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Immunity and Subsequent Informal Punishment

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COMMENTS

IMMUNITY AND SUBSEQUENT INFORMAL PUNISHMENT

Immunity is one of the many tools utilized by federal and state prosecutors to construct the case against a defendant. There has been a meteoric increase in its use over the last five years[1] and consequently the potential standards and ramifications of immunity have often been discussed.[2] While the authority to grant immunity is created by statute,[3] federal legislatures have not extended

[1] Requests for immunity have risen from 702 in 1971 to 1535 in 1975. The requests covered 2591 persons in 1971 and 3383 in 1975. These statistics represent only grants of federal immunity under 18 U.S.C. § 2514 (1970) and 18 U.S.C. §§ 6003-04 (1970). Wolfson, *Immunity—How it Works in Real Life,* 67 J. CRIM. L. & C. 167, 169 (1976).

[2] *See Symposium: Witness Immunity,* 67 J. CRIM. L. & C. 129 (1976); Skinner, *Immunity Right or Wrong? Right!,* 47 CHI. B. REC. 168 (1976); Wolfson, *Immunity, Right or Wrong? Wrong!,* 57 CHI. B. REC. 174 (1976); Comment, *Constitutional Law: Immunity, the Dilemma of "Transactional" versus "Use",* 25 OKLA. L. Rev. 109 (1972); Comment, *What Price Immunity? The Pressing Need for Protection Against the Abuse of Immunity Grants,* 3 U.S.F.V.L. REV. 83 (1974); Comment, *The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of Kastigar,* 19 VILL. L. REV. 470 (1974); Casenote, *Use and Derivative Use Immunity: A Sufficient Substitute For the Privilege Against Self-Incrimination,* 26 ARK. L. REV. 580 (1973); Comment, *Federal Immunity Statutes and the Fifth Amendment—Fresh Beginning or False Start?,* 25 U. FLA. L. REV. 394 (1973); Comment, *The End of Transactional Immunity: A Rip in Our Constitutional Fabric,* 42 U.M.K.C.L. REV. 258 (1973); Criminal Procedure—*Immunity: Fifth Amendment Privilege Against Self-Incrimination Eclipsed by Use Immunity,* 48 WASH. L. REV. 711 (1973).

[3] The relevant federal statutes provide:

§ 6001. Definitions.

As used in this part—

(1) "agency of the United States" means any executive department as defined in section 101 of title 5, United States Code, a military department as defined in section 102 of title 5, United States Code, the Atomic Energy Commission, the China Trade Act registrar appointed under 53 Stat. 1432 (15 U.S.C. sec. 143), the Civil Aeronautics Board, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the National Transportation Safety Board, the Railroad Retirement Board, an arbitration board established under 48 Stat. 1193 (45 U.S.C. sec. 157), the Securities and Exchange Commission, the Subversive Activities Control Board, or a board established under 49 Stat. 31 (15 U.S.C. sec. 715d);

(2) "other information" includes any book, paper, document, record, recording, or other material;

(3) "proceeding before an agency of the United States" means any proceeding before such an agency with respect to which it is authorized to issue subpenas and to take testimony or receive other information from witnesses under oath; and

(4) "court of the United States" means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, United States Code, the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Claims, the United States Court of Customs and Patent Appeals, the Tax Court of the United States, the Customs Court, and the Court of Military Appeals

(added Pub. L. 91-452, title II, § 201(a), Oct. 15, 1970, 84 Stat. 926.)

§ 6002. Immunity generally.

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. (Added Pub. L. 91-452, title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.)

§ 6003. Court and grand jury proceedings.

(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 which 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.

(Added Pub. L. 91-452, title II, § 201(a), Oct. 15, 1970, 84 Stat. 927)

§ 6004. Certain administrative proceedings.

(a) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of this section, an order requiring the individual to give testimony or provide other information which 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) An agency of the United States may issue an order under subsection (a) of this section only if in its 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.

§ 6005. Congressional proceedings.

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, 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, such order to become effective as provided in section 6002 of this part.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that—

(1) in the case of a proceeding before either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the Members present of that House;

(2) in the case of a proceeding before a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify. (Added Pub. L. 91-452, title II, § 201(a), Oct. 15, 1970, 84 Stat. 928.)

18 U.S.C. §§ 6001-04.

There are numerous federal decisions holding that a court may not, on its own initiative grant immunity. *See* Earl v. United States, 361 F.2d 531, 534 (D.C. Cir. 1966) (Opinion by Burger, Circuit Judge), *cert. denied*, 388 U.S. 921 (1967); *See also* In re Daley, 549 F.2d 469, 479 (7th Cir. 1977), U.S. *cert. denied*; United States v. Morrison, 535 F.2d 223, 228-29 (3d Cir. 1976), U.S. *cert. denied*; United States v. Alessio, 528 F.2d 1079, 1080-82 (9th Cir.), *cert. denied*, 426 U.S. 946 (1976); United States v. Caldwell, 543 F.2d 1333, n.115 (D.C. Cir. 1974).

The function performed by the court in approving grants of immunity is purely ministerial. The court action insures that the statutory procedures have been complied with. Ullman v. United States, 350 U.S. 422, 432-33 (1956); United States v. Hollinger, 553 F.2d 533, 548 (1977) (cases cited therein).

[4] *In re* Daley, 549 F.2d at 477.

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

[6] Kastigar v. United States, 406 U.S. 441, 453 (1972). A full discussion of use/derivative use accompanies notes 13-28 in the text.

[7] *Id.* at 453.

[8] The requirement that testimony gleaned from an immunity grant not be used in subsequent criminal prosecutions of the immunized witness originated in Brown v. Walker, 161 U.S. 591 (1896). A full discussion accompanies notes 32-66 in the text.

the protection of immunity beyond the minimum level required by the fifth amendment.[4] As a result, the constitutional guarantee that no person "shall be compelled in any criminal case to be a witness against himself"[5] protects the witness from any direct or derivative use of his testimony in a subsequent criminal prosecution.[6] Such a standard "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."[7]

Recently, the protection against infliction of penalties[8] has not been construed to forbid the

disbarment of attorneys who have provided information of their own wrongdoing while testifying under grants of immunity.[9] Though this result was characterized as "inexorable,"[10] because the disbarment action is not a criminal proceeding, a serious question can be raised regarding these recent decisions as well as the underlying doctrine.

This comment analyzes the historical basis for the criminal penalty doctrine and identifies the problems inherent in its application to non-criminal proceedings. Then, it considers the use of immunized testimony in disbarment proceedings and concludes that, even assuming the viability of the criminal penalty doctrine, the use of immunized testimony may be prohibited because the result of the proceeding is a criminal penalty. Finally, the comment considers the potential extensions of present fifth amendment law into government licensure and contracting, and demonstrates that the use of immunized testimony in non-criminal proceedings has far-reaching implications.

