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Immunity and the Grand Jury

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IMMUNITY AND THE GRAND JURY

Introduction

There have been many immunity statutes and many cases, on both the federal and state level,[1] which have dealt with the concept of immunity as related to the fifth amendment privilege against self-incrimination.[2] These statutes and case decisions have revolved around one basic issue: When a person is compelled to testify before a grand jury after being granted "immunity", does the law require that he be immune from prosecution, or merely that the compelled testimony not be used in the prosecution? The bulk of case law arises in the federal jurisdiction and in those states where serious crimes must be prosecuted by indictment. This article will emphasize the effect of a recent United States Supreme Court ruling on immunity in the grand jury system in general, with special emphasis on the Wyoming grand jury system.

General Description of the Grand Jury System

The fifth amendment provides: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury. . . ." Federal Rule 7[3] requires that all federal offenses which carry a prison term in excess of one year be prosecuted by indictment of a grand jury (unless waived).

The historical functions of the grand jury have been to sift evidence to determine whether a crime has been committed, and to provide a protective bulwark standing solidly between the ordinary citizen and over zealous prosecutors and policemen. In this aspect, its value in today's society has been a much debated question.

States that no longer have much use for the grand jury[4] have generally propounded three reasons for the shift to

1. Malloy v. Hogan, 378 U.S. 1 (1964). The court held that the same minimum standards would determine the extent or scope of the privilege in state and federal proceedings, because the same substantive guarantees of the Bill of Rights is involved.
2. U.S. Const. amend. V.
3. Fed. R. Crim. P. 7.
4. Although the Supreme Court has made the self-incrimination clause of the fifth amendment applicable to states, it has declined to apply the grand jury clause.

information: (1) the grand jury acts as a rubber stamp for the prosecuting attorney who can usually get an indictment at will; (2) the grand jury often adds needless expense and delay to the criminal process; and (3) the grand jury may often only be a duplication of the preliminary hearing.[5]

Proponents of the grand jury view it as an investigative body " ' acting independently of either prosecuting attorney or judge,' . . . (Citation omitted) whose mission is to clear the innocent, no less than to bring to trial the guilty."[6] In *United States v. Dionisio,* the court felt that if the grand jury is to properly perform, "[I]t must be free to pursue its investigation unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it."[7]

The problem is that many of a witness' legitimate rights are trampled upon. Although the grand jury may be useful for needed investigation, the grand jury witness must face the questions of the prosecutor and grand juror without the presence and protection of counsel.[8] Moreover, he may not even be advised of the subject matter of the proceedings. Without this protection, a witness may often make unnecessary admissions, or forget favorable facts. Furthermore, he cannot explain or controvert facts on cross-examination.[9] Thus, if the grand jury is to be used, there must be available the strong shield of transactional immunity to protect the vulnerable witness from the blows of injustice.

Because of these inequities in the grand jury system, many responsible law enforcement officials believe that the grand jury should be abolished in favor of the "preliminary

5. HALL, KAMISAR, LAFAVE, & ISRAEL, MODERN CRIMINAL PROCEDURE 791 (3rd ed. 1969).
6. United States v. Dionisio, ... U.S. ....., 93 S. Ct. 764, 773 (1973).
7. *Id.*
8. A witness' claimed right to have counsel with him inside the grand jury room has been repeatedly repudiated by the federal courts. *In re* Groban, 352 U.S. 330 (1957); Jones v. United States, 342 F.2d 863 (D.C. Cir. 1964).
9. Foster, *Grand Jury Practice in the 1970's,* 32 OHIO ST. L.J. 701, 716-17 (1971). Foster feels that prosecutors who claim that the grand jury system is more likely to produce the truth are, in effect, implying that the adversary system should be abolished. This type of reasoning goes against the grain of our present judiciary system which stresses that truth can best be obtained when a proper foundation is laid and when adversary counsel is present to object to improper implications, conclusions, and assumptions of facts not in evidence.

hearing" method of instituting criminal charges.[10] Wyoming has not abolished the grand jury, but it is one of twenty-two states[11] where crimes may be prosecuted by either indictment or information at the option of the prosecutor.[12] Furthermore, the preliminary hearing has become the almost exclusive means of instituting prosecution in Wyoming as the grand jury option has fallen by the wayside.

