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The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of Kastigar

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THE FIFTH AMENDMENT AND COMPELLED TESTIMONY: PRACTICAL PROBLEMS IN THE WAKE OF *KASTIGAR*

> [T]he privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized . . . . [W]e do not make even the most hardened criminal sign his own death warrant, or dig his own grave, or pull the lever that springs the trap on which he stands. We have through the course of history developed a considerable feeling of the dignity and intrinsic importance of the individual man. Even the evil man is a human being.[1]

I. INTRODUCTION

The right[2] of the individual to be free from the compulsion to act as his own accuser must be preserved in a viable free culture, lest a deprivation of this inherent right lead to a gradual, inevitable erosion of the dignity of man. However, it is evident that the interest of society in order and self-preservation demands an accommodation with this individual right. It is in the attempt to rationally accommodate these potentially conflicting interests that the dignity of the individual is threatened. Any civilized society must insure that the balance is struck in favor of preserving the "intrinsic importance" of man.

Immunity statutes represent an effort to achieve such a balance. They are designed to procure the benefits of an individual's knowledge for society while preserving the individual's constitutional right not to accuse himself. The Supreme Court recently held in *Kastigar v. United States*[3] that this accommodation may be constitutionally achieved by a federal statute which, although compelling a witness to testify over his objection that the desired testimony would be self-incriminating, guarantees that nothing he says nor anything derived therefrom can be used against him in a subsequent criminal prosecution.[4] While some commentators have criticized this approval of such "use/derivative use" immunity as failing to protect either the individual or the collective right,[5] such criticism is beyond the scope of this Comment. The focus here shall be upon the practical difficulties remaining in the application of such statutes. Consequently, the analysis of this Comment shall be directed toward the resolution of two basic problems. First, attention shall be centered upon the problems confronting a defendant in a subsequent prosecution, when he

1. E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955).

2. It should be noted at the outset that the words "right" and "privilege" are used interchangeably throughout this Comment in the discussion of the constitutional protection against self-incrimination. No distinction is thereby intended.

3. 406 U.S. 441 (1972).

4. *Id.* at 453.

5. *See, e.g.*, Note, *Immunity and the Self-Incrimination Clause*, 2 AM. J. CRIM. L. 29 (1973); Note, *Kastigar v. United States: Compulsory Witness Immunity and the Fifth Amendment*, 6 JOHN MARSHALL J. PRAC. & P. 120 (1972); Note, *The Scope of Testimonial Immunity Under the Fifth Amendment: Kastigar v. United States*, 6 LOY. L.A.L. REV. 350 (1973).

has been compelled to give incriminating testimony during a prior proceeding under a grant of "use/derivative use" immunity. Second, consideration will be given to those circumstances under which a witness may refuse to testify in the first instance, even though afforded a grant of such immunity.

II. THE HISTORICAL PERSPECTIVE

A. The Conflict: The Individual vs. The Collective Right

The privilege of the individual to be free from compulsory self-incrimination originated in the early English common law as a response to the unfettered ability of English judicial officers to place a witness under oath and conduct broad inquiries into possible criminal activity.[6] Development of the privilege was spurred by the *Trial of Lilburn*,[7] where public outrage at the defendant's whipping upon his refusal to answer incriminating questions before the Star Chamber led Parliament to abandon both the Star Chamber and the oath which imposed upon the defendant the duty to testify.[8] The effort to protect the individual from such inquisitions gradually led to the development of a privilege of silence, and by the end of the seventeenth century it was established in England that "no man is bound to answer any questions that will subject him to a penalty, or to infamy."[9] This common law privilege developed gradually in the colonies until it was found, in one form or another, in the constitution or bill of rights of seven of the American states.[10] Elevation of the privilege to constitutional status was an effort to guarantee the protection of this fundamental liberty in the face of its blatant violation by the colonial governors.[11] This early development climaxed in 1791 with the adoption of the fifth amendment of the United States Constitution, which provides that "no person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[12]

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6. *See* Note, *Witness Immunity Statutes: The Constitutional and Functional Sufficiency of "Use Immunity,"* 51 B.U.L. REV. 616, 617 (1971).

7. 3 How. St. Tr. 1315 (1637).

8. *See* Note, *supra* note 6, at 617.

9. Trial of Freind, 13 How. St. Tr. 1, 17 (1696).

10. Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 764–65 (1935). Other authorities providing a more detailed historical development of the privilege are E. GRISWOLD, *supra* note 1; L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968); 8 J. WIGMORE, EVIDENCE § 2250 (McNaughton rev. ed. 1961); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949).

11. Pittman, *supra* note 10, at 786–87.

12. U.S. CONST. amend. V. Throughout years of judicial construction this simple phrase has been explained, expanded, and limited. It is a narrower than the common law privilege to refuse to answer questions subjecting one to a penalty or *infamy*, for it has long been established that the invocation of the privilege is limited to those situations in which an answer would subject a witness to a possible criminal penalty. Hale v. Henkel, 201 U.S. 43, 66–67 (1906); Brown v. Walker, 161 U.S. 591, 605–06 (1896); Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1583 (1963). The assertion of the privilege will be sustained as long as there exists a reasonable possibility that a

The common law of England, the source of this individual right, also provided for the conflicting right of compulsory testimony. In order for the common law adversary system to effectively serve as a truth-finding process, the relevant and reliable testimony of all witnesses was required. The power of the government to compel testimony was recognized in the early English statutes,[13] and, in 1612, in the *Countess of Shrewsbury's Case*,[14] Lord Bacon stated that "all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery."[15]

This ability of the government to compel testimony was recognized constitutionally in this country to the extent that the sixth amendment provides that, in all criminal prosecutions, the accused has the right to confront those witnesses who testify against him as well as the right to compulsory process for obtaining witnesses in his behalf.[16] This collective right was legislatively recognized in the Judiciary Act of 1789[17] which provided for compulsory attendance of witnesses in federal courts.[18] The necessity for such compulsion is obvious. Without it, the courts, having the ultimate responsibility for the maintenance of social order, would be unable to adequately function.[19] For this very reason the Supreme Court has frequently and recently recognized the legitimacy of this state power.[20]

Immunity statutes represent a governmental attempt to resolve the conflict between these two interests when the necessary testimony is withheld by the witness pursuant to his constitutional right not to incriminate himself. Congress first provided for such immunity in 1857 with the passage of the Compulsory Testimony Act[21] which provided absolute

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responsive answer will subject the witness to a possible criminal penalty. Zicarelli v. New Jersey Comm'n of Investigation, 406 U.S. 472, 478–81 (1972); Blau v. United States, 340 U.S. 159, 161 (1950); Heike v. United States, 227 U.S. 131, 143–44 (1913); Brown v. Walker, 161 U.S. 591, 599–600 (1896). Furthermore, the privilege may be invoked in any proceeding. Murphy v. Waterfront Comm'n, 378 U.S. 52, 94 (1964) (White, J., concurring); McCarthy v. Arndstein, 266 U.S. 34, 40 (1924); United States v. Saline Bank, 26 U.S. (1 Pet.) 100, 104 (1828). The privilege, however, is strictly personal, protecting the witness from incriminating himself *only*. Rogers v. United States, 340 U.S. 367, 371 (1951); Hale v. Henkel, 201 U.S. 43, 69–70 (1906).

13. *See, e.g.*, 5 Eliz. 1, c. 9, § 12 (1562), which provided for the imposition of a penalty and granted a civil right action against any person who refused to appear as a witness after service of process and tender of expenses. Historical treatments of testimonial compulsion are found in L. LEVY, *supra* note 10; 8 J. WIGMORE, *supra* note 10, §§ 2190–93.

14. 2 How. St. Tr. 769 (1612).

15. *Id.* at 778.

16. U.S. CONST. amend. VI, provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . .

17. Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. 73, 88–89.

18. *Id.* § 30.

19. *See* Lilienthal, *The Power of Governmental Agencies to Compel Testimony*, 39 HARV. L. REV. 694, 695 (1926).

20. *See, e.g.*, Kastigar v. United States, 406 U.S. 441, 446 (1972); Ullmann v. United States, 350 U.S. 422, 438 (1956); Hale v. Henkel, 201 U.S. 43, 70 (1906); Brown v. Walker, 161 U.S. 591, 610 (1896).

