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Criminal Immunity in the Cowboy State - Do Real Men Squeal

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CRIMINAL IMMUNITY IN THE COWBOY STATE — Do Real Men Squeal?

INTRODUCTION

The Fifth Amendment of the United States Constitution[1] and Article I, section 11 of the Wyoming Constitution[2] guarantee all persons the privilege against self-incrimination. However, this privilege against self-incrimination does not completely exempt persons from testifying against themselves.[3] Witness immunity, a mechanism used by prosecutors to obtain testimony, allows a court to compel testimony which might otherwise violate a witness' Fifth Amendment right against self-incrimination.[4] A grant of immunity represents an accommodation between the prosecution's need to obtain testimony and the witness' constitutional privilege against self-incrimination.[5] The purpose of witness immunity is to aid prosecutors by inducing criminals, their confederates or witnesses to testify for the state, i.e. "tell on each other."[6]

The authority to grant formal immunity in the federal arena comes from statutes.[7] State authority to grant immunity is derived from a num-

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1. U.S. CONST. amend. V. states:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual services in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. WYO. CONST. art. I, § 11. states:
No person shall be compelled to testify against himself in any criminal case, nor shall any person be twice put to jeopardy for the same offense. If a jury disagree, or if the judgment be arrested after a verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy.

3. State v. Gonzalez, 853 P.2d 526 (Alaska 1993).

4. United States v. Trammel, 583 F.2d 1166 (10th Cir. 1978).

5. United States v. Tramunti, 500 F.2d 1334 (2nd Cir. 1974).

6. State *ex rel.* Raines v. Grayson, 55 So.2d 554, 555 (Fla. 1951).

7. 18 U.S.C. §§ 6001-6005 (1988 & Supp. V 1995). *See generally*, Larry D. Thompson & Phyllis B. Sumner, *Structuring Informal Immunity*, CRIM. JUST., Spring 1993, at 17, 20 (Formal immunity is only authorized by statute or constitution. Informal immunity is oral or written immunity granted in the absence of a statute or constitutional provision.). For purposes of this comment, the phrase "formal statutory immunity" will encompass formal immunity authorized by either constitution or statute.

ber of sources, such as common law, constitutions or statutes.[8] Some states' common law recognizes a prosecutor's inherent authority to grant immunity absent a statute.[9] Supporting the principle established by the U.S. Supreme Court in 1879, most state courts[10] agree that absent statutory authority or constitutional provisions, a prosecutor has no such inherent power.[11] Informal immunity is immunity lacking statutory or constitutional authority.[12]

In Wyoming, a prosecutor in a criminal case has no general statutory or constitutional authority to grant immunity to a witness. Only two witness immunity statutes are available to Wyoming prosecutors, and these statutes only address controlled substances[13] and insurance crimes.[14] In two recent Wyoming cases, *Hall v. State*[15] and *Russell v. State,*[16] the Wyoming Supreme Court held that a prosecuting attorney, solely by virtue of his office and in the absence of any statutory authority, has no inherent power to grant immunity to a witness. Despite these decisions, Wyoming prosecutors are

8. Hennigan v. State, 746 P.2d 360 (Wyo. 1987).

9. Surina v. Buckalew, 629 P.2d 969 (Alaska 1981).

10. *E.g.*, State v. Roberts, 230 A.2d 239 (Conn. 1967); Commonwealth v. Carrera, 227 A.2d 627 (Pa. 1967); Apodaca v. Viramontes, 212 P.2d 425 (N.M. 1949).

11. "Whisky Cases," United States v. Ford, 99 U.S. 594 (1878).

12. *See generally* THOMPSON & SUMNER, *supra* note 7, at 20.

13. WYO. STAT. § 35-7-1043 (1994). The controlled substance statute provides that consent for the grant of immunity is required from the "district judge in the district wherein prosecution is to take place." *Id.* This grant of immunity is available only if "testimony is necessary to secure conviction." *Id.*

14. WYO. STAT. § 26-2-124 (1991). The insurance statute calls for a directive from both the State Insurance Commissioner and the Attorney General compelling the witness to testify. The witness must first ask "to be excused from attending or testifying . . . on the ground that the testimony or evidence required of him may tend to incriminate him." *Id.*

15. Hall v. State, 851 P.2d 1262, 1266-67 (Wyo. 1993). This case involved the question of what form of immunity Hall had been granted when he testified in Hopkinson v. State, 632 P.2d 79 (Wyo. 1981). Hall was being prosecuted for his activities relating to the death of Jeff Green, and claimed transactional immunity on the basis of what had taken place in the trial of Mark Hopkinson. The Wyoming Supreme Court held that a prosecuting attorney, solely by virtue of his office and in the absence of any statutory authorization, has no power to grant immunity to a witness. However, the absence of authority to extend immunity by the prosecuting attorney does not make the agreement unenforceable. The court remanded this case to determine the extent of the immunity granted. *Hall*, 851 P.2d 1262. As of this date, no further judicial actions have commenced.

16. Russell v. State, 851 P.2d 1274, 1277 (Wyo. 1993). This case involved the question of what form of immunity Russell had been granted when he testified in *Hopkinson*, 632 P.2d 79. Russell was being prosecuted for his activities relating to the death of Jeff Green, and claimed transactional immunity on the basis of what had taken place in the trial of Mark Hopkinson. The Wyoming Supreme Court held that a prosecuting attorney, solely by virtue of his office and in the absence of any statutory authorization, has no power to grant immunity to a witness. The absence of authority to extend immunity by the prosecuting attorney does not make the agreement unenforceable. The court reversed and remanded this case. The lower court reversed because of failure to afford the defendant proper procedural protections with respect to the claim that he had been granted immunity. *Russell*, 851 P.2d 1274. In March 1995, Russell was retried in State District Court and found guilty of aiding and abetting, first-degree murder and conspiracy to commit first-degree murder in Green's 1979 death.

bargaining for testimony and evidence from witnesses in exchange for prosecutorial favors.[17] Essentially, these negotiations, regardless of method or label, result in grants of immunity.[18] The aftermath of the *Hall*[19] and *Russell*[20] decisions leaves the status of criminal immunity in Wyoming in conflict and confusion. Essentially, prosecutors who grant criminal witness immunity are in violation of judge-made law. To preserve the integrity of the criminal justice system, the legislature should codify current prosecutorial practices through legislation.

This comment looks at the historical background of federal and state immunity and explores the various forms of criminal immunity, including pure use immunity, transactional immunity and use/derivative use immunity. This comment also explains the need for immunity and particularly examines the present witness immunity controversy in Wyoming. It concludes by proposing a general immunity granting statute and alternatives to the proposed statute. Finally, a case is made for why an immunity statute could benefit Wyoming by giving prosecutors another tool for use in the ongoing war against crime.

