

Nonproduction of Witnesses as Deliberative Evidence

by James E. Beaver*

Cursed be he that
removeth his neighbor's
landmark

—Deut. 27: 17

It seems that once in the history of thought, common law rules of evidence were not conceived to involve a system of general principles. When, in the fullness of time, the idea of a general evidentiary construct developed, however, hardly were any two writers able to agree upon the appropriate divisions and arrangements of the general system. Sometimes writers could not agree upon the statement of a particular principle. Professors Thayer and Wigmore, among others, put an end to that situation. At the same time, the chief practical difficulty today, as always, lies in the particular application of a mass of evidentiary rules, in determining the bearing of various principles upon a given evidentiary issue of fact *here and now*. Nowhere has this situation continued truer than with reference to rules about evidentiary spoliation.¹ "Indeed, after reading all there is on the subject in a recent voluminous text-book, one may well be bewildered, owing to the collection of crude, inadvertent and contradictory material."² As a result, the "request to charge which more frequently than any other is made in improper form is that dealing with the failure to call a witness."³

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1. Secondary material on this subject includes: 3 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 165-69 (1827); 1 C. MOORE, *A TREATISE ON FACTS* §§ 562-99 (1908); S. PHIPSON, *EVIDENCE* §§ 360-65 (10th ed. 1963); W. RICHARDSON, *EVIDENCE* §§ 91-92 (10th ed. 1973); 2 J. WIGMORE, *EVIDENCE* § 286 (3d ed. 1940) (hereinafter cited as WIGMORE); Lawson, *The Effect of Withholding, Suppressing and Manufacturing Evidence in Civil Cases*, 18 AM. L. REV. 185 (1884); Maguire & Vincent, *Admission Implied from Spoliation or Related Conduct*, 45 YALE L.J. 226 (1935); Comment, *Drawing an Inference From the Failure to Produce a Knowledgeable Witness: Evidentiary and Constitutional Considerations*, 61 CALIF. L. REV. 1422 (1973); 30 CALIF. L. REV. 79 (1941); 34 CORNELL L.Q. 637 (1949); 17 OKLA. L. REV. 74 (1964).

2. *Reehil v. Fraas*, 129 App. Div. 563, 567, 114 N.Y.S. 17, 20 (1908), *rev'd on other grounds*, 197 N.Y. 64, 90 N.E. 340 (1909).

3. Shientag, *The Trial Of A Civil Jury Action In New York*, 69 UNITED STATES L. REV. 183, 211 (1935). See also Shientag, *Some Observations Concerning The Trial Of A Jury*

A litigant frequently has a choice among several ways to prove a contested proposition of fact. Simple common sense prompts a litigant to produce the most persuasive evidence possible. Clearly, it is good policy to put the litigant under pressure to produce the best, the most reliable, and the most enlightening evidence available. This is a proposition at least as old as the case of the chimney-sweep's boy⁴ and is no doubt as ancient as rules of evidence. As Lord Chief Justice Mansfield observed,⁵ it is a "maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." It is a rule of common sense and on occasion even finds expression in legislation.⁶

The nature of the pressure upon litigants to produce the best evidence varies. In one area the so-called "best evidence rule" affirmatively requires production of the most cogent proof of the contents of a centrally significant writing. This rule may be stated thus: to prove the terms of a writing, the original writing itself is regarded as the primary evidence, and secondary evidence is inadmissible unless failure to introduce the original is satisfactorily explained.⁷ This is generally, however, the only instance in

Action, 74 N.Y.L. Rev. 23, 28 (1940). *But see* *Clifton v. United States*, 45 U.S. (4 How.) 242, 248 (1846) (Nelson, J.) ("practical illustrations . . . of the rule are witnessed daily . . . and are too familiar to every lawyer to require a more particular reference").

4. *Armory v. Delamirie*, 93 Eng. Rep. 664 (1722). A chimney sweeper's boy found a jewel, which he took to defendant, a jeweler, for appraisal. The jeweler refused to return it. In the boy's action of trover, upon the issue of value, the Chief Justice directed the jury that "unless the defendant did produce the jewel and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages; which they accordingly did." *Id.* Similarly, in *Morrow v. United States*, 408 F.2d 1390 (8th Cir. 1969), Judge Heaney remarked: "the defendant introduced no evidence to show that the guns were not loaded and, therefore, the jury could properly infer that they were loaded." *Id.* at 1391.

5. *Blatch v. Archer*, 98 Eng. Rep. 969 (1774). *See also* *Kirby v. Tallmadge*, 160 U.S. 379, 383 (1896).

6. *E.g.*, WASH. REV. CODE § 60.24.200 (1976) ("Damages for eloining . . . or removing marks").

7. This writer prefers to state the "best evidence rule" as follows: If a transaction is embodied in a writing so that by substantive law or the practice of the parties the transaction is written and reference must be made to the writing to ascertain the terms of the transaction, proof of the terms of the transaction is of necessity proof of the writing. In such cases, unless unavailable (without fault of the proponent) or collateral, the original of the writing must be produced. *See, e.g.*, *State v. Polet*, 144 Wash. 629, 639, 258 P. 501, 505 (1927). Subjective intention is equally effective in bringing the rule into play. *See, e.g.*, *Sylvania Elec. Products, Inc. v. Flanagan*, 352 F.2d 1005, 1007-08 (1st Cir. 1965). *Flanagan*, however, contains this overbroad assertion: "It is well settled that the best evidence that is obtainable in the circumstances of the case must be adduced to prove any disputed fact[!]" *Id.* at 1007. *See generally* C. McCORMICK, EVIDENCE 559-78 (2nd ed. 1972); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 484, 489 (1898). *See also* 3 W. BLACKSTONE, COMMENTARIES *368, quoted in THAYER, *id.* at 491.

which the pressure is in the nature of an exclusionary rule.⁸ The pressure takes the form of criminal penalty in some instances.⁹

In other situations the pressure is only persuasive. A plaintiff seeking to prove the making of an advance of money to a defendant may rely on his own testimony; the testimony of a disinterested onlooker or eavesdropper; proof of an admission by a defendant; proof of a regular business entry; or any combination thereof, together with other evidence. Similarly, in a murder case, the prosecutor may rely on eye-witness testimony; a dying declaration of the alleged victim; a confession; circumstantial evidence; or some combination of these or different proofs. The pressure in these cases to make the proponent's side strong and clear lies in the risk that a natural suspicion—sharpened by the adverse comment of astute opposing counsel—may arise from failure to adduce the most cogent proof the trier believes, or is led to believe, should be available if the proponent's contentions as to the facts are sound.

Already in 1846, Mr. Justice Nelson discussed the "pressure rules" as follows:

One of the general rules of evidence, of universal application, is, that the best evidence of disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically, applies only to the distinction between primary and secondary [written] evidence; but the reason assigned for the application of the rule in a technical sense is equally applicable, and is frequently applied, to the distinction between the higher and the inferior degree of proof, speaking in a more general and enlarged sense of the terms, when tendered as evidence of a fact. The meaning of the rule is, not that courts require the strongest possible assurance of the matters in question; but that no evidence shall be admitted, which, from the nature of the case, supposes still greater evidence behind in the party's possession or power; because the absence of the primary evidence raises a presumption, that, if produced, it would give a complexion to the case at least unfavorable, if not directly adverse, to the interest of the party. . . .

8. Some jurisdictions qualify the statement in the text. See, e.g., *Goodwin v. Misticos*, 207 Miss. 361, 376, 42 So. 2d 397, 402 (1949) ("[N]o such inference upon inference will be permitted to prevail when the fact sought to be established by such inference upon inference is capable of more satisfactory proof by direct, or positive or demonstrative, [sic] evidence, within the reasonable power of the party holding the burden to produce.").

9. Secreting a witness is an obstruction of justice offensive to the federal criminal code, 18 U.S.C. § 1503. See, e.g., *Parsons v. United States*, 386 F.2d 837 (10th Cir. 1967).

For a like reason, even in cases where the higher and inferior testimony cannot be resolved into primary and secondary evidence, technically, so as to compel the production of the higher; and the inferior is therefore admissible and competent without first accounting for the other, the same presumption exists in full force and effect against the party withholding the better evidence; especially when it appears, or has been shown, to be in his possession or power, and must and should, in all cases, exercise no inconsiderable influence in assigning to the inferior proof the degree of credit to which it is rightfully entitled.¹⁰

Notwithstanding the pressures on a party to come forward with the best evidence available, it is an unavoidable, albeit lamentable, fact that oftentimes a party, for various reasons, will fail to do so. It remains, therefore, to consider the effect of this recalcitrance upon the spoliator's case. "[A]ctions are often, if not always, stronger talismans of intentions and beliefs than words."¹¹ Evidence proving or tending to establish that a party to an action, or his agent, has attempted to bribe a witness to give false testimony in favor of the party,¹² or has otherwise attempted to fabricate or suppress evidence,¹³ or in fact has been merely

10. *Clifton v. United States*, 45 U.S. (4 How.) 242, 247-48 (1846). When it is apparent that more direct and explicit proof was within the power of the party to produce, "the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory; and . . . it may well be presumed [that a] more perfect exposition . . . would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal." *Id.* at 248. Cases also using the term "presumption" include, e.g., *Graves v. United States*, 150 U.S. 118, 121 (1893); *Keifer v. State*, 204 Ind. 454, 462, 184 N.E. 557, 560 (1933) ("raises only a presumption of fact"); *Lee v. State*, 156 Ind. 541, 60 N.E. 299 (1901) (presumption of fact); *Doty v. State*, 7 Blackf. 427 (Ind. 1845). The matter is succinctly put in *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939): "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse." *Id.* at 226. See also *Runkle v. Burnham*, 153 U.S. 216, 225-26 (1894) (White, J.).

11. *Lamin v. McTighe*, 72 Wash. 2d 587, 593, 434 P.2d 565, 569 (1967). See *Pratt v. Bishop*, 257 N.C. 486, 126 S.E.2d 597 (1962). It is perhaps too obvious to merit citation that the "actions" must appear of record. See, e.g., *Long v. United States*, 422 F.2d 1024, 1026 (9th Cir. 1970); *Group v. United States*, 408 F.2d 344, 346 (1st Cir. 1969); *Hall v. United States*, 419 F.2d 582, 585 (5th Cir. 1969); *Wynn v. United States*, 397 F.2d 621, 625 (D.C. Cir. 1967); *People v. Hannon*, 19 Cal. 3d 588, 564 P.2d 1203, 138 Cal. Rptr. 885 (1977).

12. *State v. Rolfe*, 92 Idaho 467, 444 P.2d 428 (1968) is a stunning example of witness bribery. In *Rolfe*, a rape defendant offered the witness money to testify that he had taken the prosecutrix home on the night of the alleged crime. See also *Williams v. Dutton*, 400 F.2d 797, 805 (5th Cir. 1968); *State v. Russell*, 62 Wash. 2d 635, 636-37, 384 P.2d 334, 335 (1963). In *State v. Maloney*, 101 Ariz. 111, 115, 416 P.2d 544, 548 (1966), however, the defendant was not allowed to elicit that a prosecution witness's parents' expenses had been paid to come from out of state to the trial.

13. E.g., *Ashcroft v. Tennessee*, 327 U.S. 274 (1946); *Cummings v. United States*, 398 F.2d 377, 380 (8th Cir. 1968); *State v. Arnold*, 130 Wash. 370, 374, 227 P. 505, 506 (1924)

insufficiently assiduous in offering evidence when under the circumstances he would be expected to do so, is usable by the opponent. Although collateral to the issues traversed, evidence of action to fabricate or suppress is competent as an admission by conduct that the spoliating party has, or thinks he has, a weak case and that his evidence is defective or insufficient.¹⁴ Such facts are similar to the conduct of a prisoner seeking to escape before trial,¹⁵ or of a merchant to destroy or alter his books of account.¹⁶ Such proof is directly relevant, moreover, in a line of inference running about as follows: litigant has bribed a witness; litigant believes his case is bad; litigant has reason to consider it bad, and he should know; hence his cause is bad.

