IMMUNIZED TESTIMONY AND THE INEVITABLE DISCOVERY DOCTRINE: AN APPROPRIATE TRANSPLANT OF THE EXCLUSIONARY RULE OR AN EXCUSE FOR A BROKEN PROMISE?

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TABLE OF CONTENTS

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I. INTRODUCTION

Among the abuses of the crown that culminated in the English Civil War of the 1640s was the oath *ex officio*, which required the subject to answer whatever questions were propounded by the royal inquisitor. Through the oath, the subject could be compelled to accuse himself and provide the evidence for conviction. Consequently, the oath was often abused: enemies of the Crown and the Church of England were easy prey in a world where false swearing meant eternal damnation.[1]

The privilege against self-incrimination is an invention of the English common law. After 1641, the common law — with its accusatorial process and privilege against self-incrimination — prevailed. The fundamental value judgment embodied in the common law privilege — that the dangers of executive abuse outweigh the evidentiary gain obtained through compelled testimony — was a hard lesson learned from the inquisitorial Star Chamber and the Court of High Commission.[2]

Although the privilege became a first principle of English liberty, royal governors in America employed abusive tactics, including the oath, against those suspected of seditious libel.[3] Memories of these abuses undoubtedly motivated the inclusion of the privilege against self-incrimination in the Fifth Amendment: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[4]

The privilege against self-incrimination, however, is not without costs. Testimony from the accused and co-conspirators, for example, is generally unavailable.[5] Plainly, the inability to obtain such testimony can harm law enforcement efforts.[6]

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[1] Harold W. Wolfram, *John Lilburne: Democracy's Pillar of Fire*, 3 SYRACUSE L. REV. 213, 219 (1952).

[2] 8 JOHN H. WIGMORE, EVIDENCE § 2250, at 278-82 (McNaughton rev. 1961 & Supp. 1991).

[3] R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 783-85 (1935).

[4] U.S. CONST. amend. V.

[5] The privilege, of course, can be waived. As former New Jersey Supreme Court Chief Justice Weintraub once explained, law enforcement is dependent, to a large degree, on ill-advised self-incrimination:

> [A]s to the culprit who reveals his guilt unwittingly with no intent to shed his inner burden, it is no more unfair to use the evidence he thereby reveals than it is to turn against him clues at the scene of the crime which a brighter, better informed, or more gifted criminal would not have left.

State v. McKnight, 52 N.J. 35, 52, 243 A.2d 240, 250 (1968).

[6] The development of immunity law parallels that of the privilege and serves to

Until 1970, the only methods of overcoming the Fifth Amendment privilege were either to secure the voluntary cooperation of the suspect or to supplant the privilege through a grant of absolute immunity from subsequent prosecution.[7] The relatively recent approval of "use and derivative use" immunity means that the government no longer must provide absolute immunity to the witness whose testimony it has compelled. Instead, testimony can now be required as long as the witness remains substantially in the same position as if he had remained silent.[8]

Although the United States Supreme Court approved of use and derivative use immunity in *Kastigar v. United States*,[9] it provided lower courts with almost no guidance in implementation. In particular, the *Kastigar* Court did not address the difficulties that lower courts would encounter in determining whether immunized testimony played a prohibited role in any given prosecution.[10]

This Article examines whether the "inevitable discovery" exception should be applied when government investigators and witnesses are exposed to immunized materials. In *United States v. Streck*,[11] the Sixth Circuit Court of Appeals applied the doctrine and affirmed the defendant's conviction even though witnesses and government investigators had been exposed to the substance of the defendant's immunized statements. The Alaska Court of Appeals eschewed this approach in *Hazelwood v. Alaska*.[12] There the court concluded that the inevitable discovery doctrine — derived from the deterrent rationale of the exclusionary rule — is

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mitigate its adverse impact on law enforcement. Rita Werner Gordon, *Right to Immunity For Defense Witnesses*, 20 CONN. L. REV. 153, 157 (1987); WIGMORE, *supra* note 2, § 2281, at 491; Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1571 (1963).

7 Prosecutors rarely granted absolute immunity because the price — essentially a pardon — was too high. David Sugar, *Federal Witness Immunity Problems and Practices Under 18 U.S.C. §§ 6002-6003*, 14 AM. CRIM. L. REV. 275, 278 (1976).

8 The new, lower price has generated a profound effect. Specifically, prosecutors have enthusiastically compelled testimony in exchange for use and derivative use immunity. In fact, a study by the National Lawyers Guild concluded that more witnesses were granted such immunity within the first ten months of the enactment of the federal use and derivative use statute than in the preceding fifty years of transactional immunity. NATIONAL LAWYERS GUILD, REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES: A MANUAL FOR ATTORNEYS 13-52 (1974).

9 406 U.S. 441 (1972).

10 E.R. Harding, *The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of* Kastigar, 19 VILL. L. REV. 470, 477-89 (1974).

11 958 F.2d 141 (6th Cir. 1992)

12 836 P.2d 943 (Alaska Ct. App. 1992)

inapplicable in the immunity context.[13]

This Article concludes that the deterrent rationale should not apply to immunized testimony because such evidence is not unlawfully obtained. Moreover, because immunized testimony alters the course of events in unknowable ways, the inevitable discovery doctrine's inherent uncertainty produces a genuine risk of improper application. Further, inevitable discovery effectively permits the government to renege on its obligations, arising from a conscious decision to force an individual to incriminate himself. Consequently, this Article concludes that the road taken by the *Hazelwood* court is preferable to that pursued in *Streck*.

II. HISTORICAL BACKGROUND OF IMMUNITY STATUTES

A. The Privilege Against Self-Incrimination

As noted, the historic origin of the Fifth Amendment can be traced to the struggle between the common law and an inquisitorial system derived from canon law and characterized by the oath *ex officio*.[14] Originally, the oath *ex officio* was a technique that the Church employed to combat heresy throughout Christendom in the thirteenth century.[15] The suspected heretic would be brought before inquisitors, placed under the oath and forced to reveal "secret thoughts or private doubts that might constitute heresy."[16] The oaths were quite effective because a false oath before God would subject a true believer to an eternity in hell.[17] Some preferred being subjected to earthly punishment, which could include being burned at the stake.[18]

The Crown eventually adopted the oath as a tool to eliminate dissent.[19] The Court of the Star Chamber began using the oath in the sixteenth century, often targeting political enemies.[20] At this time, the royal Court of High Commission also used the

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[13] *Id.* at 953.

[14] *See generally*, LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 43-82 (1968).

[15] Charles E. Moylan, Jr. & John Sonsteng, *The Privilege Against Compelled Self-Incrimination*, 16 WM. MITCHELL L. REV. 249, 253-54 (1990).

[16] *Id.* at 254 (footnote omitted).

[17] *Id.*

[18] *Id.*

[19] The historical connection between the privilege against self-incrimination and the abolition of torture is disputed. *See* David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1077-79 (1986). It should be noted that use of the oath remained commonplace long after the use of torture had become quite rare. *Id.*

[20] LEVY, *supra* note 14, at 182-84.

oath to eradicate religious dissent.[21] In these inquisitorial courts, all judicial functions were combined in one office. The inquisitor would bring the subject to court, require self-accusation and then determine the individual's guilt or innocence. Consequently, many questionable verdicts were reached in inquisitorial courts.[22]

In the common law, however, England had developed an alternative, rival legal system. The fundamental characteristics of that system are familiar: a grand jury performed the charging function and determined who would be brought before the court for criminal prosecution, a crown prosecutor marshalled the evidence against the suspect, a judge presided over the trial and a petit jury decided the suspect's ultimate fate.[23] Unlike the inquisitorial system, the common law placed the burden of bringing charges and the burden of proof on the Crown.[24] Likewise, the inquisitorial system fragmented the Crown's functions, thereby avoiding the aggregation of judicial power in one office.

The Civil War of the 1640s ultimately decided which legal system — the inquisitorial or common law — would prevail in England. The royalists aligned with the inquisitorial system and the use of the oath *ex officio*. The Parliamentarians chose the common law. Because the Parliamentarians prevailed, they abolished the oath in 1641.[25] As a result, the oath *ex officio* was ousted and replaced by the common law principle that "no man shall be required to accuse himself."[26]

In the American colonies, the victory of the common law was not yet so complete. Several royal colonial governors used oaths

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21 *Id.* at 130-33, 182-83.

22 The trials of "Freeborn John" Lilburne brought publicity concerning royal abuse of the oath to the forefront of English public opinion. WIGMORE, *supra* note 2, § 2250, at 283, 289. Lilburne's efforts and punishment (a public whipping) for refusing to testify against himself are considered to have been major catalysts in the demise of the Star Chamber and of the oath. *Id.* at 289.

23 G.R.Y. RADCLIFFE & GEOFFREY CROSS, THE ENGLISH LEGAL SYSTEM 67-68 (5th ed. 1971).

24 E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 4-5 (1949).

25 To be precise, the oath was abolished in ecclesiastical courts. LEVY, *supra* note 14, at 281-82. The Act for Abolition of the Court of High Commission of July 5, 1641 expressly prohibited ecclesiastical courts from requiring any person " 'to confess or to accuse him or herself of any crime, offence, delinquency or misdemeanour, or any neglect or thing whereby, or by reason whereof, he or she shall or may be liable or exposed to any censure, pain, penalty or punishment whatsoever.' " *Id.* at 282 (quoting 16 Car. 1, ch.11, § 4).

26 *See* LEVY, *supra* note 14, at 266-300.

and engaged in other abusive practices.[27] Colonial legislatures adopted the privilege in response to such executive abuse.[28] These royal abuses undoubtedly were known to the members of the First Congress that adopted the Fifth Amendment in 1791. American fundamental law was now in accord with its English counterpart.

B. Immunity

The privilege carries societal costs because it deprives public authorities of evidence that the accusatorial, adversarial system must possess to convict the criminal. The common law system requires the government to marshal and present evidence and to bear the burden of proof. Often, however, the "best" witnesses will be the accused and co-conspirators. Because both the defendant and co-conspirators can invoke the privilege and be unavailable, the privilege against self-incrimination renders some crimes difficult, if not impossible, to prosecute in the absence of a method to supplant the privilege. Consequently, varieties of common law immunity are nearly as old as the privilege itself.[29]

In the early nineteenth century, the lack of organized police forces also contributed to the difficulty in prosecuting criminals.[30] Accordingly, prosecuting authorities of the day, like their modern counterparts, often "immunized" accomplices by promising pardons in exchange for testimony. The Supreme Court's *Whiskey Cases*[31] decision provides a description of the practice:

> Prosecutors . . . should explain to the accomplice that he is not obliged to [in]criminate himself, and inform him just what he may reasonably expect in case he acts in good faith, and testifies fully and fairly as to his own acts in the case, and those of his associates. When he fulfills those conditions he is equitably entitled to a pardon, and the prosecutor, and the court if

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27 *See* Pittman, *supra* note 3, at 786-87 (citing examples of abusive practices).

28 Eventually, forty-eight states adopted a privilege against self-incrimination in their state constitutions. WIGMORE, *supra* note 2, § 2252, at 319. Iowa recognizes the Fifth Amendment privilege against self-incrimination through case law. *See, e.g.*, Jones v. State, 479 N.W.2d 265, 271 (Iowa 1991). New Jersey recognizes the privilege statutorily. *See* N.J. STAT. ANN. § 2A:84A-19 (West 1992).

29 The earliest variety of common law immunity, approvement, was a practice "under which a person arraigned for a felony might accuse another as his accomplice and become entitled to a pardon if the accused accomplice were convicted." Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 7 (1992). By the eighteenth century, approvement fell into disuse. *Id.*

30 *Id.*

31 99 U.S. 594 (1878).

