Invocations as Evidence: Admitting Nonparty Witness Invocations of the Privilege Against Self-Incrimination

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Tension has been building in the courtroom. Counsel for Paul Plaintiff has laid foundational evidence showing that Wilma Witness, who is not a defendant in the case, may have assisted Dan Defendant in killing Paul's wife. Now, in the highest drama of this civil wrongful death case, counsel asks Wilma, "Did you assist in planning or carrying out the killing?" A pause, and then Wilma invokes her Fifth Amendment privilege against self-incrimination and refuses to reply.

Even if Wilma's invocation of the privilege is proper, should Paul be permitted to bring the invocation to the jury's attention and urge the jury to consider it as evidence against Dan? Does the answer change if the trial is a criminal one? These questions raise divisive constitutional and evidentiary issues.

First, does the Fifth Amendment permit the jury to consider as evidence a nonparty witness's invocation? This question may be answered by examining the policies underlying the Fifth Amendment and determining how these policies are affected when nonparty witnesses invoke their Fifth Amendment privilege.

Second, do the rules of evidence permit nonparty invocations to be admitted as evidence at trial? How is it, exactly, that nonparty invocations prove something about the parties' actions? Even if nonparty invocations do prove something, is the danger of confusing the jury so great that the invocations should be excluded anyway?

Courts' answers to these constitutional and evidentiary questions have evolved over time. Like their predecessors, modern courts hold that the Fifth Amendment prohibits using invocations as evidence in criminal cases, whether the invoking witness is the defendant or a nonparty. In contrast, the Supreme Court held in

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1 "No person . . . shall be compelled in any criminal case to be a witness against himself." US Const, Amend V.

2 Griffin v California, 380 US 609, 613-14 (1965) (holding that prosecutor's comments
1976 that in civil cases the Fifth Amendment permits juries to consider invocations made by parties to the action.4 Lower courts have subsequently struggled with the Supreme Court's constitutional analysis, although they have extended its holding to some nonparty invocations made in civil cases.5 The lower courts have also disagreed on the evidentiary prerequisites for admitting such invocations. At first, courts would not permit an invocation to be considered unless an agency relationship existed between a party and the invoking witness.6 More recently, some courts have added other relationships to the qualifying list,7 and at least one court has eliminated the relationship requirement altogether.8

By introducing systematic Fifth Amendment and evidentiary analyses, this Comment clarifies the issues surrounding the evidentiary use of nonparty witnesses' invocations of the privilege against self-incrimination. Consistent with two recent appellate decisions,9 it argues that neither the Fifth Amendment nor the Federal Rules of Evidence foreclose courts from allowing evidentiary use of "nonparty invocations." Indeed, this Comment argues that often judges should admit invocations as evidence in both civil and criminal cases. Part I of this Comment examines the Fifth Amendment and demonstrates that courts do not violate its underlying policies when they allow nonparty witness invocations to be used as evidence in civil and criminal trials. Part II turns to the constraints on using nonparty invocations as evidence. It first traces the chain of inferences that invocations must produce in

on defendant's invocation of privilege violated the Fifth Amendment).

4 United States v Johnson, 488 F2d 1206, 1211 (1st Cir 1973) (finding that neither plaintiff nor defendant has the right to benefit when a witness asserts the privilege); Billeci v United States, 184 F2d 394, 398 (DC Cir 1950) (stating that jury cannot make negative inference from invocation of privilege).

5 Baxter v Palmigiano, 425 US 308, 318-19 (1976) (contrasting civil and criminal cases and holding adverse inferences permissible under Fifth Amendment in civil cases).

6 See RAD Services, Inc v Aetna Casualty and Surety Co, 808 F2d 271, 275 (3d Cir 1986) (permitting the consideration of invocations made by employees of a party); Brink's Inc v City of New York, 717 F2d 700, 710 (2d Cir 1983) (permitting the consideration of invocations made by former employees of a party).

7 See, for example, Libutti v United States, 107 F3d 110, 123 (2d Cir 1997) (finding the relationship between a father and an adult daughter sufficient to guarantee the reliability of the invocation); Joyner v Warden, 1997 Conn Super LEXIS 2550, *21-28 (finding that attorney whose alleged misconduct gave rise to a habeas corpus petition was sufficiently related to the petitioner).

8 See FDIC v Fidelity & Deposit Co of Maryland, 45 F3d 969, 978 (5th Cir 1995) (refusing to require a special relationship between the parties).

9 See Libutti, 107 F3d at 123 (admitting an invocation made by a party's family member); Fidelity & Deposit Co of Maryland, 45 F3d at 977-98 (admitting an invocation made by a nonparty witness in a civil suit for fraud).
order to become relevant evidence and provides a method to test each link. For invocations that pass the relevancy test, it develops techniques by which judges can bolster invocations' probative value and decrease any unfair prejudice their use may incite. This Comment concludes that courts should rarely exclude relevant nonparty witness invocations in civil or criminal cases.

I. THE FIFTH AMENDMENT AND NONPARTY WITNESS INVOCATIONS

From the language of the Fifth Amendment, it appears that the privilege against self-incrimination protects only defendants in criminal trials. Yet, because of the policies underlying the text, courts have long held that the privilege extends much further and indeed covers nonparty witnesses in both criminal and civil trials. These same courts, however, remain uncertain about how the policies behind the privilege are affected when parties attempt to use the invocations of nonparty witnesses as evidence. This Part clarifies the analysis by identifying the policies that underlie the Fifth Amendment privilege and applying them specifically to nonparty witnesses.

A. The Policies Behind the Privilege

The privilege against self-incrimination was never intended to aid the truth-seeking goal of trials. Indeed, the privilege is an exception to the rule that the state has a right to every witness's

\[10\] "No person . . . shall be compelled in any criminal case to be a witness against himself." US Const, Amend V (emphasis added).

\[11\] In 1892, the Supreme Court extended the privilege to protect witnesses testifying before grand juries against self-incrimination. *Counselman v Hitchcock*, 142 US 547, 563 (1892). In 1924, the Court further expanded the privilege to cover all witnesses in all types of proceedings. *McCarthy v Arndstein*, 266 US 34, 40 (1924) (upholding the privilege's use in a bankruptcy proceeding). Thus, modern courts permit the privilege to be invoked in civil and criminal proceedings, both at trial and during discovery.

\[12\] See, for example, *Cerro Gordo Charity v Fireman's Fund American Life Insurance Co*, 819 F2d 1471, 1481-82 (8th Cir 1987) (treating such factors as the invoker's former employment relationship with a party and his extensive involvement with the events that gave rise to the case as if they were relevant to the constitutional analysis).

\[13\] See *University of Pennsylvania v EEOC*, 493 US 182, 189 (1990) (announcing that privileges contravene the public's right to every man's evidence and are thus strictly construed); *United States v Nixon*, 418 US 683, 710 (1974) (stating that the privilege is not "lightly created nor expansively construed, for [it is] in derogation of the search for truth"); Christopher B. Mueller and Laird C. Kirkpatrick, *Evidence* § 5.1 at 333 (Little, Brown 1995) ("[A] privilege should be construed to exclude no more evidence than is necessary to accomplish the purposes for which it was created.").
The privilege must appeal to other policies.

Courts and commentators generally agree that only three rationales support allowing witnesses to invoke the privilege. The first policy, entitled the "cruel trilemma," states that it would violate human dignity to force a witness to choose among self-incrimination, perjury, and contempt. Courts must therefore give the witness a fourth choice: the option to remain silent without incurring contempt liability. Without this choice, the results obtained at trial would be more accurate, but the increased accuracy would come at too high a cost to society. Although endorsed by the Supreme Court, this policy nevertheless collides with the moral principle that individuals should admit responsibility for their wrongdoing.

The second policy, often called the "fox hunter" rationale, contends that the privilege against self-incrimination is necessary to protect individual defendants (the foxes) from the prosecutor

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14 See Branzburg v Hayes, 408 US 665, 688 (1972) (stating that the public has a right to every man's evidence, except for those persons protected by privilege); 8 John Henry Wigmore, Evidence in Trials at Common Law § 2192 at 70-74 (McNaughton rev 1972) (explaining the "fundamental maxim that the public . . . has a right to every man's evidence").

15 See, for example, David M. O'Brien, The Fifth Amendment: Fox Hunters, Old Women, Hermits, and the Burger Court, 54 Notre Dame Law 26, 27-28 (1978) (arguing that "only three rationales seem fundamental"); Charles H. Rabon, Jr., Note, Evening the Odds in Civil Litigation: A Proposed Methodology for Using Adverse Inferences When Non-party Witnesses Invoke the Fifth Amendment, 42 Vand L Rev 507, 517 (1989) (supporting O'Brien's reasoning). In Murphy v Waterfront Commission of New York, the Supreme Court listed seven policies; the Court, however, counted some policies twice and added others that have subsequently been abandoned. 378 US 52, 55 (1964).


17 See O'Brien, 54 Notre Dame Law at 41-45 (cited in note 15) (discussing the moral dignity rationale for the Fifth Amendment); Robert Heidt, The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases, 91 Yale L J 1062, 1085-87 (1982) (outlining the "cruel trilemma").