The Origins of the Criminal Penalty Rule

The restrictions imposed on those seeking testimony from an immunized witness derive from the fifth amendment's admonishment that a person shall not be required to be a witness against himself. This general admonition has resulted in two primary constitutional limitations on grants of immunity. First, the testimony may not be used directly or derivatively.[11] Second, the use and derivative use standard applies only to subsequent criminal proceedings.[12]

In *Kastigar v. United States*[13] the Court set out the modern requirement against direct or derivative use of immunized testimony. As the Court stated:

> [I]mmunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege .... 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.[14]

The appellant in *Kastigar* had been found guilty of contempt after refusing to give grand jury testimony under a grant of immunity.[15] He argued that the grant of immunity was not coextensive with his fifth amendment right against self-incrimination.[16] In his view only a grant of "transactional" immunity under *Counselman v. Hitchcock*,[17] would be constitutionally sufficient to require his testimony. In *Counselman*, the Court had held that an immunity statute "must afford absolute immunity against future prosecution for the offence to which the question relates."[18] The *Counselman* Court had reasoned that the fifth amendment required the government to guarantee that no use would be made of the testimony given, and the only method to achieve that result was thought to be full transactional immunity.[19]

Although the *Kastigar* Court did not explicitly overrule *Counselman*, it felt that the underlying principle there did not require more than use immunity. It reasoned that the witness could be protected from self-incrimination so long as the applicable standard prohibited *use or derivative use* of the testimony.[20] In other words, the Court held that the prosecution could not utilize the testimony even for leads in possible crimes committed by the accused. The witness only could be prosecuted for the activities he testified about if the prosecution was not tainted by the government's use of the immunized testimony.[21] Had the "transactional

[9] In re Daley, 549 F.2d 469 (7th Cir. 1977), U.S. *cert. denied*. *See also* In the Matter of Anonymous Attorneys, 41 N.Y.2d 506 (1977); Segretti v. State Bar, 15 Cal. 3d 878, 544 P.2d 929, 126 Cal. Rptr. 793 (1976); Maryland State Bar Association, Inc. v. Sugarman, 273 Md. 306, 329 A.2d 1 (1974), *cert. denied*, 420 U.S. 974 (1975); Committee on Legal Ethics of West Virginia State Bar v. Graziani, 200 S.E.2d 353 (W. Va. 1973), *cert. denied*, 416 U.S. 995 (1974); In re Schwarz, 51 Ill. 2d 334, 282 N.E.2d 689, *cert. denied*, 409 U.S. 1047 (1972); Matter of Ungar, 27 App. Div. 2d 925, 282 N.Y.S.2d 158 (1967), *appeal denied*, 20 N.Y.2d 642, 229 N.E.2d 236, 282 N.Y.S.2d 1026, *cert. denied*, 389 U.S. 1007 (1967); In re Selig, 32 App. Div. 2d 213, 302 N.Y.S.2d 94 (1969); Arnett v. State, 304 S.W.2d 386 (Tex. Civ. App. 1957).

[10] *In re* Daley, 549 F.2d at 482 (Pell, Circuit Judge, concurring).

[11] Kastigar v. United States, 406 U.S. at 453.

[12] Ullman v. United States, 350 U.S. 422, 431 (1956); Hale v. Henkel, 201 U.S. 43, 67 (1906); Brown v. Walker, 161 U.S. 591, 605–06 (1896).

[13] 406 U.S. 441 (1972).

[14] *Id.* at 453 (footnotes omitted).

[15] *Id.* at 442.

[16] *Id.*

[17] 142 U.S. 547 (1892). "Transactional immunity" is immunity from any prosecution that involves crimes testified to during the course of one's immunized testimony.

[18] *Id.* at 586, *quoted in* Kastigar v. United States, 406 U.S. at 451.

[19] Counselman v. Hitchcock, 142 U.S. 547 (1892). *See also* Kastigar v. United States, 406 U.S. at 467–71 (Marshall, J., dissenting).

[20] *Kastigar*, 406 U.S. at 453.

[21] The Government is held to a very high burden of proof to show that an immunized witness's former testi-

immunity" standard been adopted, the immunized witness could not have been prosecuted for any part of the occurrence about which he had testified.[22]

The dissenting opinions in *Kastigar*, written by Justice Douglas[23] and Justice Marshall,[24] urged that use immunity did not meet fifth amendment guarantees. While Justice Douglas argued that the fifth amendment protected the witness from confessing any crime,[25] Justice Marshall took issue with the premise of the majority opinion that the prosecution could be kept from using the testimony as a lead to further incriminating evidence. Justice Marshall noted that a use immunity standard was dependent on good faith disclosure by the prosecution of what was discovered prior to the immunized testimony.[26] Even assuming the prosecutor's good faith, there may be no method of detecting what use was made of immunized testimony in an office of several hundred investigators.[27] In Justice Marshall's view, the risk that a defendant's fifth amendment rights would be violated was too great.

There is a second, and often overlooked element that shapes immunity grants.[28] A grant of immunity extends only to *criminal prosecutions*. The privilege established by the United States immunity statutes, like so much of American law, appears to have originated in England. As it originally developed, the privilege had two elements—a privilege against infamy and a privilege against criminal use.[29] To disgrace one's name, and therefore one's family, was a devastating consequence of any criminal act.[30] As an adjunct to that disgrace, the state added the penalty of state imposed sanctions. In such a society it was understandable that any forced statements would of necessity require a protection against both infamy and criminality. Unfortunately, American courts interpreted immunity statutes to include only the protection against criminality.[31] If the possibility of criminal penalties is removed, then the fifth amendment no longer can be invoked to prevent testimony.[32]

The requirement for a "criminal penalty" received its first comprehensive treatment in *Brown*

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mony has not been used to ferret-out the wrongdoing charged in an indictment. *Id.* at 461–62.

[22] *Id.* at 462.

[23] *Id.* at 462–67 (Douglas, J., dissenting).

[24] *Id.* at 467–71 (Marshall, J., dissenting).

[25] *Id.* at 467 (Douglas, J. dissenting).

[26] *Id.* at 469 (Marshall, J., dissenting).

[27] *Id.*

[28] On other occasions, the Court has recognized that the fifth amendment's protection must be broad in scope. For example, the use of immunized testimony within constitutional limitations is not affected by crossing jurisdictional boundaries. Prior to Kastigar, the Court had resolved this issue. In Murphy v. Waterfront Comm'n., 378 U.S. 526 (1964), the petitioners had been found in civil contempt for refusing to testify though they were granted immunity by the state prosecutor. Murphy noted that if he did testify, that testimony could be used against him in federal proceedings. The Supreme Court, with Justice Goldberg writing the opinion, ruled that the state immunity must protect the witness from any subsequent criminal prosecutions, regardless of the jurisdiction. If the immunity did not protect the witness from all subsequent criminal prosecutions, it would not be coextensive with the fifth amendment privilege. *Id.* at 78. The Court overturned two prior cases, United States v. Murdock, 284 U.S. 141 (1931), and Feldman v. United States, 322 U.S. 487 (1944), in holding that the immunity grant must stretch across state and federal sovereignties.

Similarly, the Court has taken steps to insure that a witness's refusal to testify will not lead to adverse implications of guilt. In Slochower v. Board of Education, 350 U.S. 551 (1956), a school teacher was fired for refusing to testify before Congress. The Court held that invocation of the fifth amendment privilege could not be considered by a school board as tantamount to a confession of guilt. *Id.* at 559. Any other ruling would have allowed the government to "coerce" a confession from the witness—coercion by eliminating their livelihood. *See* Garrity v. New Jersey, 385 U.S. 493, 497 (1967). This same principle was later applied to attorneys in Spevack v. Klein, 385 U.S. 511 (1967), where the Court noted that, "no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others" can be allowed. *Id.* at 516. Thus, while the Court restricted the protection afforded by grants of immunity to use and derivative use, it has insured that the protection will extend across all proceedings.

[29] 8 J. WIGMORE § 2255 (McNaughton rev. ed. 1974).

[30] *See generally* United States v. James, 60 F. 257, 263–65 (N.D. Ill. 1894).

[31] 8 J. WIGMORE § 2255 (McNaughton rev. ed. 1974). *Contra*, Brown v. Walker, 161 U.S. 591, 628 (1896) (Field, J., dissenting); Ullman v. United States, 350 U.S. 422, 440 (1956) (Douglas, J., dissenting); United States v. James, 60 F. 257 (1894) (Grosscup, Circuit Judge).

