation.<sup>160</sup> The defendant's failure to produce the witness, considering his or her power to produce the witness as well as the apparent incentive to do so, together create the grounds to infer that the reason the defendant fails to do so is that the testimony would be unfavorable to him.<sup>161</sup>

In a typical criminal trial, when a witness is physically present but refuses to testify, it will likely be difficult to show that such non-cooperation can be blamed on the defendant, as the missing witness doctrine requires. Within the peculiar context of organized crime, however, it may be possible to satisfy the requirements of the missing

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testify, an adverse inference drawn against the defendant could mean: (1) that the defendant was part of the conspiracy, (2) that the plan called for the defendant to commit a specific act, or (3) that the witness has knowledge that the defendant actually committed the specific act. Depending on the particular defense chosen, the selection of the negative inference to draw from the witness's refusal to testify could have a major impact on the outcome of the trial. Because it would be speculative and arbitrary to assume, with no additional evidence, that any of the above inferences is more appropriate than the others, the missing witness doctrine generally should lead only to the relatively limited inference that the witness's testimony would have been unfavorable to the defendant, not to the assumption that any specific testimony would have been given.

156. See *United States v. Ariza-Ibarra*, 651 F.2d 2, 16 (1st Cir. 1981) (holding that jury may draw adverse inference if material witness is not called); see also *United States v. Noah*, 475 F.2d 688, 691 (9th Cir. 1973) (finding that failure to produce material witness gives rise to presumption of unfavorable testimony).

157. See *Noah*, 475 F.2d at 691.

158. See *Graves*, 150 U.S. at 121. For a recent attempt to do this in the civil context, see *Libutti v. United States*, 107 F.3d 110 (2d Cir. 1997).

159. See *Wilson v. Merrell Dow Pharms., Inc.*, 893 F.2d 1149, 1151 (10th Cir. 1990) (holding that party must show that opponent has met criteria before missing witness instruction will be given).

160. See *United States v. St. Michael's Credit Union*, 880 F.2d 579, 597 (1st Cir. 1989) (finding that testimony of witness would have been favorable to defendant because defense counsel mentioned the witness in his opening arguments).

161. This logic counsels against allowing an adverse inference from the failure of a witness to testify when that witness's testimony, if provided, would be expected to damage the defense case. In other words, adverse inferences cannot be argued from the non-cooperation of a person who would, if testifying, be a witness for the prosecution.

witness doctrine. Where the witness and the defendant both are members of the same organized crime family, it may be reasonable to demonstrate that both witness and defendant are subject to each other's control, or are mutually subject to the control of the organization. For starters, proof of membership in a criminal "enterprise" is an element of any prosecution under RICO, the principal statutory tool for organized crime prosecutions.<sup>162</sup> Thus, witnesses already convicted of the same or similar charges cannot argue that there were no such associations.<sup>163</sup> Unlike in the past, when defendants actively denied even the existence of the mafia, defendants in organized crime trials now frequently choose to stipulate to, or at least not to contest, the allegation of association with a criminal enterprise.

Further, there is a well-established basis in the rules of evidence for making the assumption that members of the same criminal conspiracy are subject to each other's control. The coconspirator exception to the hearsay rule (defined in the Federal Rules of Evidence as an admission by a party-opponent) holds that "a statement is not hearsay" and is therefore admissible if made "by a coconspirator of a party during the course, and in furtherance of, the conspiracy."<sup>164</sup> The exception is based on a theory of agency which assumes that the shared interests of the conspirators generally make it reasonable to treat any statement against interest made by a member of the conspiracy as an adopted statement of the defendant.<sup>165</sup> Admittedly, this agency theory is also tempered by the requirement that the statement be made "during the course and in furtherance of the conspiracy."<sup>166</sup> The requirement is intended to limit the use of such statements to situations in which it is reasonable to assume that the speaker's interests do not significantly differ from those of the defendant's,<sup>167</sup> and "a

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162. See 18 U.S.C. § 1962 (1994).

163. See FED. R. EVID. 404(b) (allowing prior bad act evidence to be used to show common plan or scheme); see also *United States v. Emmanuel*, 112 F.3d 977, 980 (8th Cir. 1997) (permitting evidence of defendant's methamphetamine distribution prior to conspiracy charged); *United States v. Edwards*, 69 F.3d 419, 535-36 (10th Cir. 1995) (permitting evidence of defendant's prior joint efforts to distribute cocaine in manner similar to that giving rise to current charge), *cert. denied*, *Chaplin v. United States*, 116 S. Ct. 2497 (1996); *United States v. Brooklier*, 685 F.2d 1208, 1218 (noting that defendant had stipulated to membership in La Cosa Nostra, and both parties stipulated that such mere membership was not in itself unlawful).

164. FED. R. EVID. 801(d)(2)(E); see also Patrick J. Sullivan, Note, *Bootstrapping of Hearsay Under Federal Rule of Evidence 801(d)(2)(E): Further Erosion of the Coconspirator Exemption*, 74 IOWA L. REV. 467 (1989) (assessing the rational and judicial development of coconspirator exception).

165. See Sullivan, *supra* note 164, at 475-78.

166. *Id.* at 478.