BACKGROUND

"[T]he American system of criminal prosecution is accusatorial, not inquisitional, and . . . the Fifth Amendment privilege is its essential mainstay."[21] This privilege allows that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself."[22] Viewed literally, this privilege against self-incrimination seems only to preclude compelling the accused to testify in a criminal case. However, the U.S. Supreme Court in *Kastigar v. United States*[23] held that the privilege can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. This privilege also protects a witness against any disclosure which he reasonably believes could be used in a criminal prosecution against him, or which could lead to other evidence that might be so used.[24]

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17. *See infra* note 112.
18. These cases confirm that real men in the "Cowboy State" do squeal.
19. 851 P.2d 1262.
20. 851 P.2d 1274.
21. Malloy v. Hogan, 378 U.S. 1, 7 (1964).
22. U.S. CONST. amend. V.
23. 406 U.S. 441, 444-45 (1972).
24. *Id.* at 445.

Testimonial immunity is a logical corollary to a person's Fifth Amendment right against self-incrimination. Such immunity is a mechanism used by a court to compel testimony which might otherwise violate a witness' Fifth Amendment right against self-incrimination.[25] Granting immunity is a compromise between a court's right to compel testimony and a witness' constitutional privilege against self-incrimination.[26] The question of how much immunity will be sufficient to compel testimony over a claim of the privilege against self-incrimination remains unsettled. Although federal and state courts,[27] as well as some legislative bodies,[28] have struggled for over 100 years with the appropriate amount of immunity to be granted, this issue has not been satisfactorily resolved and the debate continues.

Types of Witness Immunity

Historically, three types of witness immunity have been granted: original pure use immunity, transactional immunity and use/derivative use immunity. This section gives a general definition of these types of immunity; their evolution is addressed in the following section under *Federal Immunity*.

Original pure use immunity only prevented the prosecution from using the witness' compelled testimony in any further criminal proceeding against that witness.[29] The Court in *Counselman v. Hitchcock*[30] ruled that original pure use immunity was unconstitutional because it did not prevent prosecuting authorities from using investigatory leads derived from the immunized witness' compelled testimony. The Court noted that a valid immunity grant "must afford absolute immunity against future prosecution for the offense to which the question relates."[31] This Supreme Court opinion has not been overruled. Subsequently, no federal or state statutes grant pure use immunity.

Transactional immunity absolutely protects the witness from prosecution for offenses related to the compelled testimony.[32] Historically, trans-

25. *Trammel*, 583 F.2d 1166.

26. *Tramunti*, 500 F.2d 1334.

27. *See, e.g.*, Counselman v. Hitchcock, 142 U.S. 547 (1892) and *Surina*, 629 P.2d 969.

28. *E.g.*, Jeffrey M. Feldman & Stuart A. Ollanik, *Compelling Testimony In Alaska: The Coming Rejection of Use and Derivative Use Immunity*, 3 ALASKA L. REV. 229, 236 n. 45 (1986) (citing Act of February 25, 1868, ch. 13, 15 Stat. 37 (indirectly declared unconstitutional in *Counselman*, 142 U.S. at 548)); ALASKA STAT. § 12.50.101 (1990).

29. *Counselman*, 142 U.S. 547 (involving a federal grand jury and decided under the Fifth Amendment at a time when that Amendment was not extended to the states).

30. *Id.* at 584.

31. *Id.*

32. *Gonzalez*, 853 P.2d 526.

actional immunity has been considered constitutionally adequate.[33] In fact, recent decisions have held that this type of immunity is even broader than the federal constitutional privilege against self-incrimination.[34] Even though they are not required to do so under the federal Constitution, many states have retained transactional immunity.[35]

One limitation of transactional immunity is that a witness may still be prosecuted for perjury committed in his immunized testimony.[36] Also, the immunity does not extend to a transaction noted in an answer totally unresponsive to the question asked.[37] Thus, the witness cannot gain immunity from prosecution for all previous criminal acts by simply including a reference to those acts in his testimony, without regard to the subject on which he was asked to testify.[38]

Use/derivative use immunity protects the witness from use of the compelled testimony and any evidence derived directly or indirectly from that testimony.[39] If a subsequent prosecution is based entirely on independently obtained evidence, the witness still may be prosecuted for crimes referred to in the compelled testimony.[40] The U.S. Supreme Court held that use/derivative use immunity is coextensive with the federal constitutional privilege against self-incrimination and is therefore a constitutionally sufficient grant of immunity.[41]

Federal Immunity

The Fifth Amendment's protection against self-incrimination was absolute until 1857. In that year, Congress adopted the first federal immunity statute, which dealt solely with testimony before Congress.[42] In 1862, this statute was amended to bar the use of the actual testimony in further proceedings, thereby granting use immunity for qualifying testimony before Congress.[43] In 1868, Congress enacted 15

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

34. *E.g.*, *Kastigar*, 406 U.S. at 453; Lefkowitz v. Cunningham, 431 U.S. 801, 809 (1977).

35. *E.g.*, OKLA. CONST. art. II, § 27; UTAH CODE ANN. § 77-22-3 (1995); WASH. REV. CODE ANN. § 10.52.090 (1989); WIS. STAT. ANN. § 972.08(1) (1985 & Supp. 1994).

36. *Brown*, 161 U.S. 591.

37. *Id.*

38. For example, a witness granted immunity for his involvement in a check fraud scheme could not obtain immunity for an unrelated prior crime merely by including a reference to this prior crime while testifying concerning the check fraud.

39. *Kastigar*, 406 U.S. 441.

40. *Surina*, 629 P.2d 969.

41. *Kastigar*, 406 U.S. at 449.

42. *E.g.*, FELDMAN & OLLANIK, *supra* note 28, at 235 n. 41 (citing Act of Jan. 24, 1857, ch. 19, 11 Stat. 155, *amended by* Act of Jan. 24 1862, ch. 11, 12 Stat. 333).

43. *Id.*

Stat. 37,[44] which extended use immunity to judicial proceedings. Neither the 1862 statute nor the 1868 statute protected witnesses against the derivative use of their testimony. In 1892, the U.S. Supreme Court in *Counselman v. Hitchcock*[45] found pure use immunity unconstitutional. The Court ruled this original pure use immunity violated a witness' Fifth Amendment privilege against self-incrimination.[46] Responding to the *Counselman* decision, in 1893 Congress passed a statute[47] which provided for transactional immunity. In 1896, transactional immunity was upheld by the Supreme Court in *Brown v. Walker*.[48] The *Brown* Court concluded that transactional immunity was consistent with the history and purpose of the Fifth Amendment privilege against self-incrimination.[49]

As part of its vigorous focus on crime control, Congress, in 1968, enacted a general transactional immunity statute for federal grand juries and courts.[50] Congress patterned this broad act after the statute upheld in *Brown v. Walker*.[51] Two years later, Congress repealed this transactional immunity statute and passed a use/derivative use immunity statute.[52]

In 1972, the inevitable constitutional challenge occurred in *Kastigar*

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44. *E.g.*, FELDMAN & OLLANIK, *supra* note 28, at 235 n. 45 (citing Act of Feb. 25, 1868, ch. 13, 15 Stat. 37 which declared:

> No Pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture, Provided, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid).

45. 142 U.S. at 584. The Supreme Court found the 1868 use immunity statute unconstitutional because it could not, and would not, prevent the use of the witness' testimony to search out other testimony to be used in evidence against him, and could thus lead to a conviction. *Id.*

46. *Id.*

47. *E.g.*, FELDMAN & OLLANIK, *supra* note 28, at 236 n. 50 (citing Act of Feb. 11, 1893, ch. 83, 27 Stat. 443, *repealed by* Act of Oct. 17, 1978, Pub. L. No. 95-473, § 4(b),(c), 92 Stat. 1466).