21. Act of Jan. 24, 1857, ch. 19, §§ 1–3, 11 Stat. 155–56.

immunity from prosecution for "any fact or act" communicated by the witness in compelled testimony before either House of Congress or a committee thereof.[22] This immunity grant proved to be overbroad in practice, leading to the so-called "immunity bath," for all a witness had to do in order to receive protection was volunteer information which criminally implicated him.[23] Consequently, Congress narrowed the scope of protection afforded the witness in the passage of the Compulsory Testimony Act of 1862,[24] which provided that "[t]he testimony of a witness . . . before either House of Congress . . . shall not be *used* as evidence in any criminal proceeding . . . ."[25]

B. The Supreme Court Treatment

It was the incorporation in the Interstate Commerce Act of 1887[26] of a provision similar to that included in the Compulsory Testimony Act of 1862 which led to the eventual consideration of "use" immunity by the Supreme Court. The complexities of economic regulation in the area of interstate commerce and the necessary reliance upon information furnished by witnesses had created the need for an immunity grant.[27] The Interstate Commerce Commission began employing the provision without hesitation, and witnesses before it correspondingly asserted their fifth amendment privilege in the face of the immunity grant.[28]

Confronted with such a situation in *Counselman v. Hitchcock*,[29] the Court, in 1892, found mere "use" immunity constitutionally deficient, indicating that any legislation seeking to replace the privilege must be at least as broad in scope and effect as the privilege itself.[30] Clearly, protection *coextensive* with the right was not provided in the statute. As the Court noted:

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22. *Id.* § 2

23. Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 GEO. WASH. L. REV. 447, 450–54 (1954). *See also* Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 ST. LOUIS L.J. 327, 333–35 (1966).

24. Act of Jan. 24, 1862, ch. 11, 12 Stat. 333.

25. *Id.* (emphasis added). In 1868 this narrower "use" immunity was also made available in any judicial proceeding. Act of Feb. 25, 1868, ch. 13, 15 Stat. 37.

26. Act of Feb. 4, 1887, ch. 104, §§ 11–12, 24 Stat. 383. Apparently, prior to the adoption of this provision the power to compel testimony possessed by Congress and the courts was not employed to any great extent. However, the ability to compel testimony under a grant of "use" immunity had been sustained by lower federal courts. *See, e.g.*, United States v. Brown, 24 F. Cas. 1273 (No. 14,671) (D.C.D. Ore. 1871); *In re* Phillips, 19 F. Cas. 506 (No. 11,097) (D.C.D. Va. 1869).

27. *See* Note, *supra* note 12, at 1573.

28. Wendel, *supra* note 23, at 338.

29. 142 U.S. 547 (1892).

30. *Id.* at 586. It should be noted that prior to *Counselman*, several state courts had sustained the constitutionality of such "use" immunity. *See, e.g.*, State v. Quarles, 13 Ark. 307 (1853); *Ex parte* Rowe, 7 Cal. 184 (1857); Higdon v. Heard, 14 Ga. 255 (1853); Wilkins v. Malone, 14 Ind. 153 (1860); People *ex rel.* Hackley v. Kelly, 24 N.Y. 74 (1871). *Contra*, Emery's Case, 107 Mass. 172 (1871); State v. Nowell, 58 N.H. 314 (1878); Cullen v. Commonwealth, 65 Va. (24 Gratt.) 624 (1873).

> [The statute] affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party.[31]

However, the most significant portion of the *Counselman* opinion was dictum to the effect that any immunity statute, in order to withstand constitutional scrutiny, must provide *"absolute immunity against future prosecution* for the offense to which the question relates."[32]

Congress immediately reacted to this invalidation of "use" immunity with the passage of the Compulsory Testimony Act of 1893,[33] which granted the witness *immunity from future prosecution* "for or on account of any transaction, matter or thing, concerning which he may testify . . . ."[34] This Act, although limited in application to evidence presented before the Interstate Commerce Commission or to proceedings brought under the Interstate Commerce Act,[35] was specifically designed to satisfy the "absolute immunity" requirement proclaimed in the *Counselman* dictum.[36] In 1896, the Supreme Court upheld the validity of this "transactional" immunity in *Brown v. Walker,*[37] wherein it was plainly indicated that such immunity fulfilled the coextensiveness requirement of *Counselman* in effectively and fully supplanting the fifth amendment right.[38] It became essentially settled after *Brown* that transactional immunity, prohibiting future prosecution of the immunized witness in relation to the matter for which immunity was granted, was constitutionally justifiable.[39] In fact, the immunity statute sustained in *Brown* became the basic model for numerous federal immunity statutes subsequently enacted by Congress.[40]

New questions arose in 1964, however, when the Supreme Court held for the first time that the fourteenth amendment constitutionally required

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31. 142 U.S. at 586.

32. *Id.* (emphasis added).

33. Act of Feb. 11, 1893, ch. 83, 27 Stat. 443. *Counselman* was decided on January 11, 1892, and the new immunity bill which was the basis for this Act was introduced on January 27, 1892. 23 CONG. REC. 573 (1892).

34. Act of Feb. 11, 1893, ch. 83, 27 Stat. 443–44.

35. After the *Counselman* Court's invalidation of the "use" immunity provision, Congress felt it was necessary to adopt a new immunity statute particularly applicable to Interstate Commerce Commission proceedings in order to insure effective administration of the Interstate Commerce Act. *See* 23 CONG. REC. 573 (1892) (remarks of Senator Cullom).

36. *Id.* at 6333 (remarks of Senator Cullom).

37. 161 U.S. 591 (1896).

38. *Id.* at 601, 606.

39. The Court frequently alluded to the absolute immunity requirement of *Counselman* in assessing the constitutionality of subsequent immunity statutes. *See, e.g.,* Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 80 (1965); Adams v. Maryland, 347 U.S. 179, 182 (1954); Smith v. United States, 337 U.S. 137, 146 (1949); United States v. Monia, 317 U.S. 424, 428 (1943); United States v. Murdock, 284 U.S. 141, 149 (1931); Hale v. Henkel, 201 U.S. 43, 67 (1906).

40. Prior to the adoption of 18 U.S.C. § 6002 (1970) (*see* notes 53–56 and accompanying text *infra*), there were over 50 such federal immunity statutes in effect. *See* National Commission on Reform of Federal Criminal Laws, Working Papers, 1444–45 (1970). Nearly all these statutes were repealed with the enactment of the Organized Crime Control Act of Oct. 15, 1970, Pub. L. No. 91–452, §§ 259–60, 84 Stat. 931, 18 U.S.C. §§ 6001–05 (1970).

the states to comply with the fifth amendment privilege against self-incrimination.[41] Having found the states so obliged to honor this privilege, the Court in *Murphy v. Waterfront Commission*[42] confronted the issue of the scope of interjurisdictional protection required when testimony compelled under a state grant of immunity criminally implicated the witness under federal law.[43] The petitioners in *Murphy* had received immunity under the laws of New York and New Jersey,[44] but nevertheless refused to testify, asserting that the desired testimony might have a tendency to incriminate them under federal criminal law.[45] The Court held that the fifth amendment protected a witness who gave immunized testimony in one jurisdiction from having that testimony used in a subsequent prosecution by a non-immunizing jurisdiction.[46] In so holding, the Court repudiated its earlier position that testimony compelled by one jurisdiction could be utilized in another jurisdiction to convict the witness of a crime.[47] To secure protection coextensive with the fifth amendment privilege, the Court fashioned an exclusionary rule,[48] consistent with its conclusion that the prosecuting jurisdiction could use neither the compelled testimony nor its fruits in its subsequent prosecution.[49]

However, since the *Murphy* Court did not address itself to the scope of protection required by the fifth amendment with respect to a subsequent prosecution in the *immunizing* jurisdiction, it was unclear whether *Murphy* was a complete repudiation of the "absolute immunity" seemingly required by *Counselman.* Some commentators reached that conclusion,[50] while others viewed *Murphy* as specifically limited to interjurisdictional problems, under which the ability to prosecute an immunized witness was retained only by the non-immunizing jurisdiction in a subsequent prosecution.[51] This uncertainty was compounded by the Court's continued reference in later cases to the *Counselman* "absolute immunity" dictum.[52]

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41. Malloy v. Hogan, 378 U.S. 1 (1964).
42. 378 U.S. 52 (1964).
43. *Id.* at 54.
44. *Id.* at 53.
45. *Id.* at 53–54.
46. *Id.* at 77–78.
47. *Id.* at 73. In United States v. Murdock, 284 U.S. 141 (1931), the Court held that "full and complete immunity against prosecution by the government compelling the witness to answer is sufficient and immunity from prosecution by another jurisdiction is not required." *Id.* at 149.
48. *See* notes 67–71 and accompanying text *infra.*
49. 378 U.S. at 79.
50. *See, e.g.,* Note, *supra* note 6. That *Murphy* created doubts about the necessity of full transactional immunity is illustrated by Byers v. People, 71 Cal. 2d 1039, 458 P.2d 465, 80 Cal. Rptr. 553 (1969), *rev'd on other grounds,* 402 U.S. 424 (1971); People v. La Bello, 24 N.Y.2d 598, 249 N.E.2d 412, 301 N.Y.S.2d 544 (1969), *overruled,* Gold v. Menna, 25 N.Y.2d 475, 255 N.E.2d 235, 307 N.Y.S.2d 33 (1969). *See also* note 57 *infra.*
51. *See, e.g.,* Wendel, *supra* note 23. *See also* note 57 *infra.*
52. Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 80 (1965). In Stevens v. Marks, 383 U.S. 234, 244 (1966), the Court specifically reserved consideration of whether "use/derivative use" immunity fulfilled the requirements of *Counselman. Cf.* Piccirillo v. New York, 400 U.S. 548, 552 (1971) (Brennan & Marshall, JJ., dissenting).

