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# INFORMAL IMMUNITY: DON'T YOU LET THAT DEAL GO DOWN

*Marc L. Sherman\**

## I. INTRODUCTION

When a person has knowledge of criminal activity, the government is entitled to the evidence unless the informant would be implicated in the crime.<sup>1</sup> If the police or prosecuting attorneys need the evidence for an investigation, they may force an informant to be a witness against his own interests promising the witness that what he says will not be used against him. When this immunity is given pursuant to federal statute,<sup>2</sup> the obtained testimony can only be used against the witness as a basis for perjury or another similar charge. Often, however, the police or prosecuting attorneys promise immunity to a witness, either orally or in writing, thus ignoring the statute. This information is then subsequently used against the witness, as this Article will argue, in violation of fifth amendment values.

The fifth amendment's prohibition against compelling a person to incriminate himself, although a constitutional imperative, is riddled with exceptions. Since 1985, the Supreme Court has recognized several ways by which a person may be forced to incriminate himself: (1) when a person waives his privilege,<sup>3</sup> (2) when the statute of limitations bars prosecution on the crime in question,<sup>4</sup> (3) when the witness has received a pardon,<sup>5</sup> or (4) when the incrimination produces only infamy and not a charge of a criminal offense.<sup>6</sup>

It is established that the government can also compel a person to give evidence which might be incriminating by granting that person im-

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1. See *United States v. Nixon*, 418 U.S. 683, 709 (1974). U.S. CONST. amend. V reads: no person "shall be compelled in any criminal case to be a witness against himself."

2. 18 U.S.C. § 6002 (1982).

3. *Brown v. Walker*, 161 U.S. 591, 597 (1896).

4. *Id.* at 598.

5. *Id.* at 599.

6. *Id.* at 598.

munity from prosecution.<sup>7</sup> The current federal immunity statute provides that:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify [in certain proceedings] . . . the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order . . . may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.<sup>8</sup>

The statute dictates that this formal immunity be approved by a judge in order to protect both the witness' and government's interests. In contrast to this statutory form of immunity, prosecutors often promise witnesses immunity without going through the steps mandated by statute. This is informal immunity.

Informal immunity has none of the procedural safeguards of formal immunity. It is not clear if prosecutors even have the power to grant it. If they do not, the question arises as to whether testimony obtained through a witness' reliance on a promise for informal immunity subsequently can be used against a witness. If the prosecutor indeed does have authority to grant informal immunity, then to what extent is the witness' testimony protected and is it protected for fifth amendment or contractual reasons? This Article attempts to answer some of these questions.

This Article may be of interest to three groups of people. The first part, which discusses theories, policies and values underlying and animating the fifth amendment self-incrimination clause, will be of particular interest to scholars. In this section the self-incrimination clause is historically and philosophically analyzed to establish a set of values which must not be ignored by immunity law.

The second section, dealing with the current law of informal immunity, is directed towards policy makers. The inadequacy and uncertainty of these cases indicate the need for a federal statute enabling prosecutors to enter into flexible immunity agreements with informant-witnesses who have information about criminal activity which would incriminate them. The proposed legislation protects the fifth amendment values explored in the first section of the Article, while allowing law enforcement to obtain information about criminal activity which the current federal immunity statute does not permit.

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7. See 18 U.S.C. § 6002 (1982).

8. *Id.*

The second section also includes information useful to practitioners. The cases discussing informal immunity agreements are presented and analyzed. The problems involved in negotiation, implementing and litigating such agreements are recognized. The cases show the current law and explores potential theories applicable to such problems.

## II. THE RIGHT AGAINST SELF-INCRIMINATION

### A. History

#### 1. *nemo tenetur maxim*

When James Madison<sup>9</sup> incorporated into the text of the fifth amendment the words, "nor shall any person . . . be compelled in any criminal case to be a witness against himself,"<sup>10</sup> he was articulating an idea as ancient as the *Talmud*.<sup>11</sup> Included in this sixth century compilation of the Jewish teachings on the *Torah* was the maxim, *ein adam meissim atsmo rasha*, which means, "a man cannot represent himself as guilty, or as a transgressor."<sup>12</sup> It has been suggested that this maxim is a gloss on the requirement in *Deuteronomy* 17:6 for two witnesses' evidence in a capital case. Witnesses were construed to mean persons other than the accused.<sup>13</sup> The traditional reasoning for this rule seems to have been the belief that testifying against oneself was inherently involuntary, because it went against a person's instinct for self-preservation. Such testimony was thought to be untrustworthy.<sup>14</sup>

No evidence exists that this Talmudic rule was a basis for the development and adoption of the right<sup>15</sup> against self-incrimination in English law.<sup>16</sup> It does, however, demonstrate an early recognition of the questionability of compelling self-incrimination. The rule against self-incrimination came into English law by a variety of precedents which built on themselves and produced in the public an evolving sense of moral indignation towards the concept that a government could force someone to

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9. L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 422-24 (1968).

10. U.S. CONST. amend. V.

11. See L. LEVY, *supra* note 9, at 434.

12. *Id.*

13. *Id.* at 435.

14. *Id.* at 436-39. *But cf.* FED. R. EVID. 804(b)(3) (statements against interests are thought to be trustworthy as matter of law of evidence).

15. In English law, the privilege against self-incrimination was technically a privilege, while, as in American constitutional law, it had the status of a right which was difficult for the state to undermine. This Article uses "privilege" and "right" interchangeably as synonyms for the fifth amendment clause against self-incrimination. The philosophy of the distinction between "privilege" and "right" is tangential to the matters discussed in this Article.

16. L. LEVY, *supra* note 9, at 439-41.

incriminate oneself.<sup>17</sup>

The idea that a person should not be compelled to incriminate himself developed as a direct reaction to the abuses of the oath *ex officio*.<sup>18</sup> Early English law demanded witnesses take this oath that they would truthfully answer interrogatories; however, witnesses were forced to swear this even before being given any idea of the charge or content of the interrogatories. The oath was imported in the thirteenth century, via canon law, into the English secular courts.<sup>19</sup> Originally, anyone accused of a crime had to take the oath. The oath allowed ecclesiastical courts to find "controverted" truth. If a person refused to take the oath, he was excommunicated.<sup>20</sup> An extorted oath would theoretically produce truth since a lie under the oath would send the sinner to the same hell to which excommunication sent him. In addition to this double bind, the accused had to contend with the unfairness of the procedure of the oath, for it

[w]as in part a sworn statement to give true answers to whatever questions might be asked, . . . taken in ignorance by the accused, that is, without his first having been formally charged with the accusation against him or having been told the identity of his accusers or the nature of the evidence against him. Following the administration of the oath, the accused, still in ignorance, was required to answer a series of interrogatories whose purpose was to extract a confession.<sup>21</sup>

The first objections to the oath derived from the unfairness of forcing someone to swear to something about which they were not informed.<sup>22</sup> Such a criticism was inherent in the canon law maxim, *nemo tenetur seipsum prodere*, that no man should have to produce evidence against himself.<sup>23</sup> Later the oath became a political tool by the English Star Chamber and High Commission to fight religious deviations during the reformation when a religious schism developed in England, as in the rest of Europe. The state imposed political pressures on those sects which refused to conform to the state's religion, so the sects would admit

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17. Cf. *Furman v. Georgia*, 408 U.S. 238, 295-306 (1972) (Brennan, J., concurring) (detailing evolution of morality regarding death penalty); see also Radin, *Cruel Punishment and Respect for Persons: Super Due Process For Death*, 53 S. CAL. L. REV. 1143, 1157 (1980) (recognizing that court may think that moral worth can "encompass the idea of time-and-culture-bound morality, as long as changes in central values are slow and slight").

18. See L. LEVY, *supra* note 9, at 45-382.

19. *Id.* at 46. For a complete history see *id.* at 45-382.

20. *Id.* at 46-48.

21. *Id.* at 47 (footnote omitted).

22. *Id.* at 59-63.

23. *Id.* at 64-66.

to or change their treasonous beliefs or practices. Adherents of certain sects were forced to take the oath prior to an inquisition regarding their religious beliefs. If the "heretics" refused to swear, they could be sent to jail for contempt.<sup>24</sup> If they lied about their religious convictions, they would, by their own beliefs, go to hell, while if they told the truth, they would be convicted and put to death since the state viewed religious heresy as political treason.<sup>25</sup>

An early proponent of the right against incrimination was William Tyndale, the first man to translate the Greek *New Testament* into English.<sup>26</sup> In the introduction to the fifth chapter of *Matthew*, Tyndale wrote that the *Bible* generally permitted oaths:

"But if the superior would compel the inferior to answer that [which] should be to the dishonour of God, or hurting of an innocent, the inferior ought rather to die than to swear: neither ought a judge to compel a man to swear against himself, that he make him not sin and forswear. . . ." <sup>27</sup>

Tyndale explained, in another passage, that it was " 'a cruel thing to break up into a man's heart, and to compel him to put either soul or body in jeopardy, or to shame himself.' " <sup>28</sup>

By the middle of the sixteenth century, in part as a result of the political-religious trials before the Star Chamber and High Commission, the invocation of a right against self-incrimination became commonplace. Professor Levy's summary of the invocations recorded in John Foxe's popular *Book of Martyrs* indicates just what the common people thought their rights were and why they had a right to silence.

Ordinary laymen—weavers, ironmakers, farmers, and haters—hoping vainly to save themselves from a horrible end, began routinely to balk the proceedings by pleading that they would not incriminate themselves. Their language varied in style. Philpot had said that he would not run himself upon the pikes. Two years later, first Stephen Gratwick and then Mat-

24. *Burrowes v. The High Commission Court*, 3 BV stroke 49, 81 Eng. Rep. 42 (1616).

25. See L. LEVY, *supra* note 9, at 48.

26. *Id.* at 62.

27. *Id.* at 63 (footnote omitted) (quoting ARBER, FIRST PRINTED ENGLISH NEW TESTAMENT 25 (photo. reprint n.d.); *An Exposition Upon the V, VI, VII, Chapters of Mathew* (n.p. 1530), reprinted in W. TYNDALE, EXPOSITIONS AND NOTES ON SUNDRY PORTIONS OF THE HOLY SCRIPTURES 56 (H. Walter ed. 1849)).

28. *Id.* at 63-64 (footnote omitted) (quoting W. TYNDALE, THE OBEDIENCE OF A CHRISTEN MAN, AND HOW CHRISTEN RULERS OUGHT TO GOVERN (1528), reprinted in W. TYNDALE, DOCTRINAL TREATISES AND INTRODUCTIONS TO DIFFERENT PORTIONS OF THE HOLY SCRIPTURES 187, 203, 355 (H. Walter ed. 1848)).

thew Plaise refused to answer articles which they called "a snare, to get my blood." . . . Ralph Allerton declared, "If I cannot have mine accusers to accuse me before you, my conscience doth constrain me to accuse myself before you. . . ." . . . Richard Gibson simply refused to take the oath and would say nothing. Reinald Eastland, refusing the oath *ex officio* too, argued that an oath was lawful to end strife—like the old oath of purgation—"but to begin a strife an oath is not lawful." In 1558 Elizabeth Young . . . [was] threatened . . . with the rack unless she swore and confessed her guilt for distributing heretical books.<sup>29</sup>

By the beginning of the seventeenth century, the common-law courts began to accept the proposition that no one should be forced to incriminate himself.<sup>30</sup> The disdain and arguments of ordinary people against forced self-incrimination evolved into judicial doctrine. Before Sir Edward Coke was appointed to the office of Chief Justice of the Court of Common Pleas in 1606, he both argued in favor of the *nemo tenetur maxim*<sup>31</sup> and acted in violation of it, as Attorney General.<sup>32</sup> Upon his appointment to the bench he issued opinions and decisions which limited the oath *ex officio*. In a section in Coke's Reports, under the heading, "Of Oaths Before an Ecclesiastical Judge Ex Officio," Coke stated:

No man ecclesiastical or temporal shall be examined upon secret thoughts of his heart, or of his secret opinion: but something ought to be objected against him what he hath spoken or done. No lay-man may be examined *ex officio*, except in two causes, and that was grounded upon great reason; for lay-men for the most part are not lettered, wherefore they may easily be inveigled and entrapped, and principally in heresy and errors of faith.<sup>33</sup>

In 1609 Coke issued a prohibition against the High Commission prosecuting a heresy case.<sup>34</sup> Later, the High Commission was prohibited from "interfering" in what Coke called the "temporal" matter of defamation as Coke further attempted to limit the examination of men under oath. The report of the case states:

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29. *Id.* at 79.

30. *Id.* at 245.

31. *Collier v. Collier*, 1 Cro. Eliz. 201; 4 Leo. 194; Mo. 906, 78 Eng. Rep. 457, 74 Eng. Rep. 816, 72 Eng. Rep. 987 (1589).

32. Coke himself was guilty of brutal torture. See L. LEVY, *supra* note 9, at 230.

33. Co. Rep. 26, 77 Eng. Rep. 1308 (1607).

34. The High Commission was an ecclesiastical arm of the royal government which was responsible for prosecuting religious nonconformity. See L. LEVY, *supra* note 9, at 127.

It was resolved, that the Ecclesiastical Judge cannot examine any man upon his oath, upon the intention and thought of his heart, for *cogitationis poenam nemo emeret*. And in cases where a man is to be examined upon his oath, he ought to be examined upon acts or words, and not of the intention or thought of his heart; and if every man should be examined upon his oath, what opinion he holdeth concerning any point of religion, he is not bound to answer the same; for in time of danger, *quis modo tutus erit*, if every one should be examined of his thoughts. And so long as a man doth not offend neither in act nor in word any law established, there is no reason that he should be examined upon his thought or cogitation: for as it hath been said in the proverb, *thought is free*.<sup>35</sup>

In Coke's last case involving the right against self-incrimination, *Burrowes v. The High Commission*,<sup>36</sup> the Chief Justice surveyed previous cases in which people were imprisoned for refusing to incriminate themselves.<sup>37</sup> Coke repeatedly mentioned an unpublished case, *Leigh's Case*,<sup>38</sup> decided by Chief Justice Byer under the reign of Queen Elizabeth. In *Leigh's Case*, Leigh had been imprisoned for keeping silent after certain articles had been read to him, relying on the *nemo tenetur* maxim. Leigh was freed when the court ruled favorably on his writ of habeas corpus that he was being held in violation of the law of the land.<sup>39</sup> The other cases mentioned in *Burrowes* only stood for the proposition that one did not have to agree to take an oath if one did not know about what one was to be asked. *Leigh's Case*, however, stood for the broader proposition that one should not have to be witness against oneself at all.

In *Burrowes*, the defendants had been in jail three-quarters of a year for refusing to swear an oath.<sup>40</sup> Coke said that they "desired a copy of the articles against them from the register, which was denied them; for their refusal to answer upon this oath, ex officio; they were therefore committed."<sup>41</sup> The defendants were released by bail because, "when they demanded the articles, they ought to have had of them a copy."<sup>42</sup> Coke gave two reasons for supplying a copy. "First, that by this, they may know, whether the matter, for which they are questioned, be within

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35. Edward's Case, 13 Co. Rep. 9, 10, 77 Eng. Rep. 1421, 1422 (emphasis in original).

36. 81 Eng. Rep. 42 (1661).

37. *Id.*

38. *Id.*

39. *Id.* at 42-43.

40. *Id.* at 42.

41. *Id.* at 45.

42. *Id.*



[the questioning court's] jurisdiction, or not. Secondly, that by this they may know what answer they are to make to the matters against them."<sup>43</sup> Thus, Coke limited his holding to a right for someone to know the charges against him. Coke's colleague on the bench, Justice Croke, however, voiced a broader moral invective against the oath, both in respect to its use by the High Commission and the Star Chamber, when he said, "[t]his is inventio diaboli, ad detrudendas animas hominum, ad diabolium."<sup>44</sup>

Although the decisions in Coke's time were limited to overruling the oath to the extent that a person had not been given advance notice of the questions he was expected to answer, much of Coke's reasoning, and tone, indicates support for the idea that it was wrong to compel self-incrimination. Apparently, people connected the unfairness of swearing to an oath to give truthful testimony about unknown charges with the more general principle that it was unfair for a person to be forced to supply the state with self-incriminating evidence. Although the two ideas are analytically distinct, there is a link: in both situations a witness is forced to provide the government with evidence that would be used against him and which the government would not have otherwise had. This was a change in the general perception of the *nemo tenetur* maxim. As Professor Levy wrote:

There had been a time when the maxim that no man is bound to accuse himself meant merely that he was not obliged to disclose voluntarily his own guilt when he was not even suspected. But more and more people were beginning to think that to coerce a man to testify against himself, with or without oath, was simply unjust—an outrage on human dignity and a violation of the very instinct of self-preservation.<sup>45</sup>

By the middle of the seventeenth century, a judge asked a defendant if he had confessed to a crime, and added, "[y]ou are not bound to answer me, but if you will not, we must prove it."<sup>46</sup> In 1679 a pardoned witness was saved from being forced to "'calumniate himself.'"<sup>47</sup> The witness was thus not forced to infame or disgrace himself because the law was deemed to be that "'neither his life nor name must suffer, and therefore such questions must not be asked him.'"<sup>48</sup> In 1696 Parliament

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43. *Id.* at 46.

44. *Id.* Literally translated: "this is an invention of the devil, oppressing the souls of men, diabolically."

45. See L. LEVY, *supra* note 9, at 263.

46. *Id.* at 313-14.

47. *Id.* at 317.

48. *Id.*

guaranteed the accused a copy of an indictment against him, which assured that an accused did not have to supply information which would lead to his indictment.<sup>49</sup> Accordingly, the purposes for which the *nemo tenetur* maxim was uttered were halted: if the state did not have enough information about a person to indict him, that person would not have to give the information himself. The state, not the accused, would have to supply the incriminatory evidence.

This hard-fought for right of knowing what one has been charged with before agreeing to answer questions is but one strand of the rope which is woven into the fifth amendment prohibition against self-incrimination. Analytically, it is the first step: if the state has to provide an indictment, then the state must have enough externally derived evidence against a person to obtain the indictment. This precludes the state from coercing incriminatory information from people whom the state thinks *might* have committed a crime. The state has to develop enough of a case to get an indictment without a person being compelled to incriminate himself. The *nemo tenetur* maxim arose in conjunction with other judicial principles also related to a right against self-incrimination. The other principles, to be discussed next, also supply values which fifth amendment jurisprudence must recognize.

## 2. Voluntary confessions and torture

From the middle of the sixteenth century, English law contained the notion that confessions had to be voluntary to be admitted into evidence. Originally, the law of evidence demanded two witnesses to an overt act of treason to establish a defendant's guilt.<sup>50</sup> A confession could also establish guilt, but the confession had to be made "willingly and without violence."<sup>51</sup> This value of only accepting voluntary confessions made its way into legal treatises by the early 17th century:

If one is indicted or appealed of felony, and on his arraignment

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49. 7 Wm. III ch. 3.

50. 2 J. WIGMORE, EVIDENCE 129 (2d ed. 1923).

51. *Id.* (quoting Stat. 1 Edw. VI, c. 12 § 22 (1547)); see also BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND OF PUBLIC WRONG 418 (1962):

The *confession* of the prisoner, which shall countervail the necessity of such proof, must be in *open court*. In the construction of which Act it has been held, that a confession of the prisoner, taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. But hasty unguarded confessions, made to persons having no such authority, ought not to be admitted as evidence under this statute. And indeed, even in cases of felony at the common law, they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence.

he confesses it, this is the best and surest answer that can be in our law for quieting the conscience of the judge and for making it a good and firm condemnation; provided, however, that the said confession did not proceed from fear, menace, or duress; which if it was the case, and the judge has become aware of it, he ought not to receive or record this confession, but cause him to plead not guilty and take an inquest to try the matter.<sup>52</sup>

Actual practice did not adhere to such legal values. The century between 1540-1640 was a bloody one: most of the torture that ever occurred in England happened during this period.<sup>53</sup> A voluntary confession, in fact, was not necessarily voluntary, free or uncoerced; a voluntary confession was often made in open court after a person had been tortured and while under the threat of more torture if the confession was repudiated.<sup>54</sup> The law of torture was so sophisticated that the confession had to be repeated in court within twenty to twenty-four hours after the confession was obtained in order to be admitted.<sup>55</sup> There is, however, also evidence that an official written version of the extra-judicial confession could be entered into evidence against the accused; this evidence would not stand alone to convict someone of treason unless there were two witnesses.<sup>56</sup>

Several reasons were offered to support the need for voluntary confessions. Essentially, involuntary confessions were, and are, deemed to be untrustworthy.<sup>57</sup> Wigmore indicates two situations in which confessions can be assumed to be untrustworthy: when there is a promise or a threat involved.<sup>58</sup> A promise provides an incentive for a person to give whatever information the promisor wants. Ideally, if the informant gives an answer which pleases the promisor, the implication is that he may get a lighter sentence. This answer, however, is not necessarily a truthful answer. A threat, on the other hand, may also produce untruthful information. An informant may want to avoid a harsher sentence, or physical pain, and so may tell the interrogator anything the interrogator wants to hear. Wigmore stated:

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52. 2 J. WIGMORE, *supra* note 50, at 128 (quoting STAUNDFORD, PLEAS OF THE CROWN §§ 6.2, 6.51).

