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REVISITING THE MISSING WITNESS INERENCE —
Quieting the Loud Voice from the Empty Chair

ROBERT H. STIER, JR.*

The situation is one of the oldest and most common in trial practice: One party fails to call a witness whose testimony evidently could help illuminate a material issue for the jury. How should the trial court control argument about the missing witness, and how should it instruct the jury about the significance of the witness' absence? Typically, courts invoke a venerable but confusing doctrine that has been subject to little critical scrutiny, despite its frequent appearance in both civil and criminal cases. In this Article, I hope to supply a fresh perspective on the traditional missing witness inference.

The doctrine that has evolved over time to handle the missing witness problem is sometimes called the "empty chair doctrine," because it holds that "a litigant's failure to produce an available witness who might be expected to testify in support of the litigant's case, permits the factfinder to draw the inference that had the witness chair been occupied, the witness would have testified adversely to the litigant." 1

The empty chair doctrine is easier to state than to apply. Evidentiary puzzles arise from the many circumstances in which the doctrine might be invoked. What argument should the court permit when one of the parties to a traffic accident fails to call a relative who was a passenger in a car or truck at the time of the collision? Does it make a difference if the "missing witness" was in the courtroom throughout the trial? Must the court allow comment on a plaintiff's failure to call a treating physician when that doctor has been deposed? In a criminal case, may the prosecutor comment on the absence of an eyewitness after the defense rests without calling any witnesses? Is the defendant entitled to an instruction when a

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1. State v. Jefferson, 116 R.I. 124, 139, 353 A.2d 190, 199 (1976). For another statement of the rule, see Hoverter v. Director of Patuxent Inst., 231 Md. 608, 609, 188 A.2d 696, 697 (1963) ("[I]t is well settled that failure of a party to produce an available witness who could testify on a material issue, if not explained, gives rise to an inference that the testimony would be unfavorable, and is a legitimate subject of comment by counsel in an argument to the jury.").

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police informant refuses to testify? When a defendant's friend identifies alibi witnesses, but they are not called to corroborate the friend's account of the defendant's alibi, may the prosecutor call attention to their absence?

In their efforts to address such puzzles and determine when the doctrine should apply, courts and commentators have focused on one main issue: When is it appropriate to infer that the witness' testimony would be adverse? However, an analysis of the problems raised by use of the missing witness rule shows that this emphasis on the propriety of the inference is misplaced. Attention should be focused instead on two more specific questions. What are the proper limits on counsel's argument about absent witnesses? And how should the judge instruct the jury when a material witness is not called? By answering these specific questions, I hope to show that a missing witness rule need not produce troublesome questions about when and how it should be invoked. I will propose some simple guidelines for the use of a rule, including a test for relevance and a revised set of jury instructions. These changes would alter the shape of the current rule, but its replacement would be fairer and more useful.

This analysis proceeds through the following steps. First, I examine the doctrinal origins of the rule. Next, I define the current rule and sketch some of its problems. And last, I propose changes in the rule and examine the likely consequences of those changes.

I. THE BIRTH OF THE MISSING WITNESS INference

The "time honored statement" of the missing witness rule is the dictum in *Graves v. United States*:

The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testi-
mony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.  

Historically, courts faced with the absence of a material witness turned for guidance to two doctrines: the ancient Roman maxim raising a presumption against spoliators, and the best evidence rule. From these sources, they forged the principle that informs the Graves rule. "The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause."  

To understand how this principle was derived from these doctrinal sources, we need to understand the sources themselves.

A. The Best Evidence Rule and the Spoliation Doctrine

The best evidence rule is intended to insure that primary materials will be introduced to prove the content of a writing. In operation, it excludes secondary proof when primary evidence is available, and it applies only to the content of writings or equivalent recordings. Although the precise technical application of this rule offers little help in dealing with the absence of a witness, the rationale behind the best evidence rule supplied guidance in shaping the missing witness rule. Various commentators and judges have

4. Id. at 121. While this inference is mislabelled as a presumption by some courts, it is clearly only permissive, and has long been regarded as such. C. McCormick, McCormick on Evidence § 72, at 806-07 (3d ed. 1984); see also Burgess v. United States, 440 F.2d 226, 233 n.10 (D.C. Cir. 1970); State v. Francis, 669 S.W.2d 85, 88 (Tenn. 1984).


6. See, e.g., 2 W.D. Evans, Notes to Pothier 128 (1806), quoted in 2 J. Wigmore, supra note 5, § 285, at 198:

When weaker and less satisfactory testimony is tendered in support of a fact the nature of which will admit of elucidation from proofs of a more direct and explicit character, the same caution which rejects evidence of an inferior degree when higher evidence might be produced will awaken suspicion; and it will reasonably be supposed that a more perfect exposition of the subject would have
elaborated on this connection, but none presents the point so starkly as Blackstone: "If it be found that there is any better evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed." Despite its confident tone, Blackstone's conclusion is not self-evident. One commentator has noted that Blackstone's presumption is really a questionable construct of two presumptions, first that there has been a deliberate concealment, and second that the concealed fact points to some falsehood.

The presumption of "concealment" that derives from the best evidence doctrine also arises by analogy to the spoliation doctrine. The ancient maxim, *Contra spoliatorem omnia praesumptur* (All things are presumed against the destroyer), was adopted by common law jurists to apply to conduct such as personal falsification, fabrication, manufacture, suppression, or destruction of evidence. A party's intentional efforts to keep evidence from the fact-finder or to substitute false evidence are interpreted as an implied admission of weakness in that party's case. More explicitly, the inference, which Wigmore calls "one of the simplest in human experience," proceeds from evidence of spoliation to the conclusion that the spoliator does not believe in his case, and from there to the ultimate conclusion that his case must not warrant belief.

The earliest cases dealt with wills, deeds, contracts or receipts that a party destroyed or refused to produce. These cases intro-
duced a peculiar new issue: Could the presumption against the destroyer be taken as evidence about the content of the missing document? Courts generally responded affirmatively, reasoning that the destroyer should be punished for his wrongdoing by a presumption which served as affirmative proof of the evidence he had destroyed.\(^{14}\) While some commentators disagreed with the propriety of this inference,\(^ {15}\) courts invoked it nevertheless.\(^ {16}\) Wigmore, among others, approved of this use of the inference when the party seeking to raise it first introduced evidence that the destroyed or withheld document was the one at issue in the case.\(^ {17}\) Wigmore gave three reasons for his support: the permissive nature of the inference, the lack of any real hardship or unfairness to the party failing to introduce the document, and the need for the court to protect its proceedings from fraud ("no one who withholds evidence can be in any sense a fit object of clemency or protection").\(^ {18}\) It is important to remember also that the inference developed at a time when parties had no means of compelling their opponents to produce documentary evidence; it supplied a necessary incentive for the parties to present a full picture of the facts.\(^ {19}\) Whether the document was destroyed or simply not produced, courts permitted the fact-finder to infer that the content of the evidence would have been unfavorable to the nonproducing party.\(^ {20}\) When evidence was destroyed, however, the courts were willing to permit a further

\(^{14}\) "[T]he law, in hatred of the spoiler, baffles the destroyer and thwarts his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrongdoer by the very means he had so confidently employed to perpetuate the wrong." Pomeroy v. Benton, 77 Mo. 64, 86 (1882). See also A.C. Becken Co. v. Gemex Corp., 314 F.2d 839, 841 (5th Cir. 1963) (law well settled that when records are destroyed they may be presumed unfavorable); Maguire & Vincent, Admissions Implied from Spoliation or Related Conduct, 45 Yale L.J. 226, 241 (1936) (quoting Pomeroy and discussing the justification for the spoliation doctrine).

\(^{15}\) See, e.g., W.D. Evans, supra note 6, at 145, quoted in 2 J. Wigmore, supra note 5, § 291, at 227.

\(^{16}\) See, e.g., Gemex, 314 F.2d at 841 (destruction of records is admission they were damaging); In re Herman, 207 F. 594, 597 (N.D. Iowa 1913) (destruction of letters may be considered admission that they were unfavorable); Love v. Dilley, 64 Md. 238, 246, 4 A. 290, 291 (1885) (applying the doctrine).

\(^{17}\) 2 J. Wigmore, supra note 5, § 291, at 228.

\(^{18}\) Id. at 227.

\(^{19}\) See Maguire & Vincent, supra note 14, at 244.

\(^{20}\) Chief Justice Shaw’s opinion in the famous Parkman murder case provides an example of the similarity with which courts regarded nonproduction and spoliation of evidence. In Commonwealth v. Webster, 59 Mass. (5 Cush.) 295 (1850), the Chief Justice, explaining the adverse inference from the absence of evidence, immediately adds: "To the same head may be referred all attempts on the part of the accused to suppress evidence, to suggest false and deceptive explanations, and to cast suspicion, without just cause, on other persons . . . ." Id. at 316.
inference that the party believed his entire case, not just a particular element, to be weak.

This treatment of a party's failure to produce real and documentary evidence served as the model for courts confronted with an absent material witness. Accordingly, the inference derived from the model follows a similar pattern: The nonproduction of a witness indicates that the party fears what the witness would say if called, from which the fact-finder may conclude that the content of the witness' testimony would be unfavorable to the party.

That the inference would take this particular form was certainly not inevitable. The inference is sometimes traced to one of the earliest cases actually to deal with a witness who failed to appear, Blatch v. Archer, which has been cited by commentators but little examined. In that case, Lord Mansfield commented: "It is certainly 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." But this statement of the law merely says that a jury may consider the absence of evidence when it decides a question of fact. It leaves a great deal of room for a variety of inferences that might be drawn from the failure to produce a witness, and it says nothing about the content of a missing witness' testimony. In fact, Lord Mansfield states only that a jury might alter its assessment of a witness' credibility because other witnesses were not called or documents were not offered—nothing more.

Although the inference need not have taken its present form, it seems clear that courts were willing to allow an inference about the unfavorable substance of the missing testimony for two reasons briefly mentioned above. First, they suspected the nonproducing party of concealing evidence, but because they could not show that unsavory act, they punished the would-be spoliators by depriving them of their supposed gain; and second, the courts wanted to provide parties with a general incentive to come forward with evidence.

For these reasons, the inference of unfavorable testimony from an absent witness became accepted as the general rule. But the analogies to the sources used in developing the rule were imperfect, and, as a result, the conclusion urged upon the jury was exaggerated. The potential for serious inaccuracy developed.

