

“COOPERATIVE PROSECUTION” AND THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

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In United States v. Balsys, the Supreme Court held definitively that the Fifth Amendment privilege against self-incrimination does not apply to fear of solely foreign prosecution. The Court also recognized in dicta that the privilege might apply under a narrow set of circumstances when a witness can prove “cooperative prosecution” between United States law enforcement officials and a foreign sovereign. Subsequent witnesses claiming this “exception” have, however, been unsuccessful. I argue, first, that the “cooperative prosecution exception” is constitutionally mandated by the traditional justifications for the Fifth Amendment privilege and should be elevated above the status of mere dicta. Second, I argue that the Supreme Court dicta as well as subsequent lower court interpretation of this language impose such a high burden on witnesses that the exception (to the extent it is recognized) is essentially nonexistent, even for meritorious claims. Borrowing from recent case law, I propose a prophylactic solution to vindicate the privilege in a manner consistent with Supreme Court precedent.

INTRODUCTION

A decade ago, the Supreme Court settled a longstanding circuit split over the scope of the Fifth Amendment privilege against self-incrimination.¹ In *United States v. Balsys*,² the Court held that a defen-

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¹ Compare *United States v. Gecas*, 120 F.3d 1419, 1430–31 (11th Cir. 1997) (holding that privilege extends only to jurisdictions subject to U.S. Constitution), *United States v. (Under Seal)*, 794 F.2d 920, 926 (4th Cir. 1986) (“[P]rivilege applies only where the sovereign compelling the testimony and the sovereign using the testimony are both restrained by the Fifth Amendment . . .”), and *In re Parker*, 411 F.2d 1067, 1070 (10th Cir. 1969) (“The fifth amendment was intended to protect against self-incrimination for crimes committed against the United States and the several states but need not and should not be interpreted as applying to acts made criminal by the laws of a foreign nation.”), *vacated as moot*, 397 U.S. 96 (1970), with *United States v. Balsys*, 119 F.3d 122, 139 (2d Cir. 1997) (concluding that grant of privilege to those who fear foreign prosecution is consistent with language and purposes of Fifth Amendment), and *In re Sealed Case*, 825 F.2d 494, 497 (D.C. Cir. 1987) (acknowledging possibility of asserting privilege but declining to decide issue). See generally Steven J. Winger, *Denying Fifth Amendment Protections to Witnesses Facing Foreign Prosecutions: Self-Incrimination Discrimination?*, 89 J. CRIM. L. & CRIMINOLOGY 1095, 1112–14 (1999) (surveying circuit split).

² 524 U.S. 666 (1998).

dant witness could not invoke the privilege against self-incrimination solely on the basis of a fear of foreign prosecution, even if that fear was "real and substantial."³ Even while acknowledging that such a holding might undermine some of the rationales behind the privilege, the Court, through a contextual reading of the Fifth Amendment and a pragmatic approach to the difficulty of expanding the privilege, limited its scope to fear of domestic prosecutions.⁴

Balsys cleared up an area of considerable uncertainty for discovery and, particularly, criminal investigations in the United States. If a witness could invoke fear of foreign prosecution as a legitimate ground for asserting the privilege against self-incrimination, that witness's testimony could be out of the reach of any U.S. investigative authority, including the grand jury. A court could not, for example, compel that witness's testimony or production of evidence through an immunity order,⁵ because a court would have no authority to enforce this order abroad.⁶ Thus, *Balsys* essentially made the privilege against self-incrimination coextensive with a court's authority to compel testimony and enforce immunity orders,⁷ and inapplicable in cases of foreign prosecution.

The Supreme Court, however, recognized in *Balsys* that it had created a potential gap in the Fifth Amendment: "cooperative prosecution" between the United States and a foreign sovereign. If the United States government could compel testimony through a domestic immunity order "for the purpose" of handing the testimony over to a foreign sovereign for foreign prosecution, the government could intentionally circumvent the protections of the Fifth Amendment.⁸ As long as the U.S. prosecutor was willing to allow the foreign sovereign to handle the prosecution, the Fifth Amendment would cease to be an obstacle to the investigation of crimes of an international character. Justice Souter suggested, in dicta, that if a defendant witness could prove this type of "cooperative conduct" between domestic and foreign law enforcement agencies, the prosecu-

³ *Id.* at 700.

⁴ *Id.* at 690.

⁵ A constitutionally sufficient grant of immunity, pursuant to a court order, displaces the privilege against self-incrimination. See *Kastigar v. United States*, 406 U.S. 441, 453 (1972) ("[A] grant of immunity must afford protection commensurate with that afforded by the privilege . . .").

⁶ *Balsys*, 524 U.S. at 693.

⁷ See Peter Westen, *Self-Incrimination's Covert Federalism*, 11 BERKELEY J. CRIM. L. 1, 2 (2006) (arguing that *Balsys* reaffirmed Supreme Court precedent holding that Fifth Amendment privilege is coextensive with government's ability to elicit testimony under grants of immunity).

⁸ *Balsys*, 524 U.S. at 698–700.

tion could not be “fairly characterized as distinctly ‘foreign,’”⁹ and “a claim could be made for recognizing fear of foreign prosecution” under the Fifth Amendment.¹⁰ This Note refers to this concept as the “cooperative prosecution exception.”

The hurdles posed by the exception for a prospective defendant witness become immediately apparent. *When* and, more importantly, *how* can an individual witness actually prove “cooperative prosecution”? Not surprisingly, lower courts have met claims based on this exception with skepticism. By recognizing a narrow set of circumstances under which the privilege can rightly be asserted, the Supreme Court attempted—albeit weakly—to close an increasingly important loophole in the protection of the Fifth Amendment privilege.

This Note is the first to critically evaluate and assess the practical application of the “cooperative prosecution exception” left open in *Balsys*. I argue that, while the Fifth Amendment mandates the exception, requiring a witness to prove “cooperative prosecution” on a case-by-case basis under the framework proposed by the Court imposes such a high burden that the exception is essentially nonexistent. In place of the Court’s current framework, I propose a prophylactic solution to a problem that will only become more prevalent as transnational cooperative law enforcement becomes increasingly widespread. I propose this solution not as a criticism of the core holding of *Balsys* itself,¹¹ but rather as a means of vindicating the policies explicitly discussed in the opinion. I suggest that nonsharing or modified immunity agreements can be employed as a constitutional prophylactic to close the Fifth Amendment loophole.

In Part I, I argue that the traditional justifications for the Fifth Amendment—at least those grounded in individual rights—are difficult to reconcile with the *Balsys* opinion, though I concede the necessity of the core holding that fear of foreign prosecution alone should not be an adequate basis for invoking the privilege. While the justifications based on individual rights should yield to the pragmatic and

⁹ *Id.* at 698.

¹⁰ *Id.*

¹¹ *Balsys* has been heavily criticized by scholars. See, e.g., Diane Marie Amann, *United States v. Balsys*, 92 AM. J. INT’L L. 759, 762–63 (1998) (arguing that traditionally broad interpretation of Fifth Amendment’s text and protection of individual dignity should have compelled contrary holding); Daniel J. Steinbock, *The Fifth Amendment at Home and Abroad: A Comment on United States v. Balsys*, 31 U. TOL. L. REV. 209, 224 (2000) (“The *Balsys* decision was not compelled by the text, prior case law, or the purposes of the Self-Incrimination Clause.”); Erin Kelly Regan, Comment, *United States v. Balsys: Denying a Suspected War Criminal the Privilege Against Self-Incrimination*, 73 ST. JOHN’S L. REV. 589, 611 (1999) (arguing *Balsys* was wrongly decided because of policies motivating privilege and fact that domestic interests would not be substantially harmed by contrary holding).

systematic difficulties of recognizing a *general* right to the privilege based on fear of foreign prosecution, I argue that, under the circumstances Justice Souter identified in dicta, the privilege must be available to potential witnesses. In Part II, I argue that although the exception left open in *Balsys* should be constitutionally required—and not regarded as mere dicta—the standard suggested by the *Balsys* majority, and subsequent lower court interpretation, imposes an impossibly high burden on the defendant witness, rendering the exception useless. In Part III, beginning from a criticism made in the *Balsys* dissent, I propose a framework for navigating the exception in *Balsys* in the context of growing international law enforcement cooperation: Instead of requiring “use and derivative-use”¹² immunity to compel testimony in a criminal proceeding, courts should impose a prophylactic rule against sharing information.

I

THE PRIVILEGE AGAINST SELF-INCRIMINATION AND *UNITED STATES V. BALSYS*

A. *Justifications for the Fifth Amendment Privilege*

It is helpful first to situate *Balsys* within the broader Fifth Amendment jurisprudence. While the Supreme Court has characterized the privilege against self-incrimination as “an important advance in the development of our liberty” and “‘one of the great landmarks in man’s struggle to make himself civilized,’”¹³ normative justifications underlying the privilege have been elusive for jurists and scholars alike.¹⁴

In struggling to find a normative justification, some scholars have separated the underlying rationales into two categories: (1)

¹² See *infra* notes 26–28 and accompanying text (discussing this requirement).

¹³ *Ullmann v. United States*, 350 U.S. 422, 426 (1956) (quoting ERWIN N. GRISWOLD, *THE 5TH AMENDMENT TODAY* 7 (1955)).

¹⁴ See, e.g., Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 245–46 (2004) (arguing that Fifth Amendment may defy any satisfying normative justification, and proposing positive theory); David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1147 (1986) (arguing that privilege is explained by “specific historical developments, but cannot be justified either functionally or conceptually”). Even Justice Goldberg, whose opinion explaining justifications for the privilege is often cited as the authority on the issue, acknowledged that the privilege eluded a clearly principled justification. *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 56 n.5 (1964) (“[The privilege] is regarded as so fundamental a part of our constitutional fabric, despite the fact that ‘the law and the lawyers . . . have never made up their minds just what it is supposed to do or just whom it is intended to protect.’” (quoting Harry Kalven, Jr., *Invoking the Fifth Amendment: Some Legal and Impractical Considerations*, 9 BULL. ATOMIC SCIENTISTS 181, 182 (1953))).

“[s]ystematic rationales” that “proponents believe to be crucial to our particular kind of criminal justice system” and (2) “[i]ndividual rationales” that focus on a “proper respect for human dignity and individuality.”¹⁵ Systematic rationales, for instance, focus on encouraging witnesses to appear willingly and testify honestly without fear of incrimination.¹⁶ Alternatively, individual rationales focus on the threat to human dignity or the invasion of privacy inherent in compelling individuals to testify against themselves.¹⁷ Others have abandoned normative or functional underlying rationales for the Fifth Amendment and instead attribute the existence of the privilege to an accident of history.¹⁸ Some even maintain that, given the lack of conceptual justification for the privilege, there is no good reason to regard the right against self-incrimination as paramount among the recognized testimonial privileges.¹⁹

Though the first principles of the privilege have eluded scholarly or judicial consensus, courts have consistently viewed the privilege against self-incrimination as sacrosanct among the testimonial privileges.²⁰ Justice Goldberg’s classic opinion in *Murphy* enumerated seven traditional policy rationales underlying the Fifth Amendment.²¹

¹⁵ Dolinko, *supra* note 14, at 1065.

¹⁶ *Id.* at 1066.

