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Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices

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JOINT TRIALS OF DEFENDANTS IN CRIMINAL CASES: AN ANALYSIS OF EFFICIENCIES AND PREJUDICES

Robert O. Dawson*†

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Criminal responsibility is individual. Even when persons are alleged to have committed a crime together, individuals — not groups — are arrested, charged, convicted, and sentenced. We have departed from this principle only rarely. Vicarious criminal

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liability is infrequent, ordinarily subject to only minor punishment, and clearly regulatory.¹ Under the law of parties, one can be held responsible for another's offense, but only upon a showing of purposeful assistance in the crime.² Even under expansive views of the responsibility of criminal conspirators, vicarious liability requires that an individual join a group and that another member of the group commit a crime in furtherance of the conspiracy's objectives.³

While the substantive criminal law scrupulously honors the principle of individual responsibility, that principle is jeopardized in a joint trial of two or more defendants. Statutes or decisions in virtually all American jurisdictions permit joinder of defendants charged with the same offense, with different offenses committed in furtherance of a common conspiracy, or with different offenses arising out of the same transaction, episode, or series of transactions or episodes.⁴ Rule 8(b) of the Federal Rules of Criminal Procedure typifies American joinder provisions:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.⁵

The prosecutor usually joins defendants by charging more than one actor in the same indictment, information, or complaint. Even when the prosecutor names the defendants in separate charging instruments, the trial judge may ordinarily consolidate the cases if the defendants could have been named in the same charging instrument.⁶

After joinder, separation is possible;⁷ for example, Rule 14 of

1. See W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 223-28 (1972) [hereinafter cited as LAFAVE].

2. See *id.* at 502-12.

3. See *Pinkerton v. United States*, 328 U.S. 640 (1946). This expansive view has been criticized. See LAFAVE, *supra* note 1, at 513-15.

4. The statutes and rules of court concerning joinder, consolidation, and severance are collected in ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO JOINDER AND SEVERANCE app. A (Approved Draft, 1968).

5. FED. R. CRIM. P. 8(b).

6. See note 4 *supra*. FED. R. CRIM. P. 13 provides:

The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. This procedure shall be the same as if the prosecution were under such single indictment or information.

7. See note 4 *supra*.

the Federal Rules of Criminal Procedure provides in part:

If it appears that a defendant or the government is prejudiced by a joinder . . . of defendants in an indictment or information or by such joinder for trial together, the court may . . . grant a severance of defendants or provide whatever other relief justice requires.⁸

In practice, however, trial courts order separate trials only upon a showing of substantial prejudice to the defendant, and appellate courts reverse a denial of severance only for abuse of discretion. The law has, in effect, created a strong presumption that defendants joined together should be tried together.⁹

This Article questions that presumption. Legislatures and courts, in weighing the relative advantages of joint and separate trials, have unreasonably struck a balance in favor of joint trials. The strongest justification traditionally offered for joint trials is efficiency. This Article shows that courts have greatly exaggerated the supposed efficiencies of joint trials while grossly underestimating the impediments joint trials pose to fair and accurate determinations of individual guilt or innocence. The propriety of joint trials is more than a question of efficiencies. Joint trials usually, although not always, help the prosecutor to get convictions, and thereby modify the balance of advantage in criminal trials.¹⁰ Disputes over joinder and severance should go beyond issues of procedural efficiency to consider the wisdom of such a modification. In considering questions of severance courts must value the impediments to fairness imposed by joint trials, both the general dangers inherent in complex litigation and the unique prejudices that flow from joinder. They must weigh these impediments, case by case, against a realistic assessment of the benefits of joinder. Such a balancing should replace the present blind preference for joint trials and the correlative barriers to severance.

I. THE EFFICIENCIES AND OTHER BENEFITS OF JOINT TRIALS

Courts and legislatures have rarely questioned their preference for joint trials whenever several defendants are charged with related crimes. Frequently, courts simply assume the defendants charged together should be tried together in the absence of a

8. FED. R. CRIM. P. 14.

9. See, e.g., 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 441-47 (1969).

10. Appellate courts acknowledge this by asserting that a better opportunity for an acquittal in a separate trial is not a ground for severance. *Id.* at 443-44.

compelling reason for severance.¹¹ Courts that bother to give reasons usually point to the efficiencies of joint trials, occasionally suggesting other justifications to buttress their reliance on efficiency.¹² But a careful analysis of the alleged advantages of joint trials reveals that they are nonexistent or, at the least, grossly exaggerated.¹³

A. *The Efficiency Justification*

1. *The Supposed Efficiencies*

Justice White, dissenting in *Bruton v. United States*,¹⁴ invoked the conventional wisdom that "[u]nquestionably, joint trials are more economical and minimize the burden on witnesses, prosecutors, and courts. They also avoid delays in bring-

11. See, e.g., *Parker v. United States*, 404 F.2d 1193 (9th Cir. 1968), cert. denied, 394 U.S. 1004 (1969), upholding the district court's decision refusing to grant severance:

Joint trials of persons charged together with committing the same offense or with being accessory to its commission are the rule, rather than the exception. There is a substantial public interest in this procedure. It expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries, and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once.

404 F.2d at 1196. See also *Linn v. State*, 505 P.2d 1270 (Wyo.), cert. denied, 411 U.S. 983 (1973).

12. See text at notes 43-70 *infra*. If joint trials were always more efficient than separate ones and if joint trials provided other substantial benefits, then severance would be rare. Severance would also be rare if one viewed the asserted prejudices to joined defendants as imaginary or justly deserved. Concerning the last point, consider the court's remarks in *Parker v. United States*, 404 F.2d 1193 (9th Cir. 1968), cert. denied, 394 U.S. 1004 (1969). In response to defendant's contention that he was prejudiced because his codefendants testified while he did not and their counsel commented upon the fact that the testifying defendants "hid nothing" from the jury, the Ninth Circuit said, "When men get together to rob a bank, and do so, they take chances, one of which is that if they are caught there may no longer be honor among thieves." 404 F.2d at 1197.

13. Of course, joinder of defendants deals with only a small segment of the criminal justice process — the trial. There is no reason why defendants charged together or whose cases are consolidated cannot jointly defend in a preliminary hearing where the issue is whether there is probable cause to believe each guilty. See FED. R. CRIM. P. 5.1. There is also no reason why pretrial hearings dealing with motions for discovery, motions to suppress evidence, and challenges to the sufficiency of the charging instrument cannot be conducted jointly. See FED. R. CRIM. P. 12. Indeed, the Federal Rules contemplate joint pretrial hearings. Rule 12(b) provides in part that "[t]he following must be raised prior to trial: . . . (5) Requests for a severance of . . . defendants under Rule 14."

14. 391 U.S. 123 (1968). In *Bruton* the Court overruled *Delli Paoli v. United States*, 352 U.S. 232 (1957), and held that admitting into evidence a codefendant's confession that implicated the defendant violated the defendant's rights of confrontation under the sixth amendment. *Bruton's* implications for separate trials are examined later. See text at notes 127-75 *infra*.

ing those accused of crime to trial.”¹⁵ While joint trials may be more efficient than individual trials in some cases, Justice White’s assumptions raise several questions: How much more efficient?¹⁶ In what kinds of cases? How much additional burden would individual trials place upon witnesses? Should it make a difference who the witnesses are? How much delay would result from individual trials or would there be delay at all in many cases? The answers to these questions suggest several reasons for doubting whether a joint trial is more efficient in the typical case than separate trials.

One supposed efficiency of joinder is a saving of the prosecutor’s time because of the substantial overlap of evidence against the different defendants. But whether the trial is joint or individual affects only a small portion of the prosecutor’s investment of time. It does not affect police investigation, which is usually completed before the prosecutor decides on charging and joinder.¹⁷ It should not affect plea bargaining — it is no more efficient for the prosecutor to plea bargain in a joined case than in one that has been severed. Although the threat of a joint trial may tilt the balance of advantage in plea bargaining toward the prosecutor, it may make actual agreement less likely.¹⁸ It need not affect pretrial hearings, which may be held jointly, even when the trials are separate.¹⁹ It probably does not even make a substantial difference in the time the prosecutor spends preparing for trial. Whether trials are joint or separate, the prosecutor must review the evidentiary file and interview the witnesses. If separate trials

15. 391 U.S. at 143. Justice Brennan, writing for the majority in *Bruton*, also assumed that joint trials promote efficiency: “Joint trials do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial.” 391 U.S. at 134.

16. Some courts seem to assume that the savings follow a mathematical formula: a joint trial of two defendants is twice as efficient as separate trials, a joint trial of three defendants is three times as efficient, etc. See note 151 *infra*.

17. W. LAFAYE, ARREST 305 (1965) (“In most cases the investigation is concluded by the time the prosecutor’s office becomes involved.”)

18. Some prosecutors take an “all-or-none” position in plea bargaining with joined defendants and insist that each defendant accept the plea offer and plead guilty or none may do so. See, e.g., *Seaton v. State*, 472 S.W.2d 905 (Tenn. Crim. App. 1971). The requirement of persuading each defendant to agree to a disposition of his case before the date set for the joint trial may mean that the case will be tried before a jury rather than disposed of by guilty pleas. If only one defendant resists the temptation to plea bargain, the others cannot plea bargain either. If the cases were severed and the others pled guilty, the resisting defendant, facing trial alone, might at the eleventh hour eagerly accept the government’s offer. This is particularly likely if one or more of the plea agreements includes a promise to testify against any defendant holding out for a jury trial.

19. See note 13 *supra*.

are held, the prosecutor must review the file again, but would surely not need as much time as he would to prepare a new case.

A second presumed efficiency of joint trials is that they are more convenient for witnesses. In fact, however, the effect of joint trials on witnesses varies greatly from case to case and depends in part on whether the witness is a civilian or a professional. To involve lay witnesses in the prosecution of a case certainly forces real burdens upon them. They must leave work or home to testify, and an important witness may be required to remain at the courthouse throughout the trial.²⁰ If the witness is a child or the victim of an alleged sex offense, we do not want him to repeat the trauma of testifying without excellent reasons.²¹ Most witnesses in criminal trials, however, are not civilians but professionals. The burden of presenting witnesses lies upon the government, whose witnesses are usually police officers, laboratory employees, prosecu-

20. *Parker v. United States*, 404 F.2d 1193 (9th Cir. 1968), *cert. denied*, 394 U.S. 1004 (1969):

The witness is the forgotten man in the administration of justice. His knowledge of the case may be purely fortuitous. Yet he can be compelled to attend, subject to heavy penalties for his failure to do so. The remuneration for loss of his time and for the inconvenience that he suffers is a mere pittance. . . . When he gets to court, he may wait a long time before he is called. In a criminal case he will probably be excluded from the courtroom and have to spend his time in a witness room, which may or may not even have windows, or, worse yet, in the corridor of the courthouse. He dare not talk to strangers or other witnesses; yet he is subject to being interviewed and re-interviewed by counsel for both sides. When called, he finds himself in a strange and often terrifying environment. . . . When he finishes, he may or may not be excused, depending upon whether some counsel thinks that he might want to recall him. Add to this merciless treatment given by the news media to all participants, including witnesses, in a trial of any notoriety, and the attempts of influence or the threats against his personal safety and that of his loved ones to which a witness is sometimes subjected, and it is no wonder that most citizens will do everything possible to avoid being called to testify. In a particular case, once ought to be enough.

404 F.2d at 1196 n.4.

21. In *State v. Druke*, 115 Ariz. 224, 564 P.2d 913 (Ct. App. 1977), the state sought mandamus to compel the trial judge to vacate his order severing the cases of two defendants charged with kidnapping and rape. The appellate court ordered the relief sought, commenting, "We are of the opinion that the factors of judicial economy and the inconvenience to witnesses, particularly the victim, if separate trials are required, outweigh the 'potential for prejudice' urged by [the defendant]." 115 Ariz. at 227, 564 P.2d at 916.

One should distinguish the inconvenience of requiring a civilian witness to testify in more than one trial arising from the same episode and the stress from requiring a witness to testify about an embarrassing, humiliating, or degrading occurrence in more than one trial. The public interest in not requiring the witness to undergo the trauma of testifying more often than necessary far exceeds mere considerations of convenience, however important those may seem to the witness himself. Further, special consideration should be given to the elderly or infirm witness because of the strain of testifying. See note 318 *infra* for a discussion of decisions that attempt to make such distinctions.

tion investigators, and others whose jobs include testifying in court. While time away from the patrol beat or the laboratory is time away from important work, professional witnesses suffer little personal inconvenience or expense by testifying more than once. Thus, when assessing the inconvenience that separate trials impose on witnesses, we should ask whether testifying is part of their jobs.

Furthermore, the parties can protect witnesses from multiple appearances by stipulating necessary but undisputed noncritical testimony. For example, the testimony of the owner of burglarized premises could be stipulated if there were no dispute that the burglary took place. Stipulation should also eliminate repeated testimony about laboratory results. Under appropriate circumstances, the trial court could even condition severance on stipulations of such testimony.

A third justification alleged for joint trials is that they conserve limited judicial resources. This efficiency is particularly stressed when joinder reduces the number of jury trials because, although jury trials are relatively infrequent in criminal cases, they consume a substantial part of a judge's court time.²² But joint trials do not necessarily save judicial energy. They are far more difficult to schedule than individual trials: as the number of participants increases, it becomes harder to find a trial date acceptable to court, prosecution, witnesses, and defense attorneys. Consequently, the court is likely to schedule a joint trial later than an individual case.²³ Moreover, a joint trial is less likely

22. While the vast majority of criminal charges are disposed of without jury trial — in dismissals, in guilty pleas, or in trials before the court — trial judges are understandably concerned about any increase in the number of jury trials that must be conducted. In the year ending June 30, 1977, United States district courts disposed of 44,111 criminal cases. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 115 (1977). Of these, 4561 (10%) were disposed of by jury trial, 2661 (6%) by trials before the court, and the remainder (84%) by pleas of guilty and dismissals. *Id.* at 275. A jury trial is a cumbersome proceeding. Even under the stern hand of a judge determined to push ahead, it takes much longer to dispose of a case by a jury trial than by any other means, including a trial before the court. Of the 2661 jury-waived criminal cases before United States district courts in the same year, 2149 (81%) were disposed of in one day or less, while only 885 of the 4561 jury trials (19%) were disposed of in one day or less. *Id.* at 352. Thus, although a judge may dispose of only 5 to 10% of his docket by jury trial, it takes only a small number of additional jury trials to destroy his calendar. For some judges, an addition of two or three criminal jury trials per year would represent a 25% increase in criminal jury trials. During the year ending June 30, 1977, there were 398 authorized United States district court judgeships. *Id.* at 112. Since there were 4561 criminal cases disposed of by jury trial during that year, that means there were 11.5 criminal jury trials per judge, or about one a month.

23. Congressional recognition that joinder of defendants is likely to delay the begin-

to begin on schedule. If another case detains one of the defense attorneys longer than expected, the court must sever that attorney's client, place the entire case on hold until the other trial is over, or select a new trial date acceptable to all participants.²⁴ Depending upon the arrangements for backup trials, the second and third choices may consume substantial court time.

In addition, once begun, joint trials are more complicated to conduct and take longer to complete than individual trials. In some jurisdictions the trial court must determine how multiple defendants may challenge potential jurors, a decision unnecessary to an individual trial.²⁵ The trial judge must also work out the order in which the defense participates, since defense attorneys are likely to have different ideas about who should cross-examine first,²⁶ present defenses first, and argue to the jury last,

ning of trial of a criminal case appears in § 101 of the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (1976). The Act provides that trial must begin within specified time limits but provides that delay for certain pretrial proceedings "shall be excluded in computing the time . . . within which the trial of any such offense must commence" 18 U.S.C. § 3161(h) (1976). The following periods of delay, among others, are excluded: examination and hearing for determination of competency to stand trial, time during which a defendant is actually incompetent to stand trial, time resulting from interlocutory appeals, delay resulting from the granting of the government's or a defendant's motion for continuance. 18 U.S.C. § 3161(h) (1976). If the case of one defendant is properly delayed under the Act so that the time limits have not run as to him, then the Act further provides for exclusion of "a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." 18 U.S.C. § 3161(h)(7) (1976). Finally, the trial court is cautioned against liberally granting motions for continuance but is instructed to consider as a factor in deciding upon such a motion "[w]hether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section." 18 U.S.C. § 3161(h)(8)(B)(ii) (1976).

24. Of course, when more witnesses are involved it is more likely that at least one will become unavailable. This is especially true of expert witnesses who may be testifying in other litigation or may have other professional commitments. Frequently, rescheduling the order in which witnesses testify will compensate for temporarily unavailable witnesses.

25. For example, FED. R. CRIM. P. 24 provides that each side has 20 peremptory challenges in a capital case, 6 in noncapital felony cases, and 3 in other cases. However, FED. R. CRIM. P. 24(b) provides, "If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly." In *Martin v. State*, 262 Ind. 232, 317 N.E.2d 430 (1974), *cert. denied*, 420 U.S. 911 (1975), the Indiana Supreme Court upheld a statute requiring codefendants to join in exercising peremptory challenges against an attack based upon equal protection of the laws.

26. A. AMSTERDAM, B. SEGAL & M. MILLER, *TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES* 1-275 (3d ed. 1974), suggests that joined defendants wondering whether to seek severance should consider whether, under local practice, "counsel's cross-examination of prosecution witnesses [will] be cut off as 'cumulative' of that of counsel for a codefendant."

whether there should be opening statements to the jury, and when they should be made.²⁷ The judge may even have to arrange seating.²⁸ During trial, a judge must expect many more objections from defense attorneys in a joint trial. In part, this is because more lawyers are available to object, each with a different interest to protect. But more important, as the number of defense attorneys increases, it is less likely that all will decide for tactical reasons not to object when an opportunity is presented. Furthermore, each attorney must object to evidence that damages his client, even if that evidence is admissible against a codefendant, particularly if the attorney is attempting to build an appellate record of prejudice from joinder. While the court may rule on many objections as they are made, many others will require extensive arguments or lengthy testimony outside the presence of the jury.²⁹

A fourth presumed justification for joint trials is that they reduce the cost of appeals. For example, if a joint trial ends with two or more convictions that are appealed, only one trial tran-

27. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 5.4 (Approved Draft, 1970), recommends the trial court conduct a pretrial conference when it anticipates the trial will be unusually complicated. The Standard recognizes as appropriate for resolution in a pretrial conference the following matters relating to multiplicity of defendants:

- (iv) excision from admissible statements of material prejudicial to a codefendant;
- (v) severance of defendants or offenses;
- (vi) seating arrangements for defendants and counsel; . . .
- (viii) conduct of voir dire;
- (ix) number and use of peremptory challenges;
- (x) procedure on objections where there are multiple counsel;
- (xi) order of presentation of evidence and arguments where there are multiple defendants;
- (xii) order of cross-examination where there are multiple counsel;

28. See, e.g., Kaufman, *The Apalachin Trial: Further Observations on the Pre-Trial in Criminal Cases*, 44 J. AM. JUD. Socy. 53, 56 (1960): "Since the physical arrangement of the courtroom in a multi-defendant case is important, the attorneys were permitted to set up their own seating, subject again to the approval of the Court."

29. A. AMSTERDAM, B. SEGAL & M. MILLER, *supra* note 26, at 1-356:

When questions of fact are involved in determining the applicability of a rule governing the admission of evidence, the trial judge ordinarily decides those questions as trier of fact, even at a jury trial. When such preliminary factual questions are presented on defense objection to any item of prosecutive evidence worth objecting to in the first place, it is ordinarily important for defense counsel to ask that the jury be excused during the presentation of testimony . . . on the preliminary question.

Of course, some of the time consumed litigating the admissibility of evidence outside the presence of the jury can be reduced by pretrial hearings on motions to suppress and by pretrial arguments on motions in limine. Even so, in a case even moderately complex, the time consumed with the jury out of the courtroom is likely to be substantial.

script is needed,³⁰ since some of the issues are likely to be common to each appeal. The savings in court reporter and stenographic time may be small or substantial, depending upon the number of appellants and the issues they raise. But joinder may prove more expensive if only a minor participant appeals on the ground that the trial was unfair to him because he was such a minor figure.³¹ To demonstrate that prejudice, he may have to present the entire trial transcript to show that only a small portion involved him. On balance, several unpredictable variables determine whether a joint trial reduces the time and expense of an appeal. If the defense attorneys present a unified attack upon the convictions, the savings for all parties during the briefing and oral argument may be substantial. But those savings are lost for points of error unique to each appellant. Moreover, each appellant may raise individual reasons why his joinder with the others particularly prejudiced him — appellate issues that would not have existed had the trials been separate.³²

Some might suggest that joint trials can offer economies for the defense. In some cases, two or more defendants may employ or be assigned the same counsel to defend them, although the increasing sensitivity of appellate courts to the potential conflict of interests in multiple-defendant representation makes this less likely today than before.³³ In theory, even if each defendant had separate counsel, the lawyers could improve the defense of each by coordinating their time, knowledge, and skills. Since each trial lawyer has his own strengths and weaknesses, they could mount a much stronger defense through a division of labor.³⁴

30. The appellate court may order the appeals consolidated so they may be presented upon a single record. See FED. R. APP. P. 3(b).

31. See text at notes 97-101 *infra*.

32. A similar observation was made by Justice Marshall, dissenting in *Nelson v. O'Neill*, 402 U.S. 622, 635 (1971):

Those that argue for the use of joint trials contend that joint trials, although often resulting in prejudice to recognized rights of one or more of the codefendants, are justified because of the saving of time, money, and energy that result. But, as this case shows, much of the supposed saving is lost through protracted litigation that results from the impingement or near impingement of a codefendant's right of confrontation and equal protection.

33. See, e.g., *Holloway v. Arkansas*, 435 U.S. 475 (1978); *State v. Olsen*, 258 N.W.2d 898 (Minn. 1977). For an excellent discussion of the entire topic of multiple representation of criminal defendants, see Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119 (1978).

34. One author has suggested that in multi-defense-counsel cases one attorney be designated "senior" or "coordinating" counsel, to act as "advisory attorney with respect

But there are flaws in this idyllic scene. If the quality of the attorneys varies, the poor lawyer may hinder the skillful one.³⁵ Even among competent attorneys cooperation will be less than perfect because each defense attorney must be acutely aware of his responsibility to his own client. They will cooperate only if cooperation furthers each client's interests. Furthermore, each must be aware that at any time before the end of the trial one defendant may strike a deal with the prosecutor, testify against the others, and reveal the entire defense strategy to the government. Alert attorneys also remember that sometimes government informants are "prosecuted" jointly with real defendants, in part to preserve their covers.³⁶ Even when defense attorneys want to cooperate, each must remain somewhat uneasy about what the others will do. That uneasiness negates many of the benefits joinder may bestow on the defense.

2. *The Underlying Assumption*

Underlying these supposed efficiencies is an assumption that if defendants are not joined, each will undergo a separate jury trial. There are, however, good reasons to question that assumption. When cases are severed, the first trial may well be the only trial: its results will often prompt the litigants to dispose of the remaining cases without trial, or at least without jury trial. The first trial will answer a number of questions for the litigants. Will a jury find the prosecution's theory of liability persuasive? Will civilian witnesses cooperate? Will a jury believe the witnesses? Will the court admit critical pieces of evidence?

To the extent a case goes to trial because of uncertainty about strength of proof, credibility of witnesses, and acceptability of different theories to a jury, answering some or all of these questions will quickly lead to settlement of remaining cases. After the first trial, each party can evaluate its chances much more accurately and may settle the case without trial or may, if the only substantial issues remaining are legal, waive a jury trial.

to those areas in which the interests of all defendants are the same." Wessel, *Procedural Safeguards for the Mass Conspiracy Trial*, 48 A.B.A.J. 628 (1962).

