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WITNESS IMMUNITY IN MODERN TRIALS: OBSERVATIONS ON THE UNIFORM RULE OF CRIMINAL PROCEDURE

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The constitutional battle over the proper scope of witness immunity has been stilled, momentarily quieted by the Supreme Court's decision in *Kastigar v. United States*.¹ The current struggle on the question has largely moved from the courts to the legislative arena, where lively controversy marks debates over pending legislation. Congress has a major overhaul of the federal criminal laws under consideration, including a comprehensive immunity provision.² Several states with existing immunity laws are reconsidering their provisions. In jurisdictions without such statutes, a good deal of enacting legislation has been introduced.³

At a time of widespread interest in immunity law revision, the attention of rule drafters appropriately may be directed to model statutes in the field. A new provision has been promulgated by the prestigious Commissioners on Uniform State Laws.⁴ In one Uniform Rule of Criminal Procedure, the Commissioners incorporate a suggested immunity law. The impact on legislative thinking no doubt will be substantial.

What form should any new immunity law take? *Kastigar* articulates only minimum standards. It merely resolves the question of what can be, not the harder question of what should be. Is "use" immunity more effectively administered than competing

patterns which embrace transactional immunity? Which approach best assists law enforcement, and which makes for fairer, more efficient justice? Such inquiries pose vital criminal law issues today. They will be considered in this article, with some discussion taking place in the context of the Uniform Rule on witness immunity. That rule provides an excellent vehicle for reviewing the proper scope of witness immunity, a most controversial topic, and it raises many other contemporary issues in the immunity field.

THE UNIFORM RULE AND HISTORICAL MILEPOSTS

Rule 732(b) of the Uniform Rules of Criminal Procedure provides that a witness who is ordered to answer a question over a valid claim of privilege "may not be prosecuted or subjected to criminal penalty . . . for or on account of any transaction or matter concerning which, in compliance with the order, he gave answer or produced information."⁵ By

⁵*Id.* The Uniform Law Commissioners created a Special Committee on Uniform Rules of Criminal Procedure. The chairman of this special committee pointed out that the rules were prepared by the committee, its reporters and staff director. The proposed legislation was approved by the Commissioners on Uniform State Laws in August, 1974, and is recommended for adoption by the states. The rule provides:

Rule 732. [Immunity.]

(a) Compelling production of information despite assertion of privilege. In any proceeding under these Rules, if a witness refuses to answer or produce information on the basis of his privilege against self-incrimination, the [district] court, unless it finds that to do so would not further the administration of justice, shall compel him to answer or produce information if:

(1) The prosecuting attorney makes a written request to the [district] court to order the witness to answer or produce information, notwithstanding his claim of privilege; and

(2) The [district] court informs the witness that by so doing he will receive immunity under subdivision (b).

(b) Nature and scope of immunity. If, but for this Rule, the witness would have been privileged to withhold the answer or information given, and he

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¹406 U.S. 441 (1972) (use immunity, as opposed to full transactional immunity, approved). The author does not imply that *Kastigar* has resolved all the constitutional issues in the field, and certain unanswered points will be developed later in this article. *Kastigar* does address itself to certain major questions, however, including especially the constitutionality of "use and fruits" immunity laws.

²S.1, 93d Cong., 2d Sess. § 3111 (1974).

³*See, e.g.*, H.B. 788, Mo. 78th Gen. Assembly, 1st Sess. (1975).

⁴UNIFORM RULES OF CRIMINAL PROCEDURE 732(b) (1974).

thus embracing the concept of transactional immunity, the Uniform Rule follows a long-standing American approach in this field.

The privilege against self-incrimination has deep roots in English and American history,⁶ and immunity laws represent an attempt to balance society's need for testimony with an individual's right to silence.⁷ American statutes dating to the mid-nineteenth century provided for broad transactional immunity.⁸ When Congress tried to narrow the scope in one enactment, the Supreme Court found the provision unconstitutional.⁹ This 1892 decision by the Court indicated that an immunity statute, in order to pass constitutional muster, must provide absolute immunity against future prosecution regarding the offense to which the question relates.¹⁰

complies with an order under subdivision (a) compelling him to answer or produce information, he may not be prosecuted or subjected to criminal penalty in the courts of this State for or on account of any transaction or matter concerning which, in compliance with the order, he gave answer or produced information.

(c) Exception for perjury and contempt. A witness granted immunity under this Rule may nevertheless be subjected to criminal penalty for any perjury, false swearing, or contempt committed in answering, failing to answer, or failing to produce information in compliance with the order.

⁶Comment, *The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of Kastigar*, 19 VILL. L. REV. 470, 471 (1974).

⁷United States v. Tramunti, 500 F.2d 1334, 1342 (2d Cir. 1974).

⁸The Compulsory Testimony Act of Jan. 24, 1857, ch. 19, §§ 1-3, 11 Stat. 155, provided for full and complete immunity from prosecution in connection with any fact or act communicated by the witness in compelled testimony. The protection was so wide that it sometimes resulted in "immunity baths," a witness immunizing himself by volunteering incriminating information in a formal proceeding. See Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1579 (1963) ("Most immunity acts grant immunity broadly. . ."). On the history of immunity grants, see Note, *Judicial Enforcement of Non-statutory "Immunity Grants": Abrogation by Analogy*, 25 HAST. L.J. 435, 443-50 (1974) [hereinafter cited as HASTINGS].

⁹Counselman v. Hitchcock, 142 U.S. 547 (1892) (invalidating statute which limited the scope of immunity by providing that compelled testimony could not be used as evidence in any criminal proceeding; the coerced witness remained subject to future prosecution if there was other evidence against him, but the Court found such "use" immunity to be too narrow). For an historical analysis of prior federal immunity legislation see Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 GEO. WASH. L. REV. 447, 554 (1954).

¹⁰Counselman v. Hitchcock, 142 U.S. at 586, discussed in Comment, *supra* note 6, at 474.

Congress quickly responded to the idea advanced in the Court's opinion. Consistent with the judicial observation that immunity should be transactional, Congress passed the Compulsory Testimony Act of 1893.¹¹ This Act returned immunity to the pattern encouraged by the Court. The Compulsory Testimony Act dealt with proceedings under the Interstate Commerce Act, and protected witnesses from the threat of criminal prosecution in connection with matters arising out of their required testimony. Providing immunity for any transaction "concerning which he may testify," the Act became a prototype for numerous federal immunity statutes enacted by Congress up until the 1970 Crime Control Act.¹² It influenced state enactments as well.¹³

THE REAPPEARANCE OF USE IMMUNITY

Transactional immunity had become the regular pattern for immunity in federal legislation. In 1964, however, the Supreme Court decided *Murphy v. Waterfront Commission*.¹⁴ Apparently prompted by certain language contained in that opinion, Congress reintroduced, after a lapse of some eighty years,¹⁵ "use" immunity into federal legislation in the 1970 Crime Control Act. Section 6002 of the Crime

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

¹²UNIFORM RULES OF CRIMINAL PROCEDURE 732(b), Comment A (1974).