¹⁷ *Id.*; see also *Murphy*, 378 U.S. at 55 (enumerating individual rights protected by privilege); *Brown v. Walker*, 161 U.S. 591, 637 (1896) (Field, J., dissenting) (“A sense of personal degradation in being compelled to incriminate one’s self must create a feeling of abhorrence in the community at its attempted enforcement.”); MCCORMICK ON EVIDENCE § 118, at 287 (Edward W. Cleary ed., 3d ed. 1984) (“The privilege . . . serves the function of assuring that even guilty individuals are treated in a manner consistent with basic respect for human dignity.”); 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2251, at 316–17 (John T. McNaughton ed., 1961) (noting that compelling testimony forces witness “to break faith with his rational commitment to truth-telling” and is “inhumane”); David W. Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CAL. L. REV. 89, 95 (1965) (“It is essentially and inherently cruel to make a man an instrument of his own condemnation.”). See generally R. Kent Greenawalt, *Silence As a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15 (1981) (arguing that privilege is moral right).

¹⁸ See Allen & Mace, *supra* note 14, at 245–46 (rejecting normative theory of privilege and adopting positive one); Dolinko, *supra* note 14, at 1147 (rejecting premise that privilege can be explained through individual rights perspective or systematic functionalist model, and instead proposing that values protected by privilege exist as result of “specific historical developments”).

¹⁹ Justice Cardozo, for instance, subscribed to this view, noting that “[j]ustice . . . would not perish if the accused were subject to a duty to respond to orderly inquiry.” *Palko v. Connecticut*, 302 U.S. 319, 326 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784, 793–95 (1969).

²⁰ See Allen & Mace, *supra* note 14, at 246 (describing Supreme Court’s “predictable” self-incrimination jurisprudence). See generally Dolinko, *supra* note 14 (noting persistence of privilege despite lack of normative justification).

²¹ *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 55 (1964).

The Supreme Court has largely focused on two of these: the individual rights justification of avoiding the "cruel trilemma of self-accusation, perjury or contempt," and the systematic rights justification of achieving "a fair state-individual balance . . . by requiring the government in its contest with the individual to shoulder the entire load."²² While these purported conceptual underpinnings may be unconvincing, or, at worst, circular,²³ the Supreme Court has applied them consistently.

This Note will not seek to evaluate the relative merits of the policies underlying the privilege; instead, I begin from the premise that the Fifth Amendment privilege has, for better or worse, become ingrained in our jurisprudence and calcified in Constitutional doctrine.²⁴ Throughout the piece, I will adopt as paramount the Supreme Court's oft-cited "cruel trilemma" and "fair state-individual balance" as the driving justifications. Even though they may be flawed, the Supreme Court has consistently invoked these principles when applying the privilege.²⁵ For the purposes of this Note, therefore, I will assume that the scope of privilege as applied should fit—at least loosely—within these twin justifications.

Finally, it is important to note that the privilege against self-incrimination is not an unconditional right: The privilege disappears

²² *Id.* (quoting WIGMORE, *supra* note 17, § 2251, at 317); *see also* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2.10(d), at 118, 120 (5th ed. 2009) (noting that achievement of fair state-individual balance is perhaps more frequently cited than any other justification, and that avoidance of cruel trilemma "receives the strongest historical support as a grounding for the privilege").

²³ The unsatisfactory nature of these rationales becomes apparent upon further review. For instance, the "cruel trilemma" rationale is circular, relying upon the conclusion that subjecting someone to this "trilemma" is, in fact, cruel. *See* Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 685–95 (1968) (sharply criticizing Justice Goldberg's rationales). Additionally, the "cruel trilemma" justification would seem to dictate, contrary to settled doctrine, that a civil defendant with a large judgment at stake would be permitted to assert the privilege against self-incrimination, without the threat that the jury would be instructed to draw a negative inference from the defendant's silence. *But see* Baxter v. Palmigiano, 425 U.S. 308, 320 (1976) (permitting "adverse inference" to be drawn). Likewise, the "fair state-individual balance" justification, without more explanation, offers little in terms of doctrinal guidance. *Cf.* Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 857 (1995) ("The Self-Incrimination Clause of the Fifth Amendment is an unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights."); William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1228 (1988) ("It is probably fair to say that most people familiar with the doctrine surrounding the privilege against self-incrimination believe that it cannot be squared with any rational theory.").

²⁴ *See, e.g.*, Dolinko, *supra* note 14, at 1147 ("[T]he absence of a satisfactory theoretical basis for the privilege would by no means establish that it should be abolished.").

²⁵ *See supra* note 22 and accompanying text (explaining Court's acceptance of rationales and their underlying conceptual problems).

when a witness has no reasonable fear that the testimony will be used against her in a future criminal proceeding. Thus, when a witness is granted constitutionally adequate immunity, a court may compel that witness to testify. In *Kastigar v. United States*, the Supreme Court established the scope of an immunity order required to dissipate the privilege.²⁶ The Court held that granting “use and derivative-use immunity”—i.e., neither the testimony itself nor any evidence derived (or insufficiently attenuated) from it may be used against the witness—adequately protects a defendant’s privilege against self-incrimination.²⁷ The Court reasoned that such immunity “leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege” by “assuring that the compelled testimony can in no way lead to the infliction of criminal penalties,” but not foreclosing the government from “using evidence from legitimate independent sources.”²⁸ Thus, the Fifth Amendment permits the government to purchase testimony that would otherwise be protected by the privilege. *Kastigar* immunity fits comfortably within the twin justifications mentioned above: An immunity order removes the “cruel trilemma” by eliminating the possibility of self-incrimination and maintains the “fair state-individual balance” by requiring the state to uphold its side of the bargain when seeking testimony.

Having established the relevant Fifth Amendment framework provided by the Supreme Court, I turn now to the *Balsys* opinion.

B. *Balsys: The Individual Right Yields to the Systematic*

When the Supreme Court granted certiorari in *Balsys*, the question of fear of foreign prosecution was ripe for decision: Hotly debated among scholars²⁹ and forming a sharp circuit split,³⁰ the ques-

²⁶ 406 U.S. 441 (1972).

²⁷ *Id.* at 458, 462.

²⁸ *Id.* at 461, 462. *Kastigar* clarified that the broader protection of “transactional immunity”—where the witness would be altogether immune from prosecution of the crime in question—was not required by the Constitution. *Id.* at 453. Because a Fifth Amendment violation only excludes the statement itself and evidence derived from the unlawfully compelled statement, requiring transactional immunity would go further than the protection envisioned. *See id.* at 453 (“Transactional immunity . . . affords the witness considerably broader protection than does the Fifth Amendment privilege.”).

²⁹ *See, e.g.,* Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201, 1293–94 (1998) (identifying circuit split and arguing that privilege should apply to avoid “debas[ing] individual dignity” and to prevent “governmental abuse”); Scott Bovino, Comment, *A Systematic Approach to Privilege Against Self-Incrimination Claims When Foreign Prosecution Is Feared*, 60 U. CHI. L. REV. 903, 904 (1993) (arguing that privilege should exist, but should be narrower for witnesses asserting privilege for fear of foreign prosecution than

tion presented went to the heart of the debate concerning the justifications for the Fifth Amendment. If the privilege were truly an individual right—for instance, if the privilege existed to protect witnesses from the “cruel trilemma” of deciding between perjury, contempt, and self-incrimination—then a real fear of criminal prosecution, by any sovereign, would implicate this right.³¹ If the privilege were a functional or systematic one, then the burdens of determining foreign law (and the likelihood of foreign prosecution) and the social costs of losing testimony, could upset the “fair state-individual balance.”³²

The case involved Aloyzas Balsys, a resident alien of the United States who was under investigation by the Office of Special Investigation (OSI) of the United States Department of Justice. He was suspected of committing crimes as a Nazi when fighting for the Lithuanian Army during World War II.³³ OSI, created to denaturalize and deport suspected Nazi war criminals, issued an administrative subpoena requiring Balsys to answer questions related to wartime activities in Europe in the early 1940s.³⁴ Balsys asserted the Fifth Amendment privilege against self-incrimination on the grounds that “his responses could subject him to criminal prosecution by Lithuania, Israel, and Germany,”³⁵ and that, by compelling his testimony, the OSI exposed him to the “cruel trilemma” that the privilege sought to

those asserting privilege for fear of domestic prosecution); Daniel J. Lindsay, Comment, *Tied Up by a “Gordian Knot”*: United States v. Gecas’s Rejection of the Privilege Against Self-Incrimination in Cases of Foreign Prosecution, 82 MINN. L. REV. 1297, 1327 (1998) (arguing that privilege should apply due to “increasingly international nature of law enforcement”); Diego A. Rotsztain, Note, *The Fifth Amendment Privilege Against Self-Incrimination and Fear of Foreign Prosecution*, 96 COLUM. L. REV. 1940, 1972 (1996) (arguing that privilege should not apply because Fifth Amendment is better understood as restriction on U.S. government than as individual right); Michael Scanes, Comment, *Extending the Privilege Against Self-Incrimination to the Threat of Prosecution Under Foreign Law*, 35 BAYLOR L. REV. 141, 154–55 (1983) (arguing for balancing test of individual right versus importance of testimony to government when analyzing defendant witness’s assertion of privilege for fear of foreign prosecution).

³⁰ See *supra* note 1 (identifying circuit split).

³¹ See generally Amann, *supra* note 29 (arguing that individual rights justification should preclude “whipsaw” effect of compelling defendant to testify when fearing foreign prosecution).

³² See Rotsztain, *supra* note 29, at 1943 (arguing that underlying rationale of privilege is preventing “governmental overreaching,” which does not apply in cases of foreign prosecution).

³³ United States v. Balsys, 524 U.S. 666, 669–70 (1998).

³⁴ *Id.* at 670.

³⁵ *Id.* The privilege with respect to domestic prosecution was unavailable, since the government conceded that prosecution for any relevant U.S. crimes was barred by the statute of limitations. *Id.* at 670 n.1.

avoid.³⁶ Though the district court determined that the Fifth Amendment did not apply to foreign prosecution,³⁷ the Second Circuit, following several other circuits, reversed and held “that the Fifth Amendment privilege against self-incrimination may be invoked by a witness who possesses a real and substantial fear of foreign prosecution,”³⁸ even if the witness faces no threat of domestic prosecution. Because the government conceded that Balsys’s “real and substantial fear” of foreign prosecution was reasonable,³⁹ the Supreme Court—having twice declined to decide the issue in previous cases⁴⁰—was faced squarely with the task of defining the scope of the Fifth Amendment privilege.

In a 7-2 opinion authored by Justice Souter, the Supreme Court held definitively that the privilege against self-incrimination was *not* available to a defendant witness asserting the privilege for fear of foreign prosecution alone.⁴¹ Instead, the Court read the privilege against self-incrimination in “any criminal case” to apply only when there is a reasonable fear of prosecution by the same sovereign compelling the testimony.⁴²

The decision relied principally on two rationales.⁴³ First, the Court read the text of the Self-Incrimination Clause in light of “the cardinal rule to construe provisions in context.”⁴⁴ Noting that all of the guarantees in the Fifth Amendment—double jeopardy, due process, grand jury, and compensation for takings of property⁴⁵—are only “implicated . . . by action of the government that it binds,” the Court reasoned that it would be “strange to choose such associates for a

³⁶ Brief for Respondent at 9, *Balsys*, 524 U.S. 666 (No. 97-873), 1998 WL 139846 at *9.

³⁷ *United States v. Balsys*, 918 F. Supp. 588, 598–99 (E.D.N.Y. 1996).

³⁸ *United States v. Balsys*, 119 F.3d 122, 140 (2d Cir. 1997).

³⁹ *Balsys*, 524 U.S. at 672.