THE PRIVILEGE AGAINST SELF-INCRIMINATION

The privilege against self-incrimination is one of our nation's most cherished principles and is perhaps the mainstay of our adversary system.[13] In this area, the Bill of Rights has been subject to broad developments. The privilege against self-incrimination is "as broad as the mischief against which it seeks to guard,"[14] and the courts of the United States should not depart from such a noble heritage. In other words, the constitutional foundation underlying the privilege is the respect that a state or federal government must accord to the dignity of its citizens.[15] But, like any other good rule, the privilege does have its exceptions. As will be seen, however, the privilege should cease to apply only when the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness. The four general exceptions are as follows:

(1) the witness may waive the privilege;[16]

10. *Id.*
11. See Calkins, *Abolition of the Grand Jury Indictment in Illinois*, U. ILL. L.F. 423, 424 n.6 (1966) for a listing of the various jurisdictions.
12. WYO. STAT. § 7-118 (1957) provides: "All crimes, misdemeanors and offenses may be prosecuted in the court having jurisdiction thereof, either by indictment as hereinafter provided, or by information." This provision was added by the legislature to allow an option since article 1, section 13, of the Wyoming Constitution provides: "Until otherwise provided by law, no person shall, for a felony, be proceeded against criminally, otherwise than by indictment. . . ." It might be noted at this point that the legislature also has the power to change, regulate, or abolish the grand jury system. WYO. CONST. art. 1, § 9.
13. Miranda v. Arizona, 384 U.S. 436, 460 (1966).
14. Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).
15. Miranda v. Arizona, 384 U.S. 436, 460 (1966).
16. If a witness does not assert his privilege to each and every question asked of him, an answer to any one question may be deemed to effect a complete waiver of the privilege. Rogers v. United States, 340 U.S. 367 (1951); Brown v. Walker, 161 U.S. 591 (1896); United States v. Seewald, 450 F.2d 1159 (2d Cir. 1971); Ellis v. United States, 416 F.2d 791 (D.C. Cir. 1969); People v. Cassidy, 213 N.Y. 388, 107 N.E. 713 (1915).
    Furthermore, prosecutors may avoid immunity problems by asking the witness to sign a waiver of immunity before entering the grand jury room.

(2) if the prosecution for a crime is barred by the statute of limitations, the witness is compelled to answer;

(3) if the answer may tend to disgrace the witness, and the proposed evidence is material to the issue on trial, he may be compelled to answer, but if the answer can have no effect upon the case, except as to impair the witness' credibility the privilege is still in effect;

(4) if the witness has already received a pardon, he can no longer use his privilege.[17]

This final exception is the one upon which the bulk of this paper will be concerned.

TRANSACTIONAL IMMUNITY VERSUS TESTIMONIAL IMMUNITY

"The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply."[18]

The main way in which criminality is taken away is by an immunity statute. Immunity signifies the nonliability for the offense itself; while privilege signifies the right not to be compelled to speak about the offense. By an immunity the offender's guilt ceases; under a privilege, it continues.[19] There are two basic types of immunity statutes in use today. One type may be called testimonial or immunity-from-use statutes. They provide that the testimony which the witness is compelled to disclose shall not afterwards be used against him in a judicial proceeding. The other type may be called

But no person may be penalized for not signing the waiver for he is merely asserting his constitutional rights of privilege against self-incrimination. Thus, the Supreme Court has nullified the ouster of a public schoolteacher, Slochower v. Board of Education, 350 U.S. 551 (1956); repudiated the disbarment of an attorney, Spevack v. Klein, 385 U.S. 511 (1967); revoked the suspension of a police officer, Garrity v. New Jersey, 385 U.S. 493 (1967); overruled the removal from office of a public official, Perla v. New York, 392 U.S. 296 (1968); and rescinded the discharge of a public employee, Uniformed Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation, 392 U.S. 280 (1968), where the individuals were disciplined merely because they invoked their privilege against self-incrimination or refused to waive an investigation.