In the Organized Crime Control Act of 1970,[53] Congress enacted an immunity provision which was designed to allow the federal government, as an immunizing jurisdiction, to retain the right to subsequently prosecute the witness for the crime to which his testimony referred, while meeting the *Murphy* standard.[54] That provision, section 6002, a product of comprehensive study by the National Commission on Reform of Federal Criminal Laws,[55] provides in part that "no testimony or other information compelled under the court order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . ."[56]

The lower federal courts immediately split over the constitutional sufficiency of this "use/derivative use" immunity, depending upon their reading of the scope of *Murphy* and their view of the viability of the *Counselman* dictum.[57] In reviewing contempt findings of witnesses refusing to testify under a grant of section 6002 immunity, the Supreme Court in *Kastigar v. United States*[58] recognized that the immunity provided did not comport with the "absolute immunity" language of *Counselman*.[59] But the *Kastigar* Court went on to indicate that the "broad language [of *Counselman*] . . . was unnecessary to the Court's decision," and could not be considered "binding authority."[60] The Court then reasoned that the protection afforded by the fifth amendment privilege is the same in both federal and state jurisdictions.[61] Consequently, if *Murphy's* prohibition of the use of compelled testimony and its fruits adequately vindicated fifth amendment rights in a non-immunizing jurisdiction, such protection must also adequately secure those identical rights in the immunizing jurisdiction.[62] Therefore, the Court concluded that "use/derivative use" immunity is sufficient protection in any jurisdiction, since it leaves the witness and the government in *"substantially* the same position as if the witness had claimed his privilege."[63] *Kastigar's* holding that immunity from use and derivative use of testimony is coextensive

53. Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified in scattered sections of 18, 28 U.S.C.).

54. 18 U.S.C. § 6002 (1970). *See* H.R. REP. No. 91-1549, 91st Cong., 2d Sess. 42 (1970); S. REP. No. 91-617, 91st Cong., 1st Sess. 50-52, 145 (1969).

55. *See* National Commission on Reform of Federal Criminal Laws, Working Papers, 1405-44 (1970).

56. 18 U.S.C. § 6002 (1970).

57. The Ninth Circuit upheld the statute over constitutional objections in Bacon v. United States, 446 F.2d 667 (9th Cir. 1971); Charleston v. United States, 444 F.2d 504 (9th Cir.), *petition for cert. dismissed,* 404 U.S. 916 (1971); Stewart v. United States, 440 F.2d 954 (9th Cir. 1971). However, the contrary position was adopted by the Fifth and Seventh Circuits. United States v. Cropper, 454 F.2d 215 (5th Cir. 1971), *rev'd,* 406 U.S. 952 (1972); *In re* Korman, 449 F.2d 32 (7th Cir. 1971), *rev'd,* 406 U.S. 952 (1972).

58. 406 U.S. 441 (1972).

59. *Id.* at 452.

60. *Id.* at 454-55.

61. *Id.* at 458.

62. *Id.* at 458-59.

63. *Id.* at 458, *quoting* Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964) (emphasis added).

with the scope of the privilege against self-incrimination has, however, left important questions concerning its workable application unresolved.

III. THE SCOPE OF PROTECTION AFFORDED

A. Non-evidentiary Use

Analysis of the difficulties arising in a criminal prosecution of a previously immunized witness must begin with an attempt to delineate the precise scope of protection afforded by the *Kastigar* decision. Initially, it must be noted that the Court plainly focused on the necessity of excluding both the compelled testimony and evidence obtained in contravention of the terms of the immunity grant.[64] Since neither section 6002 nor the fifth amendment precluded a subsequent prosecution based upon evidence derived from legitimate independent sources,[65] the Court concluded:

> This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an "investigatory lead," and also barring the use of *any evidence* obtained by focusing investigation on a witness as a result of his compelled disclosures.[66]

The Court analogized this protection to that provided by the exclusionary rule employed in coerced confession cases.[67] That rule, also utilized in cases involving evidence derived from illegal arrests, searches, and seizures[68] excludes from trial that evidence which is metaphorically deemed to be the "fruit of the poisonous tree."[69] In essence, it provides that evidence which can be considered the product or fruit of a constitutional violation will be inadmissible in a subsequent trial of the individual in question. Thus, a confession obtained from a suspect in a manner violative of his fifth amendment rights is excluded in criminal proceedings against the unwilling "confessor."[70] Similarly, so-called "tainted" evidence — that which is derived directly or indirectly by exploitation of the primary illegality — cannot be utilized by the prosecution in establishing its case.[71]

Perhaps the most illustrative Supreme Court case on the application of the exclusionary rule in the context of coerced confessions is *Harrison v. United States*,[72] a case involving the situation in which the defendant in a felony murder trial had taken the stand in his defense in an effort to counter the prosecution's introduction of his three confessions. Since

64. *Id.* at 460–62.
65. *Id.* at 461.
66. *Id.* at 460 (emphasis added) (footnote omitted).
67. *Id.* at 461. *See, e.g.*, Harrison v. United States, 392 U.S. 219 (1968); Haynes v. Washington, 373 U.S. 503 (1963); Bram v. United States, 168 U.S. 532 (1897).
68. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963); Nardone v. United States, 308 U.S. 338 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
69. Nardone v. United States, 308 U.S. 338, 341 (1939).
70. *See* the cases cited in note 67 *supra*.
71. Wong Sun v. United States, 371 U.S. 471, 488 (1963). *See* text accompanying notes 139–47 *infra*.
72. 392 U.S. 219 (1968).

the confessions had been illegally obtained and were therefore inadmissible under the exclusionary rule, the defendant's subsequent conviction was reversed, and a new trial ordered.[73] At the second trial, the prosecution sought to introduce damaging admissions made by the defendant in his testimony at the earlier proceeding.[74] The defendant asserted that those statements were inadmissible as fruit of the poisonous tree; that is, he claimed that the prior testimony had to be excluded as evidence derived from the illegality inherent in the erroneous admission of the three confessions at his initial trial.[75] The Supreme Court sustained this contention, holding that the government had the burden of establishing that its illegal use of the unlawfully obtained confessions did not induce the testimony.[76] Since the government failed to dispel the inference that such adverse testimony would not have been given absent the use of the illegally obtained confessions, the Court found that the burden had not been met and the conviction at the second trial was accordingly set aside.[77]

One rationale underlying the application of this rule in all cases is simply that by removing the usefulness of illegally obtained evidence, the incentive to violate a suspect's constitutionally protected rights will be eliminated, and there will, consequently, be a deterrent effect upon such improper governmental conduct in future cases.[78] Additionally, in the context of coerced confessions, there is a justifiable belief that such extracted statements are inherently unreliable.[79] The rule itself, of course, does not operate to remove the original illegality; nor does the original illegality operate to preclude the state from pursuing a criminal prosecution based on the use of other evidence.[80]

In analogizing the protection afforded by section 6002 to that given by the traditional exclusionary rule, the Court considered statements compelled from the immunized witness to be similar to coerced confessions. Yet the two situations are conceptually different. A coerced confession is obtained in contravention of constitutionally secured rights; statements given under a valid immunity grant, however, are the fruits of legitimate governmental action. The exclusionary rule in the former context, while serving the function of removing the incentive to engage in future illegality, fails to remove the illegality. In the latter context the statutory proscription against the use of compelled testimony or evidence derived therefrom is designed to *prevent* any illegality from the outset. In light of these differing purposes, it is plausible to suggest

73. *Id.* at 220.
74. *Id.* at 221.
75. *Id.*
76. *Id.* at 224–25.
77. *Id.* at 226.
78. *See, e.g.*, Tehan v. United States, 382 U.S. 406, 513 (1966); Elkins v. United States, 364 U.S. 206, 217 (1960); Spano v. New York, 360 U.S. 315, 320–21 (1959).
79. *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199, 207 (1960); Spano v. New York, 360 U.S. 315, 320 (1959).
80. Kastigar v. United States, 406 U.S. 441, 453 (1972).

that the statutory proscription against use of immunized statements would not, under all circumstances, be coextensive with the protection afforded by the traditional exclusionary rule.[81] However, it was clearly the design of section 6002 to provide precisely that measure of protection, as shown by the comments of the National Commission on Reform of Federal Criminal Laws concerning its proposal which became the basis for section 6002:

> Immunity from use is the only consequence flowing from a violation of an individual's constitutional right to counsel, and his constitutional right not to be coerced into confessing. The proposed immunity is thus of the same scope as that frequently, even though unintentionally, conferred as the result of constitutional violations by law enforcement officers.[82]