⁴⁰ See *Zicarelli v. N.J. State Comm’n of Investigation*, 406 U.S. 472, 480–81 (1972) (finding that because petitioner did not face “real danger” of foreign prosecution, it was unnecessary to decide whether privilege can be asserted based on fear of foreign prosecution); *Parker v. United States*, 397 U.S. 96 (1970) (per curiam) (vacating case as moot though issue was presented).

⁴¹ *Balsys*, 524 U.S. at 700.

⁴² *Id.* at 672–74 (quoting U.S. CONST. amend. V).

⁴³ The Court also relied on the interpretation of two earlier Supreme Court cases, *United States v. Murdock*, 284 U.S. 141 (1931), and *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964). See *Balsys*, 524 U.S. at 674–88 (discussing these and other precedents). Central to these cases was whether the privilege applied when the federal government compelled testimony that incriminated the witness in the state system, and vice versa. While important to the *Balsys* decision itself, this analysis is irrelevant to the present discussion.

⁴⁴ *Id.* at 673.

⁴⁵ U.S. CONST. amend. V.

Clause meant to take a broader view.”⁴⁶ Because the other guarantees of the Fifth Amendment could only be interpreted to constrain a domestic government, the privilege against self-incrimination should be read on similarly narrow terms.

Second, and more pragmatically, a court’s inability to compel testimony through the grant of immunity would substantially hamper domestic investigations.⁴⁷ Because a domestic court would have no means of enforcing an immunity order in a foreign country, a court could not compel testimony once the witness had asserted the privilege.⁴⁸ This would remove a critical investigative tool for securing information protected by the privilege against self-incrimination and render domestic discovery dependent on foreign law.⁴⁹ Because the Fifth Amendment’s protection for individual witnesses has traditionally been conditioned upon the government’s ability to coerce or “purchase” the testimony through a grant of immunity, extending the protection of the Fifth Amendment to a person fearing only foreign prosecution would “change the balance of private and governmental

⁴⁶ *Balsys*, 524 U.S. at 673.

⁴⁷ *Id.* at 697–98.

⁴⁸ *See id.* at 697 (“That some testimony will be lost is highly probable, since the United States will not be able to guarantee immunity if testimony is compelled . . .”). One could imagine, for instance, a foreign statute that criminalized cooperation with U.S. subpoena requests. If incrimination under such statutes could be invoked to assert the Fifth Amendment privilege, foreign blocking statutes could essentially shut down U.S. investigations. Indeed, Justice Stevens expressed this very fear in a concurring opinion. *See id.* at 700–01 (Stevens, J., concurring) (“A law enacted by a foreign power making it a crime for one of its citizens to testify in an American proceeding against another citizen of that country would immunize those citizens from being compelled to testify in our courts.”); *see also* *United States v. (Under Seal)*, 794 F.2d 920, 926 (4th Cir. 1986) (“[O]ur own national sovereignty would be compromised if our system of criminal justice were made to depend on the actions of foreign government beyond our control.”). This problem could be easily overcome, though, with a requirement that the fear of foreign prosecution may only be asserted for foreign crimes that are sufficiently similar to domestic crimes; thus, foreign blocking statutes would not be available as an avenue to assert the Fifth Amendment privilege.

⁴⁹ A similar policy concern—that domestic rights and obligations should not be pegged to foreign law—drove the Court’s opinion in *Small v. United States*, 544 U.S. 385 (2005), where it decided whether the predicate crime for a felony gun possession statute, 18 U.S.C. § 922(g)(1), which criminalizes the possession of a firearm by any person “who has been convicted in any court,” applied to both domestic and foreign courts. 544 U.S. at 389–90. The Court held that “any court” means only *domestic* courts, in part because a *foreign* conviction might be “from a legal system that is inconsistent with an American understanding of fairness” and “for conduct that domestic law punishes far less severely.” *Id.* *But cf.* *United States v. Barona*, 56 F.3d 1087, 1091 & n.1, 1094–96 (9th Cir. 1995) (stressing that reasonableness of foreign searches under Fourth Amendment depends on whether officials complied with foreign law).

interests that has seemingly been accepted for as long as there has been Fifth Amendment doctrine.”⁵⁰

It is difficult to reconcile the result in *Balsys* with the individual rights justification for the privilege against self-incrimination repeatedly cited by the Supreme Court. The Court in prior cases had cited the injustices of the English Star Chamber,⁵¹ as well as concerns about affronts to human dignity⁵² and personal privacy,⁵³ as justifications for the privilege. The Court has most often upheld the privilege under an individual rights justification when the witness faces the “cruel trilemma of self-accusation, perjury or contempt.”⁵⁴ Though *Balsys* clearly faced the “cruel trilemma,”⁵⁵ the Court declined to expand the scope of the privilege to protect him, focusing instead on the practical consequences of such an expansion.⁵⁶ While acknowledging the indi-

⁵⁰ *Balsys*, 524 U.S. at 693; see also *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (recognizing state-individual balance as policy justification for Fifth Amendment).

⁵¹ See *Pennsylvania v. Muniz*, 496 U.S. 582, 595–96 (1990) (describing English Star Chamber, “wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury”); see also *Balsys*, 524 U.S. at 714 (Breyer, J., dissenting) (citing *Muniz* for same description).

⁵² See *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (“[T]he constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens.”); *Ullmann v. United States*, 350 U.S. 422, 445 (1956) (Douglas, J., dissenting) (“The guarantee against self-incrimination contained in the Fifth Amendment is not only a protection against conviction and prosecution but a safeguard of conscience and human dignity and freedom of expression as well.”).

⁵³ See *United States v. Nobles*, 422 U.S. 225, 233 (1975) (“The Fifth Amendment privilege . . . protects ‘a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation.’” (quoting *Couch v. United States*, 409 U.S. 322, 327 (1973))).

⁵⁴ *Murphy*, 378 U.S. at 55; see also *Muniz*, 496 U.S. at 596 (“At its core, the privilege reflects our fierce ‘unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt.’” (quoting *Doe v. United States*, 487 U.S. 201, 212 (1988))); *South Dakota v. Neville*, 459 U.S. 553, 563 (1983) (“[T]he Court has long recognized that the Fifth Amendment prevents the State from forcing the choice of this ‘cruel trilemma’ on the defendant.”).

⁵⁵ There is an alternative way to view the “cruel trilemma” prohibition as protecting the individual only from being forced to testify by the same sovereign that he fears will prosecute him. Viewed in this way, the *Balsys* opinion left the individual right untouched—it simply does not extend to protect the witness who fears prosecution by a different sovereign. However, to the extent that the “cruel trilemma” justification rests on a dignitary or privacy interest, the right should be considered more broadly, as it is the witness’s very state of being in the “cruel trilemma” that implicates the privilege. From this perspective, it should make no difference which sovereign is prosecuting the individual.

⁵⁶ See *supra* notes 47–50 and accompanying text (discussing practical problems with expanding privilege). The Court recognized the insufficiency of individual rights justifications alone in explaining the application of the privilege. See *Balsys*, 524 U.S. at 692–93 (“[Privilege] in practice is not the protection of personal testimonial inviolability, but a conditional protection of testimonial privacy subject to basic limits recognized before the framing and refined through immunity doctrine in the intervening years.”).

vidual rights grounds for the privilege,⁵⁷ the Court found the systematic justifications for the privilege to be more important, stressing primarily the maintenance of a “fair state-individual balance.” Because the government could no longer pay for testimony at the cost of immunity if the witness invoked (and a court upheld) the privilege, the Court held that allowing the privilege would impermissibly alter “the balance of private and governmental interests . . . accepted for as long as there has been Fifth Amendment doctrine.”⁵⁸ Looking at the “likely costs and benefits of extending the privilege,” the Court weighed the danger of losing testimony against the interests of the witness.⁵⁹ Ultimately, the Court concluded that the government’s interest in being able to elicit testimony outweighed the risk of “uncertain” harm to the witness.⁶⁰

The Court, however, recognized that this core holding of the case might be vulnerable to abuse through a loophole. I now turn to this crucial dicta in Part V of the *Balsys* opinion.

C. *The Constitutionally Required “Cooperative Prosecution Exception”*

Notwithstanding the *Balsys* Court’s core holding that the privilege does not protect a witness fearing foreign prosecution, the Court hypothesized a future witness successfully invoking the privilege in cases of “cooperative conduct between the United States and foreign nations” where “the United States and its allies had . . . substantially similar criminal codes aimed at prosecuting offenses of international character.”⁶¹ Justice Souter explained that:

[I]f it could be shown that the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a [common crime], then an argument could be made that the [privilege] should apply . . . because that prosecution was not fairly characterized as distinctly “foreign.” The point would be that the prosecution was as much on behalf of the United States as of the prosecuting nation, so that . . . one nation [was] the agent of the other, rendering fear of foreign prosecution tantamount to fear of a criminal case brought by the [U.S.] Government itself.⁶²

⁵⁷ See *Balsys*, 524 U.S. at 691–92 (discussing *Murphy* rationales).

⁵⁸ *Id.* at 693.

⁵⁹ *Id.* at 696–97.

⁶⁰ *Id.* at 697–98.

⁶¹ *Id.* at 698.

⁶² *Id.* at 698–99.

Though this passage has been identified—correctly—as mere dicta,⁶³ the “exception” it describes should be considered crucial to adequately protecting the Fifth Amendment privilege as traditionally understood. Without this exception, a gap would be left open that, if exploited, would significantly undermine the protections of the privilege. Indeed, under the language of the holding of *Balsys* itself, such abuse would arguably “change the balance of private and governmental interests that has seemingly been accepted for as long as there has been Fifth Amendment doctrine.”⁶⁴

This “loophole” can be best demonstrated by example. Suppose the United States suspects an international company of bribing a foreign official, a crime not only in the United States under the Foreign Corrupt Practices Act (FCPA),⁶⁵ but also under the laws of many foreign nations.⁶⁶ In the course of the investigation, the Department of Justice (DOJ) begins to suspect W, a midlevel executive in the company, of involvement in the scheme. A prosecutor issues a grand jury subpoena, a common investigative tool, to W, a target of the investigation.⁶⁷ The prosecutor may be seeking information against higher-up, more culpable executives in the company, or may be looking to build a case against the company itself.

W, unsure about her legal liability, invokes the Fifth Amendment privilege and refuses to testify, stating that her testimony might incriminate her under the FCPA. The Department of Justice then moves for an immunity order compelling W to testify in exchange for

⁶³ See *Valenzuela v. United States*, 286 F.3d 1223, 1229 (11th Cir. 2002) (describing exception for “jointly and cooperatively conducted” investigations in *Balsys* as “dicta”); *In re Impounded*, 178 F.3d 150, 155 (3d Cir. 1999) (noting that *Balsys* exception “set[] forth a hypothetical situation reserved ‘for another day’”); *United States v. Alvarez*, 489 F. Supp. 2d 714, 722 (W.D. Tex. 2007) (characterizing exception as “only dicta”); *United States v. Abreu*, No. EP-06-CR-2576-DB, 2007 WL 1357807, at *5–6 (W.D. Tex. Mar. 1, 2007) (characterizing *Balsys* exception as “hypothesis” and “dicta”).

⁶⁴ *Balsys*, 524 U.S. at 693.

⁶⁵ 15 U.S.C. §§ 78dd-1 to 78dd-3 (2006).