35. "Referral of potential co-defendants to other counsel stems not only from the desire to control litigation, but also from the need to assure competent co-counsel, both before and at trial, since error by one counsel often influences the outcome of the whole case." Margolin, *Representing Multiple Defendants in Criminal Cases*, in PRACTICING LAW INSTITUTE, 15TH ANNUAL: DEFENDING CRIMINAL CASES 497 (1977).

36. See, e.g., *Weatherford v. Bursey*, 429 U.S. 545 (1977).

Therefore, the prosecutor will often seek to try the most serious and strongest case first, hoping the results will encourage the other defendants to accept more reasonable terms. In addition, one or more of the defendants may aid his own cause by offering to testify for the prosecution against his codefendants.³⁷ When that is acceptable to the prosecution, it not only eliminates the trial of the defendant who testifies for the government, but also tends to promote rapid settlement of the other cases.³⁸

The prosecutor may have personal reasons to dislike sequential jury trials. Trying a second codefendant is like viewing the rerun of a movie: it lacks the uncertainty that makes a criminal trial exciting for an active prosecutor. For that reason, he, too, may be more willing to settle the second case than the first. For the same reason, the news media are likely to give a second trial less extensive coverage and so a prosecutor motivated by media exposure will not have that incentive the second time around.

Finally, empirical data do not support the conventional wisdom that severing cases burdens the criminal justice system with sequential jury trials. One study suggests that when defendants have a right of severance, sequential trials are rare. In 1973, Vermont provided a right of severance in all felony cases punishable by more than five years' imprisonment.³⁹ A 1973 survey of Vermont trial judges and prosecutors found that "joint trials are virtually unheard of,"⁴⁰ even in cases, such as misdemeanors, not within the statutory right of severance. The survey also shows that when severance is granted, the first trial is the only trial, a phenomenon the author terms the "domino theory":

The verdict of the first defendant tried has a great deal of bearing on the disposition of the other defendants charged with the same offense. . . . In a vast majority of the cases, an initial conviction has induced the awaiting codefendants to negotiate a plea. . . . Thus, the experience has been that a single trial of one defendant

37. A. AMSTERDAM, B. SEGAL & M. MILLER, *supra* note 26, at 1-92: "The police or the prosecution will sometimes offer a client the opportunity to 'cooperate' by testifying against accomplices in exchange for dismissal or reduction of charges, or for recommendation of leniency to the trial judge."

38. *Id.* at 1-102: "A codefendant may turn state's evidence at any time; and his testimony is likely to be decisive at trial." Once the prosecutor has arranged for the testimony of a codefendant, he is likely to tell the defendant that he has done so in hope of inducing him to plead guilty and avoiding the ordeal of trial.

39. VT. STAT. ANN. tit. 13, § 6507 (1958) (repealed 1973). This right did not extend to conspiracy cases. Vermont has since expanded the right of severance. *See* note 315 *infra*.

40. Langrock, *Joint Trials: A Short Lesson From Little Vermont*, 9 CRIM. L. BULL. 612, 616 (1973).

has resulted in the disposition of almost all the charges stemming out of the single crime, and this has occurred without the length of the joint trial and the attendant complications that almost always go with such a trial.⁴¹

The survey concludes that "[i]t was felt by both judges and prosecutors that the resultant economy weighed in favor of separate trials rather than a joint trial."⁴² If that analysis is correct, then in deciding upon a motion for severance, a trial court should not expect sequential trials after severance but rather one trial followed by disposition of the remaining cases without trial. Severance would promote, rather than impede, the efficient administration of justice and conservation of resources.

B. *Justifications Other Than Efficiency*

Although the principal argument in favor of joint trials is efficiency in the administration of criminal justice, other arguments are made as well. To continue with the quotation from Justice White's dissent in *Bruton v. United States*:⁴³

It is also worth saying that separate trials are apt to have varying consequences for legally indistinguishable defendants. The unfairness of this is confirmed by the common prosecutorial experience of seeing codefendants who are tried separately strenuously jockeying for position with regard to who should be the first to be tried.⁴⁴

Do joint trials ensure, or even tend to ensure, consistency of result? Are separate trials inherently unfair to some of the codefendants?

Justice White could have been objecting to either or both of two inconsistencies when he spoke of the "varying consequences" of individual trials: unjustifiably different jury verdicts concerning single past events or unjustifiably different sentences for convicted codefendants. According to the first objection, for different juries to reach different verdicts on the same evidence is undeniably unjust, and to the extent the legal system can minimize the likelihood of this unjustness, it should do so. Therefore, joint trials should be held whenever feasible.

Although superficially appealing, this argument has several weaknesses. First, it is usually impossible to determine whether separate juries have reached truly inconsistent verdicts. Almost

41. *Id.* at 616-17.

42. *Id.* at 617.

43. 391 U.S. 123, 143 (1968). See text at note 15 *supra*.

44. 391 U.S. at 143.

always the evidence admissible in different trials against alleged coparticipants in an offense will differ enough to permit different treatment by the jury. Similarly, if different lawyers have represented defendants in sequential trials, differences in their competency, zeal, or preparation may affect the juries' verdicts.

Second, our society has made it clear by adopting the jury system that it values other considerations more than mere consistency of result. One does not have to acknowledge jury nullification to accept that a jury introduces greater uncertainty into all trials: this uncertainty is tolerated for the sake of greater procedural values. In separate, sequential trials, skilled attorneys will select juries best suited to the individual clients. Perhaps a defendant's right through counsel to select a jury suited to try his particular case is an important trial right, one which a joint trial with its inevitable "compromise jury"⁴⁵ should not be able to override in the name of "consistency."⁴⁶

Third, a joint trial does not guarantee consistency of result even when the evidence against each defendant is identical. The jury must decide each case individually. It is reversible error to instruct a jury that the codefendants must "sink or swim together";⁴⁷ no matter how much the evidence commands that two defendants be treated the same, the court must instruct the jury

45. In some jurisdictions defendants tried jointly are required to exercise peremptory jury challenges jointly. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY 72-75 (Approved Draft, 1968) discusses the types of provisions dealing with peremptory challenges in joint trials. The Commentary states that it may well be desirable to give each defendant at least some challenges which may be independently exercised, as only in this way can such a defendant protect himself (apart from challenge for cause) from a venireman who is prejudiced only against him. Affording such protection has been one of the traditional explanations for the peremptory challenge . . . and thus it does not appear that a codefendant should be denied all challenges except those to which all codefendants agree. In cases involving many defendants, it may be difficult or impossible to obtain such agreement.

Id. at 74-75.

46. See note 204 *infra* and accompanying text. Most questioning at voir dire examination is intended to permit the attorneys to exercise their peremptory challenges more intelligently, rather than to uncover grounds for challenges for cause.

Counsel preparing to select a jury through the exercise of challenges should bear in mind the kind of jury that is appropriate for the defense case. Some jurors will be bad jurors for the defense in any type of case; others will be good for some kinds of cases but not for others.

1A S. BERNSTEIN, CRIMINAL DEFENSE TECHNIQUES 21-44 (Supp. 1979). The right of peremptory challenge has been called "one of the most important of the rights secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408 (1894).

47. See, e.g., *Commonwealth v. Lester*, 223 Pa. Super. Ct. 473, 475, 302 A.2d 509, 510 (1973) (error for the trial court to instruct the jury that since the defendants are charged as accomplices, "they sink or swim together. If they are innocent they are innocent together. If they are guilty they are guilty together.")

that it may return a verdict of guilty for one and not guilty for the other.⁴⁸ When a jury in a joint trial has reached what an appellate court regards as inconsistent verdicts, the court is likely to reverse the judgment against the convicted codefendant out of concern for fairness between codefendants.⁴⁹

Finally, the consistency-of-verdict argument makes the same faulty assumption that the efficiency argument makes: that related defendants will each go through a trial. But, as shown above, sequential trials are unlikely in that situation, because the first case will probably form the basis for disposition of the others without trial.⁵⁰ To the extent the jury's verdict in the first case sets the standard for disposition of the other cases, severance avoids potential inconsistent jury verdicts and fosters equal treatment of defendants.

Justice White's concern for "varying consequences"⁵¹ may also embrace sentencing of those convicted. Yet such a concern is no more justified than the objection to varying verdicts. It is nearly impossible to determine if sentences vary unjustifiably because the factors that may legitimately influence the imposition of individual sentences are virtually without limit.⁵² In most American jurisdictions the trial judge, not the jury, is responsible for sentencing one convicted by a jury.⁵³ If the same judge presides at all the sequential trials, his sentences should be as consistent as if they were handed down after a joint trial. Indeed, a judge may postpone sentencing until each of the cases is completed and then consider the sentencing of all together.⁵⁴ If differ-

48. For example, in *State v. Lockamy*, 31 N.C. App. 713, 230 S.E.2d 565 (1976), the trial court did not give a "sink or swim together" charge, but failed to instruct the jury clearly that it might find one defendant guilty and the other not guilty. Although the evidence against each was identical and there is no indication in the opinion that either defendant presented a defense to the government's case, the conviction was reversed: "[T]he trial judge must either give a separate final mandate as to each defendant or otherwise clearly instruct the jury that the guilt or innocence of one defendant is not dependent upon the guilt or innocence of a codefendant." 230 S.E.2d at 568.

49. See, e.g., *People v. Beasley*, 41 Ill. App. 3d 550, 353 N.E.2d 699 (1976).

50. See text at notes 37-42 *supra*.

51. See text at note 44 *supra*.

52. See, e.g., *United States v. Grayson*, 438 U.S. 41 (1978) (upholding imposition of a more severe sentence of one believed to have committed perjury in his defense on the ground that he has thereby demonstrated bleak prospects for rehabilitation).

53. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 43-44 (Approved Draft, 1968) reports that only thirteen states permit jury sentencing in noncapital cases.

54. Another method of achieving the same result would be for the trial judge to select and impose sentence upon conviction and to make consistency adjustments through mo-

ent trial judges preside at sequential trials and sentence those convicted, then the potential problems of sentence disparity are only slightly more troublesome than the problems in sentencing criminal defendants in unrelated cases.

Are there any other reasons to believe that joint trials might be fairer than severed trials? At least three possibilities suggest themselves: (1) that a joint trial "serves to give the jury a complete overall view of the whole scheme and helps them see how each piece fits into the whole pattern,"⁵⁵ (2) that a joint trial eliminates the unfairness of forcing one defendant to be tried before his codefendants, and (3) that a joint trial precludes the danger of blame shifting between codefendants. When examined closely, however, none of the three is a persuasive argument for joint trials.

The argument for giving the jury an "overall view" fails because it ignores the prosecutor's ability and duty to present all evidence relevant to a defendant's role in an offense whether the trial is individual or joint. If the "overall view" argument calls for the admission of evidence unrelated to the defendant on trial, then it calls for unfair prejudice. If, on the other hand, it seeks to encourage the prosecutor to marshal all evidence admissible against the defendant, it seeks vigorous prosecution, an aim only marginally promoted by the clumsy apparatus of a joint trial. Neither interpretation supports a claim that joint trials are fairer than individual ones.

Another justification for joint trials is that they avoid the discrimination between the defendant tried first and those tried later. The advantages of being tried second or third in a series — advantages from deterioration of evidence, from discovery of the prosecution's case, and from additional grounds for impeachment of prosecution witnesses — would seem to support the more uniform treatment that joinder imposes on codefendants. Under closer examination, however, those advantages no longer appear so extraordinary; indeed, in many instances significant countervailing advantages accompany the first to trial.

Ordinarily, a defendant, guilty or innocent, prefers to delay his trial. Time undeniably weakens the government's case: wit-

tions to reduce sentence. See FED. R. CRIM. P. 35 (permitting reduction within 120 days after imposition of sentence or affirmance on appeal).

55. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO JOINDER AND SEVERANCE 39 (Approved Draft, 1968) (quoting from *Rakes v. United States*, 169 F.2d 739, 744 (4th Cir.), cert. denied, 335 U.S. 826 (1948)).

nesses die, move from the court's jurisdiction, and lose crisp memories;⁵⁶ prosecutorial zeal wanes and public attention wanders. Severing joint defendants may deny these benefits to the one who goes first and may unfairly favor later defendants over both the first one and the government. Although few would infer from this fact that every defendant should be guaranteed the blessing of delay, to believe that its benefits should not be distributed unequally is quite defensible.

Another advantage of being tried later is the chance to use the first trial to discover the government's case — to study it to an extent far beyond that permissible under even the most liberal discovery statutes or rules of court. That advantage, however, is slimmer than it may appear. In practice, criminal discovery regularly overreaches the strictures of the formal laws. Commonly, prosecutors disclose to the defense substantially all the information in their case files⁵⁷ even though statutes and rules of court may restrict discovery to only a few items. Furthermore, testimony of witnesses on whether there is probable cause to hold the defendant for grand jury indictment,⁵⁸ whether a stop, arrest, or search was valid, whether an admission or statement was lawfully obtained, or how an eyewitness observed the offender often emerges in pretrial hearings.⁵⁹ While all of these opportunities for taking the testimony of a witness under oath have purposes other than discovery, discovery inevitably follows.⁶⁰ In some jurisdictions, the defendant may even depose prosecution witnesses.⁶¹ All these ordinary opportunities for pretrial discovery significantly

56. "If separate trials must be held, then 'the defendants will be placed in unequal positions, with some gaining the advantage of disclosure of the Government's case and the possibility of witnesses' deaths and fading memories making proof of the charge ever more difficult.'" *Id.* (quoting from *United States v. Stromberg*, 22 F.R.D. 513, 525 (S.D.N.Y.), *affd. in part, revd. in part*, 268 F.2d 256 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959)). This was probably what Justice White was referring to in his *Bruton* dissent when he noted "the common prosecutorial experience of seeing codefendants who are tried separately strenuously jockeying for position with regard to who should be the first to be tried." 391 U.S. 123, 143 (1968). See text at note 44 *supra*.

57. The practice of informal discovery is discussed in Comment, *Texas Criminal Discovery*, 47 TEXAS L. REV. 1182 (1969). The prosecutor wants defendants to plead guilty and sees generous pretrial discovery as the first step toward plea bargaining.

58. A preliminary hearing is authorized in federal prosecutions by FED. R. CRIM. P. 5.1.

59. Pretrial hearings are authorized by FED. R. CRIM. P. 12.

60. Indeed, discovery is frequently the principal motive for initiating all of these proceedings. See A. AMSTERDAM, B. SEGAL & M. MILLER, *supra* note 26, at 1-121 to -122, 1-131 to -132 (use of the preliminary hearing as a discovery tool).

61. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 39.02 (Vernon 1979) (authorizing depositions of prosecution witnesses upon a showing of "a good reason").

reduce the incremental value to defendants not tried first of observing the first trial.

Severing cases may also allow defendants who do not go first to impeach a witness in a subsequent trial with inconsistent testimony from the first trial. Viewed from one perspective, this does not advance the search for truth because any witness who testifies more than once about the same subject will vary his statement enough to provide skillful counsel with sources of impeachment. Viewed from another perspective, however, impeachment assists the search for truth, because a witness's testimony should not vary substantially from one trial to another. Since the prosecution calls most witnesses in a criminal case, increasing the availability of impeachment material presents a tactical advantage for the later defendant.

But as with discovery, various pretrial proceedings routinely provide impeachment material. Normally in a felony case, the testimony of at least the police officer in charge of an investigation is taken at a preliminary hearing.⁶² Furthermore, major witnesses may testify before the grand jury to assist it in deciding whether to return an indictment.⁶³ Although witnesses are not cross-examined before a grand jury, their testimony is ordinarily recorded. In some jurisdictions defense counsel routinely receive a transcript of such testimony as an aid to cross-examination.⁶⁴ Finally, the increasing use of evidentiary pretrial hearings in which the testimony of important witnesses is taken provides another opportunity for the defense to obtain impeachment material.⁶⁵

The principal advantage in not being tried first is that the remaining defendants can better assess whether they should go to trial at all. They have had the benefits of a jury's assessment of the government's case. They should find the prosecutor more willing to discuss disposition without trial, since the first trial has probably wrung the maximum publicity from the case and the prosecutor may not be anxious to "re-try" it before another jury with a different defendant. Against these benefits must be bal-

62. FED. R. CRIM. P. 5.1 (c) authorizes transcription of the court reporter's notes of a preliminary hearing and provision of a copy to the defense attorney.

63. FED. R. CRIM. P. 6(d).

64. The Jencks Act, 18 U.S.C. § 3500 (1976), requires disclosure of a government witness's testimony before the grand jury after the witness has testified on direct examination at a trial.

65. See text at notes 58-59 *supra*.

anced the disadvantages of not being tried first. In a case with a high public interest, members of the jury panel are likely to have read damaging reports of the previous trial that will hinder the defense in selecting a jury.⁶⁶ A defendant in custody pending trial also has an obvious interest in a prompt trial⁶⁷ even if conviction means a certain prison sentence, since prison conditions are likely to be superior to those in a local detention facility. Moreover, if the first codefendant to be tried is convicted, he may get a lighter sentence by volunteering to testify for the government.⁶⁸ Later defendants have no such option.

A final justification for joint trials is that they determine guilt or innocence more accurately because they prevent defendants from shifting blame to each other. In separate trials, each defendant could take the stand, testify to his innocence, and blame the offense on the absent codefendant. Conceivably, separate juries might each believe the testimony and acquit both.⁶⁹ Joint trials, however, are a poor solution to this problem. If defendants accused each other in a joint trial, the jury would not necessarily be any more able to decide if one or both were lying; in a joint trial, both might be convicted although one was innocent. Appellate courts consider it unfair to require a defendant to defend against accusations by both the government and a codefendant,⁷⁰ and would probably order severance in this situation anyway. Therefore, this is no justification at all for joint trials.

II. COSTS OF JOINT TRIALS: COMPLEXITY'S GENERAL IMPEDIMENTS TO FAIRNESS AND INDIVIDUAL JUSTICE

Joint trials are more complex to administer than individual trials. Complexity reduces a trial's efficiency, but it also has a

66. However, it is also true that in a case exciting public interest, various pretrial evidentiary hearings are likely to have publicized the case before the first trial is held. Under appropriate circumstances and with the consent of the defendants, a trial court may close pretrial proceedings to the press and public. *Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (1979).

67. The Speedy Trial Act of 1974, § 101, 18 U.S.C. § 3164(b) (1976), provided as an interim measure that persons in custody must be brought to trial within 90 days and that calendar priority must be given to those cases. Some state speedy trial acts contain similar provisions. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 17.151, 32A.01 (Vernon Supp. 1978).

68. "Prior trial of the codefendants may allow defense counsel full discovery of the prosecution's case in advance of his own trial. On the other hand, if they are convicted, they may turn state's evidence in an attempt to win sentencing consideration." A. AMSTERDAM, B. SEGAL & M. MILLER, *supra* note 26, at 1-275.

69. See text at note 181 *infra*.

70. See text at notes 176-98 *infra*.

more troubling consequence: complexity sometimes impairs the ability of the jury to make fair and accurate determinations of individual guilt or innocence. This problem is most severe in a mass trial, when the multiplicity of defendants (and usually of charges) tends to overwhelm all other aspects of the proceedings. Yet even when the participants and charges are fewer, the complexity of a joint trial may confuse a jury about the responsibility of the different defendants. At times, the jury may not be confused but may nonetheless so abhor the conduct of some defendants that it finds the remainder guilty by their association with them. Courts respond to these dangers with the assumption that, by careful control of the proceedings and by appropriate jury instructions, they can eliminate the risks of confusion and guilt by association. The validity of that assumption is vital to the fairness of joint trials.

A. *Mass Trials*

It has been said that "a mass trial is contrary to the basic principles of our jurisprudence."⁷¹ The Standards Relating to Joinder and Severance require severance of defendants when "it is deemed appropriate to promote a fair determination of the guilt or innocence of one or more defendants."⁷² The Commentary explains that severance would be required under that standard "when the case is so complex that the trier of fact cannot be expected to keep straight the evidence relating to the various defendants and charges."⁷³ Despite the reassurance of these general statements, many courts tolerate mass trials.⁷⁴

71. 1 C. WRIGHT, *supra* note 9, at 447 (quoting from *United States v. Gaston*, 37 F.R.D. 476, 477 (D.D.C. 1965)).

72. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO JOINER AND SEVERANCE 35 (Approved Draft, 1968).

73. *Id.* at 40.

74. See, e.g., *United States v. McLaurin*, 557 F.2d 1064 (5th Cir.), *cert. denied*, 434 U.S. 1020 (1977) (10 charges against 15 defendants); *United States v. Morrow*, 537 F.2d 120 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977) (10 charges against 23 defendants); *United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974), *cert. denied*, 421 U.S. 110 (1975) (conspiracy charge against 24 defendants); *United States v. Barber*, 442 F.2d 517 (3d Cir.), *cert. denied*, 404 U.S. 846, 404 U.S. 958 (1971) (4 charges against 13 defendants); *United States v. Bentvena*, 319 F.2d 916 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963) (8 charges against 29 defendants, followed, after declaration of a mistrial, by a retrial of 3 charges against 14 defendants); *United States v. Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963) (30 charges against 10 defendants); *Commonwealth v. French*, 357 Mass. 356, 259 N.E.2d 195 (1970), *vacated and remanded*, 408 U.S. 936 (1972) (4 charges against 6 defendants).

The Massachusetts "small loans cases,"⁷⁵ prosecuted in the mid-sixties, illustrate the many difficulties of mass trials. A Massachusetts grand jury investigation of the small loan industry yielded seventy indictments against a number of individuals and corporations for conspiracy to bribe public officials. The Supreme Judicial Court of Massachusetts eventually affirmed convictions of many defendants, but the trials were judicial nightmares. Pretrial motions consumed 75 court days and produced 4700 pages of transcript.⁷⁶ The prosecution divided the cases into two groups for jury trial, but in fact the defendants named in each trial overlapped substantially. The first jury faced 49 indictments including at least 75 charges against 16 defendants;⁷⁷ the second jury heard 21 indictments, including at least 35 charges against 15 defendants.⁷⁸ The first trial lasted five months and produced over 7500 pages of transcript;⁷⁹ the second lasted twelve months and produced over 11,800 pages of transcript.⁸⁰ Consolidated on

In *United States v. Moreton*, 25 F.R.D. 262 (W.D.N.Y. 1960), the government filed an indictment charging 2,553 counts against 17 defendants. The trial court carved out for trial 2 counts and 3 defendants, concluding:

[A] single trial of all defendants under this multi-count indictment, as now constituted, would be prejudicial to the defendants charged. The complex involvement of the various defendants and the multiplicity of charges contained in the indictment would render it difficult, if not impossible, for the court to adequately charge a jury as to the applicable law with respect to each defendant and for the jury to apply that law intelligently in reaching verdicts on the many charges involved.

25 F.R.D. at 263.

75. *Commonwealth v. Beneficial Fin. Co.*, 360 Mass. 188, 275 N.E.2d 33 (1971), *cert. denied*, 407 U.S. 910, 407 U.S. 914 (1972).

76. 360 Mass. at 200-01, 275 N.E.2d at 42.

77. 360 Mass. at 201, 376-84, 275 N.E.2d at 42, 139-42, app. B. Directed verdicts of not guilty were entered on 15 of the 75 charges and jury verdicts were returned on 60. Seventy-five must be a minimum figure, since many of the indictments charged more than one offense and Appendix B does not disclose how many offenses an indictment charged unless there is special reason for doing so (such as a guilty verdict on one count and a not guilty verdict on another).