Underpinned by this analogy to the exclusionary rule, the *Kastigar* Court's reasoning was directed toward the necessity of avoiding *evidentiary* use of compelled testimony or evidence derived therefrom in a subsequent criminal prosecution against the immunized witness. Section 6002 on its face, however, does not purport to preclude only such uses, but rather simply provides that no compelled testimony or information derived therefrom can be used in any criminal case against the witness.[83] Other potential uses of testimony compelled under such an immunity grant are obvious. For example, the prosecutor could conceivably base his decision to institute criminal proceedings on the content of the compelled testimony, or the prosecutor may use his knowledge in formulating his trial strategy or in tailoring his cross-examination of the defendant should the latter decide to act as a witness in his own behalf. One such non-evidentiary use was involved in *United States v. McDaniel,*[84] a post-*Murphy* interjurisdictional case. In 1969, McDaniel testified before a state grand jury under a grant of full transactional immunity.[85] A United States attorney asked for and received a copy of the grand jury transcript containing the compelled testimony, and federal charges were subsequently pressed.[86] The court held that the conduct of the United States attorney amounted to a "prima facie use" of the testimony — a use proscribed by the exclusionary rule of *Murphy.*[87] In the court's view its conclusion

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81. This distinction will most likely be significant in any future litigation which may concern the extent to which the protection afforded under an immunity grant differs from that given under the exclusionary rule. However, since the focus of this Comment is upon the analysis of the *Kastigar* Court, which did not recognize the distinction, it is not discussed in detail.

82. Second Interim Report of the National Commission on Reform of Federal Criminal Laws, Mar. 17, 1969, Working Papers of the Commission, 1446 (1970).

83. *See* 18 U.S.C. § 6002 (1970).

84. 449 F.2d 832 (8th Cir. 1971), *cert. denied,* 405 U.S. 992 (1972).

85. 449 F.2d at 834. The immunity grant was essentially identical to that provided in Brown v. Walker, 161 U.S. 591 (1896). *See* notes 37–40 and accompanying text *supra.*

86. 449 F.2d at 835.

87. *Id.* at 837. *See* notes 42–49 and accompanying text *supra.*

was mandated by the requirement of *Murphy* that the immunized witness and prosecuting jurisdiction be left in substantially the same position as if there had been no compelled testimony.[88] However, the entire reasoning of the *McDaniel* court was predicated upon its view that the immunizing jurisdiction was constitutionally required, even after *Murphy,* to confer full transactional immunity, forbidding any subsequent prosecution concerning that to which the testimony related.[89] If the immunizing jurisdiction could compel testimony under an immunity grant *and* subsequently prosecute the witness with relation to the subject of his testimony, then it would appear to follow that the prosecuting jurisdiction must have the right to merely see that testimony, as long as the testimony is in no way improperly used in a subsequent criminal investigation and prosecution.

Since the *Kastigar* Court has established the erroneous nature of *McDaniel's* underlying premise requiring transactional immunity,[90] it appears basic that such non-evidentiary use is not precluded. The *Kastigar* Court's analogy to the exclusionary rule in coerced confession cases further supports this conclusion,[91] for the Court has never indicated in connection with those cases that mere possession by the prosecutor of knowledge of the contents of an illegally obtained statement is violative of a defendant's constitutionally secured rights. In fact, the Court tacitly recognized the acceptability of such possession in *Harris v. New York,*[92] wherein it permitted a defendant's statement, inadmissible in the prosecution's case in chief, to be used by the prosecution to impeach the defendant when he elected to testify in his own behalf.[93]

At least as far as the immunizing jurisdiction is concerned, preclusion of access to compelled testimony would be essentially unworkable. The attorney conducting the prosecution may have been present at the grand jury when the testimony was given, and, even if he was not present, it would be essentially impossible for him to avoid access to the testimony in some form, given the communication necessary for the effective operation of the prosecutor's office.[94] Such considerations, however, do not apply in the interjurisdictional context. One can more readily preclude a non-immunizing, prosecuting jurisdiction from obtaining the contents of the compelled testimony. Since such testimony will often be given in

88. 449 F.2d at 837.
89. *Id.* at 838.
90. 406 U.S. at 458–59.
91. *Id.* at 461.
92. 401 U.S. 222 (1971). *See* notes 107–14 and accompanying text *infra.*
93. 401 U.S. at 226.
94. In fact, this inability to isolate a prosecutor of the immunizing jurisdiction from even unwitting access to the compelled testimony was a basis for Justice Marshall's dissent in *Kastigar.* In concluding that use/derivative use immunity would be constitutionally inadequate in the immunizing jurisdiction, he noted:

> [T]he paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony.

406 U.S. at 469 (Marshall, J., dissenting).

secret, affirmative efforts by the prosecutor will be required in order to gain access to the desired information. The *Kastigar* Court, however, indicated that the protection afforded by the fifth amendment is the same whether the prosecution is instituted by the immunizing or non-immunizing jurisdiction.[95] Consequently, if such non-evidentiary use is not constitutionally precluded in the case of the immunizing jurisdiction, it is not precluded in a subsequent prosecution by the non-immunizing jurisdiction. While the *Kastigar* rationale has been criticized for failing to adequately protect defendants from such use,[96] the Court's reasoning again represents an attempt to establish a rational accommodation between conflicting interests. Apparently, society's legitimate interest in procuring the compelled testimony outweighed the minimal diminution of individual rights which may be occasioned.[97]

B. Use to Impeach

Another potential use of compelled testimony confronting the previously immunized witness may arise in the event he elects to testify in his own behalf. The prosecution, rather than using the compelled testimony for the purpose of establishing the defendant's guilt, may nonetheless attempt to utilize it on cross-examination for the purpose of impeaching the defendant's credibility as a witness.[98] Assuming that the prior statements are otherwise admissible for such a purpose and are not precluded as having been given in secret,[99] the question is whether the prior grant of immunity operates to prevent such use of the statements. At first glance one might conclude, solely on the basis of visceral reaction, that such employment of the compelled testimony to discredit the witness-defendant is obviously designed to enhance the possibility that criminal sanctions will be imposed. Thus, superficially at least, the compelled testimony will have a tendency to incriminate. However, in-depth analysis of the Court's position on the use of otherwise inadmissible evidence for impeachment purposes indicates that there is room for doubt.

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95. *Id.* at 458.

96. Reif, *The Grand Jury Witness and Compulsory Testimony Legislation,* 10 AM. CRIM. L. REV. 829, 856–58 (1972).

97. To insure that individual rights are successfully vindicated, the *Kastigar* Court, however, imposed a heavy burden of proof upon the government to affirmatively establish that its evidence is derived from sources independent of the compelled testimony. *See* notes 125–38 and accompanying text *infra.*

98. For a discussion of methods by which a witness can be impeached, *see* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 33–50 (2d ed. E. Cleary 1972).

99. Testimony before grand juries traditionally is given in secret to insure the grand jury's freedom of action and to protect the reputations of those investigated but not subsequently indicted. *See* Calkins, *Grand Jury Secrecy,* 63 MICH. L. REV. 455 (1965); Comment, *Secrecy in Grand Jury Proceedings: A Proposal for a New Federal Rule of Criminal Procedure 6(e),* 38 FORDHAM L. REV. 307 (1969). FED. R. CRIM. P. 6(e), for example, provides that testimony given in secret before a federal grand jury may be disclosed only with court approval.

In *Walder v. United States,*[100] the Court confronted a situation in which a prosecutor sought to impeach a defendant on a collateral matter with physical evidence otherwise inadmissible under the exclusionary rule. The defendant, charged with various narcotics violations, testified on direct examination that he had never sold, given, or otherwise handled narcotics.[101] On cross-examination, he was asked whether narcotics had been taken from him in a previous arrest.[102] Although defendant replied in the negative, the government independently established that heroin had been taken from him on the occasion in question — albeit in contravention of his fourth amendment rights.[103] In sustaining the admission of this evidence solely on the issue of the defendant's credibility, the Court distinguished such use of tainted evidence from use in the prosecution's affirmative case to show culpability:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.[104]

The evidence admitted in *Walder* possessed a high degree of reliability and was indeed highly probative on the issue of the defendant's credibility.[105] That evidence may be contrasted to the coerced confession, involuntarily given by a suspect and a product of oppressive governmental conduct. Exclusion of the coerced confession is justified not only to deter the objectionable conduct, but also with an awareness of its inherent unreliability.[106] However, a defendant's illegally obtained statements may be used to impeach him as a witness. The Court in *Harris v. New York*[107] applied the *Walder* rationale in allowing the defendant to be impeached with his prior inconsistent statements, inadmissible in the prosecution's case in chief. Charged with selling heroin to an undercover policeman, the defendant testified that, while he had made a sale, he had sold baking powder in an attempt to defraud the purchaser.[108] On cross-examination, the prosecutor sought to introduce the defendant's prior statements to the police which contradicted his in-court testimony.[109]