53. See J. HEATH, TORTURE AND ENGLISH LAW 74-166 (1982); LANGBEIN, TORTURE AND THE LAW OF PROOF 73-139 (1977); PARDINE, USE OF TORTURE IN THE CRIMINAL LAW OF ENGLAND (1836).

54. See J. HEATH, *supra* note 53, at 31 (continental law demanded ratification of confessions obtained through torture).

55. See LANGBEIN, *supra* note 53, at 15.

56. See J. HEATH, *supra* note 53, at 92.

57. 3 J. WIGMORE, EVIDENCE § 822 (Chadbeum rev. ed. 1970).

58. *Id.*

The ground of distrust of confessions made in certain situations is, in a rough and indefinite way, judicial experience. There has been no careful collection of statistics of untrue confessions, nor has any great number of instances been even loosely reported but enough have been verified to fortify the conclusion, based on ordinary observation of human conduct, that under certain stresses a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt. This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgment of guilt is at the time the more promising of two alternatives between which he is obliged to choose; that is, he chooses any risk that may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence.<sup>59</sup>

Further, such confessions would run all the risks normally associated with an inquisitorial system: information could be supplied to the accused which would then become the basis of a confession which would appear truthful. Nonetheless, the confession could still be contrived by the informant in order to avoid pain or gain the reward promised.<sup>60</sup>

Torture was particularly threatening and thus apt to produce untrustworthy testimony. A person might lie to avoid immediate physical pain, taking his chances with a false confession of guilt instead. In fact, Stephens, in his *History of Criminal Law*, stated:

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59. *Id.* at n.1; J. STEPHENS, HISTORY OF THE CRIMINAL LAW 446 n.1 (1883) (quoting STEPHENS, DIGEST OF THE LAW OF EVIDENCE) fleshes this out:

"Confessions caused by Inducement, Threat, or Promise, when Irrelevant in Criminal Proceedings—No confession is deemed to be voluntary if it appears to the judge to have been caused by any inducement, threat, or promise, proceeding from a person in authority, and having reference to the charge against the accused person, whether addressed to him directly or brought to his knowledge indirectly; and if (in the opinion of the judge) such inducement, threat, or promise, gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him. A confession is not involuntary only because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by an inducement collateral to the proceeding, or by inducements held out by a person not in authority. The prosecutor, officers of justice having the prisoner in custody, magistrates, and other persons in similar positions, are persons in authority. The master of the prisoner is not as such a person in authority, if the crime of which the person making the confession is accused was not committed against him. A confession is deemed to be voluntary if (in the opinion of the judge) it is shown to have been made after the complete removal of the impression produced by inducement, threat, or promise which would otherwise render it involuntary. Facts discovered in consequence of confessions improperly obtained, and so much of such confessions as distinctly relate to such facts, may be proved."

60. J. STEPHENS, *supra* note 59, at 446 n.1; see also *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964).

The general maxim, that confessions ought to be voluntary, is historically the old rule that torture for the purpose of obtaining confessions is, and long has been, illegal in England. In fact it cannot be said that it ever was legal, though it seemed at one time as if it were likely to become legal.<sup>61</sup>

Consequently, torture was not seen as a legitimate way to obtain truthful testimony.<sup>62</sup> Its method for obtaining evidence produced suspect evidence: confessions, not admissions, which were deemed worthy because they were a response to pain, not guilt or knowledge.

Torture was most often used in England before 1640 to extract confessions from religious heretics who committed treason by refusing to yield to or abide by the state religion.<sup>63</sup> It was recognized in the twelfth century that what was said under torture was “prima facie unreliable”;<sup>64</sup> thus such testimony was required to be ratified in open court.<sup>65</sup> Additionally, as alluded to by Stephens above, the legality of testimony made during or after torture was always dubious.<sup>66</sup> Nevertheless, within one century, over eighty warrants for torture were issued in England.<sup>67</sup>

Commentators for many years have enumerated several reasons not to validate the use of torture. An initial criticism was that torture punishes by pain before an accused is duly convicted, whether the accused was ultimately found guilty or not. Coke described the cruelty of the torturer by analogizing him to Virgil’s Radamanthus, the judge of hell, who

punished before he heard, and when he had heard his denial, he compelled the party accused by torture to confess . . . . And accordingly all the said ancient authors are against pain, or torment to be put or inflicted upon the prisoner before attainder, nor after attainder, but according to the judgment. And there is no one opinion in our books, or judicial records (that we have seen and remember) for the maintenance of tortures or tor-

61. J. STEPHENS, *supra* note 59, at 447.

62. This would be sidestepped by Sir Francis Bacon who defended torture in 1603 saying, “by the law of England no man is bound to accuse himself. In the highest cases of treason, torture is used for discovery and not for evidence.” J. HEATH, *supra* note 53, at 159 (quoting SPEDDING, *Letters and Life* III 114).

63. See *supra* note 53 and accompanying text. Torture must be distinguished from punishment; it is only used, in the sense applicable here, before trial.

64. J. HEATH, *supra* note 53, at 74-166.

65. *Id.* at 31.

66. This debate is beyond the scope of this Article. The question revolved around whether or not it was within the authority of the king’s prerogative. See LANGBEIN, *supra* note 53, at 129-34.

67. J. HEATH, *supra* note 53, at 94-128.

ments . . . .<sup>68</sup>

A broader version of this value was the perception that torture itself was cruel and unusual.<sup>69</sup>

More utilitarian reasons against torture have been advanced. Torture, as stated earlier, is particularly likely to produce untrustworthy involuntary confessions. Innocent persons might succumb to pain and torment and confess to things they never did.<sup>70</sup> As a method of obtaining truth, torture is not only uncivilized, but also unreliable. Consequently, by the end of the eighteenth century, torture was abolished in most of Europe.<sup>71</sup> England ended the use of torture in 1640,<sup>72</sup> about the same time that the right against self-incrimination became widely judicially accepted.<sup>73</sup>

Although the evidentiary exclusion of involuntary or tortured confessions is analytically different from the right against self-incrimination,<sup>74</sup> the connection between the two has been discussed by commentators.<sup>75</sup> Dean Griswold noticed this connection in an oft-quoted passage of his book which defended the right to invoke the fifth amendment. He wrote:

I would like to venture the suggestion that the privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized. As I have already pointed out, the establishment of the privilege is closely linked historically with the abolition of torture. Now we look upon torture with abhorrence. But torture was once used by honest and conscientious public servants as a means of obtaining information about crimes which could not otherwise be disclosed. We want none of that today, I am sure. For a very similar

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68. COKE, *INSTITUTES* 35 (n.p. 1797). It should be remembered that Coke himself participated in torture. See also Voltaire who said, "The law (loi) does not convict them, yet it inflicts on them, on account of the uncertainty whether it is their crime, a punishment more frightful than the death that is given them when it is certain that they deserve it" in *OEUVRES COMPLETES DE VOLTAIRE*. LANGBEIN, *supra* note 53, at 179 n.38 (quoting VOLTAIRE, *OEUVRES COMPLETES DE VOLTAIRE* § 5:403, at 411 (Paris 1835)).

69. But since it is analytically not a punishment, torture is not prohibited by the eighth amendment. It is, however, a violation of due process.

70. LANGBEIN, *supra* note 53, at 9.

71. *Id.* at 66-69.

72. See *id.* at 134-35.

73. See L. LEVY, *supra* note 9, at 327-28.

74. 3 WIGMORE, *supra* note 57, § 822 (involuntary confession is untrustworthy; it is not a "breach of confidence or of good faith."); see also Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 17-18 (1949).

75. L. LEVY, *supra* note 9, at 327-28; E. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 7 (1955).

reason, we do not make even the most hardened criminal sign his own death warrant, or dig his own grave, or pull the lever that springs the trap on which he stands. We have through the course of history developed a considerable feeling of the dignity and intrinsic importance of the individual man. Even the evil man is a human being.<sup>76</sup>

Since the values which account for the abolition of torture and which favor only voluntary confessions historically developed with other values animating the right against self-incrimination, it is difficult to separate them. Society's repulsion at the cruelty of torture resembles the affront to dignity we feel when someone is forced to incriminate himself. This may be because of the historical connection between torture and the right against self-incrimination, or it may stem from deeper moral roots, specifically the idea that prying words from an accused's lips is repugnant when done through physical force or judicial (or governmental) coercion.

### 3. Incompetency of the accused to testify

A final thread of the fifth amendment is the common-law doctrine that prohibited an accused from testifying.<sup>77</sup> The underlying theory was that someone with an interest in the outcome of the proceeding was incompetent to testify because he would be especially likely to testify falsely.<sup>78</sup> Consequently, the accused could not be trusted to provide accurate testimony. At the time Coke published his *Institutes* in the middle of the seventeenth century<sup>79</sup> an "accused" was universally disqualified in

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76. See E. GRISWOLD, *supra* note 75, at 7. See also *Ullmann v. United States*, 350 U.S. 422, 447-48 (1956) (Douglas J., dissenting):

[T]here are indications in the debates on the Constitution that the evil to be remedied was the use of torture to exact confessions. See, e.g., *Virginia Debates*, 221, 320-21 (2d ed. 1805); 2 *Elliot's Debates*, 111 (2d ed. 1876). It was, indeed, the condemnation of torture to exact confessions that was written into the early law of the American Colonies. Article 45 of the Massachusetts Body of Liberties of 1641 provided in part, "No man shall be forced by Torture to confesse any Crime against himselfe nor any other . . ." Connecticut adopted a similar provision. *Laws of Connecticut Colony* (1865 ed.), 65. Virginia soon followed suit: ". . . noe law can compell a man to swear against himselfe in any matter wherein he is lyable to corporall punishment." Hening, *Statutes at Large*, Vol. II, 422.

The Compulsion outlawed was moral compulsion as well as physical compulsion.

77. See L. LEVY, *supra* note 9, at 324. See also *United States v. Grunewald*, 233 F.2d 556, 578-82, 587-91 (2d Cir. 1956) (Frank, J., dissenting), *rev'd* 353 U.S. 391 (1957) (recitation of continental law which states defendants cannot take the stand in relation to privilege against self-incrimination).

78. 1 J. WIGMORE, *supra* note 50, § 575, at 996.

79. *Id.* at 990.

civil cases. By the end of that century, criminal defendants were also prohibited from testifying.<sup>80</sup> This rule has since been repudiated by every common-law jurisdiction except Georgia.<sup>81</sup> Besides relating to witness competency, the rule may also have been a device to protect a defendant's right against self-incrimination.<sup>82</sup>

Many opposed changing the rule because they believed such a change would erode the privilege against self-incrimination.<sup>83</sup> A modified version of the rule effectively precluded a defendant's silence from being incriminatory. If a defendant were allowed to testify, he could be impeached in cross-examination. Alternatively, a jury might infer guilt from the defendant's decision not to take the stand.<sup>84</sup> The common-law rule allowed a defendant to tell his own story, without being under oath. In this way, a defendant could tell the jury what he wanted. The testimony was not considered real evidence, though the jury could be moved by it.<sup>85</sup> The rule was repudiated in order to permit a defendant's testimony to have full evidentiary value.<sup>86</sup> But the idea that an accused

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80. *Id.* at 995.

81. *See* *Ferguson v. Georgia*, 365 U.S. 570, 570 (1961).

82. *See* L. LEVY, *supra* note 9, at 324.

83. *Ferguson*, 365 U.S. at 578-79.

84. *Id.* *See also* J. WIGMORE, *supra* note 50, § 578, at 1009.

85. J. WIGMORE, *supra* note 50, at 995.

86. The Supreme Court, in discussing the rule, quoted Macaulay's defense of the rule that "evidence should be taken at what it may be worth, that no consideration which has a tendency to produce conviction in a rational mind should be excluded from the consideration of the tribunals." *Ferguson*, 365 U.S. at 575 (quoting LORD MACAULAY'S LEGISLATIVE MINUTES, 127-28 (n.p. 1835)). Compare this quote with I J. STEPHEN, A HISTORY OF CRIMINAL LAW OF ENGLAND (1883) which the Court also cites with approval:

On the other hand, I am convinced by much experience that questioning, or the power of giving evidence, is a positive assistance, and a highly important one, to innocent men, and I do not see why in the case of the guilty there need be any hardship about it. . . .

. . . .  
. . . The propriety of making the parties competent witnesses in civil cases is no longer disputed. It is difficult to say why the same rule should not apply to criminal cases also. One objection to the admission of such evidence rests upon the false supposition that a witness is to be believed because he is sworn to speak the truth. The proper ground for admitting evidence is not that people are reluctant to lie but that it is extremely difficult to lie minutely and circumstantially without being found out. . . .

. . . .  
. . . Some precautions might properly be observed in admitting such evidence. If the prisoner did not offer his testimony it would be hard to allow the prosecution to call him. The fact of his refusing to testify would always have its weight with the jury. By leaving him to be examined in chief by his own counsel and cross-examined by the counsel for the crown the danger of placing the judge in a position hostile to the prisoner would be avoided. I should regard this as so important an object that unless it could be fully secured I should prefer to maintain the existing law as it stands.

*Id.* at 442, 445.



should not be subjected to a jury's conjecture regarding a decision whether to testify or not, still has currency in fifth amendment jurisprudence.<sup>87</sup>

### B. Policies and Values

The historical strands of the right against self-incrimination, together with cases and commentary, suggest several utilitarian and deontological values animating the fifth amendment. These are discussed in this subsection of this Article. Justifications of the privilege proliferate like rabbits breeding. In McNaughton's revision of Wigmore's *Evidence*, he surveys examples of commentaries declaring the meaning behind the fifth amendment; this encompasses fourteen pages of small print in a footnote.<sup>88</sup> In the treatise, he extracts at least twelve different policy considerations which commentators have identified.<sup>89</sup> He dismisses most of them as irrelevant, merely descriptive, platitudinal or deductions of other policy considerations.<sup>90</sup> He maintains that the central policies of privilege are:

(1) the frustration of prosecutions for crimes of conscience, "especially in the area of political and religious beliefs";<sup>91</sup> (2) the contribution of a "fair state-individual balance" in which the state has to leave the individual alone unless good cause is shown not to, and in which the state bears the burden of establishing that good cause;<sup>92</sup> (3) the prevention of torture and other inhumane treatments of human beings: this includes physical and psychological compulsion; (4) preventing individuals from having to decide the trilemma between harmful disclosure, contempt or perjury; (5) the prohibition of "compelling a witness to commit the 'unnatural act' of *inflicting injury on himself*."<sup>93</sup>

These considerations implicate various fifth amendment values. Each, independently, may be a sufficient reason for the right against self-incrimination. The privilege is, however, animated by the overlap of all

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87. See *Griffin v. California*, 380 U.S. 609 (1965) (no inference of guilt because of defendant's failure to testify); *Lakeside v. Oregon*, 435 U.S. 333 (1978) (judge may admonish jury to take no inference from defendant not testifying).

88. 8 J. WIGMORE, *EVIDENCE* § 225, at 297-310 n.2 (McNaughton rev. ed. 1961).

89. *Id.* at 310-18.

90. *Id.*

91. *Id.* at 313-14.

92. *Id.* at 317-18, 314-15. McNaughton treats prevention of "fishing expeditions" and the state-individual balance as two separate but related considerations. Since, however, the two are animated by a sort of probable cause rationale, this Article combines them.

93. Those last three are treated as one by McNaughton, but are easily understood as three connected values.

of these considerations, different values being more or less relevant in different situations.

One major policy consideration may aptly be described as the overlap of the first and fifth amendments.<sup>94</sup> History shows that the right to refuse to incriminate oneself is intimately connected with the right of conscience.<sup>95</sup> If the state is allowed to probe into a person's mind to discover unpopular religious or political beliefs, those beliefs are not protected; unpopular associations may be revealed and non-judicial punishments may occur because of the revelations.<sup>96</sup> Justice Douglas noted this possibility in his dissent in *Ullmann v. United States*.<sup>97</sup> In *Ullmann*, the Supreme Court affirmed that an immunity statute displaced the danger for which the privilege exists. The Court required Ullmann to answer the question of whether he had ever been a member of the Communist Party.<sup>98</sup> In addition to the possible immediate dangers that such a disclosure might have brought Ullmann, Douglas commented on the interplay between the first and fifth amendments. He said:

The guarantee against self-incrimination contained in the Fifth Amendment is not only a protection against conviction and prosecution but a safeguard of conscience and human dignity and freedom of expression as well. My view is that the Framers put it beyond the power of Congress to *compel* anyone to confess his crimes. The evil to be guarded against was partly self-accusation under legal compulsion. But that was only a part of the evil. The conscience and dignity of man were also involved. So too was his right to freedom of expression guaranteed by the First Amendment. The Framers, therefore, created the federally protected right of silence and decreed that the law could not be used to pry open one's lips and make him a witness against himself.<sup>99</sup>

The second policy consideration concerning a fair state-individual balance has two prongs. The first prong deals with our common-law heritage and the Anglo-American system's accusatorial, as opposed to inquisitorial, method of determining guilt and innocence. In our system,

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94. U.S. CONST. amend. I reads: "Congress shall make no law . . . abridging the freedom of speech." This is not the place to demonstrate exactly where, when and how the two amendments overlap. That would be another Article.

95. See *supra* notes 9-49 and accompanying text.

96. See generally Boudin, *The Constitutional Privilege in Operation*, 12 LAW. GUILD REV. 122 (1952) (fifth amendment protects areas first amendment is supposed to protect).

97. 350 U.S. 422 (1956).

98. *Id.* at 424, 439.

99. *Id.* at 445-46 (Douglas, J., dissenting) (footnote omitted) (emphasis in original).

the government must prove its case against the accused. The accused is under no obligation to help the government fortify its case. Supreme Court Justice Fortas suggested that this method was part of our underlying political traditions.<sup>100</sup> When a person is assumed innocent until proven guilty, his autonomy and sovereignty is protected. Only if an individual is assumed sovereign is he able to participate in democracy, a democracy which is comprised of autonomous sovereigns. Were a government able to force self-incriminatory testimony from an individual, the wall of separation between state and individual would crumble and the basis for democracy—*y pluribus unum* (out of many, one)—would be lost, because only the government remains.

An Englishman's home was his castle; his life was his inviolable temple. Where his life, his freedom from official restraint, his beliefs and opinions were at issue, he was no longer a subject of the state. He himself was a sovereign. He had the sovereign right to refuse to cooperate; to meet the state on terms as equal as their respective strength would permit; and to defend himself by all means within his power—including the instrument of silence. He could rest on the presumption of innocence. He could put the state to its proof. The state and he could meet, as the law contemplates, in adversary trial, as equals—strength against strength, resource against resource, argument against argument. The duty to cooperate came to an end at the threshold of conflict between the state and the individual.

The privilege against self-incrimination, therefore, was a part of the seventeenth century's compact theory of government which a little later received its classic expression by John Locke. The divine right of kings and the theory of the absolute power of government were repudiated. The state was merely an instrument created by contract in which rulers and the ruled were parties on equal terms; and the state's authority was limited by the terms of the compact.

The principle that a man is not obliged to furnish the state with ammunition to use against him is basic to this conception. Equals, meeting in battle, owe no such duty to one another, regardless of the obligations that they may be under prior to battle. A sovereign state has the right to defend itself, and

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100. Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. B.A. 91, 98-99 (1954).

within the limits of accepted procedure, to punish infractions of the rules that govern its relationships with its sovereign individuals. But it has no right to compel the sovereign individual to surrender or impair his right of self-defense.<sup>101</sup>

Thus, the fifth amendment may have political implications deeper than those which arise from its connections with the first amendment. The fifth amendment may embody libertarian commitments without which democracy itself would be threatened. Without a government respecting the privacy and the autonomy of its citizens, the constituents of the democratic body politic would be unable effectively to carry out their democratic duties.

The second policy of this consideration stems from the presumption in our society that we as individuals have a "right to be left alone" unless there is special cause for the state's interference.<sup>102</sup> This can be deconstructed into two parts. The libertarian notion is that, *prima facie*, individuals have a right of privacy protected by the fifth amendment with which the government should not interfere. Justice Brandeis recognized this when talking about the fourth and fifth amendments:

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be

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101. *Id.* See also *Brown v. Walker*, 161 U.S. 591, 637 (1896) (Field, J., dissenting) (prohibition against compulsory self-incrimination is "the result of the 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").

102. See Note, *Formalism, Legal Realism, and Constitutionality Protected Privacy under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977) (privacy aspects of fifth amendment balanced against pragmatic consequences of that privacy).

deemed a violation of the Fifth.<sup>103</sup>

The history of the privilege, both in its development stage in England, and during the McCarthy era in this century, graphically shows the power of a state unchecked by the individual's right against self-incrimination.<sup>104</sup> If an accused is privileged to be silent, his accusers cannot bring him before a tribunal and interrogate him with the hope of getting some information that might be used against him. A society might want to prohibit such coercion because an insignificant act or suspicion might become the basis for an otherwise unjustified investigation. Prosecutors could selectively prosecute people, forcing them to incriminate themselves since, as it has been said, everyone has committed at least some small prosecutable crime.<sup>105</sup> This is not the sort of discretion, or power, we want prosecutors to have. Further, the investigation might be for political reasons. In any case, the accused would be harassed and lose valuable time, and possibly community esteem, if the government investigated him in the hope that he would incriminate himself. This, however, would fall under the same values as the above first amendment considerations. We, as a society, may not want to subject our citizenry (i.e., ourselves) to the whims of petty bureaucrats, or even the politically ambitious, who might lead "fishing expeditions" for reasons other than potential criminal activity, when there is little or no reason to expect such activity exists. The fourth amendment requires that governmental investigation be triggered only by probable cause or reasonable suspicion, not evidence which we ourselves are forced to provide. In addition, we might have a notion that it is an affront to one's dignity and autonomy to be forced to incriminate oneself.