¹³For state patterns see note 65 *infra*.

¹⁴378 U.S. 52 (1964). *Murphy* held that where a defendant is compelled to answer questions about a crime in one jurisdiction, a second jurisdiction may not use his answers or the "fruits" of same to prosecute him. However, the second jurisdiction might prosecute if other evidence of the crime was available there. However, the *Murphy* Court did not address itself to the scope of prosecution in the immunizing jurisdiction, this being the question treated in the 1970 Crime Control Act at the federal level. Comment, *supra* note 6, at 475. See HASTINGS, *supra* note 8, at 461 (effect of *Murphy* was to create an exclusionary rule based on the fifth amendment which operates as a complete bar to use of the compelled testimony by any jurisdiction).

What if different immunity standards apply? Suppose the compelling state granted transactional immunity, while the federal government follows the "use/derivative use" pattern. May the federal government prosecute or is it bound to honor the complete bar imposed by the state? See *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964); *People v. Gentile*, 47 App. Div. 2d 930, 367 N.Y.S. 2d 69 (1975) (although New York grants full transactional immunity, it need not insure federal transactional immunity to a witness).

Murphy ordained no prosecution by federal authorities on evidence gathered under a state grant of immunity. The other side of the coin was mentioned in *United States v. Watkins*, 505 F.2d 545 (7th Cir. 1974), which observed that states are similarly bound when an immunized witness has testified in a federal proceeding.

¹⁵See note 12 *supra*.

Control Act provided that no testimony compelled under a court order, including information derived therefrom, could be used against a witness in a criminal case.¹⁶ However, the witness could be prosecuted for the crime he was required to talk about on the basis of other, independent evidence.

In view of its own prior opinions on witness immunity as well as conflicting lower federal court decisions on the constitutionality of section 6002,¹⁷ the Supreme Court reviewed that section in *Kastigar v. United States*.¹⁸ *Kastigar* involved witnesses who had been granted immunity and were ordered to answer questions by the United States District Court. They refused. The court held them in contempt. The witnesses claimed that the immunity they had been granted under section 6002 was not coextensive with their privilege against self-incrimination. The Supreme Court granted certiorari to resolve the important question whether testimony may be compelled by granting immunity from the use of compelled testimony and evidence derived therefrom ("use and derivative use" immunity), or whether it is necessary to grant immunity from prosecution for offenses to which compelled testimony relates ("transactional" immunity).¹⁹

In resolving this question, the Court touched upon the critical need for witness immunity laws:

¹⁶18 U.S.C. § 6002 (1970). It has been argued that the term immunity may not be technically applicable in federal practice today, especially after the repeal of the Act of June 19, 1968, Pub. L. No. 90-351, § 802, 82 Stat. 216 (repealed by 18 U.S.C. § 6001 *et seq.* (1970), repeal effective four years after the effective date of the later act, *i.e.*, Dec. 14, 1974). Thornburgh, *Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture" or "A Rational Accommodation?"* 67 J. CRIM. L. & C. —, 2 (1976) [hereinafter cited as Thornburgh]. However that may be, when referring to the protection offered a witness under 18 U.S.C. § 6002 (1970) the term immunity has obtained to popular usage as well as employment generally in legal and judicial circles. See Bauer, *Reflections on the Role of Statutory Immunity in the Criminal Justice System*, 67 J. CRIM. L. & C. —, 3 n.24, 4, 5, 13 (1976) [hereinafter cited as Bauer]. In addition, the term appears in the caption to 18 U.S.C. § 6002 (1970). Thus, it will be used in this article, as it has been by other writers in this symposium. See, *e.g.*, Thornburgh, *supra*, at 5.

¹⁷*Compare* Bacon v. United States, 446 F.2d 667 (9th Cir. 1971), *vacated*, 408 U.S. 915 (1972), *with In re Korman*, 449 F.2d 32 (7th Cir. 1971), *rev'd*, 406 U.S. 952 (1972). In another action Leslie Bacon attacked her detention, claiming she was improperly taken into custody as a material witness. Bacon v. United States, 449 F.2d 933, 939 (9th Cir. 1971) (citing this author as to the material witness point).

¹⁸406 U.S. 441 (1972).

¹⁹*Id.* at 443.

The existence of these [immunity] 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 offenses. Congress included immunity statutes in many of the regulatory measures adopted in the first half of this century. Indeed, prior to the enactment of the statute under consideration in this case, there were in force over 50 federal immunity statutes. In addition, every State in the Union, as well as the District of Columbia and Puerto Rico, has one or more such statutes. The commentators, and this Court on several occasions, have characterized immunity statutes as essential to the effective enforcement of various criminal statutes. As Mr. Justice Frankfurter observed, speaking for the Court in *Ullmann v. United States*, 350 U.S. 422 (1956), such statutes have "become part of our constitutional fabric." *Id.*, at 438.²⁰

The Court then turned to the question of whether a constitutionally sound immunity statute must embrace the complete immunity standard recognized in the Supreme Court's 1892 decision in *Counselman v. Hitchcock*.²¹ The *Kastigar* Court decided that the absolute immunity language of *Counselman* was unnecessary to the Court's decision in that case, was not binding authority, and that "use/derivative use" immunity could be incorporated in federal laws. Section 6002 was constitutionally unassailable. In approving that section, however, the Supreme Court warned that heavy burdens must rest upon prosecutors seeking to prosecute witnesses who have been compelled to testify. In such later prosecutions for crimes related to the witness' testimony, there must be a showing that the government's evidence is untainted by the preceding compelled testimony. The Court's view in this regard has created intriguing developments in subsequent litigation. The government carries a distinct burden: it may proceed only on independent evidence. The view of the Court is stated:

This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

... One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of

²⁰*Id.* at 446-47 (footnotes omitted).

²¹See note 9 and accompanying text *supra*.

proving that all of the evidence it proposes to use was derived from legitimate independent sources.²²

ADMINISTERING THE KASTIGAR STANDARD: RECENT DEVELOPMENTS

It has been suggested that a prosecutor who gathers evidence under a grant of immunity will find little difference between use and transactional immunity.²³ There is substantial difficulty imposed on the prosecutor in demonstrating that the government's case springs entirely from evidence derived independently of the immunized testimony. Illustrative is the case of *United States v. Strachan*.²⁴ There, the U.S. Attorney sought to prosecute an individual to whom use immunity had been granted. The government ultimately dismissed the prosecution. The *Strachan* case was one of the few where a prosecutor tried to prosecute someone in these circumstances. Apparently the difficulty of making the requisite showing of non-utilization of immunized testimony impedes most potential prosecutions.²⁵

²² 406 U.S. at 460-62. On the measure of proof necessary to negate "taint" see Comment, *supra* note 6, at 486, which argues for the applicability of a heavier standard than mere preponderance of the evidence.