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100. 347 U.S. 62 (1954).
101. *Id.* at 63.
102. *Id.* at 64.
103. *Id.*
104. *Id.* at 65.
105. *Id.* The government put on the stand one of the officers who had participated in the unlawful search and seizure along with a chemist who had analyzed the seized heroin capsule. *Id.* at 64.
106. *See* notes 79–80 and accompanying text *supra.*
107. 401 U.S. 222 (1971). *See* Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L.J. 1198 (1971); Note, *Impeachment by Unconstitutionally Obtained Evidence: The Rule of Harris v. New York,* 1971 WASH. U.L.Q. 441.
108. 401 U.S. at 223.
109. *Id.*

These statements, bearing directly on the issue of the defendant's guilt, were clearly inadmissible in the prosecution's affirmative case since they had been obtained in violation of *Miranda v. Arizona*,[110] which imposed upon the police the duty to inform an accused of his constitutionally secured rights before a custodial interrogation.[111] In sustaining the use of these statements solely for the purpose of impeaching the defendant, the Court considered it insignificant that they, unlike the impeaching evidence in *Walder*, related to matters directly bearing on the issue of the defendant's guilt.[112] The Court noted that the deterrence rationale underlying the exclusionary rule would not be served by exclusion in this context, and found "sufficient deterrence" in the preclusion of use in the prosecution's case in chief.[113] Thus, while a defendant might choose to testify in his own defense, this "privilege [could] not be construed to include the right to commit perjury."[114] Having taken the stand, the defendant undertook the obligation to testify truthfully and could not rely on the exclusionary rule to enhance his position with regard to his credibility.

The rationale of *Harris* arguably applies to a defendant threatened with impeachment on the basis of prior statements compelled under a grant of "use/derivative use" immunity.[115] Clearly, such a defendant has no more right than the defendant in *Harris* to commit perjury at his trial. Although he is compelled to testify, as is the individual from whom a confession is involuntarily extracted, his testimony is not subject to the same degree of doubt as to its reliability since it is given under oath. Nor is the deterrence rationale apropos, for there can be no deterrence of illegality nonexistent in the first instance. Exclusion under the immunity grant is in essence a constitutionally mandated recognition by the state that, upon the grant of immunity, it will not unlawfully employ the incriminating testimony elicited to establish its criminal case against a witness.

Broad language in *Kastigar* and other considerations, however, suggest a limited application of *Harris* in the immunity grant context. In commenting upon the scope of protection granted under section 6002, the *Kastigar* Court noted:

> [Section 6002] prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that

110. 384 U.S. 436 (1966).
111. *Id.* at 444–45.
112. 401 U.S. at 225.
113. *Id.* The Court considered it speculative to suggest that impermissible police conduct would be encouraged by allowing statements otherwise inadmissible to be used for impeachment purposes. *Id.* It does seem unlikely that police will improperly solicit statements which can be used only if the defendant takes the stand at trial, and then only if he gives perjured testimony. With the utility of improperly elicited statements so limited, *legitimate* efforts to obtain statements admissible in the prosecution's case in chief would appear to be more advantageous.
114. *Id.*
115. *See* Comment, *Impeachment, Use Immunity and the Perjurious Defendant*, 77 DICK. L. REV. 23 (1972).

> the testimony cannot lead to the infliction of criminal penalties on the witness.[116]

It is unclear whether this reference is indicative of the Court's intention to totally preclude the use of compelled testimony, including use for impeachment. Even if *Harris* is applicable, however, it should not be read to give a *carte blanche* to the prosecutor. In *United States v. Hockenberry*,[117] the Third Circuit suggested a basis for potential limitation of *Harris*. Hockenberry, a former county detective, had been given full transactional immunity and, in the course of his immunized testimony before a federal grand jury, had admitted signing affidavits in which he falsely asserted personal knowledge of the facts upon which search warrants were to be based.[118] At his subsequent trial for making false material declarations to the grand jury, he testified in his own behalf to deny the charges in the indictment. The prosecution then sought to impeach his credibility as a witness by utilizing the statements made before the grand jury to show a pattern of deceit.[119] The court held that such compelled admissions of wrongdoing obtained under a grant of immunity could not later be used to discredit the witness' effort to defend himself against a charge of some other wrongdoing.[120] The court found that *Harris* was not controlling, distinguishing it as merely a delineation of the scope of protection necessary to insure compliance by the authorities with the *Miranda* procedural requirements.[121]

It is submitted that the true rationale underlying *Harris* was that the defendant-witness should not be permitted to safely commit perjury while relying upon the exclusion of illegally obtained evidence, thereby subverting the truth-finding process of the adversary proceeding. Accordingly, *Harris* permitted impeachment to the extent that prior reliable statements were inconsistent with in-court testimony.[122] *Walder* indicated that reliable extrinsic evidence may also be used for impeachment purposes.[123] In contrast to those cases in which the defendant was attempting to enhance his position in reliance upon the inadmissibility of contrary evidence, the defendant in *Hockenberry* did not attempt to subvert the adversary nature of the proceedings by giving testimony contrary to reliable, but excluded, evidence. Rather, the prosecutor sought to improve the government's case with the introduction of the admissions contained in the compelled testimony.[124] Enhancement of the government's position in that

116. 406 U.S. at 453.
117. 474 F.2d 247 (3d Cir. 1973).
118. *Id.* at 248.
119. *Id.*
120. *Id.* at 250.
121. *Id.*
122. Harris v. New York, 401 U.S. 222 (1971). *See* text accompanying notes 107–14 *supra*.
123. Walder v. United States, 347 U.S. 62 (1954). *See* text accompanying notes 100–06 *supra*.
124. 474 F.2d at 248.

context does not necessarily fall within the *Harris* rationale. Arguably, such improvement of the government's case does have a tendency to incriminate the defendant and therefore is violative of an immunity grant. Accordingly, it would seem that if statements compelled under an immunity grant are admissible at all for impeachment purposes under *Harris,* their use must be restricted to the situation in which they are in direct conflict with in-court testimony. The same limitation may also be imposed upon such use of derivative evidence improperly obtained through the use of immunized compelled testimony.

C. The Procedural Posture

Although there has been a liberalizing trend in recent years,[125] the defendant in a criminal proceeding has only a limited ability to discover the prosecution's case against him.[126] With discovery virtually precluded, a defendant who has previously testified under a grant of immunity is severely hindered in any effort to insure that the evidence used against him is not illegally derived from his compelled testimony. In recognition of this disability, the *Kastigar* Court imposed upon the government the burden of establishing that its evidence was not improperly attributable to the immunized statements. The Court offered the following characterization of this burden:

> This burden of proof . . . is not limited to a negation of taint; rather, it imposes on the prosecution the *affirmative duty* to prove that the evidence it proposes to use is derived from a legitimate source *wholly independent* of the compelled testimony.[127]

In providing this procedural safeguard for the defendant, however, the Court failed to adequately specify the appropriate standard by which the government's burden is to be discharged, and widely divergent views have followed in its wake. At one extreme is the suggestion that the

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125. *See* 6 J. WIGMORE, EVIDENCE §§ 1850–55(b), 1859(g), 1863 (3d ed. 1940); Fletcher, *Pretrial Discovery in State Criminal Cases,* 12 STAN. L. REV. 293 (1960); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L.J. 1149 (1960).

126. For example, FED. R. CRIM. P. 16(a) grants a defendant the limited right to discover his own prior statements which are possessed by the government, the results of examinations and experiments, and his own grand jury testimony. While he does not necessarily have a right to a full grand jury transcript, FED. R. CRIM. P. 16(b) allows such discovery along with other papers and tangible objects in the government's possession "upon a showing of materiality to the preparation of his defense and that the request is reasonable." The subsection, however, expressly states that it does not authorize discovery of reports, memoranda, or other internal governmental documents made by government agents in connection with the investigation or prosecution of the defendant's case, nor does it authorize discovery of statements made by government witnesses or prospective witnesses to governmental agents. *Id.* The defendant is given a limited right to discovery of pre-trial statements of the government's witnesses under 18 U.S.C. § 3500 (1970). He may obtain such statements in the possession of the government, however, only after the witness has actually testified on direct examination at trial and if the prior statements relate to the subject matter of the witness' in-court testimony. *Id.* § 3500(a), (b).