It should be noted that certain states retain the practice of allowing invocation of the privilege against self-incrimination for disgrace as well as criminality. *See, e.g.*, GA. CODE ANN. § 38–1205 (1933) ("[n]o party shall be required to testify as to any matter which may ... tend to bring infamy"); NEV. REV. STAT. § 48.130 (1967) ("[a] witness ... need not give an answer which will have a direct tendency to ... degrade his character"); OR. REV. STAT. § 44.070 (1953) (a witness "need not give an answer which will have a direct tendency to ... degrade his character.").

For a very fine compilation of all the state laws dealing with the self-incrimination privilege see 8 J. WIGMORE § 2252 n.3 (McNaughton rev. ed. 1974).

[32] *See* Ullman v. United States, 350 U.S. 422 (1956); Brown v. Walker, 161 U.S. 591 (1896); Wolfson, *supra* note 1.

v. Walker.[33] Brown had refused to testify about potential rate violations by the Allegheny Valley Railway Company, despite a specific proviso in the act that provided immunity to the witness from subsequent criminal prosecution.[34] The grand jury reported the questions to the district court judge, who fined Brown $5.00 and ordered him held in contempt.[35] Brown was refused habeas corpus relief by the appellate court, and he subsequently appealed to the Supreme Court. The Court refused to overturn the district court's ruling.[36]

In part, the Court noted that Brown's refusal to testify had not been based on the failure of the statute to protect him adequately from subsequent *criminal* prosecution; rather, he had refused to testify because his testimony might have disgraced him.[37] The Court argued that the result of allowing such a plea to be sustained would emasculate the criminal commerce statute. As the majority noted:

> If . . . [Brown] were at liberty to set up an immunity from testifying, the enforcement of the Interstate Commerce law or other analogous acts, wherein it is for the interest of both parties to conceal their misdoings, would become impossible, since it is only from the mouths of those having knowledge of the inhibited contracts that the facts can be ascertained.[38]

The Court was clearly more concerned with enforcement of the law than it was with explaining the origins of the fifth amendment privilege. Indeed, the Court admitted that if the fifth amendment were construed literally, a person could refuse to testify when facts thereby disclosed tended "to incriminate, disgrace or expose him to unfavorable comments."[39] But, the majority accepted a less than literal interpretation and acknowledged that the "object of the provision" was "to secure the witness against a criminal prosecution."[40] The majority attempted no analysis of the fifth amendment's historical basis.

The *Brown* Court appeared to accept, without argument, that one who commits a criminal act was not meant to be protected by the fifth amendment beyond a protection from actual criminal prosecution based on his testimony. The balance to be struck was for disclosure of information. The majority noted that:

> [I]f the proposed testimony is material to the issue on trial, the fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. 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 could 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.[41]

The reasoning of the Court appears to have been based on a balancing of the public need to know against the individual's right to remain silent. Yet, no Court since *Brown* has suggested that the right to remain silent is so tempered. The reasoning of the *Brown* Court thus read like a well-written advocacy of law and order, but the opinion failed to address or resolve the real issue—on what premise the amendment is based. In sum, the invocation of the "criminality" standard appeared to be the result of a need to enforce the law rather than a desire to interpret the fifth amendment.

Mr. Justice Field's dissent in *Brown,* on the other hand, explained in detail the background of the privilege against self-incrimination. First, he compared the protections given by the fifth amend-

[33] 161 U.S. 591 (1896).

[34] *Id.* at 592–93. The questions posed by the grand jury were:

> Do you know whether or not the Allegheny Valley Railway Company transported for the Union Coal Company, during the months of July, August and September, 1894, coal from any point on the Low Grade division of said railroad company to Buffalo at a less rate than the established rates in force between the terminal points at the time of such transportation? . . .
>
> Do you know whether the Allegheny Valley Railway Company during the year 1894, paid to the Union Coal Company any rebate, refund or commission on coal transported by said railroad company from points on its Low Grade division to Buffalo, whereby the Union Coal Company obtained a transportation of such coal between the said terminal points at a less rate than the open tariff rate, or the rate established by said company? If you have such knowledge, state the amount of such rebates or drawbacks or commissions paid, to whom paid, the date of the same, and on what shipments; and state fully all the particulars within your knowlege relating to such transaction or transactions.

Id.

[35] *Id.*

[36] *Id.* at 610.

[37] *Id.* at 609–10.

[38] *Id.* at 610.

[39] *Id.* at 595.

[40] *Id.*

[41] *Id.* at 605.

ment to those afforded a person against defamation at common law. At common law, a man's name and standing in the community was far more important than the imposition of a particular fine or imprisonment.[42] The fact of legal criminality was not as important as the fact of incrimination. Field believed the fifth amendment to be an invocation of humanity and policy, and hence thought that the common law notions were incorporated within the amendment. In this view, the result of coercion of testimony is not only imprisonment but disgrace as well.[43]

With regard to the majority's argument that there should be a balance of society's need for the testimony, Justice Field observed that such an argument "ought not to have a feather's weight against the abuses which would follow necessarily the enforcement of criminating [sic] testimony."[44] According to Justice Field, "The Fifth Amendment of the Constitution of the United States gives absolute protection to a person called as a witness in a criminal case against the compulsory enforcement of any criminating testimony against himself."[45]

In summary, *Brown* decided the question of which subsequent proceedings were protected by the fifth amendment. Though a person cannot be forced to testify about a criminal act unless he is granted immunity, he must testify if he is granted immunity from criminal prosecution. The noncriminal results of his testimony are not restricted by the *Brown* interpretation of the fifth amendment.

The *Brown* decision remained unchallenged until 1956, when *Ullman v. United States*[46] was decided. There, the Court was faced with the problem of a witness who had refused to testify, under a grant of immunity, about various communist activities.[47] The witness argued that his testimony would cause certain severe disabilities, including possible loss of employment, expulsion from labor unions, loss of his passport, and general public disgrace.[48] The Court held that an immunity statute need only remove those fears which justify an invocation of the fifth amendment privilege—criminal prosecution.[49] The Court declined to address the potential disabilities which might occur. Instead, it suggested that the witness should attack the particular sanction after it is imposed on the basis that it was "criminal in nature" and therefore protected by the immunity grant.[50] Noting that *Brown v. Walker* had never been challenged as incorrect by subsequent courts, the majority refused to reconsider the *Brown* decision.[51]

Justice Douglas, joined by Justice Black, wrote a vitriolic dissent.[52] First, Douglas noted that certain disabilities would be affixed to communist party membership such as loss of a job, passport revocation and dismissal from union posts.[53] These sacrifices by the testifying party, it was argued, surely fell within the ambit of *Boyd v. United States*.[54] In *Boyd,* the Supreme Court had held that the fifth amendment protected the party from turning over certain documents in a forfeiture proceeding. In effect, the *Boyd* Court said that such a proceeding resulted in a criminal penalty by taking Boyd's property.[55]

Like the forfeitures in *Boyd,* Douglas argued that the inevitable results of Ullman's testimony would be premised in what are essentially criminal acts. While the government would not be charging Ullman with violation of a particular statute, the conduct he would be testifying about would be violative of a statute and the criminal nature of that violation would lead to severe disabilities. Douglas believed that the key element in *Boyd* and in *Ullman* was the fact that a "criminal act" was

[42] *Id.* at 636–37 (Field, J., dissenting).
[43] *Id.* at 637.
[44] *Id.* at 635.
[45] *Id.* at 630.
[46] Ullman v. United States, 350 U.S. 422 (1956).
[47] *Id.* at 423–25.
[48] *Id.* at 430.
[49] *Id.* at 431.