For Supreme Court cases after *Kastigar* in which an immunity question was involved see *United States v. Wilson*, 421 U.S. 309 (1975); *Lefkowitz v. Turley*, 414 U.S. 70 (1973). The *Wilson* decision is discussed in Recent Developments, 13 AM. CRIM. L. REV. 271 (1975). In note 3 of the *Wilson* decision the Supreme Court refers to the scope-of-immunity problem without relitigating that issue. *Wilson*, originally convicted of bank robbery on a guilty plea, had not preserved the issue for review. *United States v. Wilson*, 488 F.2d 1231, 1233 (2d Cir. 1973), *rev'd on other grounds*, 421 U.S. 309 (1975). In the *United States* Court of Appeals *Wilson* had urged that the scope of immunity provided under 18 U.S.C. § 6002 (1970) was constitutionally insufficient because "use" immunity under the statute did not prevent the employment of *Wilson's* trial testimony (given at an accomplice's trial) when *Wilson* came up for his own sentencing on the bank robbery conviction. McCormick suggests that the privilege may run through sentencing and until the time for direct appeal has expired. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 121, at 256-57 (2d ed. E. Cleary 1972).

²³ F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL, G. STARKMAN, CRIMINAL PROCEDURE 33 (Supp. 1975) [cited hereinafter as INBAU]. The authors of this text include prosecutors and law professors.

²⁴ Crim. No. 74-110 (D.D.C. 1975). The *Strachan* case had an interesting history. Prior to the dismissal, Judge Sirica inquired into the question of "uses made by the prosecutors of the immunized disclosures of Mr. Strachan." *United States v. Mitchell*, 384 F. Supp. 562, 563 (D.D.C. 1974). The *Strachan* dismissal order is noted in *United States v. De Diego*, 511 F.2d 818, 825 n.9 (D.C. Cir. 1975).

²⁵ INBAU, *supra* note 23. On the difficulties of prosecution see Thornburgh, *supra* note 16, at 18. Under one

Other procedural problems have arisen in connection with the "use/derivative use" standard. One issue which has vexed trial courts recently is the question of when to hold a "taint" hearing. In *United States v. De Diego*²⁶ a witness had testified under grants of immunity in Florida and California concerning his part in the conspiracy to enter the office of Daniel Ellsberg's psychiatrist, Dr. Lewis J. Fielding. The immunized testimony had come into the hands of federal authorities who later attempted to try him under a federal conspiracy indictment. *De Diego* moved to dismiss the federal indictment. He urged that the U. S. Attorney had not met the burden of establishing that the government's case was free of the taint of *De Diego's* prior testimony given under state immunity grants. After considering the motion, United States District Judge Gerhard Gesell dismissed the indictment.

The government appealed. On review, the court of appeals agreed with the trial court that "[o]nce immunity is shown, the prosecutor has the burden of demonstrating that its use of the immunized testimony has not tainted any aspect of the case up to indictment and will not do so during trial."²⁷ However, the order dismissing the indictment was reversed because of the trial court's failure to hold an evidentiary hearing on the question of taint. The reviewing court ruled that where a prosecutor claims independent evidence of a witness/defendant's involvement in a crime, the trial court should not dismiss the government's case without giving the prosecutor a hearing to prove lack of taint.²⁸ A strong rule was announced. The trial court has "no discretion" to order a summary dismissal.

The appellate court described the choices before a trial judge as follows:

A trial court faced with a pretrial motion to dismiss the indictment because of immunity granted by Federal or State Governments has basically four alternative procedures for determining whether or not the

proposal, prosecutors would be required to go through a certification procedure before a witness testifies, and in any subsequent prosecution of such a witness the government would be restricted to using only previously certified evidence. Note, *Standards for Exclusion in Immunity Cases After Kastigar and Zicarelli*, 82 YALE L.J. 171 (1972) [hereinafter cited as YALE L.J.], discussed in Thornburgh, *supra* note 16, at 19. On the minimal number of prosecutions following testimony coerced by "use" immunity see Bauer, *supra* note 16, at 15 n.86.

²⁶ 511 F.2d 818 (D.C. Cir. 1975).

²⁷ *Id.* at 821.

²⁸ *Id.* at 822.

prosecution's evidence is tainted: (1) it can hold a pre-trial evidentiary hearing; (2) it can hold a taint hearing during the trial as the questioned evidence is offered; (3) it can hold a post-trial hearing to determine taint; or (4) it can use a combination of these alternatives.²⁹

The hearing procedures suggested by the *De Diego* court appear to be well conceived. Apparently, however, other circuits have employed more summary alternatives in which the hearing deemed so necessary by *De Diego* was not required when the request for such relief is made by the accused. (In *De Diego* the government asked for the hearing.) The decision in *United States v. Thanasouras*³⁰ demonstrates the sometimes confusing course of the law. A witness testified before a special grand jury. Later he was indicted for a conspiracy around which several grand jury questions had centered. The defendant requested an evidentiary hearing, with the burden resting on the government to show the indictment was not tainted by the prior grant of "use" immunity. The trial court analyzed the questions which the government had put to the witness at the grand jury proceeding, found that the questions revealed a good deal of information obtained independent of the defendant's answers, and concluded that it was "clear from the government's questions that it had obtained considerable information about the defendant's alleged illegal activities from Frank Bychowski, an unindicted co-conspirator, prior to the defendant's immunized testimony."³¹ An evidentiary hearing was deemed unnecessary, and the defendant's motion was denied. The court stated:

Thus, the particular facts of the instant case do not necessitate an evidentiary hearing at this time as to whether the instant indictment was the product of an independent evidence source which is exclusive of any information or leads obtained from the defendant's immunized testimony. See, e.g., *United States v. Goodwin*, 470 F.2d 893 (5th Cir. 1973); *United States v. McDaniel*, 352 F. Supp. 585 (D.N.D. 1972). Under the peculiar circumstances and facts attendant to the instant indictment, the requested evidentiary hearing is not required in the interests of justice. To grant an evidentiary hearing in this case would only serve to allow the defendant "pre-trial discovery" which has already been denied by this Court.³²

Interpretation by the United States Supreme Court may well be in order to clarify the "when" and "whether" aspects of hearing procedures. Outside of the most exceptional cases, it would appear prudent to follow the lead of *De Diego* and to conduct an evidentiary hearing whenever the taint question appears. Protective orders could be adopted to safeguard from disclosure to the defendant any information which might threaten the safety of others.³³

WORTH THE EFFORT?