The bailiff's son could not be expected to testify unfavorably to his father, who was the real party to the action. *Id.* at 65, 98 Eng. Rep. at 970.

The most interesting facet of the case involved another agent of the sheriff, one Thomlinson, who was called to testify and "upon hearing his name, ran out of the Court to avoid his being examined." *Id.* at 64, 98 Eng. Rep. at 969. The Chief Justice does not mention this event or the inferences that the jury was likely to draw from it.

25. *Id.* at 65, 98 Eng. Rep. at 970.

26. Even this venerable maxim has incited controversy. See, e.g., Stoecker v. Boston & Me. R.R., 84 N.H. 377, 380, 151 A. 457, 458 (1930) ("proof must rest upon evidence and not upon its absence").


29. The *Graves* case provides ample illustration of the level of doctrinal confusion involving the adverse inference rule. When the Court adopted the adverse inference rule in *Graves*, it quoted from Chief Justice Shaw's opinion in Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 316 (1850), and cited three other cases. Among these, the next oldest case, Gordon v. People, 33 N.Y. 501 (1865), recognized the inference of unfavorable testimony; however, this may have been an extreme position that had been abandoned in New York by the time *Graves* arose. See Maguire & Vincent, *supra* note 14, at
B. The Problems with the Sources

The difficulties posed by the analogies to the best evidence rule and the spoliation doctrine arise from the nature of the testimonial evidence that the missing witness rule addresses. The problem is that we cannot know the content of the testimony that the absent witness would give.

The best evidence rule provides no guidance for this problem. It is hard to know when certain testimonial evidence is sufficiently "superior" to other evidence to warrant an inference if the "superior" evidence is not produced. Since testimony has no existence until it is elicited in the courtroom, one can only determine that it is superior—and therefore worthy of an inference about its content—by speculating about its expected content. But this begs the question, which is whether to permit an inference as to the content. Perhaps superiority of evidence might be inferred from a witness' apparent opportunity to observe the event in question. But a witness' perceptions are purely subjective; even a person who was ideally situated to see an event may offer little, if anything, of importance for the trier of fact. Documents do not pose the same problems under the best evidence rule. They have a physical existence, so speculation about content is less risky. Also, the order of preference is established: An original is clearly preferred to a copy or to testimonial evidence of a writing's contents.

The analogy to the spoliation doctrine ignores similar weaknesses. The adverse inference suggested by that doctrine is subject to strong criticism even as it applies to spoliators, to say nothing of those who merely fail to produce witnesses. But the inference is even weaker as it applies to the missing witness problem for two reasons. First, the inference is based on the assumption that a party

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239 n.37. Another New York case cited in *Graves*, People v. Hovey, 92 N.Y. 554 (1883), lends support to this viewpoint. There, the court permitted an inference that "the evidence of an eye-witness to a transaction would not be favorable to a party who voluntarily excluded such witness from testifying in the case." *Id.* at 559. There is a difference between evidence that is "unfavorable" and evidence that is merely "not favorable." The latter category includes evidence that neither helps nor hurts a party.

The third case relied upon in *Graves*, Mercer v. State, 17 Tex. Crim. 452 (1885), concluded merely that the failure to produce a witness corroborated the testimony of a victim. *Id.* at 46. The *Mercer* court makes no mention of inferences about the content of testimony from a missing witness. This is not just a semantic quibble. At a time when more moderate inferences were gaining acceptance in the very state courts upon which it presumed to rely, the Supreme Court adopted a rule explicitly related to the presumption against spoliators. That rule has governed decisions in the federal courts ever since. See supra note 3 and accompanying text.

intentionally fails to produce evidence.\textsuperscript{31} But such an intention is not clear from the \textit{mere absence} of evidence in court. For documents and real evidence, the connection is fairly easy to demonstrate once physical possession can be shown. With testimonial evidence, just showing that a party could present the evidence involves many more variables. Second, even if the absence of testimonial evidence is caused by one party’s intentional failure to call a witness, the decision not to call the witness may be based upon many facts besides the party’s fear that weaknesses in the case will be exposed if testimony is heard. In contrast to documentary evidence, in which the content is relatively clear and the jury’s reaction to the evidence might be predicted, the substance of a witness’ testimony is uncertain. The extent of the evidence adduced will depend upon both direct and cross-examinations. Also, the nature of the evidence—the testimony’s phrasing, intonation, clarity, and persuasiveness—and the credibility of the source, are unknown in advance. Because there are always risks involved in presenting testimonial evidence, the decision to call a particular witness will reflect a consideration of these risks, as well as a party’s beliefs about the weaknesses in his case. The same risks are not involved in presenting real or documentary materials. In sum, the negative inference about the unfavorable content of missing evidence is less well suited to testimony than to chattel or documents. But despite the inaccurate fit between the inference raised by the missing witness rule and its doctrinal sources, the rule of \textit{Graves} has become a standard piece of evidentiary ammunition. To understand the problems that use of this rule has created, I will now describe more fully the current form of the traditional inference.

\section{II. The Traditional Inference: Mystery and Mumbo-Jumbo?\textsuperscript{32}}

One characteristic is cited far more than all others as a rationale

\textsuperscript{31} See, \textit{e.g.}, Love \textit{v.} Dilley, 64 Md. 238, 243-44, 4 A. 290, 291-92 (1885) (court notes that witness was likely person to have possession of notes, that notes were destroyed, and finds that notes must have been intentionally suppressed or destroyed).

\textsuperscript{32} In UAW \textit{v.} NLRB, 459 F.2d 1329, 1335 (D.C. Cir. 1972), Judge Wright concluded that the missing witness rule (which he refers to as the “adverse witness rule”) “is disappointingly free of mystery and mumbo-jumbo . . . . [I]t is more a product of common sense than of the common law.” He acknowledged, however, that “the unwary [might] conclude that the adverse inference rule is one of those intricate gems of the common law which is riddled with nonsensical exceptions, encrusted with gloss upon gloss, and surrounded by an arcane lore last fully explicated in a three-volume treatise published in the late 19th century.” \textit{Id.}
for the inference based on the absence of a witness—its naturalness.\textsuperscript{33} The rule seems intended to respond to jurors' common sense notions, by allowing them to draw \textquotedblleft the natural conclusion\textquotedblright\textsuperscript{34} from a party's failure to explain or contradict harmful evidence. Yet, in their attempt to explain when the inference is natural, the courts have produced a set of guidelines that are extraordinary for their unnatural complexity, their ability to confuse, and their potential for abuse. Faced with this bewildering hodgepodge, one eminent jurist was moved to sigh: \textquotedblleft[L]egal presumptions involve subtle conceptions to which not even judges always bring clear understanding.\textquotedblright\textsuperscript{35} Little more need be said to evoke well-deserved sympathy for the poor jurors; after all, it is they who must find their way through \textquotedblleft an area fraught with even more difficulties for laymen than for lawyers\textquotedblright\textsuperscript{36} to arrive at their \textquotedblleft natural\textquotedblright conclusion. The rule of \textit{Graves} seems clear enough: If a party having the power to produce witnesses whose testimony would clarify issues at hand does not call them, a presumption is created that their testimony would have been unfavorable.\textsuperscript{37} But if the rule initially seems clear, it is partly because of all that it fails to say. The \textit{Graves} rule outlines when the inference is permitted, but it provides little guidance to counsel concerning the proper scope of argument about the inference, and no more help to judges who need to know when and how to instruct jurors on the subject of the missing witness. And even in its main focus, namely the circumstances in which the inference will be permitted, the rule is vague and perplexing; for example, there is widespread confusion over the meaning of the concept of a party having the \textquotedblleft power\textquotedblright to call a witness.\textsuperscript{38}

Without the benefit of a lucid rule to guide them, trial judges nevertheless have been forced to set the limits of argument and to translate their understandings into instructions. An appellate judge

\begin{itemize}
\item \textsuperscript{34} Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 316 (1850).
\item \textsuperscript{35} Richards v. United States, 275 F.2d 655, 661 n.8 (D.C. Cir. 1960) (Bazelon, J., dissenting) (citing Bollenbach v. United States, 326 U.S. 607, 614 (1945)), \textit{cert. denied}, 363 U.S. 815 (1960). Judge Bazelon is by no means alone. Other disparaging remarks about the rule can be found in Reehil v. Fraas, 129 A.D. 563, 567, 114 N.Y.S. 17, 20 (1908) (\textit{\"{}[O\textquoteright]ne may well be bewildered, owing to the collection of crude, inadvertent and contradictory material."}).
\item \textsuperscript{36} United States v. Young, 463 F.2d 934, 949 (D.C. Cir. 1972) (Robinson, J., concurring).
\item \textsuperscript{37} Graves v. United States, 150 U.S. 118, 121 (1893).
\item \textsuperscript{38} \textit{See} Richards, 275 F.2d at 660 (Bazelon, J., dissenting).
\end{itemize}
explained what has happened to the missing witness rule in the process: "Numerous American courts—this court included—have struggled in a vast multitude of lawsuits to separate the types of situations wherein the witness's absence has real significance from those in which it does not." As an inevitable result of these Herculean efforts, the simple concepts of the Graves rule have been transformed into what that judge has described as a "fairly complex body of rules" composed of "leading principles" and "a bundle of subsidiary rules." It remains to be seen whether, in the course of this development, any real elucidation has taken place.