78. 360 Mass. at 376-84, 275 N.E.2d at 139-42 app. B. The defendants sought to invoke the supervisory powers of the Supreme Judicial Court of Massachusetts to stay the second trial until after the appeal on the first trial had been decided. They argued that "they have the burden of trying complex cases while equally complex appeals following the first trial are being prosecuted" and that the "rigors of the present trial prevent them from properly preparing their cases on appeal; or, conversely, that if their counsel concentrate on the appeals, they will be unable adequately to protect their clients in the present trial." The court declined to stay the second trial and, as subsequent events made clear, decided instead to delay the appeal from the first trial and consolidate it with the appeal from the second trial. *Barber v. Commonwealth*, 353 Mass. 236, 238, 230 N.E.2d 817, 819 (1967).

79. 360 Mass. at 201, 275 N.E.2d at 42.

80. 360 Mass. at 201, 275 N.E.2d at 43.

appeal, the two cases consumed 137 pages of the Massachusetts Reporter⁸¹ and required a nine-page chart to separate the charges, defendants, and verdicts.⁸² The appellate court unanimously affirmed all the convictions.

The juries clearly faced a Herculean task. Joinder of defendants and charges led to intricate questions of fact. Much of the Commonwealth's evidence was admitted for only a limited purpose — against only some defendants or with respect to only some indictments — but sometimes the applicability of limited evidence was expanded to other defendants after further "linking" emerged. The court instructed the jury on the use of the limited evidence, both before and after it was admitted⁸³ but even with

81. In the pretrial proceedings and the trials, the defendants took over 5,400 exceptions. They made about 700 assignments of error on appeal. 360 Mass. at 201, 275 N.E.2d at 43. The court acknowledged that it was able to avoid needless "clutter" of the opinion by omitting discussion of many of the assignments of error. It then reassured counsel that "we have endeavored to consider and to give scrupulous attention to every assignment of error argued by the defendants. If some assignment of error is not specifically referred to in this opinion, a conclusion that we did not reflect on it would be far from accurate." 360 Mass. at 202-03, 275 N.E.2d at 43.

82. 360 Mass. at 374-76, 275 N.E.2d at 137-42 app. A.

83. The problems created by the limited use of evidence so pervaded both trials that the appellate court was forced to use a footnoting system of alphabetical symbols to indicate against whom the particular evidence discussed in the text was admitted:

[T]hroughout the lengthy trial, items of evidence were admitted subject to limitations. In order to recite the evidence without stating each limitation, we have adopted the following system . . . which indicates what evidence was admitted against which defendants and subsequently expanded to include other defendants. Each defendant is referred to in connection with a particular item of evidence by footnote [using the first letter of the defendant's surname for identification]. Where evidence admitted against a defendant was limited to a specific indictment or count thereof, this is stated following the symbol used for that defendant. Where original limitations were expanded to include other defendants, following the preliminary ruling by the judge as to the existence of a conspiracy, the expanded limitations are shown in parentheses following the original limitations. Thus a footnote which reads "P, G, Hly 11976 (H, B)" means that the item of evidence referred to by the footnote was originally admitted against Pratt and Glynn, and against Hanley only on Indictment 11976, and that following the preliminary ruling the limitation was expanded to include Household and Beneficial.

360 Mass. at 231 n.12, 275 N.E.2d at 59 n.12.

Presumably the jury did not have the benefit of this evidentiary roadmap. In Massachusetts the judge delivers an oral charge to the jury after the attorneys have argued. See *Commonwealth v. Therrien*, 371 Mass. 203, 355 N.E.2d 913 (1976). The appellate court's opinion in *Beneficial Finance* suggests that, despite the length and complexity of the trials in that case, the trial court delivered an oral charge, rather than a written one that the jury could use during deliberations. One portion of the court's charge to the jury quoted by the appellate court was, "the Commonwealth must prove as to a particular defendant . . . that he, by his own actions, words, or conduct entered into an agreement with one or more other persons to commit a crime. Now, this is not the same thing as talking to

the help of court and counsel, how could a jury fairly and accurately adjudicate cases of such incredible complexity, tried over such a length of time, and involving such complicated decisions? How could a jury, faced with such confusing questions, determine the fate of so many defendants with the sagacity the law contemplates? Joinder may have achieved some efficiencies in those cases, but did the trials evaluate each defendant as fairly as the law demands?⁸⁴

B. *Jury Confusion and Guilt by Association*

Much more common than mass trials are joint trials whose complexities threaten to confuse the jury or whose complications might tempt the jury to find defendants guilty by association. Claims of jury confusion in joint trials grow from concern that even a careful jury may apply evidence erroneously or, in the face of momentous and complex proceedings, may abdicate its responsibility to sift the evidence meticulously before deciding individ-

somebody about somebody else's committing a crime." 360 Mass. at 301, 275 N.E.2d at 98. See text at notes 105-06 *infra* for a comparison of oral and written jury charges.

84. In *United States v. Agueci*, 310 F.2d 817 (2d Cir. 1962), Judge Kaufman, in an opinion affirming the convictions of all 10 appellants who had been tried in a joint trial, discussed the difficulties created by such trials and then blamed the United States Attorney for failing to scale down the size of such conspiracy prosecutions:

This mass-conspiracy case, in presenting us with a great number of difficult problems arising in the course of two months of trial, and in which the record consumed almost 8000 pages, is not untypical of many cases that have come before this Court in the past. . . . The trial of these multiple-defendant conspiracy cases poses a great problem for the district judge. We recognize that if a narcotics conspiracy is of such dimension as to include a confusing array of defendants, it is inherent in the nature of the crime that the trial is certain to be rather protracted. The great problem confronting the district judge is therefore one of trial management. The jury must constantly be made aware of the fact that there are separate individuals on trial and that each must be judged solely on the evidence properly admissible against him. The difficulties of compartmentalizing the independent evidence in the mass-conspiracy case, and of focussing the attention of the jury on that evidence before consideration may be given to hearsay, are so manifest that we would labor the point were we to say more Judges . . . are confined for months on end, engaged in trying these cases.

The solution to these problems of judicial administration of the criminal law which we recognize to be difficult to find, is largely in the hands of the United States Attorney, for he is in a position in the first instance to determine whether it would be more in the interests of criminal justice to restrict the number of defendants tried at any one time. If such were done, then it would be possible to minimize the harassing problems arising from the participation of the great number of separate counsel representing individual defendants, each pursuing his own course in seeking the acquittal of his client.

310 F.2d at 840.

ual liability. Any joint trial with enough proof of guilt to reach the jury invites questions about whether the jury deliberated rationally. One must always worry that the jury might have reached its verdicts through misunderstanding of the entire case, uncertainty about who is supposed to have done what, or confusion about what evidence was admissible against whom.⁸⁵

Appellate courts, perhaps reluctant to inquire into jury deliberations, have greeted claims of jury confusion with hostility. In *Opper v. United States*,⁸⁶ Justice Reed rejected the concept of jury confusion:

To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions.⁸⁷

As Justice Reed suggests, claims of jury confusion are ordinarily speculative. The legal system insulates former jurors from the very inquiry necessary to establish jury confusion other than by inferences from the evidence presented at trial.⁸⁸ Many jurisdictions restrict investigation of a jury's deliberations.⁸⁹ And even when presented with evidence of irrational deliberation, most trial courts are reluctant to provide full legal remedies.⁹⁰ In unusual circumstances, an appellate court may infer jury confusion from the evidence, but such inference is rare.⁹¹

85. Of course, there are safeguards against egregious jury confusion in any trial when proof of guilt is so insubstantial as to be legally insufficient, compelling an acquittal or a reversal on appeal. See FED. R. CRIM. P. 29; *Burks v. United States*, 437 U.S. 1 (1978).

86. 348 U.S. 84 (1954).

87. 348 U.S. at 95. In subsequent cases, the Supreme Court has recognized the limits of juries' abilities to follow the trial court's instructions. See *Bruton v. United States*, 391 U.S. 123 (1968); *Jackson v. Denno*, 378 U.S. 368 (1964). *Bruton* is examined later. See text at notes 127-75 *infra*.

88. One can posit policy considerations for these restrictions. Prohibitions on interviewing former jurors may be justified to prevent harassment of former jurors and, indirectly, to encourage citizens to serve on juries. Prohibitions on a juror's impeaching his own verdict may stem from a fear that a juror, remorseful over finding a defendant guilty, will fabricate testimony about irrational decisional processes in order to upset the verdict, hence the rule that the testimony may go only to external influences on the juror's vote that are capable of being corroborated or refuted by other evidence. See note 90 *infra*.

89. Interviewing former jurors to uncover jury misconduct is disapproved by a number of courts. See 2 C. WRIGHT, *supra* note 9, at 493-94.

90. Many courts take the position that a juror may not impeach his verdict by testimony in a hearing on a motion for new trial. He is permitted, however, to testify to extraneous influences upon his decision. See *id.* at 492-93. Jury confusion in a joint trial is not an extraneous influence. *Id.*

91. In *United States v. Wasson*, 568 F.2d 1214, 1222-23 (5th Cir. 1978), the attorney

A few jurisdictions have expressed concern over potential jury confusion in certain kinds of joint trials. A Colorado rule of court provides, "[I]f the court finds that the prosecution probably will present against a joint defendant evidence, other than reputation or character testimony, which would not be admissible in a separate trial of the moving defendant," then the court must grant a severance.⁹² In Wisconsin, case law has produced a similar rule: Severance is usually discretionary, but it is required if there is "an entire line of evidence relevant to the liability of only one defendant [that] may be treated as evidence against all defendants by the trier of fact."⁹³

The danger that a jury may find guilt by association is closely related to the danger of jury confusion. In each the jury may irrationally apply evidence to find guilt. But a jury that finds a

for the government conceded in jury argument that there was insufficient proof that one defendant participated in the conspiracy. Nevertheless, the jury convicted him of that offense. This and another conviction from the same trial were reversed on appeal on the ground that the jury obviously was confused as to what evidence applied to which defendants.

By contrast, in *United States v. Fuel*, 583 F.2d 987 (8th Cir. 1978), three defendants were charged with conspiracy to commit mail fraud and with various substantive mail fraud offenses allegedly arising out of an insurance fraud scheme. The jury convicted them of conspiracy and of several substantive counts, but the conspiracy convictions were reversed on appeal because of insufficient evidence of agreement among the defendants. The appellate court then affirmed convictions on the substantive counts, rejecting a claim that the cases should have been severed because there existed an unacceptable risk of jury confusion:

We recognize that there is an inherent danger in a joint trial that the jury will convict on the basis of the cumulative evidence produced at trial, rather than on the basis of the quantum of evidence relating to each defendant. . . . However, a defendant is not automatically entitled to severance because the evidence against a codefendant is more damaging than the evidence against him.

Here, the trial court carefully instructed the jury that it should weigh the evidence against each defendant individually. . . . While the evidence presented at trial was complex and confusing, the trial court could reasonably have believed that the jury was capable of compartmentalizing the evidence. The fact that it failed to do so with respect to some of the grounds is insufficient justification for us to now hold that the trial court abused its discretion in denying severance. 583 F.2d at 988. *But see* *United States v. Lane*, 584 F.2d 60 (5th Cir. 1978) (finding an unacceptable risk of jury confusion in a case in which the government failed to prove its conspiracy charge).

92. COLO. R. CRIM. P. 14. The defendants' convictions for delivery of LSD and hashish were reversed in *People v. Story*, 182 Colo. 122, 511 P.2d 492 (1973), because the judge refused to give a cautionary instruction about evidence that a third defendant told an undercover officer that he had sold LSD to high school students. New Mexico has enacted a similar rule. N.M.R. CRIM. P. 34. *See* *State v. Volkman*, 86 N.M. 529, 525 P.2d 889 (Ct. App. 1974).

93. *State v. Nutley*, 24 Wis. 2d 527, 543, 129 N.W.2d 155, 171 (1964), *cert. denied*, 380 U.S. 918 (1965).

defendant guilty by association fully understands the evidence; nonetheless, it paints each member of the group with the same brush of blame, without pausing to ponder the difficult questions of individual responsibility. Justice Jackson, concurring in *Krulewitch v. United States*,⁹⁴ expressed the danger of guilt by association:

A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrong-doing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other.⁹⁵

Joinder, therefore, places upon defendants the heavy burden of proving nonparticipation in the criminal activities of the group the prosecutor has defined with his joinder decisions. While a defendant who has his trial severed may carry that burden and win an acquittal, joined defendants face a harder task. Perhaps this is what courts mean when they acknowledge that severance ordinarily increases a defendant's chances of acquittal.⁹⁶

The problems of jury confusion and guilt by association emerge most clearly in the joinder of minor and major figures. The jury may confuse the evidence and apply damaging testimony against the major defendant to convict the minor one. Even if the jury keeps the evidence separate, it may decide the minor figure must be guilty just because of his connection with the major one. Furthermore, even beyond the risk of confusion and guilt by association, it seems unfair to compel a minor figure to undergo the cost and anxiety of defending himself in a major trial, most of which involves only his codefendants,⁹⁷ and which may unfairly prejudice him.

Although some appellate courts have reversed the conviction of minor figures involved in major jury trials,⁹⁸ others have offered two justifications for joining the minor figure. First, they say,

94. 336 U.S. 440, 445 (1949).

95. 336 U.S. at 454.

96. One finds statements in appellate opinions that severance is not required merely because the defendant would have a better chance of acquittal in a separate trial. See 1 C. WRIGHT, *supra* note 9, at 443-44.

97. See *id.*

98. See, e.g., *United States v. Mardian*, 546 F.2d 973 (D.C. Cir. 1976); *United States v. Donaway*, 447 F.2d 940 (9th Cir. 1971); *Linn v. State*, 505 P.2d 1270 (Wyo.), *cert. denied*, 411 U.S. 983 (1973).

joining a minor figure encourages the prosecution of unimportant criminals because the prosecutor is likely to dismiss a case against a minor figure if obtaining a conviction would require the same dedication of resources as needed to convict a major figure.⁹⁹ This may be true in cases where, for example, the minor figure's case is set first for trial,¹⁰⁰ but it is more likely that a minor figure will agree to testify for the prosecution in exchange for not being prosecuted or for a reduced sentence. Second, those courts say, if the jury is searching for a defendant to acquit, it will surely acquit the minor figure, even though he might have been convicted if tried alone.¹⁰¹ While such acquittal is not inconceivable, it seems just as likely that the jury will convict in a joint trial the minor figure whom it might acquit if he were tried separately. And either way, the joint trial fails to produce an accurate determination of individual guilt.

Finally, guilt by association and jury confusion pose especially tricky problems for an appellate court asked to correct unfairness: appellate courts are not likely to find either type of error if the jury acquitted at least one of the joined defendants of at least one charge. The court in such a situation usually holds that the jury's acquittal demonstrated its ability to give attention to individual guilt or innocence and to follow the trial court's instructions.¹⁰² For obvious administrative reasons, appellate courts do not ordinarily delve further into the evidentiary record to determine whether the acquittal seems rationally justified or whether it is itself evidence of jury confusion.

C. *The Curative Powers of Jury Instructions*

The law, like Justice Reed,¹⁰³ assumes that juries are willing and able to follow the trial court's instructions in deciding whether the government has proved its case. It is too cynical a view of jury behavior to assume that a jury deliberately ignores

99. See, e.g., *Woodcock v. Amaral*, 511 F.2d 985, 994 n.21 (1st Cir.), *cert. denied*, 423 U.S. 841 (1974); *United States v. Cohen*, 145 F.2d 82, 95 (2d Cir.), *cert. denied*, 323 U.S. 799 (1944).

100. The prosecutor may decide that the danger of revealing his case before trial outweighs the benefits of convicting a minor figure.

101. See, e.g., *United States v. Hines*, 455 F.2d 1317, 1334 (D.C. Cir.), *cert. denied*, 406 U.S. 969, 406 U.S. 975 (1972).

102. See, e.g., *United States v. Braasch*, 505 F.2d 139, 149-50 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975), *appeal dismissed*, 542 F.2d 442 (7th Cir. 1976); *United States v. Hines*, 455 F.2d 1317, 1334 (D.C. Cir.), *cert. denied*, 406 U.S. 969, 406 U.S. 975 (1972).

103. See text at note 87 *supra*.

the court's instructions. Indeed, in other contexts, such as claims of judicial misconduct, the law assumes that the jury clings to every word the trial judge speaks and examines the judge's tone of voice, demeanor, and conduct for hints about the court's view of the evidence.¹⁰⁴ But assuming jurors want to follow the court's instructions in a joint trial, can they? The law in many jurisdictions does not help the jury. In federal prosecutions, the trial judge may charge the jury orally and then refuse to provide it with a written copy to examine during its deliberations.¹⁰⁵ In a case with multiple defendants, complex charges, and lengthy instructions, this procedure virtually assures the jury's uncertainty about the law applicable to the case. In other jurisdictions, the trial court must not only read the charge to the jury but must also provide it with a written copy of the charge to take to the jury room.¹⁰⁶

In joint trials, the court's instructions frequently attempt to compartmentalize the evidence the jury has heard into clusters that may be considered against each defendant.¹⁰⁷ The jury may be capable of following these instructions as long as logic does not require it to apply evidence across the compartmental wall the trial court has tried to construct. The classic example of attempt-

104. See, e.g., 2 C. WRIGHT, *supra* note 9, at 505 ("The jury is highly sensitive to every judicial utterance, and the judge's words to the jury carry an authority bordering on the irrefutable.")

105. Cf. *id.* at 283. ("In some states the court is required to give the jury a written copy of his instructions to take to the jury room. This practice is desirable in complex cases, but it is left to the discretion of the trial judge and it is not error either to give the jury a copy of the instructions or to refuse to do so." (footnotes omitted)).

106. See TEX. CODE CRIM. PROC. ANN. arts. 36.14, 36.18 (Vernon 1979); note 105 *supra*. Attorneys can enhance jury comprehension under either system by discussing the charge in their jury arguments. Counsel are more likely to discuss a written charge than an oral charge because a written charge will probably have stronger impact on the jury's deliberations than an oral charge. When the charge is oral and complex, counsel may tend to ignore the charge in argument, believing that the jury cannot understand it even with argument. When some judges in jurisdictions with written charges instruct the jury about deliberation, they suggest that after the jury has selected a foreman he should read the charge of the court to the jury before the deliberations begin.

107. Frequently, trial courts also instruct the jury about the limited uses to which evidence may be put as soon as it is introduced, as well as in the final charge to the jury. For example, in *Linn v. State*, 505 P.2d 1270 (Wyo.), *cert. denied*, 411 U.S. 983 (1973), three persons were being prosecuted as accessories before the fact to murder. A great part of the state's case consisted of conversations between two of the defendants. The trial court instructed the jury at least fifteen times that nothing said in those conversations was evidence against the defendant who was not present. The instruction was given so frequently that the trial court abbreviated it to be "the same admonition" or "please remember the admonition at all times." 505 P.2d at 1273. Although the evidence against the third defendant was tenuous, the jury convicted. The appellate court reversed.

ing that impossible feat is *Delli Paoli v. United States*,¹⁰⁸ in which the Supreme Court approved an instruction admonishing the jury to disregard a statement in a codefendant's confession detailing the defendant's role in the offense.¹⁰⁹ Although *Bruton v. United States*¹¹⁰ overruled *Delli Paoli*, for years the law espoused what thoughtful persons universally agreed was an unmitigated fiction — that the jury was capable of following such an instruction.¹¹¹ Finally, Justice Brennan, writing for the majority in *Bruton*, acknowledged that at times juries are simply unable to follow instructions:

Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless, as we recognized in *Jackson v. Denno*, . . . there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.¹¹²

108. 352 U.S. 232 (1957).

109. Dissenting, Justice Frankfurter noted that the traditional solution to the problem of an extrajudicial confession that incriminates a party on trial with the declarant is to admit the confession in its entirety and to admonish the jury not to consider it against anybody except the declarant. "The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell." 352 U.S. at 247.

110. 391 U.S. 123 (1968). In *Bruton*, the trial court admitted a confession implicating a joined defendant. The trial court instructed the jury at the time of the confession's admission and again during its charge to the jury that the confession was being received only because it might have a bearing on the declarant's guilt or innocence and that the jury was not to use it in deciding the defendant's fate. This was the procedure approved in *Delli Paoli*. Building upon its holding in *Jackson v. Denno*, 378 U.S. 368 (1964) (recognizing limits upon a jury's ability to disregard highly incriminating information), the Court concluded that the risk that the jury had used the codefendant's confession in determining the defendant's guilt, although prohibited from doing so by the trial court's instructions, was too great to permit the conviction to stand.

111. The rationally persuasive power of such accusations, and the futility of instructing a jury not to draw the natural inferences from them, is illustrated by Judge Learned Hand's famous statement in *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir.), *cert. denied*, 285 U.S. 556 (1932), that the rule "probably furthers, rather than impedes, the search for truth, and this perhaps excuses the device which satisfies form while it violates substance; that is, the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else."

112. 391 U.S. at 135. The Court later made *Bruton* fully retroactive and applied it to

*Stein v. New York*¹¹³ was a second example of asking the jury to do the impossible. There, the Supreme Court upheld submitting a confession to the jury with instructions that it should determine whether it was voluntary and should disregard it if it was not voluntarily given. The Court repudiated this position some years later in *Jackson v. Denno*¹¹⁴ because of grave doubts about whether the jury could perform such tasks. Yet to this day state judges frequently present admissibility issues to the jury in procedures that closely parallel those in *Stein*.¹¹⁵

Bruton and *Jackson* were major departures from the ironclad assumption that juries follow instructions, but they did not herald a complete reappraisal of that doctrine. Today some trial courts still presume that juries can understand and apply extraordinarily complicated instructions in joint trials.¹¹⁶ Some appellate

state criminal processes. *Roberts v. Russel*, 392 U.S. 293 (1968). *Bruton*, however, has been held inapplicable to jury-waived trials because, at least in the absence of evidence in the record to the contrary, it is presumed that the trial judge knew his duty to ignore the accusatory portion of a confession and in fact did so. See, e.g., *Cockrell v. Oberhauser*, 413 F.2d 256, 258 (9th Cir.), cert. denied, 397 U.S. 944 (1969). This position has also been taken in juvenile cases in which the respondent did not have the choice of a jury trial. See, e.g., *In re L.J.W.*, 370 A.2d 1333, 1336 (D.C. App. 1977).

113. 346 U.S. 156 (1953).

114. 378 U.S. 368 (1964).

115. For example, in *Huffman v. State*, 450 S.W.2d 858 (Tex. Ct. Crim. App. 1970), vacated and remanded, 408 U.S. 936 (1972), the state called a witness whom the defendant contended was his common-law wife. Under state law, if the witness and defendant were married, the witness was not competent to testify against the defendant. The trial court concluded that the resolution of that question depended upon issues of fact. It submitted those issues to the jury with instructions that if it found that the witness was married to the defendant it should disregard all of her damaging testimony. The appeals court approved of this procedure, rejecting the defendant's contention that the trial court should have itself made the admissibility determinations of fact, that the question should have been submitted to the jury in the form of special issues, or that the question should have been submitted to a different jury from the body empaneled to determine guilt or innocence.

116. *Woodcock v. Amaral*, 511 F.2d 985 (1st Cir. 1974), cert. denied, 423 U.S. 841 (1975), involved a federal petition for writ of habeas corpus in the Massachusetts small loans cases described in text at notes 75-84 *supra*. On the claim of jury confusion, the First Circuit said,

To charge that the jury would convict the appellant solely on the basis of evidence which did not directly implicate him is an indictment on the jury system itself. . . . Whether the jury was able to follow the limiting instructions of the judge with the precision of a computer is not the relevant inquiry. It is rather whether the appellant received a fundamentally fair trial in light of the legitimate interests of the Commonwealth in trying him jointly with his coconspirators. In this connection we see nothing in the evidence, the number of defendants, or the rulings of the trial judge which would warrant a conclusion that the sheer complexity of this trial prevented the jury from appraising the independent evidence against the appellant and meting out individual justice under the law.