18 See Murphy, 378 US at 55 (including among "our fundamental values" the "unwillingness to subject those suspected of crime to the cruel trilemma").

19 For this argument, see Friendly, 37 U Cin L Rev at 680 (cited in note 16) ("No parent would teach such a doctrine to his children; the lesson parents preach is that while a misdeed, even a serious one, will generally be forgiven, a failure to make a clean breast of it will not be."). See also Akhil Reed Amar and Renée B. Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 Mich L Rev 857, 890 (1995) ("[A]s a descriptive theory, the psychological cruelty argument simply does not hold water.").


21 The privilege protects only individuals, not collective entities. See Hale v Henkel,
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The policy addresses the fear that the government could easily abuse its formidable powers during the investigation and prosecution of crimes. For example, the privilege restrains the government from torturing or otherwise browbeating criminal suspects into confessing. It also requires the government to gather independent proof to establish the guilt of the individual at trial.

According to proponents of the third policy, the privilege has developed to protect witnesses' privacy interest in their incriminating testimony. Courts, however, have given this rationale little more than lip service and have never used it to extend the privilege beyond the reach justified by the other two rationales. For instance, when the state grants a witness immunity to satisfy the cruel trilemma and fox hunter policies, courts often compel the witness to testify, even though such compulsion surely violates the witness's privacy. Similarly, as long as the testimony

201 US 43, 69-70 (1906) (holding that a corporation has no privilege); United States v White, 322 US 694, 701 (1944) (holding that a labor union has no privilege).

22 See O’Brien, 54 Notre Dame Law at 37 (cited in note 15) (discussing the value of equality between the individual and the state); Edward W. Cleary, et al, McCormick’s Handbook of the Law of Evidence § 118 at 253 (West 2d ed 1972) (outlining the merits of the privilege during police interrogation). See also Heidt, 91 Yale L J at 1084-85 (cited in note 17) (discussing different types of fox hunter policies). The fox hunter policy is largely inapplicable in civil cases, because neither party has the vast power of the state. With a balance of power, there is less need to protect one party against the potential abuses of the other. One might worry, however, that permitting an invocation to be used as evidence burdens the use of the privilege, and thus may lead more witnesses to offer self-incriminating testimony. If so, the government’s burden in subsequent criminal investigations could be eased. This result is unlikely, however, because nonparty witnesses will not be burdened when the court draws an inference against a party; they therefore will feel little pressure to testify.

23 See Heidt, 91 Yale L J at 1083-84 (cited in note 17). But see Amar and Lettow, 93 Mich L Rev at 894 (cited in note 19) (arguing that the privilege does not prevent police brutality, but simply forces it underground).

24 See Heidt, 91 Yale L J at 1085 (cited in note 17). Wigmore attacked this rationale as circular: it argues that the government must prove its case through evidence other than self-incriminatory testimony, and yet it assumes that the government should not be able to use self-incriminatory testimony in the first place. 8 Wigmore, Evidence § 2251 at 312 n 6 (cited in note 14).

25 See O’Brien, 54 Notre Dame Law at 46 (cited in note 15) (arguing that compelled disclosure “diminishes the intrinsic worth of personal privacy”).

26 As a general matter, the privacy rationale seems an odd justification for the privilege. If it were the driving force, one would expect courts to apply the privilege as they do the Fourth Amendment and restrict its use where the government was sure that the testimony would produce valuable evidence; that is, where the invoking witness was the defendant in a criminal trial. That the opposite occurs is strong evidence that privacy is not the main justification for the privilege. See Friendly, 37 U Cin L Rev at 689-90 (cited in note 16).

27 See 8 Wigmore, Evidence § 2281 at 490-98 (cited in note 14) (discussing statutes granting immunity from prosecution); Friendly, 37 U Cin L Rev at 689 (cited in note 16) (arguing that it is impossible to square the privacy interest with immunity statutes).
presents no danger of self-incrimination, courts frequently re-
quire witnesses to offer testimony that involves a devastating
violation of their privacy.28

These three rationales reveal that the privilege against self-
incrimination is a purely personal one.29 It jealously protects the
invoking witness from any state coercion, but callously ignores
the harm to any others. Thus, the privilege rightly forbids a
prosecutor from commenting on a criminal defendant’s invocation
because the defendant himself is coerced by the state action.30
However, as the next two Parts demonstrate, a nonparty witness
is not coerced in a manner recognized by the privilege’s policies
when a prosecutor or plaintiff comments on his invocation. Thus,
the privilege should not bar such commentary.

B. Evidentiary Use Does Not Violate the Policies

Using nonparty witness invocations as evidence against a
party will never directly violate the policies underlying the privi-
lege. Regardless of whether the trial is civil or criminal,31 none of
the witness’s protected policy interests are directly harmed when
his invocation is used against a party. The witness can escape the
cruel trilemma and protect his privacy32 by invoking the privilege
at will33 and refusing to testify. Moreover, the balance of power
between the witness and the government remains unchanged af-
fter the invocation, because the government has gained no new
ability to interrogate the witness or convict him by his silence.

28 See Friendly, 37 U Cin L Rev at 689 (cited in note 16) (giving the example of a
mother forced to testify about her son’s possession of a murder weapon); In re Commis-
sioner of Social Services, 72 AD2d 770, 421 NYS2d 394, 394-95 (1979) (holding that
the privilege does not protect against disgrace and requiring a woman to testify about the pa-
ternity of her child).
29 See Cleary, et al, McCormick’s Evidence § 120 at 255 (cited in note 22) (writing that
the privilege is a personal one and that courts therefore rest on “questionable grounds”
when they refuse to use nonparty witness invocations as evidence because of supposed in-
fringements on the privilege). See also Rogers v United States, 340 US 367, 371 (1951)
(explaining that the privilege against self-incrimination is solely for the benefit of the wit-
ness and that “a refusal to answer cannot be justified by a desire to protect others from
punishment”).
30 See Griffin v California, 380 US 609, 613-14 (1965) (“[C]omment on the refusal to
testify is a remnant of the inquisitorial system of criminal justice.”).
31 Wigmore recognized that the Fifth Amendment did not stand in the way of admit-
ting nonparty witness invocations in criminal cases. 8 Wigmore, Evidence § 2272 at 437
(cited in note 14).
32 But note that drawing an inference from an invocation does violate the privacy of
the individual to some extent by extricating information about the individual’s previous
behavior. Nevertheless, the privacy violation is no greater than that incurred by any wit-
ness when questioned, and it cannot preclude an inference by itself.
33 Using the witness’s invocation as evidence does not limit the circumstances in which
the witness may assert the privilege.
Court decisions that reach the opposite conclusion are unpersuasive, because they conflate evidentiary concerns with the Fifth Amendment's constraints. Courts not admitting invocations do not explain their reasoning; they simply rely on older precedent. A close look at these precedents, however, reveals that the judges who crafted the rule against admitting nonparty invocations as evidence rested their decisions not on the policies underlying the Fifth Amendment but on evidentiary concerns: they doubted the probity and relevance of invocations. Because the judges found the invocations inadmissible based on their dubious evidentiary value, they never conducted a probing Fifth Amendment analysis. The opinions never discuss the cruel trilemma, the fox hunter's rationale, the privacy rationale, or any other policy underlying the privilege; and subsequent courts have not corrected that deficiency. Thus, while modern courts are certainly bound by the Fifth Amendment, they should be neither bound nor persuaded by these opinions. Although the string of precedent is a century long, it fundamentally misconstrues an evidentiary holding as a constitutional one.

But even though using nonparty witness invocations as evidence does not directly violate the policies underlying the Fifth Amendment, this fact does not resolve the constitutional issue, because a state action may still indirectly violate the Fifth Amendment policies if it unduly burdens the privilege's use. Several early cases held that when the state responded to invocations with automatic sanctions such as loss of the witness's job, it overburdened the use of the privilege. In Baxter v Palmigiano...

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34 The one modern judge who criticized the constitutionality of using nonparty witness invocations as evidence in civil trials did so by analogizing to criminal cases. He reasoned that using nonparty witness invocations as evidence in criminal cases violated the Fifth Amendment and that there was no reason to distinguish civil witnesses from their criminal counterparts. See Lionti v Lloyds Insurance Co, 709 F2d 237, 246 n 5 (3d Cir 1983) (Stern dissenting). He was correct in finding no Fifth Amendment reason to distinguish civil and criminal cases. However, as the text following this note explains, the criminal cases asserting that the Fifth Amendment forbids using nonparty witness invocations as evidence are unpersuasive.

35 See, for example, United States v Victor, 973 F2d 975, 979 (1st Cir 1992) (citing older precedent); United States v Johnson, 488 F2d 1206, 1211 (1st Cir 1973) (same).

36 See Beach v United States, 46 F 754, 755 (Cir Ct N D Cal 1890) (opinion by Field) (calling any inferences drawn from invocations unjustifiable on evidentiary grounds); Bil loci v United States, 184 F2d 394, 397-98 (DC Cir 1950) (same).