In its full glory, the current incarnation of the missing witness rule looks something like this:

If, according to the appropriate procedures, the court is shown that:

1. a witness is available, i.e., an identifiable witness may be located, is competent to testify, and is neither incapacitated nor outside the jurisdiction of the court,

2. to one of the parties alone (majority view), because only one of the parties has physical access to the witness (and in some jurisdictions, also, because the opposing party could not be expected to call the witness, who

39. Young, 463 F.2d at 946 (Robinson, J., concurring).
40. Id. at 946-47.
41. The court may require a party to obtain permission in advance before allowing that party to comment on the absence of a witness during argument. See, e.g., United States v. Martin, 696 F.2d 49, 52 (6th Cir. 1983) (the party intending to invoke the inference must obtain an advance ruling from the trial court). Also, the court may offer the opposing party an opportunity to explain a witness' absence out of the jury's presence. See, e.g., Christensen v. State, 274 Md. 133, 135, 333 A.2d 45, 46 (1975); State v. Clawans, 38 N.J. 162, 172, 183 A.2d 77, 82 (1962). Both Christensen and Clawans note a preference for such a procedure, yet neither holds it mandatory.
42. The standard of proof and allocation of the burden for this issue are not clear. See generally Vess, Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument, 64 J. CRIM. L. & CRIMINOLOGY 22, 47 (1973) (presenting the disparate views on this issue).
43. See State v. Francis, 669 S.W.2d 85, 88 n.3 (Tenn. 1984) (inference not appropriate if witness unavailable); 2 J. Wigmore, supra note 5, § 286, at 199-200; see also Nichols v. Coppola Motors, 178 Conn. 335, 342, 422 A.2d 260, 264 (1979) (availability may be shown from relationship to party as well as from physical presence or accessibility); cf. New England Whalers Hockey Club v. Nair, 1 Conn. App. 680, 474 A.2d 810, 812 (1984) (burden of showing availability is on party seeking benefit of inference).
appears prejudiced or hostile to the opposition), or to either party (minority view);  

(3) and the anticipated testimony of the witness would elucidate some material issue, in that the testimony is neither excludable on evidentiary grounds, nor privileged (unless the affected party is able to waive the privilege), nor cumulative, nor inferior;  

(4) and the party who fails to produce the witness offers no explanation;  

(5) then the fact-finder may be permitted, but is not required, to infer that the testimony would have been unfavorable to the party who failed to call the witness, however, that inference does not supply affirmative or substantive proof, but merely affects the weight or credibility of the evidence.  

45. See, e.g., Tonarelli v. Gibbons, 121 Ill. App. 3d 1042, 460 N.E.2d 464, 468 (1984) (witness not equally available to a party if likelihood exists that he would be biased against that party); see also 2 J. Wigmore, supra note 5, § 287, at 202.  

46. See generally 2 J. Wigmore, supra note 5, § 288, at 204-09. Wigmore argues for the minority rule that when the absent witness is equally available to both parties, they both are vulnerable to the adverse inference. Id.  

47. See, e.g., Wheatley v. State, 465 A.2d 1110, 1111 (Del. Super. Ct. 1983) (inference not proper because witness, an informer, was privileged and did not waive privilege); see also 2 J. Wigmore, supra note 5, § 286, at 201-02. The law is in a state of flux in its treatment of privileges, particularly between husband and wife. See Annot., 5 A.L.R.2d 886 (1949). Also, in many jurisdictions, including Maryland, the absence of an accomplice will not give rise to an adverse inference because the accomplice presumably would assert his privilege against self-incrimination. See, e.g., Christensen v. State, 274 Md. 133, 140-41, 333 A.2d 45, 49 (1975).  

48. See, e.g., United States v. Warwick, 695 F.2d 1063, 1069 (7th Cir. 1982) (negative inference may not be drawn when testimony would be cumulative); accord Barnett v. Equality Sav. & Loan Ass’n, 662 S.W.2d 924, 926 (Mo. App. 1983); cf. Arie v. Intertherm, Inc., 648 S.W.2d 142, 155 (Mo. App. 1983) (party attempting to argue inference must show witness had knowledge of pertinent facts).  

49. See Hageny v. United States, 570 F.2d 934, 936 (Ct. Cl. 1978); 2 J. Wigmore, supra note 5, § 290, at 216; see also United States v. McCaskill, 481 F.2d 855, 857 (8th Cir. 1973) (citing Wigmore). A party may not merely offer an explanation in argument, since the attorney would then be relating facts not in evidence. See United States v. Latimer, 511 F.2d 498, 503 n.7 (10th Cir. 1975) (“The nonproduction of evidence which a party would normally be expected to produce may be explained by the testimony of other witnesses, properly sworn and subject to cross-examination, or by the introduction of other evidence at trial.”). For two examples of instances where prosecutors offered improper explanations, see State v. Thomas, 305 Minn. 513, 515-16, 232 N.W.2d 766, 767-68 (1975); State v. Shupe, 293 Minn. 395, 196 N.W.2d 127 (1972).  

50. See Conlin v. Greyhound Lines, Inc., 120 R.I. 1, 6 n.3, 384 A.2d 1057, 1060 n.3 (1978). The permissive nature of the inference confuses some judges as well as juries. In United States v. Tucker, 552 F.2d 202 (7th Cir. 1977), the government failed to produce an informant in a bench trial. The judge erroneously reassured the defense counsel: “You are entitled for me to assume that the confidential informant if he is not called would testify favorably to your client . . . .” Id. at 207.  

51. 2 J. Wigmore, supra note 5, §§ 285, 290.  

MISSING WITNESS INFERENCE

In most jurisdictions, counsel for the defendant or the plaintiff (effect of inference is merely to impair value of party's proof and to give greater credibility to opposing party's direct evidence on the issue); see also 2 J. Wigmore, supra note 5, § 290, at 218-19. The fact that the inference will not supply substantive proof should never concern the jury; it is important only for the judge's decision on a motion for a directed verdict. See generally 9 J. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW, §§ 2485-88, at 185-300 (J. McNaughton rev. ed. 1961) (discussing burden of proof).


In Minnesota and Rhode Island, the inference may not be invoked by prosecutors in criminal trials. See infra notes 108-13 and accompanying text.
tiff/prosecution (where a prima facie case is shown)\textsuperscript{54} will then be permitted (or entitled)\textsuperscript{55} during argument to the jury\textsuperscript{56} to comment on the absence of a witness\textsuperscript{57} and may also be permitted to draw the inference of unfavorable testimony,\textsuperscript{58} so long as the comments do not direct the jury's attention to a criminal defendant's own failure to testify.\textsuperscript{59} If the inference is permitted, the court is allowed (or required)\textsuperscript{60} to instruct the jury about the nature of the inference.\textsuperscript{61}

Professor McCormick feared that the courts' attempts to im-

\textsuperscript{55} See, e.g., Feese v. Anderson, 48 S.W.2d 638, 639 (Mo. App. 1983) (failure to call witness who appears to be knowledgeable and is not equally available entitles counsel for opposing party to comment on that failure). It is not clear to what extent a trial judge may prohibit comment by counsel if the conditions for the inference are satisfied. See, e.g., Burgess v. United States, 440 F.2d 226, 235 (D.C. Cir. 1970) (Fahy, J., suggests that defense counsel is entitled to comment but not to draw adverse inference). This question is perhaps little explored because it arises on appeal only where the defendant claims that he was prejudiced by a ruling preventing such comment. Such cases are rare. See also United States v. Young, 463 F.2d 934, 944 n.19 (D.C. Cir. 1972) (judge has discretion to preclude comment if it would exert a disproportionate burden on the trial).

\textsuperscript{56} In those jurisdictions in which a defendant's argument is sandwiched between the plaintiff/prosecutor's closing argument and his rebuttal, the plaintiff/prosecutor may be required to comment on absent defense witnesses in the closing argument rather than in the rebuttal. This would at least permit the defendant to reply to that comment and prevent the plaintiff/prosecutor from saving his ammunition for rebuttal.

\textsuperscript{57} The court may also permit the plaintiff/prosecutor to comment on a missing witness, regardless of the propriety of the inference in other situations, if that comment responds to defense counsel's improper questions or argument. See Vess, supra note 42, at 47.

\textsuperscript{58} Judge Leventhal of the D.C. Circuit noted the confusing distinction created by Judge Fahy in Burgess, 440 F.2d at 235, which would allow counsel to comment on a witness' absence so long as the adverse inference is not mentioned. See Young, 463 F.2d at 943 n.16. Judge Leventhal observed that any comment on an absent witness is, in fact, an invitation to the jury to draw the inference. Id. See also Vess, supra note 42, at 47 (noting the danger in allowing the prosecutor to argue for the adverse inference).

\textsuperscript{59} Comments that "naturally and necessarily" focus the jurors' attention on a defendant's failure to take the stand violate the rule of Griffin v. California, 380 U.S. 609, 613 (1965)(comment on defendant's failure to testify violates fifth amendment). The courts' lax application of the Griffin standard is criticized in Comment, supra note 22, at 1430-34; Annot., 14 A.L.R.3d 723 (1967).

\textsuperscript{60} Whether the instruction is mandatory remains an issue for debate. This issue is thoughtfully examined in the opinions by Judges Fahy and Robinson in Burgess, 440 F.2d at 234, 237. Judge Fahy contends that the judge must have discretion over when to instruct, id. at 234, while Judge Robinson, in his concurring opinion, argues that once the conditions are fulfilled, the judge cannot deny a request for the instruction, id. at 237. See also Young, 463 F.2d at 944, 949 (Judges Leventhal and Robinson disagreeing over this same issue).

\textsuperscript{61} The pattern instruction for the federal courts reads:

If it is peculiarly within the power of either the prosecution or the defendant to produce a witness who could give material testimony on an issue in the case, failure to call the witness may give rise to an inference that his testimony would be unfavorable to that party. However, no such conclusion should be drawn by
pose strict control over argument and instructions about absent witnesses would result in their "spinning a web of rules," after this brief look at the current state of the rule, his apprehension seems totally justified. As this restatement of the rule indicates, courts have reacted to the rule's potential inaccuracy and unfairness by decreasing the number of situations in which the adverse inference might be applied, and by erecting procedural barriers for counsel to surmount before the substantive propriety of the inference will even be considered. Some courts require counsel to obtain an advance ruling on their intended comment or proposed instructions, which enables the court to develop a record that shows whether or not the rule was satisfied.

There are several reasons for these procedural safeguards. First, although trial judges may apply the rule incorrectly in the heat of trial, appellate judges are very reluctant to reverse a criminal conviction simply because counsel improperly referred to a missing witness. And second, the courts expressed concern that a non-producing party would be unjustly surprised by an opponent's request for a missing witness instruction, particularly when such a re-

you with regard to a witness who is equally available to both parties, or where the witness's testimony would be merely cumulative.

The jury will always bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions §17.19, at 565-66 (3d ed. 1977); compare Young, 463 F.2d at 944 app. (Judge Leventhal's specimen instruction on absent witnesses); Richards v. United States, 275 F.2d 665, 659 (D.C. Cir. 1960) (Bazelon, J., dissenting) (stating trial judges' instruction on evidentiary significance of a missing witness).