167. Alternatively, party admissions have been justified under the theory that their admissibility results from the adversarial system rather than any special guarantees of reliability. See John S. Strahorn, Jr., *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 564 (1937).



reasonable man in the declarant's position would not have made the statement unless [he believed] it to be true."<sup>168</sup>

Within the context of organized crime, the assumption of control by the defendant over recalcitrant witnesses is often appropriate. *United States v. Remini*<sup>169</sup> provides a useful example of why such an assumption is reasonable. George Remini was tried for criminal contempt after having refused to testify in a prior trial against Thomas Gambino.<sup>170</sup> Evidence presented at Remini's trial illustrated that Gambino boss John Gotti orchestrated Remini's non-cooperation.<sup>171</sup> Excerpts from surveillance tapes revealed that Gotti vetoed the suggestion that Thomas Gambino plead guilty to prevent Gotti and other members of the crime family from having to testify.<sup>172</sup> Gotti indicated that he and Remini stood ready to go to jail instead: "Get my cell ready; get Joe Butch's cell ready, and get Fat Georgie's cell ready. And nobody is taking the stand. Tell them to go fight! Don't worry about it."<sup>173</sup> As this excerpt suggests, the structure of organized crime may justify, at least in some circumstances, applying an agency theory in cases of witness non-cooperation.<sup>174</sup> This theory, furthermore, need not be based solely on a constructive theory of corporate agency.

Sometimes, as in *Remini*, members of the criminal organization counsel each other in the art of testifying falsely.<sup>175</sup> In other instances, house counsel for the organizations may provide the actual lines of communication among defendants. Often, a single lawyer will simultaneously represent a large number of criminal defendants from the same crime family,<sup>176</sup> requiring courts to conduct lengthy

168. See FED. R. EVID. 804(b)(3).

169. 967 F.2d 754 (2d Cir. 1992).

170. See *id.* at 755.

171. See *id.* at 756.

172. See *id.*

173. *United States v. Gotti*, 771 F. Supp. 552, 557 (E.D.N.Y. 1991).

174. See *FBI*, *supra* note 127, at 14 (discussing hierarchical structure of Mafia).

175. The contents of one surveillance recording, known as the "Trailer Tape," capture Sammy Gravano tutoring another member of the Gambino family on appropriate evasive measures to take before a grand jury:

You're called to the grand jury. You gotta take the fifth. Alright so far? Now they give you immunity. What do you do? . . . Now I told him there is three things: common sense, common sense is one part, seventy-five percent of the answers. Another ten or fifteen percent . . . (inaudible) you gotta dance and bob and weave. One, I didn't remember, I don't think so, or to the best of my knowledge. Okay? Let's say fifteen percent, so that's seventy-five percent, so we're up to ninety percent. Ten percent, you out and out lie.

*United States v. Gambino*, 59 F.3d 353, 364 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1671 (1996).

176. See, e.g., *United States v. Locasio*, 6 F.3d 924, 931 (2d Cir.) (disqualifying attorney Bruce Cutler from representing Gotti because "Cutler had acted as 'house counsel' to the Gambino Crime Family by receiving 'benefactor payments' to represent others in the criminal enterprise").

proceedings in which defendants waive their right to contest the attorney's conflict of interest.<sup>177</sup> One reason a defendant may not care if his lawyer is simultaneously involved in the defense of other members of the same crime organization might be that the decisions about trial strategy in his trial are being made by others in the organization. By coordinating defenses across an organization, a lawyer helps to enforce a general defense strategy that increases the ability of the organization to survive at the occasional expense of some individuals within it. Certainly, a perusal of the cases reveals many instances in which lawyers have served this type of function.<sup>178</sup> The coordination of obstruction of justice by lawyers or other members of the organization thus transfers the effective control of material witnesses from the individual to the criminal enterprise, each member of which, under the law of conspiracy, is responsible for the actions of the others made in furtherance of the conspiracy.<sup>179</sup>

Moving away from the unique dynamics of organized crime and into the broader field of multi-defendant trials, the agency assumption between codefendants or between a defendant and a third party witness grows significantly weaker. Presumably, an adverse inference based specifically on the missing witness doctrine would first require a sufficient showing at trial that the defendant exerted control over the witness, or that a criminal organization exercised control over both. This showing would consist of evidence indicating a special relationship between witness and defendant that might be termed "conspiratorial responsibility." Such a showing is necessary because the government seeks to argue a speculative inference rather than merely introduce out-of-court statements that, whatever their indicia of reliability, at least have the virtue of concreteness. In order for such speculative evidence to be deemed comparably reliable, this required showing of conspiratorial responsibility would have to exceed

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177. These proceedings are known as "Curcio Waivers." See *United States v. Curcio*, 680 F.2d 881, 888-90 (2d Cir. 1982); see also *United States v. Cintolo*, 818 F.2d 980, 986 (1st Cir. 1987) (upholding conviction of attorney who pressured client to defy court order to testify). But see *United States v. Stantini*, 85 F.3d 9, 12 (2d Cir.) (rejecting petition for conflict of interest where defendant's lawyer was simultaneously involved in defense of another member of Gambino Crime Family), cert. denied, 117 S. Ct. 498 (1996).

178. In *United States v. Cintolo*, for example, the court upheld the conviction of a lawyer who advised his client to persist in refusing to testify despite having been immunized and put under court order. See *United States v. Cintolo*, 818 F.2d 980, 983 (1st Cir. 1987). In reference to the lawyer's role in encouraging his client to obstruct justice, the court noted, "[t]he recurring theme of each conversation, significantly, was that [the witness] be coerced into 'standing up'—to serve an eighteen month sentence for contempt—rather than to accept immunity gracefully and testify freely before the grand jury." *Id.* at 986.

179. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* §§ 6.4-6.5 (2d ed. 1986) (discussing origin and theory of conspiracy law including ramifications of conspirator status).

by a substantial margin the showing that the government must make to gain the admission of hearsay evidence under the coconspirator exception to the hearsay rule.<sup>180</sup> In contrast, in organized crime, where 'made members' of the organization ritually take a vow of silence as part of their initiation into the criminal organization, the prerequisite relationship of conspiratorial responsibility is readily seen.<sup>181</sup>

In the absence of an explicit showing of a conspiratorial relationship between witness and defendant, the inferences allowable against a defendant must be highly circumscribed. It is better to interpret the missing witness rule in such circumstances to work in tandem with other proof of the facts, and to provide a presumption in favor of an adverse interpretation of those facts, rather than as an independent basis for a specific adverse inference. When the witness is unable to claim any personal privilege, however, and the prosecutor can demonstrate a conspiratorial relationship between the defendant and the witness, a prosecutor's attempt to elicit testimony from the witness is reasonable and fair.<sup>182</sup>

#### IV. THE SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES

In addition to prosecutorial misconduct, reversible error arises, according to the Supreme Court in *Namet*, when "inferences from a witness's refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination."<sup>183</sup> In other words, the tactic of forcing a witness to refuse to testify, regardless of whether the refusal is grounded in a legitimate Fifth Amendment privilege claim, must be disallowed if it violates the defendant's Sixth Amendment Confrontation Clause rights.<sup>184</sup> Some courts also have indicated that calling a witness who the state knows will refuse to testify may violate the defendant's right to cross-examine.<sup>185</sup> Judge Learned Hand was among those who held this view.<sup>186</sup> At least one

180. See FED. R. EVID. 801(d)(2)(E); see also *Bourjaily v. United States*, 483 U.S. 171, 173 (1987) (discussing standard for coconspirator exception).

181. See generally REID, *supra* note 134.

182. See *Namet v. United States*, 373 U.S. 179, 188 (1963) (holding that prosecutor's attempt to elicit testimony was permissible because "[b]oth [witnesses] possessed non-privileged information . . . they could, and did, testify that they knew the [defendant] . . . and that they themselves had engaged in [criminal activity]" with defendant).

183. See *id.* at 187.

184. See U.S. CONST. amend. VI.

185. See *United States v. Deutsch*, 987 F.2d 878, 884 (2d Cir. 1993) (upholding refusal to allow defendant to call witness who defendant knows will invoke the privilege, noting that "the probative value of this evidence is lessened by the inability of the other party to cross-examine").

186. See *United States v. Maloney*, 262 F.2d 535, 537 (2d Cir. 1959) ("[I]t is clear, not only

federal district court, however, has ruled specifically that "the mere calling of a witness to the stand to make him invoke the privilege against self-incrimination does not constitute a denial of the right to confrontation."<sup>187</sup> The Supreme Court's Confrontation Clause jurisprudence supports this view.

The Supreme Court has identified four main purposes underlying the Confrontation Clause.<sup>188</sup> First, by ensuring that testimony is given under oath, and in the presence of the accused, the Clause seeks to guarantee that the witness is fully apprised of the seriousness and moral gravity attending the testimony.<sup>189</sup> Second, the Clause ensures that the jury has an opportunity to assess the demeanor and credibility of the witness.<sup>190</sup> Third, the Clause makes certain that a witness is subject to cross-examination, which somewhat hyperbolically has been described as "the greatest legal engine ever invented for the discovery of truth."<sup>191</sup> In addition, the Supreme Court has stated that the Confrontation Clause is violated where evidence is introduced under the unavailable witness provisions of the Federal Rules of Evidence if the state fails to make a good faith effort to produce the witness.<sup>192</sup>

None of these interests is abrogated when the prosecution calls a non-privileged witness who it knows will refuse to testify. The good-faith production requirement, for instance, is amply satisfied by the prophylactic steps taken to present the witness, which include granting immunity and subpoenaing or physically producing the witness in court. When such steps are taken it is difficult to dispute the claim

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that the presumed answer has not the sanction of an oath, but—what is even more important—that the accused cannot cross examine.").

187. *Cota v. Arizona*, 304 F. Supp. 876, 879 (D. Ariz. 1969).

188. See Tom Patton, Comment, *Sixth Amendment's Confrontation Clause—Is a Showing of Unavailability Required?*, 17 S. ILL. U.L.J. 573, 574-90 (1993) (discussing development of Confrontation Clause case law).

189. See *California v. Green*, 399 U.S. 149, 158 (1970); see also *Ohio v. Roberts*, 448 U.S. 56, 63 n.6 (1980).

190. See *Mattox v. United States*, 156 U.S. 237, 242 (1895). The Court in *Mattox* stated:

The primary object of the . . . [Confrontation Clause] was . . . not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

*Id.* at 242-43.

191. See *Green*, 399 U.S. at 158; see also *Roberts*, 448 U.S. at 63 ("[A] primary interest secured by [the Confrontation Clause] is the right of cross-examination." (quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965))).

192. See *Barber v. Page*, 390 U.S. 719, 724-25 (1968) ("[A] witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.").

that the government has made the necessary good-faith effort to secure the availability of the witness.