37 See Leftowitz v Turley, 414 US 70, 82-84 (1973) (holding that the automatic loss of state contracts burdens the invocation too heavily); Uniformed Sanitation Men Association v Commissioner of Sanitation, 392 US 280, 283-84 (1968) (holding the same for loss of city job as a sanitation worker); Gardner v Broderick, 392 US 273, 278-79 (1968) (holding the same for loss of police job); Garrity v New Jersey, 385 US 493, 497-98 (1967) (same); Spevack v Klein, 385 US 511, 516 (1967) (holding the same for disbarment).
however, the Supreme Court upheld the constitutionality of Rhode Island prison rules that permitted a disciplinary board to draw inferences against an inmate when he invoked his privilege. Endorsing the rule that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them," the Court drew a line between automatic civil penalties and evidentiary use of invocations in civil cases. Subsequent courts have thus cited Baxter for the rule that inferences indirectly violate the policies of the Fifth Amendment only when they lead to direct and automatic civil sanctions against the person invoking the privilege.

Applied to the case of a nonparty witness, Baxter indicates that courts do not overburden the privilege when they admit a nonparty witness's invocation as evidence against a party in a civil case. Indeed, courts have recognized that such evidentiary use imposes only a de minimis burden on the witness that certainly does not rise to the level of the direct civil sanctions Baxter forbids.

Courts have failed to recognize, however, that Baxter compels the same result in criminal cases. The potential consequences to defendants of admitting nonparty witness invocations as evidence in criminal cases is more severe, to be sure. But the effect on the witness still falls short of Baxter's standard—a criminal penalty imposed on the defendant does not translate into a direct civil sanction against the witness. Thus, the Fifth Amendment per-
mits juries to use nonparty witness invocations as evidence in criminal, as well as civil, cases.\textsuperscript{45}

II. APPLYING THE RULES OF EVIDENCE TO NONPARTY WITNESS INVOCATIONS

Although the Fifth Amendment does not bar admitting nonparty witness invocations into evidence at trial, to be admissible the invocations must meet the requirements of the Federal Rules of Evidence.\textsuperscript{46} The Rules establish two prerequisites for admissibility: (1) the evidence must be relevant,\textsuperscript{47} and (2) the probative value of the evidence must not be substantially outweighed by any unfair prejudice it creates.\textsuperscript{48} This Part measures invocations against these standards, develops criteria that will allow judges to do the same at trial, and concludes that invocations are often admissible under the Federal Rules of Evidence.

A. Meeting the Relevance Requirement

Courts may admit only relevant evidence at trial.\textsuperscript{49} Rule 401 of the Federal Rules of Evidence establishes a two-pronged test by which relevance is to be determined. First, the proffered evidence must tend to make some fact appear "more probable or less

\textsuperscript{45} This conclusion does not change even if a nonparty witness invocation is the only evidence supporting the verdict against the party. Lower courts have assumed that when the\textit{ Baxter} Court prohibited resting a verdict on a party's invocation alone, it also precluded verdicts resting entirely on invocations made by nonparty witnesses. See, for example, \textit{FDIC v Fidelity & Deposit Co of Maryland}, 45 F3d 969, 977-79 (5th Cir 1995) (finding the evidentiary use permissible where the jury had been instructed not to find civil liability solely on a witness invocation); \textit{Libutti v United States}, 107 F3d 110, 120-25 (2d Cir 1997) (noting that the nonparty witness invocation in the civil case before it was not the sole evidence against the party). The result in\textit{ Baxter}, however, was required to avoid an indirect violation of the Fifth Amendment: if a party's own invocation leads to a civil penalty, her use of the privilege is unconstitutionally burdened. See notes 37-41 and accompanying text. This result does not restrict the use of invocations made by nonparty witnesses, because they face no direct penalties for invoking. Even if a nonparty witness's invocation is the only evidence against a party, the resulting verdict does not burden the witness's use of the privilege beyond\textit{ Baxter}'s limit. The Fifth Amendment is therefore satisfied.

\textsuperscript{46} Because the Federal Rules of Evidence serve as the model for most state evidence codes, this Comment adopts them as the standard against which to measure invocations.

\textsuperscript{47} FRE 402 ("Evidence which is not relevant is not admissible."); FRE 401 (defining "relevant" evidence).

\textsuperscript{48} FRE 403.

\textsuperscript{49} "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." FRE 402. See also Mueller and Kirkpatrick, \textit{Evidence} § 4.2 at 188-89 (cited in note 13) (discussing the admissibility of relevant evidence).
probable than it would be without the evidence."\textsuperscript{50} The Advisory Committee Notes to Rule 401 counsel that all evidence with any probative force satisfies this prong.\textsuperscript{51} Therefore, evidence need not establish some minimum quantum of probability in order to be relevant.\textsuperscript{52} Second, the fact made more probable by the evidence must be of "consequence to the determination of the action."\textsuperscript{53} Taken together, these rules craft a liberal standard of broad admissibility.\textsuperscript{54}

Given Rule 401's two prongs, a nonparty witness's invocation of the privilege will be relevant only if it produces the following chain of inferences. First, the invocation must tend to prove that the witness engaged in certain incriminating activities. Second, foundational evidence must demonstrate that the defendant\textsuperscript{55} directly participated in the proven activities with the witness. Third, the defendant's participation in these activities must fulfill an element of the cause of action against him. Under Rule 401, judges may properly conclude that a nonparty witness invocation is relevant only if each of these links is established.\textsuperscript{65}

1. Step one: The invocation tends to prove that the witness engaged in certain incriminating activity.

The name of the privilege against self-incrimination suggests that a witness's invocation proves that the withheld answer would incriminate the witness. The actual result, however, is more complex. This Part examines what facts give a nonparty

\textsuperscript{50} FRE 401.

\textsuperscript{51} FRE 401 Advisory Committee's Notes.

\textsuperscript{52} Id (asserting that any higher standard would be "unworkable and unrealistic"). See also Mueller and Kirkpatrick, \textit{Evidence} § 4.1 at 182 (cited in note 13) (explaining that admissible evidence need not render more probable than not a fact to be proved).

\textsuperscript{53} FRE 401.

\textsuperscript{54} See, for example, \textit{Old Chief v United States}, 117 S Ct 644, 649-50 (1997) (explaining the dangers of unfair prejudice but finding the evidence relevant and therefore admissible); \textit{International M \& A Consultants, Inc v Armac Enterprises, Inc}, 531 F2d 821, 823 (7th Cir 1976) (citing Rule 401 as a "liberal standard").

\textsuperscript{55} In some cases, the invocation of a nonparty witness will harm the plaintiff rather than the defendant. However, this Comment will assume for the sake of consistent terminology that the invocation is always introduced by the plaintiff in her own aid. For an example of an invocation harming the plaintiff, see \textit{Cerro Gordo Charity v Fireman's Fund American Life Insurance Co}, 819 F2d 1471 (8th Cir 1987). In that case, a charitable trust was the beneficiary of several life insurance policies on an individual. When the individual died, the trust sued the insurance company to recover. The court admitted the invocation of a former board member of the trust to suggest that he had committed fraud in causing the death of the individual. Id at 1475-76.

\textsuperscript{65} Note that relevance is only the first step in admissibility. Invocations must also meet FRE 403's balancing test that measures probative value against unfair prejudice. See Part II.B.
witness legal cause to invoke the privilege and pins down exactly what the invocation proves.

The court—not the invoking witness—decides whether an invocation of the privilege against self-incrimination is justified. Moreover, unlike a criminal defendant's privilege, a nonparty witness's privilege springs into existence only after a specific question has been asked. Therefore the witness must personally appear at judicial proceedings and invoke his privilege question by question.

Despite courts' strict procedural control over invocations, three factors make the privilege widely available. First, a witness may assert the privilege in any type of official proceeding and at

87 See Hoffman v United States, 341 US 479, 486 (1951) ("It is for the court to say whether his silence is justified and to require him to answer if it clearly appears to the court that he is mistaken.") (citations omitted); United States v Melchor Moreno, 536 F2d 1042, 1049 (5th Cir 1976) ("A witness may not withhold all of the evidence demanded of him merely because some of it is protected from disclosure by the Fifth Amendment. A blanket refusal to testify is unacceptable."). See also Cleary, et al, McCormick's Evidence § 136 at 289 (cited in note 22) (discussing the privilege of a nonparty witness).

88 Most commentators agree that there are three analytically distinct privileges: the defendant's, the suspect's, and the witness's. See, for example, Charles R. Nesson and Michael J. Leotta, The Fifth Amendment Privilege Against Cross-Examination, 85 Georgetown L J 1627, 1631 (1997) (explaining these three privileges). The criminal defendant's privilege permits him to refuse to take the stand at all. See Mullaney v United States, 79 F2d 566, 578-80 (1st Cir 1935); 8 Wigmore, Evidence § 2268 at 406 (cited in note 14) (noting that courts permit a criminal defendant to refuse to even be sworn as a witness). It is thus broader than the nonparty witness's privilege and lacks the factual underpinning that gives the witness's privilege its probative value. The witness's privilege may be the most narrow of the three privileges, see Nesson and Leotta, 85 Georgetown L J at 1631, and it is the only one with which this Comment is concerned.