In grappling with the questions of hearing rights, applicable burdens of proof, and conflicting judicial interpretations, one question continues to recur: Are the attendant rules and procedures necessitated by "use" immunity worth the effort? In his dissent in *De Diego*, Judge McGowan concluded:

The rule of *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed. 2d 212 (1972), creates certain problems where, as here, two states and the federal government grant one conspirator immunity in order to force testimony against the other conspirators, that testimony is then either passed around or made public, and finally there is an attempt to try the immunized person jointly with the other conspirators. It is true that such a trial is not impossible, but where, as here, the prosecutor advises the court against severance and presses upon it only the alternative of what would surely have been a prolonged taint hearing claiming the energies of all the parties to the impending trial just before it was to get underway, I believe that the district judge has an inherent power to dismiss the indictment with prejudice; and I would affirm its exercise in this instance.³⁴

ceedings, see *United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). The *Braasch* case involved payoffs to Chicago police by tavern owners. The members of the police department who were involved claimed they had a right to be present at hearings granting immunity to several dozen bar owners. The court held they had no right to be present nor any right to obtain the identity of government witnesses by being furnished copies of orders granting immunity. 505 F.2d at 146. On other aspects of the *Braasch* case see Wolfson, *Immunity—How It Works in Real Life*, 66 J. CRIM. L. & C. —, 16-18, 20-21 (1976) [hereinafter cited as Wolfson].

³³ See similar ideas contained in other criminal procedure rules, such as the new sentencing procedures incorporated in 1975 amendments to FED. R. CRIM. P. 32(c) (3).

³⁴ 511 F.2d at 832. See the two-day hearing procedure described in *United States v. Mitchell*, 384 F. Supp. 562 (D.D.C. 1974).

Respecting the debate over "use" versus transactional immunity, one writer has suggested that "use" immunity may make a witness' testimony more credible, or perhaps seem so. See Thornburgh, *supra* note 16, at 5. A significant

²⁹ *Id.* at 823-24. For a collection of cases in which federal prosecutions have been attacked on the ground they were tainted by state-granted immunity see *id.* at 822 n.4.

³⁰ 368 F. Supp. 534 (N.D. Ill. 1973).

³¹ *Id.* at 537.

³² *Id.* On discovery in connection with immunity pro-

Occasionally, a defendant will be successfully prosecuted after having given immunized testimony. But even the majority of the court of appeals in *De Diego*, while reversing the case in favor of the government, suggested certain problems. The court's opinion noted that the same prosecutor's office involved in *De Diego* had recently undertaken to dismiss *United States v. Strachan*, a case "apparently similar in some respect to the one before us."³⁵ The court expressed hope that the prosecutor would review the charge against *De Diego* "in the light of his action in *Strachan*, if such a review is indicated."³⁶

If only a miniscule number of defendants may be successfully prosecuted after a grant of "use" immunity, is a change in the federal immunity pattern indicated? Put differently, is an ornate procedural and hearing network justified when "prosecutors say that there is little difference between use immunity and transactional immunity?"³⁷ One important question remains: If there is a certain similarity in the practical operation of both approaches, do any important considerations militate in favor of transactional immunity?

The drafters of the new Uniform Rule on witness immunity thought so, since they concluded that considerations of effective law enforcement dictated transactional immunity. The drafting committee

discussed the views of a committee member who had special expertise in the immunity area. This member maintained that some prosecutors prefer transactional immunity because the witness who is only granted "use" immunity is likely to tell less than one testifying under a transactional grant.³⁸ A related point had been made earlier when the 1970 Crime Control Act was debated. The then-Chairman of the Federal Deposit Insurance Corporation opposed "use" immunity. Concerned that section 6002 of the pending 1970 Crime Control Act might be construed as replacing the transactional immunity provision of the Federal Deposit Insurance Act, the Chairman forecast that such a result would "make it more difficult for the Corporation to obtain information from individuals that relates to the risks being assumed by the Corporation in insuring bank deposits."³⁹

³⁸UNIFORM RULES OF CRIMINAL PROCEDURE 732, Comment (Tent. Draft No. 2, 1973). Some other arguments made in the Uniform Rule discussion on behalf of transactional immunity include: (1) under a use immunity scheme, even though the compelled testimony is not used in evidence, knowledge of it better equips the prosecutor to probe the defendant's direct testimony; (2) if evidence is located by means of the coerced testimony, there is a general reluctance of courts to vigorously enforce the "fruit of the poisonous tree" doctrine; (3) analogizing immunized testimony to coerced confessions, and thereby excluding the witness' statements as well as the "fruits of the poisonous tree," provides inadequate protection when dealing with evidence secured under immunity grants. In connection with this last point the Supreme Court in *Kastigar* had cited *Harrison v. United States*, 392 U.S. 219 (1968), a confession case, to support its view that excluding the witness' testimony from further use as well as the "fruit of the poisonous tree" provided proper protection. The Comment to the Uniform Rule termed the analogy to confessions unsound. To dismiss a prosecution completely because a single policeman conducted, perhaps in haste, an unconstitutional interrogation would be a high price to pay for the constable's blunder. On the other hand, the rule drafters urge that the prosecutor granting immunity makes a calm and calculated judgment as to whether to grant it. In such circumstances, a ban on prosecution (where the immunity is transactional) occurs not as a result of blunder or happenstance but rather as the product of reasoned choice.

³⁹S. REP. NO. 617, 91st Cong., 1st Sess. 132-34 (1969). See Note, *Immunity from Prosecution and the Fifth Amendment: An Analysis of Constitutional Standards*, 25 VAND. L. REV. 1207, 1228 n.97 (1972).

In other cases, witnesses may occasionally face consequences more fearsome than jail. See Judge Bauer's discussion of witnesses who are threatened with death if they talk. Bauer, *supra* note 16, at 11. A witness may be understandably frightened by the prospect of talking, then being prosecuted and sent to the jail which houses the culprit he was forced to testify against. Again, if sent to another institution, friends of the initial defendant might be imprisoned in the witness' place of incarceration.

question remains: Isn't there a strong motivation for the witness to "shade" trial evidence in favor of the government in order to please a prosecutor who continues to hold the hammer of prosecution over his head? Indeed, isn't it human for a suspect/witness to "go overboard" in trying to help authorities who can still prosecute him under a "use" immunity scheme? As for the suggestion that such a witness might be prosecuted for perjury, a prosecutor's motivation to vigorously do so would seem diminished when the witness' greatest error was in advancing the government's case too zealously.