48. 161 U.S. at 610. This early federal transactional immunity statute served as a model for all state and federal immunity statutes enacted within the next 75 years.

49. *Id.*

50. *E.g.*, FELDMAN & OLLANIK, *supra* note 28, at 238 n. 57 (citing Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197 (repealed 1970)).

51. 161 U.S. at 610.

52. *E.g.*, FELDMAN & OLLANIK, *supra* note 28, at 238 n. 59 (citing Organized Crime Control Act of 1970, 84 Stat. 926-928, codified as amended at 18 U.S.C. §§ 6001-6005 (1988)). The term "use/derivative use" immunity has generally been shortened to "use" immunity. For purposes of clarity, and to differentiate from original pure use immunity, the term "use/derivative use" immunity will be used throughout this comment.

v. United States.[53] The U.S. Supreme Court in a divided opinion upheld this new use/derivative use immunity statute.[54] Writing for the majority, Justice Powell held:

> The [Fifth Amendment] privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of' penalties affixed to . . . criminal acts. Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to infliction of criminal penalties on the witness.[55]

Use/derivative use immunity essentially bars the prosecution from ever using the witness' testimony, or any information derived from that testimony, as evidence against the witness.[56] A prosecutor may only prosecute an "immune" witness after showing that the evidence he proposes to use is "derived from a legitimate source wholly independent of the compelled testimony."[57]

Current federal witness immunity statutes, in line with the *Kastigar*[58] holding, are use/derivative use statutes, which prevent federal prosecutors from unilaterally granting immunity. Federal prosecutors are required instead to request a court order for immunity and receive approval from a higher ranking attorney in the Justice Department.[59] Initially, a federal prosecutor must seek the grant of immunity, but ultimately the district court grants the immunity.[60] When seeking such a grant, a prosecutor must believe that the testimony or other information desired "may be necessary to the public interest."[61] In addition, the witness must have "refused or [be] likely to refuse to testify or provide other informa-

53. 406 U.S. 441 (1972).

54. *Id.* at 453 (Mr. Justice Powell delivered the opinion of the Court. Mr. Justice Douglas and Mr. Justice Marshall dissented and filed opinions. Mr. Justice Brennan and Mr. Justice Rehnquist took no part in consideration or decision).

55. *Id.*

56. 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 78 (1978).

57. *Kastigar*, 406 U.S. at 460.

58. 406 U.S. at 453.

59. 18 U.S.C. § 6003(b) (1988). Attorneys who can approve such a request are the Attorney General, Deputy Attorney General, Associate Attorney General, or any designated Attorney General or Deputy Assistant Attorney General. *Id.*

60. 18 U.S.C. § 6003 (1988).

61. *Id.* § 6003(b)(1).

tion on the basis of his privilege against self-incrimination."[62] After the federal prosecutor has complied with the statute, the court is required to grant the requested immunity.[63]

Besides granting immunity pursuant to a statute, federal prosecutors also use informal immunity grants. Oral or written immunity granted instead of, or in the absence of, a formal grant of statutory immunity is considered informal immunity.[64] Informal immunity agreements are often more flexible than formal arrangements and may provide either use/derivative use or transactional immunity.[65] The scope of informal immunity may even exceed immunity allowed by a use/derivative use statute.[66] Since prosecutors are not required to comply with specific statutory restrictions and procedures, informal immunity is often easier to obtain than formal immunity.[67] However, the flexible nature of informal immunity can lead to miscommunication. When the agreement is tested, the prosecutor and the immunized person may disagree as to the extent of the immunity granted. Such a miscommunication is particularly likely to occur when the agreement is oral.

When an informally immunized person is compelled by threat of contempt of court to testify over an assertion of his Fifth Amendment privilege, that person may be protected by de facto immunity.[68] De facto immunity, which operates remedially as an exclusionary rule, affords the immunized person use/derivative use immunity with respect to the compelled testimony.[69] Thus, the immunized person is left in the same position, with respect to his right against self-incrimination, as if he had not testified.[70]

Federal courts have found that agreements in which a person testifies in reliance upon an informal arrangement with a prosecutor are lawful and proper.[71] In addition, some federal courts even have enforced informal immunity agreements by applying contract law.[72] In contrast, other courts have held that contract principles are inapposite to the ends of

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62. *Id.* § 6003(b)(2).

63. *Id.* § 6003(a).

64. *See generally* Thompson & Sumner, *Structuring Informal Immunity*, CRIM. JUST., Spring 1993, at 17, 20.

65. *Id.*

66. United States v. Friedrick, 842 F.2d 382 (D.C. Cir. 1988).

67. THOMPSON & SUMNER, *supra* note 64, at 21.

68. *See In re* Corrugated Container Antitrust Litigation, 662 F.2d 875 (D.C. Cir. 1981).

69. *Id.*

70. *Id.*

71. United States v. Turner, 936 F.2d 221, 223 (6th Cir. 1991); United States v. Kilpatrick, 821 F.2d 1456, 1470 (10th Cir. 1987); United States v. Anderson, 778 F.2d 602, 606 (10th Cir. 1985).

72. *E.g.*, United States v. Fulbright, 804 F.2d 847 (5th Cir. 1986); United States v. Irvine, 756 F.2d 708 (9th Cir. 1985); United States v. Brown, 801 F.2d 352 (8th Cir. 1986).

criminal justice.[73] These opposing courts have decided that an agreement not to prosecute should not be construed and interpreted under contract law.[74] Despite the availability of these remedial measures, informal immunity, in essence, leaves a defendant with no more than an equitable right to enforcement of the informal agreement.[75]

ANALYSIS

An understanding of the historical background of federal immunity and enabling authority is necessary to properly analyze and understand Wyoming's response to the criminal immunity issue. The next section examines immunity in Wyoming and develops an argument favoring a statute that gives prosecuting attorneys the official authority to grant criminal immunity.

Wyoming Immunity

Wyoming adopted the English common law as it existed in 1607.[76] When the English common law is consistent with Wyoming law, English common law is still the rule of decision in Wyoming.[77] A prosecutor has no general authority to grant immunity to a witness under English common law.[78] Absent English common law authority, the power to grant witness criminal immunity must be derived from a state's constitution, statutes or case law. Although some states' common law recognized a prosecutor's inherent authority to grant immunity absent a statute,[79] most courts support the principle that, absent contrary statutory authority or constitutional provisions, a prosecutor has no such inherent power.[80]

The Wyoming Constitution does not specifically address granting criminal immunity to witnesses.[81] Also, Wyoming is one of only three western states[82] without a general statute authorizing a prosecutor to grant

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73. *E.g.*, State v. Doe, 704 P.2d 432 (N.M. 1984).

74. *Id.*

75. "Whiskey Cases," 99 U.S. at 603.