89 See United States v Seifert, 648 F2d 557, 560-61 (9th Cir 1980) (ruling that the privilege arises only when a witness asserts it as to a question put to him).

90 See 8 Wigmore, Evidence § 2268 at 411 (cited in note 14) (stating that the privilege does not override the party’s right to call the witness and question him until the privilege is exercised); James Wm. Moore, 4 Moore's Federal Practice ¶ 26.11[1] at 172 (Matthew Bender 2d ed 1996) (explaining that the term “privileged” as used in Federal Rule of Civil Procedure 26(b), which governs discovery, mirrors the concept of privilege used in the law of evidence).

91 See Heidt, 91 Yale L J at 1074 n 52 (cited in note 17). See also Moll v US Life Title Insurance Co, 113 FRD 625, 628 (S D NY 1987) (applying the rule to witnesses testifying at depositions, because “the constitutional privilege against self-incrimination applies to any proceeding in which testimony is sought”).

92 See Lefkowitz v Turley, 414 US 70, 77 (1973) (The Fifth Amendment “not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”); McCarthy v Arndstein, 266 US 34, 40 (1924) (“The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.”).
any stage of litigation, whether at trial or during discovery. Second, the judge must give the witness the benefit of the doubt. Third, an extremely low threshold of danger of incrimination triggers the privilege's protection. The response itself need not directly incriminate the witness: the Fifth Amendment guarantees the right to invoke as long as the answer would furnish facts that could constitute "a link in the chain of evidence" needed to prosecute the witness. Furthermore, the court may not require the witness to disclose the protected response. On the contrary, the court must uphold the claim of privilege any time counsel can show how a prosecutor could, by building on the answer, proceed through various steps to link the witness to a crime. Invoking the privilege thus may be wholly consistent with the witness's actual innocence of any crime.

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See Cleary, et al, *McCormick's Evidence* § 135 at 288-89 (cited in note 22) ("Thus it is clear that the privilege extends to a party or witness in civil litigation, not only during trial but in pretrial discovery proceedings."). See also *Wehling v Columbia Broadcasting System*, 608 F2d 1084, 1087 (6th Cir 1980) (recognizing the use of the privilege in depositions); *In re Folding Carton Antitrust Litigation*, 609 F2d 867, 870-72 (7th Cir 1979) (same); *Gordon v FDIC*, 427 F2d 578, 580 (DC Cir 1970) (recognizing the use of the privilege in response to interrogatory questions). See generally 8 Wigmore, *Evidence* § 2252 at 326-38 (cited in note 14) (discussing the kinds of proceedings affected by the constitutional sanction).

See *Hoffman*, 341 US at 486 (counseling that "[t]his provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure"); *United States v Coffey*, 198 F2d 438, 440 (3d Cir 1952) ("Finally, in determining whether the witness really apprehends the danger in answering a question, the judge cannot permit himself to be skeptical.").

As one scholar explains, the privilege "may be used whenever information sufficiently relevant to civil liability to be discoverable provides even a clue that might point a hypothetical government investigator toward evidence of criminal conduct." *Heidt*, 91 Yale L J at 1065 (cited in note 17).

*Hoffman*, 341 US at 486. See also *Heidt*, 91 Yale L J at 1071-72 (cited in note 17) (arguing that courts rarely invalidate an invocation on the grounds that a response would not incriminate).

See *Hoffman*, 341 US at 486-87. Instead, "[t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Id. See also *Malloy v Hogan*, 378 US 1, 11-12 (1964) (reaffirming *Hoffman* and ruling that the context in which the questions are asked makes a difference); *Heidt*, 91 Yale L J at 1072-73 (cited in note 17) (explaining the ease of showing the incriminatory potential of a possible response).

See *Coffey*, 198 F2d at 440 (formulating the argument test and saying, "[s]pecifically, we think the problem is what to do about apparently innocuous questions, the answers to which are admittedly not incriminating in themselves, when there are no additional facts before the Court which suggest particular connecting links through which the answer might lead to and might result in incrimination of the witness. We think the Supreme Court is saying that such facts are not necessary to the sustaining of the privilege."). See also *Emspak v United States*, 349 US 190, 199 n 18 (1955) (quoting and approving the *Coffey* test).

*Grunewald v United States*, 353 US 391, 421-23 (1957) (holding that invoking the
Given the breadth of the nonparty witness's privilege, what does its invocation prove? The answer depends on the witness's reason for invoking. An invocation proves the most when a witness asserts the privilege in order to avoid giving an incriminatory answer to a narrowly phrased question. Suppose, for example, that the witness asserts his privilege in response to the question, "Did you pick the jewelry store lock for the defendant on the night the store was robbed?" If he invokes because a truthful answer would be, "yes," the invocation specifically proves the witness's incriminating activity.

On the other hand, an invocation proves much less when a witness invokes merely to avoid the danger of entrapment. Entrapment arises when, even though the witness's immediate answer denies any wrongdoing, a series of such denials will lead the prosecutor to a question that will produce an invocation, thereby locating incriminating evidence. If a witness fears entrapment, he may invoke his privilege as soon as the examiner's questions begin to probe potentially incriminating facts. For example, even if the witness could answer "no" to the lock-picking question, he could legally invoke out of concern that his answer might lead the prosecutor to ask another specific question to which a truthful answer would be "yes." Invocations made to avoid entrapment thus prove nothing specific about the invoking witness's conduct. These invocations do, however, indicate that some incriminating circumstances exist, because if there were no incriminating behavior, the witness could not be entrapped. In the absence of in-
criminating circumstances, the witness would have no legal basis to invoke.\textsuperscript{72}

Thus, at a minimum, every \textit{proper}\textsuperscript{73} invocation proves that the witness engaged in some incriminating activity related to the questions posed.\textsuperscript{74} This minimum probative floor is critically important, because neither judges nor jurors can discern which reason caused the witness to invoke. If some invocations proved nothing, judges would have to exclude all invocations, because they would be unable to distinguish the probative invocations from the nonprobative ones. Judges, however, may assume that \textit{every} invocation has at least the probative force of one made to avoid entrapment; therefore, they may assign the same minimal benchmark value to all invocations. Judges can thus be satisfied that every proper invocation meets the first prong of Rule 401: it makes some fact appear "more probable or less probable than it would be without the evidence,"\textsuperscript{5} and thereby establishes the first link in the chain of inferences.\textsuperscript{76}

Moreover, every invocation has additional negative probative force. The Supreme Court has acknowledged that jurors expect parties to present evidence if they have it and that jurors draw negative inferences against parties who fail to produce such evidence.\textsuperscript{77} Often, however, parties fail to produce evidence not because it does not exist, but because it has been protected by a witness's privilege. Making jurors aware of a witness's invocation may thus prevent them from drawing an unfounded inference against the party whose evidence has been blocked.\textsuperscript{78} Thus, the negative probative force of invocations also meets the first prong of Rule 401's relevance test.

\textsuperscript{72} See Id.

\textsuperscript{73} This Comment addresses the issue of whether courts can accurately judge the foundation of invocations in Part II.A.A.

\textsuperscript{74} See Noonan, 41 Va L Rev at 342 (cited in note 71) ("Whenever the privilege is invoked by a witness not a criminal defendant, its use is consistent only with the existence of circumstantial evidence of guilt. Hence a direct inference may always be made that circumstantial evidence exists that the witness has committed a crime.").

\textsuperscript{75} FRE 401.

\textsuperscript{76} The great danger of invocations is that juries will overvalue invocations as evidence. This Comment addresses that danger in its discussion of the potential prejudicial effects of invocation in Part II.B.

\textsuperscript{77} Carter v Kentucky, 450 US 288, 301 (1981) (explaining that even when there is no adverse comment a jury "may well draw adverse inferences from a defendant's silence").

\textsuperscript{78} See Cerro Gordo Charity, 819 F2d at 1482; Heidt, 91 Yale L J at 1123-24 (cited in note 17) (arguing that making jurors aware of a witness invocation shows why the plaintiff could not "establish his case from the invoker's lips"); Stephen A. Saltzburg, A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence, 66 Cal L Rev 1011, 1019 (1978) (analyzing the negative inferences from invocation).
In deciding which invocations are relevant, a judge must first establish that each witness has sufficient legal grounds for invoking the privilege. Once the judge knows that the witness will invoke or has invoked the privilege, the judge should determine the basis for the witness's invocation by exercising her authority under Rule 104(b) to interrogate the witness outside of the jury's presence. If there is no danger that the witness's testimony will incriminate him, the judge should require the witness to testify. If, however, danger of incrimination exists, the judge must both honor the privilege and recognize that the invocation has some probative value. Thus, the first link of the inferential chain has been forged, and the judge should proceed to the second link.

2. Step two: The defendant directly participated with the witness in the proven activities.

Proper invocations always tend to prove that the nonparty witness participated in activities that could incriminate him. This

79 The timing of this discovery is unimportant. As long as the judge can accurately gauge the propriety of the invocation—and thus screen improper ones from the jury—the evidentiary value of invocations will be preserved. Judges will likely learn about invocations far in advance of trial because of the scope of discovery and parties' incentives to bring invocations to the judge's attention. See FRCrP 12(b)(3) (providing for pretrial motions to suppress evidence); United States v Victor, 973 F2d 975, 979 (1st Cir 1992) (stating the federal practice norm that prosecutors are required to inform the judge if they believe a witness will invoke his Fifth Amendment privilege). However, even if the witness surprises everyone and invokes for the first time in front of the jury, the judge can still carry out his role.