(threats by accused against witness). *But see* *Lowe v. Donnelly*, 36 Colo. 292, 85 P. 318 (1906); *Walker v. Herke*, 20 Wash. 2d 239, 248-51, 147 P.2d 255, 259-61 (1944).

14. *Moriarty v. London, Chatham & Dover Ry.*, 5 Q.B. 314 (1870). Mrs. Moriarty sued for injuries she sustained in alighting from defendant's train; her husband sued for loss of her services. At trial one Whymark testified that Mr. Moriarty and one Cox, his attorney's clerk, suborned perjury in regard to the cause of the accident: "Cox said, 'We can make a nice case about it, we have got a good medical man, and if you and I and Dawle keep it together we shall be able to make a nice little bit between the trio.'" Two other witnesses deposed to similar overtures. Chief Justice Cockburn stated: "I think it was rightly admitted. The conduct of a party . . . may be of the highest importance in determining whether [his] cause . . . is honest and just . . . I think that the evidence was admissible, inasmuch as it went to shew that the plaintiff thought he had a bad case." The line of inference as to the husband: (1) plaintiff suborned perjury; (2) therefore he thought his cause was bad; (3) therefore the defendant was not negligent. The line of inference as to the wife (who did *not* suborn perjury): (1) her husband suborned perjury; (2) therefore he thought the cause was bad; (3) *his* opinion was based on what *she* told *him*; (4) therefore defendant was not negligent. *See also* *Newark Union v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir. 1968); *State v. Sharbono*, 563 P.2d 61, 70 (Mont. 1977); *Langley v. Devlin*, 95 Wash. 171, 163 P. 395 (1917); *WIGMORE* § 278; *Annot.*, 79 A.L.R.3d 1156 (1977). It has been said, however, that even bribing a witness "cannot take the place of proof of necessary facts." *Login v. Waisman*, 82 N.H. 500, 502, 136 A. 134, 136 (1927).

15. *E.g.*, *State v. Owen*, 94 Ariz. 404, 385 P.2d 700 (1963); *Mills v. People*, 146 Colo. 457, 362 P.2d 152 (1961), *cert. denied*, 369 U.S. 841 (1962) (flight from scene of crime); *Banks v. State*, 257 Ind. 530, 276 N.E.2d 155 (1971); *Turner v. State*, 255 Ind. 427, 265 N.E.2d 11 (1970); *Thomas v. State*, 254 Ind. 561, 261 N.E.2d 224 (1970); *Pierce v. State*, 253 Ind. 650, 256 N.E.2d 557 (1970); *Commonwealth v. Geagan*, 339 Mass. 487, 159 N.E.2d 870, *cert. denied*, 361 U.S. 895 (1959); *People v. Yazum*, 18 App. Div. 2d 409, 239 N.Y.S.2d 686 (1963); *State v. Thomas*, 63 Wash. 2d 59, 385 P.2d 532 (1963); *Note*, 34 *Rocky Mtn. L. Rev.* (1962). *Cf.* *Bird v. United States*, 187 U.S. 118 (1902) (strength of inference resulting from escape attempt depends on attendant circumstances). *See also* *Mills v. People*, 146 Colo. 457, 362 P.2d 152 (1961), *cert. denied*, 369 U.S. 841 (1962); *State v. Parr*, 64 Wash. 2d 921, 395 P.2d 196 (1964) (that defendant threw away two guns not shown to be the robbery weapons, admissible as admission of guilt). As to attempts by accused to commit suicide, *see* 1964 *WASH. U.L.Q.* 204; 7 *N.C. L. Rev.* 290 (1928). *See generally* *Hutchins & Slesinger, Some Observations On The Law Of Evidence—Consciousness Of Guilt*, 77 *U. PA. L. Rev.* 725 (1929).

16. *E.g.*, *Henderson v. Hoke*, 21 N.C. 119 (1835).

Apart from the use of spoliation as directly relevant and affirmative evidence in a line of inference bearing upon a fact traversed, spoliation has also the effect of coloring other affirmative proof. It may go further than merely reflecting upon the contents of spoliated material, do more than merely suggest the document destroyed would have worked against the destroyer or the witness retained in the wings would have testified adversely to the interest of the spoliator. Some spoliation evidence is used properly and effectively to reflect adversely upon the entire side of a controversy.¹⁷ Where it appears that a forgery or fraud in some material parts of the evidence has been the contrivance of a party to the proceeding, it affords a lever against *all* of the evidence on that side of the question, and has the effect of persuading the trier of fact to lend greater credence to *all* of the evidence of the other party and less to *all* of the evidence of the spoliator. Proof of spoliation is not usually conclusive, even when believed by the jury,¹⁸ because a party may think he has a bad case when he has in fact a good one, but such proof nevertheless tends to discredit his witnesses and cast doubt upon his entire position. Moreover, such proof may well operate with conclusive effect upon the minds of the jurors or trier of fact, notwithstanding the conduct in most cases is not acknowledgement of a specific fact, but merely concession of the general weakness of his claim or defense. The protection against the drawing of unwarranted inferences must lie in the fact that such evidence does not alone bottom an adverse verdict, in the right to offer explanation, and in the closing argument of counsel.

The precise categorization of spoliation evidence has been the subject of debate among legal scholars. Some writers have regarded spoliation evidence as within the category of admissions, an exception to the rule against hearsay.¹⁹ Other scholars, however, have considered it more appropriately under the heading of rules about relevancy.²⁰ Both classifications have much to be said for them. The rules about spoliation have a very ancient

17. *Pope v. Hoopes*, 84 F. 927, 929 (C.C.D.N.J. 1898); *State v. Sharbono*, 563 P.2d 61, 70 (Mont. 1977).

18. It hardly requires mention that the trier is free to ignore the inference. *E.g.*, *Williams v. United States*, 394 F.2d 821, 822 (5th Cir. 1968); *Buckner v. State*, 252 Ind. 379, 383, 248 N.E.2d 348, 351 (1969).

19. *E.g.*, WIGMORE §§ 277, 1048; D. STANSBURY, *THE NORTH CAROLINA LAW OF EVIDENCE* § 178 (2d ed. 1963).

20. *E.g.*, PHIPSON, *EVIDENCE* § 361 (10th ed. 1963); WIGMORE § 277; Maguire & Vincent, *Admissions Implied From Spoliation Or Related Conduct*, 45 YALE L.J. 226, 229-30 (1935).

history under the maxim *omnia praesumuntur contra spoliatorem*, and involve inferences or deductions based upon experience. The treatment of spoliation evidence may involve (1) its use logically, as a deliberative fact or even as directly probative; (2) its use in the way of judicial administration, as retributive of an insult to the court; or (3) its use as declarative or assertive conduct, in which case it sometimes is considered that it must satisfy the party admissions exception to the hearsay rule.

Spoliation rules are divisible in another way: they can be used to regulate the presentation of proofs, argument, and instructions to juries. They also are used procedurally to regulate the conduct of litigants, to chastise the dishonest and unscrupulous. A good example is found in the rules governing assessment of damages and the practice concerning neglect or refusal to obey discovery orders. Moreover, a plaintiff's failure to produce a witness equally available to his opponent may work to plaintiff's disadvantage, and even to the destruction of his cause, not by virtue of spoliation as an inference, but because the plaintiff without the testimony of the omitted witness may be unable to satisfy the requisite degree of proof. Thus, a bill to reform a deed on the grounds of mistake was dismissed when the complainant's and defendant's testimony was irreconcilable and complainant neglected to call as a witness a disinterested onlooker who was present and in fact participated in the antecedent negotiations.²¹ The mere failure of a party to call a knowledgeable witness to testify, however, and the permissible inference to be drawn therefrom, will not convert evidence otherwise insufficient into a *prima facie* case.²² The idea is, we cannot give affirmative or substantive value to something that is nonexistent.

Judicial response to evidentiary spoliation has been varied; decisions run all the way from a presumption of fact,²³ so-called, to the apparent drawing of an inference against a plaintiff who neglected to call defendant's employee.²⁴ The decisions are con-

21. *Pope v. Hoopes*, 84 F. 927, 929 (C.C.D.N.J. 1898).

22. *Northern Pac. Co. v. Page*, 274 U.S. 65, 74 (1927). See, e.g., *A.L.B. Theatre Corp. v. Loew's, Inc.*, 355 F.2d 495 (7th Cir. 1966); *Vanity Fair Paper Mills, Inc. v. F.T.C.*, 311 F.2d 480 (2d Cir. 1962); *United States v. Cherkasky Meat Co.*, 259 F.2d 89 (3d Cir. 1958); *Sunbeam Co. v. Golden Rule Appliance Co.*, 252 F.2d 467, 471-73 (2d Cir. 1958) (L. Hand., J. concurring; Lumbard, J. dissenting) (an extreme example of the rule); *United States v. Roberson*, 233 F.2d 517, 519 (5th Cir. 1956); *Middletown Trust Co. v. Bregman*, 118 Conn. 651, 657, 174 A. 67, 70 (1934); *National Life & Accident Ins. Co. v. Eddings*, 188 Tenn. 512, 221 S.W.2d 695 (1949).

23. E.g., *Keifer v. State*, 204 Ind. 454, 184 N.E. 557 (1933).

24. *Burwell v. Crist*, 251 F. Supp. 686, 688 n.3 (M.D. Pa. 1966), *rev'd on other grounds*, 373 F.2d 78 (3d Cir. 1967).

fused and inconsistent. The subject is absurdly complex because of a failure to recognize we should be dealing with a guide to the conscience of the trier, not with a legal imperative, perhaps adopted or even descended from other frames of reference. Juries should be given a free field, instead of having their thought processes constricted by rules of law that are at best difficult accurately to state and even more difficult truly to apply.

The problem of patterning jury instructions relating to the effect to be given to evidentiary spoliation is similar to the problem the courts confront when attempting to instruct upon the degree of proof needed to sustain a claim against an estate upon an oral contract by a decedent to pay for personal services performed for him. Because decedent's testimony is no longer available, such claims naturally are scrutinized with care and upheld only if fully and clearly established. Yet a charge that such claims are viewed with suspicion, that every detail must be established by a preponderance of the evidence, and that the contract must be proved in all particulars by absolutely disinterested witnesses and established by the clearest and most convincing evidence, was held error.²⁵ The jury may be given cautionary counsel, but the responsibility of determination rests ultimately with them. A trial judge should not—and should not be required to—charge as a rule of law, a caution designed to guide the trier's conscience.

The "median" common law rule on nonproduction of witnesses may be expressed as follows: in case a litigant fails, absent explanation satisfactory to the trier, to call an available material witness, when under all the surrounding circumstances a reasonable litigant would do so, an unfavorable, but rebuttable, inference may be drawn against the litigant, by virtue of which the evidence he actually offers is construed, or colored, against him.²⁶ This formulation takes into account most, if not all, of the qualifications of the rule. It supposes that the parties are permitted to comment upon the nonproduction of evidence by their opponents,

25. *McKeon v. Van Slyck*, 223 N.Y. 392, 119 N.E. 851 (1918).

26. This formulation is quite similar to that of Mr. Leo Larkin, author of the student note in 34 *CORNELL L.Q.* 637, 642 (1949), and would apply to tangible evidence. See *United States ex rel. C.H. Benton, Inc. v. Roelof Constr. Co.*, 418 F.2d 1328, 1332 (9th Cir. 1969). It is well put by Judge Breitel in *Seligson, Morris & Newburger v. Fairbanks Whitney Co.*, 22 App. Div. 2d 625, 257 N.Y.S.2d 706 (1965): "[T]he jury is entitled, if it wishes, to give the strongest weight to the evidence already in the case in favor of the other side and which has not been, but might have been, effectively contradicted or explained by the absent witnesses." *Id.* at 630, 257 N.Y.S.2d at 710. Obviously, without some direct evidence indicating what the absent witness would have said, the court must not permit the jury to merely speculate about what the absent witness would have said. *Felice v. Long Island R.R.*, 426 F.2d 192, 195 n.2 (2d Cir. 1970) (Friendly, J.).

when the nonproduction is itself properly before the tribunal, with certain exceptions in criminal cases. It avoids the fruitless doctrinal dispute whether there are not always conflicting, albeit persuasively divergent, inferences available at the behest of all parties. It recognizes the inapplicability of the rule when the evidence is equally available to both parties, although it avoids the doctrinal difficulty posed when the proof in question is privileged. The formulation further takes account of the nonavailability of the rule when the proof is merely cumulative, or when a pertinent witness is incompetent. Ultimately, the rule seems to boil down to one of common sense, but is well worth consideration for all of that.