76. WYO. STAT. § 8-1-101 (1989). *See also* Goldsmith v. Cheney, 468 P.2d 813, 816 (Wyo. 1970).

77. WYO. STAT. § 8-1-101 (1989). *See also Goldsmith*, 468 P.2d at 816; *See generally* Rules of Decision Act, Section 34 of the Judiciary Act of 1789. The famous Rules of Decision Act provided: "[T]he laws of several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decisions in trials at common law in the courts of the United States in cases where they apply." (This statute remains substantially unchanged to this day. *See* 28 U.S.C. § 1652 (1989)).

78. *Hennigan*, 746 P.2d at 412 (Urbigkit, J., dissenting).

79. *Surina*, 629 P.2d 969.

80. *E.g.*, *Roberts*, 230 A.2d at 273; *Carrera*, 227 A.2d at 629; *Apodaca*, 212 P.2d at 426.

81. WYO. CONST. art. I, § 11 states that no person shall be compelled to testify against himself in a criminal case.

82. Neither Texas nor Iowa have general statutes which allow prosecutors to grant criminal

witness criminal immunity.[83] Only two witness immunity statutes are available to Wyoming prosecutors, and these statutes only address controlled substances[84] and insurance crimes.[85]

In 1993, the Wyoming Supreme Court held in *Hall v. State*[86] that a prosecuting attorney, solely by virtue of his office and in the absence of any statutory authorization, has no inherent power to grant immunity to a witness. However, in the majority opinion, Supreme Court Justice Thomas stated that "the absence of authority to extend immunity on the part of the prosecuting attorney does not result in the agreement being unenforceable."[87] That case involved the question of what form of immunity Todd Hall had been granted when he testified in *Hopkinson v. State*.[88] In his appeal, Hall challenged the extent of his immunity grant, claiming he had been given transactional immunity. The Court remanded his case back to the district court so that the extent of immunity could be determined. As of this date, the district court has not made a determination on this issue.

In *Russell v. State*,[89] a companion case to *Hall v. State*,[90] the Wyoming Supreme Court reaffirmed its decision concerning a prosecutor's lack of inherent authority to grant immunity to a witness. The *Hall*[91] and *Russell*[92] cases presented the Wyoming Supreme Court with questions which had not been answered previously, either judicially or statutorily. The pertinent issues were: 1) whether prosecuting attorneys had authority to grant witness immunity; 2) the scope to be afforded the alleged agreements; and 3) the extent to which the agreements were enforceable.[93] Although the Supreme Court an-

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immunity to a witness.

83. The authors examined states west of the Mississippi River: Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington and Wyoming.

84. WYO. STAT. § 35-7-1043 (1994). The controlled substance statute provides that the "district judge in the district wherein prosecution is to take place" must consent for the grant of immunity. *Id.* This grant of immunity is available only if "testimony is necessary to secure conviction." *Id.*

85. WYO. STAT. § 26-2-124 (1991). The insurance statute calls for a directive from both the State Insurance Commissioner and the Attorney General compelling the witness to testify. The witness must first ask "to be excused from attending or testifying . . . on the ground that the testimony or evidence required of him may tend to incriminate him." *Id.*

86. 851 P.2d at 1266-67.

87. In *Hall*, Justice Urbigkit (retired) concurred in the decision to remand and filed an opinion. *Id.* at 1270. Justice Cardine also concurred in part and dissented in part and filed an opinion. *Id.* at 1271.

88. 632 P.2d 79 (defendant convicted of arranging the first degree murder of Jeff Green in 1979 from prison).

89. 851 P.2d at 1277.

90. 851 P.2d 1262.

91. *Id.*

92. 851 P.2d. 1274.

93. *Id.*

swered two of these questions, the issue of the scope of any immunity granted remains unresolved in the absence of statutory authority.[94] Consequently, prosecutors still may use other means, such as not prosecuting, to bargain for favorable witness testimony.[95]

Prior to these two cases, prosecutors routinely granted immunity to witnesses, and the Supreme Court never questioned the authority of a prosecutor to do so.[96] Only three years before the *Hall*[97] and *Russell*[98] decisions, the Court evaluated the controversial case of *Gale v. State*.[99] That case involved sexual abuse and neglect of several children in a family home. The prosecutor was determined to convict the family dentist, and in order to do so, granted immunity to the parents.[100] In the majority opinion, the Court neither challenged, nor discussed, the grant of immunity.[101] In his dissenting opinion, Justice Urbigkit railed against the granting of immunity and the majority's decision to affirm Dr. Gale's conviction for taking immodest, immoral or indecent liberties with a child.[102] But even in his dissent, Justice Urbigkit did not address the prosecutor's lack of authority to grant the immunity.[103]

Despite the *Hall*[104] and *Russell*[105] decisions, and in the absence of constitutional or statutory authority, Wyoming prosecutors are still bargaining for testimony and evidence from witnesses, in exchange for pros-

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94. *Id.*

95. Petition of Padget, 678 P.2d 870 (Wyo. 1984). The initial question as to whether or not charges should be filed in a criminal prosecution must be answered by the executive branch of the state government. The executive branch is required to see that the laws of the state are "faithfully executed." All jurisdictions recognize that the prosecutor has a substantial range of discretion in deciding whether or not to prosecute. Even when available evidence supports a conviction, the prosecutor can justify a decision not to prosecute. *Id.*

96. *See* Gale v. State, 792 P.2d 570 (Wyo. 1990); *Hennigan*, 746 P.2d 360; *In re* Contempt of Haselhuhn, 740 P.2d 387 (Wyo. 1987); *Hopkinson*, 632 P.2d 79; McLaughlin v. State, 626 P.2d 63 (Wyo. 1981); Channel v. State, 592 P.2d 1145 (Wyo. 1979); Salaz v. State, 561 P.2d 238 (Wyo. 1977); Jaramillo v. State, 517 P.2d 490 (Wyo. 1974); Kirk v. State, 421 P.2d 487 (Wyo. 1966).

97. 851 P.2d 1262.

98. 851 P.2d 1274.

99. 792 P.2d 570.

100. *Id.*

101. *Id.*

102. *Id.* at 590 (Urbigkit, J., dissenting). Only three years elapsed between the *Gale* decision, in which the court accepted that a prosecutor had a right to grant immunity, and the *Hall* and *Russell* decisions, in which the court found that a prosecutor had no inherent power to grant immunity. Justice Urbigkit suggested, "The change resulted from the original political machinations in *Gale* and thereafter from heightened social awareness in later cases by members of the court." Telephone interview with Walter C. Urbigkit, Jr., Wyoming Supreme Court Justice (retired) and practicing attorney, Cheyenne, Wyoming. (Oct. 7, 1994).

103. *Gale*, 792 P.2d at 590 (Urbigkit, J., dissenting).

104. 851 P.2d 1262.

105. 851 P.2d 1274.

ecutorial favors.[106] Essentially, these negotiations, regardless of method or label, result in grants of informal immunity.

As previously discussed, an oral or written grant of immunity given in the absence of a granting statute is informal immunity.[107] To determine the current use of immunity by Wyoming prosecutors, the authors conducted a number of interviews with Wyoming prosecutors, judges and practicing attorneys.[108] In these interviews, the authors sought information concerning the use of informal immunity in Wyoming, the frequency of use, changes in the type or granting of immunity since the *Hall*[109] and *Russell*[110] decisions, and the desirability of a general granting statute.[111]

Results of the 1994 Criminal Immunity Survey

All those interviewed concurred that informal immunity agreements are often used by Wyoming prosecutors.[112] Only one attorney interviewed ques-

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106. *See infra* note 112.