80 FRE 104(a), (c). Section (a) directs the judge to decide preliminary questions concerning the existence of a privilege. Section (c) permits the judge to conduct the hearing outside the jury's presence.

81 The judge will have enough information to make an informed decision even when the invocation is contained in a civil deposition transcript. Although judges are not present at depositions and may not immediately test the basis of the invocation, see FRCP 28-30 (allowing parties to designate an officer before whom depositions may be taken and proceed to take the depositions, in most cases without getting permission from the court to do so), the attorneys at the deposition are allowed to ask questions regarding the propriety of the invocation. Furthermore, judges can insist that witnesses assert the privilege question by question. See Davis v Fendler, 650 F2d 1154, 1160 (9th Cir 1981) (finding that the district court had a right to request specific information in order to make a decision on the privilege); Hudson Tire Mart, Inc v Aetna Casualty & Surety Co, 518 F2d 671, 674 (2d Cir 1975) (reasoning that a witness can only invoke immunity after counsel has asked an incriminating question); Moore, 4 Moore's Federal Practice ¶ 26.111(1) at 173-74 (cited in note 60) (explaining that a witness cannot make a blanket refusal to participate in discovery). In this manner, a record develops that the judge can use to determine whether the invocation of the privilege was justified. See SEC v First Financial Group of Texas, Inc, 659 F2d 660, 668-69 (5th Cir 1981) (explaining that even if a party has a legitimate claim of privilege to certain inquiries, he may not have a legitimate claim of privilege to remain totally silent); Capitol Products Corp v Hernon, 487 F2d 541, 544 (8th Cir 1973) (holding that defendant was required specifically to establish danger of incrimination as to each question asked).
fact alone, however, is insufficient to establish that the invocation
is relevant to the cause of action against the defendant. Under
the second prong of Rule 401’s relevance test, the fact made more
probable by the invocation must be “of consequence to the deter-
mination of the action.”\textsuperscript{82} Thus, the nonparty witness invocation
must enable the factfinder to infer something about the defendant’s actions. In addition, before Rule 401 is satisfied, there
must be proof that the defendant’s actions relate to one of the
elements of the charge.\textsuperscript{83}

To forge the link between the invocation and the defendant’s
actions, the plaintiff must establish some relationship between
the invoking witness and the defendant. In turn, this relationship
must warrant the conclusion that the defendant and the witness
participated together in the activities that could incriminate the
witness.\textsuperscript{84} The strongest example is an employment or agency rel-
ationship that existed at the time of the activity.\textsuperscript{85} For instance,
an absolute link would be established if the witness was the defen-
dant’s employee or agent at the time he participated in the ac-
tivities and his actions can be directly attributed to the defen-
dant. Other types of relationships can also satisfy the second link.
Evidence connecting the defendant and witness to the single ac-
tivity that gave rise to the case would present powerful proof of
similar conduct. For example, if an allegedly fraudulent loan
were at the heart of a case, proof that the witness received the
loan from the defendant would establish a close link between the
conduct of the two individuals.\textsuperscript{86} In contrast, proof of a loose rela-
tionship, such as a coworker relationship in a large corporate de-
partment, would lack sufficient predictive value. At most, such
evidence could show that both individuals engaged in the same
type of business activity; it would fail to prove that they did so in
the same incriminating manner.

In short, while the judge and the attorneys are out of the
jury’s presence, the judge should require the plaintiff to offer

\textsuperscript{82} FRE 401.
\textsuperscript{83} See Part II.A.3.
\textsuperscript{84} See Alfred Hill, Testimonial Privilege and Fair Trial, 80 Colum L Rev 1173, 1182
(1980) (noting that, whatever the invocation of the privilege may reveal about the witness,
it may reveal nothing regarding the defendant’s innocence).
\textsuperscript{85} In fact, this is the only evidence that courts would accept prior to 1995. See, for ex-
ample, Brink’s Inc v City of New York, 717 F2d 700, 709-10 (2d Cir 1983) (holding that in-
vocations of former employees are admissible).
\textsuperscript{86} See, for example, FDIC v Fidelity & Deposit Co of Maryland, 45 F3d 969, 977 (5th
Cir 1995) (allowing the jury to draw inferences from the silence of a witness who received
fraudulent loans from the defendant). Another example of a single transaction relation-
ship would be one between a drug seller and a drug buyer.
proof establishing a close relationship between the activities of the invoking witness and those of the defendant. In order to proceed to the third link, the judge must be satisfied that the plaintiff's proof of a relationship would allow the jury to conclude that the defendant directly participated (either actually or by attribution) in the same activities as the witness. If the judge is so satisfied, he should exercise his power under Rule 611(a) and require the plaintiff to present her foundational evidence of a relationship to the jury before the witness invocations may be offered as evidence. In this way, the judge can reinforce that the invocation's relevance depends on the jurors' assessment of the foundational evidence.


Finally, the judge should test whether the actions attributed to the defendant help establish a requisite element of the cause of action. If so, the actions are "of consequence" to the outcome of the case as Rule 401 requires. In practice, this test involves three steps. First, the judge must reason backwards from the witness's invocation and infer what actions may have created the danger of incrimination. An invocation proves the fact that the witness engaged in potentially incriminating activities, and activities incriminate only if they help establish an element of a criminal charge. Thus, the judge can narrow the range of activities suggested by an invocation by referring to the elements of the potential charge facing the witness. The judge may infer the potential charge in turn from independent evidence about the witness's activities and from the questions asked of the witness.

FRE 103(c) ("In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof."); Rabon, Note, 42 Vand L Rev at 549 (cited in note 15) (making a suggestion similar to the one in the text). See FRE 611(a) (granting courts the power to control the mode and order of questioning witnesses). According to the Advisory Committee Note, this power encompasses all trial management issues that developed under common law and that "can be solved only by the judge's common sense and fairness in view of the particular circumstances."

See Part II.A.1.

Judge Winter has sharply criticized giving weight to the questions posed by lawyers in determining the underlying activities of the witness. He argues that doing so allows the lawyers to testify without having any real foundation in the witness's experience. Brink's, 717 F2d at 715-17 (Winter dissenting). But his criticism is overstated. The answers to questions are always in part defined and explained by the questions themselves. Moreover, judges have substantial authority to limit and shape the questions that lawyers may ask and thus to prevent much of the abuse that concerns Judge Winter. For a discussion of ways in which judges may limit the prejudice of invocations, see Part II.B.
using his knowledge of the relationship between the witness and the defendant, the judge must infer the defendant's likely actions from those of the witness. And third, the judge must determine whether the defendant's actions tend to establish one of the elements of the cause of action.

To illustrate this test, suppose that a defendant is charged with making a fraudulent loan. The plaintiff proves that a witness gave the defendant questionable payments prior to receiving a loan from him. The witness invokes his privilege with respect to all questions concerning the loans. Under step one, the judge could infer from the potential charge against the witness (such as offering a kickback to receive a loan) that the witness's actions regarding receipt of the loan would tend to incriminate him. Under step two, the judge could infer that—given the witness's invocation and knowing the relationship between the witness and the defendant—the jury could find it more likely that the defendant acted in an improper manner with respect to the loan. Thus, under step three, the judge could conclude that the nonparty witness's invocation was relevant, because the defendant's action tends to establish one of the elements of the cause of action.

4. Judges' ability to test invocations accurately.

Judges who apply the tests described above will rarely, if ever, mistakenly admit invocations that have no evidentiary value. To begin with, the pool of witnesses who could invoke illegitimately is quite small. First, such witnesses must be completely innocent of all incriminating circumstances. Second, these same witnesses must be closely connected to one of the parties. And third, their activities must be relevant to an element of the charge against the defendant.

The subset of these witnesses, innocent but closely linked to the case, who will invoke is even smaller. By definition, these witnesses can clear themselves by testifying. Few indeed will instead convict themselves in the eyes of the public by falsely invoking the privilege. Thus, even if critics are correct in claiming

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91 The correlation between the activities will depend on the type of relationship. Thus, if the relationship was an agency one, the defendant's actions will be deemed to be the same as those of the witness. On the other hand, if the relationship was a transactional one, the actions will complement each other, as in the example of a witness who sold drugs to the defendant.

92 See Fidelity & Deposit Co of Maryland, 45 F3d at 977-79 (admitting the nonparty witnesses' invocations under a similar set of facts).

93 See 8 Wigmore, Evidence § 2272 at 426 (cited in note 14) (noting the "layman's natural first suggestion . . . that the resort to privilege in each instance is a clear confession of crime").
that judges are prone to misjudge invocations, the other factors that narrow potential invokers ensure that the judge's initial decision is checked and double checked. Consequently the surviving invocations constitute relevant, reliable evidence.