> need be, when fully informed of the facts, will join in such a recommendation.[32]

Significantly, however, these immunity agreements were consensual in nature. In other words, the witness bargained away the privilege in exchange for leniency or a pardon.

There is nothing voluntary about testimony pursuant to an immunity statute. Rather, the witness is compelled to testify in exchange for statutorily-determined benefits. The first federal statute,[33] enacted in 1857, granted transactional immunity to witnesses who testified before congressional subcommittees.[34] Transactional immunity forever bars prosecution of a witness for crimes revealed during compelled testimony and, consequently, can be quite beneficial to a witness. Given these substantial benefits, the absence of any procedural controls limiting who was to testify and the self-executing nature of the grant of immunity, many formerly reluctant witnesses came forward.

Abuse of the 1857 statute through so-called "immunity baths"[35] led to an 1862 amendment[36] that narrowed the scope of protection to prohibiting only the actual use of the testimony in any future prosecution.[37] The 1862 Act created a limited type of immunity, "simple use" immunity, which did not preclude derivative use of the immunized testimony. Thus, even though the immunized testimony could not be directly used, it could be used to locate new sources of evidence, which in turn could be employed to convict the witness.

i. Transactional Immunity

Simple use immunity statutes are not co-extensive with the Fifth Amendment privilege. In the 1892 case of *Counselman v. Hitchcock*,[38] the Supreme Court first addressed the constitutionality of these types of immunity statutes.[39] Significantly, the Court

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32 *Id.* at 604.

33 Act of Jan. 24, 1857, ch. 19, 11 Stat. 155-56 (1857).

34 George Dorian Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 ST. LOUIS L.J. 327, 333 (1966) (describing historical background of the 1857 legislation).

35 *Id.* at 333-35; Robert G. Dixon, Jr., *The Fifth Amendment and Federal Immunity Statutes*, 22 GEO. WASH. L. REV. 447, 450-54 (1954).

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

37 *See id.*

38 142 U.S. 547 (1892).

39 The statute at issue in *Counselman* was an 1887 act that extended simple use immunity to testimony given before the Interstate Commerce Commission. *See* Act of Feb. 4, 1887, ch. 104, 24 Stat. 383 (1887). Previously, simple use immunity had

appeared to approve of the underlying theory behind immunity — that removing the threat of criminality arising from compelled disclosure enables the government to compel a witness to testify.[40] In other words, the Fifth Amendment could be supplanted by a grant of statutory immunity "as broad as the mischief against which it [the Fifth Amendment] seeks to guard."[41]

Simple use statutes fail this test. Under such statutes, compelled testimony can be used to develop a case against the witness through third parties. The potential, indirect use of the compelled testimony — the so-called derivative use — would not leave the witness in the same position as if he had remained silent.[42] The evidence discovered as a result of compelled disclosure could make the case literally from the witness's own words.

The *Counselman* Court, therefore, unanimously held that simple use statutes violate the privilege against self-incrimination.[43] The Court, however, said more. In particular, the Court stated that a valid immunity statute must provide transactional immunity to survive Fifth Amendment scrutiny: "In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates."[44] Whether this statement constituted dicta has been the subject of much debate.[45] Nevertheless, Congress viewed the Court's language as a directive and promptly introduced legislation[46] that would provide transac-

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been made available in all federal judicial proceedings. *See* Act of Feb. 25, 1868, ch. 13, 15 Stat. 37 (1868).

40 *Counselman*, 142 U.S. at 565.

41 *Id.* at 562. The Court also stated that no grant of immunity could supplant the privilege "unless it is so broad as to have the same extent in scope and effect." *Id.* at 585.

42 Indeed, the *Counselman* Court noted that simple use immunity "could not, and would not, prevent the use of [a witness's] testimony to search out other testimony to be used . . . against him . . . . It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." *Id.* at 564.

43 *Id.* at 586.

44 *Id.*

45 *See, e.g.*, Roald Mykkeltvedt, *Ratio Decidendi or Obiter Dicta?: The Supreme Court and Modes of Precedent Transformation*, 15 GA. L. REV. 311, 328-29 (1981); Note, *Standards for Exclusion in Immunity Cases after* Kastigar *and* Zicarelli, 82 YALE L.J. 171, 174 (1972).

46 A new bill was introduced on January 23, 1892. *See* 23 CONG. REC. 573 (1892). *Counselman* was published on January 11, 1892.

tional immunity in exchange for compelled testimony.[47]

In 1896, the Supreme Court upheld transactional immunity by a five-to-four vote in *Brown v. Walker*.[48] In particular, the majority opinion traced the historical origin of the privilege against self-incrimination and found that transactional immunity statutes would vindicate the privilege's core purposes, even though the testimony could subject the witness to social sanctions.[49] The majority wrote:

> The safety and welfare of an entire community should not be put into the scale against the reputation of a self-confessed criminal, who ought not, either in justice or in good morals, to refuse to disclose that which may be of great public utility, in order that his neighbors may think well of him. The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge.[50]

Transactional immunity remained an apparently settled constitutional rule for the next half-century. Congress enacted numerous federal statutes, all based on transactional immunity.[51] Indeed, in *United States v. Ullmann*,[52] the Court seemed to have placed the question beyond dispute: "Since [1896] the Court's holding in *Brown v. Walker* has never been challenged; the case and the doctrine it an-

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47 Act of Feb. 11, 1893, ch. 83, 27 Stat. 443 (1893). The term "transactional immunity" arises from the language of the statutes, which typically bar the government from prosecuting the immunized witness for "any transaction, matter or thing" to which the witness testified. *See, e.g., id.* at 444.

48 161 U.S. 591 (1896).

49 *See generally id.* at 594-604.

50 *Id.* at 605-06. The majority also pragmatically noted that new economic regulations would be impossible to enforce without some sort of immunity statute. *See id.* at 610 ("[T]he enforcement of the interstate commerce law or other analogous acts, wherein it is for the interest of both parties to conceal their misdoings, would become impossible.").

In an unusually forceful dissent, Justice Field emphasized the fair balance between the state and the individual and, quoting Brown's counsel, specifically noted that the privilege was the " 'result of a long struggle between the opposing forces of the spirit of individual liberty on the one hand and the collective power of the State on the other.' " *Id.* at 637 (Field, J., dissenting).

51 Between 1893 and 1970, Congress enacted over fifty such statutes, all granting transactional immunity to the compelled witness. LEONARD W. LEVY, AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE 176 (1974). The legislative history to the 1970 immunity statute contains a comprehensive list of the transactional immunity statutes that were thereby repealed. *See* H.R. REP. No. 1549, 91st Cong., 2d Sess. 1, 42-46 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4019-22; *see also* Shapiro v. United States, 335 U.S. 1, 6 n.4 (1948) (setting forth an abridged list of federal statutes containing transactional immunity provisions).

52 350 U.S. 422 (1956).

nounced have consistently and without question been treated as definitive by this Court. . . . The 1893 statute has become part of our constitutional fabric . . . ."[53] The *Ullmann* Court's enshrinement of transactional immunity, however, proved to be premature.

ii. Use and Derivative Use Immunity

In the 1964 case of *Murphy v. Waterfront Commission of New York Harbor*,[54] the Supreme Court reexamined the question of how much immunity is constitutionally sufficient in an interjurisdictional case.[55] In *Murphy*, state authorities granted a witness transactional immunity and the witness disclosed his involvement in crimes that were federal offenses.[56] Thereafter, federal prosecutors indicted the witness for federal crimes described in that testimony.

The Supreme Court found that the prosecution could proceed if the government demonstrated the absence of taint from its evidence: "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence."[57] In this passage, *Murphy* signalled possible judicial approval of immunity statutes narrower than transactional immunity, but broader than use immunity.

In a concurring opinion, Justice White expressed the belief that absolute immunity is not required to supplant the Fifth

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53 *Id.* at 437-38.

54 378 U.S. 52 (1964).

55 *See id.* at 53. Under existing case law, testimony compelled by the state was generally admissible at a federal trial due to the Supremacy Clause. Feldman v. United States, 322 U.S. 487, 490-91 (1944). Previous "solutions" to the problem created by the co-existence of federal and state governments, i.e., two sovereignties, were unfair to compelled witnesses and not conducive to national-state comity. *See Murphy*, 378 U.S. at 55-57.

56 *Id.* at 53-54. The other "two sovereignties" problem, arising when federal authorities compelled testimony that would be useful in a state prosecution, involved a similarly unfair solution: the state was permitted to use the testimony. United States v. Murdock, 284 U.S. 141 (1931). Indeed, until *Murphy*'s companion case, Malloy v. Hogan, 378 U.S. 1 (1964), the privilege against self-incrimination had not been incorporated through the Fourteenth Amendment and had not been applied in state proceedings.

57 *Murphy*, 378 U.S. at 79 n.18. The Court also concluded that federal authorities could not use "compelled [state] testimony and its fruits" against a state witness. *Id.* at 79. In other words, the Court crafted a symmetrical solution to the "two sovereignties" problem.

Amendment privilege.[58] The concurrence noted that in illegal search and seizure cases and coerced confession cases, the government is still free to prosecute provided it can show that the "testimony or other evidence is [not] a fruit of the unlawfully obtained evidence . . . ."[59] Because the government is free to prosecute despite "illegal or unconstitutional conduct," it necessarily follows that in immunity cases where the government can "show that its evidence is not tainted by establishing that it had an independent, legitimate source for the disputed evidence," the case should be permitted to proceed.[60]

This so-called use and derivative use immunity is conceptually simple.[61] It also seems to offer the best of both worlds to the prosecutorial authorities: the witness can be compelled to testify *and* prosecuted as well. The witness would no longer receive the windfall of transactional immunity, but instead would be protected from the consequences of his testimony, thereby leaving him in the same position as if he had remained silent. The difficulty — for the courts, the prosecutor and the reluctant witness — is the proof required to show that there was no derivative use of the compelled testimony. In *Murphy*, the chosen solution was the independent source doctrine,[62] derived from exclusionary rule jurisprudence.[63]

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58 *Id.* at 92-107 (White, J., concurring). Justice Stewart joined Justice White's concurrence. Justice Harlan, joined by Justice Clark, concurred in the judgment in a separate opinion.

59 *Id.* at 103 (White, J., concurring) (citations omitted).

60 *Id.*

61 Under use and derivative use immunity:

> [T]he prosecutor may not use the compelled testimony as evidence or as an investigative lead. The prosecuting attorney may not even use any evidence obtained by focusing investigation on a witness as a result of compelled disclosures. Indeed, once a person testifies under a grant of use immunity, if the person is later prosecuted, the government bears the burden of showing its evidence is not tainted, by establishing that it had an independent, legitimate source for the evidence objected to.

RICHARD B. MCNAMARA, CONSTITUTIONAL LIMITATIONS ON CRIMINAL PROCEDURE § 13.12, at 210-11 (1982).

62 The independent source doctrine states that the prosecution can use illegally obtained evidence if the government also discovered such evidence by lawful means independent of the misconduct. Nix v. Williams, 467 U.S. 431, 443 (1984). In other words, the exclusionary rule does not apply to cases where the government's misconduct was not the source of the evidence.