17. Brown v. Walker, 161 U.S. 591, 599 (1896).

18. Hale v. Henkel, 201 U.S. 43, 67 (1906).

19. 8 WIGMORE, EVIDENCE § 2281 (McNaugton rev. 1961).

transactional or immunity-from-prosecution statutes. They provide that the witness may not be prosecuted or subject to any penalty for the transaction about which he testified.[20] The immunity given under both types of statutes extends only to prosecution for past crimes, and not to prosecution for future crimes or for perjury or contempt in connection with the making of the disclosure itself.[21] Wyoming has several immunity statutes; some providing for testimonial immunity and some providing for transactional immunity.[22] Each statute affects only a particular crime or small group of crimes, and the varied phraseology could lead to confusion. Until recently there were numerous federal immunity statutes and courts continuously wrestled over which type of immunity should be used. But in 1970, the United States Congress passed one immunity statute to govern all areas, and it is submitted that the United States Supreme Court rested its hat on the wrong type of immunity.

HISTORY AND CONSTITUTIONALITY OF FEDERAL IMMUNITY STATUTES

The first federal immunity statute was enacted in 1857[23] to aid in the investigation of corrupt legislators. This statute conferred transactional immunity and the witnesses received their immunity from prosecution simply by testifying before a congressional committee. Discussion of possible abuses of transactional immunity induced Congress to withdraw the legislative pardon, and adopt a new immunity

20. *Id.*
21. *Id.* § 2282.
22. WYO. CONST. art. 3, § 44 (bribery of legislators—immunity from use); WYO. STAT. § 1-415 (1957) (proceedings in aid of execution, tending to convict of fraud—immunity from use in prosecution of fraud); WYO. STAT. § 6-205 (1957) (gambling—immunity from use); WYO. STAT. § 6-212 (1957) (destruction of gambling devices—immunity from prosecutions); WYO. STAT. § 22-360 (1957) (elections, corrupt practices—immunity from use and from prosecution for any crime connected with the offense); Ch. 142, § 19 [1921] Wyo. Sess. Laws 218-37 (repealed 1967) (insurance offenses—immunity from prosecution and use); WYO. STAT. § 27-33(J) (1957) (unemployment compensation—immunity from prosecution); WYO. STAT. § 37-35 (1957) (public service commission—immunity from prosecution).
23. Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 155. The statute provided:
> [N]o person examined and testifying before either House of Congress, or any committee of either House of Congress, shall be held to answer criminally in any court of justice, or subject to any penalty or forfeiture for any fact or act touching which he shall be required to testify. . . .

statute in 1862.[24] Under this statute it was only the testimony itself which could not later be used in any criminal proceeding against the witness.[25] A similar statute,[26] which also provided only testimonial immunity was soon challenged in the famous case of *Counselman v. Hitchcock*.[27] In *Counselman* the witness was convicted of contempt of court when he refused, on the grounds of self-incrimination, to answer questions put to him during an investigation by a federal grand jury concerning alleged violations of the Interstate Commerce Act. The Supreme Court held: "[L]egislation cannot abridge a constitutional privilege, and . . . it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect."[28] In other words, the immunity statute must be "coextensive" with the Constitutional privilege before it will be upheld. The court felt that the statute in quesion was not coextensive because testimonial immunity "could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."[29] Furthermore, it "affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."[30] In short, the statute did not protect the witness from being compelled to be a witness against himself.

24. Act of Jan. 24, 1862, ch. 11, § 1, 12 Stat. 333. The statute provided: "[T]he testimony of a witness examined and testifying before either House of Congress, or any committee of either House of Congress, shall not be used as evidence in any criminal proceeding against such witness, in any court of justice. . . ." The fruits of such testimony were not immunized and future prosecutions were not barred.