⁶⁶ Thirty-eight countries, including the United States, have committed to enacting criminal foreign corruption laws. Organization for Economic Co-operation and Development: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 (setting forth country obligations); OECD Anti-Bribery Convention, www.oecd.org/daf/nocorruption/convention (last visited Aug. 11, 2010) (listing treaty signatories). The United Kingdom, for instance, relies on a set of laws that prohibits corruption. See Public Bodies Corrupt Practices Act, 1889, 52 & 53 Vict., c. 69; Prevention of Corruption Act, 1906, 6 Edw. 7, c. 34; Prevention of Corruption Act, 1916, 6 & 7 Geo. 5, c. 64. These provisions were amended to apply to bribes made abroad by the Anti-terrorism, Crime and Security Act, 2001, c. 24 §§ 108, 109.

⁶⁷ While grand juries can request information directly, it is nearly always the prosecutor who directs and issues subpoenas to prospective witnesses. See, e.g., William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174 (1973) (“Today, the grand jury is the total captive of the prosecutor . . .”).

the guarantee that such testimony, or any evidence derived from it, will not be used against W in any future criminal proceeding.⁶⁸ Despite this assurance, W is aware that other countries also have criminal provisions similar to the FCPA, and her testimony, if delivered to these countries, could subject her to criminal prosecution abroad. It is here that W faces a difficult decision: She can (1) testify and risk incriminating herself in a foreign country, (2) refuse to testify and be held in contempt, or (3) testify but conceal the truth or extent of her knowledge, and thus subject herself to prosecution for perjury. This decision clearly resembles the “cruel trilemma”—the bind the Court has held the Fifth Amendment should prevent.⁶⁹

On its face, of course, *Balsys* forecloses W’s fear of foreign prosecution as grounds for invoking the privilege. This example, however, shows how the holding of *Balsys*, if left unmodified, could easily be exploited by a zealous prosecutor willing to cooperate with a foreign nation. Imagine now that W, and not her company, is the ultimate target of the U.S. investigation, but without her self-incriminating testimony, there is no viable case. Under this set of circumstances—and assuming W’s testimony would be self-incriminating—the U.S. prosecutor can trap W with a guaranteed prosecution (for contempt, perjury, or the crime that is the subject of the self-incriminating statement) by granting W immunity and then enlisting the support of a foreign sovereign, which notwithstanding the domestic immunity order can prosecute W based on her incriminating statement. Assuming W fears foreign criminal liability, she faces the “cruel trilemma,” but the prosecutor avoids the obstacle of the Fifth Amendment as long as the DOJ is willing to allow a foreign sovereign to prosecute W.

Justice Souter imagined precisely this scenario, recognizing that the witness should be able to assert the privilege “if it could be shown that the United States was granting immunity from domestic prosecution *for the purpose of* obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries.”⁷⁰ Without the exception, a prosecutor could compel a defendant suspected of a crime of an international character—which may be prosecuted abroad—to testify, and then hand the testimony over to a foreign government for foreign prosecution. A domestic immunity

⁶⁸ This grant is pursuant to the federal immunity statute, 18 U.S.C. § 6003 (2006), which requires use and derivative-use immunity. *See supra* notes 26–28 and accompanying text (discussing use and derivative-use immunity).

⁶⁹ *See supra* note 54 and accompanying text (discussing Supreme Court’s recognition of “cruel trilemma”).

⁷⁰ *United States v. Balsys*, 524 U.S. 666, 698 (1998) (emphasis added).

order leaves W in the untenable “cruel trilemma” of deciding whether to accept the punishment of criminal contempt, or risk the incriminating consequences of testifying. Foreign prosecution thus becomes a weapon in the prosecutor’s arsenal to circumvent the Fifth Amendment.

The cooperative prosecution exception, while dicta, acknowledges this troubling result and seeks to foreclose the possibility of a future prosecutor using the holding of *Balsys* as a means to sidestep the Fifth Amendment privilege.⁷¹ The Constitution should not permit purposeful circumvention of a constitutional right through clever legal strategy.⁷² By recognizing that the privilege might exist when the prosecutor seeks to compel testimony for the purpose of a foreign prosecution, Justice Souter foresaw the potential abuse that the holding of *Balsys* made available and took the first step toward establishing the doctrinal tools necessary to foreclose such abuse.

As prosecutions for crimes across international borders become more frequent,⁷³ and cooperation among agencies across international borders grows stronger,⁷⁴ this tool of compelling self-incriminating testimony for foreign prosecutions will become increasingly available

⁷¹ Application of the Fifth Amendment during a “cooperative prosecution” can be analogized to the “joint venture” exception to the general rule that the Fourth Amendment does not apply to illegal searches and seizures by foreign governments: The Fourth Amendment *does* apply when the offending foreign officials are acting as agents of the U.S. government. *See* *United States v. DeRewal*, 10 F.3d 100, 102 (3d Cir. 1993) (recognizing “joint venture” exception).

⁷² *See infra* note 78 (discussing anti-circumvention rationale applied in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008)).

⁷³ *See* Dionne Searcey, *U.S. Cracks Down on Corporate Bribes*, WALL ST. J., May 26, 2009, at A1 (reporting on increased FCPA investigations by Department of Justice).

⁷⁴ R. Christopher Preston, Comment, *In re Impounded: When Will the Right Against Self-Incrimination Protect Witnesses from Foreign Prosecution?*, 2000 BYU L. REV. 1703, 1734–37 (arguing that exception recognized in *Balsys* should be applied more often given increased international law enforcement cooperation). Specifically, Preston points out that the proliferation of Mutual Legal Assistance treaties (MLATs), Memoranda of Understanding (MOUs), and international criminal tribunals have led to a much tighter international law enforcement community. *Id.* at 1736; *see also* Bruce Zagaris, *U.S. International Cooperation Against Transnational Organized Crime*, 44 WAYNE L. REV. 1401, 1411–21 (1998) (arguing that increasing transnational organized crime has led to increased transnational cooperation in investigation and expanding legal regimes); Searcey, *supra* note 73 (describing increase in international investigations by Department of Justice). The Antitrust Division of the U.S. Department of Justice (DOJ), in particular, has articulated a formal policy to conduct “truly joint and parallel law enforcement” with several foreign countries. Anne K. Bingaman, Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice, Address Before the American Law Institute: International Cooperation and the Future of U.S. Antitrust Enforcement 8 (May 16, 1996) (explaining cooperation in criminal antitrust enforcement between DOJ and Germany, Australia, European Union, and Canada).

for prosecutors⁷⁵ not just to secure the convictions of suspected criminals, but also to coerce the cooperation of witnesses like W. This result would not comport with *any* justification—individual or systematic—for the Fifth Amendment privilege that the Supreme Court has recognized. The example of W above demonstrates how such abuse would subject a defendant to the “cruel trilemma,” thereby implicating the individual rights justifications of the privilege. Additionally—and crucially—the conduct of the prosecutor hypothesized earlier (in which the domestic prosecutor grants immunity, then lets a foreign prosecutor use the self-incriminating statement) would also undermine the systematic rationale behind the privilege by upsetting the “fair state-individual balance”—the very balance “that has seemingly been accepted for as long as there has been Fifth Amendment doctrine.”⁷⁶ The ability to purposefully corner a potential witness with a guaranteed prosecution—either for contempt, perjury, or the substantive crime in a foreign jurisdiction—drastically shifts the bargaining power towards the state, upsetting this balance in the context of crimes of an international nature.⁷⁷ To hold the exploitation of such a lacuna lawful simply because the substantive crime is international in nature unjustly excludes a subset of suspected criminals or witnesses from the protections of the Fifth Amendment.⁷⁸ Identifying this gap, the Court correctly recognized that the privilege should be available in certain situations where the government impermissibly exploits the holding of *Balsys* to circumvent the privilege.

⁷⁵ See Zagaris, *supra* note 74, at 1460–61 (arguing that prosecutors will use *Balsys* holding to obtain testimony and expose “thousands of defendants [to] foreign criminal proceedings” that may fall below American procedural standards).

⁷⁶ *United States v. Balsys*, 524 U.S. 666, 693 (1998).

⁷⁷ This assumes, of course, that the witness’s testimony will be incriminating. One of the policies cited by Justice Goldberg in *Murphy* was to provide “protection to the innocent.” *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (citation omitted). The theory is that the Fifth Amendment privilege protects an innocent witness from a poor performance on the witness stand. For a criticism of the “cruel trilemma” rationale on the grounds that it protects only the guilty witness, see Amar & Lettow, *supra* note 23, at 890.

⁷⁸ A similar argument—that the government cannot circumvent constitutional limitations by exploiting anomalies in the territorial application of the law—was the centerpiece of the Supreme Court’s opinion holding that the government could not avoid the commands of the Suspension Clause of the Constitution by denying habeas corpus to detainees in Guantanamo Bay:

Our [Constitution] cannot be contracted away like this. . . . To hold the political branches have the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say “what the law is.”

Boumediene v. Bush, 128 S.Ct. 2229, 2259 (2008) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

After concluding that closing the *Balsys* loophole is essential to preserving the privilege for a narrow set of crimes, the question then becomes how to identify the circumstances under which a defendant witness can prove “cooperative prosecution” such that the privilege must be available. In Part II, I turn to the practical and doctrinal difficulties in identifying these circumstances on a case-by-case basis under the framework posed by the Court.

II

THE PROBLEM: PROVING THE EXCEPTION

Though the exception left open in *Balsys* is constitutionally required, the test⁷⁹ for establishing the exception as suggested by the Court poses such an unreasonable burden on a defendant witness trying to prove “cooperative prosecution” as to render the exception nonexistent. This Part shows, first, how the inquiry required under the exception, if taken seriously, poses an inherently onerous burden on a defendant witness—even one with a meritorious claim. Then, it surveys subsequent lower court interpretations of the exception, concluding that the exception has been impossible for witnesses to prove in practice.

A. *Inherent Difficulties in Proving “Cooperative Prosecution”*

The test suggested by *Balsys* provides three substantial obstacles to a defendant witness: (1) proving *collusion* between U.S. and foreign law enforcement; (2) proving the U.S. government’s *specific intent* to use the testimony for a foreign prosecution; and (3) distinguishing the facts of *Balsys*.

Proving collusion between institutions with nonpublic communications—in this case, between prosecutorial agencies in separate countries—is intrinsically problematic. Here, an analogy can be drawn to civil antitrust litigation. In many antitrust cases involving price-fixing under the Sherman Act, the plaintiff must allege the existence of a “contract, combination . . . or conspiracy” that unreasonably restrains trade.⁸⁰ Numerous commentators have noted that direct

⁷⁹ Because Justice Souter’s dicta is not binding precedent, lower courts have grappled with whether *Balsys* established a “test” for determining “cooperative prosecution” at all. See *supra* note 63 (citing cases recognizing discussion in *Balsys* of cooperative prosecution exception as dicta). I refer to the “cooperative prosecution” dicta in *Balsys* as a test insofar as, if these conditions were met, the Court might at least have occasion to consider the application of the privilege.