127. 406 U.S. at 460 (emphasis added).

prosecution must show beyond a reasonable doubt that its evidence was derived from a legitimate independent source.[128] Alternatively, the government's burden has been analogized to that imposed in coerced confession cases when the defendant challenges the admissibility of a confession on the ground that it was involuntarily given.[129] In *Lego v. Twomey,*[130] the Court found such a determination of voluntariness predicated upon a mere preponderance of the evidence to be constitutionally sufficient.[131]

It is submitted that the preponderance standard of *Lego* may not be applicable in the case of prosecution of a previously immunized witness. In that context there need be no determination of voluntariness comparable to that in a coerced confession case, for it is obvious that immunized statements compelled under the threat of contempt charges are involuntary.[132] The *Kastigar* Court, in fact, adopted the position that the mere assertion by a defendant that he testified under an immunity grant would operate to "shift to the government the *heavy burden* of proving that all the evidence it proposes to use was derived from legitimate independent sources."[133] Such a burden is comparable to that imposed upon the government to establish that its evidence is derived independently of a coerced confession once the element of coercion is established.[134] Furthermore, in the context of an adversary hearing on the issue of the voluntariness of a confession, such as in *Lego,* both the government and the defendant have access to facts relating to coercion and can adduce proof from which a determination of voluntariness can be made. A previously immunized defendant, however, is at a clear disadvantage in seeking to establish improper use of compelled testimony, for under most rules of criminal procedure, he generally has no right of access to any of the government's reports, memoranda, or other documents prepared in connection with the investigation or prosecution of his case.[135] The insufficiency of a preponderance standard is obvious where constitutionally secured rights are jeopardized and only the government possesses the information which could establish whether those rights have been protected.[136] This conclusion finds support in the *Kastigar* Court's imposition upon the government of a burden heavier than a mere "nega-

128. *See* Note, *The Scope of Testimonial Immunity Under the Fifth Amendment: Kastigar v. United States,* 6 LOY. L.A.L. REV. 350, 382 (1973).

129. *See* Note, *Immunity and the Self-Incrimination Clause,* 2 AM. J. CRIM. L. 29, 44–45 (1973).

130. 404 U.S. 477 (1972).

131. *Id.* at 484.

132. 406 U.S. at 461–62.

133. *Id.* (emphasis added) (footnote omitted).

134. Harrison v. United States, 392 U.S. 219 (1968). *See* notes 72–77 and accompanying text *supra.*

135. *See* notes 125–26 *supra.*

136. This insufficiency becomes even more apparent when the prosecuting attorney may not be fully aware of the course of the investigation and prosecution in a particular case. *See, e.g.,* Giglio v. United States, 405 U.S. 150 (1972); Santobello v. New York, 404 U.S. 257 (1971). *See also* Kastigar v. United States, 406 U.S. 441, 468 (1972) (Marshall, J., dissenting); Piccirillo v. New York, 400 U.S. 548, 568–69 (1971) (Brennan & Marshall, JJ., dissenting).

tion of taint."[137] At the very least, the government would apparently be required to trace the development of its evidence, setting forth the investigative steps leading to its acquisition, and thereby show clearly and convincingly a source for the evidence completely independent of the compelled testimony.[138]

A further significant problem related to the government's burden of persuasion arises from the requirement that the evidence be derived from an independent source.[139] Evidence which is derived from a totally independent legitimate source is clearly admissible as untainted by any illegality.[140] However, even if a causal connection is established relating evidence to a constitutional violation, the evidence is not necessarily excluded. The Supreme Court has recognized that such a causal connection may have become so attenuated that any taint upon the evidence attributable to the original unlawful conduct is dissipated.[141] The Court in *Wong Sun v. United States*[142] framed the proper consideration as follows:

> [T]he . . . question . . . is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by *exploitation* of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[143]

The doctrine was applied in *Wong Sun* to find a defendant's confession properly admissible. Wong Sun, the subject of an illegal arrest in violation of his fourth amendment rights,[144] argued that his confession was the result of the arrest and, therefore, had to be excluded as a fruit of the poisonous tree.[145] However, Wong Sun, after his illegal arrest, had been released on his own recognizance and voluntarily returned several days later to give his incriminating statement to the authorities.[146] Under such circumstances, the Court concluded that the causal connection be-

137. 406 U.S. at 460.

138. Furthermore, if the preponderance standard is found sufficient in this context, the defendant should be entitled to access to the government's files to successfully rebut any colorable case made by the government. Having established standing simply by showing that he has previously testified under an immunity grant, the defendant might argue that, under Nardone v. United States, 308 U.S. 338 (1939), he is entitled to discovery of the government's files. The *Nardone* decision provided that if that defendant has shown a violation of his constitutional rights, he is entitled to the opportunity to prove that "a substantial portion of the case against him was a fruit of the poisonous tree," *id.* at 341, and it could be argued that such an opportunity requires access to governmental files. *See also* Alderman v. United States, 394 U.S. 165, 180–85 (1969) (requiring the government to disclose surveillance files to defendant whose fourth amendment rights were shown to have been violated by illegal wiretapping). Additionally, prior statements of government agents who testified in support of the government's case for admissibility should be discoverable under 18 U.S.C. § 3500 (1970). *See* note 126 *supra*.

139. Kastigar v. United States, 406 U.S. 441, 460 (1972).

140. *See* Wong Sun v. United States, 371 U.S. 471 (1963).

141. Nardone v. United States, 308 U.S. 338, 341 (1939).

142. 371 U.S. 471 (1963).

143. *Id.* at 488, *quoting* J. MAGUIRE, EVIDENCE OF GUILT 221 (1959) (emphasis added).

144. 371 U.S. at 491.

145. *Id.*

146. *Id.*

tween the illegal arrest and the confession was so remote as to prevent the application of the exclusionary rule.[147]

Although the precise scope of the attenuation doctrine is subject to dispute,[148] the critical question is whether it is properly applicable at all in a subsequent prosecution of a previously immunized witness. Arguably, there is a conceptual basis which would support the adoption of a strictly causal relationship test in this context rather than the more liberal attenuation concept employed in *Wong Sun*. That case and its progenitors[149] dealt with the exclusionary rule as a device to vindicate fourth amendment rights. The proscription of illegal searches, seizures, and arrests under the fourth amendment is designed to secure the privacy of the individual from governmental invasions and harassment.[150] Since the focus in fourth amendment violation cases is not upon the effect at trial but on the effect upon future governmental activities, any exclusionary rule fashioned to protect those rights is constitutionally adequate if it excludes evidence obtained by "exploitation" of that illegality.[151] Where there has been no governmental exploitation of unlawfulness, that aim of deterrence would not be served by exclusion of evidence. Accordingly, if but a remote causal connection is established, evidence may nonetheless be properly admitted. In contrast, however, when testimony is compelled under an immunity grant, the witness' statutory protection, to be consonant with the mandate of the fifth amendment, must apply directly to the criminal proceeding. Exclusion in the immunity grant context is designed to guarantee that prior statements will have *no* incriminating effect at a subsequent prosecution,[152] rather than to deter future governmental conduct. If there is any causal relationship between the compelled testimony and the acquisition of the evidence proposed to be used at the later trial, it would appear to follow that the compelled testimony in fact has the prohibited incriminating effect, notwithstanding the remoteness of the causal link. Therefore, only evidence

147. *Id.*

148. United States v. Seohnlein, 423 F.2d 1051 (4th Cir.), *cert. denied,* 399 U.S. 913 (1970) (evidence traceable to primary illegality admissible if circumstances show it would have been *inevitably discovered* without illegality); *accord,* People v. Ditson, 57 Cal. 2d 415, 369 P.2d 714, 20 Cal. Rptr. 165 (1962). *Cf.* United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962) (inevitable discovery argument rejected). *Paroutian* was followed in United States v. Schipani, 289 F. Supp. 43 (E.D.N.Y. 1968). *See also* Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized,* 56 CALIF. L. REV. 579 (1968); Note, *Fruit of the Poisonous Tree — A Plea for Relevant Criteria,* 115 U. PA. L. REV. 1136 (1967).

149. Nardone v. United States, 308 U.S. 338 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

150. The language of the amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV. The right of privacy secured by the fourth amendment has been characterized by the Court as "at the core of the Fourth Amendment" and "basic to a free society." Wolf v. Colorado, 338 U.S. 25, 27 (1949).

151. Wong Sun v. United States, 371 U.S. 471, 488 (1963), *quoting* J. MAGUIRE, EVIDENCE OF GUILT 221 (1959).

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

derived from sources completely independent of the compelled testimony would be properly usable.[153] This conclusion finds support in the *Kastigar* Court's language requiring the evidence to be derived from a "legitimate source, *wholly independent* of the compelled testimony."[154] This argument is further bolstered by statements in *Harrison v. United States*,[155] wherein the Court noted that "[i]t thus appears that, *but for* the use of his confessions, the petitioner might not have testified at all."[156] Although the Court in *Harrison* approvingly referred to the *Wong Sun* attenuation formulation,[157] this "but for" language along with the strong *Kastigar* statements suggests the adoption of a causal test in this context in lieu of the more liberal attenuation doctrine.

IV. REFUSAL TO TESTIFY

The post-*Kastigar* uncertainties described above may justifiably cause distress to any witness who, after refusing to testify on the basis of his fifth amendment privilege, is then confronted with the compulsion to testify imposed by an immunity grant under section 6002. The following, therefore, is directed toward those circumstances under which a witness may refuse to testify on the ground that the immunity grant in its application fails to provide protection coextensive with the privilege it purports to supplant.