5. Responding to the critics.

Two groups of critics have argued that courts should never permit evidentiary use of nonparty witness invocations of the privilege against self-incrimination. The first group claims that invocations have no probative value and that their admission penalizes a party with unfounded inferences. These critics contend that such a penalty is patently unfair when the penalized party exercises no control over the invoking witness. As the discussion above demonstrates, however, assertions of the privilege against self-incrimination have independent probative value, and their admission "penalizes" a party only by helping to prove a fact against him.

A second group of critics reasons that invocations are akin to hearsay evidence, because counsel may not interrogate invoking witnesses. These critics argue that invocations should thus be excluded. They ignore, however, crucial differences between invo-

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94 See, for example, Ray V. Hartwell III and Douglas W. Kenyon, Reconciling Fifth Amendment Claims and the Factfinding Process in Civil Antitrust Litigation, 26 Antitrust Bull 633, 655-58 (1981) (arguing that judges sometimes permit invocations to be made that have no legal foundation); Dennis J. Bartlett, Note, Adverse Inferences Based on Nonparty Invocations: The Real Magic Trick in Fifth Amendment Civil Cases, 60 Notre Dame L Rev 370, 386-87 (1985) (arguing that giving evidentiary weight to nonparty invocations is not sufficiently justified by the cases). Invocations are improper whenever the witness would not actually incur a danger of incrimination by testifying. Thus, a witness who invoked after her incriminating facts had been made harmless to her by a statute of limitations or grant of immunity would also be invoking improperly. However, these invocations would still have the same evidentiary value as proper ones, so for the purposes of this analysis, they will be treated as such.

95 See Rabon, Note, 42 Vand L Rev at 531-32 (cited in note 15) (listing the criticisms).

96 See, for example, Lionti v Lloyds Insurance Co, 709 F2d 237, 245-46 (3d Cir 1983) (Stern dissenting); Michael M. Baylson, The Fifth Amendment in Civil Antitrust Litigation: Overview of Substantive Law, 50 Antitrust L J 837, 844 (1982) ("An adverse inference is clearly improper against a defendant which has no 'control' over a witness who invokes the privilege or other relationship with the witness sufficient to warrant association of the witness with the party."); Hartwell and Kenyon, 26 Antitrust Bull at 662-63 (cited in note 94) (arguing that "since a party's control over the evidence withheld provides the basis for the inference, comment should not be allowed where the party has not caused an individual's silence").

97 The Federal Rules of Evidence define hearsay evidence as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FRE 801(c).

98 See, for example, Brink's, 717 F2d at 715-17 (Winter dissenting) (analogizing allowing negative inferences to the hearsay exception for declarations against interest).
cation evidence and hearsay evidence. To begin, invocations are susceptible to fewer testimonial defects than hearsay. In general, testimonial evidence may contain four possible errors: defects in perception, defects in memory, defects in narration or communication, and the possibility of fabrication.\textsuperscript{29} Each of these errors may occur with hearsay evidence, and the probability of error is magnified, because hearsay testimony usually involves two people, creating two opportunities for each defect to occur.

In contrast, invocations of the privilege against self-incrimination are less susceptible to testimonial defects. Defects in the witness’s perception and memory are unlikely to affect the invocation’s quality as evidence: invoking the privilege does not require the witness to notice or recall particular details, and the judge tests the witness’s recollection, thereby guaranteeing the basis for the invocation.\textsuperscript{100} In addition, the jury is not likely to be misled by faulty narration\textsuperscript{101} or fabrication, because the judge can detect false invocations.\textsuperscript{102} Finally, because a witness invokes alone, the opportunity for defects is reduced across the board.

Powerful checks on testimonial accuracy further guarantee the reliability of invocations.\textsuperscript{103} While the unavailability of cross-examination provides a compelling rationale for the exclusion of hearsay testimony,\textsuperscript{104} the same rationale does not apply to invocations, because judges can cross-examine an invoking witness and ensure the propriety of the invocation.\textsuperscript{105} Moreover, invocations are made under oath in formal judicial proceedings. The formality decreases the danger of fabrication and increases the likelihood that the witness will take the proceedings seriously and therefore make accurate invocations.\textsuperscript{106} Hearsay statements, in


\textsuperscript{100} See Hoffman, 341 US at 486 ("It is for the court to say whether his silence is justified and to require him to answer if 'it clearly appears to the court that he is mistaken.'") (internal citations omitted).

\textsuperscript{101} There is little room for the witness to confuse "I assert my privilege against self-incrimination."

\textsuperscript{102} See Part II.A.4.

\textsuperscript{103} See Wright and Graham, 30 Federal Practice and Procedure: Evidence § 6323 at 39-44 (cited in note 99) (discussing testimonial checks such as the oath and cross-examination).

\textsuperscript{104} See id § 6325 at 49-50 (explaining the lack of cross-examination as the conventional justification for the hearsay rule).

\textsuperscript{105} See Hoffman, 341 US at 486-87.

\textsuperscript{106} See Wright and Graham, 30 Federal Practice and Procedure: Evidence § 6326 at 52-.56 (cited in note 99). The justification of demeanor evidence expands on the oath rationale by positing that a witness at court will be inspired by the solemnity of the situation and the presence of the judge to concentrate more intently on correctly remembering and narrating his testimony. See id § 6327 at 56-63. See also Penfield v Venuti, 589 F Supp 250,
contrast, are uttered out of court, where most declarants do not speak with the care and deliberation of witnesses at trial.

In sum, it is incorrect to classify nonparty witness invocations as another category of hearsay evidence. Doing so overlooks the differences between the two types of evidence with respect to both reliability and procedural safeguards. Invocation evidence is inherently more reliable than hearsay testimony, and invocations are subject to more reliability checks than hearsay. Therefore, courts should not withhold invocations from the factfinder solely because one check—lawyers' cross-examination—is unavailable.

B. Balancing Probative Value Against Unfair Prejudice

Even if evidence is relevant under Rules 401 and 402, courts must exclude it if its probative value is "substantially outweighed" by any unfair prejudice it produces.107

To calculate probative value under Rule 403, courts must evaluate an item's evidentiary weight. Evidence related to a central issue of the case is more valuable than that which relates only to collateral or minor issues.108 In addition, the Supreme Court has instructed trial courts to determine the probative value of evidence by comparing it to evidentiary alternatives rather than by making the determination in a vacuum.109 Thus, if a party could use alternative evidence to prove the same point, but with less unfair prejudice, the court should discount the probative value of the evidence the party initially sought to introduce.110

In general, nonparty witness invocations are highly probative. Relevant invocations are usually central to a case, because they enable the jury to use two general facts—the witness's incriminating actions and the defendant's close relationship to the

255 (D Conn 1984) (arguing that the formality of a deposition together with the presence of an attorney makes it just as conducive to accurate and unperjured testimony as a trial).

107 "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FRE 403.

108 See Rabon, Note, 42 Vand L Rev at 550 (cited in note 15) (advocating that inferences be admissible only when relevant to a central claim of the case); Mueller and Kirkpatrick, Evidence § 4.4 at 193-94 (cited in note 13) (noting that one factor in probative value is the centrality of the point to be proved).

109 Old Chief, 117 S Ct at 652 (holding that evidentiary alternatives are valid considerations in exercising discretion under Rule 403).

110 Id at 651. Courts also consider the clarity of the evidence in determining its probative value. See Mueller and Kirkpatrick, Evidence § 4.4 at 194 (cited in note 13). Lack of clarity is the chief source of prejudice against invocations; therefore, this Comment analyzes lack of clarity in its discussion of prejudicial effect. See text accompanying notes 111-20.
witness—to determine if the defendant’s actions are likely to fulfill an element of the cause of action. Plaintiffs will usually be able to make a credible argument that the invocations substantially augment other evidence. Thus, if Rule 403 depended solely on probative value, invocations would almost never be excluded.

However, a finding of high probative value does not end the Rule 403 inquiry, because judges must weigh the unfair prejudice created by evidence against its probative value.\[^{111}\] Unfair prejudice refers to “the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means.”\[^{112}\] Under Rule 403, persuasive evidence—no matter how devastating to a party’s case—is not prejudicial if its ability to persuade is legitimate.\[^{113}\] The Rule guards against evidence that detracts from accurate factfinding by leading the factfinder to rest a decision on an improper basis.\[^{114}\] For example, evidence may be prejudicial if it arouses undue emotion in the factfinder,\[^{115}\] or if it induces juries to value the evidence improperly, either by assigning it too much weight or by applying it to an unconnected issue.\[^{116}\] A nonparty witness invocation of the privilege against self-incrimination is

\[^{111}\] Recall, however, that prejudice must substantially outweigh probative value before the evidence may be excluded. FRE 403.

\[^{112}\] See United States v McNeese, 901 F2d 585, 599 (7th Cir 1990) (observing that “relevant evidence is, by its nature, prejudicial”); Mueller and Kirkpatrick, Evidence § 4.5 at 197 (cited in note 13) (stating that “unfair” prejudice does not protect against evidence that is prejudicial merely in the sense that it is detrimental to a party’s case).