BASIC REQUIREMENTS

When a party fails to call an available witness to testify to matters within his knowledge that would further elucidate facts in dispute, it is only natural to infer that the party fears to call him. The obvious supposition is the witness, if called, would expose facts unfavorable to the party who otherwise would naturally be expected to call him. "It is plain that the inference is based, not on the bare fact that a particular person is not produced as a witness, but on his nonproduction when it would be natural for him to produce the witness if the facts known to him would have been favorable."²⁷ Accordingly, the question arises, *when* would it be *natural* for a party to produce a witness?

First, it is obvious that the nonproduced evidence must be within the power of the party to produce. Unless there is some kind of duty, moral or otherwise, to produce the witness, so that nonproduction involves some measure of "fault," no adverse inference can be drawn.²⁸ This is the unanimous rule.²⁹ No fault is present, no inference can be sought or drawn, and no instruction can be given, when the witness is outside the jurisdiction (or *subpoena* power) of the court without the complicity of the

27. WIGMORE § 286 at 166. See *Mammoth Oil Co. v. United States*, 275 U.S. 13, 51-53 (1927); *Forsberg v. United States*, 351 F.2d 242, 249 (9th Cir. 1965). For stunning possibilities in paternity cases, see *In re Comm'r of Social Serv.*, 75 Misc. 2d 971, 348 N.Y.S.2d 831 (1973).

28. Thus, in an action by an unemployment compensation claimant against a State Employment Commission alleging sex discrimination, the Commission's destruction of records pertaining to claimant could not bottom an inference when the destruction was pursuant to Commission regulations pertaining to disposal of inactive records. *Vick v. Texas Emp. Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975). See also *United States v. Freeman*, 514 F.2d 1314, 1318 n.30 (D.C. Cir. 1975).

29. *United States v. Noah*, 475 F.2d 688, 691 (9th Cir. 1973); WIGMORE § 286.

party,³⁰ when the witness is mentally or physically ill,³¹ or indeed when the party proves to be unaware that the witness possesses the knowledge the opposing party imputes to him.³² Thus, it has been held that a party's unsuccessful attempts to locate a witness before trial precluded the drawing of an inference.³³ "This rule . . . is applicable only in cases where the party, whose duty it is to produce the witness, has failed to explain the reason for the absence of the witness. Here, it is shown, by the testimony of [the party], that he attempted to locate the [witness] on several occasions prior to the trial and that his efforts were unsuccessful."³⁴

Probably the most famous example of this sort of explanation of nonproduction is *Case v. New York Central Railroad*.³⁵ Case was a conductor suing under the Federal Employer's Liability Act for injuries suffered when he allegedly stepped in a hole by defendant's tracks at the Albany station. Case claimed the accident might have been witnessed by a brakeman named Moore and probably was observed by a fireman on a yard engine. As Judge Friendly observed, "though [plaintiff] called neither as a witness, failure by the Central to produce them . . ., if unexplained, would have given rise to an inference favorable to him,"³⁶ and unfavorable to the Railroad. The inference could not be drawn, however, unless it would have been natural for the Railroad to produce the witnesses if the facts known by them were favorable. Hence, the Railroad was properly allowed to call its claim agent to testify that the brakeman was in Florida and would not return until after the trial, that he had interviewed and taken statements from all three firemen and the three engineers working in the Albany yard at the time, and that none of the six knew anything about this accident. The trial judge observed, "that finishes that," and as Judge Friendly remarks, "it did."³⁷ This proof was offered, so two of the three judges thought, to explain³⁸ the non-

30. *E.g.*, *Smith v. Uniroyal, Inc.*, 420 F.2d 438, 441-43 (7th Cir. 1970); *Chicago, R.I. & P. Ry. v. King*, 210 Ark. 872, 197 S.W.2d 931 (1946).

31. *See Gass v. United States*, 416 F.2d 767, 775 (D.C. Cir. 1969).

32. *McKinstry v. Collins*, 74 Vt. 147, 52 A. 438 (1902) (*semble*) (but want of awareness must be shown); *State v. Fitzgerald*, 68 Vt. 125, 34 A. 429 (1896).

33. *Muhleisen v. Eberhardt*, 21 So. 2d 235 (La. Ct. App. 1945).

34. *Id.* at 237. *See also Case v. New York Cent. R.R.*, 329 F.2d 936 (2d Cir. 1964).

35. 329 F.2d 936 (2d Cir. 1964). *See also Commercial Ins. Co. of Newark v. Gonzalez*, 512 F.2d 1307 (1st Cir. 1975).

36. *Case v. New York Cent. R.R.*, 329 F.2d 936, 937 (2d Cir. 1964).

37. *Id.* A similar doctrine is applicable even in criminal cases. *See, e.g.*, *State v. La Porte*, 58 Wash. 2d 816, 824, 365 P.2d 24, 29 (1961).

38. In *Gray v. United States*, 394 F.2d 96 (9th Cir. 1968), the prosecutrix was not

production as witnesses of the railroad employees, and for this limited purpose the claim agent's testimony was not hearsay. The testimony was offered "to show that the Central reasonably believed that none of the men working in the yard had any knowledge and their nonproduction thus could not properly be attributed to fear of their testimony."³⁹ If Case wanted an instruction thus limiting the claim agent's testimony, "it was for him to seek it."⁴⁰ This case perhaps goes too far, yet the principle is clear: if the failure to produce evidence is satisfactorily explained, the inference is unavailable.

Similarly no inference is available when it would be fruitless to call the witness. Thus, comment and instruction are improper when a criminal defendant fails "to call to the stand a witness who would have to incriminate himself."⁴¹

Second, as a limitation upon the principle, no inference is available where the witness in question for any reason would appear to be so prejudiced against the party that he could not expect to elicit from him the unbiased truth.⁴²

Third, it is quite plain that putative witnesses whose testimony is insignificant, or cumulative,⁴³ or inferior to what is ac-

called by the government, the explanation being that in the "opinion" of a psychiatrist, "it would be injurious to her health were she to be required to appear." *Id.* at 101. See also *Wong v. Swier*, 267 F.2d 749, 759 (9th Cir. 1959) (explanation for tampering with ladder; jury question; inference not conclusive); *Schumacher v. United States*, 216 F.2d 780, 787-88 (8th Cir. 1954). A fascinating example of insufficient explanation is *Carr v. St. Paul Fire & Marine Ins. Co.*, 384 F. Supp. 821, 831 (W.D. Ark. 1974).

39. *Case v. New York Cent. R.R.*, 329 F.2d 936, 938 (2d Cir. 1964).

40. *Id.* Judge Hays, dissenting, concedes that "of course it is nonsense to require the production of witnesses to explain why they are not produced." *Id.* Yet he seems to have a point. Case relied on the eyewitness testimony. Central was seeking to prove that the accident did not occur. Under the guise of rebutting a spoliation inference, Central was permitted to prove precisely that out of the mouth of a person other than the eyewitness. Such "bootstrapping" has been condemned. *E.g.*, *Foster v. Atlanta Rapid Transit Co.*, 119 Ga. 675, 677, 46 S.E. 840, 841 (1904); *Birmingham v. Kansas City Pub. Serv. Co.*, 361 Mo. 458, 465-66, 235 S.W.2d 322, 327-28 (1950). See also *Shasta S.S. Co. v. Great Lakes Towing Co.*, 44 F. Supp. 572 (W.D.N.Y. 1942) (Counsel stipulated he "had no objection . . . to the reasons given . . . for the nonproduction"; equivalent to proof by the nonproducer).

41. *Bradley v. United States*, 420 F.2d 181, 186 (D.C. Cir. 1969).

42. *E.g.*, *People v. Bridgeforth*, 51 Ill. 2d 52, 59, 281 N.E.2d 617, 621 (1972); *Carter v. Troy Lumber Co.*, 138 Ill. 533, 28 N.E. 932 (1891); *State v. Cousins*, 58 Iowa 250, 12 N.W.2d 281 (1882) (alleged accomplice). *Cf.* *Fierberg v. Whitcomb*, 119 Conn. 390, 177 A. 135 (1935) (another dentist in same building).

43. *E.g.*, *United States v. Johnson*, 467 F.2d 804, 808 (1st Cir. 1972); *United States v. Johnson*, 371 F.2d 800, 807 (3d Cir. 1967); *State v. Davis*, 73 Wash. 2d 271, 438 P.2d 185 (1968); *State v. Davis*, 12 Wash. App. 288, 291, 529 P.2d 1157, 1159 (1974); *State v. Smyth*, 7 Wash. App. 50, 499 P.2d 63 (1972). See also *People v. Norwood*, 5 Ill. App. 3d 130, 133, 283 N.E.2d 256, 258 (1972).

tually presented, may be dispensed with by a party without apprehension about the drawing of unfavorable inferences. The grounds of expense and inconvenience, not only from the standpoint of the individual party but also from that of society at large, should serve to justify the rule. Put somewhat more strongly, there seems to be a general limitation, depending in its application upon the particular facts in each case, that the inference is unavailable—cannot fairly be drawn—except from nonproduction of witnesses whose testimony would be expected to be superior with respect to the fact to be proved.⁴⁴ Absent such limitation, counsel would have no choice but to call *all possible* witnesses, a result clearly undesirable from whatever standpoint.

The want of clarity in connection with this third limitation is pointed up by a federal case involving a night, wartime collision between a battleship and a merchant marine vessel.⁴⁵ The United States called many witnesses, including the captain of the battleship, and members of the watches of the battleship and the accompanying destroyer escort. But the owners of the sunken merchant vessel complained that three specifically named crew members were not called. The court recognized the general principle that failure to call witnesses who are available “may” give rise to the inference their testimony would not be helpful, but approved a ruling by the district judge: “‘But when there are a dozen witnesses to an event and two of them are not called to testify, I know of no authority which compels a court to discredit *entirely* the testimony of the other ten.’”⁴⁶ Still it would appear possible the court *may* discredit to some degree the testimony of those who did testify; use of the word “entirely” would support such a claim. The weight to be given the inference, it is clear, is to be determined by the particular facts of each case.

Several King County, Washington, Superior Court judges have confirmed their use of such a rule.⁴⁷ The general consensus was that a party's failure to call a competent witness when he otherwise would and should have is grounds for an adverse inference, and if he produced some other evidence it is possible to discredit it. The judges also agreed that when a party calls certain

44. WIGMORE § 287 at 168-69. See *United States v. Young*, 463 F.2d 934, 940 (D.C. Cir. 1972) (witnesses too remote).

45. *Pacific-Atlantic S.S. Co. v. United States*, 175 F.2d 632 (4th Cir. 1949).

46. *Id.* at 636 (emphasis added). Cf. *People v. Smith*, 3 Ill. App. 3d 64, 278 N.E.2d 551 (1971) (one of nineteen witnesses called).

47. Interviews by Mr. James Gavin, a member of the Washington Bar, taken while a third-year law student at the University of Washington School of Law. On file with the author.

witnesses but fails to call others who have some particular knowledge of the case, use of a negative inference, with some appropriate limitations, is universal. The limitations mentioned by the judges are those described in the cases: *e.g.*, competence of the witness, noncumulative quality of his testimony to avoid defeat of efficient, speedy disposition of the case, and so forth. In any event, counsel always is free to demonstrate a good reason for not calling the particular witness.

The judges believed the calling of professional forensic medical experts posed an interesting situation. One judge (it was his opinion that almost all the others did likewise) remarked that the calling of a professional plaintiff's doctor, coupled with the failure of the plaintiff to call the personal physician who actually rendered most of the medical attention, would give rise to an adverse inference that the attendant physician, had he testified, would have testified somewhat unfavorably to plaintiff.⁴⁸ The judges seemed unconcerned—and justly so—that a physician-patient privilege exists in the State of Washington. The patient can—and in such an instance should—waive the privilege.