62. C. McCormick, supra note 4, § 272, at 807.


64. See, e.g., Simmons v. United States, 444 A.2d 962, 963-64 (D.C. App. 1982) ("[D]angers inherent in allowing the jury to draw an adverse inference from the absence of evidence require the trial court to make an advance factual determination (1) that the witness is peculiarly within the power of the party to produce, and (2) that the witness' testimony is likely to elucidate the transaction at issue."); Dyson v. United States, 418 A.2d 127, 131 (D.C. App. 1980) (court must make finding that conditions creating foundation for inference exist).

65. See, e.g., Gass v. United States, 416 F.2d 767 (D.C. Cir. 1969) (prosecutor argued the inference, defense counsel failed to object, and judge gave no instructions about inference).

66. Cf. id. at 775.
quest would afford the surprised party no chance to explain to the jury any legitimate reasons for the failure to produce a witness.\textsuperscript{67}

As judicial supervision over comment and instruction increases, McCormick's concerns for the waste of judicial resources seem justified.\textsuperscript{68} At least one commentator has proposed a reformulation of the rule, in an effort to dispense with the qualifications and exceptions to the rule that have arisen in its application by the courts:

Where a litigant fails, without satisfactory explanation, to call an available material witness when under the circumstances of the case, the reasonable litigant would do so, an unfavorable but rebuttable inference of fact may be drawn against such party, in which the evidence offered is to be most strongly construed against him.\textsuperscript{69}

This proposal is a step in the right direction, for reasons that will be discussed shortly; but ultimately, it remains unsatisfactory. The "flexible, general terms" are just so many vague "weasel words."\textsuperscript{70} There is no attempt to explain what constitutes a "satisfactory explanation" for a witness' absence, or even what is an "available material witness." In light of the elaborate development of the current rule, it is easy to imagine what fun the courts would have giving meaning to such terms. Instead of more simple and direct language, we are left, ultimately, with new jargon such as "unfavorable but rebuttable inference of fact."

The problems with the *Graves* rule are not limited to judicial difficulties in administering the rule; use of the rule in its current form also permits jurors to engage in unwarranted speculation.\textsuperscript{71}

\textsuperscript{67} See, e.g., State v. Clawans, 38 N.J. 162, 172, 183 A.2d 77, 82 (1962) (better practice is to advise trial judge and counsel of intention to ask for instruction on missing witness inference so that party accused of nonproduction may have chance to respond); see also Christensen v. State, 279 Md. 133, 137 n.1, 333 A.2d 45, 46 n.1 (1975) (quoting Clawans' reasoning).

\textsuperscript{68} Other commentators echo his view. One perceptive critic noted: "In very few cases would the evidentiary value of the inference, which could only strengthen or weaken other affirmative proof, justify the necessary expenditure of judicial time." Comment, supra note 22, at 1429.

\textsuperscript{69} 94 \textsc{Cornell L.Q.} 637, 642 (1949). This commentator indicated that such a rule would need to be applied on an ad hoc basis, according to all the facts and circumstances, and would yield no "satisfactory precedents." Id.

\textsuperscript{70} Maguire & Vincent, supra note 14, at 259.

\textsuperscript{71} In People v. Taylor, 98 Misc. 2d 163, 413 N.Y.S.2d 571 (1979), the court rejected the following instruction, deeming it "pure and unadulterated speculation": "The failure of the People to produce the confidential informant as a witness or to explain his absence can permit the jury to infer that whatever testimony the confidential informant had to offer would be detrimental to the prosecution's position." Id. at 169, 413 N.Y.S.2d at 576. Instead, the court approved this charge:
The inference, say its critics, is not so "natural" after all. Rather, it allows misleading and inaccurate results.\textsuperscript{72} The rule depends on the notion that a witness is missing because the party who might be expected to have called the witness fears that the testimony will be harmful. But there are many reasons having nothing to do with the content of the witness' testimony—one critic labels these "tactical choices and personal sensibilities"—that might prevent a party from calling a witness.\textsuperscript{73}

In reply, proponents of the missing witness rule point out, first, that this is only one of many situations when we want to call the jury's attention to a circumstance that they might otherwise have overlooked or undervalued, in this instance, the absence of the witness.\textsuperscript{74} Second, the qualifications on the use of the rule are intended to limit its application to those situations in which the inference has a basis in fact and the jury has less room for speculation. And third, the rule only allows a permissive inference and it recognizes the many possible reasons for a witness' absence by allowing the jury to assign its own weight to this fact, according to the circumstances. Still, the possibility of an inaccurate inference leaves courts notably reluctant to assign much weight to the absence of a witness, and at least one court has gone so far as to prohibit such comment in criminal trials.\textsuperscript{75}

In addition, members of the jury, you have heard some evidence concerning the presence of another person—a confidential informant—during the alleged sale of heroin by the defendant to the undercover police officer. If you find that such person was in a position to give relevant evidence as to some material fact or facts in issue, then you may infer—from the failure of the People to call such person as a witness or to explain his absence—if you deem it proper to do so, you may infer that the testimony of such person would not support the evidence adduced by the People as to such material fact or facts.

\textit{Id.}

\textsuperscript{72} See, e.g., Simmons v. United States, 444 A.2d 962, 964 n.2 (D.C. 1982) (inference is dangerous because it adds fictitious weight to one side of case).

\textsuperscript{73} Comment, supra note 22, at 1427. A party may decide not to call a witness because the witness has a criminal record which could be used for impeachment, the witness is too unpredictable or untrustworthy, or the witness' personal appearance will create an adverse impression on the jurors. A party's personal sensibilities may require him to shield family members from sensationalism, to avoid placing a witness in a stressful situation, or to protect himself from having personal secrets elicited at trial. Also, a witness may refuse to testify as a political protest against the system. \textit{Id. See also} United States v. Busic, 587 F.2d 577, 586 (3d Cir.), cert. dismissed, 435 U.S. 964 (1978).

\textsuperscript{74} For a discussion of man's psychological propensity to ignore the "nonoccurrences of potential events," see R. Nisbett & L. Ross, \textsc{Human Inference: Strategies and Shortcomings of Social Judgment} 48 (1980).

\textsuperscript{75} See, e.g., State v. Caron, 300 Minn. 123, 218 N.W.2d 197 (1974) (per curiam). \textit{See also infra} text accompanying notes 108-13.
While most courts accept the rule despite these problems, courts are obviously troubled by its potential for inaccurate results, particularly in the criminal context. Indeed, courts concerned with the accuracy of the inference often respond by denying a request for a missing witness instruction altogether in one typical situation—when the prosecution fails to call an informant.

When a material witness who is obviously in the government's control does not appear, trial courts often try to justify a decision that will keep the jury from drawing the adverse inference. Sometimes, the court will attempt to rationalize that decision by appealing to the fuzzy particulars of the Graves rule, as in United States v. Long.76 There, the trial judge examined the informant in camera, determined for himself that the testimony was "corroborative and cumulative," sustained an objection to defense counsel's comment that "the government saw fit not to produce [the informant]," and instructed the jury that the witness was absent by his order!77

At other times, the court may fall back on its asserted discretionary authority when it denies a missing witness instruction. In Burgess v. United States,78 the Court of Appeals for the D.C. Circuit rejected an argument that the testimony of a narcotics informant would have been cumulative, but nevertheless upheld the trial court's refusal to give the missing witness instruction. Discussing the Graves rule, the court explained that

the Supreme Court in Graves did not deprive trial courts of considerable latitude in applying the rule, guided by the importance of the possible witness to a fair elucidation of the facts as well as by a rational interpretation of when a party has the power to produce him. Not every absent but producible witness who can be held to have some knowledge of the facts need by reason of Graves be made the subject of the "presumption."79

Of course, the question remains: When should judges grant a requested instruction? In Burgess, Judge Fahy80 proposed simply that

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76. 533 F.2d 505 (9th Cir.) (per curiam), cert. denied, 429 U.S. 829 (1976).
77. Id. at 509. See also United States v. Hines, 470 F.2d 225 (3d Cir. 1972) (When one eyewitness, whose testimony would have been inferior to that given by other eyewitness, was not called by the government, no adverse inference was warranted, because the absent witness' testimony would only have been cumulative.), cert. denied, 410 U.S. 968 (1973).
79. Id. at 233.
80. Each judge on the Burgess panel expressed a different understanding of the rule and its application under the facts presented.
the decision be left to judicial discretion.\textsuperscript{81}

At least Judge Fahy is honest about the extent to which the instruction derived from the \textit{Graves} rule may become, in actuality, a judge's ad hoc comment on the evidence. Nevertheless, our admiration for his forthrightness should not obscure the fact that he has still chopped down a jurisprudential cherry tree. A judge invades the jury's province if he uses his discretionary power as a tool to shape their decisions as he sees fit.\textsuperscript{82} And this interpretation of the \textit{Graves} rule is especially disturbing because trial courts often apply a double standard to prosecution and defense witnesses in criminal trials. In fairness, the same rule, with the same potential for inaccuracy, ought to apply to any missing witness, whether an alibi witness for the defense or an informant for the prosecution.

The missing witness rule not only affords judges an opportunity to exercise discretionary power; it also invites abuse by counsel. Too often the rule is treated as just another weapon available for the duel between the lawyers. Counsel invoke the inference of adverse testimony without any concern for the actual content of the evidence and sometimes even urge an inference known to be false just to gain an advantage.\textsuperscript{83} \textit{Blakemore v. United States}\textsuperscript{84} and \textit{Burgess v. United States}\textsuperscript{85} illustrate the problem well.

In \textit{Blakemore} the defendant was charged with possession of a sawed-off shotgun. Although the defense counsel submitted the names of six potential witnesses to the judge to be used for the voir dire, at trial, the defense called only one witness. The judge permitted the prosecutor to argue the inference that the testimony of the missing defense witnesses would have been unfavorable to the defendant. The judge agreed with the prosecutor that the defendant

\begin{footnotesize}
81. "When thus an instruction is sought which in a sense creates evidence from the absence of evidence, the court is entitled to reserve to itself the right to reach a judgment as wisely as can be done in all of the circumstances, even when the general guidelines based upon Graves are found to be supported by the evidence." \textit{Burgess}, 440 F.2d at 234. Judge Fahy added a comment in the footnote indicating that, because of differing factual circumstances, no precise guidelines could be developed. \textit{Id.} at 234 n.11.

82. The most blatant abuse of the missing witness inference occurs when judges suggest sua sponte that an instruction be requested. Such action is considered improper, but may not require a new trial. \textit{See} \textit{Brown v. United States}, 414 F.2d 1165 (D.C. Cir. 1969) (per curiam); \textit{Egan v. United States}, 287 F. 958, 969-70 (D.C. Cir. 1923).