[50] *Id.* The exact words of the Court in acknowledging that the sanction could be attacked were: "Here, since the Immunity Act protects a witness who is compelled to answer to the extent of his constitutional immunity, he has of course, when a particular sanction is sought to be imposed against him, the right to claim that it is criminal in nature." *Id.*

It should be noted that the emphasis here is on "criminal in nature." The Court has clearly allowed for invocation of the fifth amendment in proceedings which are non-criminal in intent but "criminal in nature." As will be demonstrated later, lower federal and state courts have failed to take cognizance of the potential that a sanction designated as civil is in actuality "criminal."

[51] 350 U.S. at 436–39.

[52] *Id.* at 440–55 (Douglas, J., dissenting). The scholarly depth of the dissent is unquestionable. Indeed, one commentator has suggested that future courts may well reconsider *Ullman* given the persuasive and intellectual excellence of this dissent. 1 DAVIS, ADMINISTRATIVE LAW, § 3.08 (1958).

[53] Justices Douglas and Black were quite ready to overturn Brown v. Walker, 161 U.S. 591 (1896). 350 U.S. at 455.

[54] 350 U.S. at 440 (Douglas, J., dissenting). *Cf.* Boyd v. United States, 116 U.S. 616 (1886).

[55] 116 U.S. at 638.

the base of the disability,[56] and he noted that "[t]he forfeiture of property on compelled testimony is no more abhorrent than the forfeiture of rights of citizenship. Any forfeiture of rights as a result of compelled testimony is at war with the Fifth Amendment."[57]

Douglas also demonstrated that the purpose of the fifth amendment would be lost if it only protected against criminal prosecution.[58] According to Douglas, the practical result of losing one's means of support is as serious as criminal incarceration. And, the practical result of having to testify about a criminal act is that the witness loses the right to freedom of conscience.[59] While the majority had suggested that the history of the fifth amendment called for a less than literal interpretation of the language,[60] Douglas recognized that the majority focused solely on history after the passage of the amendment to limit the amendment's protection to criminal prosecutions.[61] Apparently, the "origins" of the amendment were quite different from its "growth."[62]

The amendment, according to Douglas, was created to protect the witness from prosecution and to be a "safeguard of conscience and human dignity and freedom of expression."[63] Recounting the horrors of the Star Chamber and High Commission as well as the works of many scholars who studied the fifth amendment's origin,[64] Douglas concluded that the history of the amendment clearly demonstrated that it protected the witness from recounting his own criminal acts.[65] He reasoned that the infamy and disgrace resulting to the accused were clearly punishment for criminal acts evinced by society.[66]

Despite the dissenting statements in *Brown* and *Ullman* about the purposes and origins of the fifth amendment, the doctrine that the amendment's protection extends only to subsequent criminal proceedings is now firmly implanted. The spectre of personal disgrace and disability is not a consideration which will justify a refusal to testify.

Grants of Immunity and Subsequent Disbarment

The result of the failure to extend the fifth amendment's protection to non-criminal penalties is vividly demonstrated in the repeated refusal of the state and federal courts to overturn disbarments of attorneys when those disbarments are based on the attorney's own immunized testimony.[67]

The underpinnings of this result lie in the characterization of disbarment proceedings as "civil."[68] The removal of an attorney from the practice of law is not a criminal proceeding, it is an action taken to protect the integrity of the courts and the interests of the general population.[69] As Judge Cardozo observed:

> To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character, like the examination into learning, is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied.[70]

This examination into "fitness" is subject to the full guarantees of due process but it is still not a criminal proceeding.[71] Concern for individual

[56] 350 U.S. at 442 (Douglas, J., dissenting).

[57] *Id.*

[58] *Id.* at 445-55.

[59] If a person can be forced to testify about all manner of disgraceful acts, he may conform his activities and thoughts to the eventuality of a confession.

[60] 350 U.S. at 438-39.

[61] *Id.* at 423-46. Justice Douglas made reference to the absence of historical circumspection. *Id.* at 448-49 (Douglas, J., dissenting).

[62] The *Ullman* Court recognized this principle in quoting Gompers v. United States:

> The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.

350 U.S. at 438 n.14 (quoting Gompers v. United States, 233 U.S. 604, 610 (1914)).

[63] 350 U.S. at 45 (Douglas, J., dissenting).

[64] *Id.* at 446-53.

[65] *Id.* at 449.

[66] *Id.* at 451.

[67] *See, e.g.*, In re Schwarz, 51 Ill. 2d 334, 282 N.E.2d 889, *cert. denied*, 409 U.S. 1047 (1972).

[68] Zuckerman v. Greason, 20 N.Y.2d 430, 231 N.E.2d 718 (1967), *cert. denied*, 390 U.S. 925 (1968).

[69] For a discussion of the limits of the regulations that may be imposed on attorneys consider Bates v. State Bar of Arizona, 433 U.S. 350 (1977). *See* Note, 68 J. Crim. L. & C. 624 (1977).

[70] Matter of Rouss, 221 N.Y. 81, 84, 176 N.E. 782, 783 (1917), *cert. denied*, 246 U.S. 661 (1918) (Rouss had acted as a go-between for money used to secure the absence of a witness during the trial of his client).

[71] The proceeding has been referred to, at most, as "quasi-criminal." In re Ruffalo, 390 U.S. 544, 551 (1968). However, the burden of proof is different from the normal criminal proceeding and the result is never imprisonment or fines. The Supreme Court acknowledged that disbarment was a "penalty" in In re Ruffalo, but only so far as procedural due process rights such as notice, hearing, and

rights, while an acknowledgment of the severity of the proceeding, does not apparently evidence a concern for the guarantee against self-incrimination.

The recent decision of *In re Daley*[72] reaffirmed both the non-criminal character of disbarment proceedings and the *Brown-Ullman* line of immunity cases. Despite contrary assurances from the district court, the federal prosecutor and the Attorney General prior to a witness giving testimony, the *Daley* court held that a witness could still be disbarred for testimony he gave under a grant of immunity.[73] John Daley[74] had given testimony as the principal witness in an extortion and income tax fraud case in exchange for a grant of immunity. At the trial, Daley testified that he had passed money to Charles Bonk in exchange for certain zoning variances.[75] The district court issued an immunity order which commanded the Illinois Attorney Registration and Disciplinary Commission not to use the testimony of Mr. Daley in any bar disciplinary proceeding.[76] After the trial of Charles Bonk, the State of Illinois began a disciplinary proceeding against Daley, and he brought an action in the federal district court to restrain the Commission from using his testimony given under the immunity grant.[77] The district court issued an order demanding that the state commission refrain from using the immunized testimony.[78]

The Seventh Circuit reversed the district court and authorized the Illinois Disciplinary Commission to use any and all prior testimony given by Daley regardless of whether an immunity order had been issued. The appellate court noted that the scope of the immunity statute[79] is limited to that which the constitution requires, and the constitution protects persons only in criminal proceedings. The court suggested that a disciplinary proceeding was only a method "to protect the integrity of the courts and to safeguard the interests of the public by assuring the continued fitness of attorneys licensed by the jurisdiction,"[80] as opposed to a criminal proceeding which was meant to "redress criminal wrongs by imposing sentences of imprisonment, other types of detention or commitment, or fines."[81] The court rejected the argument that the information had been coerced from Daley, because the immunity protection effectively replaced the fifth amendment by providing that no *criminal* penalty could result. The court determined that there could be no coercion, because the state has a complete right to every man's testimony within the boundaries of the fifth amendment.[82] Only the constitutional guarantee against self-incrimination prevents the government from demanding testimony, thus the granting of immunity "effectively removed the taint of criminality from his testimony, as well as any valid reason for assertion of the privilege."[83]

In re Daley demonstrates two important tendencies of the courts addressing disbarment. First, the court implicitly adopted the reasoning of *Ullman*[84] and *Brown*[85] that fifth amendment protection ex-

specificity of charges are concerned. The case was not unique in this regard as Schware v. Board of Examiners, 353 U.S. 232 (1957), also stands for the proposition that bar admission should be subject to due process guarantees. *See* 1 DAVIS, ADMINISTRATIVE LAW § 7.18, at 494 (1958).