511 F.2d at 995.

courts conclude that joined defendants must be presumed to receive a fair trial as long as the trial court instructs the jury about compartmentalization and mentions that each defendant must be judged individually.¹¹⁷ The Fifth Circuit has said:

We concede that joint trials, and especially those involving many defendants, carry substantial risks of manifest unfairness. At the same time, it is beyond question that such trials are now an accepted and even necessary aspect of our judicial system. This is because our system will tolerate the risk of unfairness so long as careful efforts are made to ensure that the inequities are kept in check.¹¹⁸

Are the inequities that stem from the complexity of a joint trial kept in check? In many trials they surely are not. And we have not yet begun to consider all the particular forms of prejudice that may afflict a defendant because of the special events that can happen only in joint trials. Perhaps we should reconsider whether, in light of the "substantial risks of manifest unfairness," joint trials should continue to be thought "an accepted and even necessary aspect of our judicial system."

III. COSTS OF JOINT TRIALS: CREATION OR AGGRAVATION OF PARTICULAR PREJUDICES

This Section examines the prejudices that joint trials, when combined with other factors in a particular case, may create or aggravate. It principally analyzes foreseeable prejudices that must be alleged before trial, giving only limited discussion to unforeseeable prejudices that arise during trial. It concludes that trial and appellate courts have consistently undervalued the prejudicial effects of joint trials.

"Prejudice" as used here has two distinct meanings. In one sense it means a condition or event creating a substantial risk

117. See 2 C. WRIGHT, *supra* note 9, at 339-40. Wright notes:

In cases in which multiple defendants are being tried, particular care is required in the instructions. If evidence is admitted against one defendant but not against another, the jury must be instructed about this. . . .

In a conspiracy case against numerous defendants of varying degrees of involvement in the confederation, so that possibilities of injustice to particular individuals become greater, extraordinary precaution is required in order that the instructions shall scrupulously safeguard each defendant individually, as far as possible, from loss of identity in the mass.

[Footnotes omitted.]

118. *United States v. McLaurin*, 557 F.2d 1064, 1074 (5th Cir.), *cert. denied*, 434 U.S. 1020 (1977). See also *United States v. Morrow*, 537 F.2d 120, 136-37 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977).

that the jury will find against a defendant *irrationally*. For example, a jury may find one defendant guilty because it objects to a codefendant's criminal record¹¹⁹ or because it objects to a codefendant's lifestyle.¹²⁰ But "prejudice" more often means a condition or event that unfairly permits a jury to infer guilt quite *rationally*. For example, a jury may find both defendants guilty because each blamed the other for the offense.¹²¹ Either form of prejudice could justify severance. Nonetheless, appellate courts rarely overturn trial court refusals to sever:

Joinder of defendants is very frequently prejudicial. Though the reluctance of courts to grant relief from such prejudice has been sharply criticized, the usual judicial attitude is that persons jointly indicted should be tried together except for the most compelling reasons. . . . The burden is put on the defendants to make a strong showing of prejudice in order to obtain [relief from prejudicial joinder]. With such a test, it is hardly surprising that in most cases relief has been denied.¹²²

This reluctance to grant severance after trial grows in part from the many procedural difficulties of moving for severance. There is no good time to assert prejudicial joinder. Asserting it before trial is speculative; asserting it during trial is disruptive; and asserting it on appeal invites hindsight deeming the error harmless.¹²³

The most appropriate time to seek severance is before the trial. Understandably enough, statutes and rules uniformly require that a motion for severance be made before trial unless the grounds for severance are not then apparent.¹²⁴ The current system of liberal joinder would collapse if defendants could sandbag the prosecution by waiting until the trial begins to reveal known grounds for severance. But predicting trial prejudice before the trial begins is guessing at best. A pretrial motion for severance must show that joinder will harm a defendant during trial, and

119. See text at notes 285-95 *infra*.

120. See text at notes 296-99 *infra*.

121. See text at notes 176-98 *infra*.

122. 1 C. WRIGHT, *supra* note 9, at 441-42 (footnotes omitted).

123. This point is made in UNIFORM RULE OF CRIMINAL PROCEDURE 472, Comment at 239 (Approved Draft, 1974):

[I]t is difficult to ascertain the degree of prejudice before trial; once the trial is under way there is great reluctance to grant a severance and allow some defendants a fresh start; and on appeal there is even greater reluctance to find the trial judge's denial of the motion erroneous.

124. FED. R. CRIM. P. 12(b) provides in part: "The following must be raised prior to trial: . . . (5) Requests for a severance of . . . defendants under Rule 14."

it is often impossible to predict such events as a codefendant's disruptive conduct¹²⁵ or flight from the jurisdiction.¹²⁶ More commonly, the basis for the claim is known, but the extent of the prejudice is speculative: it may depend upon defense tactics or any number of other considerations. Most often, the defense attorney may suspect prejudice from joinder, but be unable to foresee the exact events that will harm his client. Thus, courts often must dismiss pretrial claims of prejudice because they are too speculative.

Furthermore, asserting prejudice before the trial may be tactically difficult. The burden of showing grounds for severance falls upon the defense, but to assert those grounds in the detail that courts reasonably require may mean giving away the defendant's case, a harm that will probably remain even if the court grants severance. Yet if the court denies the motion, and grounds for prejudice do emerge, the defendant needs only to show an appellate court that he raised the issue. Therefore, the defendant, fearing that the trial judge will not grant severance in any case, may raise the possibility of prejudice in a pretrial motion but hold back strategic information so that the judge must deny the motion. The issue is preserved for appeal, but the most economical opportunity for severance is lost.

The middle of a trial is probably the worst time for a severance motion. It thrusts a difficult decision onto the trial judge, a decision with no adequate alternatives to choose among. The impetus for the motion may be a clearly prejudicial event, and the court will find a mistrial justified. Sometimes a mistrial will be needed for all defendants; at other times mid-trial severance of only one defendant will be adequate. Either solution, however, sacrifices any economies of joinder after the judge has already endured all the headaches of a joint trial. Even if only one defendant is severed, any efficiencies of trying the remaining defendants together may be offset by an increased risk of reversible error in administering the trial. Therefore, the trial judge is likely to refuse severance, sending all cases to the jury with a promise that he will take a fresh look at the problem if the jury returns guilty verdicts.

The appellate court confronted with a claim of prejudicial joinder is often in an even more difficult position. An appellate

125. See text at notes 300-12 *infra*.

126. See text at notes 300-12 *infra*.

judge may feel that, had he faced the question, he would have granted the pretrial motion to sever; but the law permits reversal only for abuse of discretion. And more than a legal standard blocks an appellate judge's path to reversing a decision he disagrees with. Reversal would require retrial of a case that was originally joined to save the time and resources of multiple trials. Even if the trial decision were an abuse of discretion, the efficiency questions give the appellate court a strong incentive to play factfinder and deem the error "harmless." That incentive is present in all cases, but severance claims on appeal amplify it by asking the court to review all the evidence and analyze the effect of joinder on the entire structure of the trial; most appellate claims look to the admissibility of only a single piece of evidence. Not surprisingly, appellate courts regularly find prejudicial joinder to be harmless and profess to be comfortable in doing so.

Because there is no good time or way to sever defendants who have been joined, the specific and recurring prejudices of joinder must be considered earlier — when deciding whether joint trials are appropriate at all. If courts are not able to respond to significant prejudices effectively, any efficiencies of joint trials are quickly offset. The remainder of this Section investigates those prejudices and the efforts to mitigate them.

A. *Codefendant's Confession Implicates Defendant*

One danger peculiar to joint trials is that a codefendant may confess before trial and accuse another defendant of complicity in the crime. The prosecution will want to introduce the confession against the confessing codefendant, but the defendant who did not confess must be protected from prejudice. In *Bruton v. United States*¹²⁷ the Supreme Court held that admitting a codefendant's confession that implicated another defendant violated the defendant's right of confrontation. The Court held severance the most appropriate remedy. Recently, however, the Court has drawn back from the strict requirements of *Bruton*, prosecutors have devised techniques to avoid severance, and the dangers of prejudice have reappeared. The cases in this area show not only how insensitive courts are to prejudice arising from joinder, but also how far they will go to preserve joinder, even in the face of Supreme Court disapproval.

The most obvious alternative to severance on *Bruton* grounds

127. 391 U.S. 123 (1968). See text at notes 107-12 *supra*.

is for the prosecution to announce that it does not intend to introduce the offending confession.¹²⁸ Although that is a simple, and realistic,¹²⁹ solution to *Bruton* severance problems, it is not foolproof, because the prosecutor may not be able to keep his word. Prosecutors have been known to try to sneak evidence in even though they indicated at pretrial conference that they would not.¹³⁰ Moreover, a prosecutor can use an accusatory confession at trial even though it is not introduced into evidence. He might, for example, threaten a confessing defendant with perjury if he does not repeat his confession on the stand.¹³¹ Clearly a prosecutor's promise not to use evidence is a poor substitute for the protection of *Bruton*.

A second alternative is redaction — deleting the accusatory portions of the confession while preserving its substance. The

128. As noted in note 124 *supra*, severance motions must be made before trial if the grounds are known. Rules of court frequently contemplate that severance motions will be based on accusatory confessions of codefendants and provide for litigating that severance ground. For example, Rule 14 of the Federal Rules of Criminal Procedure provides in part: "In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

129. Confessions appear to be most frequently obtained from suspects when other evidence of guilt is strong. Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 519 (1967). Refraining from using a confession, therefore, although damaging to a prosecutor's case, frequently leaves ample evidence of guilt for the jury.

130. For example, in *United States v. Taylor*, 508 F.2d 761 (5th Cir. 1975), two people were charged with bank robbery. The defendant moved for severance on *Bruton* grounds, and the prosecution countered by saying it did not intend to introduce the codefendant's third confession, the one incriminating the defendant, in the trial. On that representation the trial court denied severance. On re-direct examination of a federal agent at the trial, the prosecutor brought out testimony about the third confession, contending that the defendant had "opened the door" on cross-examination of the agent. The court of appeals reversed the conviction on the ground that the defendant's cross-examination had not opened the door; but the significant point is that the prosecutor was obviously seeking any opportunity to use the damaging confession he had agreed not to use. *See also United States v. Glover*, 506 F.2d 291 (2d Cir. 1974).

131. In *People v. Hurst*, 396 Mich. 1, 238 N.W.2d 6 (1976), the defendant and his girlfriend were prosecuted for the homicide of their child. A motion for severance was made on the ground of antagonistic defenses. The girlfriend had told police the child had died from a beating by the defendant, while he claimed that the child had died from falling down a flight of stairs. Severance was denied when the state said it did not intend to use the mother's statement in the trial. She testified in her own defense in the joint trial and, on cross-examination, denied that the father had beaten the child with a belt. Outside the presence of the jury she was confronted with her confession and reminded of her liability for perjury. In the presence of the jury she then recanted her earlier testimony and repeated the accusation she had made in her confession. The Michigan Supreme Court reversed the father's conviction, but on the ground of antagonistic defenses. *See text at notes 176-98 infra* for a discussion of antagonistic defenses as a ground for severance.

prosecutor can then introduce it against the declarant without violating the confrontation rights of codefendants. Often, of course, one cannot remove all references to the participation of another person without materially altering the confession. Such radical editing could falsely suggest that the declarant admitted sole culpability for the offense.¹³² For that reason, trial courts ordinarily obscure the identities of other named participants but permit the jury to hear a confession asserting that others participated. When such limited editing is employed, however, redaction presents a basic problem: Is it really effective, or does it make a game of the confession, inviting the jury to "fill in the blank" with the name of the defendant? In many cases, the edited statement makes it "as clear as pointing and shouting"¹³³ that the other defendant on trial is the "another person"¹³⁴ or "X"¹³⁵ named in the confession. Indeed, some trial courts, perhaps misunderstanding the purpose of *Bruton*, have as much as instructed the jury on what name to insert in the blanks.¹³⁶ And appellate courts continue to uphold trial decisions to admit a *Bruton* confession with what amounts to a sham deletion.¹³⁷ It is not surpris-

132. See, e.g., *Matthews v. State*, 353 So. 2d 1274 (Fla. App. 1978) (A and B are charged with aggravated battery by kicking a drunk-tank cellmate; B moves to delete statement in A's confession that A was wearing tennis shoes, since that would imply that B inflicted the major injuries); *People v. Clark*, 42 Ill. App. 3d 472, 355 N.E.2d 619 (1976) (A, B, and C are prosecuted; A confesses to committing the crime with B but does not name C); *State v. Montgomery*, 182 Neb. 737, 157 N.W.2d 196 (1968) (A confesses to robbery but claims he was coerced into doing so by B).

133. *Harrington v. California*, 395 U.S. 250, 253 (1969).

134. *State v. Herd*, 14 Wash. App. 959, 546 P.2d 1222 (1976), *petition for review denied*, 88 Wash. 2d 1005 (1977), held that the accusation relating to "another person" was ambiguous in light of the facts and that the error, if any, was harmless in light of the overwhelming evidence of the defendant's guilt as the second person involved in the offense. The first of those holdings seems incorrect in light of the facts of the case as stated by the court in the companion case. See *State v. Kimball*, 14 Wash. App. 951, 546 P.2d 1217 (1976).

135. *Sims v. State*, 265 Ind. 647, 358 N.E.2d 746 (1977).

136. In *Tate v. State*, 556 P.2d 1014 (Okla. Crim. App. 1976), Tate and Biggoose were tried jointly for burglary. A police officer testified that Biggoose told him that "he boosted me up" to gain entrance into the building. The trial court sustained an objection on *Bruton* grounds, but then instructed the jury: "You jurors disregard the statement by the witness concerning the description of the assistance of the boosting that the witness here stated Mr. Biggoose said that Mr. Tate gave him. It should be stricken from consideration when you are determining the issues in this case because I'm ruling that that is inadmissible evidence." 556 P.2d at 1019. Similarly, in *Commonwealth v. Nagle*, 253 Pa. Super. Ct. 133, 140, 384 A.2d 1264, 1268 (1978), the trial court literally filled in the blanks for the jury in its instructions, informing the jury that confessions that name codefendants are admissible if the names of the codefendants are deleted.

137. See, e.g., *United States v. Alvarez*, 519 F.2d 1052 (3d Cir.), *cert. denied*, 423 U.S. 914 (1975); *State v. Jenkins*, 340 So. 2d 157 (La. 1976); *State v. Herd*, 14 Wash. App. 959,

ing, therefore, that the American Bar Association approves of redaction only in limited circumstances.¹³⁸

A third alternative to severance on *Bruton* grounds occurs when the defendant accused in a confession has an opportunity to cross-examine the confessing codefendant. In *Nelson v. O'Neil*,¹³⁹ the Supreme Court held that the opportunity for cross-examination preserves the defendant's right of confrontation. O'Neil had not actually cross-examined his codefendant,¹⁴⁰ and many courts would not have let him do so, since the codefendant's in-court testimony was not damaging.¹⁴¹ Nevertheless, the Court held that no *Bruton* error had been committed because when the codefendant took the stand he became available for "full and effective" cross-examination.¹⁴²

One might wonder whether *O'Neil* opportunities for cross-examination are an adequate substitute for *Bruton* severance, which would keep the jury from ever learning of the codefendant's out-of-court confession at all. If, as in *O'Neil*, the codefendant denies the truth of the out-of-court statement or denies making it, the jury will probably think the denial self-serving and give greater credence to the confession, including its accusation of the defendant. Cross-examining such a codefendant would only draw

546 P.2d 1222 (1976), *petition for review denied*, 88 Wash. 2d 1005 (1977). Alternatively, courts have held that the deletion was effective and that if it was not, the *Bruton* error was harmless in light of the overwhelming evidence of the defendant's guilt. See text at notes 160-75 *infra*.

138. The American Bar Association Standards approve of redaction, "provided that, as deleted, the confession will not prejudice the moving defendant." ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO JOINDER AND SEVERANCE § 2.3(a)(ii) (Supp. 1968). In the Tentative Draft of the same standard, admission of a confession in a joint trial was approved if "all references to the moving defendant have been effectively deleted . . ." *Id.* at § 2.3(a)(ii) (Tent. Draft 1967). The change in language was made to emphasize the need for caution in redaction. See *id.* at §§ 3-4 (Supp. 1968). The Comment warns that "courts must exercise great caution in permitting the prosecution to elect the deletion alternative. . . . In a great many cases the deletion alternative simply will not be available, as it will be impossible to remove all references to participation of another person in the crime without changing materially the substance of the statement." *Id.*

139. 402 U.S. 622 (1971).

140. O'Neil and Runnels were jointly tried for kidnapping, robbery, and vehicle theft. In its case in chief, the prosecution presented a police officer's testimony that when Runnels was arrested he confessed to the offenses and named O'Neil as his confederate. The trial court instructed the jury that it could consider Runnels's statement only against him and not against O'Neil. Runnels later testified in his own defense, denied making the statement, and called it untrue. He then testified to an alibi. On cross-examination he stuck to his story in every particular. O'Neil then testified to the same alibi.

141. See note 229 *infra*.

142. 402 U.S. at 626 (quoting from *California v. Green*, 399 U.S. 149, 158 (1970)).

the jury's attention to the accusatory portion of the out-of-court statement.¹⁴³ If, on the other hand, the codefendant stands by his out-of-court statement, then the defendant may certainly cross-examine the codefendant. Such a situation pits the defendants against each other, however, and an increasing number of courts recognize that sort of antagonism as grounds for severance or mistrial.¹⁴⁴

O'Neil presents a second problem: in such a situation the court need not instruct the jury not to consider the codefendant's statement as evidence against the defendant;¹⁴⁵ indeed, a trial court would appear, as a matter of federal constitutional law, to be correct in instructing the jury to give such weight to the accusation as it thinks proper. The prosecutor would also be permitted to use the out-of-court accusation in argument. In contrast, in a separate trial, the jury would not ever hear of the codefendant's confession. Thus, the Supreme Court has allowed "powerfully incriminating"¹⁴⁶ evidence, often repudiated by its source, to be admitted against a defendant only because the prosecutor chose to seek joinder.

In a handful of cases, courts have resorted to more imaginative solutions to *Bruton* severance problems. For example, in *State v. Johnson*,¹⁴⁷ three defendants were charged with capital murder. Each confessed, naming the others as accomplices. Simultaneous trials were conducted before three different courts and juries; each defendant's confession naming the others was introduced into evidence. but only in his own trial.¹⁴⁸ In *United*

143. [O]nce Runnels had testified that the statement was false, it could hardly have profited the respondent for his counsel through cross-examination to try to shake that testimony. If the jury were to believe that the statement was false as to Runnels, it could hardly conclude that it was not false as to the respondent as well.

402 U.S. at 629.

144. See, e.g., *United States v. Johnson*, 478 F.2d 1129 (5th Cir. 1973); *Murray v. State*, 528 P.2d 739 (Okla. Crim. App. 1974). See also text at notes 176-98 *infra*.

145. The jury instruction not to consider the accusation against the nondeclaring defendant may be required by state hearsay rules even though under *O'Neil* there is no confrontation violation. In *O'Neil*, the Court noted that "Runnels' out-of-court confession implicating the respondent was hearsay as to the latter, and therefore inadmissible against him under state evidence law. The trial judge so ruled, and instructed the jury that it must not consider any part of the statement in deciding whether or not the respondent was guilty." 402 U.S. at 626.

146. *Bruton v. United States*, 391 U.S. 123, 135 (1968).

147. 31 Ohio St. 2d 106, 285 N.E.2d 751 (1972). See also *State v. Kassow*, 28 Ohio St. 2d 141, 277 N.E.2d 435 (1971), *vacated and remanded*, 408 U.S. 939 (1972) (companion case).

148. Although the case was in fact severed in *Johnson* and each defendant was given a separate trial, the decision to conduct the trials simultaneously and risk confusing the

States v. Sidman,¹⁴⁹ two defendants were jointly tried, but there were two juries in the case, one for each defendant.¹⁵⁰ The *Bruton* confession of each was introduced while the jury for the codefendant was outside the courtroom. For each case, the charge of the court and the attorneys' jury arguments were presented while the other jury was out of the courtroom.¹⁵¹

In *United States v. Crane*,¹⁵² three codefendants were charged with bank robbery, and Crane was charged with possession of the proceeds of that robbery. Crane confessed, naming his accomplices. To permit the confession to be used against Crane, the trial court divided the trials. The three robbery codefendants were tried before a jury, and Crane and his lawyer participated in the defense.¹⁵³ During that trial, two robbery codefendants

participants was apparently intended to minimize burdens on witnesses and to eliminate the discovery benefits for those defendants not tried first in sequential trials.

149. 470 F.2d 1158 (9th Cir.), *cert. denied*, 409 U.S. 1127 (1973).

150. Each jury was selected separately. One jury sat in the jury box while the other sat in chairs in front of the box. 470 F.2d at 1168.

151. The jury in one case announced that it had reached a verdict while the other jury was still deliberating. The trial court ordered the verdict sealed, and it was not revealed until after the second jury announced that it, too, had reached a verdict. Each jury found its defendant guilty. On appeal, the Ninth Circuit unenthusiastically endorsed the trial court's scheme:

While we uphold the use of two juries in this case before us, this should not be taken as a blanket endorsement by us of such a trial. While it solved part of the *Bruton* problem in *Sidman's* case, it didn't in the *Clifford* case. . . . The underlying reason for impaneling two juries, although not expounded by the trial court, was undoubtedly one of economics, that is, conserving the juries' time and costs, the Court's time, and the witnesses' time, costs and convenience. We agree it was more economical, although the jury fees and expenses would have been the same whether the trial was joint or separate. There was a saving as to some of the witnesses' time, convenience and expense; and of course the Judge's time was saved since the joint trial took four days and separate trials would have taken eight. This was indeed a saving.

470 F.2d at 1170.

Despite the elaborate precautions against *Bruton* problems, the conviction of one defendant, *Clifford*, was reversed because while both juries were present, a government witness testified that *Sidman* had told him that he and *Clifford* had committed the robbery. *See* 470 F.2d at 1170-71.

152. 499 F.2d 1385 (6th Cir.), *cert. denied*, 419 U.S. 1002 (1974).

153. The jury would be required to resolve one question that was common to both charges — whether a robbery was committed. The dissent noted the problems this caused for *Crane's* attorney:

[T]he tandem procedure confused the role of appellant's counsel whose client's case did not enjoy the first priority on the jury's agenda during the initial phase of the trial. He might have been reluctant, for fear of antagonizing the jury that had been told to defer consideration of his client's case, to participate forcefully in the first phase of the trial, for example, in the examination of witnesses, and in the decision whether to make an opening statement or "partial" closing argument.

499 F.2d at 1390.

pleaded guilty, and the third was acquitted by the jury. Then Crane was tried before the same jury on the possession charge, and his confession was introduced into evidence. The confession listed those who were to share in the proceeds of the robbery, including the wife of the codefendant whom the jury had just acquitted. The majority of the Sixth Circuit, in affirming Crane's conviction, noted that "[e]ver since *Bruton* was decided, trial judges have struggled to find ways that defendants may be tried jointly even though one has given a statement to the police."¹⁵⁴ While it approved of the bifurcated trial in this case, it expressed "serious doubts" about its general use to cure *Bruton* severance problems. If, for example, the jury returned a verdict of guilty against the defendant being tried first, "there could be a serious question whether the same jury could later give his codefendant the dispassionate and unprejudiced hearing required by due process and by the sixth amendment."¹⁵⁵ The fact that this jury acquitted the one defendant whose case was presented to it saved Crane from that form of prejudice, but a "trial judge cannot predict at the beginning of the trial what the jury's verdict will be as to the defendant whose case is first presented."¹⁵⁶ A vigorous dissent suggested that since the jury was asked to decide whether a robbery had occurred, a necessary element of the charges against all four defendants, it would be unable to reexamine that question when it was deliberating in the second phase of the trial.¹⁵⁷ Furthermore, the jury in this trial acquitted a defendant and moments later heard Crane's confession give strong evidence that it had just acquitted a guilty person: "The jury, having been told, in effect, that it might have just erred in its earlier verdict, may have determined not to permit another 'guilty' person to go free."¹⁵⁸

Even when a trial court clearly violates *Bruton* by denying severance, the prejudiced defendant will not always be able to gain reversal on appeal. As we saw above,¹⁵⁹ appellate courts have strong policy incentives to uphold lower-court decisions not to sever; therefore, they have applied their own doctrines to avoid granting severance on *Bruton* grounds. First, they have relied

154. 499 F.2d at 1387.