Fourth, it is commonly—but not universally⁴⁹—indicated

48. Some physicians seem to be spending the majority of their time in court as witnesses for one side or the other. Many times [and this was commented upon with general agreement] an attorney uses two physicians—one who has thoroughly examined the client and who has attended him for the major portion of his illness leading to trial and another, the so-called professional witness/physician who, after a cursory examination of the client, can *turn on the jurors* with his wonderful oration. When this happens, and it is not infrequent, one can but wonder and conjecture just why the attorney did not call the first physician, after looking at all the evidence, rather than the second.

Judge of the Superior Court of King County, Washington, anonymous. *Id.*

49. *See, e.g.*, *United States v. Cotter*, 60 F.2d 689 (2d Cir. 1932) (L. Hand, J.). "When both sides fail to call a witness who knows something of the facts, their conduct, like anything else they do, is a circumstance which a jury may use. If they both call him and he is impartial, ordinarily it will have little weight" *Id.* at 692. And Professor Wigmore observes:

Yet the more logical view is that failure to produce is *open* to an inference *against both parties*, the particular strength of the inference against either depending on the circumstances. To prohibit the inference entirely is to reduce to an arbitrary rule of uniformity that which really depends on the varying significance of facts which cannot be so measured.

WIGMORE § 288 at 171 (emphasis in original). Either party can comment on failure of the other to call the witness. If both comment, the weight, if any, of each inference, is for the trier to decide. In each case, the natural question is, if the witness would be more harmful to your opponent, why did you neglect to call him? *See also United States v. Free*, 437 F.2d 631, 636 (D.C. Cir. 1970); *United States v. Evanchik*, 413 F.2d 950 (2d Cir. 1969); *United States v. Dibrizzi*, 393 F.2d 642 (2d Cir. 1968); *United States v. Comulada*, 340 F.2d 449, 452 (2d Cir.), *cert. denied*, 380 U.S. 978 (1965); *Billeci v. United States*, 184 F.2d 394, 398-99 (D.C. Cir. 1950); *United States v. Beekman*, 155 F.2d 580 (2d Cir. 1946).

that no inference is permissible when prospective witnesses are equally available to each side and particularly when such witnesses actually are present in court.⁵⁰ For the inference to be drawn, then, it must be clear there was a discrepancy in the availability of the witness to the several parties;⁵¹ the burden of proving the availability of the witness should rest with the party seeking the benefit of the inference, and not upon the party who fails to call the witness, although the latter will nevertheless for tactical reasons often make explanation.⁵²

Fifth, although the inference can be drawn when the witness who is not called and the party are one and the same,⁵³ there is a minority (diminishing at that) view to the contrary. These authorities emphasize "honor"; men of honor and integrity should not be subjected to the disgrace of having to prove their personal qualities. An old Georgia case⁵⁴ states the argument as follows:

We think . . . it is becoming, and to be commended, in a party not to testify, if he can avoid it without positive injury to the cause of truth and justice. As long as he is unheard, there should be no presumption that he is counseled by prudence rather than by modesty. While his cause should not gain by his forbearance to testify, neither should it lose by it. Public policy forbids that a suitor should feel constrained to mount the witness stand for no purpose but to let the jury know that he has something to say in his favor, or to show them that he can face the terrors of a cross-examination without breaking down. The encouragement of anything like competition in swearing would be too sure to breed perjury. Let those testify in their own behalf who volun-

50. See *United States v. Blakemore*, 489 F.2d 193, 195 (6th Cir. 1973); *United States v. Fisher*, 484 F.2d 868 (4th Cir. 1973); *United States v. Johnson*, 467 F.2d 804 (1st Cir. 1972); *United States v. Sherwood*, 435 F.2d 867, 868 (10th Cir. 1970); *United States v. Chapman*, 435 F.2d 1245, 1247 (5th Cir. 1970); *Simon v. United States*, 424 F.2d 796, 799 (D.C. Cir. 1970); *United States v. Spencer*, 415 F.2d 1301, 1304 (7th Cir. 1969); *Brown v. United States*, 414 F.2d 1165 (D.C. Cir. 1969); *Lamb v. United States*, 414 F.2d 250, 252 (9th Cir. 1969); *United States v. Tant*, 412 F.2d 840 (5th Cir. 1969); *City of Birmingham v. Levens*, 241 Ala. 47, 200 So. 888 (1941); *Fierberg v. Whitcomb*, 119 Conn. 390, 177 A. 135 (1935); *Loehr v. National Security Life Ins. Co.*, 144 Ind. App. 503, 247 N.E.2d 232 (1969). See also authorities gathered in *WIGMORE* § 288 at 189-90.

51. *E.g.*, *Jenkins v. Bierschenk*, 333 F.2d 421, 425 (8th Cir. 1964); *Schoenberg v. Commissioner*, 302 F.2d 416, 420 (8th Cir. 1962). Mere presence in the courtroom does not constitute equal availability. *E.g.*, *McClanahan v. United States*, 230 F.2d 919, 926 (5th Cir. 1956); *State v. Davis*, 73 Wash. 2d 271, 276-77, 438 P.2d 185, 188 (1968).

52. See, *e.g.*, *Case v. New York Cent. R.R.*, 329 F.2d 936 (2d Cir. 1964).

53. *E.g.*, *Howe v. Howe*, 199 Mass. 598, 603, 85 N.E. 945, 947-48 (1908). As a matter of fact, failure of a *knowledgeable party litigant* to testify is an *admission* and *substantive evidence* in many, if not most, states. See, *e.g.*, *Wilborg v. Dengell*, 359 Mass. 279, 268 N.E.2d 855 (1971).

54. *Thompson v. Davitte*, 59 Ga. 472 (1877).

tarily present themselves; but let no uncharitable imaginations light upon those who stay away, merely because they might swear if they would.⁵⁵

Would this view hold if the party in question possessed the only direct evidence in his favor? Would the appropriate inference be that he would have testified favorably and not unfavorably? Most jurisdictions now have taken the view that the failure of a party to take the stand to testify in his own behalf gives rise to the same inferences as would flow from his failure to call a knowledgeable witness subject to his control.⁵⁶ Of course, the same qualifications apply as in the case of any other witnesses, even in the majority jurisdictions. Thus, for example, the inference would be available only when the party was a useful, competent witness. Historically, parties were incompetent as witnesses.⁵⁷ When the incompetency was removed, one supposes that the party should be treated like any other witness so far as spoliation rules are concerned.⁵⁸

Sixth, it should be noted, however, criminal defendants, as party witnesses, are not treated like parties in civil cases. It is a constitutional guarantee that no person shall be compelled in any

55. *Id.* at 480. These cases should be contrasted with those cases critical, in greater or lesser degree, of rules allowing admissions by silence as an exception to the hearsay rule (or as non-hearsay). See, e.g., *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235, 237 (1847) (Shaw, C.J.); *Moore v. Smith*, 14 Serg. & Rawl. 388, 393 (Pa. 1826); *Vail v. Strong*, 10 Vt. 457, 463 (1838); and especially *Mattocks v. Lyman*, 16 Vt. 113, 119 (1844). See also *Doyle v. Ohio*, 426 U.S. 610 (1976) (use of post-arrest silence offends due process); *United States v. Brierly*, 269 F. Supp. 753 (E.D. Pa. 1967) (same); *State v. Upton*, 16 Wash. App. 195, 556 P.2d 239 (1976) (same). Decisions such as *People v. Smith*, 25 Ill. 2d 219, 184 N.E.2d 841 (1962), are easy to attack.

56. See, e.g., *Hinton & Sons v. Strahan*, 266 Ala. 307, 96 So. 2d 426 (1957):

When the . . . facts are peculiarly within a party's knowledge, and he fails or refuses to testify, when present at the trial, such failure or refusal is always subject to comment by the opposite party in a civil action; but the fact that matters in issue are not peculiarly within the party's knowledge is not of itself a significant ground to bar the adversary from commenting on his failure or refusal to testify.

Id. at 311-12, 96 So.2d at 430. See also *Attorney General v. Pelletier*, 240 Mass. 264, 316, 134 N.E. 407, 423 (1922) ("The law simply recognized the natural probative force of conduct contrary to that of the ordinary man of integrity."); *McNeill v. McNeill*, 223 N.C. 178, 182, 25 S.E.2d 615, 617 (1943); *WIGMORE* § 289.

57. Thus, in Charles Dickens' *THE PICKWICK PAPERS*, Mr. Pickwick did not take the stand to explain he had never promised to marry Mrs. Bardell. The law said he need not (indeed he could not). Had he done so, the whole case would have tumbled down like a house of cards.

58. In this connection, however, a party may "corroborate" testimony of the opposing party by failing to testify, thus rendering disregard of the *testifying party's* testimony "arbitrary." *Dumes v. Harold Laz Advertising Co.*, 2 Ariz. App. 387, 388, 409 P.2d. 307, 308 (1965).

criminal case to give evidence against himself.⁵⁹ The United States Supreme Court has held the self-incrimination guarantee of the fifth amendment forbids both federal and state judges to allow either prosecutorial comment upon an accused's silence or instructions that such silence will bottom any inference as to guilt.⁶⁰ Indeed, judges today must, upon request, instruct the jury that no inference of guilt can be drawn from an accused's failure to testify.⁶¹ Moreover, it is error to refuse to instruct the jury to disregard the prosecutor's comment upon failure by the accused to testify.⁶² And it has been held a state prosecutor's comment upon the failure of one defendant to testify can sufficiently prejudice a codefendant who did testify, to call for a new trial.⁶³ Indeed, reversible error can these days easily be committed by the court in the method adopted by the judge to rebuke offending prosecutors.

Generally, adverse inferences are equally applicable in criminal as in civil cases, where nonparty witnesses are concerned,⁶⁴ or defendants who have waived their privilege,⁶⁵ notwithstanding the burden of proof is different. As the Tennessee Supreme Court has observed:⁶⁶

59. U.S. CONST. amend. V.; WASH. CONST. art. I, § 9.

60. *Griffin v. California*, 380 U.S. 609 (1965); *Clark v. Nelson*, 411 F.2d 790 (9th Cir. 1969). Prosecutorial comment may, however, not justify reversal if it is harmless. The test enunciated by the court is "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). See also *Fontaine v. California*, 390 U.S. 593 (1968); *Anderson v. Nelson*, 390 U.S. 523 (1968); *State v. Broadhead*, 413 F.2d 1351, 1361 (7th Cir. 1969); *People v. Bynum*, 556 P.2d 469 (Colo. 1976).

61. *State v. Goldstein*, 65 Wash. 2d 901, 400 P.2d 368 (1965).

62. *State v. Stromberger*, 152 Wash. 699, 277 P. 1119 (1929); *Spokane v. Roberts*, 132 Wash. 568, 232 P. 316 (1925); *State v. Hanes*, 84 Wash. 601, 147 P. 193 (1915).

63. *Scott v. Perini*, 439 F.2d 1066 (6th Cir. 1971); *Kinser v. Cooper*, 413 F.2d 730 (6th Cir. 1969). Already in 1921, the suggestion by a district attorney that a defendant on trial for murder should have called an accomplice already convicted of first degree murder in connection with the same homicide was dismissed by the New York Court of Appeals as "fantastic." *People v. Slover*, 232 N.Y. 264, 269, 133 N.E. 633, 635 (1921).

64. *United States v. Welp*, 446 F.2d 867, 868 (9th Cir. 1971) (defendant's father); *United States v. Cox*, 428 F.2d 683, 688 (7th Cir. 1970); *State v. Mims*, 222 Kan. 335, 337, 564 P.2d 531, 534-35 (1977) (alibi; defendant claimed "he was in the company of a number of friends and relatives," but only his wife was called; failure to call others properly commented upon and inferences drawn); *State v. Robinson*, 219 Kan. 218, 221, 547 P.2d 335, 338 (1976).