[72] 549 F.2d 469 (7th Cir. 1977), U.S. *cert. denied.*

[73] *Id.* at 482. This decision may have very telling implications on the entire immunity area of the law because the Seventh Circuit held that the grant of immunity and promise not to prosecute by the federal attorney can not go beyond the guarantee of "no criminal prosecution." Any promise by the government to take other action can be voided by a later court. This result may well lead to a reduction in the number of persons who will be willing to accept the immunity grant. Given that the grant is often used as a bargaining tool by the government with a potential defendant, the defendant may, subsequent to In re Daley, choose to accept a contempt citation and risk dismissal from the bar, rather than testify about an illegal act virtually guaranteeing dismissal from the legal profession. It is unclear whether the federal attorneys would even attempt to seek a contempt citation if the person refused to testify. The failure to be able to persuade one member of the group of criminals to testify might well end the entire prosecution, and the contempt citation might not be worth the effort.

[74] A side-light of this case is the fact that Mr. Daley is a cousin of the late Chicago mayor, Richard J. Daley. He was granted immunity in United States v. Bonk, Crim. No. 75 C.R. 88 (N.D. Ill., June 6, 1975) (jury trial) (not guilty) (indicted Feb. 13, 1975).

[75] 549 F.2d at 473.

[76] The substance of the order stated that: "It is further ordered that no testimony of the witness, John Daley, compelled under this order as above may be used in any administrative proceeding, disciplinary committee, any bar association or state Supreme Court, in conjunction with any professional disciplinary proceeding or disbarment." In re John Daley, Grand Jury No. 71-3567 (N.D. Ill., July, 1974), *quoted at* 549 F.2d at 473.

[77] 549 F.2d at 473.

[78] *Id.* at 474.

[79] 18 U.S.C. §§ 6001-03 (1970). *See supra,* note 3.

[80] *Id.* at 475.

[81] *Id.*

[82] *Id.* at 481. *See, e.g.,* Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961).

[83] 549 F.2d at 481.

[84] 350 U.S. 422 (1956).

[85] 161 U.S. 591 (1896).

tends only to criminal prosecutions.[86] Secondly, the court adopted the Cardozo position[87] that bar disciplinary proceedings are not criminal proceedings. The suggestion that bar proceedings are non-criminal is essential to the findings of the various courts; yet, it deserves much closer scrutiny when it is applied to use of immunized testimony than it has gotten thus far by the courts.

Dismissal of an attorney is "to protect the court and public from the official ministrations of persons unfit to practice."[88] Each state may set its own standards for admission to the bar, and each state undoubtedly requires certain intellectual and moral standards be met.[89] The Supreme Court has placed few constitutional requirements on these standards. Primarily, the standards must have a "rational connection with the applicant's fitness or capacity."[90] Procedural restrictions imposed by the Court include notice, an opportunity to be heard and judgment by a court of law.[91] While the proceeding must meet certain due process requirements, the Court has not defined the necessary quantum of proof or the exact nature of the offenses which will give rise to disbarment.

Spevack v. Klein,[92] at first glance, appeared to extend all the constitutional protections of a criminal trial to disbarment proceedings. In *Spevack* an attorney had been disbarred because he refused to testify without a grant of immunity from future criminal prosecution and the Court ordered his reinstatement.[93] The plurality[94] noted that "[I]n this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California,* 380 U.S. 609, the imposition of any sanction which makes assertion of the Fifth Amendment privilege costly."[95] The Court then ruled that an attorney could not be disbarred for invoking the fifth amendment.[96]

Arguably, the attorney who testifies under a grant of immunity is asserting his right to be protected by the fifth amendment. If he is subsequently disbarred, the use of the fifth amendment has been a hollow formality. Disbarment is swift and sure to follow his testimony, and regardless of the semantics, it will be viewed by him as punishment.

State courts, however, have not accepted this argument. In *In re Terrell Schwarz,*[97] the Illinois Supreme Court ruled that an attorney could be disbarred based on his immunized testimony because the proceeding was not criminal.[98] The court summarily dismissed *Spevack,* noting that the fifth amendment had not been extended to cover all portions of the disbarment proceeding in that decision. Because the respondent attorney was not being prosecuted criminally, he could not raise the fifth amendment as a bar to the use of his testimony.[99]

Similarly, in *Committee on Legal Ethics of West Virginia State Bar* v. *Graziani,* the Supreme Court of Appeals[100] of West Virginia ruled that a grant of immunity did not protect the witness' attorney from subsequent disbarment. The court noted that while disbarment proceeding was quasi-criminal,[101] it was not a "criminal proceeding" within the meaning of the fifth amendment.[102] The West Virginia court noted that it was not the fact that these acts were criminal that was determinative; rather, it was the fact that the acts complained of involved moral turpitude.[103]

However, while the proceeding itself may be characterized as civil,[104] that characterization is

[86] See notes 32-66 *supra* and accompanying text.

[87] *See* In re Rouss, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917).

[88] Segretti v. State Bar, 15 Cal. 3d, 878, 882, 544 P.2d 929, 933, 126 Cal. Rptr. 793, 797 (1976).

[89] *See* In re Kunkle, 218 N.W.2d 521 (S.D.), *cert. denied,* 419 U.S. 1036 (1974); RULES FOR ADMISSION TO THE BAR (West 1975); Comment, *Procedural Due Process and Character Hearings for Bar Applicants,* 15 STAN. L. REV. 500 (1963).

[90] Schware v. Board of Examiners, 353 U.S. 232, 239 (1957).

[91] In re Ruffalo, 390 U.S. 544 (1968).

[92] 385 U.S. 511 (1967).

[93] *Id.* at 519. The *Spevack* Court explicitly overturned Cohen v. Hurley, 366 U.S. 117 (1961). 385 U.S. at 514.

[94] Joining Mr. Justice Douglas, the author of the Court's opinion, were Chief Justice Warren, Mr. Justice Black and Mr. Justice Brennan. Mr. Justice Fortas wrote a concurrence. Mr. Justice Harlan wrote a dissenting opinion joined by Mr. Justice Clark and Mr. Justice Stewart.

[95] 385 U.S. at 515.

[96] *Id.* at 519.

[97] 51 Ill. 2d 334, 282 N.E.2d 689, *cert. denied,* 409 U.S. 1047 (1972).

[98] *Id.* at 338.

[99] *Id.*

[100] 200 S.E.2d 353 (W. Va. Ct. App.), *cert. denied,* 416 U.S. 995 (1972).

[101] *Id.* at 355. *See* In re Ruffalo, 390 U.S. 544 (1966). As the Court noted: "Disbarment, designed to protect the public, is a punishment or penalty imposed on a lawyer. . . . He is accordingly entitled to procedural due process which includes fair notice of the charge." *Id.* at 550.

[102] *Graziani,* 200 S.E.2d at 355.

[103] *Id.* at 357.

[104] Zuckerman v. Greason, 20 N.Y.2d 430, 231 N.E.2d 718 (1967).

not important.[105] What is important is whether the proceeding "is one which may result in sanctions being imposed upon a person as a result of his conduct being adjudged violative of the criminal law."[106] While the general standard would seem to allow the imposition of disbarment for immunized testimony, this standard, as adopted in *Daley* and other cases, fails to take into account the realities of disbarment. It is the utmost in disgrace for the attorney and eliminates his livelihood.[107] Disbarment easily could be a more severe penalty than the lengthiest imprisonment.[108]

The criminality should draw not from the proceeding, but from the punishment that is exacted. Even Judge Sprecher, the author of the *Daley* opinion, suggested that a criminal sanction is best defined as something that is of "essence penal."[109] Several doctrines of punishment that are generally recognized by the courts could be applied to argue that a disbarment proceeding, based on immunized testimony, is a criminal proceeding which should be subject to fifth amendment prohibitions.