It has been urged that a disadvantage of transactional immunity is that a witness can shield himself from subsequent prosecution simply by mentioning pertinent past criminal acts in the course of giving immunized testimony. Thornburgh, *supra*, at 21. However, one major safeguard against witness abuse involves the principle of "responsiveness." If the witness' answer is not responsive to the question, which may be narrowly framed, immunity may properly be denied. *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472 (1972). See UNIFORM RULES OF CRIMINAL PROCEDURE 732(b), Comment D (1974). While this restriction on a witness' ability to abuse witness immunity may be circumvented, it appears to provide the government with a viable mechanism for limiting the problem. See YALE L.J., *supra* note 25, at 180.

³⁵511 F.2d. at 825.

³⁶*Id.*

³⁷See INBAU, *supra* note 23, and text accompanying note 23 *supra*.

As a former consultant in the field of legislative drafting, the author of this *Journal* article has encountered certain reactions similar to those disclosed in the preceding paragraph. While police and prosecutor opinions vary, there are some who maintain that complete immunity may be necessary in important cases to persuade a member of a criminal gang that the government is "playing fair." A critically needed witness will sometimes suffer contempt punishment rather than speak, unless he is assured that he will not be prosecuted after he talks. Of course, prosecutors frequently make informal arrangements of this kind by simply promising not to prosecute a witness who cooperates. But occasionally the witness wants something more. The desire for this "something more" might be a compelling motivation where the prosecutor is up for re-election. The prosecutor's vulnerability at the polls is a point of keen concern to the potential witness. If the "something more" desired by the witness can be given through transactional immunity, does the desirability of having it available suggest a need for it on the statute books? Some authorities think it does.⁴⁰ One commentator concluded the point this way:

The impact of *Kastigar* is still uncertain, but it has been suggested that an anomalous result might be expected. Quite possibly, section 6002, designed to achieve effective law enforcement against organized crime, may lead to precisely the opposite result. A witness may find no incentive to talk where he can still be prosecuted and may prefer the consequences of a contempt finding. Testimony in such a situation may lead to animosity on the part of compatriots and an accompanying fear on the part of the witness of adverse non-legal consequences. Without the added incentive inherent in the removal of all criminal sanctions, silence may indeed be golden.⁴¹

⁴⁰ See text accompanying notes 38-39 *supra*. There is, of course, an additional possibility. Some authorities may suggest that what has been said in the above text should cut in the direction of making two immunity sections available to the same prosecutor. Under such a pattern, the prosecutor could choose to invoke the "use" or "transactional" sections of an immunity law as the occasion demands. At least one state statute blends both use and transactional immunity language. IOWA CODE ANN. § 782.9 (Supp. 1975-76) (one portion of statute authorizes "immunity to prosecution"; another section provides that evidence given by a witness granted immunity shall not be used against him in any proceeding). One potential interpretation of such a statute is that an immunized witness cannot be prosecuted criminally, but can be pursued in a subsequent civil suit wherein he is protected only by use immunity.

⁴¹ Comment, *supra* note 6 at 495, citing Note, *Immunity and the Self-Incrimination Clause*, 2 AM. J. CRIM. L. 29 (1973); Note, *The Scope of Testimonial Immunity Under the Fifth Amendment: Kastigar v. United States*, 6 LOYOLA L.A.L. REV. 350 (1973); 48 WASH. L. REV. 711 (1973).

SELECTED TRIAL PROBLEMS

Practical trial questions occur in connection with the government's presentation of its case through witnesses who have been granted immunity. Because a witness has been immunized, is his testimony particularly vulnerable to a credibility attack? Is the grant of immunity a target for special attention in defense summation? Should the fact of immunity be singled out in the court's instructions?

The recent decision in *United States v. Demopoulos*⁴² gives qualified approval to special mention of immunity in the court's instructions to the jury. In his jury charge, the trial judge warned the jury that the testimony of an immunized witness "must be examined and weighed by the jury with greater care than the testimony of an ordinary witness."⁴³ The defendant asked the trial judge to instruct the jury that the testimony of an immunized witness "should be received with suspicion," and further requested that immunized government witnesses Boznos and Crispino be characterized as "informers" in the court's instructions. The trial court denied the first request as repetitive, a ruling

⁴² 506 F.2d 1171 (7th Cir. 1974), *cert. denied*, 420 U.S. 991 (1975).

⁴³ *Id.* at 1179. For related pattern jury instructions see 2 F. BAILEY & H. ROTHBLATT, COMPLETE MANUAL OF CRIMINAL FORMS, Form 60:9, at 482 (2d ed. 1974); 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS §12.02, at 255 (2d ed. 1970). In the *Demopoulos* case, the court further instructed the jury "that in weighing the testimony of each witness it should consider his relationship to the Government or the defendant and any interest that he had in the outcome of the case." The jury charge also described the scope and extent of immunity granted witnesses Boznos and Crispino under 18 U.S.C. § 6002 (1970). 506 F.2d at 1179. See *People v. Kress*, 284 N.Y. 452, 459, 31 N.E.2d 898, 901 (1940) (accomplice required promise of immunity for his testimony; court refers to this as one of the reasons why the statement was open to "gravest suspicion"; in such cases it is necessary, to warrant conviction of defendant, to have corroborative evidence independent of accomplice's testimony).

While some courts may give only the general credibility instruction when an immunized witness testifies, in others a special jury charge may be employed. In 1 E. DEVITT & C. BLACKMAR, *supra*, § 12.02, at 255 an illustrative instruction appears:

The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest, or by prejudice against defendant.

approved by the United States Court of Appeals. As to the "informer" request the reviewing court stated:

Boznos and Crispino were not informers, for they testified only when ordered to do so under grants of use immunity. In closing this matter, we cannot fault the trial judge for the inclusion of the following sentence in the immunity instruction:

However, the fact that this government witness was granted immunity also is not a justification under the law for your finding a defendant not guilty if you find that his guilt has been proven beyond a reasonable doubt from your consideration of the evidence.⁴⁴

Regarding the issue of final arguments, some latitude must be given defense counsel. It has been held that the defense is free to urge that an immunized accomplice who testified against his client may be selfishly seeking to protect himself (or another), as the inferences from the evidence in a particular case may suggest.⁴⁵ Of course, counsel is restricted to drawing inferences from the record and may not "testify" during closing argument. The appropriate limits of a jury argument in a criminal case have been considered in various trial standards, and the subject has been the object of comment in numerous appellate opinions.⁴⁶

Further, during the evidence-taking phase of the case the witness who testifies for the government is open to impeachment on matters demonstrating "bias, prejudice, interest, or the willingness of the witness to be unscrupulous in giving testimony."⁴⁷ Inasmuch as a witness' prior contacts with the government and the grant of immunity may affect his testimony, such subjects are generally treated as open for exposure on cross-examination.⁴⁸

⁴⁴506 F.2d at 1180.

⁴⁵United States v. DeLoach, 504 F.2d 185, 187, 190 (D.C. Cir. 1974). For a suggested form of final argument by defense attorneys see Wolfson, *supra* note 32, at 39-41.