63 *See infra* note 75 (discussing *Weeks* and the reasons for adopting the exclusionary rule in Fourth Amendment context).

iii. Statutory Enactment of Use and Derivative Use Immunity

The Organized Crime Control Act of 1970[64] created a comprehensive, single federal immunity standard — use and derivative use — and consolidated various federal statutory schemes governing grants of immunity in judicial, administrative and congressional proceedings.[65] Those compelled to testify through its provisions were guaranteed that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . ."[66]

Additionally, the Act provided procedural safeguards to insure that such immunity was not granted carelessly.[67] In particular, the prosecutor must request an order from the district court compelling testimony from a recalcitrant witness once the witness has refused to cooperate voluntarily.[68] Prior to this request, however, the prosecutor must secure approval of the Attorney General or a designate and the U.S. Attorney for the district, and certify that the testimony "may be necessary to the public interest . . . ."[69]

In *Kastigar v. United States*,[70] the Court held that use and derivative use immunity was constitutionally appropriate as long as

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64 18 U.S.C. §§ 6001-6005 (1988).

65 The fight against organized crime constituted a significant impetus to the immunity legislation. The House Judiciary Committee stated that the statute's purpose was to enhance "the legal tools in the evidence-gathering process" to counter the increasing influence of organized crime. *See* H.R. REP. No. 1549, 91st Cong., 2d Sess. 1, 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 1073.

The National Commission on Reform of Federal Criminal Laws played an important role in developing the new immunity statutes by submitting a model immunity act that served as a prototype for 18 U.S.C. §§ 6001-6005. Report of the National Commission on Reform of Federal Criminal Laws (2d Interim Report, March 19, 1969), in *Federal Immunity of Witness Act: Hearings on H.R. 11157 and H.R. 12041 Before Subcomm. No. 3 of The House Committee on the Judiciary*, 91st Cong., 1st Sess. 36-39 (1969).

66 18 U.S.C § 6002 (1988).

67 The decision to grant immunity is made by the prosecutor after a simple cost-benefit analysis. *See* Note, *supra* note 45, at 180 ("The prosecutor is in a good position to determine the possible costs. Presumably, he will grant immunity only when he is sure the information is worth more to society than the reduced chance of the witness's conviction.").

68 18 U.S.C. § 6003 (1988). Assuming that the request is technically sufficient, the district court "shall issue" the immunity order. *Id.* § 6003(a).

69 *Id.* § 6003(b); *see also* 28 C.F.R. § 0.175 (1992) (authorizing the Assistant Attorney General in charge of the Criminal Division of the Department of Justice to approve requests for immunity orders).

70 406 U.S. 441 (1972).

the testimony of a witness was not used against him directly or indirectly: "One raising a claim [of immunity] under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources."[71] Thus, the privilege extends not only to the answers that in and of themselves would support a criminal conviction, but also to those answers that would furnish a link in the chain of evidence needed to prosecute.[72]

The *Kastigar* Court outlined the government's heavy burden of demonstrating its compliance with these requirements: "This burden of proof, which we reaffirm as appropriate, 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."[73] In short, the compelled witness was to receive a promise that the evidence provided would not disadvantage him because the Fifth Amendment "prohibits the

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[71] *Id.* at 461-62. The Circuits have generally found, however, that this "heavy burden" may be satisfied by a preponderance of the evidence. *See* United States v. Harris, 973 F.2d 333, 336-37 (4th Cir. 1992); United States v. North, 910 F.2d 843, 873, *modified*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2235 (1991); United States v. Overmyer, 899 F.2d 457, 462-63 (6th Cir.), *cert. denied*, 111 S. Ct. 344 (1990); United States v. Dynalectric Co., 859 F.2d 1559, 1578 (11th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989); United States v. Williams, 817 F.2d 1136, 1138 (5th Cir.), *cert. denied*, 484 U.S. 896 (1987); United States v. Crowson, 828 F.2d 1427, 1429 (9th Cir. 1987), *cert. denied*, 488 U.S. 831 (1988); United States v. Romano, 583 F.2d 1, 7 (1st Cir. 1978). *But see* United States v. Palumbo, 897 F.2d 245, 249 (7th Cir. 1990) (strict showing); United States v. Schwimmer, 882 F.2d 22, 25 (2d Cir. 1989) (heavy burden); United States v. Smith, 580 F. Supp. 1418, 1422 (D.N.J. 1984) (clear and convincing); United States v. Hossbach, 518 F. Supp. 759, 772 (E.D. Pa. 1980) (clear and convincing).

[72] *Kastigar*, 406 U.S. at 444-45; Hoffman v. United States, 341 U.S. 479, 486 (1951). As the *Counselman* Court observed, Chief Justice Marshall was responsible for the first enunciation of the "link in the chain" analogy. Counselman v. Hitchcock, 142 U.S. 547, 566 (1892). While sitting on the Circuit Court of the United States for the District of Virginia, the Chief Justice declared that:

> Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears . . . to be the true sense of the rule, that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness, by disclosing a single fact, may complete the testimony against himself . . . . That fact of itself might be unavailing, but all other facts without it would be insufficient. . . . The rule which declares that no man is compellable to accuse himself, would most obviously be infringed, by compelling a witness to disclose a fact of this description.

Counselman, 142 U.S. at 565-66 (quoting Burr's Trial, 1 Burr's Trial 244 (1807)).

[73] *Kastigar*, 406 U.S. at 460.

prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness."[74]

III. VINDICATION OF VARIOUS CONSTITUTIONAL RIGHTS THROUGH EXCLUSIONARY RULES AND THEIR EXCEPTIONS

A. Fourth Amendment

The genesis of the exclusionary rule is the Fourth Amendment's search and seizure jurisprudence.[75] By the mid-1920s, it was clear that the Fourth Amendment mandated exclusion of illegally seized evidence in federal cases.[76] Early in the history of the exclusionary rule, an exception permitting the receipt of evidence proving the same facts as the tainted, excluded evidence evolved — the independent source doctrine.[77]

The Fourth Amendment exclusionary rule, however, was not initially incorporated through the Fourteenth Amendment and made applicable to the states.[78] Then, in 1961, the Supreme Court decided *Mapp v. Ohio*,[79] overruling precedent and holding that the states were required to exclude illegally obtained evidence.[80] The *Mapp* Court articulated three rationales for the exclusionary rule: i) such exclusion constituted a personal right of

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[74] *Id.* at 453.

[75] Weeks v. United States, 232 U.S. 383 (1914). The Court stated that exclusion of illegally obtained evidence was required to give the Fourth Amendment meaning:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the [Fourth] Amendment, declaring his right to be secure against such searches and seizures, is of no value, and . . . might as well be stricken from the Constitution.

Id. at 393. After his retirement, Justice Stewart wrote a thorough, straightforward account of the exclusionary rule cases that describes the "twists and turns" of the early case law. Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1372-77 (1983).

[76] Agnello v. United States, 269 U.S. 20, 33-34 (1925) (prohibiting use of evidence obtained without a search warrant); Gouled v. United States, 255 U.S. 298, 303 (1921) (same).

[77] *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) ("[T]his does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others . . . .").

[78] Wolf v. Colorado, 338 U.S. 25 (1949).

[79] 367 U.S. 643 (1961).

[80] *Id.* at 656-57.

the accused; ii) exclusion would deter future violations by the police; and iii) notions of judicial integrity.[81] The Warren Court's federalization of the exclusionary rule in *Mapp* eventually resulted in a shift in rationales insofar as the Burger and Rehnquist Courts have repeatedly emphasized deterrence of police misconduct as the sole rationale for the exclusionary rule.[82]

The notion that the Fourth Amendment creates a personal right of exclusion is not supported by its text.[83] In addition, the historical basis for the Fourth Amendment was the Framers' concern that warrantless searches — an abuse employed by the Crown — could become a practice of the new central govern-

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81 *See id.* at 655-56 ("the exclusion doctrine . . . [is] an essential part of the right to privacy"); *id.* at 656 ("the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it' ") (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)); *id.* at 659 (" 'For good or for ill, [the government] teaches the whole people by its example . . . . If the Government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.' ") (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

82 *See, e.g.*, United States v. Leon, 468 U.S. 897, 910 (1984) ("Standing to invoke the [exclusionary] rule has thus been limited to cases in which the prosecution seeks to use the fruits of an illegal search against the victim of police misconduct.") (citations omitted); United States v. Janis, 428 U.S. 433, 446 (1976) ("The Court, however, has established that the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct.' "); United States v. Calandra, 414 U.S. 338, 348 (1974) (exclusionary rule comprises "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved").

Several empirical studies have attempted to show whether the exclusionary rule in fact promotes police compliance with the Fourth Amendment. Recent studies by Myron Orfield demonstrate that police practices have improved. *See* Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75 (1992) (observing that the rule deters improper police behavior and has been a prime factor in professionalization of the police force, but that a substantial amount of perjury by police nonetheless occurs in suppression hearings); Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987) (same). For an "economic school" analysis concluding that the exclusionary rule is a poor tool to deter police misconduct, see Charles F. Campbell, Jr., *An Economic View of Developments in the Harmless Error and Exclusionary Rules*, 42 BAYLOR L. REV. 499, 527-29 (1990).

83 The Fourth Amendment reads, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S. CONST. amend. IV. In other words, "the people" are to be protected against warrantless searches that have not been approved by an independent magistrate. Reasonable searches, necessary to detect and punish criminals, are authorized.

ment.[84] Indeed, "[t]he most famous English and colonial search and seizure cases involved innocent citizens."[85] Thus, history and the Constitution's text suggest that criminal suspects are not the intended beneficiaries of the Fourth Amendment, but instead, similar to the community at large, may obtain its benefits.[86]

Likewise, the focus on judicial integrity has changed.[87] In particular, the Burger and Rehnquist Courts have expressed concerns about the costs that the exclusionary rule imposes on society.[88] Accordingly, the post-*Mapp* Court has established

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84 For several sources that extensively describe the historical abuses—the general warrant and writs of assistance—that precipitated the Fourth Amendment, see NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51-105 (1970); JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 30-48 (1966).

85 Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 909 (1989).

86 *See* Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) ("Although it is frequently invoked in criminal trials, the Fourth Amendment is not a trial right; the protection it affords against governmental intrusion into one's home and affairs pertains to all citizens."). This societal concern was also poignantly expressed by Justice Jackson:

> Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.

Brinegar v. United States, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting). Commentators have also focused on the beneficial aspects to society:

> The exclusionary rule protects innocent people by eliminating the incentive to search and seize unreasonably. So long as a policeman knows that any evidence he obtains in violation of the [F]ourth [A]mendment will not help secure a conviction he has less reason to violate the [A]mendment and more reason to try to understand it.

Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1266-67 (1983).

87 *See* Courtenay Bass, Note, *The Erosion of the Exclusionary Rule Under the Burger Court*, 33 BAYLOR L. REV. 363, 365 (1981) (commenting on the judicial integrity rationale for the exclusionary rule).

88 *See, e.g.*, Nix v. Williams, 467 U.S. 431, 442-43 (1984) (exclusion of probative evidence is "drastic and socially costly"); United States v. Leon, 468 U.S. 897, 907-08 (1984) (exclusionary rule interferes with truth finding process and its indiscriminate application "may well 'generat[e] disrespect for the law and administration of justice' ") (quoting Stone v. Powell, 428 U.S. 465, 491 (1976)). *Cf.* J. DAVID HIRSCHEL, FOURTH AMENDMENT RIGHTS 13-15 (1979) (emphasizing costs to the fair administration of justice and interference with legitimate police work); John H. Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479, 482 (1922) ("[The exclusionary rule] puts [courts] in the position of assisting to under-

exceptions to the Fourth Amendment exclusionary rule that serve to limit the receipt of evidence to those circumstances in which deterrence of police misconduct would be promoted.[89]

As noted, prior to the Burger era, the independent source exception to the exclusionary rule had been developed.[90] In addition, the "attenuation" doctrine existed, recognizing that the connection between an illegal search and seizure may be too remote to support exclusion.[91] A Fourth Amendment impeachment exception, which permits the use of illegally obtained evidence to prevent the defendant from lying on the stand, was recognized in the 1954 case of *Walder v. United States*.[92] More recently, the Court grafted a "good faith" exception onto the Fourth Amendment exclusionary rule, permitting admission of evidence obtained during the execution of a defective search warrant[93] or under an invalid statute.[94] The inevitable discovery

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mine the foundations of the very institutions they are set there to protect. It regards the over-zealous officer of the law as a greater danger to the community than the unpunished murderer . . . .").