In allowing the witness's refusal to testify to take place in front of the jury, the first two concerns underlying the Confrontation Clause are satisfied easily. First, the civil and penal sanctions available to a judge to enforce court orders, as well as the potential criminal charges that may be brought once the trial is over, adequately communicate to the witness the "seriousness and moral gravity" attending the proceeding.<sup>193</sup> Second, by bringing the witness before the jury, the state acts consistently with the deeper concern embodied in the Confrontation Clause, namely, that the jury be able to weigh the credibility of all the participants involved in the trial.<sup>194</sup> Even when a witness is not providing substantive testimony, the State nonetheless has an interest in compelling the witness to confront the jury, face to face, so that the jury may decide from his or her demeanor what significance to accord the event.<sup>195</sup>

The resulting inability to cross-examine the witness, though, is somewhat more troublesome.<sup>196</sup> The Confrontation Clause is intended "to advance 'the accuracy of the truth-determining process in criminal trials,'"<sup>197</sup> but it must represent more than a simple constitutionalization of the rules of evidence: "Correctly interpreted, the [C]onfrontation [C]ause is not a minor adjunct of evidence law, but is one of a bundle of rights that assures the accused the protection of our adversary system. It assures the accused the adversarial testing of the prosecution's evidence."<sup>198</sup>

The critical question, then, is whether the adversarial testing function is short-circuited when a witness refuses to answer questions posed by either the state or the defense. Because Confrontation

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193. *Green*, 399 U.S. at 158.

194. *See infra* note 210 and accompanying text.

195. *See Mattox*, 156 U.S. at 242.

196. The issue was expressly raised in *United States v. Jackson*, Nos. 94-5338 and 94-5440, 1995 U.S. App. LEXIS 13554 (4th Cir. June 2, 1995) (unpublished decision), in which the court found no error in the unsuccessful cross-examination of a contemptuous witness. *See id.* at \*8 (holding no error where defendant refused to testify and prior grand jury testimony was consequently admitted).

197. Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 576 (1988).

198. *See id.* at 622; *see also White v. Illinois*, 502 U.S. 346, 356 (1992) (maintaining that, "where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied"); *Idaho v. Wright*, 497 U.S. 805, 814 (1990) (reminding interpreters "not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements"); Margeret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 557-58 (1992) (discussing relegation of Confrontation Clause to mere equation with law of evidence).

Clause interpretation has centered on the right of cross-examination,<sup>199</sup> a defendant's Confrontation Clause rights presumably would be violated only where the witness's absolute refusal to answer questions in open court actually constitutes "unrebutted testimony" by a "witness against him."<sup>200</sup> In other words, for the Confrontation Clause to apply, a defendant must have a witness to confront and some substantive adverse testimony that cross-examination would allow the defendant to test.<sup>201</sup>

### A. The "Witnesses Against Him" Clause

Perhaps the Supreme Court's most interesting treatment of the Confrontation Clause's requirement that a defendant have an opportunity to confront "witnesses against him"<sup>202</sup> can be found in *White v. Illinois*.<sup>203</sup> In *White*, the defendant was accused of sexually molesting a four-year-old girl.<sup>204</sup> Although the girl did not testify, the trial court allowed others, including the doctor and nurse that had examined her, to testify to the girl's explanatory statements after the assault.<sup>205</sup> The trial court found that such statements were admissible under various exceptions to the hearsay rule.<sup>206</sup> The Court agreed that allowing the statements did not violate the Confrontation Clause.

In a concurring opinion, Justice Thomas explained that the phrase "witnesses against him" should be interpreted to mean that a criminal defendant's right to confront witnesses be limited to "any witness who actually testifies at trial" or to witnesses whose testimony is delivered through "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."<sup>207</sup> Such a view is consistent with the original intentions of the Framers, who were particularly attuned to the abuses of process committed by the British in the Sixteenth Century, such as presenting proof at trial that often was "given by reading depositions, confessions of accomplices, letters, and the

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199. See, e.g., Andrew Taslitz, *Catharsis, The Confrontation Clause, and Expert Testimony*, 22 CAP. U. L. REV. 103, 139 (1993) ("The critical importance of an opportunity for effective cross-examination, is definitely, consistent with a long line of United States Supreme Court Confrontation Clause jurisprudence.").

200. *Douglas v. Alabama*, 380 U.S. 415, 419-20 (1965).

201. See *id.* (holding that petitioner's inability to cross-examine witness regarding alleged confession was violation of confrontation clause).

202. See U.S. CONST. amend. VI.

203. 502 U.S. 346 (1992).

204. See *id.*

205. See *id.* at 350.

206. See *id.* at 346 (clarifying admissibility "under state law hearsay exceptions for spontaneous declaration and for statements made in the course of securing medical treatment.").