25. In 1892, the Supreme Court in Counselman v. Hitchcock, 142 U.S. 547 (1892), held that a similar immunity statute did not extend to other matters to which the testimony might indirectly lead, *i.e.*, the fruits of such testimony.

26. Act of Feb. 25, 1868, ch. 13, § 1, 15 Stat. 37. Act of Jan. 24, 1862, ch. 11, § 1, 12 Stat. 333, was never repealed, but was found to be constitutionally inadequate because it did not provide for transactional immunity. Adams v. Maryland, 347 U.S. 179 (1954).

27. 142 U.S. 547 (1892).

28. *Id.* at 585.

29. *Id.* at 564.

30. *Id.* at 586.

On the basis of the court's holding in *Counselman,* Congress enacted an immunity statute which granted absolute immunity (transactional) from future prosecution.[31] This statute was sustained in *Brown v. Walker*[32] in 1896. The court in *Brown* based its opinion on the *Counselman* decision in that the statute was coextensive with the privilege against self-incrimination.[33] The effect of *Brown* was to create a settled doctrine that the only coextensive immunity statute was of the transactional type. The statute upheld in *Brown* subsequently became the model of numerous federal immunity statutes thereafter adopted, and "has become part of our constitutional fabric."[34] A Wyoming case, *Miskimmins v. Shaver,*[35] also seemed to approve of the holding in *Counselman,* but went on to say that since Wyoming had no immunity statutes[36] only Wyoming's constitutional privilege against self-incrimination[37] would apply in cases where the witness is asked to give testimony. Therefore, a witness could not be compelled to testify.

Anyone who doubted that transactional immunity was the only type of immunity that was coextensive with the fifth amendment privilege should have had those doubts resolved by the Supreme Court's opinion in *Ullmann v. United States* in 1955.[38] The Court reaffirmed the decision in *Brown* which had involved an immunity statute quite similar to the

31. Act of Feb. 11, 1893, ch. 83, § 1, 27 Stat. 443. This statute was in aid of the Interstate Commerce Act investigations and provided:
> But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding. . . .

32. 161 U.S. 591 (1896).
33. *Id.* at 594.
34. Ullmann v. United States, 350 U.S. 422, 438 (1956).
35. 8 Wyo. 392, 58 P. 411 (1899).
36. *Id.* at 416, 58 P. at 418.
37. WYO. CONST. art. 1, § 11.
38. 350 U.S. 422 (1956).

one in *Ullman*,[39] and also stated that the statute in *Counselman* had been constitutionally inadequate.[40]

Thus from 1892 when *Counselman* was decided until 1964 there was no doubt that transactional immunity was a constitutional requirement. But in 1964, the case of *Murphy v. Waterfront Commission*[41] was decided and a shadow was placed on the security of transactional immunity by a cloud that was never really present. In *Murphy,* the defendants had refused to answer questions at a hearing before a state waterfront commission. Although they had been granted immunity from prosecution under state law, their refusal was based on the ground that they might incriminate themselves under federal law. The Supreme Court held that the constitutional privilege against self-incrimination protected a state witness in a proceeding under state law from subsequent prosecution under both state and federal law, and that "testimonial" type immunity would be given to him by federal courts.[42] All this decision really did was to resolve conflicting state and federal interests; a state interest in acquiring information and a federal interest in not beig precluded from prosecuting violators of federal law. It certainly does not follow that just because *Murphy* aids federal-state relations that the testimonial immunity will apply when only a single jurisdiction is involved. Thus, *Murphy* did not hold that testimonial immunity would satisfy the fifth amendment privilege if the jurisdiction compelling incriminating information

39. The statute involved in *Ullmann* provided:

> But no witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is so compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding. . . .

Act of Aug. 20, 1954, Pub. L. No. 83-600, § 1(c), 68 Stat. 746.