⁸⁰ 15 U.S.C. § 1 (2006); see *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (describing plaintiff’s burden of proof for claims under Sherman Act).

proof of collusion is inherently elusive,⁸¹ and plaintiffs have been forced to rely on circumstantial evidence (such as parallel economic behavior by companies in the same industry) to try to make out a claim.⁸² The high rate at which antitrust cases are dismissed—either on a Rule 12(b)(6) or summary judgment motion—because the plaintiff has not alleged facts adequate to prove collusion suggests that demonstrating a collusive relationship can place an onerous burden on plaintiffs.⁸³

Moreover, Justice Souter's language suggests that he would require a witness to prove that the government had the specific intent to compel testimony "for the purpose of obtaining evidence to be delivered to other nations."⁸⁴ This raises several obvious problems: How does a witness prove that a prosecutor is seeking to compel testimony for the specific purpose of aiding foreign prosecution? Does it have to be solely for this purpose? What if a prosecutor compels testimony, both to pursue a larger U.S. investigation and to facilitate a foreign prosecution of the defendant witness? Any accusation that a prosecutor was compelling testimony "for the purpose" of assisting a foreign prosecution seemingly could be rebutted by a conclusory assertion that the government sought the testimony "for the purpose" of assisting, at least in part, a *domestic* investigation as well.⁸⁵ This would almost always be the case, as it would be unlikely for U.S.

⁸¹ See, e.g., Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory*, 71 ANTITRUST L.J. 719, 734–51 (2004) (discussing problems of proving collusion in context of antitrust law and surveying theories of how to ease burden on plaintiffs).

⁸² See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007) (dismissing on Rule 12(b)(6) motion antitrust complaint where plaintiff alleged merely "parallel conduct and a bare assertion of conspiracy"). The important role of circumstantial evidence in proving antitrust violations has motivated an outcry against *Twombly*'s heightened pleading standard, which appears to disfavor use of such evidence. See A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 481–82 (2008) (arguing that *Twombly* placed especially restrictive burden on plaintiffs "where the needed supporting facts lie within the exclusive possession of the defendants, which can be the case in antitrust cases lacking direct evidence of a conspiracy").

⁸³ See Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 HARV. L. REV. 917, 939 (2003) (reviewing RICHARD A. POSNER, ANTITRUST LAW (2d ed. 2001)) (noting that Supreme Court in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), "tipped the balance dramatically in favor of summary disposition of antitrust disputes").

⁸⁴ *United States v. Balsys*, 524 U.S. 666, 698 (1998) (emphasis added).

⁸⁵ This seems similar to the problem of proving an allegation that a prosecutor unlawfully used a peremptory challenge to exclude a juror on the basis of race, which can easily be rebutted by a conclusory, neutral justification. See *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995) (holding that claim of race-neutral justification for excluding juror need "not demand an explanation that is persuasive, or even plausible" to rebut prima facie case of discrimination).

investigators to vigorously pursue an investigation for wholly foreign interests.⁸⁶

While proving collusion, or specific intent, would be difficult at any time, the fact that such evidence must be unearthed *during* a criminal investigation makes this task nearly impossible. For a litany of legitimate reasons—such as protecting witnesses, avoiding disclosure of means and methods of investigation, and preserving the element of surprise—the government shields its investigative techniques to the greatest extent possible during the process of a criminal investigation. Even where the state is required to deliver exculpatory evidence to the defendant,⁸⁷ it often does not do so until the last possible moment.⁸⁸ For a witness—presumably called before a grand jury to testify long before any actual trial—it will therefore be very difficult to suspect, much less prove, that the government is cooperating closely with a foreign sovereign.⁸⁹ Absent a mistake by the government in divulging the methods of its investigation, proof of collusion or specific intent will be nearly impossible to obtain.

Finally, the facts of *Balsys* place witnesses at an immediate disadvantage when proving the requisite intent or collusion of U.S. law enforcement officials. In fact, the Court acknowledged that *Balsys* had shown that the United States had specifically “assumed an interest in foreign prosecution”⁹⁰ of this category of crimes. First, *Balsys* demonstrated that the OSI had an official mandate to assist in foreign prosecution. OSI was “created to institute denaturalization and deportation

⁸⁶ In any event, the *Balsys* opinion, as unmodified by the exception, is critically flawed in that it provides prosecutors a means to circumvent the Fifth Amendment through the use of foreign prosecution, putting defendants at risk of abuse regardless of whether the U.S. prosecutor also used the testimony to assist a domestic prosecution. Therefore, the requirement of specific intent is inapposite to the policy concern Justice Souter expressed in Part V of *Balsys*.

⁸⁷ See Jencks Act, 18 U.S.C. § 3500 (2006) (requiring disclosure of prior statements by prosecution witnesses); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (requiring prosecutors to disclose favorable evidence to criminal defendant where “material either to guilt or to punishment”).

⁸⁸ See, e.g., *United States v. Tarantino*, 846 F.2d 1384, 1416 (D.C. Cir. 1988) (finding no violation where exculpatory material was produced during trial and after some government witnesses had already testified); *United States v. Pollack*, 534 F.2d 964, 969, 973–74 (D.C. Cir. 1976) (finding no violation where some exculpatory material was produced three days and one day before trial).

⁸⁹ Cf. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 586–87 (2007) (Stevens, J., dissenting) (noting difficulty of proving antitrust violations where “the proof is largely in the hands of the alleged conspirators” (internal quotation marks and citation omitted)). Similarly, all the information relevant to proving “cooperative prosecution” is in the hands of law enforcement officials. Requiring a defendant witness to prove this level of cooperation without robust factfinding renders the privilege functionally unavailable to a witness claiming the cooperative prosecution exception.

⁹⁰ *United States v. Balsys*, 524 U.S. 666, 699 (1998).

proceedings against suspect Nazi war criminals"⁹¹ and, by executive order, was given the task to "[m]aintain liaison with foreign prosecution, investigation and intelligence offices . . . and [d]irect and coordinate the investigation, prosecution and any other legal actions."⁹² Second, Balsys pointed out American obligations under a Mutual Legal Assistance Treaty (MLAT)⁹³ to give Lithuania any evidence provided by him to investigators.⁹⁴ As Justice Breyer's scathing dissent makes clear, elements of cooperative prosecution permeated the case: "Congress . . . passed a deportation law targeted at suspected Nazi war criminals"; the DOJ "established an agency [OSI] whose mandate include[d] the assistance of foreign governments in the prosecution of those deported"; and the United States explicitly agreed to cooperate with at least one country in the prosecution of war crimes committed during World War II.⁹⁵ Nevertheless, the Court found that this level of cooperation still "d[id] not rise to the level of cooperative prosecution."⁹⁶ Despite the abundance of proof that there was in fact "cooperative prosecution," at least at a general programmatic level, the Court did not regard the evidence as sufficient to invoke the exception.⁹⁷ Any future witness seeking the protection of the exception must, therefore, show an even greater degree of cooperation than

⁹¹ *Id.* at 670.

⁹² *Id.* at 699 n.18 (citation omitted).

⁹³ MLATs are essentially agreements between countries to assist in the investigation and intervention of each country's criminal laws. For a helpful discussion of MLATs, see generally James I.K. Knapp, *Mutual Legal Assistance Treaties As a Way To Pierce Bank Secrecy*, 20 CASE W. RES. J. INT'L L. 405 (1988).

⁹⁴ *Balsys*, 524 U.S. at 699 & n.19. The Court explained:

The treaty between the United States and Lithuania specifically states that the two governments agree to cooperate in prosecution of persons who are alleged to have committed war crimes[.] . . . agree to provide mutual legal assistance concerning the prosecution of persons suspected of having committed war crimes[.] . . . will assist each other in the location of witnesses believed to possess relevant information about criminal actions . . . during World War II, and agree to intermediate and endeavor to make these witnesses available for the purpose of giving testimony in accordance with the laws of the Republic of Lithuania to authorized representatives of the United States Department of Justice.

Id. at 699 n.19 (citing Memorandum of Understanding Between the United States Department of Justice and the Office of the Procurator General of the Republic of Lithuania Concerning Cooperation in the Pursuit of War Criminals, U.S.-Lith., ¶ 2, Aug. 3, 1992, T.I.A.S. No. 12,470).

⁹⁵ *Balsys*, 524 U.S. at 715–16 (Breyer, J., dissenting).

⁹⁶ *Id.* at 699 (majority opinion).

⁹⁷ It seems plausible that the Court may have been convinced by more specific evidence of cooperative prosecution in Balsys's case. And while evidence of investigation abroad suggested cooperation, it did not rise to the level of agency (i.e., that the domestic prosecutors or investigators were acting on behalf of a foreign country) that might be required to make out a claim.

that present in *Balsys*. Moreover, the witness may need evidence of specific instances of cooperation in his or her particular case, not merely programmatic cooperation, all while facing the discovery disadvantages noted above.

Given the hurdles a witness must clear—proving collusion, proving specific intent, and distinguishing the “cooperative prosecution” facts alleged in *Balsys*—it is unsurprising that lower courts have been hesitant to accept an invocation of the Fifth Amendment privilege on the basis of this exception. I now turn to subsequent lower court reactions to witness arguments invoking the cooperative prosecution exception.

B. Lower Court Reactions to “Cooperative Prosecution Exception” Arguments

Shortly after *Balsys*, several employees of an artificial sausage casings company were held in contempt by the District Court of New Jersey for refusing to testify before a grand jury as part of an investigation of price-fixing in violation of the Sherman Act. Despite the issuance of an order granting the defendants use and derivative-use immunity⁹⁸ for their testimony, the defendants invoked the cooperative prosecution exception as grounds for asserting the privilege against self-incrimination.⁹⁹ The witnesses argued that they had demonstrated cooperative prosecution by asserting several critical facts: (1) the DOJ Antitrust Division’s overt policy of cooperation with other countries, as evidenced by numerous speeches by DOJ officials; (2) the existence of antitrust laws similar to U.S. law in at least twelve other countries; (3) the existence of MLATs between the United States and these countries; (4) the active steps taken by several of these countries in their own parallel antitrust investigations of this company (e.g., interviewing witnesses, collecting documents, etc.); and (5) the International Antitrust Enforcement Assistance Act’s (IAEAA) authorization of the use of domestic grand juries in aiding foreign antitrust prosecutions.¹⁰⁰ The defendants thus asserted that their testimony would likely serve to incriminate them in any or all of several foreign countries. It should be noted here that the defendant witnesses, unlike the witness in *Balsys*, were able to show some evidence of cooperative prosecution specific to the investigation at hand, and not merely a general policy of assisting foreign prosecutions. Specifically, the witnesses alleged that Canadian witnesses had been con-

⁹⁸ See *supra* notes 26–28 and accompanying text (discussing immunity).

⁹⁹ *In re Impounded*, 178 F.3d 150, 152 (3d Cir. 1999).

¹⁰⁰ *Id.*

tacted by Canadian investigators, and in some cases were asked identical questions as the defendant witnesses before the grand jury.¹⁰¹ Unlike in *Balsys*, this supported an inference that there had been some collusion between U.S. and Canadian law enforcement *in this particular case*.

The district court first denied an evidentiary hearing requested by defendants to establish that they were, in fact, “the targets of an international joint criminal investigation.”¹⁰² Then, based on the record without such a hearing, the court rejected the assertion of the privilege on the ground that there was “virtually no likelihood of the generation of a record” that would establish a real and substantial fear of foreign prosecution to adequately meet the cooperative prosecution exception.¹⁰³ Accepting the government’s representation that “[grand jury] material was not going to be released to foreign prosecutors,” the district court found no reason to grant a hearing and held the exception inapplicable.¹⁰⁴

On appeal, the Third Circuit reached the same result, but addressed the defendants’ claims under the cooperative prosecution exception in considerably more detail. After first expressing doubt that the Supreme Court in *Balsys* established an actual test for asserting the privilege for fear of foreign prosecution,¹⁰⁵ the court went on to the merits of the witnesses’ claim that the testimony was being compelled for the purpose of a “joint prosecution.”¹⁰⁶ Relying on the facts of *Balsys*—including the agreements between the United States and Lithuania, the OSI mandate, and the MLAT¹⁰⁷—the court reasoned that “[t]he fact that a few instances of evidence gathering have occurred in other countries does not create an inferential leap that appellants’ fear of foreign prosecution is ‘tantamount to fear of a

¹⁰¹ Appellant’s Reply Brief and Argument at 15, *In re Impounded*, 178 F.3d 150 (3d Cir. 1999) (No. 98-6498), 1999 WL 33613495 at *15.