155. 499 F.2d at 1388.

156. 499 F.2d at 1388.

157. See 499 F.2d at 1390.

158. 499 F.2d at 1390.

159. See text following note 126 *supra*.

heavily on the doctrine of harmless error to affirm convictions obtained in trials that violated *Bruton*. In *Harrington v. California*,¹⁶⁰ the Supreme Court held that admitting two confessions of codefendants in a joint trial violated *Bruton* but the error was harmless because the other evidence for conviction was "overwhelming."¹⁶¹ In *Harrington* and two similar successor cases,¹⁶² the defendant claiming *Bruton* error had himself given the police an inculpatory statement, which had properly been admitted as evidence against him.¹⁶³ The Supreme Court appeared to attach no special weight to that admission, other than to note the defendant's statement as part of the "overwhelming" evidence of guilt adduced at trial.

A defendant's confession has, however, suggested a second ground for avoiding *Bruton* severance to some courts, particularly the Second Circuit. To those courts, the rationale underlying *Bruton* does not apply when the defendant has himself given an admissible statement that is "substantially identical"¹⁶⁴ to the codefendant's accusatory statement. This theory, called "interlocking confessions," holds that when the defendant has confessed to substantially the same facts as those recited in the accusatory parts of a codefendant's confession and when the defendant's confession is properly admitted into evidence, the codefendant's accusation does not have the "devastating"¹⁶⁵ effect on

160. 395 U.S. 250 (1969).

161. "[T]he case against Harrington was so overwhelming that we conclude that this violation of *Bruton* was harmless beyond a reasonable doubt" 395 U.S. at 254.

162. *Schneble v. Florida*, 405 U.S. 427 (1972); *Brown v. United States*, 411 U.S. 223 (1973).

163. Harrington gave a statement admitting that he was present at the time and place of the robbery and homicide, but denying that he participated. Although the Supreme Court mentioned Harrington's statement, 395 U.S. at 253-54, no detailed description of it appears in the opinion. The opinion below, however, indicates that the statement Harrington gave was self-inculpatory. See *People v. Bosby*, 256 Cal. App. 2d 209, 217, 64 Cal. Rptr. 159, 164 (1967). Schneble made a detailed confession of the murder with which he was charged. *Schneble v. Florida*, 405 U.S. 427, 430-31 (1972). Brown also made a statement which was admitted into evidence against him. *Brown v. United States*, 411 U.S. 223, 225 (1973).

164. The requirement that the statements be only substantially identical was explained in *United States ex rel. Stanbridge v. Zelker*, 514 F.2d 45 (2d Cir.), cert. denied, 423 U.S. 872 (1975):

[S]ince confessions are rarely maternal twins, the court must look to their substance to see whether they interlock sufficiently on vital points to indicate a common genesis. If they do, "devastating" effects do not follow from their admission. 514 F.2d at 48-49. The court then examined the two confessions before it, isolated the differences, and, concluding they were insignificant, applied the interlocking confessions doctrine to them.

165. The scope of the *Bruton* decision has been considered by our court on a num-

defendant's case that concerned the Supreme Court in *Bruton*. Using this doctrine, the sole inquiry is into whether the defendant confessed to substantially the same facts as admitted in the codefendant's statement. Thus, the doctrine avoids a detailed examination of all the other evidence to determine whether the proof was "overwhelming" under *Harrington*. Recently, however, several courts have refused to apply the interlocking confession doctrine except as part of a search for independent, overwhelming evidence of the defendant's guilt.¹⁶⁶

In *Parker v. Randolph*,¹⁶⁷ the Supreme Court considered what effect should be given to interlocking confessions in the face of a claim of a *Bruton* violation. The three respondents and two others were jointly tried and convicted of murder. None of the respondents testified, but the state introduced the oral confession of each to the events surrounding the killing. Each confession named others who were present, but the confessions were redacted and the names were replaced by the words "blank" or "another person."¹⁶⁸ On federal habeas corpus the district court and the Sixth Circuit both held that *Bruton* had been violated and that the error was not harmless under *Harrington*. A plurality of four Justices found, in an opinion by Justice Rehnquist, that introducing the redacted confessions had not violated the confrontation clause.¹⁶⁹ Justice Blackmun concurred in the judgment but rejected what he saw as an endorsement of the interlocking confessions doctrine. He concurred on the ground that while *Bruton* was violated, the error was harmless under *Harrington*.

ber of occasions, and we have concluded that error of constitutional dimensions does not inevitably occur if the questioned confession is admitted under proper instructions from the court concerning its limited use and purpose. The likelihood of error must be measured against the prejudicial consequences of the failure of the jury to follow the court's instructions, i.e., the "devastating" effect of the incriminations contained in the codefendant's admissions. . . . Where the confession adds nothing to what is otherwise clearly and properly in the case, it can have little "devastating" effect.

514 F.2d at 48 (footnote omitted).

166. See, e.g., *Hodges v. Rose*, 570 F.2d 643 (6th Cir.), cert. denied, 436 U.S. 909 (1978); *State v. Sullivan*, 224 Kan. 110, 578 P.2d 1108 (1978). The Second Circuit itself has expressed discomfort with the notion of interlocking confessions as an independent basis for evaluating *Bruton* claims. See *United States ex rel. Ortiz v. Fritz*, 476 F.2d 37 (2d Cir. 1973).

167. 99 S.Ct. 2132 (1979).

168. 99 S.Ct. at 2136 n.3. The Supreme Court acknowledged that the redaction ineffectively disguised the identities of the others named. 99 S.Ct. at 2136 n.3.

169. Justice Rehnquist was joined by the Chief Justice and Justices Stewart and White.

Three Justices dissented on the ground that *Bruton* had been violated and the Court ought not to reexamine the question of harmless error in light of the decisions of the two lower federal courts that the error was not harmless.¹⁷⁰ Thus, a majority of the Justices could not be assembled either to accept or to reject the interlocking confessions doctrine.

The remarkable feature of this inconclusive decision is the effort by Justice Rehnquist to construct an exception to *Bruton* that is broader than the interlocking confession exception recognized by some of the lower courts. Choosing to "cast the issue in a slightly broader form"¹⁷¹ than the interlocking confession question posed by the State of Tennessee, Justice Rehnquist argued that *Bruton* should be inapplicable whenever the defendant has confessed and the confession is admitted into evidence against him: "Thus, the incriminating statements of a codefendant will seldom, if ever, be of the 'devastating' character referred to in *Bruton* when the incriminated defendant has admitted his own guilt."¹⁷² If ever adopted, such a test would eliminate the need to determine whether the defendant's and codefendant's confessions interlock and the issue would simply be whether the defendant had confessed to the offense. If he had, *Bruton* would not be violated by admission of the codefendant's statement.

It is, of course, one matter to contend that a defendant's chances for acquittal are not damaged when a codefendant's confession is added to his own confession to substantially the same facts. It is quite another, however, to contend that an incriminating out-of-court statement by a codefendant is not damaging whenever the defendant has made any inculpatory statement of his own. As Justice Stevens noted in dissent,¹⁷³ why should a defendant's own confession have such a forfeiting effect and not also other highly probative evidence, such as fingerprints or eyewitness testimony?

Lower courts justifiably perceive the doctrines of harmless error and interlocking confessions as softening the *Bruton* standard.¹⁷⁴ But where two joined defendants have made confessions

170. Justice Stevens was joined by Justices Brennan and Marshall. Justice Powell did not participate in the decision.

171. 99 S.Ct. at 2139.

172. 99 S.Ct. at 2139.

173. 99 S.Ct. at 2146.

174. See, e.g., *State v. Sullivan*, 224 Kan. 110, 113, 578 P.2d 1108, 1113 (1978) ("The *Bruton* rule has been softened somewhat in later cases.").

incriminating each other that cannot be redacted effectively, *Bruton* still requires that neither confession be introduced or that each defendant receive a separate trial. Even if an appellate court uses one of the *Bruton*-weakening doctrines to uphold the result in a joint trial that admits such confessions, the defendants' confrontation rights have still been undermined. Trial courts should not accept¹⁷⁵ the recent weakening of *Bruton* as a repudiation of the fundamental rights behind that case.

B. Antagonistic Defenses

Joined defendants face the additional risk of antagonistic defenses: to defend himself properly, one codefendant may have to produce evidence that incriminates another. The latter can cross-examine his codefendant on those portions of the testimony that incriminate him,¹⁷⁶ but he is forced to defend against two accusers, the government and his codefendant. It also places an additional burden on the testifying codefendant, who must face cross-examinations by both the defendant and the prosecutor. The additional burdens on defendant and codefendant grow solely from their joinder: in separate trials, each could defend unhampered by the impact of his defense on the other.¹⁷⁷

An increasing number of courts find joint trials of defendants with antagonistic defenses unfair. The classic statement of that view appears in an Illinois case, *People v. Braune*.¹⁷⁸

175. *Hodges v. Rose*, 570 F.2d 643 (6th Cir.), cert. denied, 436 U.S. 909 (1978), admonishes trial judges not to guess about harmless error:

[A] trial court cannot decide on the admissibility of a statement under *Bruton* on the basis of the strength of the state's case. Rather, the court must decide whether the statement incriminates the defendant against whom it is inadmissible in such a way as to create a "substantial risk" that the jury will look to the statement in deciding on that defendant's guilt. Such an assessment may require consideration of other evidence in order to determine whether mere deletion of the defendant's name will be effective in making the statement non-incriminatory as to him. But consideration of the weight of independent evidence is both improper and unnecessary to determination of the *Bruton* issue at the trial court level.

570 F.2d at 647 (footnote omitted).

176. Those cases considering whether a *Bruton* violation is cured when the declarant testifies are discussed in text at notes 139-46 *supra*.

177. A defendant intending to testify in his own defense and to incriminate a codefendant would almost certainly claim his privilege against self-incrimination if the government attempted to compel his testimony in a separate trial of the codefendant. Even if such a defendant were prosecuted and convicted before his codefendant, in most jurisdictions his privilege would remain until the conviction is affirmed on appeal. Only if the defendant were tried first and acquitted could his testimony incriminating his former codefendant be compelled consistently with the fifth amendment. See text at notes 268-84 *infra*.

178. 363 Ill. 551, 2 N.E.2d 839 (1936).

The trial was in many respects more of a contest between the defendants than between the People and the defendants. It produced a spectacle where the People frequently stood by and witnessed a combat in which the defendants attempted to destroy each other.¹⁷⁹

Another court has noted "There is no more classic situation of the need for a severance than one in which two co-defendants each place the blame for a crime on the other."¹⁸⁰ But not all courts accept that view, as a recent Kentucky case shows:

A good deal of tripe has grown up around the question of what sort of prejudice should entitle a defendant to a separate trial "Prejudiced" means *unfairly* prejudiced. A defendant is prejudiced, of course, by being tried at all. . . . [N]either antagonistic defenses nor the fact that the defendant incriminates the other amounts, by itself, to unfair prejudice That different defendants alleged to have been involved in the same transaction have conflicting versions of what took place, or the extent to which they participated in it, *vel non*, is a reason for rather than against a joint trial. If one is lying, it is easier for the truth to be determined if all are required to be tried together.¹⁸¹

Courts do not agree on what constitutes an "antagonistic defense." Courts in the District of Columbia impose what are probably the most stringent requirements for severance due to antagonistic defenses. In *Rhone v. United States*,¹⁸² the District of Columbia Circuit said:

Prejudice from joinder of defendants may arise in a wide variety of circumstances as, for example, . . . where the defendants present conflicting and irreconcilable defenses and there is a danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty¹⁸³

179. 363 Ill. at 557, 2 N.E.2d at 842. The Illinois Supreme Court noted in *Braune*: It is our belief that no judge, however learned and skillful, could have protected the defendants in this case against their own hostility. The record shows in many instances that the defendants' witnesses were subjected to searching and critical cross-examinations by counsel for the antagonistic co-defendant. Frequently it extended beyond the field covered by the State's attorney and in some cases went into matters never inquired of by him.

363 Ill. at 556, 2 N.E.2d at 841.

180. *State v. Singleton*, 352 So. 2d 191, 192 (La. 1977).

181. *Ware v. Commonwealth*, 537 S.W.2d 174, 176-77 (Ky. 1976) (emphasis in original). Compare the argument that joint trials permit the jury to obtain an "overall view" of the events charged. See text at note 55 *supra*.

182. 365 F.2d 980 (D.C. Cir. 1966).

183. 365 F.2d at 981. The court concluded that the mere fact that one defendant testified while the other did not is not grounds for severance. For a discussion of this situation, see text at notes 212-54 *infra*.

In subsequent cases, the D.C. Circuit has enshrined that statement as its definitive standard. It has refused to find antagonistic defenses when one defendant attempted to destroy the credibility of a government eyewitness while the other defendant attempted to shore up the credibility of that same witness¹⁸⁴ and has said that the "mere presence of hostility among defendants or the desire of one to exculpate himself by inculpating another" is insufficient to show prejudice.¹⁸⁵ The *Rhone* rule is thus designed to restrict the need for severance to cases where defenses are directly and mutually antagonistic, and thus very likely to be prejudicial.¹⁸⁶

Other courts, purportedly taking less stringent postures than *Rhone*, have nonetheless read the "antagonistic defenses" doctrine narrowly. Some have concluded that when one defendant denies participation in an offense while another claims entrapment and admits participation, the defenses are not antagonistic, even when other testimony links the defendants together.¹⁸⁷ Others have held that where defendants did not directly accuse each

184. *United States v. Robinson*, 432 F.2d 1348, 1351 (D.C. Cir. 1970). An eyewitness had identified Robinson, but not Coles, from a photographic array. The court concluded that all Robinson had shown was that he and Coles had antagonistic strategies — an insufficient showing to compel severance — and cited *Rhone* for the proper standard by which to judge claims of antagonistic defenses.

185. *United States v. Ehrlichman*, 546 F.2d 910, 929 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977) (quoting from *United States v. Barber*, 442 F.2d 517, 430 (3d Cir.), *cert. denied*, 404 U.S. 846 (1971)). The court concluded that no "irreconcilable inconsistency of defenses" was shown under the *Rhone* standard. 546 F.2d at 929.

The District of Columbia Court of Appeals has held the *Rhone* rule governs prosecutions of offenses in the Superior Courts of the District. In *Clark v. United States*, 367 A.2d 148 (D.C. App. 1976), Clark and two codefendants were tried for armed robbery. Each codefendant testified that he had no prior knowledge of the robbery and that Clark committed the offense alone. Clark did not testify. The court avoided deciding whether antagonistic defenses under *Rhone* existed but concluded that "even assuming that there were antagonistic defenses in this case, appellant has not demonstrated that the conflict alone created a danger that in a joint trial the jury would unjustifiably infer his guilt." 367 A.2d at 160.

186. There is a danger, for example, that when each defendant testifies and exculpates himself while accusing a codefendant, the jury may automatically conclude that both are lying when one may be telling the truth. In that circumstance, some courts characterize the defenses as being "mutually antagonistic" and reverse the conviction of each defendant. *People v. Braune*, 363 Ill. 551, 2 N.E.2d 839 (1936); *People v. Markham*, 19 Mich. App. 616, 173 N.W.2d 307 (1969) (convictions not reversed because antagonistic nature of defenses not disclosed in motion for severance); *Murray v. State*, 528 P.2d 739 (Okla. Crim. App. 1974).

187. See *United States v. Garza*, 563 F.2d 1164 (5th Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978); *United States v. Morrow*, 537 F.2d 120 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977).

other, the defenses could not be antagonistic.¹⁸⁸ Finally, at least one court has refused to find antagonism when one defendant discredited part of a witness's testimony, another part of which helped a codefendant. The court did not believe that discrediting part of a witness's testimony might discredit the witness himself and hence prejudice the codefendant.¹⁸⁹

Under *Rhone*, defenses must be mutually antagonistic. Several courts, however, have extended their concerns over antagonistic defenses to reach unilateral accusation.¹⁹⁰ Of those courts, some have limited their concerns exclusively to the injury to the defendant accused by the testifying codefendant,¹⁹¹ but others have widened their focus to include the injury to the testifying codefendant from facing multiple cross-examiners, each with a different goal to achieve.¹⁹²

188. In *State v. Singleton*, 352 So. 2d 191 (La. 1977), two defendants were charged with knowing possession of a stolen automobile. Each intended to testify that he did not know the automobile was stolen because he had been picked up and offered a ride by the other. The court concluded that inadequate details were provided in support of the motion for severance and alternatively held that the defenses were not really antagonistic:

Were each defendant claiming that the other knowingly possessed the stolen car, then their defenses would have been directly accusatory, making each "defend not only against the state, but also against his co-defendant" and perhaps requiring a severance in the interest of justice. . . . Defendants' allegations here, on the other hand, would neither place guilt directly on the co-defendant nor relieve the asserter of guilt, for each defendant's acknowledged presence in the car would be some evidence of guilt of his own possession of the stolen vehicle.

352 So. 2d at 193. See also *State v. Edwards*, 197 Neb. 354, 248 N.W.2d 775 (1977).

189. In *State v. Gaxiola*, 550 P.2d 1298 (Utah 1976), two defendants were jointly tried for murder committed while within a penal institution. Gaxiola's defense was that he stabbed the deceased in defense of a fellow inmate whom the deceased was attacking. The codefendant claimed nonparticipation in the killing. The inmate whom Gaxiola contended he had been protecting testified under immunity and claimed that he had been attacked by the deceased, that Gaxiola stabbed the deceased and then withdrew from the scene, and that the codefendant then appeared and also stabbed the deceased. By skillful cross-examination, the codefendant's lawyer discredited the witness's testimony with regard to his client's participation in the events. Gaxiola contended that the cross-examination placed him and his codefendant in antagonistic positions. The court concluded, however, that the "record does not reveal the required opposing hostility in the defenses to support severance. The defendants here did not protest innocence while accusing the other." 550 P.2d at 1301. See also note 184 *supra*.

190. See, e.g., *United States v. Johnson*, 478 F.2d 1129 (5th Cir. 1973), in which a codefendant testified that he participated in the offense as a police informer and that the defendant, who relied upon a defense of mistaken identification, was the culprit. Characterizing the codefendant as the government's "best witness," the court reversed the defendant's conviction while affirming the conviction of the codefendant.

191. See note 190 *supra*. See also *People v. Davis*, 43 Ill. App. 3d 603, 357 N.E.2d 96 (1976).

192. In *State v. Holup*, 167 Conn. 240, 355 A.2d 119 (1974), Holup's defense to a charge of kidnapping was mistaken identification. Codefendant Gordon's defense was that

Some courts rely on procedural defaults to avoid dealing with claims of antagonistic defenses. In addition to requiring a pretrial motion for severance,¹⁹³ courts have insisted that it show details of likely antagonistic defenses.¹⁹⁴ Although the requirement of pretrial notice of likely trial unfairness in the form of a motion to sever serves a legitimate and necessary function, some courts go further, apparently seeking to avoid facing the underlying issues on grounds of procedural default. In *People v. Markham*,¹⁹⁵ for example, Markham and Rolston were jointly tried for kidnapping. Rolston claimed he committed the offense under Markham's coercion, while Markham offered psychiatric testimony showing both temporary insanity and a personality disorder that made it likely he would follow the leadership of an older male figure, such as Rolston. Rolston's counsel cross-examined the psychiatrist, whose testimony was "substantially undercut by the codefendant's counsel's extremely able cross-examination."¹⁹⁶ Although Rolston had notified the trial court before trial he would consider the psychiatrist's testimony to be antagonistic to his case, neither attorney had made a motion to sever before trial.¹⁹⁷ The appellate court concluded that "[s]ince the codefendant's defenses were inconsistent, and in fact antagonistic, had the trial court been fully advised, and had the defendant asserted this inconsistency before trial, it might have been an abuse of discretion not to grant separate trials."¹⁹⁸

Holup coerced him into participating. Characterizing Gordon as the "most effective witness for the state's case," the court reversed Holup's conviction. Later, in *State v. Gordon*, 170 Conn. 189, 365 A.2d 1056 (1976), Gordon's conviction was reviewed. The court reversed Gordon's conviction in part because the joint trial "subjected Gordon to cross-examination by Holup's counsel." 170 Conn. at 190, 365 A.2d at 1057.

193. See text at note 124 *supra*.

194. *State v. Jenkins*, 340 So. 2d 157, 166 (La. 1976): "Mere allegations by codefendants that defenses will be antagonistic do not require the trial judge to sever. Codefendants seeking severance must present convincing evidence to the trial judge of actual antagonism."

195. 19 Mich. App. 616, 173 N.W.2d 307 (1969).

196. 19 Mich. App. at 634, 173 N.W.2d at 316.

197. Before trial, Rolston's attorney had moved for an order permitting him to interview Markham's psychiatrist. In response, Markham's attorney moved for an order prohibiting Rolston from cross-examining the psychiatrist at trial or, in the alternative, for a separate trial. The trial court did not rule on Markham's motions, since it viewed them as conditioned upon the granting of Rolston's motion to interview the psychiatrist, which it denied. 19 Mich. App. at 620-21, 173 N.W.2d at 308-09.

198. 19 Mich. App. at 634-35, 173 N.W.2d at 316.

C. Conflicts in Trial Strategy

Even if their defenses are not overtly antagonistic, joined defendants might nevertheless prefer different defense strategies. They may, for example, differ over theories of jury selection¹⁹⁹ or whether to call a particular witness. A joint trial may prevent one defendant from using the tactics he prefers,²⁰⁰ but judicial reluctance to sever has made this an inadequate showing of prejudice to prevent joinder.²⁰¹ Yet the prejudice exists and must be considered when evaluating the wisdom of joint trials.

In *Merrill v. State*,²⁰² for example, the defendant sought severance in a pretrial motion because he planned to introduce only his unsworn statement in his trial defense. Under Georgia law, such a strategy would have given him the valuable right to make the concluding argument to the jury. His codefendant, however, intended to offer evidence, and under Georgia law, if either defendant offered evidence, neither could make the closing argument to the jury. Thus, joinder effectively transferred the right to argue last from Merrill to the prosecutor. The court gave short shrift to the defendant's motion for severance, noting only that the defenses were not antagonistic.²⁰³ Courts have given similar treatment to claims that joinder was prejudicial because the law prohibited exercising a peremptory challenge unless all defendants agreed to

199. See notes 45-46 *supra* and accompanying text.

200. Such problems do not arise, of course, when one attorney represents all of the defendants in a joint trial. However, conflicts of interest in such representation are inevitable and multiple representation should be on the decline after *Holloway v. Arkansas*, 435 U.S. 475 (1978).

201. See text at notes 176-98 *supra*.

202. 130 Ga. App. 745, 204 S.E.2d 632 (1974).

203. The court acknowledged that the right to argue last to the jury is an "important right" and that denial of that right is ordinarily grounds for reversal. 130 Ga. App. at 749, 204 S.E.2d at 636.