Justice Goldberg focused on the cruelty of forced self-incrimination in terms of the privilege's historical development when he said, the fifth amendment

reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance

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103. *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting), *overruled*, *Bergen v. New York*, 338 U.S. 41 (1967).

104. *See supra* notes 9-49 and accompanying text. *Ullmann v. United States*, 350 U.S. 422, 440-55 (1986) (Douglas, J., dissenting).

105. *See* 8 J. WIGMORE, *supra* note 88, at 314-15.

by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load"; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life"; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."<sup>106</sup>

The reason why tortured, compelled confessions are antithetical to the Anglo-American jurisprudential system was discussed earlier. History, as discussed in this Article, shows the inhumanity of the trilemma. The idea that a person should not be forced to inflict injury on himself, however, is harder to pin down. It may be a subset of our society's general repugnance for suicide or selling oneself into slavery. Society's prohibition on suicide and voluntary slavery stem from a liberal notion of autonomy.<sup>107</sup> Kant, for example, postulated that this autonomy is based on the integrity of the person.<sup>108</sup> If that autonomy is alienated from the person in such a way that it cannot again become a part of the person, then the person qua person, no longer exists as an integral entity. Thus, Kant would say, selling oneself into slavery is the sort of sale which, when consummated, kills the person, because after the autonomous choice to sell oneself, one can no longer make autonomous choices.<sup>109</sup> Society does not let this happen because society itself is based on the interconnection of individual autonomous persons. To allow such alienation would allow civilization itself to deteriorate. Thus, certain acts which destroy autonomy are prohibited by society.

Forcing people to disclose certain autonomous decisions should involve the same alienation which Kant says cannot be allowed. In terms of punishment, when the offense is capital, a forced self-incriminating statement may be the proximate cause of death. Under this reasoning, forcing a self-incriminatory statement is akin to forcing suicide. This argument would also prohibit voluntary confessions which society, in fact,

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106. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (citations omitted).

107. I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* (1965); see also Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1891-98 (1987) (discussing liberal notions of inalienability).

108. See I. KANT, *LECTURES ON ETHICS* 165 (L. Infield trans., J. MacMurray rev. ed. 1930) ("Man cannot dispose over himself because he is not a thing; he is not his own property; . . . if he were his own property, he would be a thing over which he could have ownership.").

109. See, Richards, *Commercial Self and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195 (1979).

encourages. These confessions have the same consequences for the loss of autonomy as a forced confession. Autonomy, through punishment, or through the disclosure of a private thought, is still compromised. Further, voluntary confessions are more like suicide than forced confessions because they are completely one's own. Thus, society paradoxically prohibits forcing someone to incriminate himself because it is an infringement on autonomy, while still allowing one to voluntarily relinquish one's autonomy through a confession even though the confession has the same results. This may be inconsistent, but it would be impractical, and possibly immoral, for society to ignore an individual's voluntary confession of guilt.

The history of the common-law shows a concern for convicting the guilty and exonerating the innocent even at the cost of letting some guilty people free.<sup>110</sup> American constitutional law continues this tradition to uphold certain values. As the following cases show, the values of privacy, integrity and autonomy of citizens emerge repeatedly in opinions and dissents by judges writing about the purposes of the fifth amendment. Although these values may be products of the policies behind the fifth amendment, these values are also independent values animating the fifth amendment. Because these values are valuable in and of themselves, they need to be discussed separately from the policy considerations developed to protect them.

In 1928, Justice Brandeis discussed the privacy value of the fifth amendment.<sup>111</sup> This fifth amendment privacy value has been repeated by modern jurists. Justice Powell has written that the privilege "respects a private inner sanctum of individual feeling and thought . . ."<sup>112</sup> In a dissent in the same case, Justice Marshall, commenting on the similar concerns of the fourth and fifth amendments, stated, "[b]oth involve aspects of a person's right to develop for himself a sphere of personal privacy."<sup>113</sup> Justice Brennan has stated that the fifth amendment protects matters which come within a "zone of privacy."<sup>114</sup>

Last century, in *Brown v. Walker*,<sup>115</sup> Justice Field wrote a long dissent from an opinion upholding a congressional immunity statute as con-

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110. See, e.g., *In re Winship*, 397 U.S. 358, 361-65 (1970) (government must prove criminal guilt beyond reasonable doubt); *Berger v. United States*, 295 U.S. 78, 88 (1935) ("guilt shall not escape or innocence suffer"), *overruled*, *Stirone v. United States*, 361 U.S. 212 (1960).

111. See *supra* note 103 and accompanying text.

112. *Couch v. United States*, 409 U.S. 322, 327 (1973).

113. *Id.* at 349 (Marshall, J., dissenting).

114. *Andresen v. Maryland*, 427 U.S. 463, 486 (1976) (Brennan, J., dissenting).

115. 161 U.S. 591 (1896).

sistent with the fifth amendment. Field agreed with the defendant's counsel who wrote:

both the safeguard of the Constitution and the common law rule spring alike from that sentiment of *personal self-respect, liberty, independence and dignity* which has inhabited the breasts of English speaking peoples for centuries, and to save which they have always been ready to sacrifice many governmental facilities and conveniences. In scarcely anything has that sentiment been more manifest than in the abhorrence felt at the legal compulsion upon witnesses to make concessions which must cover the witness with lasting shame and leave him degraded both in his own eyes and those of others. What can be more abhorrent . . . than to compel a man who has fought his way from obscurity to dignity and honor to reveal crimes of which he had repented and of which the world was ignorant?<sup>116</sup>

Later, in the same dissent, Justice Field added:

The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one, and needs no illustration. It is plain to every person who gives the subject a moment's thought.

A sense of personal degradation in being compelled to incriminate oneself must create a feeling of abhorrence in the community at its attempted enforcement.<sup>117</sup>

Sixty years later, Justice Douglas wrote the fifth amendment is "a safeguard of conscience and human dignity and freedom of expression."<sup>118</sup> Further, insofar as the fifth amendment is a response to torture and the abuses of government agents in coercing confessions, the fifth amendment protects against such indignities.

The autonomy value presents a more difficult problem. Justice Field did suggest that the privilege was animated by a regard for independence,<sup>119</sup> which may be another name for autonomy. In addition, the fifth amendment protections of those democratic processes based on autonomous choice indicate that autonomy is another underlying value. Autonomy, however, is a hard term to define. If autonomy indicates a distinction between a citizen and his government, it underlies those policy considerations that portray the fifth amendment as a wall between the individual and the state. If autonomy denotes thinking for oneself, the

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116. *Id.* at 632 (Field, J., dissenting) (emphasis in original).

117. *Id.* at 637 (Field, J., dissenting).

118. *Ullmann*, 350 U.S. at 445 (Douglas, J., dissenting).

119. *See supra* note 116 and accompanying text.



fifth amendment protects one by not allowing an accused to be coerced or tortured into saying what he would not otherwise say. Autonomy may also be just another word for dignity.

This section has explored the history, policy and values of the fifth amendment. The respect of dignity, privacy and autonomy, as well as utilitarian and democratic conceptions underlie the fifth amendment. Such history, policy and values of the fifth amendment can only be protected when the state obtains voluntary information. If information a prosecutor obtains is not voluntary, the very purpose and spirit of the fifth amendment is violated. Any adjudication of immunity issues must take these values into account and assure the voluntariness of the information obtained.

### III. IMMUNITY

#### A. *Statutory Immunity*

##### 1. History

Shortly after the establishment of the privilege against self-incrimination in England, cases involving immunity statutes, called indemnity, arose in England.<sup>120</sup> In 1742, the House of Commons passed a bill of indemnity immunizing testimony against prosecution, but the bill did not pass the House of Lords because it would produce involuntary confessions which were not deemed reliable.<sup>121</sup> Only the right against self-incrimination protected suspects from testifying against themselves.<sup>122</sup> Wigmore acknowledges that England has a long and established tradition of using immunity "as a lawful method of annulling the privilege against self-incrimination."<sup>123</sup>

In the United States, the first compulsory immunity statute<sup>124</sup> was passed by Congress in 1857.<sup>125</sup> This general act immunized a person who testified before Congress, or one of its committees, from being "subject to any penalty or forfeiture for any fact or act touching [that] which he shall be required to testify. . . ."<sup>126</sup> Because this statute allowed witnesses to take "immunity baths" by testifying to everything illegal they

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120. Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 ST. LOUIS U.L.J. 327, 332 (1966). See also Kastigar v. United States, 406 U.S. 441, 445 n.13 (1972).

121. See L. LEVY, *supra* note 9, at 328-29.

122. *Id.* at 329.

123. 8 J. WIGMORE, *supra* note 88, § 2281, at 493.

124. Act of Jan. 24, 1857, ch. XIX, 11 Stat. 155 (1857).

125. See Wendel, *supra* note 120, at 333.

126. See *supra* note 124.

may have ever done and then avoid prosecution, Congress rewrote the statute within five years.<sup>127</sup> The new law<sup>128</sup> limited immunity to the actual testimony and allowed prosecution to be based on evidence which was not derived from the testimony.<sup>129</sup> Thus, within the first five years of immunity statutes in America, problems which have plagued immunity statutes for the past hundred years became apparent: (1) how extensive should immunity be to overcome the problems created by the self-incrimination privilege, and (2) how narrow can immunity be so as to minimize unpunished criminal activity?

In 1868, an immunity statute was passed which immunized witnesses in judicial proceedings from having evidence obtained "in any manner used against such party or witness . . . in respect to any crime, or for the enforcement of any penalty or forfeiture. . . ."<sup>130</sup> This law started the case law of immunity when, in *Counselman v. Hitchcock*,<sup>131</sup> the statute was declared invalid because it did not extend far enough to replace the fifth amendment right against self-incrimination.

*Counselman* was the agent of a railroad being investigated by a grand jury in Illinois. When asked to answer certain questions, he refused to answer on the ground that it would tend to incriminate him.<sup>132</sup> Although the statute barred use of his testimony against him, the Court agreed that the statute compelling his testimony "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him . . . ."<sup>133</sup> In other words, his immunized testimony could be used against him. Thus, immunized testimony could be used as an investigatory tool to obtain evidence against the witness. The Court determined that the immunity statute was therefore not "coextensive with [the fifth amendment]" and was inadequate to replace the privilege.<sup>134</sup>

The Court reviewed state court decisions on this issue<sup>135</sup> and used them to bolster its conclusion that "no statute which leaves the party or witness subject to prosecution after he answers incriminating questions put to him, can have the effect of supplanting the privilege conferred by

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127. See *Wendel, supra* note 120, at 334-35.

128. Act of Jan. 24, 1862, ch. XI, 12 Stat. 333 (1882) (codified as amended at 18 U.S.C. § 3486 (1946)).

129. See *Wendel, supra* note 120, at 335-36.

130. Act of Feb. 25, 1868, ch. XIII, 15 Stat. 37 (1868), amended by ch. 17, 18 Rev. Stat. § 860 (1875).

131. 142 U.S. 547 (1892).

132. *Id.* at 560.

133. *Id.* at 564.

134. *Id.* at 565.

135. *Id.* at 565-84.

the Constitution of the United States.”<sup>136</sup> Accordingly, the Court held, “a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence [sic] to which the question relates.”<sup>137</sup> To abridge the constitutional privilege, the Court stated, the legislature would have to replace or supply one “so broad as to have the same extent in scope and effect [as the privilege].”<sup>138</sup>

Congress took the hint and revised the immunity statute in 1893. The new immunity act was passed in connection with immunizing testimony before the Interstate Commerce Commission and took a new approach to immunity. While disallowing any excuse for testifying before the Interstate Commerce Commission, the act provided that “no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify . . . .”<sup>139</sup> The language “any transaction,” which replaced the “in any manner used” wording of the statute overturned by *Counselman*, proved significant because it prohibited the use of immunized testimony to find other testimony which could be used against a witness. Transactional immunity, which prohibits the government from prosecuting a witness for a crime about which he testifies, became the model immunity statute.<sup>140</sup>

The 1893 statute was challenged and upheld in *Brown v. Walker*.<sup>141</sup> Without explicitly saying so, the Court held that the statute supplied the sort of absolute immunity the *Counselman* Court had sought. The *Brown* Court wrote:

It is not that he shall not be prosecuted for or on account of any *crime* concerning which he may testify, which might possibly be urged to apply only to crimes under the Federal law and not to crimes, such as the passing of counterfeit money, etc., which are also cognizable under state laws; but the immunity extends to any *transaction, matter or thing* concerning which he may testify, which clearly indicates that the immunity is intended to be general, and to be applicable whenever and in whatever court such prosecution may be had.<sup>142</sup>

The statute also was interpreted to prohibit the states from using the evidence obtained in federal court against witnesses in state prosecu-

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136. *Id.* at 585.

137. *Id.* at 586.

138. *Id.* at 585.

139. Act of Feb. 11, 1893, ch. 83, 27 Stat. 443 (1893).

140. See Wendel, *supra* note 120, at 342.

141. 161 U.S. 591 (1896).

142. *Id.* at 608 (emphasis in original).

tions.<sup>143</sup> Although the statute did not shield the witness from the “personal disgrace or opprobrium attaching to the exposure of his crime,”<sup>144</sup> it was not invalid because

[a] person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation, and ought not to call upon the courts to protect that which he has himself esteemed to be of such little value. 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. If he secures legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good.<sup>145</sup>

The statute was narrowly upheld, five to four. The dissenters reasoned that transactional immunity did not extend far enough because the statute left open the possibility of prosecution. Justice Shiras wrote:

It is certainly speaking within bounds to say that the effect of the provision in question, as a protection to the witness, is purely conjectural. No court can foresee all the results and consequences that may follow from enforcing this law in any given case. It is quite *certain* that the witness is *compelled* to testify against himself. Can any court be *certain* that a sure and sufficient substitute for the constitutional immunity has been supplied by this act; and if there be room for reasonable doubt, is not the conclusion an obvious and necessary one?<sup>146</sup>

Justice Field had a different approach. He believed that the privilege entitled a person to complete silence, not only because something other than silence might lead to prosecution, but because the fifth amendment protected individuals from the infamy and disgrace that disclosure of crime often brings.<sup>147</sup> He wrote: “The witness is entitled to the shield of absolute silence. . . . [The fifth amendment] exempts him from prose-

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143. *Id.* at 606-08. This holding was affirmed in *Adams v. Maryland*, 347 U.S. 179 (1954).

144. *Brown*, 161 U.S. at 605.

145. *Id.* at 605-06.

146. *Id.* at 627 (Shiras, J., dissenting) (emphasis in original).

147. *Id.* at 631 (Field, J., dissenting).

cution beyond the protection conferred by the act of Congress. It exempts him where the statute might subject him to self-incrimination."<sup>148</sup>

But the Court's majority was not persuaded by these arguments, possibly for legal realist reasons.<sup>149</sup> First, politically, it was at their insistence that the law was changed and the statutes' transactional approach was a good faith attempt to abide by their demand for "absolute immunity." Second, something more extensive than transactional immunity would look like amnesty or a pardon<sup>150</sup> which might be perceived to allow criminals to get away with too much. The Court concluded that allowing a witness to remain silent would make the obtaining of certain evidence too difficult and would also be subject to abuse.<sup>151</sup> Third, since the middle of the century, Bentham and some American followers had been calling for the elimination of the privilege altogether, on the rationale that it allowed crimes to be hidden from the public, crimes which the public had the right to know of and prosecute.<sup>152</sup>

Following *Brown*, valid immunity statutes generally followed the transactional model. Provisions were added specifying that only natural persons could be immunized,<sup>153</sup> disallowing corporations from obtaining immunity.<sup>154</sup> In 1911, provisions limiting immunity from shielding witnesses against perjury charges were upheld in *Glickstein v. United States*.<sup>155</sup> The Court reasoned that because the fifth amendment guarantee only applied to past crimes, perjury, a future crime, could still be prosecuted.<sup>156</sup> An immunity statute excluding perjured statements was therefore upheld because it was "in all respects commensurate with the

148. *Id.* (Field, J., dissenting).

149. *See supra* note 102.

150. *Id.* at 601.

151. *Id.* at 600. The Court reasoned:

The danger of extending the principle announced in *Counselman v. Hitchcock* is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege.

*Id.*

152. For criticisms of the privilege see generally, J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, THE WORKS OF JEREMY BENTHAM, 446-55 (Bowring ed. 1843); *see also* State v. Wentworth, 65 Me. 234, 241 (1875) (justice is not promoted by the privilege).

153. *See* Wendel, *supra* note 120, at 349.

154. *Hale v. Henkel*, 201 U.S. 43, 70 (1906).

155. 222 U.S. 139, 143 (1911).

156. *Id.* at 142.

protection guaranteed by the constitutional limitation."<sup>157</sup> In 1943, the Court held that if the immunity statute did not specifically demand that a witness invoke his fifth amendment privilege before conferring immunity, immunity would automatically be assumed.<sup>158</sup> In response, Congress added qualifications to certain statutes so that immunity would not unintentionally be granted.<sup>159</sup>

In the midst of the red scare of the 1950's, Congress updated the immunity law of 1862 to enable it to pursue investigations that would not be hampered by invocations of the fifth amendment.<sup>160</sup> Congress passed the Immunity Act of 1954<sup>161</sup> which gave Congress and grand juries the right to require testimony in national security investigations by providing that no "witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is so compelled, after having claimed his privilege against self-incrimination . . . ." <sup>162</sup> This Act was immediately challenged and upheld in *Ullmann v. United States*.<sup>163</sup> Ullmann refused to answer questions concerning his and others' participation and membership in the Communist Party.<sup>164</sup>

*Ullmann* examined and disposed of all the old questions. The Court reaffirmed *Brown* over Justice Douglas' vigorous dissent. Justice Douglas argued that the immunity statute did nothing to protect Ullmann from being socially penalized upon disclosure of his political beliefs.<sup>165</sup> Justice Frankfurter wrote for the Court: "the immunity granted need only remove those sanctions which generate the fear justifying invocation of the privilege . . . ." <sup>166</sup> The Court discounted the potential loss of jobs, passport eligibility and "general public opprobrium."<sup>167</sup> The opinion formalistically concluded that, "[i]mmunity displaces the danger. Once the reason for the privilege ceases, the privilege ceases. We reaffirm *Brown v. Walker*, and in so doing we need not repeat the answers given by that case to the other points raised by petitioner."<sup>168</sup> The Court fur-

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157. *Id.* at 141.

158. *United States v. Monia*, 317 U.S. 424, 430 (1943).

159. *See Wendel, supra* note 120, at 349.

160. *See id.* at 348-53. The Act of 1862, which allowed Congress to grant immunity, was a "use" immunity statute which would not have withstood the test of *Counselman*.

161. 18 U.S.C. § 3486 (1954) (repealed 1970).

162. *Id.*

163. 350 U.S. 422 (1956).

164. *Id.* at 424.

165. *Id.* at 443-54 (Douglas, J., dissenting).

166. *Id.* at 431.

167. *Id.* at 430.

168. *Id.* at 439 (footnote omitted).

ther refused to pass on the merits of Ullmann's claim that inquiry into his political associations was a first amendment violation with the non-answer that "it is every man's duty to give testimony before a duly constituted tribunal unless he invokes some valid legal exemption in withholding it."<sup>169</sup>

In 1964, two developments dramatically changed fifth amendment immunity jurisprudence. In *Malloy v. Hogan*,<sup>170</sup> the Court determined that through the fourteenth amendment the privilege against self-incrimination was applicable to the states. State immunity statutes would therefore have to protect the privilege against self-incrimination, at least to the same extent as federal immunity statutes.

On the same day, the Court also decided *Murphy v. Waterfront Commission*<sup>171</sup> which extended the logic of *Malloy* and declared that one jurisdiction's immunity grant had to be respected by other jurisdictions. The Court held that the fifth amendment protected a state witness against federal prosecution, and a federal witness against state prosecution.<sup>172</sup> This holding follows from *Malloy*'s dicta: "the same standards must determine whether [a witness'] silence in either a federal or state proceeding is justified . . .'"<sup>173</sup> But in elucidating the *Murphy* Court's holding, Justice Goldberg changed the constitutional requisite for immunity without argument, acknowledgment or justification. He wrote:

[W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be *used* in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such *use* of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness

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169. *Id.* at 439 n.15. This is nonresponsive because it asserts that the first amendment is not a valid legal exemption to testifying. It also ignores the argument's premise that the fifth amendment has historically been asserted to protect religious and political activity. See L. LEVY, *supra* note 9, at 332.

170. 378 U.S. 1 (1964).

171. 378 U.S. 52 (1964).

172. *Id.* at 77-78.