¹⁰² *Id.* at 13.

¹⁰³ *Impounded*, 178 F.3d at 153.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 154–55 (“[T]he language in *Balsys* is conditional rather than prescriptive . . . and sets forth a hypothetical situation reserved ‘for another day,’ rather than a set of rules which a court can readily apply to determine whether an investigation is such that the protections of the Fifth Amendment should apply.” (quoting *United States v. Balsys*, 524 U.S. 666, 699 (1998))). An alternate interpretation was available.

See Preston, *supra* note 74, at 1728 (arguing that Supreme Court actually meant to establish test for proving “cooperative prosecution” by including this text, notwithstanding conditional language).

¹⁰⁶ *Impounded*, 178 F.3d at 155.

¹⁰⁷ *Id.* at 155–56 (noting that despite significant evidence of cooperation between sovereigns, Supreme Court “found that this was not sufficient to create a ‘cooperative prosecution’”).

criminal case brought by the Government itself.’”¹⁰⁸ Despite specific evidence of cooperation, in addition to the general policy of antitrust enforcement officials to cooperate in “parallel” prosecutions with other nations, the Third Circuit still could not find adequate proof of cooperative prosecution—the specific intent or collusion—given the high burden articulated by the Supreme Court in *Balsys*. Thus, the court held that there was insufficient evidence of “cooperative prosecution” and rejected the defendants’ assertion of the Fifth Amendment privilege against self-incrimination.¹⁰⁹

As discussed above, such a result is unsurprising post-*Balsys*, since the defendant witnesses in *Impounded* were only able to drum up circumstantial evidence of cooperative law enforcement.¹¹⁰ It is hard to imagine, however, that the defendant witnesses could have possibly produced more evidence of cooperation without a serious misstep by the investigating authorities. As argued previously, the methods of pursuing any particular investigation are likely to be closely guarded, and potential witnesses are likely to be in the dark about the level of cooperation between governments during an investigation.¹¹¹ Indeed, in *Impounded*, it seems that only by chance were the defendant witnesses able to show that the Canadian authorities had asked nearly identical questions as the prosecutor at the grand jury. Evidence that the agencies were colluding—let alone evidence that the prosecution was compelling testimony *for the purpose* of facilitating this collusion—was simply not available. Only when the witnesses were arrested by Canadian law enforcement and faced with their own incriminating evidence compelled by the grand jury would they be able to provide sufficient proof of cooperation. The *Impounded* opinion thus profoundly demonstrates the obstacles before a defendant witness in proving cooperative prosecution: the difficulty of proving collusion and specific intent in the context of a criminal investigation and, relatedly, the difficulty in distinguishing the “cooperative prosecution” facts in *Balsys*.

Other courts to address the issue have been equally dismissive of claims under the cooperative prosecution exception. For instance, in *United States v. Alvarez*¹¹² and *United States v. Abreu*,¹¹³ the Western

¹⁰⁸ *Id.* at 156 (quoting *Balsys*, 524 U.S. at 699).

¹⁰⁹ *Id.* at 155–56.

¹¹⁰ See *supra* Part II.A (explaining theoretical obstacles to proving cooperative prosecution).

¹¹¹ See *supra* notes 87–89 and accompanying text (noting particularly onerous burden on criminal defendants in uncovering evidence of governmental conduct and strategies during investigation).

¹¹² 489 F. Supp. 2d 714 (W.D. Tex. 2007).

¹¹³ No. EP-06-CR-2576-DB, 2007 WL 1357807 (W.D. Tex. Mar. 1, 2007).

District of Texas upheld contempt orders on the grounds that the witnesses had improperly asserted the privilege based on fear of foreign prosecution. Among other reasons, the court in *Alvarez* determined that the defendant witnesses failed to meet their burden because they were unable to show the "agency relationship between the two sovereignties" that the *Balsys* opinion seems to require.¹¹⁴ Similarly, the court in *Abreu* held that a situation "where one nation supports the prosecutorial efforts of another is insufficient to raise [sic] to the level required under this hypothetical question of 'cooperative prosecution.'" ¹¹⁵ Finally, in *Valenzuela v. United States*, the Eleventh Circuit upheld a magistrate judge's "reject[ion], out of hand" of the witnesses' argument that "Italian and American authorities were cooperating to such an extent that the Italian prosecution should be treated as a prosecution initiated by the United States," despite parallel investigations by U.S. and Italian authorities of the same narcotics ring.¹¹⁶

While defendant witnesses continue to argue that their testimony is protected by the privilege under the exception in *Balsys*,¹¹⁷ there has yet to be a single reported opinion that sustains the invocation of the privilege on these grounds.¹¹⁸ Given the hurdles imposed by Justice Souter's language, the facts of *Balsys*, and the inherent difficul-

¹¹⁴ 489 F. Supp. 2d at 722.

¹¹⁵ 2007 WL 1357807, at *6 (quoting *United States v. Balsys*, 524 U.S. 666, 699–700 (1998)).

¹¹⁶ 286 F.3d 1223, 1227–28 (11th Cir. 2002).

¹¹⁷ See, e.g., Appeal From, and Objections to, Magistrate Judge Turnoff's Omnibus Order Regarding the Plaintiff's Motion to Compel Deposition Testimony from Defendant Cosvogiannis, Triton Container Int'l Ltd. v. Cosvogiannis, No. 04-21241-CIV-ALTONAGA at 7 (S.D. Fla. Aug. 9, 2005), 2005 WL 6110002 (arguing that privilege should be available where "foreign prosecutorial actions will likely transform into a domestic prosecution," and that warrants in Turkey and fear of domestic prosecution would lead to this result).

¹¹⁸ Since *Balsys*, only one state court, which was subsequently reversed, has held that the privilege should be available where there is a fear of foreign prosecution, but not on the grounds of the cooperative prosecution exception. See *Relsolelo v. Fisk*, 739 N.E.2d 954, 958 (Ill. App. Ct. 2000) (holding that privilege should be available on grounds that analogous Illinois constitutional provisions were broader than Fifth Amendment as interpreted by Supreme Court), *rev'd*, 760 N.E.2d 963 (Ill. 2001). The relative paucity of cases since *Balsys* litigating this issue should not indicate to the reader that the problem identified in this Note is insignificant. Given the difficult showing required from plaintiffs under the *Balsys* opinion and current doctrine, and the lack of "cooperative prosecution" evidence that can be unearthed by a witness during the investigative stage, witnesses may be hard-pressed to raise a nonfrivolous claim under the exception, and thus can be deterred from even making the argument. Moreover, the effect of this gap in Fifth Amendment protection may be felt most significantly at the bargaining table between the prosecutor and a potential witness. Because of the trap of a guaranteed prosecution at prosecutors' disposal—representing a tremendous shift in the "state-individual balance"—it is possible that many more witnesses in this situation agree to cooperate or plead guilty than otherwise would. Such results would explain the lack of relevant litigation.

ties of proving “cooperative prosecution,” this result should not be surprising.¹¹⁹ In theory and in practice, the cooperative prosecution claim is unavailable to a defendant witness trapped by a prosecutor who seeks to use foreign prosecution as a tool to circumvent the privilege against self-incrimination. Even where it may be obvious *ex post* that the relevant testimony was compelled at least partially for the purpose of aiding a foreign investigation or prosecution—for instance, once the witness has been arrested, prosecuted, and confronted by her own testimony in a foreign nation—a witness will not be able to make out this claim at the time at which it matters.

With such constraints, the current doctrine does not permit the *Balsys* exception defense, even in meritorious situations, except in the extremely unlikely hypothetical scenario in which the government announces its specific intent to cooperate with a foreign country in the specific criminal case. In Part III, I propose a different approach, which both protects the Fifth Amendment privilege from exploitation and maintains the core holding of *Balsys*, that testimony critical to U.S. investigations is not lost.

III

CLOSING THE LOOPHOLE: A PROPOSED SOLUTION

In this Part, I suggest a solution to the obstacles faced by defendant witnesses in successfully invoking the privilege against self-incrimination where prosecutors compel testimony in order to assist a foreign prosecution. I borrow from several criticisms of the *Balsys* opinion, including Justice Breyer’s dissent, that attack its failure to protect the rights of an imperiled defendant witness—in particular, for its failure to consider the possibility that courts could grant constructive immunity that protects the exposure of compelled testimony without losing important evidence.¹²⁰ In this Part, I seek to explore how such grants of immunity might work, addressing specifically the *Balsys* Court’s focus on enforceability. Furthermore, I will examine how to apply this immunity in practice, not as an attack on the *Balsys* holding, but rather as an attempt to vindicate the constitutional rights implicated by the “cooperative prosecution” exception.

¹¹⁹ This is not to suggest that the defendant witnesses in any of these cases properly fit within the “cooperative prosecution” exception, but that the courts’ analysis in each would seem to preclude *any* defendant from successfully invoking the exception.

¹²⁰ Expansive immunity agreements have been suggested before, mostly by commentators criticizing the *Balsys* holding. However, there is a lack of substantive discussion about how these agreements might work, and enforceability concerns have been mostly ignored. *See, e.g.,* Winger, *supra* note 1, at 1137–38 (proposing that government could grant “constructive immunity” by keeping compelled testimony under seal).

Unlike the current doctrinal framework—where courts determine whether testimony is being impermissibly compelled on a case-by-case basis—I argue that courts should insist that immunity orders include assurance to the defendant witness that testimony will not be disclosed to a foreign country, whenever a defendant makes a threshold showing of a legitimate fear of foreign prosecution. Thus, I propose an expansion of the constitutionally required scope of immunity orders beyond that required in *Kastigar*—i.e., only “use and derivative-use immunity”¹²¹—to include, under certain circumstances, protection from the *sharing* of testimony with a foreign country.

A. *Expanding Immunity Orders*

Dissenting in *Balsys*, Justice Breyer criticized the majority for failing to consider a creative solution to the practical concern of losing valuable testimony should fear of foreign prosecution be recognized under the privilege. Justice Breyer suggested a type of “*de facto* immunity,” where the government, even if it could not eliminate the possibility of foreign prosecution, could at least “make the threat of foreign prosecution insubstantial.”¹²² Justice Breyer’s approach focused on the possibility of the government securing a foreign nation’s promise not to prosecute the testifying witness.¹²³ Inevitably, this solution falls short: U.S. courts would be unable to enforce these foreign obligations on foreign prosecutors.¹²⁴ To adequately address the witness’s fear of prosecution, therefore, any “*de facto* immunity” must be calibrated to be actually enforceable by a domestic court.

The Eleventh Circuit’s 2002 decision in *Valenzuela v. United States*¹²⁵ may point the way forward. There, codefendants Valenzuela and Repper were the targets of an international narcotics investigation spanning the United States, Brazil, and Italy. Theresa Bailey, apprehended by Italian authorities with 3.2 kilograms of cocaine, cooperated with the police and fingered Valenzuela and Repper, then living in Florida, as the individuals who had recruited her to be a drug courier.¹²⁶ Her cooperation prompted an Italian court to issue warrants for their arrests.¹²⁷ Supposedly, Valenzuela and Repper approached Drug Enforcement Administration (DEA) agents in Florida to provide the agents with information about the international

¹²¹ See *supra* notes 26–28 and accompanying text (discussing immunity).