⁴⁶See Carlson, *Argument to the Jury and the Constitutional Right of Confrontation*, 9 CRIM. L. BULL. 293 (1973) (collecting cases and citing ABA standards).

⁴⁷Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 CORNELL L. Q. 239, 253 (1967). See M. LADD & R. CARLSON, CASES AND MATERIALS ON EVIDENCE 203, 213 (1972). See also *People v. Brunner*, 32 Cal. App. 3d 908, 108 Cal. Rptr. 501 (1973) (promise of immunity does not make accomplice's testimony inadmissible, but where immunity agreement depends on conviction of person against whom testimony is sought, possibility of false evidence is too great and prosecutors may not bargain for such a result).

⁴⁸On the latitude allowed a cross-examiner to question and impeach in a criminal case see *Davis v. Alaska*, 415 U.S. 308 (1974) (attack on a witness' credibility may be

While recognizing the right of defendants to attack the credibility of immunized witnesses, at the same time it should be noted that the immunized witness operates under constraints designed to insure the reliability of his testimony. The witness is himself subject to later prosecution for perjury. In an effort to insure accurate trial testimony from immunized witnesses, the Uniform Rule incorporates a long accepted approach in immunity legislation by providing: "A witness granted immunity under this Rule may nevertheless be subjected to criminal penalty for any perjury, false swearing, or contempt committed in answering, failing to answer, or failing to produce information in compliance with the order."⁴⁹

Suppose the witness who is testifying at trial is not a former associate (turned state's evidence) of the defendant, but is instead the defendant himself. Special impeachment problems are raised when the defendant is confronted with a prior trial transcript. The situation comes up this way: If the defendant had previously testified in a related proceeding under a grant of "use" immunity by appearing as a government witness against a co-conspirator, he may himself be charged with a similar offense. Under the "use" immunity statutes the transcript of his prior testimony is not usable as an admission against the defendant in the government's case-in-chief. But if the accused takes the stand in his own defense, is the prior transcript usable for another purpose, namely to impeach his later testimony? Some commentators have suggested that statements compelled under an immunity grant

made by revealing possible biases, prejudices, or ulterior motives of the witness). The preceding text and footnote references deal with the law applicable to cross-examination. Tactics and techniques of examination are reviewed in Wolfson, *supra* note 32, at 23, 26-38.

⁴⁹Rule 732(c), *supra* note 5. The provision was taken from the older MODEL STATE WITNESS IMMUNITY ACT (1952). On using the record of testimony given under an immunity grant to prosecute for perjury, as well as a description of the penalties for giving false testimony, see *Taylor v. United States*, 509 F.2d 1349 (5th Cir. 1975) (compelled testimony before grand jury cannot be used against witness unless he commits perjury before grand jury or otherwise fails to comply with immunity order); *United States v. Tramunti*, 500 F.2d 1334 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974) (immunized grand jury testimony usable in perjury prosecution); *In re Baldinger*, 356 F. Supp. 153 (C.D. Cal. 1973); Application of United States Senate Select Committee, 361 F. Supp. 1282 (D.D.C. 1973); *United States v. Doe*, 361 F. Supp. 226 (E.D. Pa.), *aff'd*, 485 F.2d 682 (3d Cir. 1973); Note, *Statutory Immunity and the Perjury Exception*, 10 CAL. W.L. REV. 428 (1974); Note, *Immunity Statutes and the Constitution*, 68 COLUM. L. REV. 959, 972-73 (1968).

may be employed to impeach the defendant when those statements are in direct conflict with his in-court testimony.⁵⁰ However, other cases, such as *United States v. Hockenberry*,⁵¹ support the opposite conclusion.

Hockenberry negates the claimed right of the government to impeach an accused who is on trial for one crime (crime A) by using immunized testimony taken from him in connection with a separate crime (crime B). The court held that such compelled admissions of wrongdoing obtained under a grant of immunity could not be used later to discredit the witness' effort to defend himself against a charge of some other wrongdoing.⁵² The court found the rule of *Harris v. New York*⁵³ to be inapplicable. *Harris* allowed impeachment of a defendant by prior inconsistent statements taken in violation of the *Miranda* rule. Distinguishing *Harris* as a delineation of the limits of protection afforded by the *Miranda* procedural requirements, *Hockenberry* refused to allow impeachment from the transcript of immunized testimony.

Arguably unresolved by *Hockenberry* was the question of whether a witness initially questioned about crime A under a grant of "use" immunity can be charged and confronted with his own statements upon a subsequent trial for crime A. If it does not answer that question, *Hockenberry* certainly militates against such a result. Another authority which by analogy suggests an inability to use immunized testimony for impeachment purposes is new rule 11(e) (6) of the Federal Rules of Criminal Procedure, entitled "Inadmissibility of Pleas, Offers of Pleas, and Related Statements." The rule, which became effective August 1, 1975, insulates from use for collateral impeachment purposes those statements made by an accused while offering a guilty plea. Rule 11(e) (6) provides:

Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in

any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.⁵⁴

One situation contemplated under the foregoing rule involves statements made by a defendant who is attempting to plead guilty. In such a case, the defendant must demonstrate a factual basis for the guilty plea. However, the judge may rule that the offered plea is not understandingly made, refuse to accept it, and set the case for trial. The factual statements made by the accused during the unsuccessful attempt to plead guilty may later conflict with the account of the crime which he gives during the trial. Just as rule 11(e) (6) makes these plea-related statements inadmissible, so also it may be urged that immunized testimony should not be allowed for impeachment. At the very least, federal rule 11(e) (6) demonstrates that *Harris v. New York*⁵⁵ will not be relentlessly applied in all situations to allow impeachment by prior contradictory statements. Coupling the principle recognized in rule 11(e) (6) with the *Kastigar* language that use immunity prohibits prosecutorial authorities from using the compelled testimony in any respect,⁵⁶ one might reasonably conclude that prior immunized testimony is not available to impeach a criminal defendant.

A final trial problem concerns the witness who initially refuses to testify because of potential self-incrimination, and then, when immunized, continues

⁵⁴ FED. R. CRIM. P. 11(e)(6) (emphasis added).

⁵⁵ *Id.* On the effect of rule 11(e)(6) and the bar imposed against using plea-related statements to impeach, see M. LADD & R. CARLSON, CASES AND MATERIALS ON EVIDENCE (Supp. 1976); J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 410-6, ¶ 410 [01] (1975).

⁵⁶ 406 U.S. at 453. In addition, *Harris v. New York* allows use of an arrested person's voluntary incriminating statements to impeach. In contrast, frequently missing from immunized testimony is any aspect of voluntariness.