65. *Caminetti v. United States*, 242 U.S. 470, 494 (1917); *United States v. Pledger*, 409 F.2d 1335, 1336 (5th Cir. 1969).

66. *Ford v. State*, 184 Tenn. 443, 449, 201 S.W.2d 539, 541 (1945). See also *State v. La Porte*, 58 Wash. 2d 816, 365 P.2d 24 (1961). As a corollary, where the prosecution makes out a probable case on an issue of which the accused has peculiar knowledge and could easily prove, but does not, an inference favorable to the prosecution arises. *Wilson v. United States*, 162 U.S. 613 (1896); *Moore v. United States*, 271 F.2d 564, 568 (4th Cir.

It is, of course, now well settled that our statute . . . providing that no presumption of guilt of the defendant shall arise from his failure to testify in his own behalf, has application only to the personal testimony of the defendant himself and does not extend to apparently available testimony by others.

The problem is sometimes, however, not that simple. Thus, what if accused's witness pleads the self-incrimination privilege and refuses to testify? It has been held:⁶⁷

[T]he correct rule is that, when a witness [other than the accused] declines to answer a question on the ground that his answer would tend to incriminate him, that refusal alone cannot be made the basis of any inference by the jury, either favorable to the prosecution or favorable to the defendant.

The reason for the rule seems clear: the witness is exercising a constitutional right personal to himself, the exercise of which should not affect the rights of the parties to the lawsuit one way or the other.

One additional rule, peculiar to criminal cases, must be mentioned. The prosecutor has a duty to disclose material evidence favorable to accused.⁶⁸ Furthermore, prosecutorial destruction or suppression of evidence in a criminal proceeding may deprive defendant of due process, thus vitiating the proceeding⁶⁹ or requiring a new trial.⁷⁰ Thus, in *State v. Wright*,⁷¹ defendant was convicted of first degree murder. However, evidence taken from the victim's person and from the room in which the victim was

1959); *State v. Clay*, 29 Ohio App. 2d 206, 209-10, 280 N.E.2d 385, 388 (1972).

67. *Billeci v. United States*, 184 F.2d 394, 398 (D.C. Cir. 1950). See also Annot., 24 A.L.R.2d 895 (1952).

68. *Hamric v. Bailey*, 386 F.2d 390, 393 (4th Cir. 1967); *Barbee v. Warden*, 331 F.2d 842, 847 (4th Cir. 1964). See *McSurely v. McClellan*, 426 F.2d 664, 671 (D.C. Cir. 1970); *United States v. Elmore*, 423 F.2d 775, 779 (4th Cir. 1970); *United States ex rel. Meers v. Wilkins*, 326 F.2d 135 (2d Cir. 1964). The prosecutor, however, has no duty to produce if the defendant is aware of the evidence and does not request it. *Wallace v. Hocker*, 441 F.2d 219, 220 (9th Cir. 1971). See *Brown v. Crouse*, 425 F.2d 305, 309 (10th Cir. 1970). The same result obtains if the evidence was destroyed unbeknownst to the prosecution by a third party. *Margoles v. United States*, 402 F.2d 450, 452 (9th Cir. 1968).

69. E.g., *State v. Wright*, 87 Wash. 2d 783, 557 P.2d 1 (1976). See also *United States v. Perlman*, 430 F.2d 22, 25 (7th Cir.), cert. denied, 400 U.S. 832 (1970); *United States v. Young*, 426 F.2d 93, 94-95 (6th Cir.), cert. denied, 400 U.S. 828 (1970).

70. *Miller v. Pate*, 386 U.S. 1 (1967); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959); *United States v. Polisi*, 416 F.2d 573, 577 (2d Cir. 1969); *In re Ferguson*, 5 Cal. 3d 525, 487 P.2d 1234, 96 Cal. Rptr. 594 (1971); *People v. Wilson*, 24 Ill. 2d 425, 182 N.E.2d 203 (1962) (federal government sent informer out of state; Illinois answerable); Note, *The Prosecutor's Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964); Annot., 34 A.L.R.3d 16 (1970).

71. 87 Wash. 2d 783, 557 P.2d 1 (1976).

found was destroyed. There was no suggestion that the destruction was for the purpose of hindering the defense.⁷² It was reasonably probable, however, the evidence was material and there was no showing that administrative convenience or inadequate facilities justified the failure to preserve the evidence. The remedy? "[T]he destruction of evidence deprived defendant of a fair trial. Obviously, for the same reason, it will never be possible for defendant to have a fair trial."⁷³ Thus, the judgment of conviction was reversed and the prosecution dismissed.⁷⁴ Obviously, neither the police nor the prosecution may decide *ex parte* what evidence is "favorable" or "material."⁷⁵ The range of sanctions in criminal destruction of evidence cases will necessarily be developed over time.⁷⁶ But for Washington State a prospective rule is announced: before "testing or disposition of evidence occurs, the defendant should be given notice of the type of evidence involved and its planned disposition."⁷⁷ If defendant cannot be contacted, the aid of the proper court must be sought.⁷⁸ A corollary rule is that an informer's disappearance must be shown not to be the result of governmental action and that reasonable efforts must be made to produce the informer.⁷⁹

72. Motive is immaterial. *Jackson v. Wainwright*, 390 F.2d 288, 295 (5th Cir. 1968); *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 571 (2d Cir. 1961); *State v. Haynes*, 16 Wash. App. 778, 559 P.2d 583 (1977). The due process requirement is "not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *But see* *People v. Poole*, 555 P.2d 980 (Colo. 1976).

73. *State v. Wright*, 87 Wash. 2d 783, 795, 557 P.2d 1, 9 (1976) (Wright, J., concurring).

74. *Accord*, *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971); *People v. Hitch*, 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974).

75. *Barbee v. Warden*, 331 F.2d 842, 845 (4th Cir. 1964); *Griffin v. United States*, 183 F.2d 990, 993 (D.C. Cir. 1950).

76. *See* Comment, *Judicial Response to Governmental Loss or Destruction of Evidence*, 39 U. CHI. L. REV. 542, 564-65 (1972). *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971), suggests a weighing of "the degree of negligence or bad faith involved, the importance of the evidence lost, and the evidence of guilt adduced at trial in order to come to a determination that will serve the ends of justice." *Id.* at 653. This is perhaps not as satisfactory as a black and white "destruction requires dismissal" test. Yet it may be impossible to preserve every fragment of possible evidence. *See* Note, *The Right to Independent Testing: A New Hitch in the Preservation of Evidence Doctrine*, 75 COLUM. L. REV. 1355, 1375-80 (1975).

77. *State v. Wright*, 87 Wash. 2d 783, 793, 557 P.2d 1, 7 (1976).

78. *Id.*

79. *E.g.*, *United States v. Cansler*, 419 F.2d 952, 954 (7th Cir. 1969), *cert. denied*, 397 U.S. 1029 (1970); *Velarde v. United States*, 354 F.2d 9 (9th Cir. 1965).

EFFECT OF VARIOUS RELATIONSHIPS

The questions always must arise, who should have called the particular knowledgeable witness? Which way does the adverse inference run? The most significant datum in answering these questions is the relationship of the putative witness to the parties in the lawsuit. Ordinarily one would expect parties to call those knowledgeable witnesses who are bound to them by ties of blood, interest, and affection, unless they happen to be aware that such persons would, under the suasive impact of the courtroom atmosphere and the sanction of the oath, give unfavorable testimony because of knowledge of facts adverse to the claims of the natural sponsor. Failure of the natural sponsor to call may, of course, be due to an unrevealed antipathy, or a party's desire to avoid sponsorship in order to impeach or cross-examine the putative witness, but this is always subject to explanation.⁸⁰

The strength of the inference naturally wanes in proportion to the remoteness of the ties. Hence, the inference is strong and freedom allowed by courts substantial, when the putative witness is a near relative, but weaker and more restrained when distant relations are in question. Similarly, the failure to call a knowledgeable current employee gives rise to a strong and vigorous inference, but neglect to call a knowledgeable disgruntled former employee will certainly give rise to a much weaker inference, and the inference may indeed be explained away altogether by the fact of current non-employment, even without proof of disgruntlement. When it comes to professional relationships, courts are reluctant to permit the drawing of an inference due sometimes to the privileged relationship, and in any case to underlying public policies and ethical considerations.

Employment Relations

An employe is obviously peculiarly available as a witness to the employer-party and unavailable to the opponent.⁸¹ Thus, a

80. Explanation itself may, of course, be embarrassing. See Wall St. J. Sept. 14, 1977, at 22 col. 1. A Senate committee was about to ratify the appointment of Bert Lance to manage the nation's budget. Mr. Robert Bloom, former acting Comptroller of the Currency, failed to forward the information that bank examiners found Mr. Lance to be a "very weak administrator and executive officer" in running a local Georgia bank. His explanation: "I happen to be a man who depends on his government job for a living, and it was only human on my part to worry about the effect on my future." *Id.*

81. *E.g.*, *Tradesmen's Bank v. Mulligan*, 2 Conn. Cir. Ct. 672, 205 A.2d 186 (1964); *Memphis Light Co. v. Evans*, 54 Tenn. App. 223, 389 S.W.2d 80 (1964); *Shelby Mutual Ins. Co. v. Wilson*, 53 Tenn. App. 428, 383 S.W.2d 791 (1964) (adverse inference when

railroad employee sues the railroad for injuries sustained while in its employ. If defendant neglects to call a co-worker present at the time of the injury, this failure is held subject to comment by plaintiff's counsel.⁸²

The law is well settled where an employee who could give important testimony relative to issues in litigation is not present, and his absence is unaccounted for by his employer, who is a party to the action, the presumption⁸³ arises that the testimony of such employee would be unfavorable to his employer.⁸⁴

Under some circumstances, of course, no adverse inference can be drawn from the failure on the part of the employer to call the employee.⁸⁵ For example, it may be considered that the putative witness may actually have been equally available to both sides.⁸⁶ Alternatively it may be shown that the witness is unavailable or has no knowledge,⁸⁷ or that the opposing party has not satisfied his burden of going forward with some evidence, as a result of which the employer has no duty to do anything.⁸⁸ Finally, there is always the possibility that the employee's testimony would be merely cumulative.⁸⁹

For some reason the use of adverse inferences from nonproduction of employees in admiralty cases seems very frequent. An early example in the United States Supreme Court dates to

insurance company failed to call knowledgeable agent); *Hope Acres, Inc. v. Harris*, 27 Wis. 2d 285, 134 N.W.2d 462, *modified*, 135 N.W.2d 775 (1965).

82. *Western & Atl. R.R. v. Morrison*, 102 Ga. 319, 29 S.E. 104 (1897).

83. Some courts refer to a presumption whereas the majority of the courts refer to an inference. It would appear the use of inference would be preferable. An inference is a permissible deduction the jury is entitled to draw from the evidence. It has no legal probative effect other than what the jury is pleased to attribute to it in a given case. Presumptions of law are artificial rules having legal effect independent of any belief, and stand in the place of proof until the contrary is proven. *Puget Sound Elec. Ry. v. Benson*, 253 F. 710 (9th Cir. 1918). A presumption "is a fixed inference." 5 R. MEISENHOLDER, *WASHINGTON EVIDENCE LAW AND PRACTICE* § 566 at 533 (1965 ed.).

84. *Ellerman v. Skelly Oil Co.*, 227 Minn. 65, 70, 34 N.W.2d 251, 254 (1948).

85. *E.g.*, *International Harvester Co. v. National Surety Co.*, 44 F.2d 746 (7th Cir. 1930), *cert. denied*, 282 U.S. 895 (1931).

86. *E.g.*, *Iowa Cent. R.R. v. Hampton Electric Light & Power Co.*, 204 F. 961 (8th Cir. 1913); *Jordan v. Austin*, 161 Ala. 585, 50 So. 70 (1909); *Bartlett v. Cain*, 366 S.W.2d 491 (Mo. Ct. App. 1963).

87. *E.g.*, *Case v. New York Cent. R.R.*, 329 F.2d 936 (2d Cir. 1964); *Peetz v. St. Charles St. Ry.*, 42 La. Ann. 541, 7 So. 688 (1890); *Davis v. Castile*, 257 S.W. 870 (Tex. Comm. App. 1924).