40. 350 U.S. 422, 436-37 (1956).

41. 378 U.S. 52 (1964).

42. *Id.* at 79. In stating the rule, the court said:

> [W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him.

This is slightly different from the Counselman statute in that the Counselman statute did not prevent the "fruits" from being used. *See supra* note 26.

only gave testimonial immunity,[43] but in fact, actually broadened the immunity concept by granting an immunity beyond the jurisdiction.

To reinforce the fact that *Counselman* was not reversed by *Murphy,* the Supreme Court, in 1965 held in *Albertson v. Subversive Activities Control Board*[44] that an adequate immunity statute must afford "absolute immunity against future prosecution for the offense to which the question relates."[45] Thus, the Supreme Court as of this decision had not yet moved away from the constitutional requirement of absolute immunity in single jurisdiction cases. Unfortunately, Justice White's concurring opinion in *Murphy* seems to have been read as the holding. He felt:

> The Constitution does not require that immunity go so far as to protect against all prosecutions to which the testimony relates, including prosecutions of another government, whether or not there is any casual connection between the disclosure and the prosecution or evidence offered at trial.[46]

He also felt that when only testimonial immunity is given "[b]oth the Federal Government and the witness are in exactly the same position as if the witness had remained silent."[47] These statements were contrary to seventy-two years of Supreme Court opinions and apparently this is the opinion that the United States Legislature relied on in drafting the immunity provisions of the Organized Crime Control Act of 1970.[48]

The new federal law repealed over fifty existing federal immunity statutes,[49] and states that a witness who invokes

43. Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information,* 1966 SUP. CT. R. 103, 165 (1966). If a witness is being asked questions about a state violation only and the federal government is not concerned, the state should still be required to give transactional immunity. The same would be true if only the Federal government were involved. Furthermore, if a witness is being asked questions at a state trial about an offense which may be punishable at both the state and the federal levels, the state should still be required to give transactional immunity, but the federal court may be allowed to use testimonial immunity.
44. 382 U.S. 70 (1965).
45. *Id.* at 79-80.
46. Murphy v. Waterfront Comm'n, 378 U.S. 52, 106-07 (1964).
47. *Id.* at 101.
48. Pub. L. No. 91-452, § 201, 84 Stat. 926 (codified at 18 U.S.C. §§ 6001-05 (1970)).
49. *See* 18 U.S.C. §§ 6002-05 (1970).

his privilege against self-incrimination may not refuse to testify if he is granted the immunity provided for by the statute. The immunity provided is as follows:

> [N]o 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.[50]

By not granting transactional immunity, this statute has erased over seventy years of progressive development and has all but returned to requirements that *Counselman* and subsequent cases held were constitutionally inadequate.[51] The legislature apparently misinterpreted *Murphy* to mean that only testimonial immunity was required in single jurisdiction cases. Although this misinterpretation was indeed surprising, it was not nearly as surprising as the United States Supreme Court's decision in *Kastigar v. United States.*[52]

. In *Kastigar,* the witnesses were subpoenaed to appear before a United States grand jury, and since the Government believed that the witnesses were likely to assert their privilege against self-incrimination, it gave the witnesses testimonial immunity pursuant to 18 U.S.C. §§ 6002, 6003. The witnesses opposed the order claiming that the scope of immunity provided was not coextensive with the scope of the privilege against self-incrimination. Consequently the Court found the witnesses in contempt.[53] The Court, in upholding the contempt citations, held that mere testimonial immunity was coextensive with the privilege and affirmed the constitutionality of the new Federal statute. The Court felt that its decision was consistent with the conceptual basis of *Counselman* since the statute in *Counselman* was found to be unconstitutional because it "failed to protect a witness from future prosecution based on knowledge and sources of information