First, the imposition of disbarment is clearly the imposition of an affirmative disability on the person disbarred. The attorney's opportunities are limited after disbarment. By being ordered never to practice law, the disbarred attorney is, in effect, affirmatively restricted. The Supreme Court apparently accepted this argument in *Ex Parte Garland.*[110] There, the Court addressed the issue of whether a post-Civil War oath imposed by some states violated the presidential pardon of all Confederate soldiers. The oath required all attorneys to declare that they had not served in the Confederacy.[111] Refusal to take the oath resulted in disbarment for the attorney involved. In disallowing such oaths, and in reinstating the attorney to the bar, the Court concluded that, "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."[112] Since the oath requirement and subsequent disbarment was punishment, it violated the presidential pardon. Similarly, in *Spevack* the removal of the attorney for invoking his fifth amendment protection was characterized as a penalty.[113]

To impose disbarment is, under the *Garland* ruling, to impose an affirmative disability on the attorney. Such a disability is a penalty, or could be a penalty, and should therefore be protected by the constitutional guarantees of the fifth amendment.

Also, the disciplinary action taken by the bar association or state court is always taken pursuant to a written code[114] and surely, the fifth amendment did not contemplate the imposition of criminal penalties only pursuant to criminal codes. On the contrary, the Supreme Court has repeatedly looked beyond the criminal codes to call something a criminal punishment.[115] For instance, in *Kennedy v. Mendoza-Martinez,*[116] the Court listed at least seven

[105] The particular characterization of a proceeding as civil or criminal is purely a matter of convenience. If the result of a proceeding is criminal, then it will be treated as a criminal proceeding. If the result of a proceeding is civil, then it must be treated as a civil proceeding. *Daley,* 549 F.2d at 474. *See* In re Gault, 387 U.S. 1, 50 (1967).

[106] *Daley,* 549 F.2d 474.

[107] The importance of respect by the public for the legal profession is best noted in the "Code of Professional Responsibility."

> But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction.

AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY, Preamble (1975). Thus, even the Bar Association itself acknowledges that disbarment is a most severe penalty.

[108] A comparable situation occurred in Campbell Painting Corporation v. Reid, 392 U.S. 286 (1968), where the Supreme Court affirmed its prior holdings that a corporation had no fifth amendment privilege. Justice Douglas, in dissent, noted that loss of financial livelihood was as severe a restriction as any penalty. 392 U.S. at 291-92 (Douglas, J., dissenting). Clearly, if a direct imposition of a fine for a criminal act would be considered a penalty, then a removal of the right to make money should be considered a penalty.

[109] 549 F.2d at 475.

[110] 4 Wall 333 (1866).

[111] *Id.* at 381.

[112] *Id.* at 377. The Court also stated that, "to exclude him [Garland], by reason of that offence, from continuing in the enjoyment of a previously acquired right, is to enforce a punishment for that offence not withstanding the pardon." *Id.* at 381.

[113] 385 U.S. 511, 515 (1967).

[114] AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY, Canon 1 (1975), provides, "A lawyer should assist in maintaining the integrity and competence of the legal profession." The Disciplinary Rules for the first Canon provide that, "DR 1-102 Misconduct. A lawyer shall not:... (3) Engage in illegal conduct involving moral turpitude. (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." It is through this canon and disciplinary rule that violations of criminal statutes are punished in state bar proceedings.

[115] A fine compilation of the cases which have imputed criminality to a proceeding otherwise considered civil is given in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

[116] 372 U.S. 144 (1963).

factors which might lead a reviewing court to consider a certain action penal[117] and these factors included a question as to whether the sanction imposed an affirmative disability. In a society with multiple levels of government and a plethora of enforcement agencies and statutes, the Court recognized that it would be unreasonable to suggest that criminal penalties are meted out only by the courts enforcing criminal codes. The disbarment proceeding, by imposing an affirmative disability on the attorney, is of essence penal and should be within the fifth amendment's protection.[118]

Secondly, the intent of the disciplinary codes seems to fall within our general understanding of deterrence.[119] Where the predominant intent is deterrence, the discipline exacted can be characterized as a penalty.[120] The clear intent of a disciplinary proceeding is not only to protect the courts from this one person; it is also intended to deter others from engaging in such conduct in the future. For example, prior to *Bates v. State Bar of Arizona,*[121] a state ban on advertising acted as a continuing restraint on attorneys in their day to day practice of law.[122] The fact that any attorney who advertised might have been penalized by the state bar association surely had something to do with the deterrence. Continued obedience to the Code of Professional Responsibility is at least in part due to attorney awareness of the potential sanctions. Again, while the label may suggest that a bar disciplinary proceeding is "civil," the realities suggest that it is much more. Its impact is to deter conduct, and it therefore can be considered a penalty.

Thirdly, and perhaps most importantly, the sanctions which are imposed on attorneys subsequent to their giving immunized testimony are sanctions imposed for violations of the criminal law. In *Maryland State Bar Association, Inc. v. Sugarman,*[123] the appellant was disciplined for his participation in a scheme to avoid federal income taxes. The scheme was clearly a violation of federal law.[124] In *Committee on Legal Ethics of West Virginia State Bar v. Graziani,*[125] the appellant was specifically accused of conspiring to give a bribe. That offense would, again, have been a violation of the federal criminal law.[126] In *In re Schwarz,*[127] the petitioner had also given bribes which would have violated federal anti-bribery statutes.[128] Finally, in *In re Daley*[129] the petitioner faced charges regarding his criminal conduct in acting as the go-between for passing bribe money to the judge.[130] Thus, even if one suggests that the disbarment proceeding is not created to enforce the criminal law, the result is that it does enforce it. The attorney is directly punished for his participation in a criminal act. The court system may not be looking to the criminal code in order to disbar the attorney, but it is nevertheless imposing a penalty for a criminal act.

The courts have argued that the person is not disbarred because the act is criminal; rather, he is disbarred because the act is indicative of bad character.[131] Of course, the action indicates "bad character," otherwise it would not be a criminal violation, but the criminal codes also penalize "bad character." The salient feature of both the disciplinary proceeding based on immunized testimony

[117] *Id.* at 168-69. That list included:

> [1] Whether the sanction involved an affirmative disability or restraint; [2] Whether it has historically been regarded as punishment; [3] Whether it comes into play only on a finding of *scienter*; [4] Whether its operation will promote the traditional aims of punishment—retribution and deterrence; [5] Whether the behavior to which it applies is already a crime; [6] Whether an alternative purpose to which it may rationally be connected is assignable for it; [7] Whether it appears excessive in relation to the alternative purpose assigned.

Id. at 168-69.

[118] It is perhaps too obvious to take note of, but the name of the proceeding is after all a "disciplinary proceeding." Surely its intent is reflected in its name—to mete out discipline.

[119] *See* 372 U.S. at 168.

[120] For a consideration of the concept of deterrence see Pell v. Procunier, 417 U.S. 817, 822 (1974); F. ZIMRING & G. HAWKINS, DETERRENCE (1973); van den Haag, *In Defense of the Death Penalty: a Legal-Practical-Moral Analysis*, 14 CRIM. L. BULL. 51, 59 (1978). For a discussion of economic factors and deterrence consider Comment, *Criminal Sanctions for Corporate Illegality*, 69 J. CRIM. L. & C. 40, 44-47 (1978).

[121] 433 U.S. 350 (1977).