89 Although the shift in focus to solely a deterrence rationale probably better accords with the Fourth Amendment's language and purpose, the change has not passed without criticism. *See, e.g.*, Lane V. Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & CRIMINOLOGY 141, 145 n.31 (1978) (discussing empirical studies of the deterrent effect of the exclusionary rule); Thomas S. Schrock & Robert C. Welsh, *Up from* Calandra*: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 253-54 (1974) (studying Justice Powell's and Justice Brennan's opposing views regarding the justification for the exclusionary rule).

90 *See supra* note 75 (discussing the Court's adoption of the exclusionary rule in *Weeks v. United States*). Whether the independent source doctrine truly constitutes an exclusionary rule exception is debatable. Rather, the actual existence of an independent source serves as an alternative means of admitting that which would otherwise be tainted. The existence of this untainted alternative does not make the tainted evidence per se admissible, but rather means that the foundation upon which admissibility is established is different. In other words, it is a parallel untainted source. John E. Fennelly, *Inevitable Discovery: An Overview*, THE ARMY LAWYER, Jan. 1988, at 12.

91 Nardone v. United States, 308 U.S. 338, 341 (1939) ("As a matter of good sense . . . such connection may have become so attenuated as to dissipate the taint."). Again, whether attenuation is truly an exception is debatable: the attenuation doctrine serves to define and delineate the extent of taint. Perhaps that which falls outside is better described as untainted, rather than being admitted through an exception.

92 347 U.S. 62 (1954) (allowing evidence obtained in violation of Fourth Amendment to impeach direct testimony). *See also* United States v. Havens, 446 U.S. 620 (1980) (extension of impeachment exception to cross-examination).

93 United States v. Leon, 468 U.S. 897 (1984) (facially valid warrant relied upon in good faith). The good faith exception comprises a true exception: because the warrant is defective, the seized materials have been obtained, in effect, in a prohibited warrantless search. Accordingly, *Leon* is properly recognized as an exception, rather than a delineation of taint.

doctrine,[95] which holds that evidence that was *in fact* obtained improperly is nonetheless admissible if it would inevitably have been discovered by lawful means,[96] resulted from this balancing process.

Although the Supreme Court has yet to specify the proofs that are required to invoke the inevitable discovery exception,[97] the Court has clearly expressed the exception's rationale — to "ensure that the prosecution is not put in a *worse* position simply because of some earlier police error or misconduct."[98] To satisfy the exception, lower federal courts have attempted to articulate tests that are designed to admit evidence that would have been

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94 Illinois v. Krull, 480 U.S. 340 (1987) (exclusion not required even though search warrant relies on statute later declared unconstitutional).

95 Nix v. Williams, 467 U.S. 431, 441-48 (1984) (notwithstanding breach of Sixth Amendment right, inevitable discovery doctrine found applicable to Fourth, Fifth and Sixth Amendment cases). *See infra* notes 103-112 and accompanying text (reviewing *Nix*).

96 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.4(a), at 378-88 (2d ed. 1987).

97 The Court has suggested that inevitable discovery has its own distinct requirements, although such requirements remain undelineated. *See* Murray v. United States, 487 U.S. 533, 539 (1988) ("The inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine: *since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered."). In his *Nix* concurrence, however, Justice Stevens concluded that inevitable discovery is applicable if the prosecution can show that "at the time of the constitutional violation an investigation was already under way which, in the natural and probable course of events, would have soon discovered the [evidence]." *Nix*, 467 U.S. at 456-57 (Stevens, J., concurring). The majority opinion does not state whether an alternative investigation is required. Justice Brennan's dissent would require the government to show that such an investigation was underway and to satisfy a clear and convincing standard. *Id.* (Brennan, J., dissenting).

According to one pre-*Nix* commentary, the critical factor in inevitable discovery analysis should be whether an investigation was prompted, expanded or refocused as a result of tainted material:

> If the illegality was critical in initiating or determining the direction and form of the investigation, regardless of the legal sufficiency of the untainted evidence, the defendant's rights were clearly impaired because of the misconduct and the resultant evidence must be excluded. But if in the absence of the illegality an investigation would have occurred and proceeded in a manner that would inevitably have led to discovery of the questioned evidence, the police derived no actual benefit from that misconduct, no substantial infringement of the defendant's constitutional rights took place, and the evidence can justifiably be admitted.

Harold S. Novikoff, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 COLUM. L. REV. 88, 102 (1974).

98 *Nix*, 467 U.S. at 443. Interestingly, even though the *Nix* majority did not describe the proofs necessary to satisfy the inevitable discovery doctrine, it insisted that the exception involves no speculative elements, but rather focuses on historical facts capable of ready verification or impeachment. *Id.* at 445 n.5.

uncovered even in the absence of police misconduct.[99] Although these tests rely on historic facts, the inferences drawn from such facts are necessarily speculative. The inevitable discovery doctrine's hypothetical nature means that rules of law cannot prevent inappropriate application of the doctrine. "What would have happened" is in a very real way unknowable. Thus, by definition, the inevitable discovery doctrine presents a greater possibility of error than the independent source doctrine.

Despite these risks, the potential availability of the inevitable discovery exception may be, on balance, responsive to the societal-based purposes of the Fourth Amendment. Ultimately, the question becomes one of burden of proof and risk of error.[100] Although there is some disagreement in these areas, the inevitable discovery doctrine seems fundamentally sound in the Fourth Amendment context.

B. Sixth Amendment

Cases involving the right to counsel under the Sixth Amend-

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[99] The circuits have split on the applicable test. R. Bradley Lamberth, Comment, *The Inevitable Discovery Doctrine: Procedural Safeguards to Ensure Inevitability*, 40 BAYLOR L. REV. 129, 141-43 (1988). In *United States v. Cherry*, the Fifth Circuit required the government to prove by a preponderance of the evidence: (1) that there was "a reasonable probability that the evidence would have been discovered" by lawful means "in the absence of police misconduct," and (2) "that the government was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation." United States v. Cherry, 759 F.2d 1196, 1205-06 (5th Cir. 1985), *cert. denied*, 479 U.S. 1056 (1987). The requirement that the government demonstrate an active, alternative line of investigation has been accepted by several other circuits. *See* United States v. Eng, 971 F.2d 854, 861 (2d Cir. 1992); United States v. Ivey, 915 F.2d 380, 385 (8th Cir. 1990); United States v. Khoury, 901 F.2d 948, 960 (11th Cir. 1990).

Other circuits have rejected the requirement in favor of a more "flexible" approach. *See* United States v. Thomas, 955 F.2d 207, 210 (4th Cir. 1992) (requiring that "the fact or likelihood that makes discovery inevitable arise from circumstances other than those disclosed by the illegal search itself") (quoting United States v. Boatwright, 822 F.2d 862, 864-65 (9th Cir. 1987)); United States v. Silvestri, 787 F.2d 736, 746 (1st Cir. 1986) (requirement too rigid in cases where a search warrant is eventually obtained), *cert. denied*, 487 U.S. 1233 (1988).

[100] A well-written comment urged that the government be required to show by clear and convincing evidence that it would have inevitably discovered the tainted evidence. Lamberth, *supra* note 99, at 145-46. In addition, another commentator urged that a showing of good faith constitutes a prerequisite to application of inevitable discovery. John E. Fennelly, *Refinement of the Inevitable Discovery Exception: The Need for a Good Faith Requirement*, 17 WM. MITCHELL L. REV. 1085 (1991). Despite both arguments' merit, *Nix* rejected each of these requirements. *See supra* note 97 (noting that the requirements of the inevitable discovery doctrine remain undelineated).

ment[101] are somewhat more problematic because this right is less susceptible to categorization. During the Warren era, the Supreme Court's language in Sixth Amendment cases suggested that the right to counsel was a fundamental, personal right not subject to balancing, rather than an independent pretrial wrong to be remedied through judicious application of the exclusionary rule.[102]

There have been two notable exceptions to the Sixth Amendment rights-based jurisprudence. First, the Burger Court employed a balancing approach in *Nix v. Williams*,[103] adopting the inevitable discovery doctrine in the Sixth Amendment right to counsel context.[104] In *Nix*, the defendant, Williams, had surrendered in Davenport, Iowa, on kidnapping and murder charges and, after invoking his right to counsel,[105] was transported back to Des Moines, 160 miles away.[106] The victim's body had not been recovered when the trip began.[107] During the ride, a police officer accompanying Williams initiated a conversation by stating that because the girl's body might never be found, and the victim

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101 The Sixth Amendment reads in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

102 *See* United States v. Wade, 388 U.S. 218 (1967) (per se exclusionary rule when right to counsel at lineup was violated); Gilbert v. California, 388 U.S. 263, 272-73 (1967) (same); Massiah v. United States, 377 U.S. 201, 207 (1964) ("All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstance here disclosed, *could not constitutionally be used* by the prosecution as evidence against *him at his trial*.") (emphasis added, except for "*him*").

103 467 U.S. 431 (1984). The Fourth Amendment exclusionary rule cases provided the Court with the independent source doctrine employed in *Nix*. *See* Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was it a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 135 (1984) (maintaining that the *Nix* majority "seeks to justify the adoption of the inevitable discovery exception by analogy to the independent source doctrine of the [F]ourth [A]mendment exclusionary rule").

104 *Nix*, 467 U.S. at 444.

105 *Id.* Williams was arraigned in Davenport and represented by counsel by the time the return trip commenced. Brewer v. Williams, 430 U.S. 387, 391 (1977). *Brewer* held that Williams was denied his Sixth Amendment right to the assistance of counsel, a decision from which Chief Justice Burger and Justices White, Blackmun and Rehnquist dissented. *Id.* at 406.

Nix arose upon Williams' petition for a writ of habeas corpus from his post-*Brewer* state court conviction for murder. *Id.* at 439. Presented again with the *Brewer* facts, the Supreme Court, with Chief Justice Burger writing the majority opinion, declared: "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means [then] the evidence should be received." *Nix*, 467 U.S. at 444. Justices Brennan and Marshall dissented in *Nix*. *Id.* at 458-60.

106 *Id.* at 434-35.

107 *Id.* at 435.

would not receive "a Christian burial."[108] Thereafter, Williams confessed and led the officers to the girl's body.[109]

The Court ruled that the body was admissible, by virtue of the inevitable discovery doctrine, because an organized search was shown to have been "approaching the actual location of the body . . . ."[110] The record reflected that police would have inevitably discovered the body, but for its prior tainted discovery.[111] Again, the Court focused on deterrence as providing a counterbalance to exclusion: "If the prosecution can establish . . . that the information ultimately or inevitably would have been discovered by lawful means . . . then the *deterrence rationale* has so little basis that the evidence should be received."[112]

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108 *Id.* Chief Justice Burger's majority opinion in *Nix* quoted the officer's speech as such:

> I want to give you something to think about while we're traveling down the road. . . . They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is . . . and if you get a snow on top of it you yourself may be unable to find it. . . . I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered . . . .

Id. at 435.

In *Brewer*, four Justices dissented and found that Williams's disclosures were voluntary. *See Brewer*, 430 U.S. at 415-41. Significantly, Justice Blackmun, joined by Justices White and Rehnquist, discussed the case in *Miranda* terms rather than with regard to core Sixth Amendment rights. *See id.* at 438-41 (Blackmun, J., dissenting). The fourth dissenter, Chief Justice Burger, concluded that the defendant had made a valid waiver of his Sixth Amendment rights. *See id.* at 418 (Burger, C.J., dissenting).