107. *See generally* THOMPSON & SUMNER, *supra* note 64, at 20.

108. The 13 interviewees consisted of six prosecuting attorneys, three practicing attorneys, two public defenders and two judges.

109. 851 P.2d 1262.

110. 851 P.2d 1274.

111. The following questions were asked during interviews:

1. Is immunity granted in Wyoming?
2. What form of immunity is granted?
3. How often is immunity granted?
4. What are the advantages and disadvantages of immunity?
5. What changes have occurred in the use of immunity since the *Hall* and *Russell* decisions?
6. Is immunity necessary in Wyoming?
7. Does Wyoming need a general immunity granting statute?
8. (If yes) Who should have the authority to grant immunity under a statute?
9. Would you prefer a use/derivative use or a transactional statute?
10. Tell us any general views or concerns you have concerning immunity in Wyoming.

112. Survey Results:

Question 1: All 13 persons interviewed concurred that immunity is being granted in Wyoming.

Question 2: All those interviewed stated that the form of immunity granted varies according to a prosecutor's goals.

Question 3: Two prosecutors estimated that they grant criminal immunity six times per year. The remaining interviewees believed granting immunity is fairly common, but did not give a specific number. One prosecutor stated that "handshake" immunity agreements are very common.

Question 4: All 13 interviewees viewed criminal immunity as an advantageous tool for prosecutors. In addition, the two defense attorneys believed that any immunity statute should also allow defense attorneys to offer immunity for testimony. (The granting of immunity for defense witnesses is an area of concern to Wyoming judges, prosecutors, defendants and their attorneys. Although this subject is also worthy of investigation and comment, it is nonetheless beyond the scope of this Comment.)

Question 5: All those interviewed agreed that since the *Hall* and *Russell* decisions, prosecutors hesitate to execute written immunity agreements. One prosecutor believes that a prosecutor has inherent authority to grant witness immunity. However, he does not grant immunity since

tioned the benefit of an immunity statute.[113] All of those interviewed suggested that since the *Hall*[114] and *Russell*[115] decisions, prosecutors may prefer

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Wyoming lacks a general authorizing statute. He stated that he only encourages a witness "to help himself by cooperating" and if the witness cooperates, he will then "do what he can to help." Another prosecutor indicated that many prosecutors use "informal immunity deals" because the legal status of immunity grants "is up in the air." He continued that prosecutors may be hesitant to openly grant immunity because the most recent Wyoming Supreme Court decisions dealing with criminal immunity do not clarify a prosecutor's position. A third prosecutor said that since the *Hall* and *Russell* decisions prosecutors are even more careful to keep immunity agreements "off the record." Additionally, one public defender believes that prosecutors used informal immunity extensively before *Hall* and *Russell*, and are still offering witnesses the same informal immunity. However, he stated that these agreements are now more secretive, making it harder for defense attorneys to get information concerning "what the real deal for the immunized person is."

Question 6: All 13 interviewees thought that criminal immunity is necessary in Wyoming.

Question 7: Twelve of the persons interviewed felt strongly that Wyoming needs an immunity statute. One public defender questioned the benefit of an immunity statute from a defense viewpoint. One prosecutor said such a statute is needed because the terms and guarantees in informal immunity agreements are often unclear and result in retrial. A second prosecutor said informal, oral agreements always have the potential for confusion and error. He stated that a crystal clear general granting statute would eliminate most of these problems.

Question 8: Six prosecutors, three practicing attorneys and one judge stated that the prosecutor should have sole authority to grant immunity under a statute. The two public defenders and one judge believed judicial overview of immunity decisions should be required. Two *prosecutors view judicial supervision, such as that required by the federal immunity* statutes, as a mere "rubber stamp" for prosecutorial decisions.

Question 9: Seven of the interviewees preferred a transactional immunity statute (three prosecutors, two practicing attorneys and two public defenders). Four interviewees had no preference as to type of immunity statute (two prosecutors and two judges). Two of the interviewees wanted a use/derivative use immunity statute (one prosecutor and one practicing attorney). One prosecutor saw little difference between transactional and use/derivative use immunity. He stated that although only transactional immunity forecloses further prosecutions, the requirements for obtaining independent evidence under use/derivative use immunity is so difficult that subsequent prosecutions are rare. Two prosecutors concurred that use/derivative use immunity forecloses subsequent prosecution in many cases because of the difficulty of "building walls around any evidence."

Question 10: All those interviewed offered opinions concerning the immunity issue. Some of the most representative statements follow. One prosecutor stated "criminal immunity should be codified because it is an important tool in the criminal justice area." Another prosecutor stated that absent a clear opinion concerning criminal witness immunity by Wyoming"s Supreme Court, and without a general granting statute, due process limits a prosecutor's use of immunity. A third prosecutor opposes the current system in which the Wyoming Supreme Court reviews questions of immunity, in retrospect, from a "cold record." He believes that the legislature is the appropriate authority to determine how to grant witness immunity.

Summary:

All those interviewed stated that immunity is necessary in Wyoming. twelve of the 13 interviewees believed that Wyoming needs a general criminal immunity granting statute. A majority of seven of the interviewees stated that Wyoming should have a transactional immunity statute with prosecutorial granting authority.

113. *Id.*

114. 851 P.2d 1262.

115. 851 P.2d 1274.

to keep these types of agreements "off the record."[116] Justice Cardine, who participated in the *Hall*[117] and *Russell*[118] cases, believes that as a result of these decisions, prosecutors are hesitant to go before the Wyoming Supreme Court with unauthorized informal immunity agreements.[119]

Why Wyoming Needs a General Immunity Statute

The status of criminal immunity in Wyoming is uncertain, leaving judges, prosecutors, defendants and their attorneys without definitive guidance when dealing with immunity issues. A general immunity granting statute could clarify this uncertainty. As stated by Benjamin Nathan Cardozo, while Chief Judge of the New York Court of Appeals:

> [W]hether the good to be attained by procuring the testimony of a criminal is greater or less than the evil to be wrought by exempting them forever from prosecution for their crimes is a question of high policy as to which the law-making department of the government is entitled to be heard.[120]

Twice since 1987 the Wyoming Legislature failed to pass bills which would authorize the granting of formal criminal immunity.[121] One possible

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116. *See supra* note 112 for an overview of prosecutors' opinions.

117. 851 P.2d 1262.

118. 851 P.2d 1274.

119. Interview with G. Joseph Cardine, Wyoming Supreme Court Justice (retired), in Laramie, Wyoming (Sept. 19, 1994).

120. Doyle v. Hofstader, 177 N.E. 489, 495 (N.Y. 1931).

121. The 1987 House version read as follows:

7-11-701. Immunity from prosecution; writing; effect.

(a) Immunity may be granted to any person whose testimony or evidence is necessary or useful in the investigation by an impaneled grand jury or in the trial of a violation of the criminal statutes of this state.