83. \textit{See}, e.g., \textit{United States v. Dailey}, 524 F.2d 911 (8th Cir. 1975) (prosecutor argued for the adverse inference although he knew that absent witness' testimony would not be unfavorable to defendant). In the criminal context, such behavior is clearly prohibited according to the ABA Standards Relating to the Administration of Criminal Justice: The Prosecution Function § 5.8(a) and The Defense Function § 7.8(a).

84. 489 F.2d 193 (6th Cir. 1973).

\end{footnotesize}
had tried to use a long list of witnesses for voir dire to suggest he had more support for his defense than he actually had, and the judge allowed the prosecutor to argue that it was only fair, if the defendant failed to call those witnesses, to restore the balance of advantages by penalizing the defense with an unfavorable inference.86

In Burgess, the defense counsel asked for a missing witness instruction after the prosecutor failed to call an informant. Although the informant was available to the defense, defense counsel did not call him. The concurring opinion noted wryly:

Counsel carefully refrained from urging strenuously that the witness be produced; his cry for help was so muted as to be almost inaudible. I think it is a fair inference that counsel did not want the witness but hoped to take advantage of a missing witness instruction, or claim of error if the instruction was refused.87

This transformation of the missing witness instruction into a tactical weapon should not be surprising, considering the nature of the allowable inference. Counsel are offered the opportunity to speculate, with the court’s blessings, about the content of testimony from a witness who will never face an attorney’s cross-examination or the jury’s scrutiny. Any serious proposal to change the Graves rule should remove this obvious temptation.

III. ChALLENGES TO THE TRADITIONAL INFERENCE

Given the questionable logic of the rule’s origins, the complexity of its current form, and the number of problems with its application, perhaps it is not surprising that, in both civil and criminal contexts, the continuing viability of the missing witness inference has been challenged.

86. Blakemore, 489 F.2d at 194. The appellate court reversed and remanded, holding that, although the prosecutor had asked for and received an advance ruling on the appropriateness such an argument, the trial judge erred in failing to explore the circumstances that might have made the inference inappropriate. Id. at 196. For example, the trial judge did not inquire into whether the missing witnesses were peculiarly within the defendant’s control. Id. at 195-96. Also, the prosecution did not demonstrate that “the anticipated testimony of the uncalled witness [would] ‘elucidate the transaction.’” Id. at 196.

87. Burgess, 440 F.2d at 239. See also United States v. Williams, 496 F.2d 378, 383 (1st Cir. 1974) (finding no error in failure to give missing witness instruction where absent government informants were equally available to both sides).
A. Civil Cases

Some critics, including Professor McCormick, have suggested that the missing witness rule is unnecessary in civil cases because the opportunity for discovery makes any witness "available" to a party.\textsuperscript{88} Hence, no witness can be said to be peculiarly available to one party alone. Rather than relying on an inference in an effort to establish the content of a missing witness’s testimony, a party should depose the witness. If the party fails to avail itself of its discovery opportunities, then there should be no complaint that an adversary is withholding evidence from the finder of fact.\textsuperscript{89}

This argument, while not without some persuasive appeal, is ultimately unsatisfactory. First, from a theoretical perspective, the mere physical availability of a witness either for deposition or for testimony at trial is not the critical issue; it is instead the witness’ natural propensity to favor one side over another. It is this witness’ predisposition toward one party that makes it natural for jurors to infer that the party would be likely to produce that witness if the witness’ testimony were favorable to its case. Physical availability alone is not enough to support the inference in most jurisdictions.\textsuperscript{90} Instead, there must be a known relationship between the witness and party against whom the inference would be invoked. For example, civil cases involving the inference usually deal with missing relatives, employees, doctors, or attorneys—persons with whom the party has a pre-existing relationship.\textsuperscript{91} Since physical availability is

\textsuperscript{88} C. McCormick, supra note 4, § 272, at 806; Comment, supra note 22, at 1424-25 n.17; see also Harper v. B&W Bandag Center, Inc., 311 S.E.2d 104, 106-07 (Va. 1984) (Russel, J., concurring) (missing witness doctrine should be accorded "decent burial" as discovery should be used instead).

\textsuperscript{89} See, e.g., General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1024, 1217 (8th Cir. 1973), cert. denied, 414 U.S. 1162 (1974); Jenkins v. Bierschenk, 333 F.2d 421, 425 (8th Cir. 1964) (Blackmun, J.). The Court of Special Appeals of Maryland, while not endorsing this theory explicitly, has indicated that a witness’ availability through discovery may be an important consideration in determining whether an instruction is proper. Thomas v. Owens, 28 Md. App. 442, 452, 346 A.2d 662, 668 (1975).

\textsuperscript{90} See, e.g., State v. Bennett, 171 Conn. 47, 55, 368 A.2d 184, 189 (1976) (witness must be available and must be one whom party would naturally produce); Hertz v. Hardy, 197 Pa. Super. 466, 473, 178 A.2d 833, 837 (1962) (rule not invoked unless party’s interest would be furthered by the production of the witness); Secondino v. New Haven Gas Co., 147 Conn. 672, 675, 165 A.2d 598, 600 (1960) ("Availability of the witness is not the sole test."); cf. Atlantic Coast Line R.R. Co. v. Larisey, 269 Ala. 203, 207-08, 112 So. 2d 203, 207 (1959) (failure to offer an available witness whose testimony would merely support uncontradicted testimony does not raise the presumption).

only a part of the justification for the inference, the failure to take advantage of that availability by deposition is an incomplete argument for disallowing the inference.

Second, a more important policy-based rationale favors retaining the inference even though the absent witness could have been deposed. The proposal to deny the inference is based upon the contention that discovery should be used in place of the inference to expose testimony favorable to one's position. While this has the advantage of abolishing uncertainty about the nature of a witness' testimony, it also creates incentives that are wasteful and inefficient. It requires one party to identify those opposition witnesses who possess information that may be damaging to the other party and then to devise a discovery strategy to uncover that information. In effect, such a rule requires a party to depose all witnesses favoring the opposing party, in the hope of uncovering useful facts. But forcing a party to search for beneficial evidence in unlikely places is bound to offer a low return for the time, energy, and expense invested. It is akin to demanding that a party prove the negative of a proposition, and the distribution of burdens is similarly inefficient.

The traditional inference, on the other hand, automatically performs the difficult task of selecting those witnesses who may harbor damaging information without imposing the costs of extensive discovery. They are the knowledgeable witnesses not called by the other side. The traditional inference may not be accurate, but that is a separate problem, which will be addressed shortly. At least the inference focuses attention on those witnesses whose testimony is most promising for the adverse party, without resort to a shotgun approach to discovery.

Several other factors favor keeping some form of adverse inference in civil cases. First, a rule conditioning the inference on a witness' "non-availability" for discovery would create another issue—non-availability—that would have to be litigated to determine whether an inference should be allowed. For example, discovery of expert witnesses is not available as of right in most jurisdictions. When a party fails to call an expert who has been identified but not deposed, could the opposing party invoke the inference? Presumably the answer would depend on a host of factors specific to each particular case. Thus instead of abolishing the inference, the proposed rule could have the opposite effect. It would add yet another condition to be satisfied by a party who seeks to invoke the inference. Second, precluding the inference assumes that, before trial, a party is always able to identify those adverse witnesses who possess
potentially beneficial information. But, the importance of a witness may not become apparent until trial, and the inference allows a party to use that newly acquired knowledge.

In sum, while there are arguably sound reasons for precluding the argument or instruction about missing witnesses in civil cases, the wiser course is to retain some form of inference.

B. Criminal Cases

In the criminal context, there are potentially stronger criticisms against the use of the missing witness rule. Two arguments are advanced by those who would prohibit the inference. The first critique challenges the constitutionality of the missing witness rule as a violation of a defendant's privilege against self-incrimination, while the second is based upon state policies that prohibit the prosecutor from commenting on a witness' absence.

The constitutional argument, suggested by one recent law review comment, is derived from two Supreme Court cases, Schmerber v. California and Griffin v. California. In Griffin, the Court held that the prosecution may not comment on a defendant's failure to take the stand because such comment penalizes the accused for exercising his fifth amendment right to remain silent. Schmerber is cited for the proposition that a defendant cannot be compelled to "provide the State with evidence of a testimonial or communicative nature." Together, says the commentator, these cases mean that "any application of the inference rule in criminal cases violates the fifth amendment."

The analogy to these cases is that the adverse inference is a penalty imposed upon a defendant for asserting his privilege not to provide the state with testimonial evidence from a witness who, presumably, would testify against him. The argument takes its

92. Comment, supra note 22.
95. Id. at 613.
96. 384 U.S. at 761. The Court held that the fifth amendment permits the use of a mandatory blood-alcohol check as evidence against the defendant, since the blood sample readings are physical evidence, rather than testimonial evidence. Id.
97. Comment, supra note 22, at 1435.
98. This reasoning departs from that of the Comment cited supra note 22. In that Comment, the author begins with the principle that the Constitution is violated if the state penalizes a defendant for asserting a privilege. She then characterizes the threat of an adverse comment as a penalty, but never fully develops the second part of the analogy to explain what privilege is being asserted. That privilege is the right, protected by Schmerber, not to produce evidence of a testimonial or communicative nature. But what does
strongest form when an adverse inference is permitted against a defendant who calls a material witness, but fails to question that witness about a critical issue. In sum, unless a defendant explains incriminating circumstances by calling and questioning a knowledgeable witness, he may be penalized with an adverse inference. The analogy is, however, imperfect since the privilege against self-incrimination does not extend to the testimonial evidence given by a witness other than the defendant. Rather, "the only type of self-incrimination which the fifth amendment protects is testimony elicited from the defendant himself, or from his personal records."