Justice Stewart's majority opinion did not address whether Williams's responses were voluntary and also did not attempt to distinguish between a core Sixth Amendment violation and a violation of a prophylactic standard. *See id.* at 397-98. This approach is hardly surprising inasmuch as the jurisprudence distinguishing between core rights and *Miranda* procedural requirements was yet to be developed in the Sixth Amendment context at the time of *Brewer*. *See infra* notes 113-19 and accompanying text (discussing *Michigan v. Harvey* and its separation of the notion of a "prophylactic rule" from a direct violation of the Sixth Amendment). A foreshadowing of the distinction and the battle lines, however, can be drawn from *Brewer* with little effort.

109 *Nix*, 467 U.S. at 436. The Court affirmed the exclusion of the confession in *Brewer*. The *Brewer* Court also suggested that the body's location and condition "might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams." *Brewer*, 430 U.S. at 407 n.12.

110 *Nix*, 467 U.S. at 449.

111 *Id.* at 449-50. *But c.f.* Yale Kamisar, Brewer v. Williams — *A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209 (1977) (suggesting the problematic nature of inevitable discovery under the *Brewer* facts).

112 *Nix*, 467 U.S. at 444 (emphasis added).

Second, in *Michigan v. Harvey*,[113] the Court permitted a statement obtained in violation of a suspect's right to counsel to be used on cross-examination.[114] The Court's language is quite interesting because it separates the notion of a "prophylactic rule"[115] from a direct violation of the Sixth Amendment.[116] In particular, the Court in *Harvey* essentially duplicated the analysis that it had previously used in *Miranda* cases implicating Fifth Amendment concerns:

> There is no reason for a different result [here] where the prophylactic rule is designed to ensure voluntary, knowing, and intelligent waivers of the Sixth Amendment right to counsel rather than the Fifth Amendment privilege against self-incrimination or "right to counsel." . . . We have never prevented use by the prosecution of relevant voluntary statements by a defendant, particularly when the violations alleged by a defendant relate only to procedural safeguards that are "not themselves rights protected by the Constitution," [*Miranda* rules], but are instead measures designed to ensure that constitutional rights are protected.[117]

By construing the case as one involving prophylactic *Miranda* rules, rather than a core violation of the Sixth Amendment, the *Harvey* Court was able to invoke a deterrence-based analysis.[118] Indeed, with *Harvey*'s analysis and the *Nix* majority's use of deterrence language, it is now entirely possible to view *Nix* as a *Miranda* case,

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113 494 U.S. 344 (1990).

114 *See id.*

115 A prophylactic rule establishes procedural protections designed to effectuate a right. The concept finds its genesis in *Miranda v. Arizona*, which requires police to inform arrested persons that: 1) they have the right to remain silent when taken into custody; 2) anything they say can and will be used against them in court; 3) they have a right to consult with a lawyer; and 4) that a lawyer will be appointed for them if they cannot afford one. Miranda v. Arizona, 384 U.S. 436, 467-73 (1966). Once a suspect invokes the right to remain silent, the police must cease their questioning. *Id.* at 473-74. In *Edwards v. Arizona*, the Court established a further prophylactic rule: once the suspect has invoked the right to remain silent, waiver cannot occur as a result of police-initiated interrogation. Edwards v. Arizona, 451 U.S. 477, 484 (1981).

116 *Michigan v. Jackson*, to effectuate the Sixth Amendment right to counsel, established a cognate prophylactic rule derived from *Edwards*: once the suspect has invoked the right to counsel, police-initiated questioning cannot result in a waiver. Michigan v. Jackson, 475 U.S. 625, 636 (1986).

117 *Harvey*, 494 U.S. at 351 (citations omitted).

118 With core violations, the Court explicitly left open the question of whether any sort of balancing would be permissible. *See id.* at 354. There can be little doubt, however, that the denial of trial counsel in contravention of Gideon v. Wainwright, 372 U.S. 335 (1963), and its progeny would constitute reversible error per se. *See* Chapman v. California, 386 U.S. 18, 23 n.8 (1967) (citing cases).

rather than a core Sixth Amendment case.[119]

C. *Fifth Amendment*

Unlike the Fourth or Sixth Amendments, the Fifth Amendment operates directly as an exclusionary rule.[120] Fifth Amendment cases are of two types: *Miranda* violations and core Fifth Amendment violations.[121] Core violations involve cases where the witness has actually been compelled to testify. Alternatively, Fifth Amendment *Miranda* issues are dealt with in the same manner as Sixth Amendment *Miranda* issues.

In particular, *Miranda* violations, whether involving Fifth or Sixth Amendment concerns, do not constitute core violations. The existence of several exclusionary "exceptions" in the Fifth Amendment *Miranda* context confirms this observation.[122] Indeed, it is possible, as Justice O'Connor suggested in *Oregon v. Elstad*,[123] that violations of *Miranda*'s prophylactic rules will not necessarily result in the suppression of derivative evidence:

> [T]he *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted. Despite the fact that patently *voluntary* statements taken in vio-

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[119] In *Nix*, the majority avoided a discussion of whether the exclusion there resulted from a core violation or a *Miranda* violation by assuming that the inevitable discovery doctrine is consistent with the core conception of the Sixth Amendment. *Nix*, 467 U.S. at 446. In other words, the Court failed to discuss whether Sixth Amendment exclusion constitutes a core right or a remedy. Patricia Lyn Hurst, Note, *Overriding a Constitutional Governor: The Supreme Court's Application of the Impeachment Exception in* Michigan v. Harvey *to the Sixth Amendment Exclusionary Rule*, 69 N.C. L. REV. 551, 568 n.149 (1991); James J. Tomkovicz, *The* Massiah *Right to Exclusion: Constitutional Premises and Doctrinal Implications*, 67 N.C. L. REV. 751, 764-65 (1989). *Harvey* makes evident that the issues in the *Nix* case apparently were prophylactic in nature. In a *Nix* concurrence, Justice White explicitly viewed the case as a *Miranda* issue and reiterated the view that the Court had become " 'lost in the intricacies of the prophylactic rules of *Miranda v. Arizona* . . . .' " *Nix*, 467 U.S. at 450-51 (White, J., concurring) (quoting Brewer v. Williams, 430 U.S. 387, 438 (1977) (White, J., dissenting)). Observed in such a light, *Nix* is no longer the outlier that it appears on initial examination. Rather, *Nix* is simply another "police practices" case in which *Miranda* balancing mitigates the loss of probative evidence through another exception to the exclusionary rule.

[120] Loewy, *supra* note 85, at 926 ("[T]he [F]ifth [A]mendment does not contain an exclusionary rule; it is itself an exclusionary rule.").

[121] Fifth Amendment *Miranda* rules do not constitute the actual privilege against self-incrimination, but rather "prophylactic standards [designed] to safeguard that privilege." Michigan v. Tucker, 417 U.S. 433, 446 (1974).

[122] *See, e.g.*, New York v. Quarles, 467 U.S. 649 (1984) (public safety exception); Harris v. New York, 401 U.S. 222 (1971) (cross-examination exception).

[123] 470 U.S. 298 (1985).

> lation of *Miranda* must be excluded from the prosecution's case, the presumption of coercion does not bar their use for impeachment purposes on cross-examination.[124]

Thus, whether the fruit of the poisonous tree doctrine is applicable to *Miranda* Fifth Amendment cases is debatable.[125] In any event, it is certain that balancing, as used in police practice cases of all types, is employed in the Fifth Amendment *Miranda* context.

There is, however, a bifurcation in the Court's approach to Fifth Amendment core cases and *Miranda* cases. The use of coerced confessions, whether true or false, is forbidden because of the basic principle that our criminal law system is accusatorial, not inquisitorial.[126] Plainly, "[t]estimony given in response to a grant of legislative immunity is the essence of coerced testimony."[127] Consequently, the use of immunized testimony is absolutely prohibited:

> In such cases there is no question whether physical or psychological pressures overrode the defendant's will; the witness is told to talk or face the government's coercive sanctions . . . . The information given in response to a grant of immunity may well be more reliable than information beaten from a helpless defendant, but it is no less compelled . . . . Balancing of interests was thought to be necessary in [*Miranda* cases] when the attempt to deter unlawful police conduct collided with the need to prevent perjury. *Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible.*[128]

The *Harvey* Court cited, with approval, this "no balancing rule" for core violations.[129]

In short, the Supreme Court appears to recognize that in core Fifth Amendment jurisprudence, immunity cases for example, balancing is inappropriate. Balancing, however, has been repeatedly applied in the Fifth Amendment *Miranda* context. The "second class" status of *Miranda* violations has not escaped severe criti-

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124 *Id.* at 307 (citing Harris v. New York, 401 U.S. 222 (1971)).

125 For a complete exposition of this point, see Mark S. Bransdorfer, Note, Miranda *Right-to-Counsel Violations and the Fruit of the Poisonous Tree Doctrine*, 62 IND. L.J. 1061, 1078-82 (1987).

126 Arizona v. Fulminante, 111 S. Ct. 1246, 1256 (1991) (White, J., dissenting in part) (dissenting from application of harmless error analysis to coerced confessions).

127 New Jersey v. Portash, 440 U.S. 450, 459 (1979).

128 *Id.* (emphasis added).

129 Michigan v. Harvey, 494 U.S. 344, 351 (1990).

cism.[130] Regardless of this criticism, the case law recognizes that Fifth Amendment core values are entitled to a higher level of protection — no balancing whatsoever.

IV. THE INEVITABLE DISCOVERY DOCTRINE CROSSES OVER TO IMMUNITY JURISPRUDENCE: THE *STRECK* AND *HAZELWOOD* CASES

Two recent cases involving immunity and the potential application of the inevitable discovery doctrine to derivative evidence have reached opposite conclusions. The first case, *United States v. Streck*,[131] applies the doctrine without substantial discussion. The second, *Hazelwood v. Alaska*,[132] holds the doctrine inapplicable as a matter of law.

A. The Streck *Case*

On November 3, 1988, Donald W. Streck was indicted for federal income tax evasion in violation of 26 U.S.C. § 7201.[133] In essence, the indictment charged Streck with receiving approximately $1,800,000 from a Francis J. Walsh, Jr., and his closely-held companies in 1983, 1984 and 1985, and failing to report the money as income.[134] The government's position was that the funds were either the proceeds of an embezzlement or commissions. Streck, on the other hand, argued that because he had taken the funds as a result of a business dispute, they did not constitute current income. Alternatively, Streck argued that he lacked the willfulness to violate the tax laws due to the unresolved nature of the transactions with Walsh.

Prior to his indictment, Streck was immunized in connection with a grand jury investigation in the Northern District of California.[135] The grand jury investigation led to Walsh's indictment on mail fraud charges. During the course of these proceedings, the

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130 *See, e.g.*, Loewy, *supra* note 85, at 927-28 ("If the court cannot accept *Miranda* for its proper [F]ifth [A]mendment value, perhaps it should overrule it. Preferably, it should take that [F]ifth [A]mendment value seriously.").

131 958 F.2d 141 (6th Cir. 1992).

132 836 P.2d 943 (Alaska Ct. App. 1992).

133 United States v. Streck, Cr. No. 1-88-096 (S.D. Ohio Nov. 3, 1988). Streck and his wife, Debra L. Streck, were also jointly charged with bankruptcy fraud in violation of 18 U.S.C. § 152. Both were acquitted of these charges.