207. *Id.* at 364-66.

like.”<sup>208</sup> In order to protect the accused from such practices, the Confrontation Clause assures the defendant the opportunity to have “the witnesses brought before him face to face.”<sup>209</sup>

Applying this reading of the phrase “witnesses against him,” it is clear that a witness’s in-court refusal to testify would not violate the Confrontation Clause. When a witness is called into court and provided an opportunity to testify, the main function of the guarantee is satisfied, even if the witness refuses, because the defendant has an opportunity to confront the non-cooperative witness “face to face.” To the contrary, when the witness’s non-cooperation is clearly harmful to the defendant, and there is no possibility of self-incrimination, a trial judge’s decision to *exclude* the refusal would seem to violate the spirit of the Clause. The ruling would prevent the witness from facing the defendant in court and would keep the defendant from exerting the moral suasion that would attach to such a confrontation. In sum, a witness who refuses to testify at trial does not produce testimony that requires rebuttal, since such a witness obviously is not one who “actually testifies at trial.”<sup>210</sup>

The same point can be made by examining, not the intent of the witness (in this case, the intent is to provide no testimony at all), but

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208. *Id.* at 361 (quoting 1 J. STEPHAN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 221, 326 (1883)).

209. *Id.*

210. *See id.* at 352-57. The majority in *White*, however, explicitly rejected the interpretation of Justices Thomas and Scalia. Under the majority view, it was much less certain that a non-cooperating witness should not be considered a “witness against” for the purposes of the Confrontation Clause. *See id.* Nonetheless, even the broad criteria established by the Court in its landmark Confrontation Clause decision of *Ohio v. Roberts*, 448 U.S. 56 (1980). *See United States v. Inadi*, 475 U.S. 387 (1986) (interpreting *Ohio v. Roberts*, 448 U.S. 56 (1980)), and later restricted in *White*, *see White*, 502 U.S. at 354-57 (restricting *Ohio* ruling to facts of that case where out-of-court statement in question is in context of prior testimony), indicate that the presentation of a non-testifying witness does not violate the Confrontation Clause. While the Court’s decision in *Roberts* places a heavy production burden on the state before a witness will be found unavailable, *see Roberts*, 448 U.S. at 74-75 (discussing criteria that must be met by prosecution before witness is declared unavailable), this production burden is clearly met in the case of the produced, immunized and uncooperative witness. Even under the broadest reading of *Roberts*, such a witness presents no Confrontation Clause violation. Moreover, the Court in *White* refused to go even so far as to require actual production. *See White*, 502 U.S. at 357 (“Establishing a generally applicable unavailability rule would have few practical benefits while imposing pointless litigation costs.”). Instead, the adopted rule required courts only to engage in the unavailability analysis, rather than actually find the witness unavailable. *See id.* at 356-57. This holding comports with the Sixth Amendment jurisprudence that favors a balancing approach to such issues, over rigid rules. *See Mattox v. United States*, 156 U.S. 237, 243 (1895) (noting that “general rules of law . . . however beneficent in thier operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case”). Although the majority in *White v. Illinois* rejected the position of Justices Thomas and Scalia, it nonetheless came to the same conclusion in the case, that the out-of-court statements made by a sexually-abused girl were not inadmissible hearsay, and the admission of the statements, despite the potential availability of the witness, did not violate the Confrontation Clause. *See White*, 502 U.S. at 356-57.

rather the evidence produced by the procedure. First, the mere fact that an individual provides a source of evidence does not make that evidence "testimonial."<sup>211</sup> A long line of Supreme Court cases has limited the kind of evidence that qualifies for this designation.<sup>212</sup> For instance, the Court has explicitly stated that participating in a line-up for identification purposes,<sup>213</sup> the provision of handwriting exemplars,<sup>214</sup> the provision of blood,<sup>215</sup> and the modeling of clothing<sup>216</sup> are "non-testimonial." Other courts have held that providing DNA,<sup>217</sup> hair,<sup>218</sup> bodily fluids,<sup>219</sup> and other types of forensic evidence<sup>220</sup> are "non-testimonial." In order to be testimonial, the Supreme Court has explained that a "communication must itself, explicitly or implicitly, relate a factual assertion or disclose information."<sup>221</sup> Since the physical presence of a silent witness does not meet this requirement, the mere appearance in court by a non-cooperative witness does not by itself create testimony. Instead, he or she performs a "verbal act" by invoking the privilege, or by facing contempt sanctions after refusing to testify.<sup>222</sup>

### B. *The Verbal Act Doctrine*

The verbal act doctrine is an evidence precept that has received

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211. See generally 6 WIGMORE, *supra* note 150, § 1766.

212. See, e.g., *Pennsylvania v. Muniz*, 496 U.S. 582, 592 (1990) (holding that slurred nature of defendant's answers to police questions was non-testimonial evidence); *Doe v. United States*, 487 U.S. 201, 210 (1988) (defining 'testimonial' as communications that "explicitly or implicitly, relate a factual assertion or disclose information"); *United States v. Dionisio*, 388 U.S. 1, 7 (1970) (stating that voice recordings used to measure physical properties of witness's voices were non-testimonial evidence).

213. See *United States v. Wade*, 388 U.S. 218, 222 (1967) (holding that participation in lineup for identification purposes does not result in testimonial evidence).

214. See *Gilbert v. California*, 388 U.S. 263, 266-67 (1967) (stating that handwriting exemplars are "physical characteristics" and are non-testimonial unlike content of writing).

215. See *Schmerber v. California*, 384 U.S. 757, 761 (1966) (concluding that withdrawal of defendant's blood would not provide testimonial evidence).

216. See *Holt v. United States*, 218 U.S. 245, 251-53 (1910) (stating that, when defendant models clothing for witness to view, he did not provide evidence of a testimonial nature). For an indelible example of how such prosecutorial techniques can backfire, see commentaries on the O.J. Simpson murder trial. See Henry Reske, *Observers Say Prosecution Lost the Case Over a Bloody Glove, Racist Cop*, 81 A.B.A. J., Nov. 1995, at 48.