Although the cases speak with one voice on what constitutes self-incrimination, the lack of any thorough exploration of this result may leave some observers unsatisfied. The courts are not rigorous enough when they fall back on the distinction between testimony from the defendant and from his witnesses. The crucial question is left unexamined: Whether the State may compel a

that include? Clearly the testimonial and communicative evidence protected by Schmerber does not include evidence from witnesses other than the defendant. The author moves from this dubious first analogy to a second one: The prosecutor's comment on the accused's failure to call a witness somehow converts the defendant's conduct into a self-incriminating statement. "Extracting from the defendant's trial conduct a harmful communication which the defendant would never voluntarily verbalize is indistinguishable from compelling [sic] him to make an incriminating statement: the defendant is, in effect, forced to give evidence against himself." Id. at 1437-38. See also Adamson v. California, 332 U.S. 46, 124 (1974) (Murphy, J., dissenting) (employing similar reasoning). In fact, however, the difference between the prosecutor's characterization and a statement uttered by the defendant himself is enormous. When the missing witness inference is invoked, the defendant is not forced to do anything; the prosecutor merely argues from the facts. If the prosecutor's argument were to be treated as if it somehow miraculously became transformed into a statement by the defendant, no prosecutor could ever discuss the issue of intent, since that would be extracting a statement of mental impressions from a defendant. Clearly, this analysis yields rather absurd conclusions.

99. Cf. Caminetti v. United States, 242 U.S. 470, 493 (1917) (prosecutor may comment on the defendant's failure to explain certain events if the defendant takes the stand); United States v. Helms, 703 F.2d 759, 765 (4th Cir. 1983) (recognizing that a court is entitled to infer that a party who, without prejudicing his rights, could contradict testimony given against him by his own testimony, would not have contradicted that adverse testimony); People v. Moore, 17 A.D.2d 57, 61-62, 230 N.Y.S.2d 880, 885, cert. denied, 371 U.S. 838 (1962) (prosecutor's failure to cross-examine a witness who would presumably give favorable testimony for the prosecution and who actually took the stand entitled the defendant to the same adverse inference as is warranted if the witness had not been called at all).

100. It is important to recall that the inference is only permissive; no presumption is established that could shift the burden of proof to the defendant.


102. Id. at 175.

103. It is not certain that the Court would be willing to extend its reasoning in Griffin
defendant to present information that may help the State to convict him.\textsuperscript{104}

The arguments on both sides are suggested in \textit{Williams v. Florida},\textsuperscript{105} which considered whether a requirement that a defendant supply notice of an alibi defense and the names of alibi witnesses before trial violated the privilege against self-incrimination. In upholding the requirement, Justice White argued that the pressures that cause a defendant to present alibi witnesses arise not from the state's control of punitive measures but from "the force of historical fact beyond both his and the State's control and the strength of the State's case built on these facts. Response to that kind of pressure by offering evidence or testimony is not compelled self-incrimination transgressing the Fifth and Fourteenth Amendments."\textsuperscript{106} A prosecutor's comments on the weaknesses in a defendant's case are to be expected; that is the essence of argument. If, by reflecting the relative strength of the State's case, those comments induce the defendant to risk exposing further weaknesses by calling and examining witnesses, he has only himself to blame.

Justice Black asserts the opposing viewpoint in his dissent:

The defendant, under our Constitution, need not do anything at all to defend himself, and certainly he cannot be required to help convict himself. Rather he has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. Throughout the process the defendant has a fundamental right to remain silent, in effect challenging the State at every point to: "Prove it!"\textsuperscript{107}

As Justice Black's argument indicates, the question not fully an-
swered is what conduct by the State amounts to compelling self-incrimination.

The second critique of the rule reflects similar considerations, although it is based upon state policy rather than constitutional interpretation. Minnesota and Rhode Island have adopted a rule prohibiting a prosecutor from commenting on a defendant's failure to produce witnesses. In State v. Caron the defendant was accused of selling marijuana to narcotics agents who called on him at his Minnesota farmhouse. Although he took the stand to present an alibi defense that placed him at a local gas station and liquor store at the time of the sale, the defendant failed to call several critical alibi witnesses. The prosecutor's comment in closing argument was found improper on appeal for two reasons: "First, such comment might suggest to the jury that defendant has some duty to produce witnesses or that he bears some burden of proof; second, the comment might erroneously suggest to the jury that defendant did not call the witnesses because he knew their testimony would be unfavorable."109

The Rhode Island Supreme Court adopted this rationale in State v. Jefferson.110 There, the defendant was accused of brutally beating to death the 79-year-old owner of his apartment house. When the defendant was seized shortly after the murder, his right hand was very swollen. Police photographs of the hand were introduced at trial. The defendant claimed to have injured his hand at work earlier in the week, but he introduced no corroborating evidence. In summation, the prosecutor commented: "What I'm sug-

the trial. The latter pressures may compel the defendant to present information that ultimately helps the State convict him, which seems acceptable even to Justice Black.

Any constitutional attack on the missing witness inferences must be founded on the specific protections of the privilege against self-incrimination. This result is suggested by Adamson v. California, 332 U.S. 46 (1947). In Adamson, the Court concluded that the general due process rights to a fair trial do not protect the defendant from a prosecutor's comment on the defendant's failure to explain or deny adverse testimony. Id. at 58.

109. "When he went to Arnie's [gas station] he didn't remember if he talked to Arnold Warnke or Mr. Nelson. He stated he would buy all his gas there. Of course, we haven't seen Mr. Warnke or Mr. Nelson today. Also, he went to the liquor store, of course, we haven't seen anybody from the liquor store." Id. at 126-27, 218 N.W.2d at 200.
110. Id. at 127, 218 N.W.2d at 200. (emphasis added). See also State v. Tungland, 281 N.W.2d 646, 651 (Minn. 1979) (quoting State v. Caron). Minnesota continues to allow the rule in civil cases. See, e.g., Springfield Farm Elevator Co. v. Hogeson Constr. Co., 268 N.W.2d 80, 83 (Minn. 1978) (noting that inference may not be used when witness equally available to both sides).
gesting is that there are many people that could say, "I noticed the swollen hand before the time of the murder." We know from the testimony that he was living with a woman—" The defense objected, and the state supreme court found the comment improper. In so ruling, it repudiated the "empty chair doctrine" that had governed previous cases and it explicitly adopted the Caron rationale.

It does seem inconsistent that although the defendant bears no burden and need not present evidence or call witnesses, courts will allow adverse comment by the prosecutor on the lack of evidence. Wigmore recognized that the burden of proof issue complicates the analysis of the inference, but he still supported the inference in criminal cases, concluding that earlier decisions similar to Caron and Jefferson were mistaken.

For Wigmore, the adverse inference was justified against a defendant if the prosecution had satisfied its burden of production. He would not have permitted the prosecution to rely on inferences drawn from the defendant's conduct to prove its own case. But once the prosecution had presented sufficient affirmative evidence to overcome a defendant's motion for a directed verdict, the permissive inference was mere overkill, and Wigmore's primary concern vanished.

But the burden of proof is more than just a confusing nuisance,

112. Id. at 136, 353 A.2d at 197.
113. Id. Like Minnesota, Rhode Island has retained the inference in civil cases. See, e.g., Conlin v. Greyhound Lines, Inc., 120 R.I. 1, 6, 384 A.2d 1057, 1060 (1978) (stating inference but disallowing substitution of inference for evidence in enacting another inference); McAree v. Gerber Products Co., 115 R.I. 243, 258-59 n.6, 342 A.2d 608, 616 n.6 (1975) (recognizing that doctrine should be applied cautiously and requiring party invoking it to inform judge ahead of time).
114. 8 J. WIGMORE, supra note 52, § 2273, at 450. The "risk of an inference from non-production" is only a "seeming paradox" that "has misled a few courts to deny that any inference may be drawn." Id.
115. 9 J. WIGMORE, supra note 52, § 2511, at 530.
116. Even accepting Wigmore's primary concerns, his result can be challenged. His test to determine the propriety of an inference—whether the prosecution could survive a motion for a directed verdict—does not differentiate adequately between cases when the inference may or may not help to prove the prosecution's affirmative case. Suppose, for example, the prosecutor's case against a robbery suspect is based largely on circumstantial evidence. The defense moves for a directed verdict at the close of the prosecutor's case in chief. The motion is denied because the judge correctly finds that a reasonable juror might find guilt beyond a reasonable doubt. The defense rests without presenting any witnesses. At this point, we know only that a single reasonable juror could find guilt beyond a reasonable doubt. But the gap between that standard and the standard requiring unanimous agreement among twelve different jurors may be too great to bridge without the inference. That is, the inference may be the deciding factor in establishing the prosecution's case and convicting the defendant, when the only case before the jury is the State's case. For this reason, the adverse inference may prevent the defendant from putting the prosecution to its full burden of proof.
Wigmore notwithstanding. To evaluate the Caron and Jefferson holdings, we must understand the relationship between this permissive inference and the burden of proof.

To say, as Justice Black does in Williams, that "the State itself must bear the entire burden without any assistance from the defendant,"\(^{117}\) is only to suggest the beginning of this inquiry. There is only one way to assure that the outcome of a trial is based solely on the State's affirmative case. Show the jury nothing but that case. That happens when the defense rests without calling witnesses or introducing exhibits. If, as Justice Black suggests, the defendant has a fundamental right to force the prosecution to meet its burden squarely,\(^{118}\) he has a right not to present a defense, even if the prosecutor offers a prima facie case.\(^{119}\) This proposition is often embodied in instructions to the jury that "the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence."\(^{120}\)

This is not to say that the defendant may avoid the risk of conviction by asserting the right; conviction remains a distinct possibility when he presents no defense. But the same is true when a defendant decides not to testify. Any assertion of rights may be risky. The principle that emerges from this analysis is that the risk should not be increased because a defendant chooses to assert his right. That would penalize the defendant, and Griffin states that a defendant may not be penalized for exercising his rights.\(^{121}\) Extending the reasoning of Griffin leads, then, to this proposition: A prosecutor may not comment on a defendant's failure to call a witness if the accused has presented no defense at all. Despite the apparent fairness of this position, it is not the rule. Although a few cases have found that the missing witness rule is not applicable when a criminal defendant calls no witnesses,\(^{122}\) most cases hold that the prosecutor may co-

\(^{117}\) 399 U.S. at 112.

\(^{118}\) See supra note 107 and accompanying text.


\(^{120}\) See 1 E. Devitt & C. Blademar, supra note 61, § 17.19. That the State may never impose a burden or duty upon the defendant to produce evidence is another way of saying the defendant has a right not to defend and may instead rely on weaknesses in the State's case.

\(^{121}\) Griffin v. California, 380 U.S. 609, 614 (1965).