(b) Immunity may be granted by a district attorney or the attorney general and shall be in a notarized writing signed by the prosecuting attorney.

(c) Any person granted immunity under this section shall not be excused from testifying or producing evidence before a grand jury or in the trial of a criminal violation on the grounds that the testimony or evidence required of him may tend to incriminate him or subject him to penalty or forfeiture. No testimony so given, evidence so produced, or fruits of the compelled testimony or evidence shall be received against that person in any criminal proceeding. No person given immunity under this section shall be exempt from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

House Bill 0099, WY. Leg., (1987).

The 1989 Senate version read as follows:

7-11-601. Immunity from prosecution; writing; effect

(a) Immunity may be granted to any person whose testimony or evidence is necessary or useful in the investigation by an impaneled grand jury or in the trial of a violation of the criminal statutes of this state.

rationale for why these bills failed is that the legislature simply did not want general grants of criminal immunity in Wyoming. However, in 1977 the Wyoming Legislature recodified a statute which dealt specifically with the defendant as a witness.[122] This statute makes it clear that a defendant shall not be required to testify in any case unless he has been lawfully granted immunity from prosecution, penalty or forfeiture.[123] By using the term "lawfully granted immunity," the legislature must have intended that such immunity would be available in Wyoming. If this were the intent, further legislative action is required.

A second possible rationale for failing to pass these bills is that the legislature assumed that Wyoming prosecutors already had sufficient authority for granting immunity. It is also possible that the bills did not have sufficient support from prosecutors, who assumed they already had the power to grant immunity. However, in view of the *Hall*[124] and *Rus-*

(b) Immunity may be granted by a district attorney or the attorney general. A notarized statement of immunity, including any conditions of immunity, shall be signed by the prosecuting attorney.

(c) Any person granted immunity under this section shall not be excused from testifying or producing evidence before a grand jury or in the trial of a criminal violation on the grounds that the testimony or evidence required of him may tend to incriminate him or subject him to penalty or forfeiture. If immunity is granted to a person under this section, no testimony given, evidence produced, or fruits of compelled testimony or evidence shall be received against that person in any criminal proceeding except in a criminal proceeding against him for perjury or contempt committed while giving testimony or producing evidence pursuant to a grant of immunity. No person given immunity under this section shall be exempt from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

Senate File 0068, WY. Leg. (1989).

Since Wyoming records little legislative history, the authors contacted three legislators involved with these bills to find out why the measures did not pass.

The 1987 house bill, after being amended three times, failed on the floor of the House by a narrow margin of 30 ayes to 34 noes. State of Wyoming, Legislative Services Office, 87LSO-0247 (1987). The 1989 senate bill was passed by the Senate, then sent to the House, where it was amended and passed. State of Wyoming, Legislative Services Office, 89LSO-0256 (1989). The bill then returned to the Senate, where that body unanimously moved to not concur on the House amendments. A Joint Conference Committee was appointed and the bill then died shortly after in that committee. The Joint Conference Committee members were Senators Perry, Reese and Eddins and Representatives Tipton, Honaker and Alden. A member of that committee suggested that the House amendments may have "watered down" the bill, thus negating its originator's "law and order" purpose. Consequently, the bill was allowed to die in committee.

122. WYO. STAT. § 7-11-401 (1987 Repl.) states in part:

The defendant in all criminal cases, in all the courts in this state, may be sworn and examined as a witness, if he so elects, but the defendant shall not be required to testify in any case unless he has been lawfully granted immunity from prosecution, penalty or forfeiture.

In 1869, the first Territorial Legislature enacted this statute, which is virtually unchanged to this day. WYO. TERRITORIAL LAWS, ch. 74, tit. XI, §§ 128-29 (1869).

123. *Id.*

124. 851 P.2d 1262.

sell[125] decisions, none of these hypothesized rationales can now be used as a bar to current general immunity legislation. These decisions leave prosecutors in the nebulous position of granting immunity without the authority to do so.

The authority to grant witness criminal immunity is a useful tool for prosecutors, and substantial harm could result from a decision which removes this weapon from the prosecutor's arsenal.[126] Many Wyoming prosecutors would prefer to have general statutory authority for granting immunity to witnesses.[127] A statute should provide that a defendant could not successfully argue for a broader interpretation than the plain language of a written agreement, as occurred in *Hall*[128] and *Russell*.[129] Theoretically, a statute would also limit claims of misrepresentation as to the prosecutor's authority to grant immunity to a defendant. Since a prosecutor would know precisely the amount of immunity he could lawfully offer, a prosecutor would be encouraged to negotiate written, on-the-record, immunity agreements. The use of formal agreements would eliminate many of the problems concerning scope of immunity which occur when informal agreements, particularly oral agreements, are used. In addition, a statute would allow both the prosecution and defense to bargain openly. Open and recorded negotiations tend to alleviate such problems as misunderstood terms and conflicting interpretations, which often accompany informal oral agreements. In addition, above-board negotiations increase a prosecutor's credibility:

> We recognize that the public may benefit substantially from a prosecutor's decision to withhold prosecution of one individual in exchange for information leading to the arrest and conviction of a person deemed more dangerous to the public welfare. The availability and usefulness of this strategy could be substantially neutralized if the prosecutor's promise is perceived to be unreliable.[130]

Regulated and open negotiations reduce the need for judicial intervention. Justice Cardine commented that: "A statute would save court time and money. Absent a statute, immunity questions could be appealed in every case. These questions often require remand and re-trial."[131]

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125. 851 P.2d 1274.
126. Bowers v. State, 500 N.E.2d 203 (Ind. 1986).
127. *See supra* note 112.
128. 851 P.2d 1262.
129. 851 P.2d 1274.
130. *Bowers*, 500 N.E.2d at 204.
131. Interview with Justice Cardine *supra* note 119. Justice Cardine pointed out that in the absence of a granting statute, whether immunity has been granted and the extent of its scope could

Thus, a clear and concise immunity statute would help conserve scarce judicial resources.

A criminal defendant would also benefit from a formal immunity agreement resulting from a general granting statute. However, an argument can be made that defendants, like the defendants in *Hall*[132] and *Russell*[133] who benefited from their informal written immunity agreements, do not need formal grants of immunity. But because of these unprecedented decisions, Wyoming prosecutors now hesitate to participate in written informal immunity agreements.[134] Obviously, such hesitation is detrimental to defendants. Justice Urbigkit, who joined in these decisions, recently stated that a statute would be more beneficial to a defendant than the present "see no evil, hear no evil"[135] status of Wyoming immunity. Currently, defendants and their attorneys are often placed in the tenuous position of relying upon informal, "handshake" immunity agreements.[136] As has long been accepted, immunity must be "something more substantial than the grace or favor of the prosecuting officer."[137] By adopting a general granting statute, Wyoming also would benefit by avoiding "piecemeal"[138] legislation. Such legislation occurs when the legislature continues to enact specific statutes apply only to particular crimes.[139]

Proposed Legislation

The status of criminal immunity in Wyoming leaves judges, prosecutors, defendants and their attorneys without definitive guidance when dealing with immunity issues. A general immunity granting statute could clarify this uncertainty. On the following page is a proposed general immunity granting statute to assist the legislature in resolving this gap in Wyoming's criminal law.