Perhaps because the point may not have been argued, the court did not discuss whether the nontestifying defendant might retain his right to make the closing argument to the jury, while at the same time accommodating the government's desire to rebut the arguments of the testifying codefendants. In *Raysor v. State*, 272 So. 2d 867 (Fla. Dist. Ct. App. 1973), Lester and the brothers Raysor were jointly tried for robbery. Under Florida law, a defendant who has presented only his own testimony in defense has the right to argue last to the jury. Since the Raysors presented other evidence, while Lester did not, the trial court permitted the government to argue last with respect to all three. The court of appeals reversed Lester's conviction on the ground that the trial court had unnecessarily deprived him of a valuable procedural right. The court suggested that the following order of argument would have accommodated the interests of all three defendants and the government: (1) Lester opens; (2) State argues all three cases; (3) Raysors argue their cases; (4) State argues again with regard to all defendants; (5) Lester presents the concluding argument. 272 So. 2d at 869.

it,²⁰⁴ or that a defendant was unfairly forced to defend in a joint trial where his attorney and his codefendant's attorney had irreconcilable differences.²⁰⁵

Special problems arise when one defendant exercises his sixth amendment right²⁰⁶ to represent himself. Because such a person, even when assisted by standby counsel, is likely to be unfamiliar with trial procedures and limitations, he may inadvertently prejudice the other defendants. In one such case,²⁰⁷ characterized by the appellate court as illustrating that a "defendant's right to defend a criminal charge *pro se* . . . may not be an unmixed blessing in a multi-defendant case even when assisting counsel is assigned,"²⁰⁸ the court held that the *pro se* defendant's lapses from standard trial procedure,²⁰⁹ although "unfortunate,"²¹⁰ did not require reversal of the conviction of a

204. In *State v. Persinger*, 62 Wash. 2d 362, 382 P.2d 497 (1963), *appeal dismissed*, 376 U.S. 187 (1964), the court rejected a variety of constitutional attacks upon the Washington jury-selection procedure, which requires joined defendants to exercise peremptory challenges jointly. Since counsel for the joined codefendant would not concur in the defendant's desire to exercise their sixth and final peremptory challenge on a particular member of the panel, and since the trial court refused defendant's motion that he be permitted to exercise the challenge individually, the challenge was lost. A similar attack upon a similar procedure was turned aside in *Martin v. State*, 262 Ind. 232, 317 N.E.2d 430 (1974), *cert. denied*, 420 U.S. 911 (1975). The court did recognize, however, that each defendant should have the right to show that the requirement of joint exercise of peremptory challenges would be prejudicial in his particular case and, upon such a showing, that the trial court should apportion the challenges among the defendants for individual exercise.

205. *People v. Brown*, 27 Ill. App. 3d 569, 327 N.E.2d 51 (1975). A few of the differences: the defendant's counsel wished to try the case on the single point of identity while the codefendant's counsel planned multiple defenses; the attorneys could not agree on a single approach to jury selection; the codefendant's lawyer cross-examined the defendant's alibi witnesses, but only on collateral points; during closing arguments, the defendant's lawyer characterized the evidence against the codefendant as overwhelming, while the codefendant's lawyer disputed this and discussed the strength of the government's case against the defendant. The defendant claimed further that there was "personal antagonism" between the attorneys. The appellate court refused to overturn the trial court's denial of severance, since the defenses (alibi and mistaken identification) were not inconsistent. 27 Ill. App. 3d at 574, 327 N.E.2d at 54.

206. See *Faretta v. California*, 422 U.S. 806 (1975).

207. *United States v. Sacco*, 563 F.2d 552 (2d Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978).

208. 563 F.2d at 555.

209. In his opening statement, Sacco said that a codefendant intended to testify and briefly outlined the nature of that testimony, but the codefendant changed his mind and did not testify. See 563 F.2d at 555. Similarly, Sacco commented in his jury argument on matters not in evidence. See 563 F.2d at 556.

210. 563 F.2d at 555. The court concluded, "Nor do we agree that Sacco's conduct of his defense was so inept or comments he made in summation so prejudicial as to deprive Gentile of a fair trial." 563 F.2d at 555 (footnote omitted).

codefendant. Nevertheless, the court prescribed steps to be taken by trial courts in the future to minimize the prejudicial effect of *pro se* representation on codefendants.²¹¹

Joinder may also distort one of the most important components of trial strategy: a defendant's decision whether to testify.²¹² The correctness of that decision may determine acquittal or conviction. Although it is widely assumed that not testifying places additional burdens upon the defense,²¹³ testifying is not always the best course of action. The defendant's demeanor, the credibility of his testimony, or the revelation of prior convictions may transform him into the government's best witness and ensure conviction in what would otherwise be a doubtful case.²¹⁴

Moreover, the defendant's decision whether to testify will

211. In addition to the steps taken by the trial court in this case (assigning standby counsel to advise the *pro se* defendant, holding the *pro se* defendant to the rules of trial procedure, cautioning him to "refrain from speaking in the first person as though he were testifying, or voicing personal observations in his comments on the evidence," cautioning the jury when he strayed beyond those bounds, and informing the jury that nothing said by the lawyers was evidence in the case), the court suggested the following:

[T]o avoid any ambiguity in the jury's mind about the unsworn statements of a *pro se* defendant, it should be made clear to the jury at the outset that anything he says in his "lawyer" role is not evidence against him or a co-defendant, and his remarks are to be regarded no differently than those of the attorneys in the case. The *pro se* defendant should also be specifically instructed beforehand that in any opening statement or summation he must avoid reference to co-defendants without prior permission from the court, and should refrain from commenting upon matters not in evidence or solely within his personal knowledge or belief.

563 F.2d at 556-57 (footnote omitted).

212. As between counsel and the accused, the decision whether to testify is made by the accused. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 5.2(a) (Approved Draft, 1971):

Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (i) what plea to enter; (ii) whether to waive jury trial; (iii) whether to testify in his own behalf.

Standard 5.2(b) states that other decisions "on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client."

213. A. AMSTERDAM, B. SEGAL & M. MILLER, *supra* note 26, at 1-386: "It is widely agreed among criminal lawyers of experience that the defendant's failure to take the stand will be construed by the fact finder as an indication that the defendant is hiding something — hence that he has something to hide."

214. *Id.* at 1-385:

Obviously, the weaker the prosecution's case, the more difficult is the choice [whether to put the accused on the stand], since defense testimony may supply deficiencies in the prosecution's evidence and bolster unconvincing aspects. . . . [T]he only broad principle that is of much use is that generally no defense is better than a bad defense — from the point of view *both* of verdict and of sentence.

dictate other defensive strategy in a case. Important trial tactics — jury selection, the opening statement, other defense evidence, and counsel's argument to the jury — depend to a large extent upon whether the defendant testifies.²¹⁵ Pretrial matters, such as what pretrial motions to file,²¹⁶ and even defense investigation of the case,²¹⁷ also depend greatly upon whether the defendant plans to take the stand.

Joinder complicates each defendant's decision. Ideally, joined defendants should all make the same decision, thus minimizing the danger of inconsistent defenses and widening the scope of cooperation in pretrial motions, jury selection, opening statements, other defensive evidence, and jury argument. There is, therefore, great pressure on the defense to make an "all or none" decision about testifying in a joint trial. Often, however, defendants in a joint trial must go their separate ways on this pivotal question; when they do, some prejudice is almost inevitable. The diverging strategies may compound other joint trial harms, for example when the testifying defendant intends to incriminate the nontestifying defendant²¹⁸ or when the nontestifying defendant would testify for the testifying defendant in a separate trial.²¹⁹ In this Section, however, I will limit my analysis to prejudice beyond the harms discussed elsewhere in this Article.

In *Griffin v. California*,²²⁰ the Supreme Court held that the fifth and fourteenth amendments prohibit "either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."²²¹ Comment on a defendant's assertion of his privilege against self-incrimination by not testifying "is a penalty . . . for exercising a constitutional privilege" which "cuts down on the privilege by making its asser-

215. *Id.*: "All cross-examination of prosecution witnesses and any opening statement that defense counsel may have made at the beginning of the case were, of course, designed to harmonize with the defensive case he has been planning to present."

216. For example, if the defense counsel expects his client to testify, he may wish to litigate the admissibility of his client's criminal record for impeachment purposes in advance of trial. Of course, the outcome of such a pretrial motion may have much to do with whether his client will actually testify.

217. If the accused will testify to an alibi, the defense counsel must direct an immediate investigation, before witnesses disappear and memories fade, in order to secure evidence that will corroborate the defendant's testimony.

218. See text at notes 176-98 *supra* for a discussion of antagonistic defenses between joined codefendants.

219. See text at notes 268-84 *infra* for a discussion of severance to enable one defendant to testify for another.

220. 380 U.S. 609 (1965).

221. 380 U.S. at 615 (footnote omitted).

tion costly.”²²² In response to the argument that the jury will in any event draw an unfavorable inference from the defendant’s failure to testify, the Court stated, “What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.”²²³

The unfavorable inference the jury is likely to draw from a defendant’s silence is a significant defensive problem even in an individual trial. But when silence is contrasted with testimony by a codefendant in a joint trial, the jury is more likely to draw that unfavorable inference and rely on it in reaching a verdict. By instructing the jury that it may draw no inference from the failure of one defendant to testify²²⁴ and by instructing the jury on how to evaluate the codefendant’s testimony,²²⁵ the trial court only highlights the contrast.²²⁶ Despite the silent defendant’s efforts to characterize the trial as solely a test of the government’s proof,²²⁷ the testimony of the codefendant is dramatic evidence to the jury that at least one party thought the government’s case worthy of response. Why, then, did not the silent defendant offer a defense, unless he had none to offer? When a jury compares the strategies in that manner, has not an additional penalty been exacted from the silent defendant “for exercising a constitutional privilege”²²⁸ because of the fortuity of being jointly tried with a codefendant who elected to testify?

That burden for the silent defendant often accompanies a correlative benefit for the testifying codefendant. As long as the testifying codefendant refrains from accusing the silent defendant of responsibility for the offense, that defendant is unlikely to cross-examine him.²²⁹ The jury sees him take the witness stand

222. 380 U.S. at 614.

223. 380 U.S. at 614.

224. Such an instruction may be given over the defendant’s objection. *Lakeside v. Oregon*, 435 U.S. 333 (1978).

225. *See, e.g.*, the instruction given by the trial court in *De Luna v. United States*, 308 F.2d 140, 143 (5th Cir. 1962).

226. The charge prohibiting the jury from drawing an adverse inference from the defendant’s failure to testify has been described as “a little like trying to hide an elephant under a handkerchief.” A. AMSTERDAM, B. SEGAL & M. MILLER, *supra* note 26, at 1-386.

227. *See generally id.* at 1-339.

228. *Griffin v. California*, 380 U.S. 609, 614 (1965).

229. Some courts take the position that a defendant’s right to cross-examine a codefendant or a codefendant’s witnesses exists only to the extent the direct testimony incriminates the defendant. *See, e.g.*, *United States v. Mercks*, 304 F.2d 771, 772 (4th Cir. 1962); *Eder v. People*, 179 Colo. 122, 125, 498 P.2d 945, 946-47 (1974).

and subject himself to cross-examination by the prosecution, in stark relief against the defendant who elects to hold his peace. In closing argument, the attorney for the testifying codefendant will doubtless underscore the courage and candor of his client in taking the witness stand and enduring a rigorous cross-examination by the government.²³⁰

Counsel for the testifying codefendant would like to go further in that line of argument: he would rather allude specifically to the defendant's failure to testify, contrasting it with his client's action. Sometimes, he would even like to argue that his client has demonstrated his innocence by testifying, while the defendant has demonstrated his guilt by keeping silent. Do the principles of *Griffin* prohibit him from doing so?

The leading case discussing this problem is *De Luna v. United States*.²³¹ De Luna and Gomez were jointly tried for federal narcotics offenses. Gomez took the stand and testified that he was an innocent victim of circumstance and that de Luna was totally responsible.²³² De Luna did not testify, but his attorney contended in jury argument that he was being made a scapegoat and recalled that police witnesses had not corroborated Gomez's version of the facts. In his jury argument, Gomez's lawyer declaimed: "*Well, at least one man was honest enough and had courage enough to take the stand and subject himself to cross examination, and tell you the whole story. . . . You haven't heard a word from this man [de Luna].*"²³³ De Luna's objections to this argument were overruled. The trial court instructed the jury that it could draw no adverse inference from de Luna's failure to testify²³⁴ and also instructed the jury about how to evaluate

230. See, e.g., *United States v. Shuford*, 454 F.2d 772, 779 (4th Cir. 1971) ("Mr. Shuford answered questions in a direct, forthright manner without evasion").

231. 308 F.2d 140 (5th Cir. 1962).

232. He testified that when he and de Luna were riding in Gomez's car, de Luna saw the police and tossed him a package, telling him to throw it to the ground. Gomez did so, and when the police recovered the package, it was found to contain narcotics.

233. 308 F.2d at 142 n.1 (emphasis supplied by the court). Before this comment, Gomez's lawyer argued that "We know a little something about Adolfo Gomez. We knew that for fifteen or twenty years, more or less, he has worked day after day at hard labor. I don't know what this man does for a living. *He could have gotten up and told you. . . .*" 308 F.2d at 142 n.1 (emphasis supplied by the court). The trial court overruled de Luna's objection. Gomez's lawyer then argued, "Now, further, Adolfo Gomez has given you his version of the facts in this case. He has told you how the narcotics came into his possession. . . . *I haven't heard anyone deny that.*" 308 F.2d at 142 n.1 (emphasis supplied by the court). Again, an objection was overruled.

234. The court charged the jury:

The defendant Carlos Garza De Luna has not testified in this case. You are instructed that under the law a defendant in a criminal case may take the stand

the testimony of Gomez.²³⁵ Gomez was acquitted and de Luna convicted. The Fifth Circuit reversed de Luna's conviction because of the comments of Gomez's attorney on de Luna's failure to testify.

Although Judge Bell, concurring specially, believed reversal was required because the trial court had not sustained de Luna's objection to the argument and had failed to instruct the jury to disregard the comments of Gomez's attorney, the majority went much further in its analysis. Judge Wisdom, writing for the majority, held that a codefendant's allusion to a defendant's failure to testify infringes fifth amendment rights as much as if the comment comes from the prosecutor or the trial court. But, the majority noted, counsel for the testifying codefendant may have a duty to comment on the failure of a joined defendant to testify that conflicts with the fifth amendment rights of the silent defendant:

These were not casual or isolated references; they were integral to Gomez's defense. And considering the case from Gomez's point of view, his attorneys should be free to draw all rational inferences from the failure of a codefendant to testify, just as an attorney is free to comment on the effect of any interested party's failure to produce material evidence in his possession or to call witnesses who have knowledge of pertinent facts. Gomez has rights as well as de Luna, and they should be no less than if he were prosecuted singly. His right to confrontation allows him to invoke every inference from de Luna's absence from the stand.²³⁶

With that understanding of the rights of the parties, the majority

and testify in his own behalf if he chooses, but the defendant is not required to testify, and you are charged that the failure of the defendant to take the stand in his own behalf in this case will not be considered by you as any evidence at all of his guilt as to the charge contained in the indictment in this case, and in your retirement you will not consider or refer to the fact that the defendant did not testify.

308 F.2d at 143 n.2.

235. The court charged the jury:

The defendant Adolfo O. Gomez has taken the stand and testified in his own behalf in this case. A defendant cannot, in a criminal case, be compelled to take the witness stand and to testify. Whether he testifies or does not testify is a matter of his own choosing.

When, however, a defendant elects to take the witness stand and testify, then you have no right to disregard his testimony because he is accused of a crime. When a defendant does testify, he at once becomes the same as any other witness, and his credibility is to be tested by and subjected to the same tests as are legally applied to any other witness.

308 F.2d at 143.

236. 308 F.2d at 143.

saw only one clear remedy: "If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a codefendant's silence, the trial judge's duty is to order that the defendants be tried separately."²³⁷

Severance does indeed resolve the conflict in duties. Although a *defendant* has a fifth amendment right not to be called to give testimony in his own trial,²³⁸ a *witness* has only a right not to be compelled to answer incriminating questions.²³⁹ Thus, after severance, counsel for a defendant could call the former codefendant to the witness stand and require him to claim his privilege against self-incrimination question by question, for a line of questions, or at least once for all questions, in the presence of the jury. In argument, counsel could then effectively contrast the witness's silence with the courage and candor of his testifying client without injuring the silent former codefendant.²⁴⁰

Severance to avoid the *De Luna* dilemma fosters two objections: first, that such severance might force a witness to invoke the fifth amendment before a jury, and second, that such severance might disrupt the criminal justice system. Each objection is groundless. Some courts hold that a party may not call a witness whom it knows will claim his fifth amendment right and require him to make the claim in the presence of the jury.²⁴¹ If it is estab-

237. 308 F.2d at 141.

238. See V. BALL, R. BARNHART, K. BROWN, G. DIX, E. GELHORN, R. MEISENHOLDER, E. ROBERTS, & J. STRONG, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 130, at 272 (2d ed. E. McCleary 1972) [hereinafter cited as MCCORMICK]:

Basically, the right of an accused is the right not only to avoid giving incriminating responses to inquiries put to him but also to be free from the inquiries themselves. Thus the privilege of an accused allows him not only to refuse to respond to questions directed at his alleged participation in the offense but also entitles him not even to be called as a witness at his own trial.

239. *Id.* § 136.

240. See, e.g., *United States v. Bautista*, 509 F.2d 675, 678 (9th Cir.), *cert. denied*, 421 U.S. 976 (1975):

Taylor, who was in this case in the role of a witness as distinguished from a defendant, could not refuse to take the stand and be examined. His privilege would have arisen only when the answer to some question asked would have tended to incriminate him, and it would have been for the court to say whether silence was justified.

(Footnotes omitted.)

241. See, e.g., *Bowles v. United States*, 439 F.2d 536 (D.C. Cir. 1970), *cert. denied*, 415 U.S. 995 (1971); *United States v. Marquez*, 319 F. Supp. 1016, 1019 n.6 (S.D.N.Y. 1970), *affd.*, 449 F.2d 89 (2d Cir. 1971); *State v. Morales*, 138 N.J. Super. 225, 229, 350 A.2d 492, 495 (App. Div. 1975); *Rodriguez v. State*, 513 S.W.2d 594, 596 (Tex. Crim. App. 1974). ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 7.6(c) (Supp. 1971) provides: "A lawyer should not call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege. In some in-

lished outside the presence of the jury that the witness intends to invoke his fifth amendment right in response to all or substantially all of the questions that could be asked — which would surely be true of a former codefendant not yet tried — trial courts in those jurisdictions would not permit the witness to be called. Nor would they instruct the jury that the witness claimed the fifth amendment or give a missing witness instruction.²⁴² They usually justify their refusals on the grounds that the witness's claim would not assist the defendant's case or that the jury might attach too much importance to the claim because of the high courtroom drama surrounding it.²⁴³

The doctrinal soundness of such decisions is doubtful. They prohibit defensive tactics that suggest rational inferences to the jury, do not infringe upon the witness's privilege against self-incrimination, and are arguably protected by the defendant's right to have compulsory process and to present evidence in his defense. Unless the testifying defendant can require the former codefendant to claim his fifth amendment right in front of the jury in a severed trial, he gained nothing by severing the cases. Indeed, the testifying defendant lost the natural contrast between his testimony and the silence of the codefendant, and, on that score, is worse off after severance than before.

The second objection to the *De Luna* solution — disruption of the judicial dockets — was succinctly expressed by Judge Bell:

[S]everance in advance of trial may be required where there is a representation to the court that one co-defendant does not expect to take the stand while another or others do expect to testify, and claim their right to comment upon the failure of the other to testify. This would eliminate joint trials, or vest in a defendant the right to a mistrial during final arguments, or in the alternative create built-in reversible error, all in the discretion of the defendants.²⁴⁴

But Judge Bell's nightmare has not come to pass. Later cases have quite uniformly limited *De Luna* to circumstances in which the defenses of the testifying and nontestifying defendants are antagonistic.²⁴⁵ As the Fifth Circuit itself explained in *Gurleski v.*

stances, as defined in the Code of Professional Responsibility, doing so will constitute unprofessional conduct." See ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(a) (8) & DR 7-106(c)(7).

242. See *Bowles v. United States*, 439 F.2d 536, 542 (D.C. Cir. 1970), cert. denied, 415 U.S. 995 (1971).

243. See cases cited in note 241 *supra*.

244. 308 F.2d 140, 156 (5th Cir. 1962).

245. See, e.g., *United States v. De La Cruz Bellinger*, 422 F.2d 723, 726-27 (9th Cir.),

United States:²⁴⁶ "The *De Luna* rule applies only when it is counsel's duty to make a comment, and a mere desire to do so will not support an incursion on a defendant's carefully protected right to silence. Clearly, a duty arises only when the arguments of the codefendants are antagonistic."²⁴⁷ And yet *Gurleski's* argument seems strained. Although comment upon silence is more potent when the testifying defendant has accused the silent defendant of responsibility for the offense, *De Luna*, if it is correct at all, should not be limited to such a situation. The silence of a codefendant compares unfavorably with the testimony of a defendant in any case, whether the defenses are antagonistic or not. Other courts have narrowed *De Luna* by limiting what is considered a comment upon silence. Much as courts require that, to be error, prosecutorial comment upon silence refer only to the defendant's silence,²⁴⁸ courts have countenanced arguments by counsel for testifying codefendants that discuss the courage and candor of their clients in taking the witness stand,²⁴⁹ as long as they refrain from comparing that courage and candor directly with the supposed cowardice and evasiveness of the defendant who remained silent. They have even held direct comparisons cured when the trial court sustained an objection and instructed the jury to disregard the argument.²⁵⁰ If courts continue to eviscerate *De Luna*, we may never know if Judge Bell's fears for the judicial system were justified.

Even apart from the penalty exacted for remaining silent when a codefendant has testified, the credibility of the codefendant's testimony may vitally affect the silent defendant. If the codefendant testifies to a defense that includes the silent defendant, such as a joint alibi, then the silent defendant may actually benefit from a joint trial. If the evidence is credible, the silent defendant shares its benefit without running the risks of testifying and being cross-examined. On the other hand, if the jury disbelieves the codefendant's testimony, it is likely to include the silent defendant within its disbelief and anger. The rights of the

cert. denied, 398 U.S. 942 (1970); *United States v. Battaglia*, 394 F.2d 304, 317 (7th Cir. 1968); *Kolod v. United States*, 371 F.2d 983 (10th Cir. 1967); *Hayes v. United States*, 329 F.2d 209, 221-22 (8th Cir.), *cert. denied*, 337 U.S. 980 (1964). The majority position in *De Luna* was flatly rejected in *United States v. McKinney*, 379 F.2d 259, 265 (6th Cir. 1967).

246. 405 F.2d 253 (5th Cir. 1968), *cert. denied*, 395 U.S. 977, 981 (1969).

247. 405 F.2d at 265 (emphasis original).

248. See McCORMICK, *supra* note 238, § 131.

249. See, e.g., *United States v. Shuford*, 454 F.2d 772, 779 (4th Cir. 1971).

250. See, e.g., *United States v. Alpern*, 564 F.2d 755, 761-62 (7th Cir. 1977).

testifying codefendant sharply circumscribe any efforts by the silent defendant to disavow his codefendant's testimony. Thus, the fate of the silent defendant often hinges upon the nature and quality of his codefendant's testimony, an aspect of the trial almost totally beyond his control.