\(^{122}\) See, e.g., Robins Dry Dock & Repair Co. v. Navigazione Libera Triestina, S.A., 32 F.2d 209 (2d Cir. 1929):

The rule applicable to a party failing to call witnesses exclusively in its control does not apply to a defendant who introduces no evidence at all. A defendant, if so advised, may well let the case go to the jury on the weakness of the evi-
But this analysis still does not determine whether Caron and Jefferson were correctly decided, because in both cases the accused did offer a defense. An analogy to the defendant's decision whether to take the stand is illuminating. If the defendant testifies, he waives his privilege, and the "prohibition against inferences from his failure to testify comes to an end with the ending of the privilege. Hence, his failure in his testimony to deny or explain the evidence against him which he might naturally have explained is therefore open to inference." Similarly, as soon as the defendant produces some evidence to support his case, he waives his right not to present a defense, and the prosecution should be permitted to comment on the weaknesses in the defendant's case. The jury now knows that the lack of explanation does not result from the assertion of a right not to explain; rather, the attempted explanation fails because of its own inherent weaknesses.

Caron and Jefferson were incorrectly decided, then, and some form of the missing witness inference should apply to criminal cases except those in which the defendant chooses not to present a case.

I have discussed the origins of the missing witness rule, described this rule in its present form, and considered arguments for...
its abolition. It is now time to suggest modifications to the rule that would alleviate the problems caused by the rule's questionable origins, complex evolution, and seeming impropriety in certain kinds of cases.

IV. A New Perspective on the Missing Witness

Trial courts are usually called upon to determine the propriety of the missing witness inference in two situations: when an opposing counsel objects to a reference made in a closing argument about an uncalled witness, and when counsel request jury instructions on the inference. By focusing on these two situations in particular, that is, on the context in which the inference is invoked, rather than on the inference itself, criteria for a simpler and more appropriate rule may be developed.

A. Argument

Generally, counsel are permitted to argue freely so long as they avoid blatant appeals to the jury's empathy, sympathy, or prejudice, and limit their argument to facts in evidence and inferences drawn from those facts. For the purposes of this analysis, it is the latter restriction—to facts in the record—that is most significant.

As Wigmore explains, the rule prohibiting argument about facts not in evidence is based on the same principles that inform the hearsay rule. The purpose of argument is for counsel to present factual conclusions that support their client's positions. Those conclusions must be based either on evidence already introduced or on facts that are "notorious"—that is, subject to judicial notice.127 Any other assertion of fact makes counsel a witness whose testimony is not subject to cross-examination, and that is contrary to the principle that informs the hearsay rule.128 However, Wigmore makes a special effort to justify comment on a missing document or witness by explaining how such an omission is "in evidence": "[T]he failure to produce is in evidence from the very nature of the situation, and therefore, when relevant . . . , may be referred to."129

Wigmore's discussion of the comment on a witness' absence is ultimately unsatisfactory. To begin, the "failure to produce" is not necessarily "in evidence" as Wigmore asserts. Instead, the jury may

128. Id.
129. Id., § 1807, at 358.
only know that the witness is absent. This is one of many pieces of data that, by the nature of the proceedings, is already before the fact-finder but is not admitted as evidence on the record. The most obvious example of this kind of information is the appearance and demeanor of a criminal defendant who does not take the stand. Whether a court is restricting comment about a defendant’s appearance, or limiting argument about an absent witness, the court is, in effect, attempting to remove from the jury’s consideration some information that it already possesses. When it considers counsels’ use of such information in closing argument, in essence, the court is ruling on the admissibility of these obvious facts as evidence.

To be admissible, that evidence must be relevant. Counsel should not be permitted to allude to a person’s failure to appear and testify unless a foundation for relevance is first laid. The mere absence of a witness is neither related to a party nor relevant to the truth or falsity of any issue of fact, and should not be subject to comment. However, an intentional decision not to call a witness could be relevant to a party’s belief in the strength or weakness of his evidence on a particular issue. This belief in turn reflects on the credibility of witnesses and the weight of real and documentary evidence. The relevance necessary to justify comment in argument is supplied, then, by a showing that the absence of a witness is due to a party’s willful decision not to call that witness. Thus, relevance is conditioned on a question of fact: whether the party could have produced the witness.\textsuperscript{130} Stating the problem in this way suggests the test that should be used to determine whether counsel’s comments are proper. If the judge finds sufficient evidence of record that the party could have called the witness, the jury should be permitted to consider the witness’ absence and assign to that fact whatever weight it considers appropriate according to its own findings on the issue of relevance.\textsuperscript{131}

Of course, the judge may exclude even relevant evidence if that evidence would prejudice one party, confuse the issues, mislead the jury, or waste time. Comment about the absence of a material witness, however, is not likely to have an unduly prejudicial or confusing effect on the jury sufficient to warrant its exclusion, so long as counsel exercises reasonable restraint in calling the jury’s attention to that fact. The inquiry into relevance, then, remains the critical issue in determining the propriety of the missing witness argument.

\textsuperscript{130} Thus, the decision to allow an inference is part of the same class of conditional relevancy problems addressed by \textit{Fed. R. Evid.} 104(b).

\textsuperscript{131} \textit{See Fed. R. Evid.} 104(b); C. McCormick, \textit{supra} note 4, § 53, at 137.
Once a fact is in evidence, counsel are permitted to argue inferences from that fact subject only to the duty to exercise good faith. Thus, counsel should be allowed to argue without interference from the court, with "the answering argument and the jury's good sense" to serve as corrective measures where appropriate.

B. Instruction

The formal distinction between argument and instruction is well recognized. Argument involves counsel's analysis of all of the evidence, and is not limited to those matters for which a jury instruction is required. Jurors may treat the argument for what it is. But a jury instruction has the weight of law, even if, in the case of instruction as to an inference, it only permits and does not require the inference. In considering whether to give jury instruction on an inference, a court must weigh its knowledge that in the absence of instruction a jury will make an unguided natural inference against its knowledge that an inference embodied in an instruction assumes a greater importance for the jury. As Justice Douglas remarked in Griffin: "What the jury may infer, given no help from the court is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is another."

132. See, e.g., Graves v. United States, 150 U.S. 118, 125 (1893) (Brewer, J., dissenting) ("[T]he rule that should be laid down is, that, in the absence of express prohibition, every fact which, in no illegal manner, comes to the knowledge of the jury during the progress of a trial, and which may influence their minds, is a subject of comment by counsel in their argument."); see also Note, The Permissible Scope of Summation, 36 Colum. L. Rev. 931 (1936).

133. C. McCormick, supra note 4, § 272, at 807-08.

134. According to this analysis, Graves was incorrectly decided; the absence of the defendant's wife was clearly relevant to his consciousness of guilt, and the fact that the defendant could not have called her to testify is not material. The prosecutor did not call attention to defendant's failure to call his wife, only to her absence from the courtroom. And other evidence showed that she could have attended.

Support for this viewpoint is found in the generally accepted rule that the prosecutor is allowed to comment upon the defendant's conduct in the courtroom. See Vess, supra note 42, at 42. But see United States v. Wright, 489 F.2d 1181, 1186 (D.C. Cir. 1973) (courtroom behavior not legally relevant to guilt or innocence).


137. Griffin v. California, 380 U.S. 609, 614 (1965). It is not clear whether the court "solemnizes" the conduct of the accused as evidence against him merely by permitting argument. Burgess implies that this is not the case. Burgess, 440 F.2d at 235. But see Graves, 150 U.S. at 121 ("permission to make this comment was equivalent to saying to the jury that it was a circumstance against the accused . . . .").
Courts have shown a similar concern when requested to give a missing witness instruction.\textsuperscript{138} From the comments above, one might suppose that the best practice would be not to instruct at all, and in fact this position has been argued forcefully.\textsuperscript{139} However, the sounder view recognizes that lay jurors need guidance in reaching a just decision. Jurors are expected to sort through not only the mass of conflicting testimony and exhibits but also the arguments of counsel. The absence of instructions leaves jurors with their individual conceptions and misconceptions of what the applicable law is.\textsuperscript{140}

And the need for an instruction becomes even clearer when the issue is viewed from the perspective of the jurors at trial. A recent article calls attention to the fact that jurors form inferences from the absence of evidence that they had expected to see produced, and suggests that judges should take such "negative inferences" into account when ruling on the admissibility of evidence.\textsuperscript{141} This problem is fundamental. Jurors are passive; during the course of a trial they are expected to decide issues based on incomplete evidence, evidence that is in the absolute control of the litigating parties. Naturally, questions will arise in the minds of any people put into such a situation, and jurors are no exception. Their expectations about having their questions answered will not always be fulfilled. Nor are they usually encouraged to ask their questions directly.\textsuperscript{142} While this may be understandable and necessary for expeditious trials of

\textsuperscript{138} See, e.g. United States v. Ferguson, 498 F.2d 1001, 1008 (D.C. Cir.), cert. denied, 419 U.S. 900 (1974) (quoting Burgess, 440 F.2d at 234) ("[T]here is a danger that the instruction permitting an adverse inference may add a fictitious weight to one side or another of the case.").

\textsuperscript{139} There being no reason why this particular inference has a quality distinct from any other, it should be admitted into or excluded from instructions according to whether inferences are ever proper material for instructions. It may be repeated that I doubt whether this inference rises to the dignity of either a "rule" or a presumption. As an inference, it is logical . . . . . . . If it commends itself to reason, born of common judgment and experience, the jury will apply it without hint or argument from the Court . . . . Those cases are sound which deny to the inference any quality other than mere argument. Here again a safe and logical test is: if counsel is free to argue it, the Court is not.

\textsuperscript{140} United States v. Young, 463 F.2d 934, 945 (D.C. Cir. 1972) (Robinson, J., concurring).

\textsuperscript{141} Saltzburg, supra note 119.

cases, it does not seem necessary to ignore the jurors’ frustrations and leave them without guidance in resolving their uncertainties.

Jurors’ uncertainties about missing witnesses should be treated as one part of a larger set of unresolved questions. The court should provide guidance by instructing the jury as follows:

Members of the jury: Both sides have now rested their cases. Even though you may still have questions that remain unanswered, you must now reach a decision. It is your duty to decide this case by weighing the evidence that has been presented here, including all the testimony from witnesses and all the exhibits that have been introduced.

When the relevance of a witness’ absence has been established, the court should continue:

In addition, if you find from the evidence before you that a party could have called a witness, and yet that witness was not called, you may infer that the party believed for some reason that the witness would not be helpful in proving its case. Common sense will often suggest many reasons why the absent witness might not help to prove a party’s case.