\[^{113}\] See Victor J. Gold, Limiting Judicial Discretion to Exclude Prejudicial Evidence, 18 UC Davis L Rev 59, 67, 81-84 (1984) (explaining that the primary focus of Rule 403 is “whether the jury will use the evidence in a way that will enhance or detract from accurate factfinding”); Mueller and Kirkpatrick, Evidence § 4.5 at 194 (cited in note 13) (discussing evidence that would lead to prejudice from “excessive emotional or irrational effects”).

\[^{114}\] See FRE 403 Advisory Committee Note (“Unfair prejudice’ within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”); Cleary, et al, McCormick’s Evidence § 185 at 438-39 (cited in note 22) (explaining that the court may exclude even relevant evidence if it would “unduly arouse the jury’s emotions of prejudice”). See, for example, United States v Carter, 1995 US Dist LEXIS 11597, *10-11 (N D Ill) (excluding evidence of defendant’s role as head of a prostitution ring for fear that juror would convict out of contempt for defendant).

\[^{115}\] See Stephen A. Saltzburg, Michael M. Martin, and Daniel J. Capra, 1 Federal Rules of Evidence Manual 243 (Michie 7th ed 1997) (discussing the meaning of prejudice); Victor J. Gold, Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence, 58 Wash L Rev 497, 506 (1983) (describing two types of inferential errors: when the jury decides evidence is probative of an alleged fact when it is not; and when the jury gives more or less weight to evidence than it ought to give). See, for example, United States v Buchanan, 964 F Supp 533, 537-38 (D Mass 1997) (excluding expert testimony about standards of conduct in the banking industry because the jury could give the testimony too much weight on both legal and factual questions).
likely to result in the latter type of prejudice,\textsuperscript{117} because it can easily mislead juries as to the weight of its probative value.\textsuperscript{118} Courts recognize that invocations may sweep juries away with their "high courtroom drama"\textsuperscript{119} and thus carry disproportionate weight during deliberations.\textsuperscript{120} Absent corrective action by judges, every invocation suffers from this danger. Whether a witness invokes in response to a question as dramatic as, "Did you help the defendant murder the victim?," or as benign as, "Do you know the defendant?," uneducated jurors will nearly always assume that the withheld answer is "yes" and thus misconstrue the invocation's evidentiary value.

This prejudice, however, is not fatal to invocations; judges can mitigate prejudice by educating the jury about what invocations really prove.\textsuperscript{121} Following the principles developed earlier in this Comment, judges faced with Fifth Amendment invocations by nonparty witnesses should instruct jurors in the following manner:

Under our laws, a witness does not need to have a guilty answer to a question in order to invoke her privilege. Even an innocent witness can sometimes invoke the privilege. Thus,

\textsuperscript{117} An invocation might arouse the jury's anger by making jurors think the witness is frustrating justice, but it is "hardly the equivalent of passing a bloody shirt among the jury or introducing a dying accusation of poisoning." \textit{Brink's, Inc v City of New York}, 539 F Supp 1139, 1141 (S D NY 1982), quoting \textit{United States v Leonard}, 524 F2d 1076, 1091 (2d Cir 1975). Additionally, the jury is likely to channel its emotion against the witness toward the party only if the party controlled the witness, permitting the jury to infer that it was the party who was obstructing justice.

\textsuperscript{118} See, for example, \textit{Fidelity & Deposit Co of Maryland}, 45 F3d at 978 (concentrating on the danger that the jury will give improper claims of the privilege too much weight); \textit{Cerro Gordo Charity}, 819 F2d at 1482 (relying on specific facts to rebut the danger that the jury relied too heavily on the evidence).

\textsuperscript{119} \textit{Bowles v United States}, 439 F2d 536, 541 (DC Cir 1970).

\textsuperscript{120} A number of writers, including Wigmore, have noted that lay jurors assume that "taking the Fifth Amendment" is equivalent to a confession of guilt. See S Wigmore, \textit{Evidence} § 2272 at 426 (cited in note 14). See also Hartwell and Kenyon, 26 Antitrust Bull at 658 (cited in note 94) (discussing the likely jury bias against a Fifth Amendment claim). Although this danger could also be characterized as "misleading the jury" under Rule 403, this Comment follows the convention of the cases by addressing it under the heading of "unfair prejudice."

\textsuperscript{121} Jury instructions currently give erroneous guidance or none at all. For an example of the latter, see \textit{RAD Services, Inc v Aetna Casualty and Surety Co}, 808 F2d 271, 277 (3d Cir 1986) (approving the following instruction: "During the trial you also heard evidence by past or present employees of the plaintiff refusing to answer certain questions on the grounds that it may tend to incriminate them. . . . You may, but you need not, infer by such refusal that the answers would have been adverse to the plaintiff's interests."). The jury instruction upheld on review in \textit{Fidelity & Deposit Co of Maryland}, 45 F3d at 979 n 5, instructed jurors that they could use the invocations only to assess facts that had already been independently established by a preponderance of the evidence, thus making any adverse inference essentially useless.
just because a witness asserts her privilege, you cannot know what her exact answer would have been. Instead, an invocation shows only that the witness engaged in some activities connected to the question that could tend to incriminate her. You should also understand that the witness's invocation by itself does not prove anything about the defendant. As jurors, you must decide whether there is evidence linking the defendant to the witness, and whether this evidence is strong enough to allow you to conclude that the defendant acted in the same incriminating manner as the witness. Only if you are satisfied that this evidence exists should you conclude, on the basis of a witness's invocation, anything about how the defendant acted.

If the jurors understand that an invocation proves nothing unless there is a link between the witness and the defendant, it is unlikely that they will be swept away by the drama accompanying a Fifth Amendment claim. Moreover, although jury instructions often seem ineffective,\(^2\) this particular instruction is likely to succeed: it does not tell jurors how to use invocations but simply explains their legal meaning. Thus, jurors are less likely to reject the instruction as an insult to their intelligence and an artificial restraint on their good judgment. Furthermore, if judges exercise their discretionary power under Rule 403\(^2\) to instruct the jurors before they see an invocation (rather than save the instruction until the end of the trial), the jurors will be even more likely to heed the instruction.\(^2\)

Trial judges may further reduce invocations' prejudicial impact by structuring how the jury learns of them,\(^2\) either by admitting them in the form of deposition testimony or by using the power granted by Rule 611(a) to control the lawyers' questioning.\(^2\) When judges conduct their initial hearing outside the presence of the jury to determine the scope of and support for the wit-

\(^{12}\) See Peter Meijes Tiersma, Reforming the Language of Jury Instructions, 22 Hofstra L Rev 37 (1993) (noting and discussing the incomprehensibility of many jury instructions).

\(^{12}\) The Advisory Committee Note to Rule 403 directs readers to Rule 105, dealing with limiting instructions, and its accompanying note. The intentional pairing of the two rules gives judges the authority to limit the prejudice of evidence through instructions.

\(^{12}\) For suggested and actual jury instructions, see Rabon, Note, 42 Vand L Rev at 553-54 (cited in note 15) (suggested instructions), and RAD Services, 808 F2d at 277 (actual instructions).

\(^{12}\) See RAD Services, 808 F2d at 277-78 (noting that FRE 403 gives a trial judge discretion to control the way in which the privilege reaches the jury).

\(^{12}\) "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . make the interrogation and presentation effective for the ascertainment of the truth." FRE 611(a).
ness's privilege, they can also decide how many and what types of questions will best reveal the evidentiary qualities of the invocations. Then, by restricting lawyers to asking only those questions, judges can blunt the lawyers' "sharp practice" of using leading questions to suggest specific answers to the jury.

Judges can most effectively limit the prejudice of invocations by reading them to the jury from a deposition transcript, thereby completely eliminating the invocations' "high courtroom drama." Courts have long favored oral testimony over transcribed depositions because they believe jurors are best able to determine the credibility of live witness testimony. When invocations are involved, however, jurors' assessment of the witness's credibility adds little to the value of the evidence. An invocation's probative force comes from its prediction that the witness engaged in some incriminating activities. The judge—not the jury—assesses the validity of this prediction by determining whether the witness has legal cause to invoke. The jury can increase the overall value of the evidence only by catching legally baseless invocations that the judge missed. But jurors do not have the expertise to fill this role. In fact, prejudice arises because jurors accept invocations too quickly. For these reasons, nothing would be gained by permitting jurors to observe the witness while he invokes.