173. *Id.* at 79 (quoting *Malloy v. Hogan*, 378 U.S. 1, 11 (1964) (citations omitted)).

had claimed his privilege in the absence of a state grant of immunity.<sup>174</sup>

Employment of the word "use" overruled, sub silentio, *Brown* and *Counselman* which premised the legitimacy of immunity statutes on giving "absolute" immunity or immunity for any "transaction."<sup>175</sup>

After *Murphy*, it was not clear whether the "transactional" immunity of *Brown*, or the "use" immunity possibly approved by *Murphy*, was the minimal immunity needed to be constitutionally acceptable.<sup>176</sup> Thereafter, Congress, moved by public sentiment increasingly hostile to crime and immunity statutes<sup>177</sup> and perhaps cognizant of a change in the Supreme Court's attitude, passed a new immunity act in the Organized Crime Control Act of 1970.<sup>178</sup> The new immunity statute tracked Jus-

174. *Id.* at 79 (footnote omitted) (emphasis added).

175. See *Kastigar v. United States*, 406 U.S. 441, 463 (1972) (Douglas, J., dissenting).

176. *Piccirillo v. New York*, 400 U.S. 548 (1971).

177. McClellan, *The Organized Crime Act (S. 30) or its Critics: Which Threatens Civil Liberties?* 46 NOTRE DAME LAW. 55, 60, 84 (1970).

178. Organized Crime Control Act of 1970, 84 Stat. 922 (codified in scattered sections of 18 U.S.C.). The pertinent parts of this act are 18 U.S.C. § 6002-6008 (1982). Section 6002 provides:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

- (1) a court or grand jury of the United States
- (2) an agency of the United States, or
- (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but 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, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6002 (1982).

Section 6003 reads:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

- (1) the testimony or other information from such individual may be necessary to the public interest; and
- (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.



tice Goldberg's language in *Murphy* and provided that neither the testimony, nor evidence derived from the immunized testimony, could be used against a witness.<sup>179</sup> This "use and derivative use" immunity was challenged and upheld in *Kastigar v. United States*.<sup>180</sup>

Justice Powell's opinion in *Kastigar* revolved around the necessity to reserve to government certain powers to compel testimony. Describing "the general common-law principle that 'the public has a right to every man's evidence'" as an "indubitable certainty,"<sup>181</sup> Justice Powell said, "[i]mmunity statutes . . . are not incompatible with [the] values [of the fifth amendment]."<sup>182</sup> According to Justice Powell:

[T]hey seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime. Indeed, their origins were in the context of such offenses, and their primary use has been to investigate such offense. Congress included immunity statutes in many of the regulatory measures adopted in the first half of this century.<sup>183</sup>

The use and derivative use immunity statute was thus found to be consistent with the conceptual basis of *Counselman*<sup>184</sup> because:

Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the 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.<sup>185</sup>

The Court bolstered this holding with dicta from *Murphy* which noted that "immunity from use and derivative use 'leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege' in the absence of a grant of immunity."<sup>186</sup>

18 U.S.C. § 6003 (1982).

179. 18 U.S.C. § 6002 (1982).

180. 406 U.S. 441 (1972). Such immunity is often now called "limited" immunity by the broadcast media and popular press.

181. *Id.* at 443.

182. *Id.* at 445-46.

183. *Id.* at 446-47 (footnotes omitted).

184. *Id.* at 452-53.

185. *Id.* at 453.

186. *Id.* at 458-59 (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964)).

Accordingly, use and derivative use immunity was "protection coextensive with the privilege [and] is the degree of protection that the Constitution requires, and is all that the Constitution requires even against the jurisdiction compelling testimony by granting immunity."<sup>187</sup>

The *Kastigar* Court attempted to justify its decision by interpreting the statute as being analogous to the fifth amendment requirements for coerced confessions.<sup>188</sup> The Court developed a procedure, which if read into the statute, allowed immunized statements to be excluded in the same way as coerced confessions. Thus, one could challenge evidence and attempt to exclude it by showing that the defendant had testified under a grant of immunity. By doing so, the defendant "shift[s] to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources."<sup>189</sup>

Justice Marshall, dissenting, argued that this, in effect, left the defendant with no remedy.<sup>190</sup> He reasoned that since the chain of evidence was known only to the government, the government could meet its burden by mere assertion as long as the witness-defendant had no contrary evidence.<sup>191</sup> He maintained, "[t]he Court today sets out a loose net to trap tainted evidence and prevent its use against the witness, but it accepts an intolerably great risk that tainted evidence will in fact slip through that net."<sup>192</sup> Both Justice Marshall and Douglas, and Justice Brennan as shown by his dissent in *Piccirillo v. New York*<sup>193</sup> believed this was the form of "use" immunity *Counselman* invalidated and which granted "far less than it had taken away."<sup>194</sup> Both Justices saw "use and derivative use" immunity as unconstitutional because it was not coextensive with the fifth amendment privilege against self-incrimination.<sup>195</sup> However, use and derivative use immunity theoretically answers the Court's concerns in *Counselman* by mandating that immunized testimony is not to be used to uncover new evidence against a witness. Further, use and derivative use immunity allows prosecution for a crime

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187. *Id.* at 459 (footnote omitted).

188. *Id.* at 461.

189. *Id.* at 461-62.

190. *Id.* at 467.

191. *Id.* at 469 (Marshall, J., dissenting).

192. *Id.* (Marshall, J., dissenting).

193. 400 U.S. 548, 552 (1971) (Brennan, J., dissenting).

194. 406 U.S. at 466 (Douglas, J., dissenting).

195. See, e.g., Strachen, *Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791 (1978); Note, *The Scope of Testimonial Immunity Under the Fifth Amendment: Kastigar v. United States*, 6 LOY. L.A.L. REV. 350 (1973) (both criticizing *Kastigar's* less than transaction immunity standard).

using evidence the government has obtained independently before or after a witness' testimony.

## 2. Theories justifying immunity

One of two general theories, the gratuity theory or the exchange theory, are used to justify immunity statutes.<sup>196</sup> Justice Frankfurter's dissent in *United States v. Monia* best represents the exchange theory.<sup>197</sup> In *Monia*, the Court decided whether a person could benefit from an immunity statute without invoking the fifth amendment before testifying.<sup>198</sup> The majority held that the statute automatically conferred immunity.<sup>199</sup> Frankfurter disagreed: "Duty, not privilege, lies at the core of this problem—the duty to testify, and not the privilege that relieves of such duty."<sup>200</sup> Since witnesses could refuse to testify under the fifth amendment privilege, Congress, to obtain testimony, had to make an exchange for testimony which " 'otherwise could not be got.' "<sup>201</sup> Frankfurter wrote that "when Congress turned to the devise of immunity legislation . . . it did not provide a 'substitute' for the performance of the universal duty to appear as a witness—it did not undertake to give something for nothing."<sup>202</sup> To facilitate investigations, immunity is exchanged for the privilege against self-incrimination. Since *Counselman*, the exchange theory has been promoted by the view that to be valid, immunity grants must be coextensive with the privilege replaced.

Frankfurter made his argument in response to the idea that Congress had gratuitously passed immunity statutes as amnesties.<sup>203</sup> Under the gratuity theory, immunity is granted without first examining what triggers the grant. The majority in *Monia* found that testimony procured from a subpoena to testify would immediately trigger immunity.<sup>204</sup> Voluntary testimony, accordingly, would not automatically produce immunity.<sup>205</sup> Therefore, immunity was gratuitously given to those summoned. The gratuity theory, however, may also encompass the idea that immunity is exchanged for testimony without invoking the privilege.

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196. Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 GEO. WASH. L. REV. 447, 554, 560 (1954).

197. 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting).

198. *Id.* at 425.

199. *Id.* at 430-31.

200. *Id.* at 432 (Frankfurter, J., dissenting).

201. *Id.* at 433 (quoting *Heike v. United States*, 227 U.S. 131, 142 (1913)).

202. *Id.*

203. *Id.* at 441.

204. *Id.* at 429.

205. *Id.*

Assuming a summoned witness will invoke the privilege because the testimony might implicate him in a crime, the only way the testimony will be obtained is if immunity is granted. The right to invoke the privilege is exchanged for an agreement that the testimony will not be used against the witness. Only if witnesses would implicate themselves in crimes, and not invoke the privilege, could the immunity be considered a gratuity. Since self-incriminating testimony cannot be compelled, unless immunity is granted, an immunity grant would only be "a gratuity to crime"<sup>206</sup> when no compulsion is present and the incriminating testimony would have been obtained without the grant of immunity. But because of the ease with which the government can compel a witness to testify through a grant of immunity, it cannot be assumed that a witness would be willing to give testimony implicating himself in chargeable crimes, if not protected by an immunity grant. Immunity is an exchange, not a gift, which protects the witness and compels testimony.

### 3. Procedure to grant statutory immunity

Section 6003 of the immunity statute provides the mechanism whereby immunity can be granted, and a witness' testimony compelled. The statute mandates that:

[T]he United States District Court for the judicial district in which the proceeding [where the testimony is desired] is or may be held shall issue . . . upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination . . . .<sup>207</sup>

The request must be approved by "the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General"<sup>208</sup> if (1) the information to be received is "necessary to the public interest"; and (2) the witness "has refused or is likely to refuse to testify . . . on the

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206. *Heike v. United States*, 227 U.S. 131, 142 (1913); *see also* McClellan, *supra* note 177, at 84.

207. 18 U.S.C. § 6003(a) (1982).

208. *Id.* § 6003(b) (1982). The Justice Department promulgated regulations delegating approval power to Assistant Attorneys General in charge of certain divisions. They in turn are authorized to redelegate their approval authority. The regulations, however, have a provision that "no approval shall be granted unless the Criminal Division indicates that it has no objection to the proposed grant of immunity." 28 C.F.R. § 0.175-0.178 (1986); *see also* *United States v. Yanagita*, 552 F.2d 940, 947 (2d Cir. 1977) ("acting" Assistant Attorney General authorized to approve immunity request). Further, the request need not be made by the United States Attorney himself, but may be made by a delegate. *In re Di Bella*, 499 F.2d 1175, 1177 (2d Cir. 1974); *In re Grand Jury Proceedings*, 554 F.2d 712, 713 (5th Cir. 1977).

basis of his privilege against self-incrimination."<sup>209</sup>

Before a prosecutor seeks an immunity order from a court, several steps have already been taken. Often there has been a proffer of evidence concerning that which the witness will testify and a subsequent determination of the testimony's trustworthiness.<sup>210</sup> After receiving the evidence, a prosecutor must decide whether the evidence is so important to an investigation or prosecution that the need for the evidence outweighs society's desire to prosecute the witness. An Assistant United States Attorney of the Criminal Division wrote:

Many factors are pertinent to making this decision including the seriousness of the crime with respect to which the witness will testify, the involvement and culpability, if any, of the witness in the crime, and the ability of the prosecutor to prosecute the case without the testimony of the witness concerned. Additional factors include the ability of the prosecutor to prosecute the witness for his criminal activity independent of the testimony for which he is immunized, the likelihood that the witness will refuse to testify even if ordered to do so by the court, and whether, if a witness does refuse to testify, there will be an effective sanction against such contemptuous conduct. A consideration of whether the witness' compelled testimony might lead to unfortunate collateral consequences, such as physical reprisals by a putative defendant, the likelihood that the witness will commit perjury, and the question of whether the prosecutor could bring a prosecution against him if he did are also elements of this determination. The value of the case at hand in achieving an effective program of enforcing pertinent criminal laws is a final important part of this "public interest" inquiry.<sup>211</sup>

If these considerations convince the prosecutor that immunity is within the public interest and if the witness is likely to refuse to testify otherwise, the prosecution requests authorization from the Assistant Attorney General, or his delegate, with responsibility for the subject matter of the case to apply for an immunity order.<sup>212</sup> Normal processing of

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209. 18 U.S.C. § 6003(c)(1)(2) (1982).

210. Skimmer, *Immunity, Right or Wrong? Right!*, 57 CHI. B. REC. 168, 172.

211. Thornburgh, *Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture" or "A Rational Accommodation?"*, 67 J. CRIM. L. & CRIMINOLOGY 155, 158-59 (1976).

212. NATIONAL LAWYERS GUILD, *Representation of Witnesses Before Federal Grand Juries* § 8.12(i), at 8-80 (1985) (quoting 1 U.S. ATTORNEYS' MANUAL, AUTHORIZATION PROCEDURES §§ 1-121.100—1-11.130 (1977)) [hereinafter FEDERAL GRAND JURIES].

such requests takes two weeks, though emergency authorization decisions can sometimes be made by phone or teletype in one to three days.<sup>213</sup> Approval by form letter is usually automatic, with few, if any, standards maintained for reviewing immunity requests.<sup>214</sup> After Justice Department approval is received, the United States Attorney files a petition before a district judge in the jurisdiction of the investigation.<sup>215</sup>

Upon filing the request for the immunity order, the judge's role is largely ministerial. Despite arguments that the judges should determine the propriety of granting immunity orders and inquire as to possible overreaching by prosecutors or other constitutional violations,<sup>216</sup> if the order is properly requested the court has little discretion to deny it.<sup>217</sup> A judge may not review facts supporting the United States Attorney's decision that a grant of immunity is within the public interest, because, "that judgment is entirely a matter for the executive branch."<sup>218</sup> Further, the court need not specify or limit the questions which may be asked, contrary to the previous situation under transactional immunity statutes.<sup>219</sup> When a United States Attorney refused to indicate the subject matter, at least one court has denied issuance of the immunity grant.<sup>220</sup> The witness to whom immunity is being granted need not be notified of an immunity request hearing<sup>221</sup> or be given an opportunity to be heard.<sup>222</sup> Those judges, like the Department of Justice officials approving the immunity request, act as a rubber stamp of the prosecutor's decision to grant immunity. As has been said, "[i]n effect the judge is being asked to sign an order affecting basic rights without being given an opportunity to exercise judicial discretion."<sup>223</sup> This process may be bureaucratic, but a United States Attorney can effectively compel testimony through this process. During the first five years of its enactment, the immunity statute

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213. *Id.* at 8-81.

214. Wolfson, *Immunity—How It Works in Real Life*, 67 J. CRIM. L. & CRIMINOLOGY 167, 167 (1976).

215. *Id.* at 168.

216. See, e.g., FEDERAL GRAND JURIES, *supra* note 212, at § 8.12(c), 8-70-71; Skimmer, *supra* note 210 at 178-79; *In re Grand Jury Investigation*, 657 F.2d 88, 92 (6th Cir. 1981).

217. See FEDERAL GRAND JURIES, *supra* note 212, § 8.12(c), at 8-69.

218. *Ryan v. Commissioner*, 568 F.2d 531, 541 (7th Cir. 1977).

219. FEDERAL GRAND JURIES, *supra* note 212, at § 8.12(c), 8-75; *United States v. Leyva*, 513 F.2d 774 (5th Cir. 1975); *Ryan*, 568 F.2d at 541.

220. *In re Parkin*, No. Mo-88 (W.D. Wis., Feb. 23, 1973), reported in FEDERAL GRAND JURIES, *supra* note 212, § 812(c), at 8-875.

221. *In re Grand Jury Investigation*, 657 F.2d at 91 (lack of notice does not violate due process because immunity is not property right).

222. *United States v. Pacella*, 622 F.2d 640, 643 (2d Cir. 1980) (*ex parte* grant of immunity approved as long as government followed statutory procedures).

223. Wolfson, *supra* note 214, at 168.

was used to obtain authority to immunize over 15,000 witnesses.<sup>224</sup> The process may be used by prosecutors to immunize prospective witnesses.<sup>225</sup> Once immunized, witnesses will be held in contempt for refusing to answer questions when appearing before the investigative body.<sup>226</sup>

The ease with which prosecutors can overcome the privilege against self-incrimination is an important background to consider when examining a person's decision to agree to informal immunity. Since a potential witness can easily be compelled to testify, it cannot be assumed that a grant of informal immunity is an uncompelled or voluntary agreement. Both prosecutors and witnesses may find it to be a shortcut to a place they would end up in any case—the witness giving testimony. The shortcut, in turn, minimizes the alienation and maximizes the cooperation on each side. The witness' choice to enter into that agreement, however, is compelled in the same manner section 6002 compels testimony once immunity is granted.

#### IV. INFORMAL IMMUNITY

##### A. Introduction

There are two general situations in which informal immunity<sup>227</sup> can arise. The first one involves an ongoing investigation of criminal activity. There, the government may have discovered the existence of a culpable witness. The testimony of that witness would either facilitate the investigation or provide evidence leading to another suspect's indictment or conviction. Naturally, the government seeks to obtain the witness' testimony. However, the fifth amendment prohibits the government from compelling such testimony because it would be incriminating. As discussed in the previous section, the government could easily get a statutory grant of immunity to compel the witness to testify.<sup>228</sup> Yet, the government also wants the cooperation of the witness in the investigation. This goal of cooperation makes the government willing to fashion an agreement whereby a witness discloses to the government, and to the grand jury if necessary, information to which he is privy, in exchange for nonprosecution. A witness may also agree to plead guilty to a lesser offense in exchange for the promise that what he says will not be used

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224. *Id.* at 169.

225. FEDERAL GRAND JURIES, *supra* note 212, § 8.12(f), at 8-76.

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

227. There are many different names and forms for informal immunity. Among them are "pocket immunity," "hip-pocket immunity," "nonstatutory immunity," and letters of assurances. This Article uses the term informal immunity because of the laxness it connotes.

228. *See supra* notes 207-26 and accompanying text.

against him. Often such agreements will include any or all combinations of these promises. Such agreements may also include promises on the witness' part to cooperate in some special way with the government, by the witness' counsel or by the witness himself.

The second situation in which informal immunity is often granted is where an informant who has been involved with some criminal activity decides to go to law enforcement to "turn state's evidence." The reasons an informant might do this are numerous. He might have been betrayed by other members of the criminal activities, he might be searching for protection from dangerous one-time partners, he might be trying to get out of a criminal lifestyle and wipe his slate clean, or he might think an investigation that will discover him is pending and he is trying to minimize his criminal liability. The second scenario differs from the first because here the informant is giving the government information about himself and others about which the government would not otherwise know. In doing so, he asks, in exchange from the government, either nonprosecution, little or no prison time for his crimes and/or the promise that what he says will not be used against him. Depending on how much his information is worth to the government, and how much he demands for it, the government may also add conditions to its promises which minimize the informant's criminal liability. This bargaining is different from that which takes place when the government already knows of the activity, for in that situation the government already has something on the informant-witness<sup>229</sup> and, thus, has more cards with which to bargain.

There is much confusion in the cases as to whether these situations and agreements, in fact, immunize the information given. Because plea bargains and agreements of nonprosecution are often included when informal immunity agreements are made, courts often analyze the entire package without being concerned with the fifth amendment values implicated by the immunity part of the agreement. Informal immunity is distinguishable from plea bargaining and agreements of nonprosecution in that the fifth amendment privilege of not being compelled to disclose self-incriminatory information is overridden by the government when immunity is granted. Immunity occurs only at those times the privilege is triggered—when self-incriminatory information is provided to the government—which, but for an agreement or understanding that it would

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229. This section of the Article will use the term "informant-witness" to indicate the different roles played by those given informal immunity. When the Article uses one of the words of the term alone, or uses the word "defendant," it is to indicate the predominant role of the information-giver in the particular situation under discussion.



not be used against the informant-witness, the government would not have obtained in the first place.

The nonstatutory method of promising immunity makes the immunity grant informal, while the self-incriminating nature of the information produced by the promise of immunity mandates the immunity analysis. Because informal immunity agreements are based on the information produced, the nonprosecution agreements included in them provide immunity to the extent that the information provided by the informant might otherwise be used against the informant. Similarly, in the plea bargaining context, the immunity analysis is relevant to the extent that the government directly or derivatively receives incriminating evidence.<sup>230</sup> Agreements of nonprosecution and plea bargains may involve informal immunity, but if no self-incriminatory information or testimony is provided in reliance on such agreements, there is no need for constitutional immunity analysis to protect the values behind the fifth amendment.

Informal immunity differs from statutory immunity only in the manner in which it is conferred.<sup>231</sup> When a prosecutor confers informal immunity, he need not obtain approval from the Attorney General or from other officials designated by Congress in section 6003.<sup>232</sup> Further, no approval—automatic or otherwise—is required by a supervising court. In effect, an informal immunity grant is the shortcutting of what is already an almost automatic process of conferring immunity on a witness in order to compel incriminatory testimony. Consequently, informal immunity involves even more discretion reposed in the prosecuting attorney than is the case with statutory immunity because the institutional mechanisms which insure that the initial grant of immunity is within the public interest are absent.

### B. *Legitimacy of Informal Immunity*

The power of a prosecutor to grant a witness informal immunity is often defended as a necessary outgrowth of the general powers and discretion prosecutors generally have over cases. The decision of how and to whom immunity is granted has been said to be vested solely in the

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230. The plea itself may be considered incriminating, but sixth amendment jurisprudence, which explicitly deals with problems of improper pleas, allows the entire plea to be withdrawn and permanently excluded from being used against a defendant. Comment, *Judicial Supervision of Non-Statutory Immunity*, 65 J. CRIM. L. & CRIMINOLOGY 334, 335-37, 336 n.11 (1974).

231. For an overview of the method whereby statutory immunity is granted, see *supra* notes 207-26 and accompanying text.