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be an appealable issue in every case. He feels such appeals are a serious drain on judicial time and resources. Justice Cardine stated: "Informal immunity, especially that which results from a 'handshake deal,' is always open to question." He believes that without statutory assurances, a defendant does not know "where he stands and is always taking a chance." *Id.*

132. 851 P.2d 1262.

133. 851 P.2d 1274.

134. *See supra* note 112.

135. Telephone interview with Walter C. Urbigkit, Jr., Wyoming Supreme Court Justice (retired) and practicing attorney, Cheyenne, Wyoming (Oct. 7, 1994). Justice Urbigkit said that a statute would provide a defendant with some certainty about immunity. He feels that informal immunity is unenforceable and that a prosecutor has no inherent authority to grant immunity. In his opinion, a statute should require a written immunity agreement that would state the burdens and benefits to the involved parties. *Id.*

136. Interview with Justice Cardine *supra* note 119. In this interview, Justice Cardine also stated that, "A handshake doesn't mean a hell of a lot to a defendant who's in prison." *Id.*

137. *Apodaca*, 212 P.2d at 427.

138. *Surina*, 629 P.2d at 978.

139. *Id. See also supra* text accompanying notes 13 & 14.

Proposed Wyoming Immunity Statute:

(1) At any time in any investigation or prosecution of a criminal case, the county attorney, the district attorney or the attorney general may grant, on behalf of the State and only in writing, transactional immunity from prosecution or punishment to any person who is called, or who is intended to be called, as a witness or who gives evidence. This written immunity will be made part of the official court record in the case.

(A) Definition of Transactional Immunity: Transactional immunity is immunity that absolutely precludes prosecution of a witness for a crime, or related testimony inquired about during investigation of the crime or in compelled testimony.

(B) This transactional immunity may be granted on account of:

(i) any transaction or matter contained in any statement or,

(ii) any matter about which such person shall be compelled to testify.

(C) The exact terms of the immunity granted must be in writing. This agreement must be signed by the prosecutor, the immunized person and counsel, if retained. The defendant and counsel for the defendant must be notified in writing within 20 days that a witness has been granted immunity.

(2) A prosecution may not be instituted against the person for any crime, under the laws of Wyoming or any municipality, which was disclosed by his testimony or during investigation pursuant to this statute, unless such evidence is volunteered by this person.

(3) Testimony given under a grant of immunity in a criminal case may be used in a subsequent civil case for damages and forfeitures against the immunized person.

(4) If the person testifies falsely, immunity granted under this statute is repealed, both retroactively and prospectively. Also, if the person testifies falsely, immunity granted under this statute does not prevent prosecution for perjury or false statement or any other crime committed in giving such evidence.

(5) After being granted immunity from prosecution or punishment, no person shall be excused from testifying at trial, or giving statements in pre-trial actions on the ground that this testimony may incriminate him.

(6) Upon written application by the prosecuting attorney, County or District Court shall set a time for a hearing and order the person to appear to show cause why the question should not be answered or the evidence produced.

(7) Under the grant of immunity, the court shall order the question answered or the evidence produced unless it finds compliance would be contrary to the public interest or in violation of the constitutional rights of the immunized person.

(8) If the witness still refuses to answer or produce the evidence, he is guilty of contempt and will be punished accordingly, at the discretion of the court.[140]

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140. The Kansas and Utah criminal immunity statutes were used as models for this proposed statute. These statutes were chosen because they deal with many of the issues which should be addressed by immunity statutes. Kansas and Utah are in the Tenth Circuit federal system with Wyoming. An additional consideration was that Utah is a sister state and generally as politically conservative as Wyoming.

KAN. STAT. ANN. § 22-3415 (1988) reads:

> The provisions of law in civil cases relative to compelling the attendance and testimony of witnesses, their examination, the administration of oaths and affirmations, and proceedings as for contempt, to enforce the remedies and protect the rights of the parties, shall extend to criminal cases so far as they are in their nature applicable, unless other provision is made by statute.
>
> The county or district attorney or the attorney general may at any time, on behalf of the state, grant in writing to any person immunity from prosecution or punishment on account of any transaction or matter contained in any statement or about which such person shall be compelled to testify and such statement or testimony shall not be used against such person in any prosecution for a crime under the laws of Kansas or any municipal ordinance. After being granted immunity from prosecution or punishment, as herein provided, no person shall be excused from testifying on the ground that his testimony may incriminate him unless such testimony is a violation of federal law. He shall not be granted immunity from prosecution for perjury or false statement or any other crime committed in giving such evidence.

UTAH CODE ANN. § 77-22-3 (1995) reads:

> (1) In any investigation or prosecution of a criminal case, the attorney general, county attorney, and district attorney as provided under Sections 17-18-1 and 17-18-1.7 may grant transactional immunity from prosecution to any person who is called or who is intended to be called as a witness on behalf of the state when the attorney general, county attorney, or district attorney finds that the testimony of the person is necessary to the investigation or prosecution of the case.
>
> (2)(a) A prosecution may not be instituted against the person for any crime disclosed by his testimony pursuant to this chapter, unless the evidence is volunteered by such person or is not responsive to a question.
>
> (b) However, if the person testifies falsely, immunity granted under this section does not prevent prosecution for perjury.
>
> (3)(a) If during the investigation or prosecution any person refuses to answer a question or produce evidence of any kind on the ground that he may be incriminated, the attorney issuing the subpoena may file an application in writing with the district court in which the examination is being conducted for an order requiring that person to answer the question or produce the evidence requested.
>
> (b) The court shall set a time for hearing and order the person to appear to show cause why the question should not be answered or the evidence produced.

Ideally, the power to grant immunity should be used with great caution, and only in strict compliance with a statute.[141] However, a transactional immunity statute, as proposed above, will not remedy all problems that can arise when granting immunity. A statute would not necessarily remedy a situation such as that which occurred in *Gale*.[142] But fear or concern about this type of situation should not foreclose enacting an immunity statute, since a similar situation could happen with or without an immunity statute. In theory, prosecutors who make poor prosecutorial immunity decisions should be voted out of office.

Despite the possibility that such a questionable grant of immunity could again occur, the primary authority to grant immunity to a witness should remain with the prosecutor. Such an arrangement fulfills Wyoming's constitutionally mandated distribution of powers doctrine, which requires that the government be divided into legislative, executive and judicial branches.[143] Under this doctrine, one branch is not permitted to encroach on the domain or exercise the powers of another branch.[144] Although judicial supervision of prosecutorial immunity decisions may not violate this doctrine, other concerns make such supervision unnecessary.

The federal immunity statute requires judicial supervision,[145] but such supervision is often viewed as a mere "rubber stamp"[146] for prosecutorial decisions. This proposed statute does not include judicial supervision, thus avoiding the time and inefficiency of this formality. Judicial supervision also could create a potential conflict of interest by making the judge privy to information unnecessarily incriminating to a witness.[147]

(c) The court shall order the question answered or the evidence produced unless it finds that it would be clearly contrary to the public interest or could subject the witness to a criminal prosecution in another jurisdiction.

(d) If the witness still refuses to answer or produce the evidence, he is guilty of contempt of court and shall be punished accordingly.