88. *E.g.*, *Wichita Falls, R. & Ft. W. Ry. v. Emberlin*, 255 S.W. 796 (Tex. Civ. App. 1923), *rev'd on other grounds*, 267 S.W. 463 (Tex. Comm. App. 1924).

89. *E.g.*, *Georgia S. & Fla. Ry. v. Perry*, 326 F.2d 921 (5th Cir. 1964); *Pacific-Atlantic S.S. Co. v. United States*, 175 F.2d 632 (4th Cir. 1949).

1855.⁹⁰ More recently, the case of *Petition of Mahoney*⁹¹ involved a barge owner's petition for limitation of liability in connection with the sinking of the barge moored at a pier. Upon an issue whether the barge was seaworthy, certain of petitioner's experts gave testimony that it was. Defendant failed to call any of its employees who were working on the barge when it sank. Hence, the court stated:

It is not without significance the [defendant] failed to call . . . its employees who worked on the ARLENE . . . I draw the inference from [defendant's] failure to call the witnesses that their testimony as to the condition of the ARLENE would have been adverse to [defendant's] interest.⁹²

In another recent admiralty case, question arose whether the *Russel 18* had actually struck a bank, causing claimants' husbands' deaths. Nonproduction of owner's witnesses was considered to give rise to an inference reinforcing the testimony of claimants' expert:

While Marina contests the Russell 18 did not strike the bank, it failed to call any of its surveyors or experts who examined the Russell 18. The unexplained failure to call the only witnesses who were in a position to challenge Ganly's testimony permits the inference that their testimony would corroborate his.⁹³

An adverse inference was also drawn in *In re Landi's Petition*,⁹⁴ wherein a cabin cruiser and a tanker collided. The court held:

Of course, as far as the Derby is concerned, the unexplained failure to call as a witness anyone connected with the navigation of that vessel may give rise to an unfavorable inference concerning that navigation. Omission to produce a lookout or to account satisfactorily for not doing so gives rise to an inference that a proper lookout was not kept.⁹⁵

90. *Culbertson v. The Southern Belle*, 59 U.S. (18 How.) 584, 588 (1855).

91. 255 F. Supp. 310 (D.N.H. 1966).

92. *Id.* at 312. The inference is also available against the United States in admiralty litigation. *Bloomfield S.S. Co. v. United States*, 258 F. Supp. 891 (S.D. Tex. 1964), *rev'd on other grounds*, 359 F.2d 506 (5th Cir.), *cert. denied*, 385 U.S. 1004 (1966).

93. *Petition of Marina Mercante Nicaraguense, S.A.*, 248 F. Supp. 15, 22 n.6 (S.D.N.Y. 1965) (Weinfield, J.), *cert. denied*, 385 U.S. 1005 (1966). *See also* *Cargo of the Brig Aurora*, 11 U.S. (7 Cranch) 382, 387 (1813); *J. Gerber & Co. v. S.S. Sabine Howaldt*, 437 F.2d 580, 593 (2d Cir. 1971); *O.F. Scheerer & Sons v. Cincinnati Marine Serv., Inc.*, 279 F.2d 68, 73 (6th Cir. 1960); *Coyle Lines, Inc. v. United States*, 195 F.2d 737 (5th Cir. 1952); *Old Colony Ins. Co. v. S.S. Southern Star*, 280 F. Supp. 189, 191 (D. Ore. 1967); *Petition of Mahoney*, 255 F. Supp. 310 (D.N.H. 1966).

94. 194 F. Supp. 353 (S.D.N.Y. 1960). *See also* *The New York*, 175 U.S. 187, 204-05 (1899).

95. *In re Landi's Petition*, 194 F. Supp. 353, 360 (S.D.N.Y. 1960). *See also* *The Joseph*

Again, however, the inference is not available if good reason for the nonproduction is given to the court.⁹⁶

Probably the most frequent situation in which failure of an employer to call employees has given rise to the inference is in the case of railroad accidents.⁹⁷ Even in this context, however, there are cases where the drawing of the inference has been disapproved.⁹⁸ Adverse inferences are also available from the failure of a corporation to call its officers or directors, as the United States Supreme Court has observed:

The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.⁹⁹

Nor is the sovereign exempt; it has been held that failure by the United States to produce knowledgeable employees "not only justifies but compels the inference that such testimony would have been unfavorable to the government."¹⁰⁰ So also the failure of any other principal to call his agent.¹⁰¹ Once the relationship ends, of course, the inference becomes unavailable; at least, absent special circumstances, so holds the increasing weight of authority:

This rule, however, has no application where such a witness is no longer in the employ of the party to the litigation. When the evidence discloses such to be the fact and the burden of proof is on the plaintiff, no obligation rests upon a defendant employer to present his former employee as a witness. Here, plaintiff did not produce the witness nor explain his absence.

B. Thomas, 81 F. 578, 583-84 (N.D. Cal. 1897), *aff'd*, 86 F. 658 (9th Cir. 1898); *The Bombay*, 46 F. 665, 667 (E.D.N.Y. 1891).

96. *E.g.*, *Hoskyn & Co. v. Silver Line Ltd.*, 63 F. Supp. 452 (S.D.N.Y. 1943), *aff'd*, 143 F.2d 462 (2d Cir.), *cert. denied*, 323 U.S. 767 (1944); *Fetan v. Atlantic & Caribbean Steam Nav. Co.*, 60 F.2d 328 (S.D.N.Y. 1932); *Boston Ins. Co. v. Mesick & Mesick*, 286 F. 531 (D. Conn. 1923). *See also* *United States v. S.S. Soya Atlantic*, 213 F. Supp. 7, 26 (D. Md. 1963) (alteration of evidence).

97. Annot., 5 A.L.R.2d 893, 903 (1949).

98. *E.g.*, *Louisville & N.R.R. v. Sullivan Timber Co.*, 126 Ala. 95, 27 So. 760 (1900); *Norfolk & W.R.R. v. Brown*, 91 Va. 668, 22 S.E. 496 (1895).

99. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939). *See also* *Mari-gold Coal, Inc. v. Thames*, 274 Ala. 421, 427, 149 So. 2d 276, 281-82 (1963) (comment upon absence at trial of defendant's president).

100. *Bloomfield S.S. Co. v. United States*, 258 F. Supp. 891, 908 (S.D. Tex. 1964).

101. Annot., 5 A.L.R.2d 893, 909-11 (1949).

Her failure in this respect certainly would not be said to have created a presumption that the testimony of the absent witness would have been unfavorable to the Skelly Company.¹⁰²

Physicians

When a physical or mental condition of a party is in issue, it would be natural to assume that the party's personal physician would have the best knowledge, and, moreover, would be inclined favorably to his patient. It is, therefore, natural to suppose when such a party fails to call his personal physician, that he would have testified unfavorably to such party's interests. On the other hand, in states where the physician-patient privilege exists, it might be argued that utilization of the inference, allowing comment upon the nonproduction, etc., would effectively negate the privilege.¹⁰³

In a notable Mississippi case,¹⁰⁴ plaintiff called as witnesses two of the three physicians who had examined him, but failed to call the third. The court upheld a jury instruction authorizing an inference that the unelicited testimony would have been unfavorable. A physician-patient privilege statute was in effect at the time, but the court reasoned that the legislature never intended to condone such "unjust uses." Although no comment was allowed in Mississippi upon failure to call an attorney or a spouse when a privilege applied, the court considered that "our jurisprudence attained to its present heights and our civil society reached its flower in a hundred years of development in this state before the physicians' privilege statute ever became part of our law."¹⁰⁵ Further:

[I]t is the duty of courts, as time progresses, to closely observe the uses to which any procedural rule, whether of the common law or of the statutes, has been put, and to so control those uses, that while the terms of the rule or statute shall be fairly fulfilled, it shall be put to no use for the ends of injustice, or to the defeat of real justice, when such use can at least be minimized by resort to other established procedural rules, and when such resort

102. *Ellerman v. Skelly Oil Co.*, 227 Minn. 65, 70, 34 N.W.2d 251, 254 (1948).

103. *See, e.g., Patania v. Silverstone*, 3 Ariz. App. 424, 428, 415 P.2d 139, 143 (1966). Of course, courts often hold that if the patient places privileged matters in issue, the privilege does not apply. *See, e.g., Collins v. Bair*, 256 Ind. 230, 268 N.E.2d 95 (1971); *Killings v. Metropolitan Life Ins. Co.*, 187 Miss. 265, 192 So. 577 (1940). *But see Bond v. Independent Order of Foresters*, 69 Wash. 2d 879, 421 P.2d 351 (1967).

104. *Killings v. Metropolitan Life Ins. Co.*, 187 Miss. 265, 192 So. 577 (1940).

105. *Id.* at 273, 192 So. at 579.

works no intrusion upon that which is essentially fundamental in the judicial process or in the preservation of the foundations of society itself.¹⁰⁶

Similarly, in a significant federal case,¹⁰⁷ plaintiff neglected to call the physician who had attended her deceased husband and the court said this failure justified the inference that the physician would not have affirmed her contention that her husband's death was the result of an accident. The courts are badly split, however, some courts allowing the inference,¹⁰⁸ and some not.¹⁰⁹

When, under modern court rules,¹¹⁰ a physician has examined one of the parties at the request of the other, the inference should be freely available against the employing party, no privilege seemingly applying in such circumstances.¹¹¹ No inference should be available, however, when the physician is appointed by the court, because the appointed physician is equally available to both parties. Nevertheless, in one especially interesting case,¹¹² upon defendant's motion, the court appointed two physicians to examine plaintiff. Although at trial, defendant produced only one of them, without explaining the failure to call the other, the court held that an adverse inference could be drawn.

Attorneys

Understandably, courts are exceedingly reluctant to permit an adverse inference to be drawn upon failure of a party to call an attorney to testify, especially when the supposedly knowledge-

106. *Id.*

107. *Troutman v. Mutual Life Ins. Co.*, 125 F.2d 769, 773 (6th Cir. 1942).

108. *E.g.*, *Taylor v. Associated Cab Co.*, 110 Ga. App. 616, 139 S.E.2d 519 (1964); *Richoux v. Grain Dealers Ins. Co.*, 175 So. 2d 883 (La. Ct. App. 1965); *Thomas v. Maryland Cas. Co.*, 32 So. 2d 472 (La. Ct. App. 1947); *Vergin v. City of Saginaw*, 196 Mich. 499, 84 N.W. 1075 (1917); *Cooley v. Foltz*, 85 Mich. 47, 48 N.W. 176 (1891); *Killings v. Metropolitan Life Ins. Co.*, 187 Miss. 265, 192 So. 577 (1940); *Gatlin v. Allen*, 203 Miss. 135, 33 So. 2d 304 (1948); *Robinson v. Haydel*, 177 Miss. 233, 171 So. 7 (1936); *Miller v. Collins*, 328 Mo. 313, 40 S.W.2d 1062 (1931); *Atkinson v. United Rys.*, 286 Mo. 634, 228 S.W. 483 (1921); *Evans v. Trenton*, 112 Mo. 390, 20 S.W. 614 (1892).

109. *E.g.*, *Stone v. Stone*, 136 F.2d 761, 764 (D.C. Cir. 1943); *Cherry-Burrell Co. v. Thatcher*, 107 F.2d 65, 69 (9th Cir. 1939); *Dorian v. Federal Shipbuilding & Dry Dock Co.*, 25 N.J. Misc. 249, 264, 52 A.2d 551, 559 (1947), *rev'd on other grounds*, 136 N.J.L. 306, 55 A.2d 776 (N.J. Sup. Ct. 1947), *aff'd*, 137 N.J.L. 185, 59 A.2d 9 (1948). *Cf.* *Crawford v. McNece*, 388 S.W.2d 809, 816 (Mo. 1965) (*semble*; failure to call physician not ground for adverse inference but only affected credibility of plaintiff's evidence).

110. *E.g.*, Fed. R. Civ. P. 35.