232. 18 U.S.C. § 6003 (1982).

executive branch of the government because it has the sole discretion as to whether to prosecute a case.<sup>233</sup> Supposedly within this broad prosecutorial discretion is the power to make informal agreements with witnesses.<sup>234</sup> The power to grant immunity from prosecution, on the theory that prosecutors can make decisions not to prosecute in the first place, falls into this discretionary area as well.<sup>235</sup> This follows to the extent that the greater power to abstain from prosecuting infers the lesser power to only partially prosecute or even to condition an agreement not to prosecute. However, the discretion a prosecutor has to not initiate a prosecution is theoretically different from a prosecutor's discretion to confer immunity on an informant-witness in exchange for self-incriminatory information.

For a variety of reasons, a prosecutor can decide not to prosecute a crime. For instance, the social costs of a crime may not outweigh the costs of prosecuting the criminal. The suspect may have already been punished by community disgrace and may have reimbursed his victim, so that prosecution for the crime would serve little purpose. On the other hand, a government attorney may selectively decide to prosecute a suspect because of the deterrent effect such a prosecution would have on other criminal activity. Prosecution for a minor crime can be cost-effective when it serves as a general deterrent.<sup>236</sup>

Placing the discretion to prosecute in a local government attorney's hand gives needed flexibility. The different criteria for deciding whether a prosecution would be feasible and serve justice may be weighed by a local government attorney without going through the impersonal and inflexible bureaucracy of an institution like the Justice Department. Further, the prosecutor is the person who best knows the resources that can be used for a case and the potential for its success. Giving a prosecutor the discretion not to prosecute, or to accept a plea lesser than the maximum potential verdict, allows for the most effective allocation of law enforcement resources while also permitting justice to be served.<sup>237</sup>

These different variables also go into a prosecutor's decision of whether, and to whom, immunity should be granted. As stated previously, a prosecutor weighs many factors before he applies to the Justice Department for statutory immunity. Among these factors are culpability

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233. *United States v. Librach*, 536 F.2d 1228, 1230 (8th Cir. 1976).

234. *United States v. Quatermain*, 613 F.2d 38, 45 (3d Cir.) (Aldisert, J., dissenting), *cert. denied*, 446 U.S. 954 (1980).

235. *Id.* (Aldisert, J., dissenting).

236. See Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519 (1969) (criteria for decisions of initiating prosecutions).

237. *Santobello v. New York*, 404 U.S. 257, 260 (1971).

of the witness, the information to which he might testify, the potential for a successful prosecution of the offense and the importance of convicting other suspects in the criminal activity.<sup>238</sup> There is an additional factor as well: for the promise of informal immunity the witness reveals information he would not have had to reveal because of the constitutional right not to incriminate himself. Once the informant-witness gives incriminatory information, law enforcement is prohibited from using the information only to the extent that the promise is enforced.

The analytical difference between a decision not to prosecute and the granting of informal immunity is twofold. When a prosecutor decides not to prosecute, he is deciding *not* to do something. The granting of informal immunity is an affirmative action. It is the difference between giving someone a shield and not shooting someone. While it is clear that a prosecutor's power includes the power to abstain from prosecution,<sup>239</sup> it is not clear whether the office of prosecutor is vested with the power to grant immunity on its own.<sup>240</sup> The second difference involves the potential irreparable injury which an informant-witness subjects himself when he gives information relying on an informal immunity agreement. If a prosecutor does not prosecute, the informant-witness has forfeited nothing. However, after the incriminating information is provided to the government, only the prosecutor's promise prevents its use against him. The promise is a shield only as long as it is kept. If the promise is not kept, the informant-witness is particularly vulnerable. He needs a positive action, the immunity grant, to provide the inviolability of a shield.

There may be reasons, however, to give prosecutors the power to grant immunity. It has by now been well established that there are policy reasons to give prosecutors the affirmative power to bargain for and accept pleas of guilty to lesser crimes than a prosecutor might otherwise charge. This is defended as a matter of judicial and law enforcement

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238. See *supra* note 212 and accompanying text.

239. *United States v. Nixon*, 418 U.S. 683 (1974); *Librach*, 536 F.2d at 1230.

240. See *Whiskey Cases*, 99 U.S. 594 (1878) (prosecutor can recommend a "pardon"); *United States v. Kilpatrick*, 594 F. Supp. 1324 (D. Colo. 1984), *rev'd*, 821 F.2d 1456 (10th Cir. 1987). This case was reversed after the body of this Article was written. The court of appeals held the prosecutorial conduct not to be so bad as to be a constitutional violation and not to have substantially effected the indictments which the district court found faulty. 821 F.2d at 1465. The circuit court also held that the "defendant's [had] failed to show how the use of informal immunity prejudiced the grand jury." *Id.* at 1470. The court found nothing improper with the use of informal immunity. *Id.*; see also *United States v. Kates*, 419 F. Supp. 846 (E.D. Pa. 1976) (no authority to grant immunity). With respect to the states, see *Bowie v. State*, 14 Md. App. 567, 575, 287 A.2d 782, 787 (1972) ("immunity is exclusively a creation of statute").

efficiency.<sup>241</sup> It is also assumed that a local prosecutor familiar with a case often does a good job of judging the defendant, specifically the need for society to punish him and to what extent.<sup>242</sup>

It is arguably within the public interest to acknowledge, or to grant, prosecutors the ability to make immunity agreements. Presently, as described above, prosecutors in the federal system use the statutory method prescribed in sections 6002 to 6005, while most state prosecutors have statutes providing the power to grant immunity in certain circumstances. However, these statutes may not give prosecutors the same amount of flexibility as informal immunity agreements provide. Further, the institutional system of approval might hinder prosecutors in fashioning such individual and flexible agreements.<sup>243</sup> If local prosecutors indeed do need flexibility and individual discretion in forming agreements, four factors must be determined: (1) whether the current statutory immunity system prevents certain information from being given to law enforcement because it prohibits needed flexibility; (2) whether the current statutory scheme can be interpreted to permit such flexibility; (3) whether new immunity laws enabling prosecutors to enter into flexible immunity agreements are needed; and (4) whether such changes would be beneficial to society.

The current statutory immunity regime gives prosecutors nearly unlimited discretion. Immunity can be obtained for almost any witness. The Justice Department and the courts serve as little more than rubber stamps for the local prosecutor's decisions.<sup>244</sup> However, statutes such as the current federal immunity statute do not anticipate a prosecutor and informant bargaining for immunity. The model for federal immunity envisions a witness that is already discovered and called to testify before a grand jury or legislative body. The witness is given immunity either after he has refused to testify, through asserting his fifth amendment privilege, or if the prosecutor has reason to believe he will refuse to testify. Immunity is conferred to compel testimony.

Informal immunity often arises from circumstances where the government is trying to get much more than mere testimony. The government is trying to obtain information and even cooperation so that suspects in a crime may be caught and tried. In such a situation, law

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241. *Santobello*, 404 U.S. at 260-61 (1971).

242. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 53-54 (1968).

243. See *supra* notes 207-26 which illustrate that approval by the Justice Department is a matter of course which does not infringe on a prosecutor's decision to grant immunity. The immunity provided is often not tailored to an individual's need; it is usually a form letter.

244. See *supra* notes 207-26 and accompanying text.

enforcement officials may find that they need to give something to the informant-witness in exchange for information. This is the promise that what the informant-witness says will not be used against him or that the informant-witness will receive little or no punishment for an acknowledged crime. Sometimes it is both. Often, however, the government wants to condition immunity on the cooperation of the informant-witness in the investigation. The purpose of such a condition is to prevent the informant-witness from deserting law enforcement officials in the middle of an investigation, while allowing him to avoid liability for his disclosed crimes.

It would be simple to allow flexible immunity agreements where immunity can be conditioned on either the government or informant-witness, or both, meeting certain conditions. The easiest change would be legislative; the immunity statute would be amended to reflect the need for flexibility. In making such an amendment, the legislature would have to determine what degree of discretion for making conditional agreements should be in the hands of the prosecutor. Further, the question of court and executive branch supervision would have to be addressed: since such agreements would be more sophisticated than mere conferrals of immunity, they would presumably trigger a more complicated response than the current usual form letter approval of immunity. Each agreement of immunity would be individually tailored to the particular situation. Supervision of prosecutors in this task will be explored more fully later in this Article.<sup>245</sup>

A legislative response is mandated because the current use of informal immunity is of dubious legality. In the *Whiskey Cases*,<sup>246</sup> the Supreme Court held that prosecutors have no authority to enter into liability limiting agreements with culpable accomplices in exchange for testimony against other suspects.<sup>247</sup> However, this case was decided on the basis of an alternative analysis, equitable immunity.<sup>248</sup> The case held that there was no right to a stay of execution so a pardon could be requested from the executive branch, allowing the government to live up to its promise of immunity.<sup>249</sup> However, the Court in *Santobello v. New York*,<sup>250</sup> held that plea agreements must be kept. Most federal courts

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245. See *infra* notes 320-40 and accompanying text.

246. 99 U.S. 594 (1878).

247. *Id.* at 606.

248. Equitable immunity was an ancient judicial concept where an accomplice in a crime would not be prosecuted for the same offense if he testified against his partners in crime for the same offense. *Id.* at 595.

249. *Whiskey Cases*, 99 U.S. at 599.

250. 404 U.S. 257 (1971).

have enforced immunity agreements against the government.<sup>251</sup> This enforcement renders questionable the validity of the holding in the *Whiskey Cases*.<sup>252</sup>

Further, because the federal statute provides that prosecutors must obtain Justice Department permission and judicial action to grant immunity to a witness, it has been argued that any other grant of immunity is illegal.<sup>253</sup> Judge Kane of the United States District Court of Colorado has written that informal immunity violates statutes and taints with illegality indictments obtained through informal immunity.<sup>254</sup> In his view,

[it] can be seen most clearly that Congress has vested exclusive authority to grant immunities in a few specified officials in the Department of Justice. Further, Congress has clearly and unequivocally set forth the parameters within which that discretion must be exercised. Ordinary statutory construction employing the principle of *expressio unius est exclusio alterius* . . . leads to only one conclusion: Pocket [informal] immunity is illegal; when granting immunity, the Department of Justice must comply with the requirements of sections 6002 and 6003.<sup>255</sup>

Some state courts have limited the right of a prosecutor to grant immunity for the same reasons. In *Bowie v. Maryland*,<sup>256</sup> the defendant alleged he was promised immunity by the prosecutors. The state appellate court held that:

Immunity, in the first place, could never be granted to the appellant by anyone in the circumstances of this case. There is no inherent, common law power in the State's Attorney or in the Grand Jury or in the judge or in anyone else to confer immunity from prosecution. Immunity is exclusively a creation of statute and can only exist where a statute has brought it into being.<sup>257</sup>

In California, a district attorney has no right to grant immunity except through statute.<sup>258</sup> Moreover, the statute requires court approval

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251. See *infra* notes 278-401 and accompanying text.

252. *United States v. Paiva*, 294 F. Supp. 742, 745 (D.D.C. 1969).

253. *Kilpatrick*, 594 F. Supp. at 1349.

254. *Id.*

255. *Id.*; see also *United States v. Taylor*, 728 F.2d 930, 934 (7th Cir. 1984) ("immunity is a statutory creation").

256. 14 Md. App. 567, 287 A.2d 782 (1972).

257. *Id.* at 575, 287 A.2d at 787.

258. *People v. Brunner*, 32 Cal. App. 3d 908, 108 Cal. Rptr. 501 (1973).

for a grant of immunity.<sup>259</sup> According to the court of appeal in *People v. Brunner*:<sup>260</sup>

[A] witness may be so influenced by his hopes and fears that he will promise to testify to anything desired by the prosecution in order to obtain a grant of immunity. Because the satisfaction of the prosecutor is the witness's [sic] ticket to freedom, the prosecutor, by dangling the promise of immunity, can put the words he wishes into the witness's mouth. This danger is especially grave when the witness knows he is expected to give particular testimony, absent which he will not receive the promised immunity.<sup>261</sup>

Therefore, the court asserted that the state immunity statute

[p]roperly used . . . protects the witness against prosecution pressure to color existing or create additional testimony in order to obtain previously promised immunity. [It] establishes a procedure under which the bargain between prosecutor and witness, each to perform certain acts in the future, can be made a matter of record so that dishonesty, equivocation, and misunderstanding may be minimized.<sup>262</sup>

Although the current federal immunity statute does not explicitly provide supervision which would protect a witness against such overbearing,<sup>263</sup> the statute provides a witness protection insofar as a prosecutor must answer to others for his actions before incriminatory information is revealed. The statutory mandate that federal courts must issue, or presumably can deny the issuance of, immunity also serves as a bulwark against such overbearing.<sup>264</sup> Without such protections, informal immunity grants are in conflict with, and therefore precluded by, the immunity statute. Only legislative action can permit grants of immunity without

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259. CAL. PENAL CODE § 1324 (West 1970).

260. 32 Cal. App. 3d 908, 108 Cal. Rptr. 501 (1973).

261. *Id.* at 913-14, 108 Cal. Rptr. at 505.

262. *Id.* at 914, 108 Cal. Rptr. at 505.

263. Whether immunity statutes in general should include provisions whereby there would be supervision over individual prosecutors' potential overbearing, or if the current constitutional law logically extends so far, is discussed at *infra* notes 320-40 and accompanying text. That the Justice Department must approve all statutory immunity grants and a judge must issue them insulates an informant-witness from being completely at the mercy of a local prosecutor.

264. The commission proposing the federal immunity statute specifically suggested that the language of the statute was designed to reserve to the judiciary the "inherent power" to deny immunity requests. 2 NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS WORKING PAPERS, 1435-36 (1970) [hereinafter WORKING PAPERS]; see also Note, *Federal Witness Immunity Problems And Practices Under 18 U.S.C. §§ 6002-6003*, 14 AM. CRIM. L. REV. 275, 296-97 (1976).

the current federal requirement of the Justice Department's and courts' supervision. Such legislation can and should minimize the impact of such unsupervised discretion. However, this would not be possible with unsupervised informal immunity.

Judge Kane has pointed out another problem with informal immunity with respect to the federal system. He wrote:

The procedure [for statutory immunity] leaves no doubt the accomplishment of the grant, the particularized need of the witness and the scope of immunity. . . . Informal immunity, apparently in widespread use by the Justice Department, accomplishes none of those goals. It is a damnable practice. No notice need be given to senior Justice Department officials or to a judge. The only record, if any, is a letter by the U.S. Attorney or a transcript of an oral representation, if it was made on the record. Such informality has resulted in confusion over witnesses rights in the past . . . . While the immunity grant is always a matter of prosecutorial discretion, the procedures of §§ 6002 and 6003 subject it to the light of public, congressional and judicial scrutiny and insure that it is not invoked or revoked arbitrarily or capriciously.<sup>265</sup>

The arguments that informal immunity is illegal because it is preempted by the statutes providing for certain procedures for immunity, and that it is inherently dangerous, are persuasive. However, if a need existed for the flexibility of informal immunity, Congress, or state legislatures, could pass general enabling statutes empowering prosecutors to make immunity agreements with informant-witnesses. Only with such legislative action could prosecutors legitimately have the power to confer immunity on informant-witnesses and fashion mutually beneficial agreements without going through bureaucratic channels. This may be desirable if the bureaucratic channels and the current statutory methods of granting immunity were, in fact, inadequate. Further, it would have to be shown that any abuses inherent in allowing such discretion by prosecutors could be minimized, while maximizing judicial and law enforcement efficiency.

Current federal statutory immunity methods permit a great deal of discretion in the local prosecutor. As discussed earlier, local prosecutors must do little more than ask their superiors in the Department of Justice before immunity can be granted. Once this approval is given, a judge is

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265. *Kilpatrick*, 594 F. Supp. at 1348 (quoting *Anderson v. United States*, 577 F. Supp. 223, 233 (D. Wyo. 1983)).



practically powerless to deny a request for immunity.<sup>266</sup> A prosecutor's discretion as to whom to grant immunity is not hindered by the federal immunity regime. The fact that negotiations with an informant-witness often occur when there are time restraints is no problem under the current federal statute since Justice Department approval can be obtained within a day.<sup>267</sup>

The question is whether the current regime permits enough flexibility to make deals with informant-witnesses. If an informant comes to a prosecutor's office and proffers that he has self-incriminatory information, but refuses to give it unless given the promise that the information he gave will not be used against him, the prosecutor needs the power to fashion a deal whereby the informant-witness is assured that his information will not be used against him. The prosecutor could compel the disclosure of this information by providing the informant-witness with statutory immunity. However, the prosecutor might have no knowledge of the criminal activity to investigate, and about which he is attempting to compel testimony, unless given more information voluntarily.

Further, the information might lead to an investigation in which the informant's cooperation is necessary. Information about the criminal activity would be forthcoming if the prosecutor could condition the grant of immunity on the witness' continued cooperation. Each side may also want other assurances so that the deal becomes more than the simple grant of immunity for testimony in front of a court or grand jury envisioned by the immunity statute, but rather a sophisticated contract. For instance, the informant-witness may want to avoid a prison term, he may desire protection from reprisals from those against whom he is going to testify or he may even want government support while he is cooperating with them. The government, on the other hand, may want the informant-witness to take a polygraph, help arrange the arrest of, and gather evidence against, suspects. It may want assurances that the informant will indeed testify in open court or before a grand jury. Thus, the government and informant-witness may negotiate for what in the end becomes a contract with interlocking and binding conditions.

The federal immunity statute is not geared to such agreements, although it might be interpreted to allow them.<sup>268</sup> The statute compels a

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266. See *supra* notes 216-23 and accompanying text.

267. *Id.*

268. In the report accompanying the federal immunity statute, informal immunity is mentioned as a legitimate alternative to statutory immunity. However, the committee's analysis only discusses informal immunity agreements in which a prosecutor promises not to prosecute for crimes disclosed in exchange for cooperation. It does not touch on the more difficult question of whether the statute would allow the government to fashion an agreement with the

witness who is called before a court, grand jury or legislative body to testify. It provides for the granting of immunity in exchange for relinquishment of the fifth amendment privilege. However, it has no provisions for immunity to be exchanged for witnesses' information given in the course of an investigation or for such immunity to be conditional. The statute addresses only immunity for testimony or information provided "at any proceeding before or ancillary to a court of the United States or a grand jury of the United States."<sup>269</sup> The exchange of information and cooperation needed for an investigation are, therefore, not covered by the statute. Further, the statute's discussion of approving a grant of immunity implies that only an affirmative grant of immunity is envisioned by the statute. The complicated conditional agreements, involving cooperation and plea agreements, which are the ingredients of informal immunity agreements, are not covered by the statute. The automatic method of approval of statutory immunity by the Department of Justice<sup>270</sup> further supports the notion that the statute only permits a limited form of immunity: a grant that what one says in a judicial or legislative proceeding will not be used against one. This is an unconditional grant, except that the testimony must be true.<sup>271</sup> Moreover, there are no mechanisms for reviewing the various forms of informal immunity agreements with their multiple conditions and different articulations.

Prosecutors, however, need the flexibility that they achieve by informal immunity agreements. Such agreements serve as an adjunct to the power a prosecutor has to make plea bargains. In order for the resources of a prosecutor's office to achieve the most efficient law enforcement result, the prosecutor must have the power to enter into complicated settlements the same way prosecutor's civil analogues, civil lawyers, do.<sup>272</sup> In addition to accepting lesser pleas when it seems preferable, prosecutors must be able to induce witnesses to testify freely and fully about criminal activity of which they are aware and in which they are implicated. Only a deal which covers all the variables in the testimony and information-giving process can fully protect both sides, so that both sides are willing to trust each other and the information can be obtained.

In addition, law enforcement officials must have assurances that information provided is reliable and continues until an investigation has

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informant-witness, as opposed to just compelling his self-incriminatory testimony. WORKING PAPERS, *supra* note 264, at 1419-20.

269. 18 U.S.C. § 6003(a) (1982).

270. See *supra* notes 207-14 and accompanying text.

271. See 18 U.S.C. § 6002 (1982).

272. The Supreme Court has called plea bargaining "an essential component of the administration of justice" which is to be "encouraged." *Santobello*, 404 U.S. at 260.

been completed. Incorporating a condition into an agreement that the information provided will not be used against the provider as long as the information is true and continues throughout the investigation will provide such needed assurances. Such an agreement also ensures that the information provided will not be used against the provider, but only if the informant in fact testifies before a grand jury and maybe later at trial. The agreement can assure the informant that he will be protected while giving information, face a minimal charge, and that the information he supplied will not be used against him. The intertwining of all the conditions, on the prosecution's part as well as the informant's part, produces the needed information. The entire deal has to be protected as an integral whole, not piecemeal. Section 6002 has no provision for such integrated immunity agreements.<sup>273</sup>

The limitations of the federal immunity statute probably caused the development of informal immunity.<sup>274</sup> Law enforcement needed the testimony, and just as importantly, the information from culpable informants. Informants, on the other hand, would not give this information unless given certain assurances. However, the immunity statute did not provide for these assurances. Consequently, prosecutors had to make promises on their own which they had no authority to make. Since the information provided by informants serves an important role in federal prosecutions, federal judges often abide by the agreements made between informants and prosecutors. But problems have arisen since there are no standards by which to judge and enforce these agreements, nor standards by which to clarify the meaning of the elements of the individual agreements.<sup>275</sup>

In effect, law enforcement policy may dictate the need for the more flexible immunity agreements which the federal immunity statute seems to preempt. The language of the federal immunity statute might be stretched so that judges could allow prosecutors to have flexibility in making immunity agreements. Such an interpretation might consider Congress' intent in passing the statute generally to enable law enforcement to obtain information from the culpable. Arguably, Congress passed the statute to further this goal. The specificity of approval, according to the argument, was not meant to limit prosecutors. If flexible agreements further this goal, they should be allowed.