50. *Id.* § 6002.
51. *Compare* 18 U.S.C. § 6002 (1970) *with* Act of Feb. 25, 1868, ch. 13, § 1, 15 Stat. 37. It will be remembered that the *Counselman* statute (Act of Feb. 25, 1868) did not prevent the fruits from being used, however.
52. ____ U.S. ____, 92 S.Ct. 1653 (1972).
53. The contempt order was issued pursuant to 28 U.S.C. § 1826 (1970).

obtained from the compelled testimony,"[54] whereas 18 U.S.C. 6002 prevents indirect information from being used. But the Court did not give full weight to the rest of the *Counselman* opinion which stated, "[A] statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."[55] The Court then went on to state that the testimonial immunity approved in *Murphy* did not relate to single jurisdiction cases, but nevertheless the reasoning in *Murphy* compelled the conclusion that testimonial immunity was sufficient to compel testimony over the claim of the privilege even if only a single jurisdiction were involved.[56] This is certainly expanding *Murphy* beyond its facts and the reasons for such an expansion are quite impractical. The Court felt that testimonial immunity "provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead'. . . ."[57] Furthermore, the Court stated that a person accorded testimonial immunity is not dependent upon the good faith and integrity of the prosecuting authorities for the preservation of his Constitutional rights since "the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence."[58] The Court then made an analogy between compelled testimony and coerced confessions. Its logic was that since a coerced confession was excluded as evidence in a prosecuion suit, so should compelled testimony be excluded in a prosecution suit.[59] In other words, the immunity that was constitutionally required was reduced to a mere exclusion. Unfortunately, on that same fateful day, the Court, in a companion case entitled *Zicarelli v. New Jersey State Commission of Investigation,*[60] reached the same conclusions in assessing the constitutionality of a state statute providing for only testimonial immunity.

The reasoning of the Court has several basic flaws. The first is that the Court majority fails to face reality. As Mr.

54. 92 S.Ct. 1653, 1661-62 (1972).
55. Counselman v. Hitchcock, 142 U.S. 547, 586 (1892).
56. 92 S.Ct. 1653, 1663-64 (1972).
57. *Id.* at 1664-65.
58. *Id.* at 1665.
59. *Id.*
60. ..... U.S. ....., 92 S.Ct. 1670 (1972).

Justice Marshall pointed out in the dissenting opinion, it is indeed futile to expect that a ban on any information derived directly or indirectly from compelled testmony can be enforced. The only safeguard of the witness' rights is the good faith of the prosecuting authorities. Even if one concedes that all prosecuting authorities act in good faith, their good faith alone does not provide a sufficient safeguard.

> For the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony. . . . (Citations omitted) The Court today sets out a loose net to trap tainted evidence and prevent its use against the witness, but it accepts an intolerably great risk that tainted evidence will in fact slip through that net.[61]

Thus, when the prosecution is allowed to offer only testimonial immunity, it is given much more than is taken away. For while the witness has given up his constitutional right of silence, all the prosecution has given up is an unenforceable rule that will not give immunity, but a mere exclusion. As Mr. Justice Marshall put it, "[T]he Court turns reason on its head when it compares a statutory grant of immunity to the 'immunity' that is inadvertently conferred by an unconstitutional interrogation."[62] There is really no comparison between the two because the evidence obtained through coercive confessions and illegal searches is excluded at trial because the use of such evidence is prohibited by the Constitution. Exclusionary rules fail to offer a full and adequate remedy in two respects: the accused is inadequately protected from illegal police conduct, and the police are deterred from continuing in such conduct only insofar as the must forego use of the fruits of the illegal conduct. Exclusionary rules have a retroactive effect in that they attempt to cure a past wrong, while an immunity statute attempts to prevent a future wrong. Consequently, immunity statutes should be judged

61. Kastigar v. United States, ___ U.S. ___, 92 S.Ct. 1653, 1669 (1972) (Marshall concurring).
62. *Id.*

by stricter standards than exclusionary rules. While it may be true that granting transactional immunity for a policeman's error in conducting an illegal interrogation or search might be too high of a price to pay; it is certainly not true in the case of compulsory testimony. In the latter, the prosecuting officials have a valid choice—either to "compel [the] testimony and suffer the resulting ban on prosecution or to forego the testimony."[63]