134 It was undisputed that Streck did not report approximately $1 million of these receipts as income in those years.

135 *In re* Donald W. Streck A Witness Before The Special Grand Jury, Cr. No. 85-566 Misc. (N.D. Cal. Dec. 12, 1985). The compulsion order can be found in the district court record, United States v. Streck, Cr. No. 1-88-096 (S.D. Ohio Dec. 19,

government gave several immunized admissions by Streck to Walsh's attorneys in discovery. A March 23, 1987 letter from the prosecutor to Walsh's attorneys noted:

> When Streck commenced work in 1983 as a financial consultant with Francis J. Walsh, . . . Streck and Walsh agreed on a compensation package that included a 2 percent commission on any financing transactions that Streck would arrange for Walsh. Between 1983 and 1986 there were a number of occasions when Mr. Walsh did not pay Streck's commission when it was due. As a consequence, Streck began secretly diverting funds that were due from Walsh to reimburse himself for the commissions he did not receive.[136]

The letter further observed that "Streck secretly diverted in excess of $1,000,000" by endorsing Walsh's checks to a closely-held company, ACI.[137]

After receipt of this immunized letter, Walsh's attorneys reported the information to the New Jersey bankruptcy court where several of Walsh's companies and Walsh himself were debtors.[138] The bankruptcy court in turn provided this information to the United States Attorney for the District of New Jersey and, shortly thereafter, several of Walsh's companies instituted an adversary proceeding against Streck seeking recovery of some of the funds.[139]

The adversary proceeding was the first time Walsh had disputed Streck's claim, even though Walsh was previously aware of a substantial diversion of funds by Streck. Testimony from Walsh representatives showed that, in September 1985, Walsh was already aware that Streck had taken approximately $400,000.[140] Streck was not fired, but instead continued as a financial consultant with the Walsh entities until June 1986.

In 1985, the Internal Revenue Service (IRS) commenced a civil audit of Streck's tax returns. The Revenue Agent conducting the audit ultimately referred Streck's 1984 and 1985 tax returns to the Criminal Investigation Division (CID) of the IRS in May 1987.[141]

1988), Statement of Charles J. Walsh Pursuant to 28 U.S.C. § 1746, dated December 19, 1988 at ¶ 9 [hereinafter Walsh Statement] (Record Entry No. 9).

136 *Id.* at Exhibit C.

137 *Id.*

138 Walsh Statement, *supra* note 135, ¶ 14.

139 Walsh Trucking Co., v. Streck, Case Nos. 85-03260, 85-03266, 85-03286, 85-03287, 85-03267, Adv. No. 87-0880 TG (Bankr. D.N.J. Sept. 6, 1987).

140 United States v. Streck, Cr. No. 1-88-096 (S.D. Ohio Nov. 3, 1988), Record No. 99 at 67-25 to 68-11 (testimony of Marc L. Zoldessy).

141 At the time the Revenue Agent referred these returns to the CID, she did not know the source of the 1984 and 1985 funds and had made no effort to contact the

Shortly thereafter, the CID assigned an IRS Special Agent to conduct a Cincinnati-based criminal tax investigation. The Special Agent apparently then learned about a New Jersey-based investigation concerning Streck and contacted an Assistant United States Attorney in the Newark, New Jersey office.[142]

The Special Agent subsequently travelled to New Jersey and reviewed documents at the United States Attorneys' Office, but was denied access to documents that the New Jersey federal prosecutors had obtained from the Northern District of California.[143] The Assistant United States Attorney assigned, however, directed the Special Agent to "public records" relating to the Walsh-Streck adversary proceeding available through the Assistant United States Bankruptcy Trustee.[144] It is undisputed that at the Trustee's office the Special Agent came in contact with fruits of the immunized letter no later than November 17, 1987 — almost one year prior to Streck's indictment and before any of the witnesses were interviewed.

In his initial appeal, Streck argued that the government had not satisfied its *Kastigar* obligations and that, in any event, the district court had not made the specific findings necessary for appellate review.[145] The Sixth Circuit agreed with the latter point and remanded the immunity question to the district court with the direction to "make specific findings as [to] the independent sources from which the government's grand jury evidence was derived."[146]

On remand, the district court relied on the independent source doctrine. Specifically, the court found that Walsh representatives were independent sources because Walsh "had *independently* uncovered misappropriations around September of 1985 and June of

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Walsh companies. United States v. Streck, Cr. No. 1-88-096 (S.D. Ohio Nov. 3, 1988); Record No. 39, 44-17 to 45-13 (testimony of Mary E. Kifer). The district court appeared to find that Kifer did not know that the Walsh companies were the sources of these funds. United States v. Streck, Cr. No. 1-88-096, at 5 (S.D. Ohio, Mar. 27, 1992) (Record Entry No. 115).

142 *Id.* at 6.

143 Affidavit of James R. Kuntz, dated February 16, 1989, at 3-4, United States v. Streck, Cr. No. 1-88-096 (S.D. Ohio Nov. 3, 1988) (Record Entry No. 24).

144 *Id.*

145 The district court conducted a pretrial *Kastigar* hearing in which the Special Agent and the Revenue Agent testified. In an order dated March 22, 1989, the district court found that the government met its *Kastigar* burden, but made no specific findings of fact. United States v. Streck, Cr. No. 1-88-096 (S.D. Ohio Mar. 22, 1989) (Record Entry No. 35).

146 United States v. Streck, 914 F.2d 1495 (6th Cir. Sept. 26, 1990) (per curiam) (table) (available on WESTLAW). The district court was also directed to "make its findings under either the 'inevitable discovery' or the 'independent sources' doctrine, but it should make clear which doctrine it is applying so as to avoid confusion on review." *Id.*

1986."[147]

In the second appeal, the Sixth Circuit tacitly rejected the findings of independence, but affirmed on the inevitable discovery doctrine.[148] In particular, the appellate panel tersely concluded:

> There are simply no grounds for believing that, prior to their exposure to the [prosecutor's] letter, Walsh representatives would have mistakenly told [the Special Agent] that the disputed funds were loans rather than something else. Accordingly, we find it beyond dispute that [the Special Agent] would have discovered that the funds were not loans even if the [prosecutor's] letter had never existed.[149]

The Sixth Circuit's finding of inevitable discovery ultimately rests, as all such findings, on supposition. The district court made few findings relating to the Special Agent's criminal investigation. Many of the limited findings suggested investigative use.[150] In par-

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147 United States v. Streck, Cr. No. 1-88-096 (S.D. Ohio Mar. 27, 1991) (Record Entry No. 115) (emphasis added).

148 United States v. Streck, 958 F.2d 141, 146 (6th Cir. 1992).

149 *Id.* In the absence of the immunized letter, there was no reason to believe that Walsh representatives, as opposed to Walsh himself, would have known about the diverted funds. Moreover, given the close connection of the diversions to underlying transactions for which Walsh was indicted, Walsh himself was unavailable as a witness.

150 Investigative use is prohibited because it enhances the quality and quantity of evidence available against the immunized witness and is therefore *an evidentiary use* of the witness's compelled testimony. *See* Kastigar v. United States, 406 U.S. 441, 460 (1972) ("This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead . . . .' ") (footnote omitted).

The courts are divided over whether other advantages, so-called non-evidentiary uses, are prohibited. *See* United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973) ("Such use[s] could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise planning trial strategy."). The Third and Eighth Circuits clearly bar non-evidentiary uses. *See* United States v. Semkiw, 712 F.2d 891, 895 (3d Cir. 1983); *McDaniel*, 482 F.2d at 311. The District of Columbia Circuit has stated in dicta that non-evidentiary use is "troubling." United States v. North, 910 F.2d 843, 860, *modified*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2235 (1991). Other circuits, however, permit non-evidentiary use. *See* United States v. Velasco, 953 F.2d 1467, 1472-74 (7th Cir. 1992); United States v. Serrano, 870 F.2d 1, 16 (1st Cir. 1989); United States v. Crowson, 828 F.2d 1427, 1431-32 (9th Cir. 1987), *cert. denied*, 488 U.S. 831 (1988); United States v. Byrd, 765 F.2d 1524, 1528-31 (11th Cir. 1985). Likewise, recent Second Circuit case law has suggested that non-evidentiary use of immunized materials may be permissible or is harmless. United States v. Rivieccio, 919 F.2d 812 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2852 (1991); United States v. Mariani, 851 F.2d 595, 599 (2d Cir. 1988), *cert. denied*, 490 U.S. 1011 (1989). Even under these cases, however, proof of the lack of prior independent knowledge of a material fact would be sufficient to show improper use. *See* United States v. Kristel, 762 F. Supp. 1100, 1107 (S.D.N.Y. 1991) ("This Court does not read either *Rivieccio* or *Miriani* [sic] as sup-

ticular, the trial judge found that the Special Agent "requested subpoenaed bank account records and books of the various Frank Walsh corporations" after learning of the suspicion of a New Jersey Assistant U.S. Attorney "that the unreported income was coming from Frank Walsh or his related entities . . . ."[151] This finding suggested that the Special Agent's investigation was affected by immunized materials from its inception.[152]

Even assuming that the Special Agent did not learn of the immunized letter until November 1987, the letter undoubtedly helped organize and focus his investigation. As noted, no witnesses had been interviewed. Thus, by the time Walsh representatives were interviewed, the immunized letter had provided the investigator with an organizing principle for his interviews. More significantly, the immunized letter had irretrievably altered the knowledge and apparent attitude of Walsh and his representatives. Consequently, testimony from Walsh representatives helped strengthen the government's case on two issues — current taxability and willfulness.

The Sixth Circuit's application of the inevitable discovery doc-

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porting the Government's contention that immunized testimony . . . can properly be used as an investigatory lead or as a means of focusing an investigation in light of the Supreme Court's decision in *Kastigar*. In the present case, unlike *Rivieccio* and *Miriani* [sic], there has been no showing that the Government . . . had prior knowledge from an untainted source . . . .").

151 United States v. Streck, Cr. No. 1-88-096, at 6 (S.D. Ohio Mar. 27, 1991) (Record Entry No. 115).

152 Streck was not able to develop this point in the absence of discovery from the government. Significantly, the criminal defendant generally possesses no right of access to any of the government's papers prepared in connection with the investigation of the case. FED. R. CRIM. P. 16(b). Due to Rule 16b and Rule 6(e)—relating to the secrecy of grand jury proceedings—or both, immunized defendants rarely have been granted significant discovery, such as access to grand jury materials, to prepare for *Kastigar* hearings. *But cf.* United States v. Smith, 580 F. Supp. 1418 (D.N.J. 1984) (district court conducts a twenty-six day *Kastigar* hearing in which the government agents who conducted the investigation testified and were cross-examined by defense counsel); United States v. Dornau, 356 F. Supp. 1091, 1097-98 (S.D.N.Y. 1973) (granting access to grand jury minutes), *rev'd on other grounds*, 491 F.2d 473 (2d Cir. 1974), *cert. denied*, 419 U.S. 872 (1974).

Lacking discovery, Streck's counsel were unaware of the basis for the district court's conclusion on this point inasmuch as there was no testimony at the *Kastigar* hearing from the Special Agent that would support such a finding. Counsel believe that the finding was either based on grand jury materials (to which Streck was denied access) or perhaps even was a mistake. The Sixth Circuit disregarded the argument that if the Special Agent's decision to subpoena Walsh's various bank records was motivated by derivative use of the immunized letter, the whole focus of the IRS investigation was turned by the use of Streck's immunized statements. *See* Streck, 958 F.2d at 143 n.1.

trine in the context of an immunity case apparently was a first.[153] In fact, the appellate panel relied on *Nix v. Williams*,[154] the only Supreme Court case that has approved the doctrine's use.[155] The Sixth Circuit cited no case involving the inevitable discovery doctrine and immunity.[156]

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153 In *United States v. North*, the District of Columbia Circuit briefly mentioned the inevitable discovery doctrine, but did not analyze its potential applicability to immunized testimony. United States v. North, 920 F.2d 940, 943 n.3 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2235 (1991). *North* itself was not decided on the basis of the inevitable discovery doctrine.