A. Threat of Foreign Prosecution

The first of two potential, but limited, objections is of constitutional dimension, applicable under any immunity grant. It is predicated upon the unresolved question of whether the fifth amendment operates to protect a witness from incriminating himself under the laws of a foreign country. If the privilege does provide protection of such scope, no national immunity grant could successfully vindicate the rights of a witness who, through his testimony, might expose himself to such criminal sanctions. In *Zicarelli v. New Jersey State Commission of Investigation*,[158] the Court most artfully avoided a determination of this issue. A commission, investigating organized crime in New Jersey, had granted use/derivative use immunity to Zicarelli upon his refusal to testify on fifth amendment grounds.[159] In spite of that he persisted in his refusal to answer, claiming that responsive answers would pose a threat of prosecution under foreign law.[160] The Court concluded that only one question posed by

153. *Cf.* Note, *Developments in the Law — Confessions*, 79 HARV. L. REV. 935, 1038 n.21 (1966). *See* Pitler, *supra* note 148, at 620.
154. 406 U.S. at 460 (emphasis added).
155. 392 U.S. 219 (1968). *See* notes 72–77 and accompanying text *supra*.
156. 392 U.S. at 225 (footnote omitted).
157. *Id.* at 226.
158. 406 U.S. 472 (1972).
159. *Id.* at 474.
160. *Id.* at 478.

the commission — an inquiry into those geographic areas in which the witness had Cosa Nostra responsibilities — even arguably created such a threat.[161] In the context of an investigation of organized crime in New Jersey, however, the Court found this question, concerned only geographic areas within New Jersey.[162] To have divulged Cosa Nostra responsibilities on an international level in response to the question would have, according to the Court, involved information irrelevant to the scope of the investigation. With the question so limited, a proper answer would present no real danger of foreign incrimination, and the Court consequently found it unnecessary to consider the constitutional issue.[163]

Applying the underlying rationale of *Zicarelli,* the Fifth Circuit in the case of *In re Tierney*[164] found no substantial risk of foreign prosecution posed in the context of testimony compelled under section 6002 before a federal grand jury.[165] The fact that such testimony was given in strict secrecy was considered sufficient to eliminate any real danger of foreign prosecution in light of the fact that disclosure of the secret testimony could not be made without court order.[166] The *Tierney* court reasoned that if any substantial likelihood of foreign prosecution appeared upon a request for disclosure, the court could simply refuse to make the testimony available.[167] If the *Tierney* court is correct in this regard, the potential, narrow exception in favor of those witnesses whose testimony might lead to the imposition of criminal sanctions under foreign law will be further limited. Only witnesses testifying in a non-secret proceeding could possibly assert fear of foreign prosecution as a basis for refusing to testify.

The *Tierney* rationale was rejected by the United States District Court for the District of Connecticut in the case of *In re Cardassi.*[168] The district judge reasoned that, if the fifth amendment privilege did extend to protect one from incriminating himself under foreign law, the requirements imposed by *Kastigar* must be met in order to insure constitutional vindication of fifth amendment rights.[169] Mere secrecy did not even remotely provide the *Kastigar* protection from use and derivative use of compelled statements by a foreign jurisdiction, necessary to remove any potentially incriminating effect.[170] This argument suggests the under-

161. *Id.* at 479–80.
162. *Id.* at 480.
163. *Id.* at 481. *See also In re* Cahalane, 361 F. Supp. 226 (E.D. Pa.), *aff'd,* 485 F.2d 678 (3d Cir. 1973) (mem.).
164. 465 F.2d 806 (5th Cir. 1972).
165. *Accord, In re* Parker, 411 F.2d 1067 (10th Cir. 1969), *vacated as moot sub nom.,* Parker v. United States, 397 U.S. 96 (1970).
166. 465 F.2d at 812. *See* note 99 *supra.*
167. 465 F.2d at 812.
168. 351 F. Supp. 1080 (D.C. Conn. 1972).
169. *Id.* at 1083.
170. *Id.* Unfortunately, this argument was not extensively developed by the court. It is based upon the conclusion that secrecy does not afford adequate constitutional protection in either the *Kastigar* or *Murphy* context. An assurance of secrecy by the jurisdiction compelling the testimony does not fulfill the Kastigar requirement, for it alone does not insure that the testimony will not be used in a subsequent criminal

lying conceptual difficulty with the *Tierney* rationale. *Tierney* confused the threat of prosecution arising from compelled testimony with the threat of incrimination inherent in those statements. While this confusion stems from the reference in *Zicarelli* to the lack of any real danger of foreign prosecution, the *Zicarelli* Court clearly focused on the lack of any real danger of foreign incrimination posed by a truly responsive answer to the question propounded.[171] A witness testifying in secret before a federal grand jury must reasonably believe that his statements will implicate him in conduct criminal under state law to justify reliance upon his fifth amendment privilege. It is against this incrimination which his privilege protects him, and its assertion is not dependent upon the likelihood that he will be prosecuted. Clearly, under *Murphy,* the constitutional guarantee against self-incrimination requires that a federal or state witness be assured before testifying that none of his compelled statements or evidence derived therefrom will be used against him in a subsequent prosecution by the non-immunizing jurisdiction.[172] Thus, if the fifth amendment protects one from incriminating himself under foreign laws, testimony cannot be compelled absent the initial assurance against use which is mandated by *Murphy.*

Even if the secrecy requirement of grand jury proceedings should be considered sufficient to permit compelling testimony before the grand jury over an assertion of foreign incrimination, the *Cardassi* court's further consideration of the constitutional issue is nonetheless highly significant, for testimony can legitimately be compelled under section 6002 in non-secret situations before any federal court or agency.[173] In squarely confronting the constitutional issue, the *Cardassi* court focused upon questions propounded to the immunized witness which related to

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prosecution by that jurisdiction. Furthermore, it fails to provide the required constitutional guarantee of *Murphy* — that another jurisdiction in the federal context will not utilize the compelled statements in a criminal prosecution. Positing that the fifth amendment privilege extends to protect one from incriminating himself under foreign laws, the question, therefore, becomes whether mere secrecy of the testimony will then provide the constitutionally mandated protection, absent any concomitant assurance against use of the compelled testimony by a foreign prosecuting jurisdiction. Secrecy of the testimony does not in and of itself insure that a foreign prosecutor will not somehow obtain the testimony and use it against the witness in a criminal proceeding. The potential incriminating effect therefore remains, and full constitutional protection required by *Kastigar* has not been provided.

171. The *Ziccarelli* Court did state that a constitutional issue would be presented if the inquiry was "into matters that might incriminate [the witness] under foreign law *and* pose a substantial risk of foreign prosecution . . . ." 406 U.S. at 481 (emphasis added). But in finding no constitutional issue presented, the Court simply concluded that the witness "was never in any real danger of being compelled to disclose information that might incriminate him under foreign law." *Id.* at 480.

172. *See* notes 41–52 and accompanying text *supra.*

173. 18 U.S.C. § 6002 (1970) is applicable:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
> (1) a court or grand jury of the United States,
> (2) an agency of the United States, or
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House . . . .

Id.

marihuana smuggling activities in Mexico. It was shown that Mexican law penalized exporting and trafficking in marihuana as well as aiding and abetting such an offense.[174] Because the questions directly related to activities in another country, unlike those of *Zicarelli,* the court found that a reasonable fear of foreign prosecution existed and that the rationale of *Murphy* operated to preclude any compulsory disclosure.[175] Reliance was placed upon dictum in *Murphy* which stated, in effect, that the fifth amendment privilege has the same scope as its English ancestor[176] under which a witness could refuse to furnish information if a threat of incrimination under foreign law would thereby be raised.[177] This *Murphy* dictum, when considered with an examination of the recognized policies underlying the privilege, reveals that the *Cardassi* conclusion has substantial foundation. Those policies, as articulated in *Murphy,* include an unwillingness to subject suspects to the "cruel trilemma of self-accusation, perjury or contempt;" a preference for an accusatorial rather than an inquisitorial system; a fear of inhumane treatment employed to elicit incriminating statements; a sense of fair play in requiring the government to establish guilt independently;[178] and a respect for the right of the individual to a "private enclave where he may lead a private life."[179] Since nearly all of these policies are arguably relevant when the threat of incrimination arises under foreign law, it seems that the privilege would be well served by holding it applicable in that context.[180]

B. A Section 6002 Statutory Construction Problem

A second potential basis for refusal to testify is predicated upon a statutory construction problem unique to section 6002. The precise wording of the statute operates to preclude use and derivative use of

174. 351 F. Supp. at 1084.
175. *Id.* at 1084–85.
176. Murphy v. Waterfront Comm'n, 378 U.S. 52, 67–68 (1964).
177. *See, e.g.,* United States v. McRae, L.R., 3 Ch. App. 79 (1867); East India Co. v. Campbell, 27 Eng. Rep. 1010 (Ex. 1749). *Cf.* King of The Two Sicilies v. Willcox, 61 Eng. Rep. 116 (Ch. 1851).
178. 378 U.S. at 55.
179. *Id., quoting* United States v. Grunewald, 233 F.2d 556, 581–82 (2d Cir. 1956) (Frank, J., dissenting), *rev'd,* 353 U.S. 391 (1957).
180. It has been suggested, however, that the most basic policy underlying the privilege — fear of inhumane treatment — is not applicable where the future prosecution is by a foreign jurisdiction. *See, e.g.,* McNaughton, *Self-Incrimination Under Foreign Law,* 45 VA. L. REV. 1299 (1959). If the prosecution is unable to use compelled incriminating statements in an effort to convict the witness, it is argued that the incentive to violate fifth amendment rights with coercive tactics is thereby removed. *Murphy,* in holding that the privilege extends to preclude use of compelled testimony or its fruits by a non-immunizing jurisdiction, has clearly established the erroneous nature of this argument with respect to internal jurisdictions. There seems to be no reason to differentiate the threat of prosecution posed by an external jurisdiction.