In connection with the suggested conclusion that immunized testimony is unavailable for impeachment, a further question must be raised. May the prosecutor make non-evidentiary use of such testimony, either in forming subsequent charges against the witness or in planning cross-examination at trial? While *United States v. McDaniel*, 449 F.2d 832 (8th Cir. 1971), cert. denied, 405 U.S. 992 (1972), indicates a negative answer, it was a pre-*Kastigar* case, and some commentators view it as being undercut by *Kastigar*. See Comment, *supra* note 6, at 479-80.

⁵⁰ See, e.g., Comment, *supra* note 6, at 485, citing *Walder v. United States*, 347 U.S. 62 (1954). See also *Dershowitz & Ely, Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1223 (1971); Comment, *Impeachment, Use Immunity and the Perjurious Defendant*, 77 DICK. L. REV. 23, 46 (1972).

⁵¹ 474 F.2d 247 (3d Cir. 1973).

⁵² *Id.* at 250. See Comment, *supra* note 6, at 484.

⁵³ 401 U.S. 222 (1971).

to resist because of the risk of *foreign* prosecution. This problem might come up under either transactional immunity statutes or use immunity schemes. Even with a national grant of immunity, the threat of foreign prosecution may be very real in certain cases. If the fifth amendment protects a witness from incriminating himself under foreign laws, an immunized witness might still refuse to testify, pointing to the incapacity of any immunizing authority to protect him completely. Of course, the problem will not arise in the ordinary felony. But some conduct may transgress both domestic and foreign laws, and thus raise the issue of foreign prosecution.

This question has been largely sidestepped by the courts. Raised in 1974 by an American citizen who was deported from Mexico, the United States Court of Appeals did not review the full sweep of the fifth amendment.⁵⁷ The citizen had been cited for contempt for failing to answer questions before an American grand jury. The questions concerned his transportation of marijuana to the United States from Mexico. He had been granted immunity in the United States, but claimed the immunity was insufficient to protect him from prosecution in Mexico. The appellate court's response was that grand jury proceedings are secret, and "we cannot assume that the rule will be broken and the proceedings disclosed to the Mexican government."⁵⁸ Thus, he had no right to refuse to cooperate.

In other opinions, courts have artfully avoided a determination of the issue by finding no substantial danger of foreign incrimination in the compelled testimony.⁵⁹ There will be future cases, however, in which the testimony poses a real threat of foreign prosecution, thus eliminating the "no substantial danger" ground for resolving the case. This might occur in a situation where a witness' actual testimony at trial is needed so the case cannot be simply resolved on the secrecy ground. When such hard cases arise, intensive scrutiny will have to be given the scope of the fifth amendment. Under one view, "when the threat of incrimination arises under

foreign law, it seems that the privilege would be well served by holding it applicable in that context."⁶⁰

CONCLUSION

This article has focused on significant trial problems connected with the administration of witness immunity. This focus appears to be deserved in view of the complexity and importance of the pretrial and trial issues involved. Other questions which might have been discussed include the application of immunity principles to congressional⁶¹ and other⁶² proceedings, comparisons between statutory and nonstatutory immunity,⁶³ and whether a potential

⁶⁰ Comment, *supra* note 6, at 492, citing *In re Cardassi*, 351 F. Supp. 1080 (D. Conn. 1972). The *Cardassi* case concluded that when a reasonable fear of foreign prosecution existed, the rationale of *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964), operated to bar compulsory disclosure. Authorities are reviewed in the trial court opinion in the *Weir* case discussed in the text accompanying note 57. *In re Weir*, 377 F. Supp. 919 (S.D. Cal.), *aff'd*, 495 F.2d 879 (9th Cir.), *cert. denied*, 419 U.S. 1038 (1974). See Bauer, *supra* note 16, at 13.

⁶¹ On the special problems of representing congressional witnesses, see 4 S. BERNSTEIN, CRIMINAL DEFENSE TECHNIQUES § 71.11 (1975). Sections 6001-6005 of the 1970 Crime Control Act, 18 U.S.C. §§ 6001-05 (1970) ("use" immunity), cover witnesses who appear before Congress and grand juries as well as those who appear in court.

⁶² The "use" immunity provision of the 1970 Crime Control Act, 18 U.S.C. § 6002 (1970) covers grand jury as well as other proceedings. On representing a grand jury witness, especially one who has been granted immunity, see 1 R. CIPES, CRIMINAL DEFENSE TECHNIQUES §§ 601, 609 (1975). The grand jury setting has given rise to the issue of what grand jury requests may be resisted by a witness under the fifth amendment. Such things as voice or handwriting exemplars are not protected by the privilege against compulsory self-incrimination. *United States v. Dionisio*, 410 U.S. 1 (1973); *United States v. Hawkins*, 501 F.2d 1029 (9th Cir.), *cert. denied*, 419 U.S. 1079 (1974). As to whether a grand jury witness must be advised of his privilege against self-incrimination, see *United States v. Mandujano*, 496 F.2d 1050 (5th Cir. (1974), *cert. granted*, 420 U.S. 989 (1975).

⁶³ As when the prosecutor negotiates an agreement to testify as part of a plea bargain with a guilty-pleading defendant. See HASTINGS, *supra* note 8, which suggests that any abuses in this process, such as the prosecutor making unauthorized immunity grants, might be ameliorated by disclosing of plea agreements in open court. *Id.* at 443. Under new amendments to the Federal Rules of Criminal Procedure, such reforms have been initiated. FED. R. CRIM. P. 11(e) (1)-(4) now provides:

(1) *In general.*—The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the

⁵⁷ *In re Weir*, 495 F.2d 879 (9th Cir.), *cert. denied*, 419 U.S. 1038 (1974).

⁵⁸ *Id.* at 881.

⁵⁹ Comment, *supra* note 6, at 490, citing *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472 (1972), and *In re Tierney*, 465 F.2d 806 (5th Cir. 1972). In a very recent decision, the United States Court of Appeals for the First Circuit ruled that the defendant had failed to particularize "any real or substantial danger of foreign prosecution." *In re Quinn*, 525 F.2d 222, 223 (1st Cir. 1975).

grant of immunity should be submitted for judicial approval.⁶⁴ But the emphasis here has been on the trial process, *i.e.*, the impact of immunity grants on witnesses in criminal courts. Detailed discussion of

other settings and different concepts would necessarily dilute this emphasis to some extent. Accordingly, related problems have been mentioned, but only briefly, at this time.

Regarding the scope of witness immunity, most jurisdictions have a provision for granting immunity, and some of these are under current review.⁶⁵ In

attorney for the government will do any of the following:

(A) move for dismissal of other charges;
or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in such discussions.