¹²² *Balsys*, 524 U.S. at 719 (Breyer, J., dissenting) (internal quotation marks omitted).

¹²³ *Id.*

¹²⁴ See *supra* note 48.

¹²⁵ 286 F.3d 1223 (11th Cir. 2002).

¹²⁶ *Id.* at 1225.

¹²⁷ *Id.*

drug organization, presumably to seek leniency through cooperation.¹²⁸ Valenzuela and Repper secured use and transactional immunity from the DEA for the information they provided, and, essential for the purposes of this discussion, Repper secured a “Cooperating Individual Agreement” that “guaranteed that the DEA would ‘use all lawful means to protect [the defendant’s] confidentiality’” in exchange for cooperation with the DEA.¹²⁹ This agreement, as acknowledged by the Eleventh Circuit, clearly was made to prevent the disclosure of incriminating statements to Italian authorities.¹³⁰ Later that year, the DEA terminated the cooperation agreement after Valenzuela and Repper violated the terms of the agreement by contacting members of the drug ring without permission. The two defendants were subsequently arrested in Florida, and the DEA initiated extradition proceedings for their transfer into the custody of Italian authorities. To establish that extradition was warranted, the United States Attorney sought to introduce an agent’s affidavit that included the defendants’ incriminating statements. The defendants objected to this use of testimony on two grounds: (1) use of the affidavit violated the defendants’ privilege against self-incrimination under the cooperative prosecution exception, and (2) use of the affidavit violated the defendants’ due process rights by failing to adhere to the confidentiality clause of the Cooperation Agreement.¹³¹

The Eleventh Circuit rejected the first argument on now-familiar grounds, stating that:

[T]here is simply nothing in the record to support a finding that the investigation by Italy was so jointly and cooperatively conducted with the United States as to allow petitioners to take advantage of dicta in *Balsys* that may allow individuals to claim that “fear of foreign prosecution [is] tantamount to fear of a criminal case brought by the Government itself.”¹³²

The court agreed with the defendants, however, that the violation of the agreement to keep such statements confidential constituted a denial of due process. Specifically, the court found that the defendants would have refused to cooperate “if the agents had told them that the information they provided, along with their identities, might be disclosed to the Italian authorities and might result in their extradition to Italy for trial.”¹³³ Relying on *Santobello v. New York*, in which the

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 1230.

¹³¹ *Id.* at 1228.

¹³² *Id.* at 1229 (quoting *United States v. Balsys*, 524 U.S. 666, 698–99 (1998)).

¹³³ *Id.* at 1230.

Supreme Court held that a prosecutor’s breach of a plea agreement may constitute a denial of due process,¹³⁴ the Eleventh Circuit concluded that the breach of the Cooperation Agreement—and “use [of] the fruits of the breach”—would constitute a denial of a fair extradition hearing in violation of the Due Process Clause.¹³⁵

While *Valenzuela* did not break new ground in finding a due process violation in the government’s breach of a cooperation agreement, the nature of the cooperation agreement (that is, a confidentiality agreement for the purpose of preventing transnational sharing) in the case suggests a different, more administrable, tool available to courts to avoid the cooperative prosecution trap. This method provides assurance to a defendant against abuse by prosecutors seeking to exploit the *Balsys* holding to circumvent the Fifth Amendment privilege, while still allowing prosecutors to compel testimony. I propose that, under circumstances where a defendant witness can prove a threshold fear of foreign prosecution via circumstantial evidence, courts should require the use of a cooperation agreement similar to the one used in *Valenzuela* as a constitutionally mandated prophylactic to protect against exploitation of the defendant’s Fifth Amendment rights.

Under current doctrine, *Kastigar* requires only the grant of “use and derivative-use immunity” to protect the Fifth Amendment privilege adequately.¹³⁶ This “assur[es] that the compelled testimony can in no way lead to the infliction of criminal penalties,” but does not prevent the government from “using evidence from legitimate independent sources” in any related prosecution.¹³⁷ As shown above, however, “use and derivative-use immunity” from a domestic prosecution does not adequately address the self-incrimination concerns of a defendant who fears foreign prosecution. To the contrary, these immunity orders can allow a prosecutor to trap a defendant accused of a crime of an international character.¹³⁸

In order to close the *Balsys* loophole, courts should insist that immunity agreements include, in addition to an agreement not to use or derivatively use compelled testimony, an agreement not to disclose such information to foreign authorities, assuming the witness can make a threshold showing of a reasonable fear of foreign prosecution.

¹³⁴ 404 U.S. 257, 262–63 (1971).

¹³⁵ *Valenzuela*, 286 F.3d at 1230.

¹³⁶ See *supra* notes 26–28 and accompanying text (explaining scope of immunity required by *Kastigar*).

¹³⁷ *Kastigar v. United States*, 406 U.S. 441, 461 (1972).

¹³⁸ See *supra* notes 65–78 and accompanying text (explaining trap available to prosecutors exploiting *Balsys* loophole).

This spares witnesses the impossible burden of proving cooperative prosecution and saves courts the cost of holding evidentiary hearings to determine whether the cooperative prosecution exception should apply, while still allowing prosecutors to compel testimony by using (modified) immunity orders. This would both prevent the “cruel trilemma” and restore the “fair state-individual balance” by protecting the individual’s Fifth Amendment privilege and allowing the government to purchase important testimony on fair terms.

B. The Mechanics and Enforceability of Expanded Immunity Orders

While the exact mechanics of modified immunity orders are beyond the scope of this Note, I will provide a brief sketch of how such a regime might function. Let us return to W, our defendant witness in the Foreign Corrupt Practices Act investigation. W, in response to a discovery request, would invoke the privilege against self-incrimination for any domestic crime as well as against any self-incrimination through “cooperative prosecution” between the United States and a foreign country with complementary criminal provisions.¹³⁹ Assuming the government accepts W’s invocation of the privilege with respect to the domestic FCPA charge as genuine, the next step would be to determine whether the government would challenge W’s assertion of self-incrimination under foreign law. If the government does not challenge W’s invocation, any immunity order issued by the court should include a nonsharing provision, thereby binding the enforcement agency and the prosecutor to not share the fruits of any testimony with a foreign nation—perhaps under the threat of criminal penalty.¹⁴⁰ Alternatively, if the government does challenge the invocation, W should be permitted to make a threshold showing through circumstantial evidence that she has a reasonable fear of foreign prosecution.¹⁴¹ Relevant circumstantial evidence may include:

¹³⁹ Most of the European Union nations, for instance, have criminal laws that roughly mirror the FCPA. See *supra* note 66 (describing OECD convention on foreign corruption law).

¹⁴⁰ The likely penalty for such a violation is contempt of court.

¹⁴¹ In the circuits that permitted witnesses to assert fear of foreign prosecution under the Fifth Amendment before *Balsys* was decided, the most common threshold showing (and the showing still used by courts evaluating the *Balsys* exception under current doctrine) is whether the fear of foreign prosecution is “real and substantial.” See *In re Impounded*, 178 F.3d 150, 156–57 (3d Cir. 1999) (holding that even if cooperative prosecution were valid exception to *Balsys* rule, defendant witnesses still did not establish “real and substantial” fear of foreign conviction); *United States v. Gecas*, 120 F.3d 1419, 1425–26 (11th Cir. 1997) (holding pre-*Balsys* that privilege could only be asserted where “real and substantial” danger of foreign prosecution existed); *In re Grand Jury Subpoena of Flanagan*, 691 F.2d 116, 121 (2d Cir. 1982) (holding that fear of foreign prosecution must

policy statements by U.S. government agencies, MLATs, extradition treaties, prior transnational cooperation in similar types of cases, foreign criminal laws relevant to the defendant's testimony, and a history of prosecution of similar crimes by foreign countries.¹⁴² Upon an adequate showing, a court should require a nonsharing provision in the immunity order.¹⁴³ Only then should the court be constitutionally per-

be "real and reasonable"). The defendant witnesses in *Impounded* argued for application of a test to determine reasonable fear of foreign prosecution. See *Impounded*, 178 F.3d at 155. I would adopt this "reasonable fear" approach for two reasons. First, the traditional interpretation of the Self-Incrimination Clause in domestic cases permits invocation even when a risk of incrimination is attenuated: All that needs to be shown is that there is a reasonable fear that testimony could furnish a link in the chain of incrimination. See *Pillsbury Co. v. Conboy*, 459 U.S. 248, 266 n.1 (1983) (Marshall, J., concurring) ("A witness is generally entitled to invoke the Fifth Amendment privilege against self-incrimination whenever there is a *realistic possibility* that his answer to a question can be used in any way to convict him of a crime.") (emphasis added); *Malloy v. Hogan*, 378 U.S. 1, 11 (1964) ("The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . .") (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951))). Second, my proposal makes the cooperative prosecution exception less costly to prosecutors than the situation feared by the Court in *Balsys*. The Court was particularly concerned that acknowledging fear of foreign prosecution would render evidence utterly outside the reach of criminal discovery; therefore, a higher burden—real and substantial fear—was justified by this drastic outcome. By permitting the prosecution to obtain important testimony through modified immunity orders, however, a higher threshold than that required for defendants fearing domestic prosecution becomes far more difficult to justify.

¹⁴² Some scholars have argued that due to the administrative burdens inherent in the careful parsing of foreign law and domestic courts' lack of relevant expertise, courts cannot or should not attempt to make subtle determinations of foreign law to decide when a defendant has a fear of foreign prosecution. See Rotszain, *supra* note 29, at 1943 (arguing that inquiries into whether fear of foreign prosecution is "real and substantial" will "necessarily involve identifying and interpreting foreign laws—tasks that are difficult and cumbersome for U.S. courts"). The same argument could be made against my proposal. It should be noted, however, that U.S. domestic courts frequently make determinations of foreign law. In complex international cases, courts often apply foreign law. In determining whether international comity requires deference to a foreign nation, for instance, courts necessarily must determine the substance of foreign statutes. Evaluation of a threshold showing that there is merely a risk of foreign prosecution would be substantially less burdensome than this nuanced analysis. For a discussion of international comity and the foreign compulsion defense, see generally Michael A. Helfand, *When Religious Practices Become Legal Obligations: Extending the Foreign Compulsion Defense*, 23 J.L. & RELIGION 535 (2008).