217. See *Prince v. Superior Court*, 8 Cal. App. 4th 1176, 1179 (Cal. Ct. App. 1992) (stating that non-testimonial evidence is involved when defendant provides semen for DNA testing).

218. See *Fouts v. Georgia*, 239 S.E. 2d 366, 370 (Ga. 1977) (holding that hair samples are non-testimonial evidence).

219. See *Lucero v. Gunter*, 17 F.3d 1347, 1350 (10th Cir. 1994) (stating that urine samples taken for drug testing do not constitute testimonial evidence).

220. See *Connecticut v. Chesney*, 353 A.2d 783, 788 (Conn. 1974) (stating that application of paraffin wax to hands to test for gunpowder residue is not testimonial evidence).

221. *Doe v. United States*, 487 U.S. 201 (1988).

222. See generally 6 WIGMORE, *supra* note 150, § 1772 (providing descriptions of situations in which utterances are "verbal acts" rather than testimonial evidence).



scant attention from the Supreme Court.<sup>223</sup> Verbal acts are "utterances which accompany some act or conduct to which it is desired to give a legal effect."<sup>224</sup> They are exempt from the hearsay rule because they are "not an assertion" and are "not offered to prove the facts asserted."<sup>225</sup> Because verbal acts do not constitute hearsay, their admission does not raise Confrontation Clause problems under the theory that there can be no real dispute regarding the truth of the facts contained within the statement.<sup>226</sup> Examples of verbal acts include saying "I do" at a wedding, offering or accepting a contract,<sup>227</sup> using "threatening words,"<sup>228</sup> and placing bets.<sup>229</sup>

Invoking the Fifth Amendment right, or refusing to testify in court, is a perfect example of a verbal act. The statement triggers a complicated set of legal consequences the significance of which can be debated, like other evidence, by counsel at trial.<sup>230</sup> As one commentator explained, the invocation of the Fifth Amendment privilege "is not a testimonial or communicative act . . . . It is simply a physical reality of the trial, akin to the fact, likewise obvious to the jury, that [the defendant] fits a certain physical description or behaves in a manner indicative of guilt."<sup>231</sup>

Another feature of a verbal act is that though it technically involves speech, its nature makes it virtually nonsensical to attempt to deter-

223. The verbal act doctrine applies in those situations where "declarations of an individual are so connected with his acts . . . [that] the declaration becomes part of the transaction and is admissible." 31A C.J.S. *Evidence* § 403(2) (West 1964 and Supp. 1996). The language of the doctrine stems from *Insurance Co. v. Mosley*, 75 U.S. 397, 411 (1869). Despite the Supreme Court's limited discussion in *Mosley*, some states have discussed the verbal act doctrine. See, e.g., *Gurganus v. Guaranty Bank & Trust Co.*, 100 S.E.2d 81, 84 (N.C. 1957) (holding verbal act doctrine inapplicable because the "declarations did not accompany conduct to which it was desired to give legal effect").

224. See 31A C.J.S. *Evidence* § 403(2) (West 1964) ("In some cases, the term 'verbal act' has been used to describe a declaration admissible as circumstantially relevant to establish a fact, but without testimonial effect in itself.").

225. See CLEARY ET AL., *supra* note 90, § 249, at 732.

226. See 6 WIGMORE, *supra* note 150, § 1772 (stating that because verbal acts are not assertions, they are not offered as evidence of truth of any matter).

227. See CLEARY ET AL., *supra* note 90, § 249, at 733 ("[O]ral utterances . . . constituting the offer and acceptance [of a contract] . . . are not evidence of assertions offered testimonially but rather of utterances . . .").

228. See *United States v. Jones*, 663 F.2d 567, 571 (5th Cir. 1981) (holding that statements of defendant's threats against federal officers are not offered to prove the truth of the matter asserted, but rather constitute "operative words of criminal action").

229. See *State v. Romano*, 332 A.2d 64 (Conn. 1973) (concluding that evidence of telephone calls placing bets were not offered to prove that content of calls were true, but were verbal acts constituting evidence of betting activity).

230. See *Albert v. Alschuler*, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2672 n.177 (1996) (proposing statute in which defendant's decision to remain silent is explicitly made subject to comment by prosecution).

231. See *id.* at 868.

mine "the truth or falsity of the [speech]."<sup>232</sup> To take one example, the words "I do" signify legal acceptance of the marriage contract. Beyond that, any investigation into their meaning is pointless. Cross-examination of the speaker regarding the substance of the statement would be unlikely to provide any new interpretation or reading of the phrase. Contrast this with out of court hearsay statements offered for their truth, such as "John told me that Wendy murdered Bill." Although the rules of evidence might allow the statement to be admitted to prove the fact that John and the listener spoke, it would not be admissible as evidence that Wendy was the murderer.<sup>233</sup> A higher standard, or greater "indicia of reliability," is required before a court can find such easily falsified evidence admissible.<sup>234</sup>

Refusing to testify is like saying "I do" at a wedding—its significance is self-evident. The witness refuses to answer any questions or provide any substantive testimony regarding the proceeding. Cross-examination of this witness is pointless, since there is no "testimony" to cross-examine. It is as if the government had admitted a photo or a bloody glove. Although the significance of the evidence is subject to different interpretations that might necessitate the introduction of additional rebuttal evidence, the photo or the glove itself cannot be interrogated or cross-examined, only interpreted. So too the verbal act. Therefore the refusal of a witness to testify before a jury does not violate the Confrontation Clause.<sup>235</sup>

## V. HANDLING THE EVIDENCE

### A. *Prejudice*

Prejudice occurs where there is "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."<sup>236</sup> The associative inference of guilt attached to forcing a witness to invoke the privilege before the jury might provide grounds for exclusion under Rule 403. Yet, if the witness has no privilege, due to prior conviction or plea, or the privilege has been

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232. See *Gurganus v. Guaranty Bank & Trust Co.*, 100 S.E.2d 81, 84 (N.C. 1957).