(2) *Notice of Such Agreement.*—If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) *Acceptance of a Plea Agreement.*—If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) *Rejection of a Plea Agreement.*—If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

For consideration of other settings which give rise to non-statutory immunity and discussion of the enforceability against the government of such agreements see the excellent collection of authorities in Comment, *Judicial Supervision of Non-Statutory Immunity*, 65 J. CRIM. L. & C. 334 (1974). The article distinguishes between agreements to testify and plea bargains. It cites, among others, the cases of *United States v. Paiva*, 294 F. Supp. 742 (D.D.C. 1969) (agreement enforceable), and *People v. Brunner*, 32 Cal. App. 3d 908, 108 Cal. Rptr. 501 (1973) (substantial performance on part of accused, bargain held operative). See also Thornburgh, *supra* note 16, at 29-35.

⁶⁴Under the Uniform Rule, the witness must make a claim of privilege as a precondition of immunity. Most recent statutes follow this pattern, and it appears to be a prudent provision, alerting the prosecutor to matters the witness deems incriminating. See Dixon, *Comment on Immunity Provisions*, 2 WORKING PAPERS, NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS 1405, 1422 (1970); Y. KAMISAR, W. LAFAYETTE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 947 (4th ed. 1974) (noting compet-

ing models); Note, *Federal Witness Immunity Act: Expanding the Scope of Pre-Testimony Judicial Review*, 5 LOYOLA U.L.J. 470, 475 (1974) [hereinafter cited as *Federal Witness Immunity Act*]. For the Uniform Rule provision see note 5 *supra*. On the rules to be applied to test whether a witness' claim of self-incrimination is justified, see *State v. Graham*, 527 S.W.2d 722 (Mo. App. 1975) (collecting cases); M. LADD & R. CARLSON, *CASES AND MATERIALS ON EVIDENCE* 516-18 (1972). See also *Patrick v. United States*, 524 F.2d 1109, 1120-21 (7th Cir. 1975) ("witness has no Fifth Amendment privilege against giving testimony detrimental to his interests in a civil case unless such testimony tends to incriminate him"). The *Patrick* case is discussed in Wolfson, *supra* note 32, at 20.

After the witness claims the privilege, under the Uniform Rule the prosecuting attorney may make a written request for an immunity order. This raises the question of whether immunity grants should be strictly a prosecutorial function, or whether the trial judge should be given a centralizing role. Judicial intervention meets the concerns of those who feel that otherwise immunity may be improvidently conferred. In *Ullmann v. United States*, 350 U.S. 422 (1956), the question presented was whether the district court had discretion to review the United States Attorney's determination that it was "necessary to the public interest" to grant immunity. The Court held that the statute involved in the case afforded no discretion to deny an immunity order on these grounds. The new Uniform Rule carefully includes language designed to accord the court authority to prevent abuses. The question is discussed in *Federal Witness Immunity Act, supra*. See Thornburgh, *supra* note 16, at 11.

A related question deals with the issue of whether a prosecutor can be compelled to request immunity on behalf of a witness sought by the defendant. See *United States v. Alessio*, 528 F.2d 1079 (9th Cir. 1976) (key question is whether defendant is denied a fair trial by government's refusal to seek immunity for defense witness) and Thornburgh, *supra* note 16, at 26.

⁶⁵See note 3 *supra*. For recently revised laws see, *e.g.*, FLA. STAT. ANN. § 914.04 (West's Supp. 1975-76) (no person shall be prosecuted on account of any transaction concerning which he may testify); GA. CODE ANN. § 38-1715 (Supp. 1975); HAWAII REV. STAT. § 621 C-1 (Supp. 1974); IOWA CODE ANN. § 782.9 (Supp. 1975-76) (judge may enter order granting witness "immunity to prosecution"); N.Y. CRIM. PRO. LAW § 50.20 (McKinney 1971); N.C. GEN. STAT. § 15A-1051 *et seq.* (1975); OHIO REV. CODE ANN. § 2945.44 (Page 1975); UTAH CODE ANN. § 77-45-21 (Supp. 1975). A listing of state laws appears in MODEL STATE WITNESS IMMUNITY ACT, Comments (1952); 8 WIGMORE, EVIDENCE § 2281 n.11 (J. McNaughten rev. ed 1961 and Supp. 1975).

judging which pattern of immunity serves best, certain questions must be asked. Which approach, transactional or "use/derivative use," reduces the need for extended court hearings? Which pattern encourages a broad flow of information to the government? It has been suggested by some authorities that transactional immunity lends itself to ease of administration, precluding the need for complex

pretrial "taint" hearings. Transactional immunity may also work surprisingly to the benefit of law enforcement, some suggest, by encouraging people to testify in hard cases. For several reasons the transactional pattern has been embraced by the Commissioners on Uniform State Laws, and is recommended by them for adoption in the various states.⁶⁶ The careful reasoning underlying the Uniform Rule commends its approach to the attention of the United States Congress as well. At a time when comprehensive immunity provisions are under discussion there,⁶⁷ serious and open thinking on witness immunity should characterize the deliberations. Consideration might well be given to adaptation of the Uniform Rule as a potential model for federal legislation.

Recent state cases include *State v. Denson*, 59 Ill. 2d 546, 322 N.E. 2d 464 (1975) (even though trial court, prosecutor, witness and her attorney mistakenly believed immunized testimony could be used to prove prior perjury, witness was in contempt for failure to obey order to testify under grant of immunity); *State v. Hanson*, 342 A.2d 300 (Me. 1975) (limits of perjury prosecution discussed); *Production Credit Ass'n. v. Good*, 228 N.W.2d 574, 577 (Minn. 1975) ("witness who in good faith claims the Fifth Amendment privilege is [not] the sole judge of whether a question would tend to incriminate him"); *State v. Graham*, 527 S.W.2d 722 (Mo. App. 1975) ("Only when the court can say as a matter of law that it is impossible that the witness would incriminate himself by answering a question, can the court require an answer"); *People v. Gentile*, 47 App. Div. 2d 930, 367 N.Y.S.2d. 69 (1975) (although New York grants full transactional immunity, it need not insure full federal transactional immunity to a witness); *State v. Sinito*, 43 Ohio St. 2d 98, 330 N.E.2d 896 (1975) (construed immunity statute to provide both use and derivative use immunity, so as to be "coextensive in scope with the Fifth Amendment privilege against self-incrimination").

⁶⁶See Pirsig & Kirwin, *The N.C.C.U.S.L.'s New Uniform Rules of Criminal Procedure*, 61 A.B.A.J. 848 (1975). The authors state:

The Uniform Rules of Criminal Procedure, approved and recommended for adoption in all the states by the National Conference of Commissioners on Uniform State Laws last August . . . possess not only the general merit of providing for the states a comprehensive set of modern and efficient criminal procedure rules but also the specific merit of making a huge step in the direction of implementing the American Bar Association's Standards for Criminal Justice.

⁶⁷See note 2 *supra*.