[122] ABA, CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-101 (A)(1975). The ban on advertising was applicable to every attorney member of the ABA. The effectiveness of the ban as a deterrent to advertising was clearly implied in the invalidation of the Code provision by the Supreme Court. The provision had effectively cut-off advertising of fees and services for the general public. Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

[123] 273 Md. 306, 329 A.2d 1 (1974).

[124] *Id.* at 2. *See* 26 U.S.C. § 7201 (1970), "Attempt to Evade or Defeat Tax."

[125] 200 S.E.2d 353 (W. Va. Ct. App.), *cert. denied*, 416 U.S. 995 (1972).

[126] *Id.* at 354. 18 U.S.C. § 201 (1970).

[127] 51 Ill. 2d 334, 282 N.E.2d 689 (1972), *cert. denied*, 409 U.S. 1047 (1973).

[128] *Id.* at 335-36. 18 U.S.C. § 201.

[129] 549 F.2d 469 (7th Cir. 1977).

[130] *Id.* at 473. 18 U.S.C. § 201.

[131] *See, e.g.*, In re Rouss, 221 N.Y. 81, 116 N.E. 782 (1917).

and the criminal court proceeding, is the recognition that certain actions violate a written standard of conduct and are thus criminal. In emphasizing the purpose of beginning the action against the attorney, the courts have misapplied the law of punishment. The result of the disciplinary proceeding is the enforcement of a criminal law through a bar sanction. Such an action should be interpreted as nothing less than a criminal penalty.

If one can show that the action taken is tantamount to a criminal penalty, then there is not justification for a court refusing to apply fifth amendment protections to the proceeding which can lead to those sanctions. While it may be laudatory to protect the courts from the taint of allowing admitted criminals to practice law,[132] the expansion of the principles set down in cases such as *In re Daley* are frightening. A prosecutor bent on attacking someone could force that person to testify under a grant of immunity for an act which could not otherwise be proven.[133] That person might subsequently be spared a jail term, but lose his reputation and livelihood.

Potential Abuse: Licensure and State Contracting

The limitless use of immunized testimony outside the criminal courts may have far-reaching consequences. States have authority to issue licenses to nearly all professions, and the disclosure of criminal involvement may result in termination of that license. From barbers to doctors, state licensure can be a prerequisite to work.[134] New York alone licenses over three hundred occupations.[135] A survey of state codes shows that there are more than four thousand separate statutory provisions on occupational licensure.[136] Indeed, more and more professions are being licensed every year as lobbyists for these professions attempt to protect their area of expertise from possible encroachment.[137]

Recently, a court allowed the introduction of immunized testimony in an action to remove the registration certificate of an engineer.[138] The court noted in that case that immunity was not meant to go beyond criminal proceedings, and the licensure of an engineer was not such a criminal inquiry.[139] The analysis is clearly parallel to the analysis given the disbarment cases discussed earlier,[140] and there is no reason to believe that it could not be extended to cover all types of licensure proceedings.

There is a possibility that a licensure proceeding which attempts to use immunized testimony to establish criminality could be challenged for failure to show a need even to investigate or consider such conduct. As one court has stated, "[S]tandards for excluding persons from engaging in such commercial activities must bear some reasonable relation to their qualifications to engage in those activities."[141] For instance, a taxi license cannot be denied simply because of a disorderly conduct con-

[132] It is quite possible that there are other methods for proving attorney misconduct. A more vigorous policing of the legal profession is surely possible, along with a greater concern for the competency of those practicing. Perhaps it would be possible to build a case without the immunized testimony in the same fashion that a criminal court must look at evidence not derived from the immunized testimony. This approach, requiring the same standard for criminal court and disciplinary actions, would not entirely preclude disciplinary action, it would only require greater diligence on the part of the Bar Associations. *See* Kastigar v. United States, 406 U.S. at 461–62.

[133] In essence the prosecutor can make this a short cut for a full investigation. If he can force the testimony of a co-conspirator, while knowing that the co-conspirator will be severely punished by disbarment, then his choice will be clear cut. As noted earlier, see note 3 *supra*, the power of the prosecutor to grant immunity is virtually without limit.

[134] A state is not given complete leeway as to what it can and can not license. It is generally accepted that a state may not, for instance, license "common" occupations. *See* Dasch v. Jackson, 170 Md. 251, 268, 183 A. 534, 539 (1936). *See also* Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1884). Though it is difficult to set down a precise definition of "common" occupation, the most general criteria is that the occupation not involve a "threat to the public welfare." Dasch v. Jackson, 170 Md. 251, 268, 183 A. 534, 539 (1936).

[135] N.Y. Consolidated Laws (McKinney 1955) "Master Index D-L."

[136] Stacy, *Limitations on Denying Licensure to Ex-Offenders*, 2 Cap. U. L. Rev. 1 (1973).

[137] W. Gellhorn, Individual Freedom and Governmental Restraints 109 (1956).

[138] Childs v. McCord, 420 F. Supp. 428 (D. Md. 1976).

[139] *Id.* at 434.

[140] *See* notes 72–109 *supra* and accompanying text.

[141] Perrine v. Municipal Court, 488 P.2d 648, 97 Cal. Rptr. 320 (1971). The similarity between the licensure test and the fourteenth amendment equal protection test is striking. In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), the Court stated, "We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary ... ' and bears 'a rational relationship to a [permissible] state objective.' " *Id.* at 8. To the same effect is Graham v. Richardson, 403 U.S. 365 (1970). In *Graham*, the Supreme Court ordered states to provide aid to resident aliens who qualified under welfare laws. The Court stated, "Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis .... " *Id.* at 371.

viction during a campus socialist rally.[142] A California court overturned the refusal of a state to license a bookseller based on his criminal record.[143]

The problem with applying this general argument to the use of immunized testimony is, of course, that the admission by the witness that he has committed a criminal act is an admission of bad character. No court has yet said that moral character is never a legitimate criteria on which to deny or revoke a license. The general proposition that a state may examine moral character of applicants for licensure apparently goes unquestioned as to many licensed professions.[144]

There appears to be no barrier to the use of immunized testimony in any and all licensure proceedings. As long as those bodies may consider moral character in their licensure decisions, and as long as a penalty is not discerned from the proceeding, the states will be able to utilize otherwise immunized testimony.[145]

Another area of state control is the right to select contractors for state projects. The right to contract with the government can be put in serious jeopardy when an officer of a corporation testifies under a grant of immunity. In nearly every statute authorizing competitive bidding, there are words to the effect that the bid should go to the "lowest responsible bidder."[146] "Responsible" is defined as "going to the skill, judgment, and integrity"[147] and in Illinois a contractor must be "by experience and otherwise, capable of doing the work in a satisfactory manner."[148] Defining "satisfactory" and "integrity" is a task left to the discretion of the governmental unit involved. Surely those terms could be used to connote an absence from criminal activity.[149]

In *Trap Rock Industries, Inc. v. Kohl*,[150] the Supreme Court of New Jersey upheld the disqualification of a corporation from state contracting when it was disclosed that a corporate officer had been indicted for bribery. The indicated officer had not been convicted, nor was he the sole owner of Trap Rock Industries, Inc.[151] The court, however, agreed that even the appearance of a criminal doing work for the state was considered detrimental enough to allow the disqualification.[152] The bidders' interests, it was alleged, are always subordinate to those of the state.[153] The fact that this corporate officer was not the sole owner of the corporation was deemed irrelevant because the integrity of the officers and the corporation were, in the court's view, virtually inseparable. As the court noted, "the moral responsibility of a corporation is one and same with the moral responsibility of the individuals who give it direction."[154] Further, with regard to the relevancy of a criminal violation, the New Jersey court noted:

> It is settled that the legislative mandate that a bidder be "responsible" embraces moral integrity just as surely as it embraces a capacity to supply labor and materials .... The relevancy of moral responsibility is evident. It heads off the risk of collusive bidding. It assures honest performance. It meets the citizen's expectation that his government will do business only with men of integrity.[155]

While no cases have extended the *Trap Rock* rationale to an instance where immunized testimony is used to show criminal activity, the premise seems to carry over to those cases. If the immunized

[142] Kaufman v. Taxicab Bureau, 236 Md. 476, 204 A.2d 521 (1964).