In *United States v. Gambrill*,²⁵¹ two defendants were jointly tried for rape. One defendant elected not to testify, but the other offered testimony that he and the silent defendant were together elsewhere at the time of the offense. The silent defendant, believing that the alibi testimony lacked credibility and damaged his case, wished to disavow it. Since the testimony was superficially beneficial to him, the silent defendant could not cross-examine the codefendant or his witness to impeach them. At the defendant's request, the trial court instructed the jury at the time the testimony was offered and in its general charge that the alibi testimony was being offered only on behalf of the testifying codefendant.²⁵² On appeal from conviction, the D.C. Circuit ordered severance on the ground that the trial court's instructions had informed the jury that the silent defendant did not believe the alibi testimony. Because this message was delivered without sworn testimony from the silent defendant that would be subject to cross-examination, the testifying defendant was deprived of his right to confront witnesses. It would have been permissible, the court believed, for the silent defendant to have taken the stand and testified that the alibi evidence was false, but he could not use the court's instructions to do so. The appellate court also rejected suggestions that the trial court's procedure would have been proper if it had included an instruction to the jury not to draw inferences of falsity from the limiting instruction or if it had instructed the alibi witnesses to delete all references to the silent defendant in their testimony.²⁵³

The problems posed by *Gambrill* can only be solved by separate trials. The testifying codefendant's case was damaged by the instruction that the alibi evidence, although including the silent defendant, was offered only on behalf of the testifying codefendant. The silent defendant may well have been damaged by alibi testimony of dubious truthfulness, testimony that increased

251. 449 F.2d 1148 (D.C. Cir. 1971).

252. In its charge, the trial court said, "At the outset I will repeat what I said earlier at the request of Mr. Gambrill's counsel. That is, that the witnesses called by Mr. Hunter's attorney are offered on behalf of Mr. Hunter, only." 449 F.2d at 1161 n.50.

253. See 449 F.2d at 1163 n.60.

rather than decreased the likelihood of a guilty verdict against both.²⁵⁴ Yet even under *Gambrill*, a defendant cannot remain silent and combat his gratuitous inclusion in the injurious alibi of another.

Whenever one defendant chooses to testify while another chooses to remain silent, any adverse inference the jury naturally draws from silence is heightened by the contrast between the divergent defense strategies. Some courts may believe that conflicts in defense strategy are inevitable in any multi-defendant case.²⁵⁵ For the discerning jurist, however, severance is the obvious and easy solution.

D. *Codefendant Would Testify for Defendant in a Separate Trial*

Joint trials can sometimes produce a converse of antagonistic defenses that is even more troubling: a codefendant may be willing to testify on behalf of a defendant but refuse to do so in a joint trial because his testimony may adversely affect his own defense. In this situation, joinder can preclude a defendant from presenting testimony that may be crucial to his defense. Some courts have recognized obtaining the beneficial testimony of a codefendant as among the most compelling reasons for granting

254. Even when a codefendant presents an alibi that does not include the defendant within its exculpatory intent, the quality of the codefendant's defense may affect the defendant. For example, in *United States v. De Larosa*, 450 F.2d 1057 (3d Cir. 1971), *cert. denied*, 405 U.S. 927, 405 U.S. 957 (1972), the alibi witnesses of the codefendant were hostile while testifying and all had criminal records, one for perjury, which were introduced into evidence. During the same trial, codefendant Jones, while testifying in his own defense, stated that he had first met codefendant Noel in prison. Noel had declined to testify in order to keep his criminal record from the jury. The appellate court found that the trial court's instruction to disregard the reference to Noel's imprisonment was sufficient to cure the prejudice. 450 F.2d at 1062-63.

255. In *State v. Fitzpatrick*, ___ Mont. ___, 569 P.2d 383 (1977), each of four defendants claimed that joinder denied effective assistance of counsel on the following grounds:

(1) The number of defendants and independent counsel made it impossible to employ effective trial tactics; (2) one defendant or another disqualified a district judge or challenged a juror that another defendant would have allowed to remain in the case; (3) certain counsel delved into areas on cross-examination that merely repeated the state's case against particular defendants; and (4) all defendants, with the exception of Radi, elected to rest their cases following the state's case-in-chief, thus compelling Radi to rest.

___ Mont. at ___, 569 P.2d at 393. The court responded to these claims by stating that they "could be raised in almost any multiple defendant-counsel proceeding. It would be most unusual, in our opinion, if four defense counsel representing individual clients did agree on every question of trial tactics." ___ Mont. at ___, 569 P.2d at 393.

a severance,²⁵⁶ but other courts have adopted an extremely cynical position, apparently viewing this ground of severance as an "alibi-swapping device."²⁵⁷

It is not surprising that some courts take a cynical attitude. Severance to obtain a codefendant's testimony will work only in limited circumstances. Moreover, it presents the court with a number of difficult problems, beautifully illustrated in the recent case of *United States v. Gay*.²⁵⁸ Dixon, Harris and Gay were indicted for conspiracy to possess heroin with intent to distribute it and for possession and distribution of heroin. Dixon sought severance, asserting that if the cases were severed, Harris would testify that Dixon "was not involved in the narcotic transaction."²⁵⁹ Harris confirmed this and asked to be tried first to forestall the admission of his testimony for Dixon at his own trial. The trial court thought the defendants were "playing games"²⁶⁰ and offered to sever the cases only on the following conditions: that Dixon be tried first and that Harris waive his privilege against self-incrimination at each trial so that if he did not testify for Dixon the government could call him at Dixon's trial and so that in any event the government could call him at his own trial.²⁶¹ Not surprisingly, Harris rejected that offer, and the trial court denied the motion for severance. The following colloquy ensued:

MR. SHERMAN [Counsel for Dixon]: Your Honor, may I just inquire of the Court as to why, if there is a severance, why would it be necessary for Mr. Harris to have to incriminate himself at his own trial if he wishes to testify on behalf of the codefendant?

THE COURT: Counsel, I am not going to answer any questions for you.²⁶²

After joint trial, all three defendants were convicted and the

256. See, e.g., *United States v. Shuford*, 454 F.2d 772, 777 (4th Cir. 1971); *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970); *United States v. Echeles*, 352 F.2d 892, 897 (7th Cir. 1965).

257. *State v. Talavera*, 243 So. 2d 595, 597 (Fla. 1971) (judgment vacated on federal habeas corpus for failure to provide the defendant an opportunity to show the trial court constitutional grounds for severance; habeas writ upheld in *Talavera v. Wainwright*, 468 F.2d 1013 (5th Cir. 1972)). Other courts have expressed great skepticism about the veracity of proffered testimony. See *United States v. Rosa*, 560 F.2d 149 (3d Cir.), cert. denied, 434 U.S. 862 (1977) (suspicions aroused by timing of the motion for severance and familial relationship of codefendant to defendant).

258. 567 F.2d 916 (9th Cir.), cert. denied, 435 U.S. 999 (1978).

259. 567 F.2d at 917 n.1.

260. 567 F.2d at 923.

261. See 567 F.2d at 917, 922.

262. 567 F.2d at 923.

convictions were affirmed by the Ninth Circuit. The appellate court characterized Harris's offer to testify for Dixon if he were tried first as conditional²⁶³ and held that the trial court was within the bounds of discretion in denying it on that ground. The appellate court doubted whether Harris could be forced to waive his privilege against self-incrimination as a price of severance,²⁶⁴ but it did not doubt the propriety of the trial court's ruling that Dixon, not Harris, would be tried first. Although it would appear that the trial court's insistence that Dixon be tried first was intended to preclude Harris from testifying,²⁶⁵ the appellate court held that the trial court's action was in fact designed to ensure that "the separate trials would be scheduled and conducted under the same rules and with the same consequences as if the defendants had been separately indicted."²⁶⁶

Gay reveals the many considerations that a trial court must bear in mind when faced with a motion for severance to obtain a codefendant's testimony. First, no matter how critical the testimony, a defendant cannot violate a codefendant's privilege against self-incrimination.²⁶⁷ He may not compel a codefendant to testify in a joint trial;²⁶⁸ he may not even call the codefendant as a witness and force him to plead the fifth amendment before the jury.²⁶⁹ A defendant may not comment upon a codefendant's failure to take the stand in a joint trial.²⁷⁰ As long as they are

263. 567 F.2d at 917. The offer to testify for Dixon was, of course, conditioned upon Harris being tried first. Presumably, all such offers to testify are so conditioned because if the codefendant were willing to testify for another before his own case was tried, that would be tantamount to testifying in his own trial. The court's action in disqualifying the motion for severance on the ground that the offer to testify was conditional was based upon *United States v. Rice*, 550 F.2d 1364 (5th Cir.), *cert. denied*, 434 U.S. 954 (1977). *Rice* is, however, distinguishable in that the Fifth Circuit in that case interpreted the offer to testify to mean that "[w]hatever the testimony, it was contingent upon Alvarez not being required to testify to anything which might tend to incriminate him." 550 F.2d at 1370. Such an offer is much more limited than one which merely seeks to have the offeror tried first.

264. *See* 567 F.2d at 917-18 n.2.

265. There is, for example, no indication that the attorney for the government had any legitimate preference about who should be tried first if a severance were granted to enable Dixon to obtain the testimony of Harris.

266. 567 F.2d at 920.

267. *See generally* McCORMICK, *supra* note 238, § 141.

268. McCORMICK, *supra* note 238, § 130.

269. *See, e.g.,* *Coleman v. United States*, 420 F.2d 616 (D.C. Cir. 1969); *United States v. Carella*, 411 F.2d 729 (2d Cir.), *cert. denied*, 396 U.S. 860 (1969).

270. Although such a prohibition would seem compelled by the principle of *Griffin v. California*, 380 U.S. 609 (1965), the question is somewhat clouded by *De Luna v. United States*, 308 F.2d 140 (5th Cir. 1962). *De Luna* is discussed in text at notes 231-50 *supra*.

joined for trial, the codefendant alone decides whether he will testify. Of course, he will rarely testify in a joint trial if testifying harms his own interests — altruism does not typify the behavior of criminal defendants. And there are many good reasons not to testify. Truthful testimony might assure conviction. Even if the testimony would help his cause, a codefendant might prefer that the jury not learn of his criminal record. He might simply be too nervous or inarticulate to make a good witness.²⁷¹ Thus, joinder often guarantees that a defendant will not be able to use a codefendant's testimony in fashioning his defense.

Second, the codefendant with helpful testimony must be tried first if severance is to offer any improvement.²⁷² Otherwise, his testimony could be used against him, even if he does not testify at his own trial,²⁷³ and he would be just as unwilling to help his comrade as if the cases were still joined.²⁷⁴ Even after being tried first, a codefendant may feel uncomfortable testifying, perhaps because he fears additional charges or because he hopes for a new trial. If his concerns are realistic, his privilege against self-incrimination still protects him; he may decide to waive whatever remains of his privilege,²⁷⁵ but he may renege on his earlier offer

271. See A. AMSTERDAM, B. SEGAL & M. MILLER, *supra* note 26, at 1-386 to -392 for a brief discussion of the considerations that should inform the decision whether to put a defendant on the witness stand.

272. See 567 F.2d at 920.

273. MCCORMICK, *supra* note 238, § 132.

274. Some courts, in affirming denials of severance, express doubt about whether severance would have been efficacious, in view of the uncertainty about whether the codefendant would be tried first, ignoring the obvious truth that the same considerations that require severance also require an order that the codefendant be tried first. See, e.g., *United States v. Jackson*, 549 F.2d 517, 524 (8th Cir.), *cert. denied*, 430 U.S. 985, 431 U.S. 923, 431 U.S. 968 (1977): "Severance of Muhammad would not automatically have created an environment in which his codefendants could have testified without waiving their Fifth Amendment rights. If Muhammad had been severed and tried first, his codefendants would have had to waive their Fifth Amendment rights in order to testify on his behalf."

When appellate courts hold that trial courts have abused discretion in not granting severance in this situation, they usually do no more than suggest that it might be appropriate to set the cases of the testifying codefendants first. See, e.g., *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970); *United States v. Echeles*, 352 F.2d 892, 898 (7th Cir. 1965): "[W]e do not feel it would have been egregious had the trial judge, after granting the motion for separate trial, also directed the Government to proceed first with the case against Arrington." Admittedly, order-of-trial problems can become quite complicated when more than one defendant wishes to call a codefendant as a defense witness. See *United States v. Finkelstein*, 526 F.2d 517, 523-25 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976).

275. For example, in *United States v. Echeles*, 352 F.2d 892 (7th Cir. 1965), an attorney, Echeles, and his former client, Arrington, were indicted for suborning perjury and perjury respectively. Arrington had stated three times in his earlier criminal proceed-

instead.²⁷⁶ The court, therefore, must assess the likelihood that the codefendant will actually testify when the smoke has cleared. Numerous motions for severance have been denied because the trial court was not persuaded that the codefendant would in fact testify when called upon to do so.²⁷⁷

Third, the codefendant may be unwilling, for tactical reasons, to reveal the nature of his testimony. Occasionally, prior proceedings may reveal a codefendant's testimony,²⁷⁸ but when they do not, trial courts quite properly insist upon more than affidavits that merely promise exculpatory or beneficial testimony.²⁷⁹ The codefendant, on the other hand, has no desire to give

ings that Echeles had not advised him to commit perjury. After holding that severance should have been granted and that the trial court could have directed the government to try Arrington first, the court addressed the concern that there would still be no guarantee that Arrington would testify for Echeles:

Speculation about what Arrington might do at a later Echeles trial undoubtedly would be a matter of some concern to Echeles, but he should not be foreclosed of the possibility that Arrington would testify in his behalf merely because that eventuality was not a certainty. . . . Moreover, it would in fact seem more likely than not that Arrington would have testified for Echeles for the reason that three times previously, in open court, Arrington had voluntarily exculpated Echeles, apparently contrary to his own penal interest.

352 F.2d at 898.

276. See generally *McCORMICK*, *supra* note 238, § 139.

277. See, e.g., *United States v. Thomas*, 453 F.2d 141 (9th Cir. 1971), *cert. denied*, 405 U.S. 1069 (1972); *United States v. Kilgore*, 403 F.2d 627 (4th Cir. 1968), *cert. denied*, 394 U.S. 932 (1969). If the appellate court is persuaded that the testimony sought is important to the moving party, it will require severance even if there is no guarantee that the testimony will be forthcoming. *United States v. Shuford*, 454 F.2d 772, 778 (4th Cir. 1971):

This is not to say that it is beyond question that Jordan's testimony would be forthcoming after severance. The movant is not put to such stringent proof. A reasonable probability appearing that the proffered testimony would, in fact, materialize, Shuford should not have been foreclosed from the benefits of Jordan's pivotal testimony simply because that probability was not an absolute certainty.

278. See *United States v. Starr*, 584 F.2d 235 (8th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *United States v. Echeles*, 352 F.2d 892 (7th Cir. 1965). See also *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222 (codefendant had confessed to the offense and named one other than defendant as his partner), *vacated and remanded*, 429 U.S. 809 (1976).

279. In *United States v. Jackson*, 549 F.2d 517 (8th Cir.), *cert. denied*, 430 U.S. 985, 431 U.S. 923, 431 U.S. 968 (1977), four codefendants of defendant Muhammad offered to testify for him but only in a severed trial. When asked about the nature of the testimony that would be given, each claimed the fifth amendment. Denial of severance was upheld on appeal. Although other factors were involved, the appellate court emphasized the undisclosed nature of the offered testimony:

The trial court was, accordingly, asked to take the extreme step of severing Muhammad without any knowledge of the nature or extent of purportedly exculpatory evidence and without any indications that co-defendants would in fact be willing to offer such evidence in the event of severance. The bald and conclusory assertions of Muhammad's co-defendants that they possessed potentially exculpatory evi-

away either his own case or the defendant's. This stalemate may be resolved by permitting a codefendant to disclose the testimony he would present on behalf of another in chambers, without revealing it to the prosecutor.²⁸⁰ The proffer could be sealed in the record to permit full appellate review of the trial court's ruling on the motion for severance. Under such a procedure, trial courts could preview the offered testimony before deciding whether to grant severance, without disclosing the testimony prematurely.

Assuming the trial court has some idea of what the testimony will be, a fourth determination remains: how important is the testimony to the defendant's case? If the testimony would provide the only defense in the case, the analysis is easy. Usually, however, the court must make a more difficult judgment. In making this judgment, courts have usually asked the wrong questions. They ask, for example, whether the testimony exculpates the defendant or "merely" impeaches a government witness,²⁸¹ whether the testimony is the only evidence of a fact or "merely" corroborates other defense evidence.²⁸² Courts legitimately want not to order severance when the codefendant's testimony is too weak to warrant it, but the strength of evidence is not determined by whether it is exculpatory rather than impeaching, unique rather than corroborative. Consider a very typical case: The defendant's own testimony is not enough to avert a guilty verdict; without anything to impeach the government witness, the defendant would lose; but when the codefendant "merely" corroborates the defendant's alibi²⁸³ and "merely" impeaches the govern-

dence did not provide adequate grounds for pre-trial severance in this multi-defendant trial.

549 F.2d at 524.

280. See, e.g., FED. R. CRIM. P. 14, which provides in part: "In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial." This would prevent disclosure to the nondeclarant defendants, who would otherwise have no right to discover it. See FED. R. CRIM. P. 16.

281. See, e.g., *United States v. Abraham*, 541 F.2d 1234 (7th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977); *Jackson v. United States*, 329 A.2d 782, 788 (D.C. App. 1974).

282. *United States v. Jackson*, 549 F.2d 517, 525 (8th Cir.), *cert. denied*, 430 U.S. 985, 431 U.S. 923, 431 U.S. 968 (1977); *United States v. Thomas*, 453 F.2d 141, 144 (9th Cir. 1971), *cert. denied*, 405 U.S. 1069 (1972). See also *United States v. Gay*, 567 F.2d 916, 921 n.7 (9th Cir.), *cert. denied*, 435 U.S. 999 (1978).

283. See A. AMSTERDAM, B. SEGAL & M. MILLER, *supra* note 26, at 1-396:

It is vital to corroborate the defendant on every point on which corroboration is possible. Nothing should be left to rest on the defendant's unsupported testimony if there is any extrinsic proof of substance to support it. . . . Every matter in which

ment witness's motive by testifying to a prior inconsistent statement, the jury quickly accepts the defendant's arguments. Courts must look to what *difference* particular testimony makes, not to whether it is independently conclusive.

Severance to obtain a codefendant's testimony poses greater potential disruption of the trial process than other grounds of severance. Severance on this ground deals with whether the defendant will be able to present defense evidence to the trier of fact, and thus affects nonjury as well as jury trials. Further it requires an order that the codefendant be tried first. Because severance is granted to permit testimony in the second of the severed cases, two trials are likely, rather than one trial followed by nontrial disposition of the other.²⁸⁴

Balanced against those considerations, however, is the possibility that a joint trial will preclude an effective defense. If severance is denied, that decision may contribute to the conviction of an innocent person. For that reason alone, this ground of severance should command the most sympathetic attention of the trial courts.

E. Codefendant's Criminal Record

Another danger of joinder is that a defendant may be prejudiced by his codefendant's criminal record. A defendant's record of convictions is ordinarily not admissible against him because of his right to be tried on the offense charged and not on his criminal background.²⁸⁵ There are, however, numerous exceptions to this prohibition, and a defendant's record is often admitted for limited purposes.²⁸⁶ The jury is instructed about the limited use to

he is supported by proof that the trier of fact is likely to believe has a capacity to spread and envelop his testimony with an atmosphere of veracity. He needs this badly, since his testimony is suspect for obvious self-interest.

284. See text at notes 37-40 *supra*.

285. See generally McCormick, *supra* note 238, § 190.

286. Evidence of a criminal conviction may be admissible because it is an element of the offense charged. For example, driving while intoxicated by one who has previously been convicted of that offense is frequently made a felony. See, e.g., TEX. STAT. ANN. art. 67011-2 (Vernon 1977). To prove its charge under such a statute, the prosecution must prove the earlier conviction and the current incident.

A defendant's record may also be used as predisposition evidence when entrapment is raised. If the defendant has been convicted of a similar offense, it is less likely that he was an innocent person entrapped by the creative activity of a government agent. See *Sherman v. United States*, 356 U.S. 369, 375 (1958); *Sorrells v. United States*, 287 U.S. 435, 451 (1932).

A record may be admitted to determine the credibility of the defendant's testimony.

which it is supposed to put the record, but some jurors may consider earlier convictions as evidence of the defendant's criminal propensities and convict him accordingly. Joinder exacerbates this problem because evidence of a codefendant's record may reflect prejudicially on the other defendant.

On the one hand, the jury may favor a defendant when it learns of a codefendant's earlier conviction but not of the defendant's. It might assume (perhaps erroneously) that the defendant must not have a record, and acquit him. On the other hand, the codefendant's record might unfairly prejudice the defendant. To the extent the defenses of the defendant and the codefendant interlock, the defendant's case may fall with the codefendant's. The jury might also disbelieve a defendant's contention of innocence because of his association with someone with a record, tarring both defendants as "birds of a feather." Finally, if the evidence against each is similar enough to warrant identical treatment of the parties, the jury may convict one defendant only to avoid acquitting a codefendant with a record.

This type of prejudice has aroused the concern of some states. A Texas statute, for example, mandates severance if one defendant has an admissible conviction and the other does not.²⁸⁷ Kentucky courts recognize a presumption of prejudice from joinder of a defendant with a codefendant who is charged under the habitual offender law.²⁸⁸ But most states approach the problem on an ad hoc basis and require the defendant to show actual prejudice before compelling severance. For example, in *Davis v.*

Ordinarily, the conviction must be for a felony or for certain misdemeanors, such as those involving "moral turpitude" or "dishonesty or false statement." See FED. R. EVID. 609. A defendant's record may also be used to enhance punishment under a habitual offender statute. See, e.g., *Spencer v. Texas*, 385 U.S. 554 (1967).

287. TEX. CODE CRIM. PROC. ANN art. 36.09 (Vernon Supp. 1978) provides in part that "in cases in which, upon timely motion to sever, and evidence introduced thereon, it is made known to the court that there is a previous admissible conviction against one defendant . . . the court shall order a severance. . . ." This provision has been interpreted to require proof that one defendant has a prior conviction admissible in evidence while the moving defendant has no prior admissible conviction. See, e.g., *Robinson v. State*, 449 S.W.2d 239, 240 (Tex. Crim. App. 1969).

288. In *Hardin v. Commonwealth*, 437 S.W.2d 931, 933 (Ky. Ct. App. 1968), the court concluded that joinder "for trial with a defendant being tried under the habitual criminal statute is inherently prejudicial to a defendant who is not accused under that statute." In *Jones v. Commonwealth*, 457 S.W.2d 627, 629 (Ky. Ct. App. 1970), *cert. denied*, 401 U.S. 946 (1971), the court interpreted its earlier statement in *Hardin* to establish merely a presumption of prejudice that could be overcome by evidence, and it indicated that the trial court's denial of a motion for severance in the absence of contrary evidence could, on appeal, be harmless error.

State,²⁸⁹ the defendant was indicted for auto theft with a codefendant who was alleged in the same indictment to have four prior convictions of auto theft. The trial court denied severance. Although the entire indictment, including the allegations of the codefendant's convictions, was read to the jury when the trial began,²⁹⁰ the appellate court affirmed the conviction because the defendant could specify no particular prejudice from the procedure. As long as an appellate court can conceive of a trial that does not prejudice the defendant, it seems unlikely that he will prevail in many jurisdictions without direct proof of prejudice.