The court might then instruct the jury that certain specific witnesses could not have appeared, for example, because they are deemed incompetent to testify or because they could not be found when subpoenaed. In this way, the court would, in effect, be ruling that for those witnesses the inference is not allowed.

V. TRIALS WITHOUT GRAVES: WHAT DIFFERENCE WILL IT MAKE?

By adopting the standards proposed here for argument and instruction, courts could avoid the most significant problems with the current rule. The complexity stemming from the Graves rule is reduced drastically because the court need consider only one simple question: whether enough evidence has been presented to establish the relevance of the witness’ failure to testify. Since the jury would make the determination about the significance of a witness’ absence, courts would be released from deciding controversies over when a witness may elucidate a matter or how to treat a witness who is equally available to both parties. Also, the proposed rule

143. Even this test might be simplified by a presumption that the party was able to call the witness, which might be rebutted, for example, by evidence that a subpoena could not be served. Of course, this would place the burden on the parties to explain why witnesses are absent, but that is merely expecting lawyers to prepare their cases thoroughly.

144. This solution is in accord with Wigmore’s analysis suggesting that an inference
would avoid the procedural requirements for advance rulings that are now imposed in some jurisdictions.

Other criticisms of the current embodiment of the *Graves* rule\textsuperscript{145} are answered by the suggested reform in jury instruction. First, the court no longer suggests to the jury an inference that is exaggerated and possibly untrue. The nature of the proposed inference is understated; it is more natural and accurate. The jury is no longer permitted explicitly to speculate about the nature of the missing testimony. Instead, its attention is more appropriately focused on the evidence that has been introduced. The instruction says, in effect, that all the relevant and useful information is before the jury. Second, because the content of the instruction is neutral, the inference is not a covert means of suggesting to the jury how evidence should be weighed. The proposed rule helps to preserve the integrity of the jury’s independent decision-making power. Third, the proposed rule removes the incentive for abuse by counsel. The instruction as proposed favors neither side, unlike the current adverse inference rule. Strategic posturings in hopes of receiving a missing witness instruction should be removed. Counsel must direct their efforts at eliciting testimony unfavorable to the other side from witnesses subject to cross-examination, rather than relying on the possibility of a free ride from a missing witness.

Finally, even some of the theoretical objections to the *Graves* rule may be answered by the proposed instruction. The instruction is neutral, not adverse to the nonproducing party, so that party cannot complain of being “penalized” by the court for its decision not to call a particular witness.\textsuperscript{146} And even though counsel could still argue inferences of guilt or fear of exposure from the failure to produce witnesses, the court would no longer lend explicit support to those inferences.\textsuperscript{147}

\textsuperscript{145} See supra text accompanying notes 41-52.

\textsuperscript{146} But see Young, 463 F.2d at 943 n.16: [W]e are not so clear concerning Judge Fahy’s distinction which would permit some comment in counsel’s argument on the fact that a witness is missing so long as he stopped short of saying that an inference could be drawn that the testimony of the absent witness would be adverse to the other side had he been called. Whether or not the lawyer explicitly uses the word “inference,” when his comment, as in argument to the jury, emphasizes the fact that the witnesses were not called by the other party, he is, ordinarily at least, in fact arguing to the jury that they may conclude that the testimony of these witnesses would be adverse to the party who failed to call them.

\textsuperscript{147} One might argue that, by permitting such comments, the court is still penalizing
But if the proposed instruction—and thus the inference allowed—appears to avoid the difficulties with the present rule, one may still ask if it achieves a desired result. Will courts sacrifice something by adopting a new rule? After all, the problems with the present rule would also vanish if comments were banned altogether and no instructions were given. The proposed instruction is worthy of serious consideration precisely because it is able to offer needed guidance to the jury without introducing unnecessary and misleading elements into their deliberations.

The inferential chain under the current rule can be represented in this way:

- a witness is absent—
  - a party failed to call the witness—
  ̈ that party fears what the witness would say—
  ̈ the testimony would hurt the party.

The recommended rule severs the final link in the chain, which was the weakest by far, and replaces the third level inference with a conclusion that is less sensational and more accurate. But suppose it is a fact that the witness' testimony would have been damaging to a party. Is the restraint in the new instruction then a drawback?

On the contrary. While the language of the new instruction is understated, the impact is not. The force of the inference is more clearly tied to the known circumstances presented to the jury, and the impact of the inference focuses the jury's attention on their task of weighing the evidence of record rather than on possible speculation about evidence the jury has not seen.

A case will help to illustrate the point. In Seyle v. State, the defendant was accused of murdering his 2-year-old stepson. According to the prosecution's evidence, the child's injuries indicated severe physical abuse. The defendant testified on his own behalf and claimed that, while he and the child were in the bathroom, the child had a seizure, fell to the floor unconscious, and received his fatal injuries. According to the defendant, his wife was present at

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148. The proposed rule could be diagrammed as follows:

A witness is absent—
  - a party failed to call the witness—
  ̈ the party believes the witness would not be helpful to its case.

149. 584 P.2d 1081 (Wyo. 1978).
the time and witnessed the entire event. The wife was not called to testify. The proposed inference, that the defendant believes the wife would not be helpful in presenting his defense, is quite as damaging as the Graves inference, that his wife would have testified against the defendant. If the accused is to be believed, his wife should be helpful. To say that an eyewitness would not help the case is to cast grave suspicion on the testimony already presented by the defendant.

On the other hand, in a case like United States v. Young, in which the defendant failed to call alibi witnesses that he claimed to have seen at a bar at the time of a shooting elsewhere, the proposed inference is less damaging to the defense. It is probable that such an alibi witness might not aid the defense, even assuming the defendant is innocent, because the bar may have been crowded, the dates and times could be confused, and those witnesses might themselves have criminal records that would subject them to impeachment.

The impact of the inference on the weight of the evidence will turn, then, on one question. How helpful might a particular witness be to a "virtuous" party (for example, an innocent criminal defendant) under the facts and circumstances in evidence? This instruction is an improvement because it focuses the jury's attention most directly on the critical variables that should affect their decision.

A different rule, sometimes proposed as an alternative to the empty-chair doctrine, instructs the jury that it "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." But this instruction poses two problems. First, it is at least superfluous, because the jury knows already that it can attach greater weight to one side's evidence if it wishes, and possibly worse, because it may be interpreted as a suggestion by the judge that the evidence be weighted in this manner. Second, and more troublesome, if the jury entertains a reasonable doubt, based on a criminal defendant's testimony, before the instruction is given and the judge then instructs that the evidence may be construed most strongly against the defendant, the instruction to construe the evidence most strongly against the defendant may obliterate the

150. 463 F.2d 934 (D.C. Cir. 1972).
reasonable doubt standard, by permitting the jurors to disregard those reasonable doubts arising from the defendant's testimony. Thus, this attempt to design a better inference rule falls short of the mark. Certainly, in criminal cases, a charge that the jury should weigh the evidence differently because of the failure of one party to call a witness is confusing, at best, and, at worst, challengeable for interfering with the reasonable doubt standard.

Precedent supports the instruction and inference proposed. Considering only the federal rule for a moment, it is helpful to remember that the *Graves* opinion, while much relied upon, is dictum. In several more recent cases, federal courts have cited another Supreme Court opinion, *United States v. DiRe*, for support when they have refused to grant the adverse inference. There, the government failed to call an informer who was in a position to relate critical details about a conspiracy to counterfeit ration coupons. The Court, wrote Justice Jackson, "must assume that his testimony would not have been helpful in bringing guilty knowledge home to DiRe." The inference that I propose here goes one step further than *DiRe* by focusing on the unhelpful nature of the witness rather than the testimony. This is an improvement, since it recognizes that factors having little to do with the testimony—for example, a witness' appearance or criminal record—may weigh in a party's decision not to call a witness. And while the precise nature of the inference may differ, the recommended rule also gathers support from those state courts that already shy away from the traditional conclusion that the nature of the testimony from a missing witness would be unfavorable.

But all precedent does not favor the new rule, and at least one case directly rejected an instruction very similar to that proposed here. In *Fey v. Walston & Co., Inc.* a widow sued her stockbroker for churning her account. At issue was a power of attorney in favor of plaintiff's son, which permitted him to trade stocks for her. It was unclear whether the power applied only to a single transaction, or to an entire series of trades that the son had initiated. Plaintiff did not call her son to testify. When the defendant requested the traditional

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154. *Id.* at 593.
155. 493 F.2d 1036 (7th Cir. 1974).
instruction, the judge modified it, and instructed the jury: "If a party to this case has not produced a witness within his power to produce, you may infer that the testimony of the witness would be of no aid to that party . . . ."156 The Seventh Circuit reversed on appeal, reasoning that

[a]s given, the instruction could have been more prejudicial than failure to give any instruction at all on the subject, since in one of its possible interpretations it could have reassured jurors wondering about plaintiff's failure to call the son that his testimony would have been merely "of no aid" although not necessarily adverse to plaintiff's case in view of the sufficiency of plaintiff's other evidence. Any such interpretation would have been accentuated by another instruction in which the court told the jury that the law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial . . . .157

This reasoning is worthy of careful scrutiny, because it illustrates the intimate connection between the instruction and the underlying inference. The appellate court rejects the instruction because that tribunal assumes (1) that a party is entitled to have the jury infer that the potential testimony would be unfavorable, and (2) that this moderate instruction may prevent the jury from thus "properly" evaluating the absence of a witness. The instruction is adjudged prejudicial because it may preclude the adverse inference.

For our purposes, the court begs the question—what is the proper nature of the inference, and hence the appropriate content of the instruction—by assuming that the inference about a witness's adverse testimony is proper, without ever addressing the issue. Thus, the most that can be said for Fey is that it stands for the proposition that as long as we accept the traditional inference, we must retain the traditional instruction; one cannot be changed without changing the other. But because the court fails to consider the critical issue on the merits, Fey does not present a serious obstacle to the ideas and proposals advocated here.

**Conclusion**

The empty chair now speaks too eloquently, and it is time to
discard the inference that gives it such a powerful voice. The current doctrine is too complex to administer, too easy to abuse, and too common to ignore. In its place, courts should substitute a rule that allows greater latitude to counsel in their argument, so long as a simple condition is fulfilled, and instructions that provide more accurate guidance and more understandable direction to jurors. Surely, it is not a simple matter to reconsider a rule as venerable as the Graves doctrine. But neither can we allow tradition to substitute for diligent inquiry. The vitality of our trial courts depends on our willingness to reconsider and react.