[143] Perrine v. Municipal Court, 488 P.2d 648, 97 Cal. Rptr. 320 (1971).

[144] This general proposition draws its precedent from the 1898 case of Hawker v. New York, 170 U.S. 189 (1898). In that case the state denied a license to a doctor who had performed an abortion in 1878. He served a sentence of ten years in jail. In 1895 the state passed a law which made it illegal for anyone to practice medicine who had been convicted of a felony, and Dr. Hawker was fined for violating this prohibition. The Supreme Court upheld his conviction viewing the regulation as "prescribing the qualifications" for the practice of medicine—not a penalty. *Id.* at 200. As the Court said, "It is not open to doubt that the commission of crime, the violation of the penal laws of a State, has some relation to the question of character." *Id.* at 196. This automatic disqualification from the practice of medicine was considered a legitimate exercise of the state's power to protect the public health and welfare.

Recently, a few courts have questioned this absolute bar to ex-felons. Conviction of an offense, according to these courts, must bear some relation to the profession that is being considered. Kaufman v. Taxicab Bureau, 236 Md. 476, 204 A.2d 521 (1964).

[145] *See* notes 72-109 *supra* and accompanying text.

[146] *See, e.g.*, 24 ILL. REV. STAT. § 9-2-105 (West 1961). Federal contractors may also be disqualified from bidding, for "cause." 41 C.F.R. § 1-1.605-1(2) (1976).

[147] J.N. Futia Co. v. Office of General Services, 39 App. Div. 2d 136, 137, 332 N.Y.S.2d 261, 263 (1972).

[148] Panozzo v. City of Rockford, 306 Ill. App. 443, 449, 28 N.E.2d 748, 751 (1940).

[149] Trap Rock Industries, Inc. v. Kohl, 59 N.J. 471, 284 A.2d 161 (1971). *See also* Comment, *Criminal Sanctions for Corporate Illegality*, 69 J. CRIM. L. & C. 40, 55 (1978).

[150] 59 N.J. 471, 284 A.2d 161 (1971).

[151] *Id.* at 476, 284 A.2d at 163-64.

[152] *Id.* at 487, 284 A.2d at 170.

[153] *Id.* at 481, 284 A.2d at 166.

[154] *Id.* at 482, 284 A.2d at 166-67.

[155] *Id.* at 482, 284 A.2d at 166.

testimony demonstrates an involvement in criminal activity, then the same considerations of "integrity" would attach.

In *Lefkowitz v. Turley*,[156] the Supreme Court held that the New York laws disqualifying contractors whose officers refused to waive their fifth amendment rights, in effect "coerced" the contractors into speaking out.[157] The court held that the statement taken could not be introduced against the witness at a subsequent criminal proceeding.[158] The ability of a state to treat a corporation and its officers differently derives from the Supreme Court's decision in *Campbell Painting Corporation v. Reid*.[159] There, the Court reasoned that the fifth amendment could not be invoked to protect a corporation.[160] A contractor had been barred from state jobs after he refused to waive his fifth amendment privilege against self-incrimination.[161] The Court refused to consider the immense monetary loss that could result to the contractor from the disqualification to bid state jobs. That monetary loss could, of course, be just as severe a penalty for invocation of the fifth amendment as the direct loss of a job. The dissent argued quite strongly that such an imposition by the state was indeed a penalty.[162] As with disbarment, a consideration of whether the action taken is a penalty could result in a serious challenge to any disqualification based on immunized testimony.[163]

Recently, the State of Illinois has explicitly stated that persons who are granted immunity may have that immunized testimony used against them in a disqualification action by the state.[164] No challenge has yet been made of that statute, and given the *Daley* decision's[165] clear statement that a federal immunity grant can not bind a state proceeding,[166] it seems unlikely that such a challenge would succeed in the Seventh Circuit. This explicit statement of policy by the State of Illinois, however, clearly indicates that the action is not taken to guarantee an efficient and honest contractor. Rather, it is taken to punish the otherwise unpunished offender.[167] Such an explicit state policy might well lead to a crystallization of the real issue behind the use of immunized testimony—whether the use by a non-criminal agency is in effect punishment for a criminal act.[168] Ironically, the candor of the Illinois law may well prove its downfall.

Conclusion

It is clear that the fifth amendment's protection against self-incrimination now extends only to criminal proceedings. The *Brown* decision and its progeny leave little doubt as to the law's application to the criminal process. However, the actions taken by agencies against an immunized witness appear to be misuse of the constitutional doctrine. The actions taken based on immunized testimony often are no less than a criminal prosecution in the guise of an administrative hearing.

Even accepting the position of the Court with regard to the need to show a "criminal penalty," the expansion by lower courts allowing the use of immunized testimony seems unwarranted. Disbarment and other disciplinary actions by state bar associations fall within the accepted doctrines of penalties, and the courts should acknowledge that a penalty can be a criminal penalty even when generally intended to meet problems other than those addressed by the criminal law. This is especially true when one considers that several of the disbarment/immunized testimony cases involved criminal offenses.[169] Regardless of the underlying motivation, the result of disciplinary proceedings is often the enforcement of the criminal law.

The potential for continuing expansion of the use of immunized testimony exists in many other areas outside the courts. Both state licensure and contracting could utilize immunized testimony to the detriment of the immunized witness. These areas pose the same problems in determining what constitutes a penalty as does the disbarment proceeding. The abuse of the fifth amendment guar-

[156] 414 U.S. 70 (1973).
[157] *Id.* at 82–83.
[158] *Id.* at 85.
[159] 392 U.S. 286 (1968).
[160] *Id.* at 288–89.
[161] *Id.* at 287–88.
[162] *Id.* at 289–92 (Douglas, J., dissenting). *See also* Lefkowitz v. Turley, 414 U.S. 70, 83 (1973) where the Court acknowledged that loss of state contracts acted to coerce a confession from an architect.
[163] *See* notes 110–33 *supra* and accompanying text.
[164] Chicago Sun Times, Sept. 14, 1977, at 18, col. 1. In addition, the federal government has begun to exclude contractors *convicted* of bid rigging. Chicago Tribune, Feb. 6, 1978, at 1, col. 4.
[165] *Daley*, 549 F.2d 469.
[166] *Id.* at 482.
[167] The author of the Illinois bill has stated, "Just because the federal government gives immunity doesn't mean that the state government has to give it." Chicago Sun Times, Sept. 14, 1977, at 18, col. 5.
[168] This is, of course, the key element in determining the extent of fifth amendment protection. 549 F.2d at 474–75.
[169] *See* notes 123–30 *supra* and accompanying text.

antee was predicted in the 1800's, and the words of one judge as to the protections of the fifth amendment appear to be true even today:

> The oppression of crowns and principalities is unquestionably over, but the more frightful oppression of selfish, ruthless and merciless majorities may yet constitute one of the chapters of future history. In my opinion, the privilege against a criminal accusation, guaranteed by the fifth amendment, was meant to extend to all the consequences of disclosure.[170]

At the very least, it is time that the Supreme Court consider the current impact of *Brown* and *Ullman* on the unlimited use of immunized testimony by administrative agencies.

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[170] United States v. James, 60 F. 257, 265 (N.D. Ill. 1894).