111. *See, e.g.*, 5 R. MEISENHOLDER, *WASHINGTON EVIDENCE LAW AND PRACTICE* § 225 at 208 (1965 ed.); 2A W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE & PROCEDURE* §§ 821-25 (1961 ed.).

112. *Commonwealth Power & Light Co. v. Vaught*, 191 Ky. 641, 231 S.W. 247 (1921).

able attorney is counsel of record. "The relation between attorney and client and its privileges are such that courts could not function nor justice be administered in any acceptable way other than that the privilege be placed wholly above any adverse comment or inference from it" ¹¹³ Such inferences have, however, on occasion been drawn. Thus, in a stunning case, ¹¹⁴ defendant's former attorney testified that he was no longer representing defendant at the time a certain notice was allegedly served upon him, and that he so informed plaintiff's attorney. Plaintiff's attorney did not take the witness stand to refute this testimony, and the court drew the inference that the former attorney's testimony was true. ¹¹⁵ Similarly, the Supreme Court of Washington held that defendant's execution of a deed to plaintiff in the presence of the attorneys was sufficiently established by the testimony of defendant's attorney accompanied by the failure of plaintiff to call her attorney. Her unexplained failure fostered the inference that "if his testimony would have been favorable . . . she would have called him." ¹¹⁶

Ethical considerations may justify nonallowance of an inference. In an Illinois case, ¹¹⁷ the drafter of a will was also attorney for the executor. The court held no inference could be drawn from the attorney's failure to testify, because it would be a breach of professional propriety for him to do so. There appears to be no case *expressly* stating that an adverse inference can be drawn notwithstanding the privilege; the cases discussed above, however, indicate that common sense occasionally overbalances doctrine.

Family Relationships

Manifestly, the closer the relationship, the stronger will be the inference from nonproduction of the related witness. Thus, cases are frequent in which a negative inference has been drawn from failure to call a spouse, ¹¹⁸ especially when no marital privi-

113. *Killings v. Metropolitan Life Ins. Co.*, 187 Miss. 265, 273, 192 So. 577, 579 (1940) (dictum). As to the husband-wife privilege, moreover, "the relationship of husband and wife lies at the very foundations of civil society" *Id.*

114. *Chamberlain v. Bruce Furniture Co.*, 35 So. 2d 257 (La. Ct. App. 1948).

115. *See also* *United States v. Woodall*, 438 F.2d 1317, 1327 (5th Cir. 1971); *Van Houten v. Whitaker*, 169 Cal. App. 2d 510, 337 P.2d 900 (1959); *Douglas v. Insurance Co. of N. America*, 215 Mich. 529, 184 N.W. 539 (1921).

116. *Gardner v. Herbert*, 165 Wash. 429, 432, 5 P.2d 782, 783 (1931).

117. *Ravenscroft v. Stull*, 280 Ill. 406, 117 N.E. 602 (1917). *See also* *Gardner v. Benedict*, 82 N.Y. Sup. Ct. (75 Hun.) 204, 207-08, 27 N.Y.S. 3, 5 (1894).

118. *E.g.*, *Pennsylvania Fire Ins. Co. v. Thomason*, 293 Ky. 142, 168 S.W.2d 547 (1943); *Jones v. Wettlin*, 39 Wyo. 331, 271 P. 217 (1928).

lege obtrudes.¹¹⁹ There are, however, cases to the contrary.¹²⁰ There exist, in fact, criminal cases, in which adverse inferences have been drawn against defendant for failing to call his spouse.¹²¹ In an Oklahoma case,¹²² defendant husband was prosecuted for selling intoxicating liquor; certain state witnesses testified that the sale was made by accused's wife. The court made this extraordinary, but telling, analysis:

If the sales were not made by the wife of appellant as testified to on behalf of the state, she was a competent witness in his behalf. His failure to place her upon the stand, or to account for his failure to do so, was a tacit admission of the truthfulness of the state's testimony. Like Adam of old, his only defense was that the woman did it. This plea did not save Adam, and it should not be permitted to save appellant. In such a case as this, the husband should not be allowed to hide behind his wife's skirts.¹²³

This writer, however, has not yet discovered a case permitting an adverse inference in the face of a timely-invoked and applicable statutory or other spousal privilege or immunity.

Frequently, inferences are drawn from failure to call knowledgeable parents of parties in both criminal and civil cases.¹²⁴ Similarly, if a knowledgeable child is omitted from the witness stand, at least if the child appears competent to testify.¹²⁵ Similar

119. If an existing marital privilege renders one spouse incompetent to testify against the other, no negative inference from nonproduction of the spouse is permissible. See *United States v. Tapia-Lopez*, 521 F.2d 582, 584 (9th Cir. 1975).

120. *E.g.*, *McGeorge v. Grand Realty Trust*, 316 Mass. 373, 55 N.E.2d 694 (1944); *McPhail v. Houghtelling*, 225 S.W.2d 162 (Mo. Ct. App. 1949); *Clover v. Clover*, 224 S.W. 916 (Tex. Civ. App. 1920).

121. See, *e.g.*, *United States v. Seay*, 432 F.2d 395, 404 (5th Cir.), *cert. denied*, 401 U.S. 942 (1970); *Tucker v. State*, 7 Okla. Crim. 634, 125 P. 1089 (1912); *Wood v. State*, 374 S.W.2d 896 (Tex. Crim. App. 1964). *But see* *State v. Wyatt*, 276 S.W.2d 86, 89-90 (Mo. 1955).

122. *Tucker v. State*, 7 Okla. Crim. 634, 125 P. 1089 (1912).

123. *Id.* at 644, 125 P. at 1093.

124. Civil cases: *E.g.*, *Young v. Corrigan*, 208 F. 431, 435-36 (N.D. Ohio 1912); *Farmer v. Smith*, 227 Ark. 582, 300 S.W.2d 937 (1957); *Duchossois v. Duchossois*, 139 Pa. Super. Ct. 1, 5, 10 A.2d 824, 826 (1940).

Criminal cases: *E.g.*, *People v. Rosoto*, 58 Cal. 2d 304, 357-58, 373 P.2d 867, 896, 23 Cal. Rptr. 779, 808 (1962), *modified*, 62 Cal. 2d 684, 401 P.2d 220, 43 Cal. Rptr. 828 (1965); *Anderson v. Commonwealth*, 288 Ky. 576, 578, 156 S.W.2d 860, 861 (1941); *State v. Martin*, 32 N.M. 48, 65-67, 250 P. 842, 849-50 (1926).

125. Civil cases: *E.g.*, *Lasseter v. Green*, 202 Ga. 148, 148-49, 42 S.E.2d 480, 480-81 (1947); *Chicago Daily News, Inc. v. Kohler*, 360 Ill. 351, 369-70, 196 N.E. 445, 453-54 (1935); *Van Bernum v. Van Bernum*, 140 N.J. Eq. 413, 415-16, 55 A.2d 51, 52 (1947). *But see* *Jenkins v. Bierschenk*, 333 F.2d 421, 425 (8th Cir. 1964) (son equally available to both parties). *Cf.* *Veillon v. Sylvester*, 174 So. 2d 189 (La. Ct. App. 1965) (son not in position to see).

inferences have been drawn from the failure to call siblings,¹²⁶ nephews,¹²⁷ and parents-in-law.¹²⁸

Other Relationships and Subject Omissions

Courts have allowed the drawing of adverse inferences in other situations; for example, the failure of property owners to call their predecessors in title,¹²⁹ or a party's failure to call fellow passengers,¹³⁰ partners,¹³¹ or bankers.¹³² It has, however, been held that the failure of an accused to call a co-defendant or accomplice does not justify any adverse inference against accused.¹³³ With respect to any of the above relationships, what if the witness is called, but the interrogation is carefully limited to skirt significant areas? In such a situation it is widely held that an inference adverse to the sponsor of the witness is available.¹³⁴ As in total failure to produce, of course, the measure of the relationship will determine the strength of the inference.

INSTRUCTIONS

The rules governing application of adverse inferences when the putative witness is or is not subject to the control of the party against whom the adverse inference is sought to be drawn, or where the witness is equally available to both parties, are easily enough stated. But their application in specific cases has proved a challenging task. A good borderline case is *Reehil v. Fraas*,¹³⁵ in

Criminal cases: *E.g.*, *Commonwealth v. Clark*, 80 Mass. (14 Gray) 373 (1860); *State v. Parker*, 172 Mo. 191, 204-05, 72 S.W. 650, 654 (1903).

126. *E.g.*, *United States Bond & Mort. Co. v. Reddick*, 199 Ark. 82, 133 S.W.2d 23 (1939); *Henderson v. Ball*, 193 Iowa 812, 186 N.W. 668 (1922).

127. *E.g.*, *In re Eisenberg*, 41 F. Supp. 482, 484 (E.D. Pa. 1941) (Kalodner, J.).

128. *E.g.*, *Button v. Knight*, 95 Vt. 381, 115 A. 499 (1921). However, no inference is available when the putative witness is related to both parties. *E.g.*, *Knoots v. Sentinel Life Ins. Co.*, 228 Mo. App. 353, 67 S.W.2d 798 (1934).

129. *E.g.*, *Dawson v. Davis*, 125 Conn. 330, 334, 5 A.2d 703, 705 (1939).

130. *E.g.*, *A.B.C. Storage & Moving Co., Inc. v. Herron*, 138 S.W.2d 211, 215-16 (Tex. Civ. App. 1940) (dictum). *But see Rosenstrom v. North Bend Stage Lines*, 154 Wash. 57, 65, 280 P. 932, 935 (1929) (inference unavailable in case of "strangers who are mere witnesses to the transaction and equally within the call of one party as the other").

131. *See, e.g.*, *Bleecker v. Johnston*, 69 N.Y. 309, 311 (1877) (dictum).

132. *Green v. Enen*, 270 S.W. 929, 931 (Tex. Civ. App. 1925).

133. *E.g.*, *Clayton v. United States*, 152 F.2d 402 (9th Cir. 1945); *State v. Cavness*, 46 Haw. 470, 381 P.2d 685 (1963). *See also Bradley v. United States*, 420 F.2d 181 (D.C. Cir. 1969).

134. *See, e.g.*, *Halpine v. Halpine*, 138 Conn. 578, 87 A.2d 148 (1952); *Milliman v. Rochester Ry.*, 3 App. Div. 109, 39 N.Y.S. 274 (1896).

135. 129 App. Div. 563, 114 N.Y.S. 17 (1908), *rev'd on other grounds*, 197 N.Y. 64, 90 N.E. 340 (1909).

which defendant's horse and wagon knocked down plaintiff pedestrian. At the time of the collision a boy, a stranger to defendant, with no right to be in the wagon, was nevertheless riding in it with the driver. This boy gave testimony on the first trial of the action but on retrial was not called by either party. The trial judge permitted plaintiff's counsel in summing up to refer to defendant's failure to call the boy and overruled objections to these comments. In his charge the judge told the jurors that, although no unfavorable inference could be drawn against defendant for not calling the boy, "I leave it all to you as one of the questions of fact in this action."

The Appellate Division reversed by a vote of 3—2. The majority considered that it was not always for the jury to draw any inference it saw fit from the failure to call any witness. There is a line somewhere, and the court, without stating exactly why, held the case before it was on the wrong side of the line. The dissent sharply differed from this view and avowed it was for the jury to say what inference, if any, should be drawn. As the dissenting judges pointed out, the trial judge had very carefully charged the jury:¹³⁶

This witness was not under the control of the defendant. This witness sat right here in the courtroom. He could have been called by either party. So far as it appears, he was not employed by the defendant. He was not in the control of the defendant, and, therefore, under those circumstances, gentlemen, I do not think you can draw any inferences against the defendant from the fact that he did not call that witness, any more than you can draw an inference against the plaintiff from the fact that he did not call that witness. It is only in cases where the evidence is peculiarly in the power of one of the parties that such an inference as that will be permitted. In my opinion, no inference can be drawn either way from the fact that the witness was not called. In my opinion, he was not called because neither party was satisfied with his evidence. I leave that all to you as one of the questions of fact in this action.