The problem with this argument, of course, is that it flies in the face of the statute. The statute very specifically provides for methods

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273. 18 U.S.C. § 6002 (1982).

274. *Quatermain*, 613 F.2d at 45.

275. *See generally id.* at 46-47.

whereby immunity is conferred. To permit a method other than that dictated by Congress would be to ignore the statute. Congress' method of approval serves the purposes of limiting, at least theoretically, the discretion of local prosecutors, while providing for a central supervisory and record-keeping institution in the Department of Justice.<sup>276</sup> The statute also limits the delegability of approving immunity grants. This, according to the report accompanying the proposed statute, "serves to highlight the social cost in immunity grants and minimize the possibility of abuse through overly broad subdelegations by the Attorney General."<sup>277</sup> These provisions militate against the interpretation that the federal immunity statute includes the broader power for prosecutors to make flexible informal immunity agreements. Only legislative action can provide for the needed flexibility of informal immunity.

## V. PROBLEMS OF INFORMAL IMMUNITY

Since the above analysis suggests that the flexibility of informal immunity agreements is desirable, and since only new legislative action can permit such agreements, the question is what such legislation should look like. Before proposing legislation, we must examine the cases in which informal immunity agreements were at issue. These cases present the problems at issue when flexible immunity agreements are entered into between prosecutors and informant-witnesses. Any proposed legislation must address these issues. These issues include: (1) whether a prosecutor's promise is enforceable in jurisdictions other than his own; (2) whether he can promise more than use and derivative use immunity; (3) whether such immunity agreements are voluntary; (4) whether an informant-witness needs to be informed of constitutional rights before entering into the agreement; and (5) whether representation by counsel is necessary. Also important are recordation of the agreements, judicial or Department of Justice approval of agreements, interpretation of agreements and appropriate remedies for breaches of agreements.

### A. Jurisdictional Limitations

Because informal immunity arises from a promise that is theoretically implicit in prosecutorial discretion, the jurisdictional extent of the promise is often in question. In one case, *United States v. Carter*,<sup>278</sup> a defendant challenged a federal conspiracy conviction in Virginia on the

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276. WORKING PAPERS, *supra* note 264, at 1434-35.

277. *Id.* at 1437.

278. 454 F.2d 426 (4th Cir. 1972).

basis that he was promised immunity for his cooperation by the Assistant United States Attorney (AUSA) for the District of Columbia. The court held that if the government made the agreement, and the defendant relied on it, the government must abide by it.<sup>279</sup> The court reasoned:

Many federal crimes have multistate ramifications and are committed by persons acting in concert. If we hypothesize a single defendant charged with the interstate transportation of a stolen motor vehicle through several states, we would not question that the efficient administration of justice would support the authority of the prosecutor in one of those states to obtain an indictment and bargain for a guilty plea, agreeing that all offenses in the other jurisdictions would be disposed of in the single case.<sup>280</sup>

The court relied on another case, *United States v. Paiva*,<sup>281</sup> in which the defendant made a plea agreement with the AUSA, and after pleading, the Secret Service proceeded with a separate complaint based on the same transactions and information provided by the defendant. The *Paiva* court held that:

[I]f, after having utilized its discretion to strike bargains with potential defendants, the Government seeks to avoid those arrangements by using the courts, its decision to do so will come under scrutiny. If it further appears that the defendant, to his prejudice, performed his part of the agreement while the Government did not, the indictment may be dismissed.<sup>282</sup>

Both *Carter* and *Paiva* may be limited by the fact that it was the United States, although different divisions of the United States, that initiated the prosecutions. The *Carter* court wrote:

The United States government is the United States government throughout all of the states and districts. If the United States government in the District of Columbia, acting through one of its apparently authorized agents, promised that the sole prosecution against [a] defendant would be the misdemeanor charge in that jurisdiction, and the defendant relied on the promise to his prejudice . . . we will not permit the United States government in the Eastern District of Virginia to breach the promise.<sup>283</sup>

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279. *Id.* at 427-28.

280. *Id.* at 428.

281. 294 F. Supp. 742 (D.D.C. 1969).

282. *Id.* at 747.

283. *Carter*, 454 F.2d at 428.

No case has yet tackled the problem of whether informal immunity agreements are enforceable as between states and the federal prosecuting agencies. However, logic dictates that such agreements must be reciprocal, at least to the minimal extent mandated by the fifth amendment. The ruling in *Murphy v. Waterfront Commission of New York Harbor*<sup>284</sup> stands for the proposition that if a state or federal jurisdiction grants immunity to a witness, the other jurisdiction cannot use the testimony or the fruits of the testimony against the witness.<sup>285</sup> Similarly, if one jurisdiction informally grants immunity, other states or the federal government cannot use the testimony thus obtained against the witness. The holdings in *Murphy*, *Paiva* and *Carter* all suggest this result. However, *Murphy* limits this result. It is only the constitutional minimum use and derivative use of the immunized information that cannot be used by the other jurisdiction.

It is not clear whether an informal immunity agreement which provides more than the fifth amendment's requirement of use and derivative use immunity can bind prosecutors in other jurisdictions.<sup>286</sup> The holding in *Murphy* suggests that other jurisdictions would have to respect the immunity only to the extent it replaces the fifth amendment privilege.<sup>287</sup> Accordingly, they would not be able to use the testimony against the informant-witness. However, if the informant-witness relied on a transactional immunity agreement which he thought would be binding in all jurisdictions, it may be argued that it would be unfair to allow other jurisdictions to prosecute him. This would be true even if the evidence used was not derived from his immunized information. Promises made by the government, should be kept. In the informant's mind there is no distinction between jurisdictions. Such prosecutions might hinder prosecutors from obtaining information through immunity agreements if informants know of other prosecutions in which informants did not get the benefit of the bargains for which they negotiated because other jurisdic-

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284. 378 U.S. 52 (1964).

285. See *supra* text accompanying notes 171-74.

286. This Article later argues that informal immunity agreements should be enforceable even if they provide more immunity than the constitutional minimum requirement of use and derivative use immunity. As a result, a prosecutor might agree to give transactional immunity for an informant-witness' information.

287. The result in *Murphy* is dictated by our federal system of courts. The analysis of this Article focuses on a federal immunity grant. However, to the extent an immunity grant may create information a state might want to use, the analysis is applicable to a state's use of the information or a grant of immunity made by a state also. The nongranteeing jurisdiction is compelled to respect the constitutional minimum use and derivative use immunity which supplants the fifth amendment.

tions did not respect them. The informant might think that the information supplied is surreptitiously shared among jurisdictions.

If the law was clear that only use immunity was obtained through such informal agreements, it would be unreasonable to think that agreements providing transactional immunity in one jurisdiction would be enforced to the same extent in other jurisdictions. Therefore, testimony given in reliance on informal immunity agreements which provide transactional immunity in a federal jurisdiction could be used in the prosecution of the same crimes in a state's jurisdiction, as long as the informant-witness was aware of this fact. This awareness could be assured by informing the informant-witness of the limitation of the agreement, or by supplying him with an attorney before making the agreement. Knowing that an immunity agreement only provides transactional immunity where it was granted, and only use immunity in other jurisdictions, an informant-witness could enter into an agreement with full knowledge of its consequences. His waiver of his fifth amendment privilege would be voluntary and his rights protected. He might still have the incentive to give information because the agreement would prohibit the federal government from charging him for a crime and the state from using his testimony against him.<sup>288</sup>

### B. Prosecutorial Misconduct

The general theory of prosecutorial misconduct raises a series of problems connected with informal immunity agreements. The current practice of informal immunity gives local prosecutors a great deal of discretion. In their zeal to obtain convictions of certain criminals, prosecutors, unbridled by the constraints of statutory or constitutional protections, may ignore the rights of the informant-witnesses or larger law enforcement policies of the government. Misconduct may stem from forces such as political ambitions or political pressure. Statutory immunity also presents similar problems because a local prosecutor's discretion is generally approved by the Department of Justice and courts have little choice but to approve grants of immunity.<sup>289</sup> However, these problems are more pronounced when a complete lack of external control exists, as in the case of informal immunity. Under this practice, a prosecutor could even make an arguably binding agreement against the public interest and violate the constitutional rights of the informant-witness.

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288. See *infra* notes 346-72 and accompanying text for further discussions of these protections.

289. See *supra* text accompanying notes 207-23; see also Note, *supra* note 264, at 292-97.

In *United States v. Kilpatrick*,<sup>290</sup> District Judge Kane dismissed conspiracy and fraud indictments, in part because of the use of informal immunity.<sup>291</sup> Under a totality of circumstances test, the use of informal immunity, along with other improprieties, showed prosecutorial misconduct.<sup>292</sup> In his opinion, Judge Kane discussed many of the gray areas that prosecutors use to their advantage in the formation of informal immunity agreements. Judge Kane condemned the prosecutors for “inject[ing] serious ambiguity in the critical areas of witness credibility” through “their deliberate efforts to avoid the review process and the certainty that Congress intended in the granting of witness immunity.”<sup>293</sup> Some witnesses who testified before the grand jury in accordance with their informal immunity grants were told that the immunity replaced their fifth amendment privilege, while others were allowed to assert the privilege and not testify to certain transactions.<sup>294</sup> The use of informal immunity also “left every witness in the posture of testifying with the impression and fear that unless the witness’ testimony pleased the government, the government might withdraw its assurances.”<sup>295</sup> Even experienced attorneys were unsure of the effect of the agreement.<sup>296</sup>

Such actions by prosecutors are in direct conflict with the values underlying the fifth amendment clause against self-incrimination and the equal protection values embodied in the fifth and fourteenth amendments. The agreements obtained testimony for the government. However, because of the witnesses’ fear, there was a real threat, as in information obtained through tortured or forced confessions,<sup>297</sup> that the information received was not reliable. There was a danger that the testimony could be tainted since the witness was trying to insure his immunity by pleasing the prosecutor.<sup>298</sup> Further, similarly situated people were treated dissimilarly.

With statutory immunity, the witnesses could have been assured of their immunity and a record of the exact agreements obtained could have been maintained, possibly centrally, to insure the agreements were interpreted consistently. Prosecutorial discretion could have been minimized by guidelines, supervision and review. A degree of consistency could

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290. 594 F. Supp. 1324 (D. Colo. 1984), *rev'd*, 821 F.2d 1456 (10th Cir. 1987).

291. *Id.* at 1353.

292. *Id.* at 1337.

293. *Id.*

294. *Id.*

295. *Id.* at 1338.

296. *Id.*

297. *See supra* notes 50-76 and accompanying text.

298. *Id.*



have been achieved so that certain defendants would not have been duped or frightened into testifying. Rather than being arbitrary, the defendants' deals could have been structured according to the nature and degree of culpability for crimes and the extent of their cooperation.

This prosecutorial misconduct is only one example of the potential for misuse of a prosecutor's superior bargaining position. A major concern in informal immunity agreements is whether the informant-witness was aware of his rights before making an agreement to modify them. When an informant-witness makes an informal immunity agreement, in effect he agrees to waive his privilege against self-incrimination by giving information he is privileged from disclosing, in exchange for whatever the prosecutor has promised. Such a waiver of this constitutional right is allowed as long as the waiver is "knowing and voluntarily made."<sup>299</sup> Even where a prosecutor interviews an informant-witness proffering information which might lead to an immunity grant, the Supreme Court has said the prosecutor "should explain . . . that he is not obliged to criminate himself . . . ."<sup>300</sup>

### C. *Warning Before Waiver*

In *United States v. Quatermain*<sup>301</sup> the issue was the scope of an informal immunity agreement. The court decided that ambiguities in the written memorandum could not be construed to grant the defendant less than the constitutional immunity because the defendant was not represented by counsel and because:

[T]he defendant gave up a constitutional right not to testify and assisted the government. He should not be presumed to have done so for less than his constitutional entitlement, absent any evidence that he was informed of the scope of that right by the government's attorney or that he knowingly and intelligently waived it.<sup>302</sup>

Thus, a warning of the sort mandated by *Miranda v. Arizona*<sup>303</sup> would be in order before an informant-witness commits himself to an informal immunity agreement.

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299. *Gardner v. Broderick*, 392 U.S. 273, 276 (1968).

300. *Whiskey Cases*, 99 U.S. 594, 604 (1878); see also *In re Kelly*, 350 F. Supp. 1198, 1200 (E.D. Ark. 1972) (warning of possible prosecution for testimony given in course of grand jury investigation necessary). Further, the government must keep promises made in negotiations, even if immunity is not eventually granted in exchange for the proffered information. *United States v. Lyons*, 670 F.2d 77, 80 (7th Cir.), cert. denied, 457 U.S. 1136 (1982).

301. 467 F. Supp. 782 (E.D. Pa. 1979), rev'd on other grounds, 613 F.2d 38 (3d Cir. 1980).

302. *Id.* at 788.

303. 384 U.S. 436 (1966).

The procedural safeguards proclaimed in *Miranda*, whereby a suspect is informed of certain basic constitutional guarantees before law enforcement is permitted to question him, only apply to custodial interrogations.<sup>304</sup> Because informal immunity agreements often arise in situations different than that envisioned by *Miranda*, informant-witnesses are often not advised of the fifth amendment rights they waive in the agreement. For instance, if an informant walks into a law enforcement office to give information about a crime which would also incriminate himself, the police would not be obligated to read him his *Miranda* rights. He would therefore start providing incriminatory information without knowing of his right to silence or the extent of it. The interrogators could get information which could be used as bargaining chips against the informant.

Such information, arguably, could not be used against the informant under *Miranda*. However, if the informant were ignorant of this privilege, the interrogators could induce cooperation by saying they would use the information as a basis for an indictment or an investigation against the informant. The informant would be coerced into further cooperation with the police because of ignorance of the constitutional right to silence. This type of forced cooperation conflicts with the values of the privilege against self-incrimination.<sup>305</sup> It is also an example of the worthlessness of a constitutional right of which the right-holder is not informed. A statute allowing flexible immunity agreements should thus incorporate a clause whereby informant-witnesses would be informed of their rights before any information was given. Although it is arguable that this might hinder the flow of information needed for law enforcement purposes, if this information is currently received because of people's ignorance of their constitutional rights, it is illegitimately received in the first place. Further, studies of *Miranda* itself show that warnings do not impede law enforcement's gathering of information.<sup>306</sup>

#### D. Right to Counsel

An important element in *Miranda v. Arizona* is that the information provided by a defendant is voluntary only if a right to counsel exists.<sup>307</sup> The right to counsel should also be an indispensable element in respect to flexible immunity agreements. As mentioned above, in *United States v.*

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304. *Id.* at 478.

305. See *supra* notes 50-119 and accompanying text.

306. Note, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967).

307. 384 U.S. 436, 444-45 (1966).

*Quatermain*,<sup>308</sup> ambiguities in an agreement were construed against the government because the defendant was not provided counsel when he agreed to his informal immunity grant.<sup>309</sup> In *United States v. Kilpatrick*,<sup>310</sup> the government took advantage of ambiguities it created in the agreement.

At least two general reasons exist for why there should be a right to counsel for informant-witnesses when negotiating for immunity agreements. The first is efficiency. Advocates of this view claim that two attorneys can create an agreement faster, more equitably and with fewer ambiguities than can a lay person and an attorney. This argument is weak because there are cases in which poor agreements were written by attorneys.<sup>311</sup>

The more powerful argument is one of fairness. A well established assumption in law is that an attorney should represent a person in negotiations with other attorneys. In respect to criminal procedure, this assumption is incorporated in the ABA Standards for the Prosecution Function concerning both plea discussions<sup>312</sup> and guilty pleas.<sup>313</sup> The standard regarding plea discussions reads:

It is unprofessional conduct for a prosecutor to engage in plea discussions directly with an accused who is represented by counsel, except with counsel's approval. Where the defendant has properly waived counsel, the prosecuting attorney may engage in plea discussions with the defendant, although ordinarily a verbatim record of such discussions should be made and preserved.<sup>314</sup>

The explanation of this standard reads:

The obvious policy of this rule is to protect a litigant against overreaching by adversary counsel and it is applicable to criminal cases as well as civil litigation. Indeed, it has been held to be a denial of the right of counsel for the prosecutor to negotiate directly with the defendant in the absence of the defense attorney.<sup>315</sup>

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308. 467 F. Supp. 782 (E.D. Pa. 1979), *rev'd on other grounds*, 613 F.2d 38 (3d Cir. 1980).

309. *Id.* at 788.

310. 594 F. Supp. 1324, 1337 (D. Colo. 1984), *rev'd*, 821 F.2d 1456 (10th Cir. 1987).

311. *See, e.g.*, *United States v. Pellon*, 475 F. Supp. 467, 474 (S.D.N.Y. 1979), *aff'd*, 620 F.2d 286 (1980) (vague and badly drafted agreement negotiated between defendants' and government's attorneys).

312. A.B.A. STANDARDS FOR THE PROSECUTION FUNCTION, § 3-4.1 (1978).

313. *Id.* § 14-3.1(a).

314. *Id.* § 3-4.1(b).

315. *Id.* (citations omitted).

In respect to having a record when counsel has been waived, the explanation reads:

Given the unequal bargaining positions between prosecutor and defendant, the requirement of a verbatim record is necessary to protect the prosecutor from charges of exerting undue influence.<sup>316</sup>

Thus, the way to insure that a plea agreement is voluntary, and not due to prosecutorial overreaching, is by having attorneys negotiate the deal.

The same is true with immunity agreements. To insure there is no prosecutorial overreaching, immunity agreements need to be negotiated between the defendant's and the government's attorneys. If an informant-witness cannot afford an attorney, one should be provided for him. Some jurisdictions, such as Seattle, provide counsel before a witness is sworn to testify before the grand jury. Witnesses may enter into an agreement at that time.<sup>317</sup> However, the question of whether there is a right to counsel to negotiate immunity agreements has not yet arisen in the federal courts.

Such a right, if it existed, would safeguard an informant-witness' constitutional privilege and insure that the right against self-incrimination would only be knowingly, intelligently and voluntarily waived. This safeguard would further insure the protection of the fifth amendment values discussed earlier: the government would not be able to force someone to incriminate himself through overbearing prosecutors.

If there should be counsel for negotiations of immunity agreements, because the prejudice of constitutional rights could be hindered by lack of counsel, then the right to know that counsel can be appointed is suggested by the rationale of *Miranda*. *Miranda* indicates that a suspect has the right to remain silent until his counsel—appointed or retained—is present.<sup>318</sup> *Miranda* further requires that police must inform the suspect of this fact, so he can waive it if he chooses.<sup>319</sup> Similarly, law enforcement officials should warn an informant-witness that before he tells them his information, he may want to have an attorney present to protect his interests. The protection provided by an attorney would then include the determination of whether and to what extent an immunity agreement could be made. Until such an investigation could be completed, a competent attorney would presumably tell his client to keep silent. Silence is, of course, required to avoid prejudicing his bargaining position and to

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316. *Id.*

317. *United States v. Irvine*, 756 F.2d 708 (9th Cir. 1985).

318. 384 U.S. at 467-79.

319. *Id.* at 479.

avoid giving law enforcement officials information before the grant of immunity, which might be used against the informant-witness. This would stop the threat of police and prosecutorial overreaching. The informant-witness would have the counsel of someone who would know the law which would counter the prosecutor's and police's arguments for cooperation based on their own version of what the law was.

### E. Supervision

Prosecutors have almost unlimited discretion as to whom to offer immunity and to whom to deny it. In *United States v. Librach*,<sup>320</sup> the defendant challenged the prosecutor's decision to grant immunity to another witness rather than the defendant. Although the court had suggested the decision was unwise, it said that unless evidence was presented to show the decision was arbitrary there could be no finding that there was an abuse of discretion.<sup>321</sup> In *United States v. Kilpatrick*,<sup>322</sup> prosecutors "liberally" granted informal immunity to witnesses in a tax shelter grand jury investigation until it was decided "all good things come to an end."<sup>323</sup> Such unprincipled discretion does little to further the goal of informal immunity: to obtain information about culpable criminal conduct from those who are minimally culpable and whom society must forego the chance to prosecute. First come, first serve immunity only creates a race to the prosecutor's office, not the important weighing in which both the local prosecutor and Justice Department must engage to insure a statutory grant of immunity is within the public interest.

A statute providing for flexible immunity agreements must force the prosecutor to weigh appropriate factors and make an adequate record of the weighing.<sup>324</sup> Prosecutorial abuses could also be minimized if there were supervisory control of immunity agreements. The present statute already forces prosecutors to go to the Justice Department for approval of grants of immunity, after which immunity is judicially issued.<sup>325</sup> Informal immunity bypasses these methods, leaving the fate of the informant-witness subject to the prosecutor's whims. Although the prosecution must have enough discretion to fashion a flexible immunity agreement

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320. 536 F.2d 1228 (8th Cir.), cert. denied, 429 U.S. 939 (1976).

321. *Id.* at 1230.

322. 594 F. Supp. at 1338.