CONSEQUENCES ON WYOMING GRAND JURIES

In the past, the grand jury has played a minimal role in Wyoming's judicial process. As noted previously, Wyoming prosecutors can choose between indictment by grand jury and information in pursuing prosecutions.[64] In addition to prohibitive cost, unnecessary duplication of the preliminary hearing, and the "rubber stamp" notion,[65] there is one additional factor that has kept prosecutors in Wyoming from using the grand jury. While other state and federal prosecutors have been able to use the grand jury system as a means of obtaining valuable prosecuting information, Wyoming prosecutors have not had much of a chance to do this.[66]

Unlike the Federal Government, Wyoming does not have a single immunity statute which provides for immunity from compelled testimony in any criminal case. Instead there are several inconsistent statutes which affect only a few infrequently committed crimes. The practical significane of this difference is that immunity in Wyoming is almost unknown and thus, most witnesses can still claim their Constitutionally protected right against self-incrimination. As Justice Corn stated in *Miskimmins v. Shaver*:

> There are also statutes of the United States and many of the states providing that evidence thus elicited shall not be used against the witness in any prosecution against him, or that he shall not be prosecuted for any matter concerning which he may testify . . . and [since] we have no statute attempting to confer immunity upon a witness . . . we have only the consti-

63. *Id.* at 1670.
64. WYO. STAT. § 7-118 (1957).
65. See Introduction *supra.*
66. *See* note 22 *supra.*

> tutional privilege itself to consider as applied to the facts of the case. . . .[67]

This means that immunity can not be granted without statutory authority, and when when statutory immunity is lacking, the witness does not need to waive his fifth amendment rights. Consequently, the only crimes in which a witness may be compelled to testify by granting him immunity are in those few narrow crimes listed in the statutes. Without the possibility of getting a witness to talk, the possibility of gaining information about crimes is greatly reduced. Perhaps this lack of comprehensive immunity statute is the safest route to follow as far as protecting individual rights is concerned. For as long as there are no additions to the list of immunity statutes, there can be no added deprivations of constitutional rights by way of testimonial immunity. However, this might not be the most satisfactory approach. As previously discussed, a grand jury can serve a very useful purpose. As long as certain procedural safeguards are followed, the grand jury can obtain needed information without resorting to undesirable police conduct such as illegal search and seizure and illegal wiretapping. The procedural safeguard that shoud be of foremost importance is transactional immunity. By having a comprehensive transactional immunity statute, Wyoming can live in the best of both worlds. The state can receive information needed in crime prevention and detection, and the citizen will retain his right against self-incrimination through a truly "coextensive" statute.

CONCLUSION

For over seventy years both the legislation and the cases adjudicated have, for the most part, agreed that only transactional immunity was coextensive with the privilege against self-incrimination. Many statutes were declared unconstitutional and many prisoners were freed of contempt charges because Congressmen and judges alike knew that testimonial immunity did not grant witnesses the absolute immunity from prosecution which they constitutionally deserved in return for their compelled testimony.

67. 8 Wyo. 392, 58 P. 411, 418 (1899).

Then, in 1970, Congress misinterpreted a case, which actually broadened transactional immunity, to mean that testimonial immunity was the only protection a witness needed when compelled to give testimony before a grand jury. The United States Supreme Court upheld the constitutionality of this statute and in several short pages of opinion wiped out a constitutionally sound immunity and replaced it with an inadequate, impractical, and unrealistic substitute.

In Wyoming, at least in ordinary prosecutions, perhaps the grand jury system is no longer needed. It has been of little use in the past and it should not be used extensively in the future unless certain fundamental changes are made. First, a comprehensive immunity statute should be enacted which will provide for immunity from compelled testimony in any criminal case. But in order for Wyoming to protect the constitutional rights of its citizens, it is imperative that the immunity to be granted should be transactional and not merely testimonial.

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