Furthermore, the argument is based upon the erroneous assumption that there will not be cooperative efforts between prosecuting authorities. It is not beyond the realm of possibility that law enforcement agencies of different countries may unite in an effort to control criminal conduct within the borders of each. Accordingly, it may be in the interest of a prosecutor in one jurisdiction to compel testimony incriminating under laws of another, even though he may be constitutionally precluded from using it to obtain a conviction.

compelled testimony in a subsequent prosecution, "except [in] a prosecution for perjury, *giving a false statement,* or otherwise failing to comply with the order [of immunity]."[181] Although *Kastigar* upheld the facial constitutionality of section 6002, this exceptive language has raised questions concerning the statute's legitimacy in a narrow class of cases.

The problem first arose in connection with an investigation by the FBI of a firebombing at Claremont Men's College in California in 1971. During the course of the investigation, Sara Baldinger made statements concerning the fire to special agents. Subsequently, she was served with a subpoena to testify before a federal grand jury, and at that appearance she invoked her fifth amendment privilege.[182] In opposition to the government's application for immunity in the case of *In re Baldinger,*[183] she argued that the exceptive language of section 6002 would render any grant of immunity in her case constitutionally insufficient, claiming that her answers under oath would allegedly show that false statements had been given to the investigating agents prior to any immunity grant.[184] Such testimony could be used to subject the witness to criminal liability for the federal offense of giving false statements,[185] unless the immunity grant operated to preclude such use. As the exceptive language expressly permitted use of the compelled statements in a subsquent prosecution for giving false statements, the immunity grant was assertedly constitutionally inadequate for failing to protect the witness — as would the fifth amendment — from an incriminating effect in connection with the previously given statements.[186] The government argued, however, that the exception permitting prosecution for false statements did not apply to previously given false statements but rather to false statements given in connection with the grand jury testimony after immunity attached.[187]

In rejecting the government's assertion, the district judge in *Baldinger* noted that giving false testimony under oath before the grand jury constituted the offense of perjury,[188] separate and distinct from the offense of giving false statements.[189] Accordingly, the court reasoned that the traditional statutory construction precept of giving effect to the plain meaning of the words of a statute indicated that Congress plainly intended

181. 18 U.S.C. § 6002 (1970) (emphasis added).
182. *In re* Baldinger, 356 F. Supp. 153, 154–55 (C.D. Cal. 1973).
183. 356 F. Supp. 153 (C.D. Cal. 1973).
184. *Id.* at 157.
185. 18 U.S.C. § 1001 (1970), provides:
Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false . . . statements . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.
Id.
186. 356 F. Supp. at 157.
187. *Id.*
188. The offense of perjury is defined in 18 U.S.C. § 1621 (1970), which provides: Whoever, having taken an oath before a competent tribunal, officer, or person . . . willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall . . . be fined not more than $2,000 or imprisoned not more than five years, or both.
Id.
189. 356 F. Supp. at 159.

to carve out two different exceptions to the immunity grant in its reference to perjury *and* giving false statements.[190] Only the offense of perjury could be considered to cover subsequent untruthful statements made in the context of testimony given before the grand jury. The court, therefore, concluded that if any effect is to be given to the language relating to the giving of false statements in this context, it must be deemed to refer to false statements previously given to the federal agents.[191] On that basis the court refused to order immunity as requested by the government, on the ground that in its application the immunity grant would not be coextensive with the witness' fifth amendment privilege.[192]

The *Baldinger* reasoning treats a situation distinct from possibilities of foreign incrimination in which a witness is conceivably not afforded adequate protection by the application of an immunity statute. It is submitted, however, that the court's reasoning is of doubtful validity. The court's focus upon the grand jury proceedings in construing the statute was entirely too narrow, although it was probably precipitated by the government's argument that the phrase "giving false statements" extended only to those statements given in connection with grand jury testimony.[193] Section 6002 is not limited to conferrals of immunity to grand jury witnesses, but extends the immunity grant to any witness refusing "to testify or provide other information in a proceeding before any court, grand jury or agency of the United States or either House of Congress."[194] Because the grand jury is plainly not the only forum of immunity, it is entirely possible that immunity could be granted to a witness in a context when untruthful statements given *after* the immunity grant are not given under oath and simply constitute the offense of giving false statements rather than perjury.[195] Accordingly, it seems entirely possible that the *Baldinger* court could have given effect to the plain words of the statute by concluding that the statutory exception applied only to such future incriminating statements. Thus the court could have provided protection co-extensive with the fifth amendment without finding section 6002 unconstitutional in its application. This conclusion finds further support in the legislative history which indicates that the immunity exceptions were intended to apply only to prospective statements made after a conferral of immunity.[196] This exceptive language, which was in fact considered unnecessary, was included only as a precautionary device to insure that an immunity grant did not protect such future state-

190. *Id.*
191. *Id.* at 164–66.
192. *Id.* at 167.
193. *Id.* at 157.
194. 18 U.S.C. § 6002 (1970).
195. For example, an immunity grant could conceivably protect the witness from use of any statements made before FBI agents in connection with an investigation. If such statements are not made under oath, the offense of perjury is not applicable, while the offense of giving false statements is. *See* notes 185 & 188 *supra.*
196. *See* H.R. REP. No. 91-1549, 91st Cong., 2d Sess. 42 (1970); S. REP. No. 91-617, 91st Cong., 1st Sess. 145 (1969).

ments.[197] In recognition of this, Judge Ditter, of the Eastern District of Pennsylvania, declined to follow the ruling of *Baldinger* under analogous circumstances in the case of *In re Cahalane*.[198] Concluding that the exceptions to the immunity grant operated only upon future statements and conduct, Judge Ditter made the additional observation that such construction of the statute comported with the elementary principle that statutes should be construed whenever possible to sustain their constitutionality.[199]

V. CONCLUSION

The foregoing analysis inevitably leads to two conclusions. Initially, it is apparent that uncertainties persist in the subsequent prosecution of a witness immunized under a grant of use/derivative use immunity. Second, it is apparent that recognition of the constitutional sufficiency of use/derivative use immunity has emasculated the scope of protection previously thought to be constitutionally mandated by the fifth amendment. A witness is still subject to criminal prosecution, and his ability to avoid compulsory testimony is drastically limited to arguable and narrow situations.

The impact of *Kastigar* is still uncertain, but it has been suggested that an anomalous result might be expected.[200] Quite possibly, section 6002, designed to achieve effective law enforcement against organized crime, may lead to precisely the opposite result. A witness may find no incentive to talk where he can still be prosecuted and may prefer the consequences of a contempt finding. Testimony in such a situation may lead to animosity on the part of compatriots and an accompanying fear on the part of the witness of adverse non-legal consequences. Without the added incentive inherent in the removal of all criminal sanctions, silence may indeed be golden.

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197. In H.R. REP. No. 91-1549, 91st Cong., 2d Sess. 42 (1970), it was stated:
> The exception for perjury, false statements or other failure to comply with the order is probably unnecessary. . . . It is included out of caution to insure that such immunity is not given.

198. 361 F. Supp. 226, 228 (E.D. Pa.), *aff'd*, 485 F.2d 678 (3d Cir. 1973) (mem.). The witness Cahalane had previously made false statements on federal registration certificates required in connection with the purchase of guns allegedly smuggled to Northern Ireland. As he could be prosecuted for such statements under 18 U.S.C. § 1001 (1970) (*see* note 185 *supra*), he claimed that the exceptive language of section 6002 rendered the proposed immunity grant constitutionally deficient in not precluding use of compelled testimony in a prosecution for that prior offense. 361 F. Supp. at 228.

199. 361 F. Supp. at 228. *See* United States v. Vuitch, 402 U.S. 62, 70 (1971).

200. *See, e.g.*, Note, *Immunity and the Self-Incrimination Clause*, 2 AM. J. CRIM. L. 29 (1973); Note, *The Scope of Testimonial Immunity Under the Fifth Amendment: Kastigar v. United States*, 6 LOY. L.A.L. REV. 350 (1973); 48 WASH. L. REV. 711 (1973).