233. See FED. R. EVID. 802.

234. See *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (suggesting that there must be some "indicia of reliability" to determine whether statement may be placed before jury, despite lack of confrontation of declarant).

235. See *Bartel*, *supra* note 13, at 1417 (arguing that accomplice witness who invokes privilege should do so before jury, as "the guarantees of the Sixth Amendment's Confrontation Clause may be implicated where a jury is not permitted to learn that a prosecution witness had claimed the attorney-client privilege in response to specific questions").

236. See FED. R. EVID. 403 advisory committee's note.

obviated because of the conferral of use immunity, the negative inference flowing from the refusal to testify no longer has the same associative quality.<sup>237</sup> Compared to situations where the witness has a legitimate fear of self-incrimination, the motivation of the non-privileged witness is much more likely to be related directly to the circumstances confronting the defendant, and thus the adverse inference is in some sense brought about by the defendant.

In an adversarial system, the determination of what kinds of evidence are too prejudicial to be admissible hinges on the "rebuttability" of the evidence.<sup>238</sup> Seen in this light, prejudicial evidence is evidence that, because of its peculiar nature, prevents the defendant from challenging its credibility.<sup>239</sup> Accordingly, the determination of whether the inferences stemming from a witness's refusal to testify are rebuttable should also encompass whether they are prejudicial under Rule 403. As previously discussed, the non-testimonial nature of the act removes any concern with a Confrontation Clause violation.<sup>240</sup> That also, however, means that there is no basis on which to cross-examine.

Whether a substantive point actually requires rebutting depends on the nature of the evidence, or the content of the inference drawn from the refusal to testify.<sup>241</sup> If the government presents non-cooperative witnesses to show that important members of the criminal organization refuse to testify without cooperation agreements, the defense theoretically could attempt to rebut that claim by calling other members of the criminal enterprise. Although they would be unlikely to pursue this strategy in reality, that does not mean that the defendant lacked an opportunity to rebut the inference. It indicates, instead, that the inference argued by the prosecutor is likely to be true.

Some evidence, although potentially highly prejudicial, remains admissible under a theory of party admissions.<sup>242</sup> When the defen-

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237. See *id.*

238. See Gold, *supra* note 101, at 508 (arguing that "[w]hen the tendency of evidence to induce inferential error cannot be overcome by opposing counsel, that evidence is unfairly prejudicial").

239. See *id.* (pointing out that prejudicial evidence provides insufficient opportunity for rebuttal by opposing counsel). As Gold explains, "finding unfair prejudice under Rule 403 in the tendency to lead to inferential error advances the cause of fairness by identifying Rule 403 as a remedy for an inadequate opportunity to rebut." *Id.* at 509.

240. See *supra* notes 184-222 and accompanying text (exploring Confrontation Clause implications).

241. For a discussion of various inferences drawn from the refusal to testify, see Diane Luka-Hopson, Note, *The Existing Conflict Between the Defendant's Right of Confrontation and the Witness' Right to Avoid Self-incrimination: A Constitutional Dilemma*, 38 CATH. L. REV. 245 (1988).

242. See generally CLEARY ET AL., *supra* note 90, § 262 (defining party admissions as words or

dant takes actions constituting an obstruction of justice, for instance, "the evidence is generally admitted, despite incidental disclosure of another crime."<sup>243</sup> The prohibition against other crimes evidence, which is exceedingly prejudicial, is considered to be waived by the attempt to obstruct or impede the judicial process.<sup>244</sup>

Thus, a Rule 403 inquiry into prejudice will inevitably require a case-specific analysis of the factors at play.<sup>245</sup> The analysis will turn on the purposes for which the government seeks to elicit the act of non-cooperation, and how the other evidence produced at trial serves these purposes. The court will have to consider whether the inferences that the government attempts to draw are theoretically rebuttable. If not, those inferences are probably in violation of Rule 403 and should be excluded. Finally, the handling of the evidence, if it is allowed into the trial, must be carefully controlled through the crafting of effective jury instructions.

### B. Jury Instructions

Clearly, the court must devise instructions that communicate to the jury the precise purposes for allowing an act of non-cooperation to become an evidentiary fact at trial.<sup>246</sup> The judge must instruct the jury not to draw any unduly speculative inferences based on the act of non-cooperation.<sup>247</sup> In most cases, the jury should be prohibited from drawing any adverse inference about the content of a non-cooperative witness's testimony.<sup>248</sup> When the government has adequately shown a "conspiratorial relationship," these prohibitions on the drawing of adverse inferences may be relaxed in accordance with

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acts of a party offered as evidence against him).