Curiously, however, when the codefendant's record is *improperly* revealed to the jury, some courts are quick to find that action also prejudicial to the defendant. But to the defendant, an improper admission is no more damaging than a proper one. In *People v. Shuler*,²⁹¹ for example, the jury incorrectly learned of a codefendant's earlier murder conviction. In reversing the defendant's conviction, the court commented: "The evidence against both defendants was almost identical, and the only logical verdict would have been a conviction of both defendants or an acquittal of both of them."²⁹² In a similar case, *People v. Watson*,²⁹³ the court, in reversing the conviction of a defendant because testimony of a previous arrest was improperly admitted against a codefendant, commented:

The two men were being tried together for one criminal act. In the minds of the jurors, the two men must have appeared as a single unit. . . . When the jury discovered that Harris had an arrest record, it is reasonable to conclude that this fact tainted its view of Watson. It is a simple matter of "guilt by association."²⁹⁴

In each case the appellate court had earlier reversed the conviction of the codefendant²⁹⁵ and may have believed that justice between the defendants required it also to reverse the conviction of the defendant. Yet the court surely would not have done so unless it felt that the codefendant's record had prejudiced the defendant. Courts should recognize that the damage to the defen-

289. 129 Ga. App. 796, 201 S.E.2d 345 (1973).

290. 129 Ga. App. at 796, 201 S.E.2d at 346 (syllabus by the court).

291. 55 App. Div. 2d 609, 389 N.Y.S.2d 383 (1976).

292. 55 App. Div. 2d at 609, 389 N.Y.S.2d at 383.

293. 55 App. Div. 2d 873, 390 N.Y.S.2d 116 (1977).

294. 55 App. Div. 2d at 873, 390 N.Y.S.2d at 117.

295. Shuler's codefendant's conviction was reversed in *People v. Gardella*, 55 App. Div. 2d 607, 389 N.Y.S.2d 118 (1976), and Watson's in *People v. Harris*, 52 App. Div. 2d 560, 382 N.Y.S.2d 322 (1976).

dant is not less great when the codefendant's record is properly admitted, and should sever all defendants when one has a record that is admissible at trial.

F. *Lifestyle of Codefendant or Codefendant's Counsel*

Joinder may place a defendant on trial with a codefendant whose way of living, manner of dress, or philosophy of existence offends some members of the jury. The jury may express its displeasure with an unfavorable verdict, and may spill some of its disfavor onto the defendant. Ordinarily this is not grounds for severance, but it is still a factor to be considered when evaluating the soundness of joinder as a judicial institution. In *United States v. De Larosa*,²⁹⁶ three of the four defendants prosecuted jointly for bank robbery claimed prejudice to their cases on the ground that the fourth defendant wore clothes commonly associated with "Black Militants" and used a name also associated with that group. The court rejected the claim, commenting, "Severance was not required by the unfavorable impression which may have been created by [the fourth defendant's] identification with an unpopular social and political group."²⁹⁷ In *Merrill v. State*,²⁹⁸ the defendant, charged with possession of marijuana, moved for severance on the ground that while he and his attorney were clean shaven, both codefendant and his attorney exhibited full, long beards and long hair in an unkempt state. The court let this claim pass with the comment that it was a "cosmetic handicap."²⁹⁹

But although severance is not always appropriate in these cases, such factors as appearance or lifestyle nevertheless do affect jury deliberations, despite efforts to neutralize them. It is one thing for prejudice of this sort to influence the decision of the jury

296. 450 F.2d 1057 (3d Cir. 1971), *cert. denied*, 405 U.S. 927, 405 U.S. 957 (1972).

297. 450 F.2d at 1065. The fourth defendant's participation introduced other risks of prejudice. His alibi witnesses all had criminal records, which were revealed to the jury, and one had previously been convicted of perjury. They were also described as "hostile" witnesses. Furthermore, some physical evidence was relevant only to the fourth defendant's participation in the offense, but was admitted and was argued by the prosecutor to corroborate the accomplice's testimony as to the guilt of all four.

298. 130 Ga. App. 745, 204 S.E.2d 632 (1974).

299. 130 Ga. App. at 748, 204 S.E.2d at 636. There was an additional ground for severance. The defendant's motion stated that he intended only to introduce his unsworn statement in defense while his codefendant intended to introduce testimony. Under Georgia law, had the defendant been tried separately, his counsel would have been given the right to make the final argument to the jury because no testimony was offered in defense, but if the codefendant testified, then both defendants would forfeit this right. The court also rejected this contention.

as to the person against whom the bias is directed, but it is quite another, more serious matter if the prejudice taints one who is merely joined for trial with that person. Courts should, therefore, guard against this type of prejudice by severing defendants where necessary.

G. *Trial Occurrences That Cannot Be Reasonably Anticipated*

Special problems arise when grounds for prejudice unexpectedly emerge after a joint trial is underway. Most types of prejudice — such as those already discussed — can usually be anticipated and raised in a pretrial motion for severance.³⁰⁰ No pretrial planning can prepare a defendant for the unexpected actions of his codefendants. A codefendant may plead guilty during the trial. A codefendant may flee. Or a codefendant may disrupt a trial with his behavior. In all these cases, the remaining defendants must face a jury that already has something to hold against one defendant; the danger in a joint trial is that the jury will use this prejudice to convict another defendant who had no control over his codefendant's actions. A jury may reason, for example, that if a codefendant flees during the trial he is guilty. From this conclusion, it may reason that defendants joined with the one who fled are guilty, too. Similarly, a jury whose patience has been severely tried by a disruptive defendant may express its displeasure by convicting all the codefendants. Courts try to overcome this prejudice with remedial instruction, but often severance is the only workable solution.

*United States v. Beasley*³⁰¹ illustrates the problem. Beasley was tried jointly with several other defendants for income tax evasion. During the trial, all Beasley's codefendants pleaded guilty, leaving him to face the jury alone. The trial judge did not explain to the jury why some defendants were periodically disappearing from the defense counsel's tables, and Beasley did not request any such explanation. On appeal, however, he urged that the court's failure to explain was plain error.³⁰² The appellate court recognized that the jury might guess that the other defendants had pleaded guilty and therefore assume that Beasley was also guilty.³⁰³ Nevertheless, it ruled that an explanatory instruc-

300. FED. R. CRIM. P. 12(b) provides in part: "The following must be raised prior to trial: . . . (5) Requests for a severance of . . . defendants under Rule 14."

301. 519 F.2d 233 (5th Cir. 1975), *vacated and remanded*, 425 U.S. 956 (1976).

302. See FED. R. CRIM. P. 52(b).

303. The court stated that, "the strong probability of prejudice to Beasley emanating

tion³⁰⁴ was not necessary since the remaining defendants had not asked for it.³⁰⁵ The court's belief that an explanatory instruction would cure the prejudice³⁰⁶ seems unjustified: by settling the jury's doubts about the fate of the other defendants, it could harm the defendant just as easily as it could help him. The prejudice in *Beasley* would persist with or without an instruction. The court's opinion seems particularly strange because the same court has reversed convictions of defendants where a codefendant pleaded guilty *before* the trial and the trial court instructed the jury of the plea and that it should not be considered as evidence

from the guilty pleas of all three of his codefendants cast a substantial shadow on the fairness of the trial proceedings." 519 F.2d at 238. Further,

This was a lengthy trial. As the evidence before the jury mounted, defendants began to disappear without explanation. It is possible that some jurors may have attributed their absences to dismissal, severance, mistrial, illness or some condition short of confessed guilt. . . . It is . . . equally possible that the jury surmised that pleas of guilty caused the disappearance of Matthews, Wilson and Finley. If this is what they thought, did it affect their weighing of Beasley's guilt?

519 F.2d at 239. Finally, the defendants were charged with conspiracy and the crime of conspiracy by its very nature may lend itself to an improper jury finding of guilt by association with those found to be participants in the conspiracy rather than the required finding of guilt based upon proof beyond a reasonable doubt that the defendant participated in the conspiracy. This danger of transferred guilt is acute in this case where the evidence against the sole remaining defendant repeatedly refers to his relationship with persons who have suddenly and unexplainedly disappeared from the trial.

519 F.2d at 239.

304. The instruction in question is one "advising the jury that a codefendant has pleaded guilty coupled with an instruction that such plea cannot be considered as evidence of the guilt of the remaining defendant." 519 F.2d at 239.

305. The appellate court speculated that an explanatory instruction may not have been requested by Beasley's counsel for tactical reasons, believing that "to emphasize the admitted guilt of those others named in the indictment would have been even more prejudicial" than to permit the jury to speculate about the fates of the former codefendants. 519 F.2d at 240.

The appellate court did not consider what the trial court should do when one of the remaining defendants requests the instruction while another objects to it. Presumably, the trial court must give the instruction. If so, then the tactical decision of the attorney who does not wish the instruction, which the court acknowledged was a realistic and legitimate consideration in the context of its plain error discussions, is overridden by the wishes of a codefendant who, for whatever reason, views the tactical situation differently. Of course, once the trial court has been required to make the instruction, it must encompass all remaining defendants, or else the jury is invited to make a totally irrational judgment that the plea is evidence of one codefendant's guilt but not of another's.

306. The court said that an instruction revealing the pleas of guilty but directing the jury to draw from them no inference as to the remaining defendant's guilt "will prevent improper inferences that the codefendants' absence has something to say for the remaining defendant's guilt." 519 F.2d at 239. Of course, this is the same instruction that the court had earlier said might do more harm than good. See note 305 *supra*.

of the remaining defendant's guilt.³⁰⁷ Yet prejudice in that case is surely not as strong as when the jury has seen the pleading defendants participate in the trial.

A problem similar to that in *Beasley* can arise when a co-defendant flees the jurisdiction during the trial³⁰⁸ or in some way disrupts the trial.³⁰⁹ Again, the jury may infer a defendant's guilt from the actions of a codefendant. The usual judicial response has been remedial instruction,³¹⁰ but it is not clear that juries are really able to follow these instructions. Understandably, courts

307. See *United States v. Vaughn*, 546 F.2d 47 (5th Cir. 1977); *United States v. Hansen*, 544 F.2d 778 (5th Cir. 1977). In *Hansen*, the court criticized the action of the trial court:

We think this is a bad practice which ought not, and must not, be followed. Trial Courts have an abundance of resources to handle situations where the plea occurs after the jury has been exposed to the array of the multiple defendants and has likely heard the reading of an incriminating indictment embellished by the prosecutor's opening statement and perhaps testimony of government witnesses. But there is no need to advise the jury or its prospective members that some one not in court, not on trial, and not to be tried, has pleaded guilty. The prejudice to the remaining parties who are charged with complicity in the acts of the self-confessed guilty participant is obvious.

544 F.2d at 780.

308. When a defendant flees after trial has begun, the trial may proceed in his absence. See FED. R. CRIM. P. 43. A judge may instruct the jury that flight is evidence of guilt. See *McCORMICK*, *supra* note 238, § 271. Some courts have speculated that the flight of one defendant may lead the jury to believe that those who stayed are not guilty. See, e.g., *United States v. Lobo*, 516 F.2d 883 (2d Cir.), *cert. denied*, 423 U.S. 837 (1975). But assuming such a favorable inference is surely questionable.

309. A court can take strong measures against a disruptive defendant under *Illinois v. Allen*, 365 U.S. 337 (1970), and these measures might reflect unfavorably on joined defendants. A jury might not punish a defendant who has observed rules of courtroom behavior, and some courts have noted this as reason to deny a new trial. In *Commonwealth v. Flowers*, ___ Mass. App. Ct. ___, 365 N.E.2d 839, *cert. denied*, 434 U.S. 1077 (1977), *Flowers* and *White* were tried for robbery. *Flowers* elected to represent himself and disrupted the trial on several occasions. On appeal, *White* contended that *Flowers's* behavior had prejudiced him in the eyes of the jury. The court did not agree:

White argues that *Flowers's* conduct was such as to engender sympathy for the Commonwealth and was thus harmful to him. The record does not support any such conclusion. If anything, we are more inclined to the view that if the jury's sympathy was directed toward anyone, it would have been toward *White* and his counsel.

___ Mass. App. Ct. at ___, 365 N.E.2d at 847. On the other hand, the jury may conclude that the passive defendant is as bad as the disruptive one because they were being tried together. The jury might also be so annoyed by the disruptions that it will not examine the evidence with the required detachment.

310. As to fleeing codefendants, see, e.g., *People v. Smith*, 63 Mich. App. 35, 233 N.W.2d 883 (1975); *People v. Shepherd*, 63 Mich. App. 316, 234 N.W.2d 502 (1975) (holding that such an instruction need be given only if requested by the remaining defendant).

As to disruptive codefendants, see, e.g., *United States v. Marshall*, 458 F.2d 446 (2d Cir. 1972); *Commonwealth v. Flowers*, ___ Mass. App. Ct. ___, 365 N.E.2d 839, *cert. denied*, 434 U.S. 1077 (1977).

fear allowing defendants to force a court into granting severance where it does not want to,³¹¹ and a disruptive defendant might be misbehaving only for that purpose. Nonetheless, whatever advantages a defendant might gain from severance will probably be lost because of his behavior,³¹² and in any case this danger does not lessen the prejudice that well-behaved defendants might suffer.

Rather than trying to cure prejudice through instruction, courts should be more forthright in their analysis. They should acknowledge that a defendant cannot control the actions of his codefendants. They should recognize that a jury will often infer guilt from the action of one defendant and then apply that inference to another defendant. As long as defendants are joined, nothing can repair the prejudice caused by a codefendant pleading guilty, fleeing the jurisdiction, or disrupting a trial. Trial courts should accept that, in these cases, the efforts to preserve joinder are often more costly than severance, and they should order separate trials whenever they would serve the cause of justice.

311. For example, in *United States v. Bamberger*, 465 F.2d 1119 (3d Cir.), *cert. denied*, 406 U.S. 969 (1972), 413 U.S. 919 (1973), two defendants complained of the conduct of two other defendants during their joint trial. In the words of the appellate court,

Young made the following outbursts, *inter alia*: "white people carry us through this mock justice. And the judge sitting up there acting all dignified, with his mess;" "we didn't have nothing when you came to pick us up 400 years ago and put us in chains. It ain't no different today, you are the same devils, braggarts, braggarts, braggarts." In open court, he called F.B.I. agent Keogh a liar, and branded F.B.I. agent Childers an "arch-liar." Bamberger continually interrupted the testimony of F.B.I. agent Hale, and climaxed this activity by swallowing government exhibit G-77.

456 F.2d at 1127.

The appellate court rejected the contention that the misconduct posed a sufficiently grave risk to the rights of the passive defendants to require the trial court to grant a mistrial and severance:

Courtroom outbursts and disruptions, lately occurring with increased frequency, although regrettable and deplorable, cannot be seized upon in and of themselves as justifications for retrials. "If such conduct by a co-defendant on trial were held to require a retrial it might never be possible to conclude a trial involving more than one defendant; it would provide an easy device for defendants to provoke mistrials whenever they might choose to do so."

456 F.2d at 1128 (quoting *United States v. Aviles*, 274 F.2d 179, 193 (2d Cir. 1960)).

312. There is a substantial risk of being held in contempt of court, *see, e.g.*, *Illinois v. Allen*, 379 U.S. 337, 344 (1970), and a substantial likelihood that the trial court will manage a vivid recollection of the events when it is time for sentencing the disruptive defendant, *see, e.g.*, *United States v. Grayson*, 438 U.S. 41 (1978) (permissible for trial judge to increase sentence because of a belief that the defendant committed perjury in his own defense).

IV. SUGGESTIONS FOR FUNDAMENTAL CHANGE

Legislation and rules of court have moved steadily toward a greater reliance on joint trials to dispose of criminal cases in which more than one actor is allegedly involved. In 1930, the American Law Institute reported in its Code of Criminal Procedure that statutes in twenty-two jurisdictions granted a criminal defendant the right to a separate trial in felony cases.³¹³ In 1968, the American Bar Association Project on Standards for Criminal Justice reported that only eight jurisdictions provided by statute or rule for severance in felony cases upon demand of a defendant.³¹⁴ Since then, five of those jurisdictions have provided for severance in the discretion of the trial court.³¹⁵

Only the Uniform Rules of Criminal Procedure, promulgated in 1974, run counter to this trend. Rule 472 provides in part:

[U]pon motion of the prosecuting attorney or defendant . . . the court shall sever . . . defendants unless it determines that because of a significant risk that material evidence which cannot otherwise be preserved will be lost, the severance would defeat the ends of justice.³¹⁶

In light of the substantial risk of prejudice inherent in joint trials, the position taken in the Uniform Rules is correct. The uncertain benefits of joint trials and the mischief they so frequently work justify a statute or rule of court giving defendants rights to separate trials. While it may be argued that an absolute right to severance cuts too deeply, the record of trial and appellate courts

313. ALI, CODE OF CRIMINAL PROCEDURE § 324, at 239-40 (Proposed Final Draft, 1930). The Code of Criminal Procedure itself recommended, "When two or more defendants are jointly charged with any offense, whether felony or misdemeanor, they shall be tried jointly, unless the court in its discretion on the motion of the prosecuting attorney or any defendant orders separate trials." ALI, CODE OF CRIMINAL PROCEDURE § 312 (Official Draft, 1930).

314. ABA PROJECT ON MINIMAL STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO JOINDER AND SEVERANCE §§ 48-66 (Approved Draft, 1968).

315. GA. CODE ANN. § 27-2101 (1978 Rev.) was amended to make severance discretionary except in capital cases. KAN. STAT. ANN. § 62-1429 (1950) was replaced by KAN. STAT. ANN. § 22-3204 (1974), making severance discretionary in all cases. MINN. STAT. ANN. § 631.03 (Supp. 1979) was replaced by MINN. R. CRIM. P. 17.03, making severance discretionary but creating a presumption of separate trials. MISS. CODE ANN. § 99-15-47 (1972) was interpreted by rule of court and judicial decision to grant a right of severance only in capital cases. See *Price v. State*, 336 So. 2d 1311 (Miss. 1973). NEB. REV. STAT. § 29-2002 (1957) was amended to provide for discretionary severance.

One jurisdiction, Vermont, expanded the right of severance. A statute granted a right of severance to all persons charged with a felony, other than conspiracy, punishable by death or more than five years' imprisonment. VT. STAT. ANN. tit. 13, § 6507 (1958). Under VT. R. CRIM. P. 14, the right to severance was expanded to encompass all felony cases.

316. UNIFORM RULE OF CRIMINAL PROCEDURE 472 (Approved Draft, 1974).

in administering the discretionary system is so dismal that anything less may be inadequate.

While legislation providing a right of severance is justified, less radical solutions may be more attainable. One possible remedy is to reverse the "presumption" of the current law that defendants jointly charged should be jointly tried. For example, the Minnesota rules of court provide in part:

When two or more defendants shall be jointly charged with a felony, they shall be tried separately provided, however, upon written motion, the court in the interests of justice and not solely related to economy of time or expense may order a joint trial for any two or more said defendants.³¹⁷

This rule places the burden of justifying a joint trial upon the party wishing it, ordinarily the prosecutor. While the phrase "in the interest of justice" is too vague to be useful, the trial court is also directed not to order a joint trial for reasons "solely related to economy of time or expense." These directions require courts to consider the justifications that do not relate only to efficiency,³¹⁸ reasons which usually would not compel a joint trial.

317. MINN. R. CRIM. P. 17.03.

318. See text at notes 43-70 *supra*. Although the rule, and the statute it superseded without change in substance, replaced an earlier statute providing an absolute right to a separate trial in felony cases, the Minnesota court adopted the interpretative policy that "this state still strongly favors separate trials, and recognizes that they should be the rule rather than the exception." *State v. Duncan*, 250 N.W.2d 189, 198 (Minn. 1977). The court, interpreting the requirement that ordering a joint trial must be "in the interest of justice and not related to time or economy" emphasized the trauma created by requiring certain kinds of victims to testify in multiple trials. In *State v. Gengler*, 294 Minn. 503, 200 N.W.2d 187 (1972), three defendants were convicted of having sexual intercourse with a child under 14 years of age, and two of those defendants were also convicted of committing sodomy. The court upheld the joint trial order with the comment: "Clearly, it was in the interests of justice that the victims be spared the ordeal of testifying on three separate occasions to the terrifying and revolting details of these offenses." 294 Minn. at 504, 200 N.W.2d at 189. Similarly, in *State v. Swenson*, 301 Minn. 199, 221 N.W.2d 706 (1974), the court upheld a joint trial order in a robbery case on the ground that four of the five victims were from 63 to 73 years of age, one of them was nearly blind, and three of them had heart problems. In *State v. Strimling*, 265 N.W.2d 423 (Minn. 1978), however, the court upheld a joint trial order on the less standard ground that many of the state's witnesses were business associates of the defendants:

Much of the state's case at trial depended on the testimony of several of the defendants' business associates — witnesses who were at best sympathetic toward defendants and at worst openly hostile toward the prosecution. It would be naive to think that the opportunity for such witnesses to rehearse and compare notes following a first trial would not affect the state's proof in a second trial.

265 N.W.2d at 432. The *Strimling* court also relied on a variant of the "overall view" argument for joint trials, see text at note 55 *supra*, that could authorize joint trials for many so-called white-collar crimes:

[I]n a prosecution for a "white-collar" crime where the defendants have acted in

Properly applied, this rule would reserve joinder for the peculiar cases in which it is appropriate.³¹⁹

Even if courts are reluctant to shift the burden to the prosecution, they can at least relax the requirement that a defendant show a compelling reason to be severed. Trial courts have uncritically accepted the alleged benefits of joint trials just as they have unthinkingly ignored both the general impediments joint trials pose to fair adjudication and the specific prejudices they create or aggravate. Trial courts should look realistically at the advantages and disadvantages of joint trials. They could require that a defendant show substantial — not monumental — prejudice from joinder. The prosecution could then rebut by showing a substantial benefit from joinder. This arrangement of burdens would eliminate at least some of the injustices of the current presumption in favor of joinder.

Appellate courts, too, must scrutinize severance questions more closely, respecting appropriate spheres of trial court autonomy but appreciating that the legitimacy of an entire lawsuit is

concert to spin a complex web of legal and illegal entrepreneurial activity, we think justice requires that the members of the jury be confronted with both participants in order to facilitate their fullest comprehension of the alleged wrongdoing and the accompanying proofs and defenses. We conclude, therefore, that a joint trial was not only allowable, but also well-suited to the unusual demands of this prosecution. 265 N.W.2d at 432. In each of these cases the Minnesota court held that the facts did not justify granting a severance to prevent prejudice to the defendants.

319. Ohio provided by statute: "When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately, unless the court orders the defendants to be tried jointly, upon application by the prosecuting attorney or one or more of the defendants and for good cause shown." OHIO REV. CODE ANN. § 2945.20 (Page 1975), *superseded without change in substance* by OHIO R. CRIM. P. 14. In *State v. Abbott*, 152 Ohio St. 228, 89 N.E.2d 147 (1949), the Ohio Supreme Court placed the burden of showing "good cause" under the statute upon the party seeking a joint trial. It interpreted "good cause" to be

some operative factor not present in every case of joint indictments of defendants in capital cases. For instance, the additional time and labor required of the state or court, or the expense to the state, made necessary by separate trials, cannot be assigned or considered as good cause.

152 Ohio St. at 236, 89 N.E.2d at 151. In *State v. Fields*, 29 Ohio App. 2d 154, 279 N.E.2d 616 (1971), the court of appeals, in applying the *Abbott* criteria, held that the trial court did not abuse its discretion by providing a joint trial of capital crimes after a change of venue had been granted:

Such change of venue required the transportation of witnesses, exhibits, case materials and counsel for considerably greater distances than would otherwise have been necessary. Duplication of this inconvenience and expense should not be permitted unless the examination thereof by a joint trial would result in actual prejudice to the defendants jointly tried.

29 Ohio App. 2d at 160, 279 N.E.2d at 620.

in question. With an especially critical eye, they must examine the standard justifications for joint trials that the government offers to discharge its burden. The prosecution should no longer be permitted to rest on its presumption.