(e) If the witness complies with the order and he would have been privileged to withhold the answer given or the evidence produced by him except for this section, he may not be prosecuted or subjected to penalty or forfeiture on account of any fact or act concerning which he was ordered to answer or produce evidence. However, he may be prosecuted or subjected to penalty for any perjury, false swearing or contempt committed in answering, failing to answer, or for producing or failing to produce any evidence in accordance with the order.

141. State v. Ward, 571 P.2d 1343 (Utah 1977).

142. 792 P.2d 570. *See supra* text accompanying notes 99 through 103.

143. WYO. CONST. art. II, § 1.

144. *Id.*

145. *See, e.g.*, 18 U.S.C. § 6003 (1988).

146. *See supra* note 112.

147. *See supra* note 119. In the words of Justice Cardine: "It's none of the judge's damn business." *Id.*

State prosecutors and legislatures initially might prefer a narrower use/derivative use statute, similar to the federal immunity statutes.[148] A use/derivative use statute may appease voters who question immunity decisions. This type of statute allows a prosecutor to hold out the possibility of a future prosecution through independent evidence. In reality, satisfying the requirements for obtaining independent evidence, as outlined by the Supreme Court in *Kastigar*,[149] is so rigid that subsequent prosecution is rare.[150] Under a use/derivative use statute, a witness may attempt to acquire additional immunity by mentioning an unrelated crime during testimony. However, this same problem can occur under either use/derivative use or transactional immunity.

Additionally, some state constitutions currently require the broader immunity coverage provided by transactional immunity.[151] In *State v. Gonzalez*,[152] the Alaska Supreme Court held that Alaska's use/derivative use immunity statute[153] violated the state constitutional provision against self-incrimination.[154] This violation occurred because the judicial process could not completely safeguard the derivative use of compelled testimony.[155] That court stated that a subsequently accused witness faces proof

148. 18 U.S.C. §§ 6001-6005 (1988 & Supp. 1995) Neighboring states Montana and Nebraska have enacted use/derivative use statutes similar to these federal statutes. MONT. CODE ANN. § 46-15-331 (1994) and NEB. REV. STAT. § 29-2011.02 (1989 & Supp. 1995); NEB. REV. STAT. § 29-2011.03 (1989 & Supp. 1995). In 1994, Hawaii added a transactional immunity provision to its existing use/derivative use statutes. These dual statutes allow prosecutors to choose either use/derivative use or transactional immunity. HAW. REV. STAT. ANN. § 621C-1 (1988); HAW. REV. STAT. ANN. § 621C-2 (1988); HAW. REV. STAT. ANN. § 621C-3 (1988); HAW. REV. STAT. ANN. § 621C-4 (1994).

149. 406 U.S. at 444-45.

150. *See supra* note 112.

151. *See generally* Wright v. McAdory, 536 So.2d 897 (Miss. 1988); State v. Soriano, 684 P.2d 1220 (Or. 1984); Attorney General v. Colleton, 444 N.E.2d 915 (Mass. 1982); State v. Miyasaki, 614 P.2d 915 (Haw. 1980).

152. 853 P.2d at 533.

153. ALASKA STAT. ANN. § 12.50.101 (1990) reads:

> (a) If a witness refuses on the basis of the privilege against self-incrimination to testify or provide other information in a criminal proceeding before or ancillary to a court or grand jury of this state, and a judge issues an order under (b) of this section, the witness may not refuse to comply with the order on the basis of the privilege against self-incrimination. If the witness fully complies with the order, no testimony or other information compelled under the order, or information directly or indirectly derived from that testimony or other information, may be used against the witness in a criminal case, except in a prosecution based on perjury, giving a false statement, or otherwise knowingly providing false information, or hindering prosecution. (citing only relevant portion of statute).

154. *Gonzalez*, 853 P.2d at 530 The Alaska use/derivative use statute, ALASKA STAT. ANN. § 12.50.101, *see supra* note 153, impermissively dilutes the protection of art. I. § 9 of the Alaska Constitution. *See infra* note 160.

155. *Gonzales*, 853 P.2d at 530-31 (quoting Piccirillo v. New York, 400 U.S. 548, 552 (1971) (Brennan, J., dissenting)).

problems because all evidence regarding use of the compelled testimony rests in the hands of the prosecutor.[156] Also, that court found that the state could not completely safeguard against "nonevidentiary use"[157] of compelled testimony, because numerous people come into contact with such evidence through official duties, or even through the media.[158] Wyoming's constitutional provision against self-incrimination[159] is essentially identical to that provision in Alaska's Constitution.[160]

To prevent future constitutional challenges, such as those which have occurred in Alaska, Wyoming should enact a transactional immunity statute. In addition, as previously discussed, the current status of granting immunity in Wyoming is uncertain, leaving judges, prosecutors, defendants and their attorneys without definitive guidance when dealing with immunity issues. Wyoming's enactment of a statute similar to the one proposed above would resolve these situations.

CONCLUSION

Wyoming prides itself upon being an independent state with a dislike of government intrusion and involvement. Many Wyoming citizens believe a person's word is good enough and a handshake binds a deal. Sadly enough, situations exist in which neither will suffice. The granting of criminal immunity is one of those situations.

Although Wyoming has no general immunity statute, prosecutors have granted informal immunity to witnesses for many years. In 1993, the Wyoming Supreme Court twice ruled that a prosecutor has no authority to grant immunity to a witness. But despite these decisions, prosecutors still obtain evidence or testimony through informal arrangements which are open to misinterpretation. Obviously, real men and women do squeal, even in the Cowboy State.[161] Since they do, Wyoming needs a statute

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156. *Id.* at 532.

157. *Id.* at 531-32 (citing United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973) (finding that nonevidentiary use includes assistance in focusing the investigation, deciding to initiate the prosecution, refusing to plea bargain, interpreting evidence, planning cross examination, and otherwise generally planning trial strategy).

158. *Id.* at 532.

159. WYO. CONST. art. I, § 11. *See supra* note 2.

160. ALASKA CONST. art. I, § 9. states:

No person shall be put in jeopardy twice for the same offense. No person shall be compelled in any criminal proceeding to be a witness against himself.

161. These cases represent a sampling of case law which supports the contention that real men and women do squeal, and have for a number of years: Jaramillo v. State, 802 P.2d. 872 (Wyo. 1990); Gale v. State, 792 P.2d 570 (Wyo. 1990); Hennigan v. State, 746 P.2d 360 (Wyo. 1987); In re Contempt of Haselhuhn, 740 P.2d 387 (Wyo. 1987); Hopkinson v. State, 632 P.2d 79 (Wyo.

outlining exactly how immunity should be granted. The Wyoming legislature should resolve this gap in Wyoming's criminal justice system by adopting the transactional immunity statute proposed in this comment.

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1981); McLaughlin v. State, 626 P.2d 63 (Wyo. 1981); Channel v. State, 592 P.2d 1145 (Wyo. 1979); Salaz v. State, 561 P.2d 238 (Wyo. 1977); Jaramillo v. State, 517 P.2d 490 (Wyo. 1974); Kirk v. State, 421 P.2d 487 (Wyo. 1966).