243. See *id.* § 273.

244. See Maguire & Vincent, *supra* note 47, at 247-49 (arguing that spoliation evidence should be used primarily for purposes of impeachment, and not as substantive evidence).

245. See *supra* Part V.A (discussing factors that courts should consider when determining prejudice). For criticism of this case specific balancing approach of Rule 403, see D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289 (1989).

246. See Luka-Hopson, *supra* note 241, at 255 (discussing use of jury instructions to preclude jury from making adverse inferences regarding witness's Fifth Amendment claim). But see Marcotte, *The Jury Will Disregard*, 73 A.B.A. J., Nov. 1987, at 34 (citing study that found that all information presented at trial affects jury deliberations despite instructions to disregard certain evidence).

247. See Luka-Hopson, *supra* note 241, at 255 (discussing use of jury instructions to address possible inferences drawn by jury about non-cooperative witness).

248. See *Carter v. Kentucky*, 450 U.S. 288, 303 (1981) (noting that, although judge cannot prevent jury from speculating about content of testimony of non-cooperative witness, judge must use jury instructions to "reduce that speculation to a minimum."); see also *Lakeside v. Oregon*, 435 U.S. 333, 339 (1978) (stating that judge's instruction that jury should draw no adverse inferences removes adverse speculation from deliberation).

the missing witness doctrine.<sup>249</sup> In no circumstance, however, should a judge deliver a missing witness instruction which would expressly command the jury to draw the adverse inference.<sup>250</sup> Such an instruction from the court would dramatically change the significance of the witness's refusal to testify. The evidence of non-cooperation has been produced, and is equally available to both parties to argue its meaning. As one commentator has asserted, "a safe and logical test is: if counsel is free to argue it, the Court is not."<sup>251</sup> Where the government seeks to elicit "more" from the fact of non-cooperation, such as inferring what the witness would have said had the witness testified, such argument should be disallowed as overly speculative and prejudicial to the defendant.<sup>252</sup>

The appropriate posture to adopt regarding the types of permissible inferences depends on a context-specific investigation, and the court's jury instructions must reflect that investigation.<sup>253</sup> Because "[p]rejudice is largely a product of the circumstances of each case and the viewpoints of the decisionmakers confronting those circumstances,"<sup>254</sup> jury instructions must carefully reflect the particular evidentiary context in order to delimit the proper evidentiary value of a witness's refusal to testify.

#### CONCLUSION: AN ESCAPE FROM THE PRISONER'S DILEMMA

In the classic formulation of the strategic game known as the Prisoner's Dilemma, the terms "cooperation" and "defection" refer to the decisions of accused criminals, held incommunicado, to cooperate or not cooperate with each other.<sup>255</sup> In the world of criminal prosecution, by contrast, "cooperation" generally refers to a defendant's or witness's willingness to assist the authorities.<sup>256</sup> From the government's perspective, a successful resolution of the prisoner's dilemma is not the mutual resistance of non-cooperating witnesses, but

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249. See *supra* Part III.B (discussing missing witness doctrine).

250. Although case law does not establish whether a judge may give a missing witness instruction in the situation described here, an adverse comment by the judge regarding the defendant's silence is clearly impermissible. See *Lakeside*, 435 U.S. at 338-41.

251. See Julian P. Alexander, *Presumptions: Their Use and Abuse*, 17 MISS. L.J. 1, 14 (1945).

252. See *supra* Part III (investigating inferences that may be drawn from non-testifying witness).

253. See Craig M. Bradley, *Griffin v. California: Still Viable After All These Years*, 79 MICH. L. REV. 1290, 1293 n.18 (1981) (pointing out distinction between factual prescriptions based on defendant's behavior and irrational presumptions based on exercise of constitutional rights).

254. See Gold, *supra* note 101, at 503.

255. See *supra* note 2 and accompanying text (explaining "prisoners dilemma").

256. See 18 U.S.C. § 6002 (1994) (authorizing government to compel witness to testify by granting immunity to that witness); see also *supra* note 1 and accompanying text (discussing government cooperation agreements).

rather the production of all witnesses "whose testimony would elucidate the transaction." A successful resolution of the dilemma from the prisoner's perspective is a failure of the criminal justice system from the perspective of the prosecutor, and, for that matter, from that of the judicial system at large. The criminal justice system would do well, therefore, to reduce the number of opportunities available to criminal defendants to "win" at the strategic game.

The code of *omerta*—the ruthlessly enforced retributive mechanism that the Mafia uses to discourage its members from cooperating with the authorities—is one tool that organized criminals have used to "win" the Prisoner's Dilemma. By recalibrating the payoff matrix in such a way that no organized crime member will think it in his interest to cooperate with the authorities, the enterprise is able to ensure mutual non-cooperation with the government. The mob has reaped substantial rewards from this insightful application of game theory.<sup>257</sup>

Although game theorists might applaud, the government's appropriate response is to make non-cooperation a less viable option for organized crime. If the government is allowed to utilize the "non-cooperation" of a witness to the detriment of the defendant, prosecutors can at least partially undermine the effectiveness of *omerta*. Furthermore, they can do it while preserving the full legal rights of witnesses, and without unfairly jeopardizing a defendant's opportunity to rebut the adverse inferences against him. By pursuing such a strategy, the Prisoner's Dilemma may become more of a dilemma to the prisoner, and less of one to the criminal justice system.

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257. See generally REID, *supra* note 134.