154 467 U.S. 431, 442-44 (1984).

155 United States v. Streck, 914 F.2d 1495 (6th Cir. Sept. 26, 1990) (per curiam) (table) (available on WESTLAW).

None of the inevitable discovery cases cited in *Nix* involved an immunity situation. *See Nix*, 467 U.S. at 440 n.2 (citing cases). *See also* United States v. Apker, 705 F.2d 293, 306-07 (8th Cir. 1983) (Fourth Amendment case), *cert. denied*, 465 U.S. 1005 (1984); United States v. Fisher, 700 F.2d 780, 784 (2d Cir. 1983) (admissions that may have been voluntary nonetheless not used, as other evidence resulted from routine police investigation); United States v. Roper, 681 F.2d 1354, 1358 (11th Cir. 1982) (*Miranda* violations cured because an inevitable search would have otherwise occurred), *cert. denied*, 459 U.S. 1207 (1983); United States v. Romero, 692 F.2d 699, 704 (10th Cir. 1982) (Fourth Amendment case); Papp v. Jago, 656 F.2d 221, 222 (6th Cir.) (applying inevitable discovery rule; *Miranda* violations), *cert. denied*, 454 U.S. 1035 (1981); United States v. Brookins, 614 F.2d 1037, 1042, 1044 (5th Cir. 1980) (*Miranda*-violative questioning led to witnesses whose identity would inevitably have been discovered); United States v. Bienvenue, 632 F.2d 910, 914 (1st Cir. 1980) (Fourth Amendment search and seizure); United States v. Schmidt, 573 F.2d 1057, 1065-66 n.9 (9th Cir.) (dicta stating that if the defendant's statements had been coerced, inevitable discovery would have made derivative evidence admissible), *cert. denied*, 439 U.S. 881 (1978); United States *ex rel.* Owens v. Twomey, 508 F.2d 858, 865-66 (7th Cir. 1974) (Fourth Amendment case; approving inevitable discovery doctrine in dicta); Gov't of Virgin Islands v. Gereau, 502 F.2d 914, 927-28 (3d Cir. 1974) (pistol would have inevitably been found regardless of statement obtained in violation of *Miranda*; officers heard noises of windows being opened and object striking rooftop below), *cert. denied*, 420 U.S. 909 (1975); United States v. Seohnlein, 423 F.2d 1051, 1053 (4th Cir.) (after illegal search of defendant's wallet provides defendant's identity, defendant arrested with fellow bank robbers; therefore, identification was inevitable), *cert. denied*, 399 U.S. 913 (1970); Wayne v. United States, 318 F.2d 205, 209 (D.C. Cir.) (Fourth Amendment exclusionary case, emergency situation justifies entry), *cert. denied*, 375 U.S. 860 (1963).

It should be noted that these circuit court cases were constrained by more stringent versions of the inevitable discovery exception than that articulated by the *Nix* Court. *The Leading Cases of the 1983 Term*, 98 HARV. L. REV. 87, 123 n.45 (1984) [hereinafter *Leading Cases*].

156 *See* United States v. Streck, 914 F.2d 1495 (6th Cir. Sept. 26, 1990) (per curiam) (table) (available on WESTLAW). The only Fifth Amendment case cited by the Sixth Circuit, United States v. Martinez-Gallegos, 807 F.2d 868, 870 (9th Cir. 1987), was a *Miranda* case, not a core violation or an immunity case.

B. *The* Hazelwood *Case*

Hazelwood v. Alaska arose from "the largest tanker spill in United States history."[157] The Exxon *Valdez*, captained by Joseph J. Hazelwood (Hazelwood), ran aground hours after leaving the port of Valdez, Alaska with a load of 1,260,000 barrels of oil. Twenty minutes after the grounding, Hazelwood reported that the ship had "fetched up" and "evidently [was] leaking some oil . . . ."[158] Within two days, the resulting slick of approximately 240,000 barrels of oil covered almost fifty square miles.[159] Hazelwood was subsequently charged and convicted of the negligent discharge of oil under Alaska state law.[160]

On appeal, Hazelwood argued that because he had promptly notified authorities of the spill, federal law provided him with use and derivative use immunity of the report and resulting investigations.[161] Hazelwood also argued that the inevitable discovery exception did not apply as a matter of law.[162]

The Alaska Court of Appeals found that the nature of immunized statements rendered application of the inevitable discovery doctrine constitutionally prohibited in the immunity context:

> [The] fundamental differences between the exclusion of evidence in cases of illegally obtained evidence and cases of evidence derived from immunized information lead us to conclude that the inevitable discovery doctrine—an exception rooted in the pragmatism of the exclusionary rule and its narrow deterrent purpose—has no application in the immunity context. The use of inevitable discovery in this context would be directly contrary to the express protection of the privilege against self-incrimination.[163]

In addition, the court found the deterrence rationale inapplicable in the immunity context because "[e]vidence is not unlawfully obtained when an individual provides information to the government

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157 Philip Shabecoff, *Largest U.S. Tanker Spill Spews 270,000 Barrels of Oil Off Alaska*, N.Y. TIMES, March 25, 1989, at 1.

158 Hazelwood v. Alaska, 836 P.2d 943, 944 (Alaska Ct. App. 1992).

159 Richard Mauer, *Alaska Aide Assails Oil Industry For Inadequate Response to Spill*, N.Y. TIMES, March 26, 1989, at 1, 22.

160 *Hazelwood*, 836 P.2d at 944. *See* ALASKA STAT. §§ 46.03.740, .790(a)(1) (1991).

161 *Hazelwood*, 836 P.2d at 945-46. The federal statute requires "[a]ny person in charge of a vessel" to notify the appropriate governmental agency "as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel[,]" but that "[n]otification received . . . or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case . . . ." 33 U.S.C. § 1321(b)(5) (1988).

162 *Hazelwood*, 836 P.2d at 945-46.

163 *Id.* at 953.

under a grant of immunity. Hence, the exclusion of information that derives from immunized testimony is unrelated to deterrence of official misconduct . . . ."[164]

The *Hazelwood* court also recognized that promises of immunity made to an individual in exchange for incriminating statements must be judicially enforced:

> Because the ultimate aim of the constitutional privilege is to assure that no compelled statement will be used against the accused in a criminal case, the Supreme Court has long recognized that the first facet of the privilege—its protection against compulsory elicitation of potentially incriminating statements—may be properly invaded by the government, but only in exchange for a guarantee that the second facet of the privilege—the use of compelled statements or evidence derived therefrom—will not be breached.[165]

Finally, the court observed that fairness required exclusion:

> Although the state, by invoking the inevitable discovery doctrine, seeks dispensation from the promise of immunity expressly made in the federal statute, it is difficult to see how such dispensation can be justified. Having gained its evidence from the exploitation of information it obtained by a promise of immunity, the state should not be free to renege merely because, in retrospect, the promise appears to have been unnecessary.[166]

V. ANALYSIS

As noted, in *Mapp v. Ohio*[167] the Warren Court identified three bases for the exclusionary rule: i) a personal right of exclusion; ii) deterrence of police misconduct; and iii) judicial integ-

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164 *Id.* at 951.

165 *Id.* at 952.

166 *Id.* at 953. The self-executing nature of 33 U.S.C. § 1321(b) undoubtedly does result in immunity grants that are unnecessary in certain instances. Such overbreadth, however, appears to be constitutionally necessary to compel the reporting of spills in *all* cases. Specifically, to compel any individual to report a spill, *all* persons must be promised use and derivative use immunity. *See* Pillsbury Co. v. Conboy, 459 U.S. 248, 257 (1983) (the witness's "primary interest is that the protection be certain").

Unfortunately, the *Hazelwood* court suggested in dicta that "Congress could have readily carved out an [inevitable discovery] exception" statutorily. *Hazelwood*, 836 P.2d at 954. The authors submit that this dicta is wrong because, as a matter of constitutional law, an individual must be promised immunity if he is to be compelled to incriminate himself. This dicta somewhat muddles an otherwise thoughtful, well-reasoned opinion.

167 367 U.S. 643 (1961).

rity.[168] When the Supreme Court approved the concept of use and derivative use immunity in *Murphy v. Waterfront Commission of New York Harbor*,[169] the protection of personal rights and judicial integrity were valid exclusionary rule rationales.

Under the Burger and Rehnquist Courts, deterrence of police misconduct has become the sole rationale for exclusionary rules. The other rationales — the personal right of exclusion and judicial integrity — have been discarded. Similarly, *Miranda* jurisprudence currently recognizes that deterrence of police misconduct is the primary goal of its rule-based exclusions. Accordingly, the Court has applied limitations and exceptions to *Miranda*-based exclusionary rules to insure that exclusion actually serves the purpose of deterrence. Deterrence-based language now dominates *Miranda* decisions.

In recognizing the inevitable discovery exception, the *Nix* Court explicitly described the rationale behind the exception as deterrence: "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers' search—then the deterrence rationale has so little basis that the evidence should be received."[170] The inevitable discovery exception appears to produce little damage to the deterrence rationale underlying both *Miranda* and exclusionary rule jurisprudence.

In contrast, no deterrence rationale justifies the inevitable discovery exception in the context of use and derivative use immunity. Specifically, the goal of immunity statutes is to legalize and encourage this form of investigative tool *provided that* there is no self-incriminatory use of the witness's compelled testimony. Accordingly, exclusion of immunized statements bears no relation to deterrence of police misconduct.[171]

The two other rationales for exclusionary rules that have been discarded by the Burger and Rehnquist Courts—a personal right of exclusion and judicial integrity—remain vital in this Fifth Amendment context. The Fifth Amendment is itself an exclusionary rule that is founded in the personal rights of the accused.

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168 *See supra* text accompanying note 81 (noting the Warren Court's three-fold rationale for the exclusionary rule).

169 378 U.S. 52 (1964).

170 Nix v. Williams, 467 U.S. 431, 444 (1984).

171 The Second Circuit has also recognized that the deterrence rationale is irrelevant in the immunity context. *See* United States v. Kurzer, 534 F.2d 511, 516 (2d Cir. 1976).

Likewise, judicial integrity requires courts to enforce immunity agreements as written.[172] Courts participate in the immunity-granting process by ordering the compelled witness to testify and by use of their contempt powers to enforce such directions. By excusing the government's promise of immunity in the form of a judicial order, courts could well be seen as parties to governmental entrapment.

The Fifth Amendment prohibits application of the inevitable discovery rule to core Fifth Amendment violations.[173] In contrast to Fourth Amendment cases and violations of the *Miranda* rules, the use of compelled testimony constitutes a direct violation of the Fifth Amendment. It cannot be said that the inevitable discovery doctrine, unlike the independent source doctrine sustained in *Kastigar*, makes *no use in fact* of the witness's own compelled testimony. Therefore, the Fifth Amendment mandates exclusion.

The *Hazelwood* court correctly found that the Fifth Amendment's constitutional command is absolute:

> [T]he United States Supreme Court has been careful to distinguish between the "balancing of interests . . . thought to be necessary . . . when the attempt to deter unlawful police conduct" is involved, . . . and the less flexible approach toward excluding evidence that is necessary in immunity cases: Testimony given in response to a grant of legislative immunity is the essence of coerced testimony . . . . Here, . . . we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible . . . .[174]

In short, when a witness is immunized, 18 U.S.C. § 6002[175] guarantees the witness that no use of the testimony or other compelled

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[172] For reasons of judicial integrity, courts enforce informal immunity agreements. *See, e.g.*, United States v. Plummer, 941 F.2d 799, 802 (9th Cir. 1991); United States v. Palumbo, 897 F.2d 245 (7th Cir. 1990); United States v. Harvey, 869 F.2d 1439 (11th Cir. 1989).