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127 See text accompanying notes 79-81.
128 See generally Brink's, 717 F2d at 715-16 (Winter dissenting) (highlighting the dangers of prejudice that accompany invocations made in front of the jury).
129 See, for example, Loinaz v E G & G, Inc, 910 F2d 1, 8 (1st Cir 1990) ("When a witness' credibility is a central issue, a deposition is an inadequate substitute for the presence of that witness."); Napier v Bossard, 102 F2d 467, 469 (2d Cir 1939) (opinion by Hand) ("The deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand."); Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8A Federal Practice and Procedure: Civil 2d § 2142 at 158 (West 1994) ("The restrictions imposed by Rule 32 make it clear that the federal rules have not changed the long-established principle that testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is not available to testify in person.").
130 See, for example, Loinaz, 910 F2d at 8 (Given a deposition, juries can "judge the credibility of the words they read, but [can] not judge the credibility of the man who spoke [them].").
131 See Part II.A.1.
132 See text accompanying note 57.
133 See, for example, 8 Wigmore, Evidence § 2272 at 426 (cited in note 14) (acknowledging that most lay jurors equate invoking the privilege with confessing guilt).
134 An invocation made during a deposition benefits from all the inducements to accuracy that are present at trial, including the solemnity of an oath and the screening of a judge. See text accompanying notes 103-06. Apart from the absence of demeanor evidence, there is no reason to favor invocations made at trial over those made at a deposition. But see Rabon, Note, 42 Vand L Rev at 514-15 (cited in note 15) (noting that a party who fails to probe the invocation of the privilege during a deposition will rarely be allowed to make up for that deficit at trial).
Moreover, much would be lost, as the suggestive drama of a lawyer asking a series of increasingly sharp questions in response to which the witness repeatedly invokes his privilege would surely increase the danger of unfair prejudice. Presenting invocations to the jury by reading deposition testimony both avoids this danger and maintains the probative value of the inference.

Admitting invocations made in depositions may, however, present a hearsay problem. Invocations made during depositions fall within the Federal Rules' definition of hearsay, because they are statements made out of court and then offered as substantive evidence.\textsuperscript{135} Courts, however, can take one of two possible routes around the hearsay barrier: Federal Rule of Evidence 807 or Federal Rule of Civil Procedure 32(a)(3)(E).\textsuperscript{136}

Rule 807 is probably the best way to admit invocations via deposition transcript.\textsuperscript{137} It provides a "catch-all" hearsay exception that augments the specific exceptions catalogued in Rules

\textsuperscript{135} See FRE 801(c), 802.

\textsuperscript{136} A third option, FRE 804(a)(1), (b)(1), is appealing, but logical inconsistencies demonstrate that it will not work. Rule 804 requires the witness to be unavailable to testify before his hearsay statements may be admitted. FRE 804(b). Section (a)(1) provides that invoking a privilege makes the witness unavailable, and courts have universally applied this section to successful invocations of the privilege against self-incrimination. See, for example, United States v Kimball, 15 F3d 54, 55 (5th Cir 1994) (recognizing that claim of privilege made defendant unavailable but excluding deposition testimony where defendant created his own unavailability). However, courts applied this section because invocations of the privilege were not considered admissible as evidence. It would be anomalous to use a witness's invocation of the privilege to explain his unavailability to testify, only to turn around and admit the witness's deposition invocation as testimonial evidence. See Rosebud Sioux Tribe v A & P Steel, Inc, 733 F2d 509, 523 (8th Cir 1984) (recognizing that when the court admits invocations it cannot use them to establish unavailability under Rule 804).

\textsuperscript{137} Some courts have mistakenly thought that depositions must always meet the requirements of FRCP 32(a) before they may be admitted, even if they independently satisfy a hearsay exception. See, for example, Kolb v County of Suffolk, 109 FRD 125, 126-27 (E D NY 1985) (explaining that the specific provisions of Rule 32(a) must always be met before a deposition may be admissible). But the 1980 amendment to 32(a)(1) and the accompanying Advisory Committee Note make it clear that the drafters intended Rule 32 and the FRE to be alternative methods of avoiding the hearsay rule. See Amendments to the Federal Rules of Civil Procedure, 85 FRD 591, 590 (1980); Moore, 4A Moore's Federal Practice ¶ 32.02[1] at 32-13 (cited in note 60) ("The Evidence Rules expand to some extent the admissibility of depositions taken in the action and taken in prior actions."); Wright, Miller, and Marcus, 8A Federal Practice and Procedure: Civil 2d § 2141-42 at 157-58 (cited in note 129) (writing that, while FRCP 32 defines some circumstances in which a deposition is admissible, the Federal Rules of Evidence provide the general rules regarding the use at trial of depositions). See also Angelo v Armstrong World Industries, Inc, 11 F3d 957, 963 (10th Cir 1993) ("Depositions may also be independently admissible under the Federal Rules of Evidence."); Polozie v United States, 835 F Supp 68, 71 (D Conn 1993) (stating that deposition, although hearsay, was potentially admissible under both FRCP 32 and FRE 804); United States v IBM Corp, 90 FRD 377, 384 (S D NY 1981) (holding that FRCP 32 and FRE 804 are "independent bases for admitting depositions").
803 and 804.\textsuperscript{138} To fall within this catch-all, a piece of evidence that would otherwise be hearsay must meet five requirements. First, the statement must have "circumstantial guarantees of trustworthiness" equivalent to those found in the express categories articulated in Rules 803 and 804.\textsuperscript{139} Rule 807 focuses on the circumstances surrounding the making of the statement;\textsuperscript{140} invocations meet this requirement, because they are made in formal judicial proceedings with all of the checks on testimonial accuracy.\textsuperscript{141} Second, compared to other evidence that can be procured through reasonable efforts, Rule 807 requires that statements be more probative on the point for which they are offered.\textsuperscript{142} Like Rule 403, this test balances the probative value of the evidence against its prejudicial effect; it consequently raises no additional barrier to admitting invocations. The Rule's final three requirements add little to the substantive requirements for admission.\textsuperscript{143} Thus, invocations appear to be a perfect fit for admission under Rule 807, because they are relevant and reliable, and because defendants and courts have an interest in reducing their possible prejudicial effect.

Rule 32(a) of the Federal Rules of Civil Procedure provides another possible exception to the hearsay rule. For depositions that meet its provisions, Rule 32(a) requires courts to apply the rules of evidence as if the "witness were then present and testifying."\textsuperscript{144} Under Subsection (a)(3)(E), this treatment may be ex-
tended to any deposition "upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court to allow the depositions to be used." Generally courts look to the other provisions of the Rule to determine what constitutes an "exceptional" circumstance. Because the Rule's other provisions describe various reasons why the witness cannot be present during the trial, courts have considered the witness's absence from trial to be the only circumstance that is "exceptional." The plain text of Subsection (a)(3)(E), however, does not limit "exceptional circumstances" in that manner. Looking to the Rule's plain language, invocations present exactly the type of exceptional circumstance contemplated by the Rule: (1) their evidentiary value is not improved by allowing jurors to see live invocations, and (2) the need to avoid compelling prejudice supports admitting them via deposition. Although it would be a break from precedent to include the nature of the testimony as an exceptional circumstance, such an analysis would contradict neither the purpose nor text of Rule 32(a).

At the end of the Rule 403 analysis, relevant invocations emerge with high probative value and very little prejudice that judges cannot eliminate through jury instructions or the trial's structure. Thus, while trial judges hold broad discretion to exclude evidence under Rule 403, they should be reluctant to exclude evidence under Rule 32(a).
exercise it when invocations are at issue. In light of the Rules' preference for admitting relevant evidence, courts have considered excluding evidence under Rule 403 to be an extraordinary remedy. Therefore, they have applied it only where unfair prejudice substantially outweighs probative value. Rarely will relevant invocations carry such extraordinary prejudice that judges cannot limit it at trial and preserve the probative value for the fact-finder.

CONCLUSION

Courts should treat nonparty witness invocations of the privilege against self-incrimination as any other piece of evidence. If judges identify the three inferential links that ensure invocations' relevance and apply the links at trial, they can ensure that the jury considers only probative, reliable invocations as evidence. Moreover, judges can employ several effective methods to reduce the possibility that invocations will be prejudicial and that any prejudice does not substantially exceed probative value. In addition, the Fifth Amendment does not bar using invocations as evidence. The policies underlying the Amendment reveal that the privilege against self-incrimination is a personal one. Therefore, because nonparty witnesses are not personally harmed when their invocations are used as evidence, the Fifth Amendment is not violated, regardless of whether the trial is a civil or criminal one. Courts that wish to further the factfinding role of trials should treat each nonparty invocation as a piece of evidence—admissible or precluded on the same terms as any other testimony.

A generous standard of review further insulates the authority of trial judges. See Veranda Beach Club Ltd Partnership v Western Surety Co, 936 F2d 1364, 1372 (1st Cir 1991) ("[The trial court's construction of the probative value/unfair prejudice balance, hammered out during the rough and tumble of the trial itself, is subject to substantial deference on appeal."); Mueller and Kirkpatrick, Evidence § 4.4 at 196 (cited in note 13) (stating that Rule 403 rulings are reversed only for "clear abuse" of discretion); Saltzburg, Martin, and Capra, 1 Federal Rules of Evidence Manual at 258 (cited in note 116) (stating that "error will be found only if the Trial Judge's decision cannot be supported by reasonable argument").

McCormick counseled that "reason would suggest that if evidence is logically probative, it should be received unless there is some distinct ground for refusing to hear it." Cleary, et al, McCormick's Evidence § 184 at 433 (cited in note 22). The tight restrictions on Rule 403 exclusion are thus manifestly appropriate in light of Rule 102's direction to construe the rules of evidence "to the end that truth may be ascertained and proceedings justly determined." FRE 102.

See United States v Mende, 43 F3d 1298, 1302 (9th Cir 1995); Saltzburg, Martin, and Capra, 1 Federal Rules of Evidence Manual at 259 (cited in note 116) (declaring that the rule should rarely be invoked to exclude relevant evidence).