¹⁴³ A modified immunity order, in the context of a grand jury subpoena, should explicitly preempt an exception to the grand jury secrecy rules that permit disclosure of grand jury testimony to "any government personnel—including those of a . . . foreign government." FED. R. CRIM. P. 6(e)(3)(A)(ii). Indeed, some courts, pre-*Balsys*, had held that grand jury secrecy rules under 6(e) dissipated any fear of foreign prosecution because disclosure was illegal. See *In re Tierney*, 465 F.2d 806, 811 (5th Cir. 1972) ("[B]ecause of the secrecy of . . . grand jury proceedings no substantial risk of foreign prosecution is posed."). Circuits that upheld the privilege, however, noted that the grand jury secrecy rules—and the district court's ability to effectively enforce them—were insufficient to guarantee the witness proper protection from disclosure. See *United States v. Gecas*, 50 F.3d 1549, 1559

mitted to compel W's testimony under penalty of contempt. While this process will have the greatest effect in grand jury proceedings, it could be expanded to situations where a witness is compelled to testify in open court by imposing limitations on public access to the courtroom whenever such a situation arises.¹⁴⁴

This solution addresses a key concern of the *Balsys* opinion: enforceability. *Balsys* was driven substantially by the practical constraints of a domestic court's power to enforce an immunity order.¹⁴⁵ If the privilege extended to fear of foreign prosecution, courts would lack the authority to issue an immunity order that could bind a foreign sovereign, and thus be unable to adequately address self-incrimination concerns. Because foreign agencies and courts are beyond the sphere of an Article III court's authority, the result would be a permanent loss of the testimony. The Court therefore placed great weight on the limits of judicial power. However, this approach ignores the relevant actors over which domestic courts *do* have authority: the prosecutors and enforcement agents themselves. Courts can, through their contempt powers, bar prosecutors and enforcement officials from sharing testimony, curbing at least the most egregious exploitations of the *Balsys* holding.

One might argue that this solution misconstrues the privilege against self-incrimination, which is at heart a trial right. Unlike the Fourth Amendment, the violation of which takes place at the time of the illegal search or seizure,¹⁴⁶ the violation of the Self-Incrimination

(11th Cir. 1995) (affirming district court's determination that nondisclosure order was insufficient to assuage fear of foreign prosecution should evidence be shared with another country); *United States v. (Under Seal)*, 794 F.2d 920, 924–25 (4th Cir. 1986) (finding district court's order encompassing Rule 6(e) procedures to protect witness from disclosure of grand jury testimony to foreign government to be inadequate to protect witness); *In re Cardassi*, 351 F. Supp. 1080, 1082 (D. Conn. 1972) (same).

¹⁴⁴ Testimony in open court provides a dilemma because it would be difficult to stop incriminating evidence exposed in this manner from flowing to a foreign prosecutorial agency. This is not problematic for my proposal. If a domestic trial involving the testimony were actually taking place, it would be unlikely that the prosecutor was using foreign prosecution to circumvent the privilege rather than to inform its own investigation. In other words, in such a situation, "cooperative prosecution" as an end run around the privilege would be unlikely. If, however, cooperative prosecution were still a concern, a court could impose restrictions on public access to the court. *See United States v. Marzook*, 412 F. Supp. 2d 913, 925–26 (N.D. Ill. 2006) (closing court to public to protect classified information and identities, and because of safety concerns regarding foreign intelligence officials testifying in public).

¹⁴⁵ *See supra* notes 47–50 and accompanying text (arguing that *Balsys* Court weighed heavily practical consequences of losing testimony protected by privilege).

¹⁴⁶ *See United States v. Leon*, 468 U.S. 897, 906 (1984) ("The wrong condemned by the [Fourth] Amendment is fully accomplished by the unlawful search or seizure itself, and the exclusionary rule is neither intended nor able to cure the invasion of the defendant's rights which he has already suffered." (citations and internal quotation marks omitted)).

Clause occurs when compelled testimony (or the fruits thereof) is *used* in any criminal proceeding—not at the time of compulsion.¹⁴⁷ Therefore, one might argue, to adequately protect against a Fifth Amendment violation, the court must protect against the use of the compelled testimony in the criminal case, not merely the means of communicating the testimony. In this context, if we were to accept that, in some cases, a prosecutor's sharing of testimony would violate the Fifth Amendment, a court would be required to actually exclude testimony from use in a foreign court—a power *Balsys* shows is clearly beyond the authority of U.S. courts.¹⁴⁸

My proposal, however, can be viewed as a prophylactic solution to potential, but difficult to prove, violations of the Self-Incrimination Clause. By exercising authority over domestic officials—instead of enforcing the trial right—courts would be preventing potential, not necessarily actual, Fifth Amendment violations. This concept is not unheard of in Fifth Amendment jurisprudence. Indeed, the requirement of *Miranda*¹⁴⁹ warnings, a touchstone of modern self-incrimination doctrine, is justified primarily as a constitutional prophylactic that excludes testimony not necessarily compelled under the Fifth Amendment.¹⁵⁰ The approach I advocate simply extends the logic of *Miranda* to a different context: It calls for application of a constitutional prophylactic to prevent the sharing of testimony where the possibility of a Fifth Amendment violation actually coming to fruition cannot be determined with certainty, given the discovery burden.

It might also be argued that my proposed solution threatens transnational cooperation among law enforcement agencies in a time when such cooperation has become vital. International organized crime, foreign corruption, and international terrorism have increasingly become the focus of investigations that span across national borders and require the resources of multiple sovereigns.¹⁵¹ If the fruits of U.S. investigations, such as grand jury testimony, are suddenly made unavailable to foreign governments because of modified immunity orders, cooperation with U.S. law enforcement may erode, ultimately

¹⁴⁷ See *Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (holding that there is no Self-Incrimination Clause violation where compelled "statements were never admitted as testimony against [defendant] in a criminal case"); Amar & Lettow, *supra* note 23, at 869 n.36 ("[A] Fifth Amendment violation occurs at the point when compelled testimony is introduced in a criminal case.").

¹⁴⁸ See *supra* notes 5–6, 47–50 and accompanying text.

¹⁴⁹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁵⁰ See Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 553–56 (1996) (discussing merits of *Miranda*'s prophylactic rule in protecting constitutional rights).

¹⁵¹ See *supra* notes 73–75 (discussing international and transnational law enforcement).

undermining law enforcement efforts. Further, information gleaned from grand jury testimony might be vital to broader investigations. Imagine, for instance, that W's testimony reveals a much wider scheme of corruption, involving many more individuals, say, in Germany. U.S. investigators will want, of course, to share this testimony with German authorities in order to secure their arrest and extradition, and to prevent additional violations of the law. In cases where the stakes are higher, and the imperatives of preventing continued criminal activity more compelling—for instance, in cases of international terrorism—investigators, both domestic and abroad, might feel unreasonably restricted by covenants binding them not to share W's testimony with their counterparts in a foreign country.¹⁵²

Despite the detrimental impact such a result would have on transnational law enforcement efforts and, ultimately, U.S. interests, this outcome is nevertheless necessarily compelled by the Self-Incrimination Clause of the Fifth Amendment.¹⁵³ The alternative—allowing prosecutors to willingly use foreign prosecution to circumvent the privilege—is wholly contrary to the commandments of the Fifth Amendment, the harm to law enforcement notwithstanding. As the Supreme Court recently stated, “abridging the constitutional rights of criminal defendants is not in the State’s arsenal.”¹⁵⁴ Allowing the gap in *Balsys* to remain open bars a subset of individuals—those suspected of crimes of an international character—from the protections of a longstanding constitutional privilege. If this privilege must yield to a compelling state interest in transnational law enforcement, it should, at least, be made clear. If courts weigh the loss of cooperation more heavily than the privilege against self-incrimination, they should do so explicitly and outside of the shadow of *Balsys*'s equivocal language. By creating a standard that could not possibly be met, and in dicta no less, the Court quietly oversaw a significant erosion of the privilege against self-incrimination and a substantial change in the relationship between the state and the individual.

¹⁵² One might say that investigators could give the substance of the testimony to the foreign country without identifying the witness. This approach suffers from two deficiencies. First, it seems likely (especially after arrests in the foreign country are made) that the foreign country would be able to divine the identity of the witness. Second, the foreign country might be less likely to act on the information provided because it can be attributed only to an anonymous source: Even if the information were “reliable,” to the extent it is inadmissible in criminal proceedings, it may not be particularly useful.

¹⁵³ Alternatively, it might be argued that any loss in cooperation will not be particularly drastic. Foreign countries will still be willing to cooperate with the United States because of the vast resources U.S. authorities can commit to transnational law enforcement. Other means of investigation, which do not involve privileged witness testimony, can also be employed.

¹⁵⁴ *Giles v. California*, 128 S. Ct. 2678, 2692–93 (2008).

Alternatively, if the cost of undermining cooperation is too much to bear, a modified version of my proposal could still serve the purposes of the privilege while allowing the sharing of crucial testimony. While more difficult to administer, courts could accept nonsharing agreements that include the following exception: Officials would be permitted to share the privileged testimony with countries that have agreed—either on a case-by-case basis or as general practice (e.g., through an MLAT provision)—neither to use this testimony against the witness in a future criminal proceeding or share it with another country not bound by a similar agreement. Covenants restricting other sovereigns in this manner are not uncommon. The United States, for instance, is bound by several MLATs not to seek the death penalty against criminal defendants extradited from certain countries.¹⁵⁵ Similarly, a court could carve out exceptions to these modified immunity orders for countries that are bound by treaty or specific agreement to respect the witness's immunity from future prosecution.¹⁵⁶ Such a result would permit sharing with our allies when absolutely necessary for the success of an important investigation. This would, however, place the witness at a heightened risk of foreign prosecution. Unlike my initial proposal, which seeks to bind the actors within the jurisdiction of the court, a U.S. court could not enforce a foreign country's compliance with the MLAT or agreement not to use the compelled testimony. As noted above, this inability to enforce orders abroad underlies the core *Balsys* holding.¹⁵⁷ By requiring such a nondisclosure agreement, however, courts would have at least taken a productive step to prevent a prosecutor from purposefully evading a defendant's privilege against self-incrimination.

¹⁵⁵ See, e.g., Extradition Treaty, U.S.-U.K., art. IV, June 8, 1972, 28 U.S.T. 227 (stating that extradition may be refused when offense is punishable by death in requesting country and not in requested country).

¹⁵⁶ As a doctrinal matter, such a solution would be difficult after *Balsys*. In *Balsys*, the Second Circuit suggested that "by statute and treaty the United States could limit the occasions on which a reasonable fear of foreign prosecution could be shown, as by modifying extradition and deportation standards in cases involving the privilege," thereby maintaining the ability of a prosecutor to compel testimony by dissipating the fear of foreign prosecution. *United States v. Balsys*, 524 U.S. 666, 696 (1998) (citing *United States v. Balsys*, 119 F.3d 122, 138–39 (2d Cir. 1997)). The Supreme Court, however, rejected such a solution on separation of powers grounds. See *id.* at 696–97 (expressing caution about "induc[ing] the Government to adopt legislation with international implications or to seek international agreements . . . [b]ecause foreign relations are specifically committed by the Constitution to the political branches").

¹⁵⁷ See *supra* notes 47–50 and accompanying text.

CONCLUSION

This Note is a starting point for balancing the policies that the Fifth Amendment privilege against self-incrimination seeks to protect and the investigatory necessities of securing testimony in the context of crimes of an international character. Notwithstanding the propriety of the core holding of the *Balsys* opinion, the decision spawned—and simultaneously recognized—a lacuna that does not comport with any of the traditional understandings of the privilege. As transnational law enforcement cooperation grows, witnesses will increasingly face a “cruel trilemma,” and prosecutors will increasingly be tempted by the power to trap a witness, thereby seriously altering the traditional “state-individual balance” established by the privilege.

The solution should not be a symbolic right that can only be exercised in the most unlikely of hypotheticals, as the doctrine is currently understood. Instead, courts must seek to assure witnesses that self-incriminating statements, elicited under threat of contempt, will not be purposefully leveraged against them through a foreign power. This assurance already exists for all witnesses suspected solely of domestic U.S. crimes and should similarly extend to witnesses suspected of crimes recognized by more than one nation. A right so traditionally grounded in our jurisprudence must not be circumvented by mere technicality.