[173] *See* New Jersey v. Portash, 440 U.S. 450, 459 (1979) (prohibiting the application of policy-oriented balancing to core Fifth Amendment violations).

[174] Hazelwood v. Alaska, 836 P.2d 943, 952 (Alaska Ct. App. 1992) (quoting New Jersey v. Portash, 440 U.S. 450, 459 (1979)).

[175] The legislative history of the use and derivative use statute does not specifically discuss whether the inevitable discovery exception should apply to immunized testimony. Rather, numerous statements simply distinguish use and derivative use from transactional immunity without precisely delineating the former. *See, e.g.*, H.R. REP. No. 1549, 91st Cong., 2d Sess. 1, 42 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4017-18 ("This statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination. It is designed to reflect the use-restriction immunity concept . . . rather than the transaction immu-

information will be made.[176]

The Fifth Amendment represents a fundamental value judgment that the criminal justice system in the United States should be accusatorial rather than inquisitorial.[177] The Amendment was motivated by historical abuses found in early Anglo-American justice:

> No doubt the constitutional privilege may, on occasion, save a guilty man from his just deserts. It was aimed at a more far-reaching evil — a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality. Prevention of the greater evil was deemed of more importance than occurrence of the lesser evil. Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law-enforcing agencies.[178]

The privilege against self-incrimination protects values other than the strict determination of facts, such as the prevention of abuse of power, which are fundamental to our criminal justice system. These systemic concerns, and not deterrence of police misadventure, justify exclusion.

This balance of power rationale also suggests practical reasons why the inevitable discovery exception should not apply. Specifically, the decision to grant immunity is a deliberate and intentional act[179] that may make it impossible to later prosecute the witness. In

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nity concept . . . ."). In fact, it appears that Congress's conception of the exclusionary rule apparently assumed that the Court treated all violations similarly:

> [T]he immunity grant would constitute a ground for the suppression of the use of compelled testimony and the fruits of that testimony, rather than a total defense. It would be a use restriction, a use restriction similar to the exclusionary rule which is now applied against such things as involuntary confessions, evidence acquired from unlawful searches and seizures, evidence acquired in violation of the *Miranda* warnings, to cite only a few examples.

Federal Immunity of Witnesses Act: Hearings Before Subcomm. No. 3 of the House Committee on the Judiciary, 91st Cong., 1st Sess. 30 (1969) (statement of Congressman Richard H. Poff). Of course, as shown above, the jurisprudence for these different areas of law diverges widely.

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

177 Arizona v. Fulminante, 111 S. Ct. 1246, 1256 (1991) (White, J., dissenting in part) (quoting Rogers v. Richmond, 365 U.S. 534, 540-41 (1961)). The *Fulminante* Court, per Chief Justice Rehnquist, held that the admission of involuntary confessions violating core Fifth Amendment values is not per se reversible error. *See id.* at 1264-66 (adopting harmless beyond a reasonable doubt standard). Previously, the Second Circuit had adopted the harmless beyond a reasonable doubt standard in the context of immunized testimony in United States v. Gallo, 859 F.2d 1078, 1083-84 (2d Cir. 1988), *cert. denied sub nom.* Miron v. United States, 490 U.S. 1089 (1989). Presumably, *Fulminante* compels such a result for the other circuits.

178 Ullmann v. United States, 350 U.S. 422, 428 (1956) (Frankfurter, J.).

179 As noted, the federal immunity statute requires the approval of both the

some cases, it will be impossible to prevent the dissemination of the substance of immunized statements.[180] When the prosecutor or government investigator is exposed to immunized testimony or its substance, the prosecution is advantaged in many subtle and more overt ways.

Contact with immunized statements irrevocably alters the course of events. When an investigator or witness learns of the substance of immunized materials, the effect can never truly be unscrambled from that person's prior untainted knowledge.[181] In such

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United States Attorney in the district where immunity is granted and a high-ranking official in the Justice Department before use and derivative use can be granted. 18 U.S.C. § 6003. The procedure's formality undoubtedly is designed to impress upon the prosecutor that prosecution of the immunized witness may be forfeited by the choice to immunize.

Self-executing federal immunity statutes, such as the one involved in *Hazelwood*, appear to be rare. There may be substantial policy justifications for narrowly crafted, self-executing immunity statutes. Presumably, Congress is capable of weighing the costs and benefits of such statutes. In any event, it is not the judicial function to overrule the congressional choice. *See* Hazelwood v. Alaska, 836 P.2d 943, 953 (Alaska Ct. App. 1992) ("adding an exception to the congressional grant of immunity for cases in which a finding of inevitable discovery could eventually be made would unquestionably frustrate the congressional purpose of encouraging prompt notice in all cases").

180 Of course, where the prosecutor, the government investigators and the witnesses are unaware of the immunized statements, there has been no "use" almost by definition.

181 Whether non-evidentiary use is also constitutionally proscribed is beyond the scope of this Article. *Compare* Jefferson Keenan, *Nonevidentiary Use of Compelled Testimony and the Increased Likelihood of Conviction*, 32 ARIZ. L. REV. 173 (1990) (arguing that non-evidentiary use is prohibited because any advantage conferred on the prosecution means that the witness's own words have aided the government's case; recommending per se rule requiring withdrawal of any prosecutor with access to immunized testimony) *with* Gary S. Humble, *Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment*, 66 TEX. L. REV. 351, 355 (1987) (stating that if non-evidentiary uses are prohibited, then use and derivative use will become the equivalent of transactional immunity).

The authors believe that non-evidentiary use can be advantageous to the prosecution in ways that are significant and quite difficult to detect. For example, the prosecution can gain insight into matters previously known, but not truly understood. *See* United States v. Tormos-Vega, 656 F. Supp. 1525, 1533 (D.P.R. 1987) (noting that use of immunized testimony allowed the case agent to "advanc[e] and gain[] insight into voluminous materials"), *aff'd sub nom.* United States v. Luis-Boscio, 843 F.2d 1384 (1st Cir.), *cert. denied*, 488 U.S. 848 (1988). Trial tactics, including the opening statement, witness preparation, choice of trial witness and cross-examination strategy, can be greatly aided by knowing the defendant's position in advance of trial. *See* Keenan, *supra*, at 186 ("[A] prosecuting attorney with prior knowledge of the accused's defense clearly possesses an advantage over a prosecutor with precisely the same evidence to present at trial but no prior knowledge of the defense.").

Investigatory use of immunized materials may also be very difficult to detect, especially given the reluctance of most courts to grant access to grand jury tran-

circumstances, there can be no inquiry that is capable of producing ultimate facts.[182] Thus, in the absence of documentary materials that provide a thorough chronology of an investigation, there is simply no way to challenge an investigator's assertion that the course of investigation was unaffected by exposure to the immunized materials.

Likewise, the public dissemination of immunized materials affects witnesses. This result should constitute a prohibited use: "*Kastigar* is . . . violated whenever the prosecution puts on a witness whose testimony is shaped, directly or indirectly, by compelled testimony, regardless of *how or by whom* he was exposed to that compelled testimony."[183]

Additionally, due to the inevitable discovery exception's hypothetical nature, an inescapable amount of speculation obtains in its application. Because the inevitable discovery inquiry involves speculative elements, there is a genuine risk of erroneous application in any given case. The risk of erroneous application is particularly great where the compelled testimony is strongly incriminating. Such a witness is not a particularly sympathetic person, especially when viewed in the post-indictment or post-conviction context. The emotional temptation to apply the inevitable discovery doctrine against an already convicted defendant may lead to its injudicious application: it must be remembered that, after all, hindsight is 20-

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scripts and minutes. *See* FED. R. CRIM. P. 6(e). Moreover, assuming that discovery is obtained and it can be shown that the investigator had access to immunized materials, proving use may be quite difficult when the investigator denies such use. *See Leading Cases*, *supra* note 155, at 129-30 ("[T]he exception requires a court to assess post hoc conjecture by the prosecution, buttressed by police testimony as to what investigators would have done and would have achieved. Such avowals are easily made, yet particularly difficult to rebut persuasively."). Indeed, prosecutorial access to immunized materials can similarly affect the decision to prosecute. In rejecting the contention that *Kastigar* proscribed non-evidential use, the Eleventh Circuit, for example, acknowledged that few prosecutorial decisions could be shown to be unaffected by access to immunized materials. *See* United States v. Byrd, 765 F.2d 1524, 1530 (11th Cir. 1985).

Such use, however, can usually be avoided by restricting access to grand jury materials within the prosecutor's office. Casual handling of immunized materials inevitably results in their use. In short, the non-evidential use of immunized materials may represent an erosion of the Fifth Amendment's protection. Prudential safeguards and presumptions of use, much like *Miranda* prophylactic rules, appear to be necessary to prevent the government from obtaining both subtle and not-so-subtle advantages conferred by the defendant's own coerced words.

182 Jessica Forbes, Note, *The Inevitable Discovery Exception, Primary Evidence, and the Emasculation of the Fourth Amendment*, 55 FORDHAM L. REV. 1221, 1235 (1987) (inevitability finding "is based in many cases on speculation").

183 United States v. North, 920 F.2d 940, 942 (D.C. Cir. 1990).

20.[184] Consequently, the availability of the inevitable discovery exception per se may not leave the immunized witness substantially in the same position as if he had remained silent.

The Supreme Court's rationale for use and derivative use immunity statutes is that the compelled witness *can be* left in the same position if a subsequent prosecution proceeds only with independent evidence: "[T]he immunity provided by 18 U.S.C. § 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it."[185]

The independent source rule passes this test because the rule posits that the evidence against the defendant *factually* was not affected by his immunized statements. The inevitable discovery exception, however, does not make this claim. Rather, the exception admits that the immunized statements have been used, but then excuses the usage on a policy-oriented basis. Such core violations cannot be cured with excuses if the Fifth Amendment is to continue to have meaning.

VI. CONCLUSION

The choice to immunize a witness is a deliberate act that may later prevent the government from prosecuting a witness. In cases where information used by the prosecution is not truly independent of the testimony coerced through a grant of use and derivative use immunity, the Fifth Amendment's core values are violated. Upon granting immunity, the government is obligated to remove all threats of danger of incrimination arising from truthful immunized testimony. The inevitable discovery doctrine's hypothetical nature creates unjustifiable risks of incrimination to the immunized witness and should not be permitted as a

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184 Mark Paul Schnapp, *Inevitable Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule*, 5 HOFSTRA L. REV. 137, 155 (1976) ("Just as there is a danger that sophisticated legal argument will be used to show a causal connection between the initial illegal conduct and the discovery of derivative evidence, the same 'sophisticated argument' aided by hindsight can be used to show what the police would have done in a given situation.").

185 Kastigar v. United States, 406 U.S. 441, 462 (1972). The witness is left "in substantially the same position" provided that the witness's testimony is truthful. False immunized testimony may subject the witness to a perjury charge in which the immunized testimony is available to prove perjury. *See* United States v. Apfelbaum, 445 U.S. 115 (1980) (allowing admission of witness's immunized truthful testimony before grand jury at witness's later prosecution for false swearing before grand jury).

matter of law. The inevitable discovery doctrine should be confined to constitutional rights to which the pragmatism of the exclusionary rule and its deterrent purpose are properly addressed. Immunized testimony is not such a circumstance.