323. *Id.*

324. See *United States v. Librach*, 536 F.2d 1228, 1230 (1976) (decision to grant informal immunity is not arbitrary if the record reveals the decision was made "in good faith and upon consideration of appropriate factors").

325. See *supra* notes 207-26 and accompanying text.

for each particular informant-witness and each peculiar situation, supervision and guidelines would still enable such deals to be made.

The prosecutor still needs to be able to freely negotiate with informant-witnesses, so that the maximum information is obtained for the minimal social price. The prosecutor is in a better position to know an informant-witness's relative culpability than the Justice Department, but he is also more likely to have his emotions blind his objectivity since he is so closely involved with the investigation. Further, if he knows any agreement made with an informant-witness will be scrutinized, even to a small degree, by someone other than himself, he will have an incentive to be more objective and cautious in making and drafting immunity agreements.

Two obvious supervisory bodies exist, both of which are used by the current immunity statute. The Justice Department approves and keeps records of all statutory immunity grants.<sup>326</sup> Although this approval is almost automatic,<sup>327</sup> it does force a public interest inquiry by both the local prosecutor and, at least theoretically, the delegate of the attorney general.<sup>328</sup> In defending the placing of approval and clearance of all federal immunity grants in the Justice Department, the Working Papers accompanying the statute say:

The argument for centralizing approval in the Attorney General is quite compelling. In a precise sense there is no "right" to a grant of immunity. The starting point is a witness' plea of the fifth amendment. At that point, if the government wishes to go forward with the investigation it must make a determination in these terms: Is the public need for the particular testimony or documentary information in question so great as to override the social cost of granting immunity and thereby possibly pardoning a person who has violated the criminal law? Such a calculation can be made only by a person familiar with the total range of law enforcement policies which would be affected by an immunity grant, and not by one familiar only with the asserted public need in the particular case.<sup>329</sup>

A statute enabling flexible immunity agreements should also include a provision whereby the Justice Department must approve the grant. Much discretion would remain in the local prosecutor, but the final details of the deal would need to be approved. Speed should not be an

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326. 18 U.S.C. § 6002 (1982). See also *Kilpatrick*, 594 F. Supp. at 1336-38, 1348-49.

327. See *supra* notes 207-14 and accompanying text.

328. See WORKING PAPERS, *supra* note 264, at 1433-34.

329. *Id.* at 1433.

issue. Even if the agreement has been worked out the day before the information is needed, or before the testimony is supposed to be given before a grand jury, the current Justice Department procedures allocate resources so that approval can be given in a day.<sup>330</sup> If delay is necessary to protect an individual's constitutional rights, delay is the price we pay for living in a constitutional democracy.<sup>331</sup> This would discourage hastily and poorly written immunity agreements in which last minute bargaining creates ambiguities and interpretation problems.<sup>332</sup>

The other body to supervise flexible immunity agreements would be the courts. Such supervision would raise controversial separation of powers problems.<sup>333</sup> The argument against the courts having a role in grants of immunity is that the function of the court is not to weigh the social costs of immunity against the need for information; this weighing is something only a policy-making agent should do.<sup>334</sup> If the decision to grant immunity should exclusively belong to the executive branch, courts would have nothing to review and no standards by which to review prosecutors' grants of immunity.<sup>335</sup> The judiciary would only hear evidence on an abuse of prosecutorial discretion occurred. With respect to a federal immunity system where the Justice Department has to approve all immunity grants, the courts in effect would be questioning whether the Attorney General's, or his delegate's, action was in good faith.<sup>336</sup> This minimal review would be a mere shibboleth.

Judicial review of immunity grants, on the other hand, could be more extensive. Although forcing a person to speak by a grant of immunity is not prohibited by the fifth amendment,<sup>337</sup> and a waiver of the fifth amendment right to silence is permitted, a court could insure fifth amendment values are protected by the immunity grant. A court could

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330. See *supra* text accompanying note 213.

331. For further discussion of the social costs and balancing of constitutional protections in the criminal procedural area and why we should pay them, see Sherman, *Detailing the Exceptions that Swallow the Rule: The Woeful Directions of Our Supreme Court*, COGITATIONS L. & GOV'T, Apr. 1985, at 60.

332. See, e.g., *United States v. Pellon*, 475 F. Supp. 467, 473-75 (S.D.N.Y. 1979), *aff'd*, 620 F.2d 286 (1980) (hastily and poorly written agreement); *United States v. Irvine*, 756 F.2d 708 (9th Cir. 1985) (agreement changed just prior to grand jury testimony).

333. Compare *Librach*, 536 F.2d at 1230 (decision to prosecute rests in the Executive Branch) with *United States v. Paiva*, 294 F. Supp. 742, 746-47 (D.D.C. 1969) ("when the conduct of an officer of the executive branch becomes enmeshed in the judicial process, the courts have the power and resulting duty to supervise that conduct to the extent its [sic] uses the judicial administration of criminal justice").

334. WORKING PAPERS, *supra* note 264, at 1435-36.

335. *Id.*

336. *Id.*

337. See *supra* notes 7-8 and accompanying text.

hear evidence of whether an immunity agreement was a knowing and voluntary waiver of the fifth amendment privilege. It could determine if there were any threats which produced the immunity agreement, or whether any other prosecutorial overreaching occurred.<sup>338</sup> The argument that this review should be done before law enforcement officials receive any information would be that a determination of the legitimacy of the agreement before the information was received would assure that an informant-witness was not compelled to provide incriminatory information. Thus, such information would not be available for law enforcement to use against him. An investigation initiated by such information would be precluded and there would be no possibility that law enforcement would use it in violation of an individual's fifth amendment rights.

However, a full-scale hearing before a grant of immunity might be a costly use of judicial resources. It may be more economical to have a hearing on the validity of an immunity agreement only if it went sour and a prosecution ensued. This is how immunity grants are currently reviewed. If law enforcement officials proceed with a prosecution against someone to whom they have granted immunity, the court must decide: if immunity was legitimately granted; the extent of the immunity; and on what grounds the immunity was conditioned. If the court finds immunity was indeed granted, then the defendant shifts "to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources."<sup>339</sup> Otherwise, the evidence is excluded. This procedure theoretically protects the defendant from having information he gave in reliance on illegitimate immunity used against him, protecting his fifth amendment privilege.<sup>340</sup> Thus, judicial supervision of immunity agreements could be performed effectively and economically in the course of a prosecution after an immunity agreement has been made and becomes the subject of a subsequent challenge. The court's inquiry at that time could insure that fifth amendment values were protected, while determining the other procedural and substantive issues.

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338. Cf. FED. R. CRIM. P. 11(g); *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969).

339. *Kastigar v. United States*, 406 U.S. 441, 461-62 (1972); see also *United States v. Deerfield Specialty Papers, Inc.*, 501 F. Supp. 796, 800-01 n.3 (E.D. Pa. 1980).

340. See *Kastigar*, 406 U.S. at 469 (Marshall, J., dissenting) (arguing this does not in fact protect privilege because the government might still find ways to use evidence obtained under immunity grant).



## VI. INTERPRETATION OF IMMUNITY AGREEMENTS: TRANSACTIONAL VERSUS USE IMMUNITY

The most difficult task for courts with respect to the flexibility of informal immunity agreements is to interpret them. A great deal depends upon this interpretation, including constitutional values and the freedom or incarceration of the informant-witness. A statute cannot resolve all of the interpretation problems which arise in flexible immunity agreements. Each agreement will present individual problems which can only be settled by viewing the entire agreement and looking "to the evidence of the setting in which the agreement was reached and to the context of immunity law."<sup>341</sup> Because an immunity agreement involves a quid pro quo, where each side often has many bargaining chips and goals, both courts and legislators must give prosecutors flexibility to create an agreement suitable to the particular circumstances. This allows the informant-witness to exchange his information—information which the fifth amendment assures he is not compelled to disclose if it is incriminating—to limit his criminal liability.

Society gains evidence of, and often convictions for, antisocial criminal activity. But this exchange only takes place if both society and the informant-witness are assured that the bargain between them is honored. Thus, a court must determine just what was intended to be agreed to by both sides, using the background of immunity law to guide the process. The legislature's role is to enable the bargaining to take place and to give parameters to the process.

The current immunity statute provides for use and derivative use immunity, which the court in *Kastigar v. United States*<sup>342</sup> approved as being the constitutional minimum.<sup>343</sup> Some courts have assumed this limits prosecutors to use and derivative use informal immunity grants as well.<sup>344</sup> But the *Kastigar* court also indicated that jurisdictions might allow, although not constitutionally required to allow, the broader transactional immunity.<sup>345</sup> Thus, since states may provide transactional immunity, so could a federal flexible immunity enabling statute.

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341. *United States v. Quatermain*, 467 F. Supp. 782, 787 (E.D. Pa. 1979), *rev'd on other grounds*, 613 F.2d 38 (3d Cir. 1980), *cert. denied*, 446 U.S. 954 (1980).

342. 594 F. Supp. 1324 (D. Colo. 1984), *rev'd*, 821 F.2d 1456 (10th Cir. 1987).

343. *Kastigar*, 406 U.S. at 459.

344. *United States v. Society of Indep. Gasoline Marketers*, 624 F.2d 461, 474 (4th Cir. 1979); *Quatermain*, 467 F. Supp. at 788.

345. *Kastigar*, 406 U.S. at 453. This Article uses transactional immunity to represent any sort of immunity which might be more encompassing than the constitutional minimal use and derivative use immunity. The analysis is the same under any standard broader than use and derivative use immunity.

There are several rationales in favor of giving prosecutors the power to grant transactional immunity in agreements. Initially, the power to grant transactional immunity would give prosecutors room to negotiate. Transactional immunity would be a bargaining chip to get the informant-witness to cooperate in ways that he would not otherwise cooperate. It might be seen as an award for such cooperation. For instance, an informant-witness might have information about a gun smuggling conspiracy. Law enforcement officials may want to arrest members of the conspiracy while involved in a transaction where they could obtain physical evidence. They might ask the informant to set up the deal. Because such an arrangement would subject the informant-witness to great risk, prosecutors might reward such risk with transactional immunity, instead of just use and derivative use immunity. Of course, they could accomplish the same thing, and often do, by simply using their discretion not to prosecute the informant-witness. However, if transactional immunity were part of an agreement, the informant-witness would be protected from prosecution for that transaction in other jurisdictions as well.

If flexible immunity agreements are viewed as a complement to the current federal immunity statute which compels testimony, a better understanding of the necessity of allowing transactional immunity grants becomes clear. There is little incentive for a person to be more than a witness if he gains nothing beyond the use and derivative use immunity he would obtain through normal channels. Transactional immunity provides something that a person with information could not otherwise receive by the mere assertion of his fifth amendment right against self-incrimination. At the same time, it gives law enforcement officials a chance to receive information, cooperation and assistance that they might not otherwise be able to obtain.<sup>346</sup> A federal flexible immunity enabling statute should clearly state that a prosecutor can grant transactional immunity, while not precluding the granting of the constitutional use and derivative use immunity.

#### *A. Meaning of Immunity*

A problem has arisen in informal immunity cases regarding the meaning of the word "immunity" in a written memorandum of an agree-

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<sup>346</sup> In fact, current agreements for nonprosecution often provide for cooperation in exchange for nonprosecution of the revealed crime. Ironically, in respect to the incriminatory information provided in reliance on such agreements, the prosecutor is providing transactional immunity without statutory authority, while if he were working under the statute, the most he could provide would be use and derivative use immunity. This is another anomaly remedied by a flexible immunity statute.

ment.<sup>347</sup> If either transactional or use and derivative use immunity may be granted, only an explicit recitation of the type of immunity agreed upon would protect the parties to the agreement. Immunity agreements must spell out the exact type of immunity which is being provided, and what, if any conditions are attached.<sup>348</sup>

In one case, in which the author was involved, the government promised not to charge the defendant for crimes he had revealed in exchange for his cooperation and assistance.<sup>349</sup> At the end of the typewritten memorandum of the agreement, a handwritten sentence was added just before the defendant was to testify before the grand jury. The sentence created terrible confusion. It read: "[t]he use immunity conferred by this letter shall be transformed into transactional immunity at the completion of the trials of this case, provided you comply in good faith with the . . . conditions outlined in this letter."<sup>350</sup> The type and the timing of the immunity had to be determined by the court, as well as the issue of what good faith meant. The sentence could have meant that two types of immunity were provided by the agreement: use immunity during the investigation, and transactional immunity at the investigation's completion. It could have been an exchange of use immunity for the defendant's information and testimony, giving the defendant what he would have received had he been compelled to testify before the grand jury by statutory immunity, and transactional immunity in exchange for the defendant's cooperation and assistance in the investigation of the crimes he revealed. Although the author suggested these interpretations to the Ninth Circuit panel, the court expressed doubt in oral argument as to whether the prosecutor could even grant transactional immunity. If a statute enabling such immunity agreements expressly included the power to grant transactional immunity, such confusion would be prevented in the future. Supervision of such an agreement might have prevented the ambiguity.

### B. Remedies for Broken Agreements

In *United States v. Irvine*,<sup>351</sup> the court was presented with the issue

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347. See, e.g., *United States v. Quatermain*, 467 F. Supp. 782 (E.D. Pa. 1979), *rev'd on other grounds*, 613 F.2d 38 (3d Cir. 1980), *cert. denied*, 446 U.S. 954 (1980); *United States v. Kates*, 419 F. Supp. 846, 859 (E.D. Pa. 1976); *United States v. Irvine*, 756 F.2d 708 (9th Cir. 1985).

348. *United States v. Quatermain*, 613 F.2d 38, 46 (3d Cir.) (Aldisert, J., dissenting), *cert. denied*, 446 U.S. 954 (1980).

349. The author was involved with this case as a student at the University of Southern California Law Center Post-Conviction Justice Project.

350. *United States v. Irvine*, 756 F.2d 708, 710 (9th Cir. 1985).

351. 756 F.2d 708 (9th Cir. 1985).

of what happens when immunity is conditioned on certain acts of the defendant.<sup>352</sup> The government alleged that the defendant did not abide by the conditions, and prosecuted him for the underlying crimes he disclosed to it and the grand jury.<sup>353</sup> The trial court was thus faced with interpreting the meaning of the conditions enumerated in the agreement and deciding whether the conditions had been met.<sup>354</sup> Irvine's agreement included a provision for a polygraph test, an agreement to assist in the collection of evidence about the transactions about which he gave information and any other investigation in the jurisdiction, and a condition of no deception.<sup>355</sup> By not meeting any of these conditions, Irvine was liable for the underlying charge. The government was therefore able to use Irvine in their investigations while Irvine could not refuse because he was under the threat of prosecution based on his own testimony.

This situation raises the question: how long can the government use an informant-witness before he is assured that the testimony he gave will not be used against him? The longer the period of time, the more chance an informant-witness will breach one of the conditions. For instance, he might be in a situation where he is confronted by those about whom he is giving information. He might need to lie or break a condition of staying silent about the investigation to protect his safety. A well-written immunity agreement would provide for a specific amount of time, but good drafting alone may not be sufficient protection. A statute might have a statute of limitations, after which time the government would be prevented from using the information provided under a putative grant of immunity, even if one or more conditions are deemed subsequently broken by the informant-witness. This would further serve as an incentive for the government diligently to complete the investigation produced by the informant-witness' information and minimize the danger the informant-witness would be put in either by giving the information or by the government's use of his assistance in obtaining evidence.<sup>356</sup>

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352. *Id.* at 709-10.

353. *Id.* at 710.

354. It is not this Article's task to reargue the case, rather it is to raise the problems in the current informal immunity regime. These problems might be minimized by a statute enabling flexible immunity.

355. *Irvine*, 756 F.2d at 709-10.

356. If the government were completely prohibited from using information derived from an immunity agreement, even if the informant-witness broke a condition of the agreement, a statute of limitations clause would not be necessary. Because this Article asserts, at *infra* notes 373-85 and accompanying text, that the fifth amendment and fairness prevents the use of information obtained by an immunity agreement against the giver, and instead advocates a penalty clause to keep an informant-witness cooperating, this Article does not incorporate a statute of limitations in the proposed flexible immunity statute.

In the landmark case of *Santobello v. New York*,<sup>357</sup> the Supreme Court stated with respect to plea bargaining: "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."<sup>358</sup> This is also the case with immunity agreements.<sup>359</sup> Although it is clear that the prosecution should be held to the agreement it made, there is often a question as to what actions of the defendant breach the agreement and what remedies the government has in the case of such a breach.

An initial problem is the relationship between an immunity agreement and an agreement of nonprosecution to understand the remedy problem. Informal immunity agreements are generally understood to be part of a prosecutor's discretion not to prosecute, in other words, a subset of nonprosecution agreements.<sup>360</sup> However, as discussed above<sup>361</sup> immunity agreements trigger a different analysis. Even when the word "immunity" is not used in an agreement, if self-incriminatory information is provided, an agreement for nonprosecution includes an agreement not to use that testimony against the informant-witness. This agreement provides the immunity exchanged for the non assertion of the fifth amendment right which triggers the need to protect fifth amendment values.<sup>362</sup>

Nonprosecution agreements could be made where no incriminatory information is given to law enforcement officials by the informant-witness. For instance, a person charged with one crime may know of a worse crime with which he was not involved. Information on the other crime may be offered to law enforcement officials in exchange for their promise not to prosecute him for the crime with which the person is already charged. No fifth amendment problems would be encountered in such a situation. A nonprosecution agreement of this type might be analyzed under contract law terms so that each party would receive the benefit of the bargain.<sup>363</sup>

The situation in *United States v. Deerfield Specialty Papers, Inc.*<sup>364</sup>

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357. 404 U.S. 257 (1971).

358. *Id.* at 262.

359. *United States v. Carter*, 454 F.2d 426, 428-29 (4th Cir. 1972).

360. *United States v. Quatermain*, 613 F.2d 38, 44-45 (3d Cir.) (Aldisert, J., dissenting) *cert. denied*, 446 U.S. 954 (1980).

361. *See supra* notes 233-40 and accompanying text.

362. *See supra* notes 130-95 and accompanying text.

363. *United States v. Carrillo*, 709 F.2d 35, 36 (9th Cir. 1983); *United States v. Deerfield Specialty Papers, Inc.*, 501 F. Supp. 796, 800-01 n.3 (E.D. Pa. 1980).

364. 501 F. Supp. 796 (E.D. Pa. 1980).

illustrates the confusion that the courts encounter in this sort of circumstance. In that case, a defendant filed for the dismissal of an indictment because it was obtained through information provided to the government pursuant to an informal immunity grant.<sup>365</sup> The court ruled that an evidentiary hearing was necessary to determine if the agreement should be characterized as a grant of immunity or as a nonprosecution agreement.<sup>366</sup> The court held that the following letter memorialized one of the two types of agreements:

This is to confirm our appointment for February 28 at 12 o'clock. As we discussed, based upon your representation of your medical history and *your offer of cooperation with the Government, the Antitrust Division does not intend to prosecute you for any violation of the antitrust laws based on the information or testimony you may give in connection with this matter.*<sup>367</sup>

The court "preliminarily" noted that this language suggested an agreement of nonprosecution, "rather than a blind grant of informal immunity."<sup>368</sup> At the same time, however, the court noted the letter's similarity to an agreement in *United States v. Quatermain*<sup>369</sup> which that court had held to provide informal immunity.<sup>370</sup> The letter in *Quatermain* read:

This letter is to confirm our understanding with respect to your cooperation with the Drug Enforcement Administration and the United States Attorney's Office . . . . It has been agreed that in return for your cooperation and truthful testimony in any court proceeding related to these matters that the Government will provide you with immunity from prosecution for your participation and involvement with Zelman A. Fairth and others relating to the manufacture of methamphetamine.<sup>371</sup>

It would be odd if the distinction between the letters turned on the appearance or nonappearance of the word "immunity." Such formalities neither serve the administration of justice nor fifth amendment values. If a prosecutor can avoid the requirements of immunity law by using words which signify the same thing, i.e. "does not intend to prosecute you . . . based on information or testimony you may give," then an informant-

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365. *Id.* at 800.

366. *Id.* at 802-03.

367. *Id.* at 801 (emphasis in original).

368. *Id.*

369. 613 F.2d 38 (3d Cir. 1980), *cert denied*, 446 U.S. 954 (1980).

370. 501 F. Supp. at 801-02.

371. *Id.* (emphasis in original) (quoting *United States v. Quatermain*, 613 F.2d 38, 44 (3d Cir.), *cert. denied*, 446 U.S. 954 (1980)).

witness's fifth amendment rights may be undermined. Only if the informant-witness had retained or was appointed an attorney familiar enough with the intricacies of immunity law to point out this subterfuge would such an informant-witness be protected. It would make more logical and constitutional sense if the distinction between the two sorts of agreements depended upon the sort of information provided by the agreement and the voluntariness involved.<sup>372</sup> If self-incriminatory information were provided, then the agreement would be correctly characterized as an immunity agreement and fifth amendment rights could be protected through immunity law. However, if no self-incriminatory information were provided, the nonprosecution agreement would still be deemed complete by contract standards.

### C. Breach of Agreement

A court's analysis of an agreement significantly affects the remedy for a putative breach of the agreement by the informant-witness, who at this point would be a defendant. The inquiry becomes: (1) what actions by an informant-witness would constitute a breach of the agreement; and (2) if a breach occurred, with what crimes can the government charge the informant-witness. In the case of a nonprosecution agreement, the court uses a contractual analysis; a breach of any condition, whether material or not, breaches the whole agreement and allows the government to prosecute.<sup>373</sup> On the other hand, for an immunity agreement, different constitutional values must be protected so that a person is not compelled to incriminate himself.