This is approximately the position of the Washington Supreme Court Committee on Jury Instructions,¹³⁷ which concludes the inference "may" be drawn only when a failure to produce "unexplained, creates a suspicion that the failure to produce was a willful attempt to withhold competent testimony." The Committee concluded: "There are so many collateral reasons why a

136. 129 App. Div. 563, 571, 114 N.Y.S.17, 23 (1908).

137. WASHINGTON PATTERN JURY INSTRUCTIONS—CIVIL, §§ 5.00, 5.01 (1967).

party may not wish to call a particular witness that the Committee believes the matter is better left to argument of counsel."¹³⁸ In this writer's opinion, an instruction, if one must be given, should read about as follows:

The failure to call any given witness in and of itself does not constitute evidence, because it is not proof of any fact. No duty rests upon a party to call any given witness within his control who could testify to facts material to the issues in this case, nor does any presumption attach to an omission to call such a witness. Where it is apparently within the power of a party to produce a witness, and it appears that the testimony of that witness would throw additional light upon the controversy, the jury is not permitted to speculate as to what the testimony of the uncalled witness would be. The unexplained omission by one party, however, to call such a witness who is within his control warrants you in considering most strongly and favorably the evidence presented by the other, or opposing party, which the testimony of the witness not produced might have contradicted or explained, if under all of the circumstances of this case you deem such a course to be justified.¹³⁹

Where any jury inference is warranted from failure of a party to call a witness, and if the jury is to be instructed at all, they should be instructed that they may infer the witness would not have controverted the opposing party's material adverse testimony that the witness was in a position to corroborate or controvert, because the party might reasonably have been expected to call the uncalled witness if his testimony would have been favorable to the party. Or, they might be instructed that the uncalled witness would *not* have corroborated material testimony of the party who ordinarily would have called him and that he was in a position to corroborate or controvert. The jury, therefore, would be warranted to lend credence to the testimony adverse to the party who thus might have controverted it if he could, and might

138. *Id.* § 5.01 (comment) at 33-34. As to the Washington situation in general, see, e.g., *State v. Nelson*, 63 Wash. 2d 188, 386 P.2d 142 (1963); *State v. Baker*, 56 Wash. 2d 846, 355 P.2d 806 (1960); *Wright v. Safeway Stores, Inc.*, 7 Wash. 2d 341, 109 P.2d 542 (1941). As to the breadth of permissible comment, see, e.g., *Krieger v. McLaughlin*, 50 Wash. 2d 461, 313 P.2d 361 (1957). But see *McCormick, What Shall the Trial Judge Tell the Jury About Presumptions?*, 13 WASH. L. REV. 185 (1938). Instructing juries about presumptions is "well-nigh universal." In criminal cases, this is "especially true of . . . 'hortatory' presumptions, such as . . . the presumption against one who suppresses evidence, that it would have made against him." *Id.* at 187.

139. See generally Hofstadter & Richter, *Effect of Failure to Call a Witness—New Rule Proposed*, 135 N.Y.L.J., June 4, 1956, at 4, cols. 1-3; *id.*, June 5, 1956, at 4, cols. 1-3; *id.* June 6, 1956, at 4, cols. 1-3; *id.* June 7, 1956, at 4, cols. 1-3.

weigh such testimony most strongly against such party. But there is no presumption involved, and the jury have no right to indulge in speculation regarding what the witness, if called, would have testified to. That is, the case must be decided on the substantive evidence before the tribunal.

The trier of facts, engaged in the subtle task of deciding disputed facts, should not be subject to a mechanical rule that every experienced trial lawyer and trial judge knows is honored more in the breach than in the observance by the bench without aid of jury. Mr. Justice Miller once observed how readily judges came to an agreement upon questions of law and how often they disagreed upon questions of fact. Accordingly, juries should not have to wrestle with a charge that impedes and obscures rather than assists and lights their way to a sound solution.

The basis for all spoliation rules is, or ought to be, common sense. It is an obvious truth that self-interest ordinarily prompts a litigant to produce all available evidence likely to help him. If he does not call a witness with pertinent knowledge who is subject to his "control," there must be a good reason for not doing so. This is an inference, clearly. From its nature, the inference can be as varied as the myriad of circumstances in which it is called into play. It fits into a prescribed formula no better than the circumstances that gave it birth. Thus, one supposes that the jury should be instructed, roughly, to follow its common sense in the matter, the natural supposition being that unproduced evidence would work against the nonproducer.

NATURE OF SPOLIATION

The application of the law is not a purely mechanical process; it involves not merely logic but intuition as well. The naive notion that the law should be applied merely mechanically is attractive, but English law is not a science. A peculiarity of spoliation evidence is that it tends not to be objective, of the world of nature, but subjective, part of the domain of human intuition. It usually operates, not directly to establish a relevant datum, but indirectly, by way of reducing the probative force of evidence actually produced by the spoliator. It thus adds, but only indirectly, to the relative weight and probative force of the case affirmatively offered by the spoliator's opponent. It *impeaches* the spoliator and *rehabilitates*—or, better, *accredits*—his opponent. Spoliation proof is thus halfway between impeaching, nonsubstantive evidence on the one hand, and direct, affirmative, sub-

stantive proof on the other.¹⁴⁰

As to the impeaching quality of spoliation, when two partners jointly sue, and only one testifies, because the other partner did not corroborate the one who did give evidence, it is for the trier to consider that fact. If the trier concludes the unproduced, knowledgeable partner did not testify because he could not, or dare not, the judge or jury will assess the testifying partner's testimony accordingly, and decide from this circumstance, among others, the weight to be given his testimony, or whether they should believe it at all. The same is true—though generally to a lesser extent—of the testimony of a nonparty witness.

LIMITS OF THE DOCTRINE

Great care, one supposes, ought to be taken, not to give to spoliation a weight it does not merit. It is perhaps true that nations vary, and generations change, in the quantity and in the tone of moral conduct, in the good character and purity of feeling that are diffused through a society, and in their reverence or irreverence for the sacred quality of the oath. Bentham tells us that in another age there existed "houses of call . . . for a sort of witness of all work," and that even in his own time, under the Turkish regime, "it seems generally understood that the trade of testimony exists upon a footing at least as flourishing as any other"¹⁴¹ Men differ in force of character and in courage. Courts diverge in the breadth of their abilities (or incompetencies) as well as in the hardihood (or "squishy softness") of their impartiality, not to mention the quantity of evidence they may require to be exacted for the proof of an essential fact.

Undoubtedly, the suppression or fabrication of evidence or the failure to produce significant available evidence will always be a singularly forceful circumstance bearing upon the proof of a fact. Yet instances surely have occurred of innocent persons, alarmed at a body of evidence perhaps collusively constructed against them, and which, while false or inconclusive, they felt themselves unable to refute, having recourse to the fabrication of exculpatory testimony. Jeremy Bentham relates the following interesting story. A great personage produced a sumptuous enter-

140. Compare *Wright v. Safeway Stores, Inc.*, 7 Wash. 2d 341, 353-55, 109 P.2d 542, 547-48 (1941) (Blake, J., dissenting) (rebuttable presumption) with *Stocker v. Boston & M.R.R.*, 84 N.H. 377, 151 A. 457 (1930) (inference not substantive proof). The insistence is that the trier of fact base his finding on the evidence before him and not speculate on what unproduced evidence might show.

141. 3 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE*, 168, 169 (1827).

tainment for a numerous and mixed company, at which a valuable jewel, belonging to a member of the company, was suddenly missed. The alarm having been given, upon the proposal of a member of the party, all present agreed to be searched, save one man who, by virtue of his obstinate refusal, drew down upon himself the strong suspicion of the balance of the company. Yet this man entreated and secured from the master of the house a private audience; whereupon, his pockets being turned inside out, there was discovered, not the bauble sought, but six drumsticks, which he had laid by to carry home to his wife, who was starving.¹⁴²

Sir Edward Coke relates a stunning instance of the same sort, of an innocent person, alarmed at the mass of evidence marshalled against him, having recourse to suppression or fabrication of evidence.¹⁴³ An uncle had the guardianship of his niece, who was entitled under her father's will, to a substantial estate, upon attaining the age of 16. The uncle was next in line in this estate. When she was about 8, the uncle was heard one day correcting her on account of some offense, when she said, "Oh, uncle, kill me not." Thereafter, the child disappeared, and the uncle was jailed on suspicion of her murder. The uncle, released to produce the child, could not do so, but dressed up another child to represent the niece. The falsehood being detected, the uncle was convicted and executed for the supposed murder. It afterwards appeared, however, that the niece had only run away, and remained away until she attained the age sixteen, whereupon she returned to claim her property. "Which case," Lord Coke adds, "we have reported for a double caveat: first to judges, that they in case of life judge not too hastily upon bare presumption; and secondly, to the innocent and true man, that he never seek to excuse himself by false or undue means, lest thereby he offending God (the Author of Truth) overthrow himself, as the uncle did."¹⁴⁴

The unexplained absence of material witnesses is commonplace in trial practice. But the question of how the law should deal with such an everyday occurrence has been highly confused, in the courts, in the books, and in the classroom. Perhaps too much erudition has been expended on the subject so the plain truth comes to be overlooked; the difficulty is one of giving practical expression in the formulation of the rule to the teachings of everyday experience and the age long experience of mankind.

142. Based upon a story related in *id.* at 88-89.

143. 3 COKE, *INSTITUTE OF THE LAWS OF ENGLAND* c. 104 at 232 (1644).

144. *Id.*

Counsel, it is submitted, should be permitted to comment as fully as their hearts desire and the trier should be permitted to draw whatever inference is considered justified. There is authority for this position. As Judge Miller observed, dissenting in *Reehil v. Fraas*.¹⁴⁵

The question in a given case is: What, according to common experience, would a party be likely to do? That question cannot be defined by a line: the jury must be permitted to determine whether any inference at all shall be drawn from a given state of facts, its strength, if one is drawn, and the effect to be given it in considering the other evidence in the case.

This may seem a radical, simplistic, proposal. It would, of course, render obsolete much that has been written on the subject. It is submitted, however, as sound, easy, workable, and above all realistic. In jury trials it would relieve the judge of the almost impossible task of determining first whether any comment or instruction at all is called for, then correctly stating an amorphous rule; confusion would give way to directness and simplicity and the trier would be relieved of an assumed constraint to conform to artificial rules.

CONCLUSION

Jurors are told they are to appraise veracity as they would in their own affairs. They are expected to do their own thinking in their own way, and their very freedom to do so is a salient feature of the jury system. Similarly in the case of a bench trial, findings are made against a backdrop of the judge's own experience. Nonproduction of evidence by a party is one of the factors, and a highly significant one, that the trier takes into account in the quest for the truth. The inference, if any, he will draw, against either party, depends upon innumerable factors: the nature of the evidence withheld, the relation of the uncalled witness to the party, the witnesses' availability and accessibility, and the countless other circumstances that bear in varying degree upon the final question whether, when the nonproduction demands explanation, it has been explained satisfactorily, or whether the party has failed to offer the evidence because he believed this course more to his advantage. These factors are to be weighed by the trier of fact; the inference drawing is merely part of the mental operation by which he ascertains the truth. Should that mental operation be circumscribed by legal formula? The trier should be left free from dictation as to how he is to reach his goal. Water-

145. 129 App. Div. 563, 570, 114 N.Y.S. 17, 22-23 (1908).

tight compartments are alien to human reason, though perhaps not to robotry, and harsh canons contribute little to the delicate process of discovering truth.

The human brain makes visual and other perceptions coherent by virtue of some internal organizing faculty. The colors of a painting assume their varying shades, depths, textures, and qualities from the surroundings in which they are placed. The mental process of evaluation of received evidence is similar. The acts and statements of litigating parties secure their significance and weight from their total context. The importance of a party's failure to call a witness differs in each individual case according to its background. Frequently, the diverse threads of the proofs bearing upon a matter in issue resemble a hopelessly entangled Gordian knot until one thread is pulled and a whole series of variegated and inchoate motives, acts, and events emerges clear and straight in a cohesive whole. Any rule boldly attempting to alter reality must prove sterile and affirmatively obstructive.