When an immunity agreement is breached, a contractual analysis premised on performing all conditions does not adequately protect fifth amendment rights. In a typical breach of immunity agreement, an informant-witness reveals incriminatory information to a law enforcement entity or to a grand jury, and breaches one or more conditions of the agreement subsequent to that disclosure. For instance, the informant-witness may refuse to assist in an arrest of the person against whom he testified, or he may refuse to give further testimony. In response, the government will prosecute the informant-witness by using the testimony or information he already gave to the government under the impression that it was immunized. Thus, the government's use of this information acts as a retroactive withdrawal of the immunity grant after the damag-

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372. For a discussion of the voluntariness issue, see *infra* notes 373-76 and accompanying text.

373. *United States v. Deerfield Specialty Papers, Inc.*, 501 F. Supp. 796, 800-01 n.3 (E.D. Pa. 1980); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 225 (1981).

ing information had already been revealed. The words once out of the informant's mouth cannot be returned. However, the information was only revealed on the proviso that it be immunized. The information was only voluntary to the extent that it would not be used against the informant-witness. When the immunity is "revoked," the information previously obtained is no longer voluntary. It becomes retroactively compelled incriminatory information which is being used against the informant-witness. The government cannot constitutionally use such involuntarily obtained information against a defendant.

Opposed to this reasoning is the view that the information or testimony is not compelled because initially it was voluntarily given, and the conditions on which the immunity grant depended were voluntarily breached by the informant. Thus, the situation is aptly characterized as: the informant-witness made his own bed, and now he has to sleep in it. The informant-witness freely bargained for immunity received in exchange for the information given when waiving the fifth amendment privilege. If he breaks the bargained-for conditions, he will have to pay the consequences: no immunity. Although this is intuitively a powerful argument, it discounts the importance of the policies underlying the fifth amendment. Furthermore, the argument assumes equal bargaining power between informant-witnesses and prosecutors, which is a dubious assumption, even when the informant-witness is represented by counsel.

Fifth amendment policies must be enforced even if the informant-witness breached conditions of the agreement. Because the information obtained is only voluntary to the extent that it was immunized, it becomes involuntary when used against the informant. Although the agreement voluntarily included conditions, it was a voluntary agreement to provide information, information which was not supposed to be used against the informant, information which would not have even been known by the government except for the promise of immunity.

It must be made clear that this is not a *Miranda v. Arizona*<sup>374</sup> confession situation. There, if *Miranda* is complied with, a confession is voluntarily made on the basis that it *will* be used against the maker.<sup>375</sup> The confession is voluntary as long as the defendant knows it will be used against him; its use is not conditioned on doing certain things.

The information obtained through informal immunity is different. It is not an admission of guilt. It is the information intended to allow law enforcement to make its case against others, not the provider of the infor-

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374. 384 U.S. 436 (1966).

375. *Id.* at 478.



mation. Once the information is given, it cannot be taken back. The informant then has the Sword of Damocles, of his own making, dangling over his head, forcing the actions on which the government has conditioned his immunity. However, he only gave the information in the first place to be used against other people, not himself. The argument that since the informant voluntarily agreed that if he did not perform the conditions on which his immunity is based, the information could be used against him, and further, that his breaching his conditions voluntarily breached the agreement, only show the voluntariness of the agreement, not the information obtained.

The very fact that immunity is given in exchange for the information shows that the information is not voluntarily given. As the first part of this Article shows, immunity is given to protect the privilege against self-incrimination. Immunity protects one who has given information which he would otherwise not have had to give but for the immunity grant. This is the only way the values which animate the fifth amendment can be protected. It is the only way to insure no involuntarily obtained information may be used against the person who supplied the information. Just because an agreement was voluntarily entered and subsequently breached, does not make the information thereby provided voluntary. The information is only a by-product of the immunity grant. Once the grant is abrogated, even if it was agreed in advance that it could be abrogated, the information would no longer be voluntarily obtained. Unless the immunity grant is judicially enforced, fifth amendment values are undermined when a person's involuntary statements are used to incriminate him.

However, the government still needs a hold on an informant-witness when it enters into an immunity agreement. An informant-witness, of course, needs an incentive to live up to the agreement's conditions. Although the government would violate fifth amendment values by using the obtained information against a breacher, the government may prosecute for any subsequent violation of law. Prosecution could occur in a number of ways. First, a flexible immunity statute could be enacted that would make breach of the agreement a violation of law, and fix a certain substantial punishment for such a breach. Second, the violation of an immunity agreement may inherently break other laws. For instance, if the agreement contained a condition of truthful testimony, the violation of this condition would result in a perjury action. If the promised cooperation in the investigation was not forthcoming, it may be possible to indict the informant-witness for obstruction of justice. Finally, if the breach of the agreement violates laws that are unrelated to the inform-

ant-witness' testimony, then law enforcement officials can prosecute for those particular crimes. For example, if an informant-witness testified about gun trafficking in July and engaged in gun running in September, he could still be prosecuted for the subsequent crime of the September gun running.

In effect, once a person has testified or given information in reliance on a grant of immunity, whether statutory, informal or conditional, he has precluded the government from ever using his testimony or information against him. This preclusion is what the privilege against self-incrimination demands. The current immunity statute incorporates this idea by saying that testimony or information obtained by an immunity grant can only be used in a "prosecution for perjury, giving a false statement, or otherwise failing to comply with the order [to testify]."<sup>376</sup> Cases have held that when a witness abrogates his immunity agreement, the testimony can only be used against him as a basis for a prosecution for perjury and similar charges.<sup>377</sup>

Similar to formal immunity agreements, the government is limited in its use of information obtained through informal immunity agreements even when the informant-witness breaches the agreement. In *United States v. Deerfield Specialty Papers*,<sup>378</sup> the court held that if an evidentiary hearing showed that an immunity agreement existed, "the government must establish evidence derived from sources independent of the defendant and supportive of the indictment,"<sup>379</sup> or it would not be able to proceed with the indictment. Similarly, in *United States v. Kurzer*,<sup>380</sup> the government argued that the defendant forfeited his immunity by lying to the government while immunized. The government characterized Kurzer as "less than candid in his conversations with Government agents [and in] his testimony before the grand jury."<sup>381</sup> However, the court dismissed the argument by stating: "the ordinary remedy for the Government when an immunized witness lies or fails to cooperate fully is a prosecution for perjury or for contempt, rather than abrogation of the immunity agreement . . . ."<sup>382</sup> The *Kurzer* court's holding also suggests that minimal breaches of conditions of informal immunity agreements do

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376. 18 U.S.C. § 6002(c) (1982).

377. *Glickstein v. United States*, 222 U.S. 139 (1911); *United States v. Frumento*, 552 F.2d 534, 543 (3d Cir. 1977); *United States v. Tramunti*, 500 F.2d 1334 (2d Cir. 1974).

378. 501 F. Supp. 796 (E.D. Pa. 1980).

379. *Id.* at 801 n.3.

380. 534 F.2d 511 (2d Cir. 1976).

381. *Id.* at 518.

382. *Id.*

not breach the entire agreement.<sup>383</sup>

The one case contrary to this idea is *United States v. Irvine*.<sup>384</sup> In *Irvine*, the Ninth Circuit held that the defendant's violation of a condition to an informal immunity agreement vitiated the immunity so that the government could use his testimony against him. The government was allowed to prosecute on the underlying criminal activity about which Irvine testified.

To summarize, the current state of informal immunity agreements and the case law that has developed around them, suggest problems that can be easily avoided by the adoption of a flexible immunity statute. These cases, together with the fifth amendment values and policies which animate them, indicate that a flexible immunity statute would enable prosecutors to grant as much transactional immunity as they desire, instead of being bound by the constitutional minimum of use and derivative use immunity. The immunity promised by the prosecutor, whatever its extent, should be enforceable in all jurisdictions. Such a statute should provide that before information is obtained through such agreements, informant-witnesses should be warned of their fifth amendment right to silence and a right to counsel. Indigents should be provided counsel for the negotiation and drafting of the agreements. The Justice Department, through the Attorney General or his delegates, should approve all grants, while judicial protection can be achieved in litigation if an informant-witness is subsequently prosecuted. Immunity agreements should be entered into whenever self-incriminatory information is received by law enforcement on account of a promise. Once that information is received, it could no longer be the basis of a prosecution on the crime revealed. Under a flexible immunity statute, only perjury, obstruction of justice, and a statutory crime for breaking the immunity agreement could be charged.

A flexible immunity statute, based on the above, would read something like the following:

An Assistant United States Attorney (AUSA) may enter into an agreement with a person who has information about criminal activity, whereby the AUSA, as representative of the government, offers immunity either from prosecution for the transaction, or from use of incriminatory testimony or information, in exchange for such information or testimony. The agreement made by the AUSA is binding on all jurisdictions of

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383. *Id.* See also *United States v. Paiva*, 294 F. Supp. 742, 748 (D.D.C. 1969) (minor breach by defendant does not preclude finding of performance of agreement).

384. 756 F.2d 708 (9th Cir. 1985).

the United States. The immunity may be conditioned on anything agreed to by the informant-witness and the AUSA, provided that:

(1) No incriminatory information is received before the informant-witness is warned of his right to remain silent under the fifth amendment, and right to attorney under the sixth amendment.

(2) The informant-witness is provided counsel, if he cannot afford it, to negotiate and draft such immunity agreement.

(3) The Attorney General, Deputy Assistant Attorney, or any designated Assistant Attorney General must approve the final draft of the immunity agreement.

Information or testimony given in reliance on such immunity agreements will not be the basis of a prosecution, except for perjury, giving a false statement, or breaking the immunity agreement. An informant-witness, breaking the immunity agreement, either by breaching an agreed to condition, or the entire agreement, will make the informant-witness liable for a five year prison term.<sup>385</sup>

## VII. CURRENT INFORMAL IMMUNITY LAW

The current conflicts in informal immunity law illustrate why a statute allowing prosecutors to make flexible immunity agreements is so important. Although the majority of cases assume that informal immunity grants are enforceable "to the same extent as a formal grant of immunity,"<sup>386</sup> there are cases which hold that informal immunity grants are illegal and are unenforceable against either defendants<sup>387</sup> or the government.<sup>388</sup> The example of an immunity statute given above would codify

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385. Five years seems long enough a period to create a disincentive to not cooperate with law enforcement by breaking the agreement.

386. *United States v. Kurzer*, 534 F.2d 511, 513 n.3 (2d Cir. 1976); *see also United States v. Pellon*, 475 F. Supp. 467, 479 (S.D.N.Y. 1979). Other cases holding informal immunity agreements to be enforceable include: *United States v. Winter*, 663 F.2d 1120, 1133 (1st Cir. 1981); *United States v. Society of Indep. Gasoline Marketers*, 624 F.2d 461 (4th Cir. 1979); *United States v. Librach*, 536 F.2d 1228 (8th Cir. 1976); *Rowe v. Griffin*, 497 F. Supp. 610 (M.D. Ala. 1980), *aff'd*, 676 F.2d 331 (5th Cir. 1982); *United States v. Quatermain*, 467 F. Supp. 782, 790 (E.D. Pa. 1979), *rev'd on other grounds*, 613 F.2d 38 (3d Cir.), *cert. denied*, 446 U.S. 954 (1980); *In re Kelley*, 350 F. Supp. 1198 (E.D. Ark. 1972); *United States v. Paiva*, 294 F. Supp. 742 (D.D.C. 1969).

387. *Whiskey Cases*, 99 U.S. 594 (1878); *United States v. Kilpatrick*, 594 F. Supp. 1324 (D. Colo. 1984), *rev'd*, 821 F.2d 1456 (10th Cir. 1987).

388. *United States v. Kates*, 419 F. Supp. 846 (E.D. Pa. 1976).

much of what is in fact existing law. It would protect the government from losing information due to an attorney's advice to a client not to enter into immunity agreements because of their questionable legality. More importantly, a flexible immunity statute would protect informant-witnesses who give information relying on prosecutors' promises of immunity, and are subsequently indicted because a court ruled that the prosecutor had no authority to enter into such an agreement.

The argument that informal immunity agreements are not binding on the government stems from the fact that a prosecutor has no authority to bind the government.<sup>389</sup> This position has most recently been approved by a court in *United States v. Kates*.<sup>390</sup> In *Kates*, the judge stated that "the United States [was] not bound by [the] unauthorized acts" of an Assistant United States Attorney who entered an immunity agreement without authority.<sup>391</sup> The unauthorized agent problem, which precluded a valid immunity grant in *Kates*, was solved by Judge Winter of the Fourth Circuit in *United States v. Carter*.<sup>392</sup> This often quoted passage appeared:

If there be fear that an United States Attorney may unreasonably bargain away the government's right and duty to prosecute, the solution lies in the administrative controls which the Attorney General of the United States may promulgate to regulate and control the conduct of cases by the United States Attorneys and their assistants. The solution does not lie in formalisms about the express, implied or apparent authority of one United States Attorney, or his representative, to bind another United States Attorney and thus visit a . . . sentence on a defendant in violation of a bargain he fully performed. There is more at stake than just the liberty of th[e] defendant. At stake is the honor of the government[,] public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government.<sup>393</sup>

Thus, as Winter noted, a government agent's promise of immunity must be abided by, if for no other reason, because the keeping of such promises is vital to the effective and fair administration of justice.

Another reason why the government should not be able to renege on

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389. For both sides of this argument, see *supra* notes 233-40 and accompanying text.

390. *Kates*, 419 F. Supp. at 858.

391. *Id.* For a survey on the state law in regard to nonstatutory grants of immunity by local prosecutors, see Note, *Judicial Supervision of Non-Statutory Immunity*, 65 J. CRIM. L. & CRIMINOLOGY 334 (1974).

392. 454 F.2d 426 (4th Cir. 1972).

393. *Id.* at 428.

its agent's promise of an immunity grant stems from the contractual doctrine of promissory estoppel.<sup>394</sup> This doctrine holds that if a person has reasonably relied on a promise and has thereby changed his position, the promisor will be held to abide by the terms of his promise. The fact that the government did not authorize the immunity is not dispositive; rather, the important fact is whether an informant detrimentally relied on and reasonably changed his position because someone whom he thought had authority promised him immunity. The information or testimony obtained should therefore not be used against him. *United States v. Carter*<sup>395</sup> held: "if the promise was made to defendant . . . and defendant relied upon it in incriminating himself and others, the government should be held to abide by its terms."<sup>396</sup>

Simply stated, the estoppel argument is that it is reasonable to rely on an assurance of informal immunity.<sup>397</sup> A flexible immunity enabling statute avoids the examination of the reasonableness of a defendant's reliance. Furthermore, since most courts accept informal immunity agreements as binding, a person could reasonably change his position in response to a promise of informal immunity. Under a flexible immunity statute, an attorney might reasonably advise his client that such an agreement was binding. Additionally, even if the informant-witness was not advised by counsel, a layperson, untrained in the law, could expect that a prosecutor has the power to negotiate an agreement to exchange information for immunity. In *United States v. Society of Independent Gasoline Marketers*,<sup>398</sup> the Fourth Circuit held that:

The question is whether [the defendant], as a layman, acted reasonably in relying upon . . . assurances of immunity, and our appraisal of such reliance should not be made on the basis of any fine-fingered legal analysis. . . . "[C]onstitutional decisions cannot be made to turn in favor of the government on the fortuities of communications or on a refusal to accord any substantive value to reasonably induced expectations that government will honor its firmly advanced proposals."<sup>399</sup>

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394. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

395. 454 F.2d 426 (4th Cir. 1972).

396. *Id.* at 427-28.

397. See, e.g., *United States v. Society of Indep. Gasoline Marketers*, 624 F.2d 461, 472-73 (4th Cir. 1979).

398. 624 F.2d 461 (4th Cir. 1979).

399. *Id.* at 473 (citation omitted). It should be noted that there are cases in which cooperation agreements were made between police and defendants. These cases have held that because police have no statutory power to grant immunity, even if the agreements are fulfilled by the defendant, the police's promise cannot bar prosecution. However, these cases may be read not as agency problems, but in respect to promissory estoppel law. It might be unreasonable—

A California case provides another reason why informal immunity reasons should be enforced against the state. It combines the above two rationales:

It would be anomalous to permit the People, represented by the district attorney, to argue that an earlier agreement entered into by the district attorney was void for lack of compliance with a statute of whose existence the district attorney must have been aware. "[I]f a prosecutor, in the furtherance of justice, makes an agreement to withhold prosecution, the court may, upon proper showing, even in the absence of statute authority, honor the undertaking."<sup>400</sup>

Another California case explains: "the prosecution may be estopped from asserting the lack of compliance with the statute. However, in cases where the courts have found estoppel, the person claiming immunity had already testified and completed his part of the bargain."<sup>401</sup>

Fifth amendment values and policies also support upholding informal immunity agreements against the government, which is analogous to compelling a person to make incriminating statements against himself. A statement obtained in this manner would be involuntary, unknowing and certainly not intelligent. *Miranda v. Arizona*<sup>402</sup> mandates that waivers of the fifth amendment right to silence be voluntary, knowing and intelligent in order "to secure the privilege against self-incrimination."<sup>403</sup> As this Article argues, the only way to prevent the undermining of the fifth amendment when unauthorized informal immunity is granted is to abide by the promise and exclude any evidence derived from that testimony or information from being used against the giver of that information.<sup>404</sup> Thus, under an informal immunity agreement or flexible immunity statute, the policies and values of the fifth amendment mentioned in this Article's first section would be upheld to the fullest extent possible.<sup>405</sup>

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even for a lay person—to think that police have the power not to prosecute in exchange for immunity. Police are not prosecutors. *See Hunter v. United States*, 405 F.2d 1187 (9th Cir. 1969).

400. *People v. Brunner*, 32 Cal. App. 3d 908, 915, 108 Cal. Rptr. 501, 506 (1973) (citations omitted).

401. *People v. Yu*, 143 Cal. App. 3d 358, 369, 191 Cal. Rptr. 859, 864-65 (1983) (citations omitted).

402. 384 U.S. 436 (1966).

403. *Id.* at 444.

404. *See supra* notes 373-85 and accompanying text.

405. *See supra* notes 92-119 and accompanying text. It should be noted that such an exclusionary rule would not completely remedy the improper acquiring of information. For instance, if an informant told law enforcement of criminal activity which they did not know

Opponents of an informal immunity agreement could argue that entering into an informal immunity agreement is a voluntary act, so the information or testimony derived is not compelled. However, the ease with which a prosecutor can get statutory immunity and compel an informant-witness to give information cannot be ignored.<sup>406</sup> Informal immunity is used by prosecutors as an alternative to statutory immunity.<sup>407</sup> If both sides know how easy the compulsion of testimony is, they may agree to the nonstatutory method. Refusing to do so would gain nothing. An informant-witness could still be compelled to testify anyhow for the minimal use and derivative use immunity.

In addition, the testimony or information is given only as a result of the immunity promise. If the testimony is voluntary at all, it is voluntary only to the extent that the informant-witness gets the bargained-for exchange without which he would not have given any information. However, if there is no fulfillment of the agreement on the part of the government, then there is no incentive for the informant to provide the information. When the information is already given, what might have been initially a voluntary act of giving information, becomes an involuntary and compelled act upon the government's refusal or inability to fulfill its part of the agreement.

### VIII. CONCLUSION

This Article's title is taken from an admonition in a song by the rock group, the Grateful Dead.<sup>408</sup> Because of the informality of informal immunity agreements, it is possible that, "the deal goes down." Such an occurrence is a tragedy. It is a tragedy, not because a culpable criminal is incarcerated for crimes he committed, but because it is a violation of the fifth amendment and the history and policies that underlie it. It is another strike at that battered parchment, the Constitution.

The purpose of this Article has simply been to explore the history and discover the policies animating the fifth amendment in order to find guidelines for an informal immunity statute which would fulfill the requirements of the fifth amendment. Such a statute must provide the con-

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about, the police might reasonably initiate an investigation into that activity that they would not otherwise have started. If evidence is subsequently discovered which incriminates the original informant, and if the police could show that it was independent of the original information provided by the informant, then they might be able to prosecute him. See *Kastigar v. United States*, 406 U.S. 441, 469 (1972) (Marshall, J., dissenting).

406. See *supra* notes 207-26 and accompanying text.

407. See *United States v. Kilpatrick*, 594 F. Supp. 1324, 1337 (D. Colo. 1984), *rev'd*, 821 F.2d 1456 (10th Cir. 1987).

408. GARCIA & HUNTER, *Deal* in GRATEFUL DEAD ANTHOLOGY 123, 124 (1979).



stitutional minimum of use and derivative use immunity and should allow for transactional immunity. This will give flexibility to prosecutors and informant-witnesses to fashion agreements where they can work together to uncover criminal activity. Further, the statute should provide for counsel for indigents, and disclosure of such a right. Most importantly, although the statute should allow the agreement to include certain conditions, it should also foreclose the possibility that information obtained through an immunity grant could ever be used against the provider. Instead, it should include other incentives to insure the cooperation of the informant-witness. Only in this way can constitutional values be upheld.