CONSTITUTIONAL LAW—THE FIFTH AMENDMENT'S PROXY—TRANSACTIONAL OR USE IMMUNITY?—*In re Korman*, 449 F.2d 32 (7th Cir. 1971); *Stewart v. United States*, 440 F.2d 954 (9th Cir. 1971).

Jack Korman and Robert Likas were subpoenaed to appear before the grand jury which was investigating illegal activities prohibited by the Organized Crime Control Act.[1] They declined to answer questions, relying on their fifth amendment privilege against self-incrimination.[2] After being given use immunity,[3] they reappeared before the grand jury, but once more they refused to answer the questions asked them. The government entered a motion for an order to hold them in contempt.[4] At a hearing on the contempt charge, they contended that the statutory immunity from the use of their testimony in a criminal case was unconstitutional. The district court granted the government's motion, and held both witnesses in contempt, from which judgment they appealed.[5]

On appeal, the Seventh Circuit in *In re Korman*[6] reversed the con-

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1 18 U.S.C. §§ 371, 1511, 1952, 1955 (1970).

2 *In re* Korman, 449 F.2d 32, 34 (7th Cir. 1971).

3 The Organized Crime Control Act § 201(a), 18 U.S.C. § 6002 (1970) provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
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> (1) a court or grand jury of the United States,
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> (2) an agency of the United States, or
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> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

4 The Organized Crime Control Act § 301(a), 28 U.S.C. § 1826 (1970) in pertinent part provides:

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—
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> (1) the court proceeding, or
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> (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

5 449 F.2d at 33-34.

6 449 F.2d 32 (7th Cir. 1971).

tempt order on the ground that appellants' privilege against self-incrimination could not be constitutionally supplanted by use immunity.[7] The court held that use immunity does not fulfill the "minimal constitutional guarantees" required for immunity statutes, since it leaves the witnesses subject to future prosecution grounded on matters related to their compelled testimony.[8] It was held that only transactional immunity can completely protect the witness against future prosecution in the jurisdiction which compelled the testimony.[9]

In *Stewart v. United States*,[10] the Ninth Circuit, construing the same immunity statute, held it constitutional since it proscribed the use of the compelled testimony and any other information directly or indirectly derived from such testimony.[11]

The origin of the privilege against self-incrimination lies in the oath *ex officio*,[12] established in 1236 by the ecclesiastical courts of England. The oath traveled a difficult course, caught between the Church's desire to conduct unabridged inquiries into the behavior and morals of those in the diocese and the sovereign's wish to forbid Church officials from compelling persons to give testimony which might defame them. By the middle of the 18th Century, this strife culminated in the English judiciary giving effect to an individual's privilege not to incriminate himself.[13]

The result of these developments was firmly established in the American colonies by 1789.[14] Six colonies incorporated self-incrimina-

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7 *Id.* at 35.

8 *Id.*

9 *Id.* at 39.

10 440 F.2d 954 (9th Cir. 1971).

11 *Id.* at 957. Michael Stewart and Charles Kastigar were subpoenaed to appear before the grand jury. When they refused to testify concerning alleged violations of federal law, they were granted use immunity pursuant to 18 U.S.C. § 6002 (1970), but remained silent. They appealed from the district court's order of contempt and imprisonment. The order was affirmed and they appealed to the United States Supreme Court where certiorari was granted *sub nom.* Kastigar v. United States, 402 U.S. 971 (1971).

12 The oath required a person to answer all questions put to him by church officials without presentment or accusation. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949). For an interesting discussion of the historical evolution of the oath, *see* Silving, *The Oath: I*, 68 YALE L.J. 1329 (1959). *See also* 8 J. WIGMORE, EVIDENCE § 2250 (McNaughton rev. 1961).

13 For interesting and informative reading on the history of the oath *ex officio* in England, *see* Morgan, *supra* note 12, at 1-18.

14 *Id.* at 22. For a more detailed discussion of the development of the privilege in the United States, *see* Pittman, *Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935). *See also* Pittman, *The Fifth Amendment: Yesterday, Today and Tomorrow*, 42 A.B.A.J. 509 (1956). *See generally* Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 191 (1930).

tion provisions into their laws.[15] The inequities resulting from the denial of a person's right not to incriminate himself motivated the colonists to write a constitutional amendment which states that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[16] Thus, the "maxim, [*nemo tenetur seipsum accusare* (no one is bound to accuse himself)][17] which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."[18] With the passage of time, and the progressive development of the United States, many immunity statutes were enacted which specifically defined the type of immunity that was sufficient to compel the witness to testify against himself.[19] These statutes can be separated into two types—use or testimonial immunity, and transactional or absolute immunity.[20]

The use immunity statutes prevent the utilization of the compelled testimony and its direct or indirect fruits in a subsequent prosecution, but allow the government to utilize evidence obtained from an independent, legitimate and untainted source to prosecute the witness.[21] Transactional immunity, in addition to granting use protection, also prohibits subsequent prosecution for any transaction to which the

15 Morgan, *supra* note 12, at 22. These colonies were Virginia, Pennsylvania, New Hampshire, North Carolina, Vermont and Massachusetts. *See* 1 B. POORE, UNITED STATES CHARTERS AND CONSTITUTIONS, 956; 2 B. POORE, *supra*, at 1294, 1409, 1541-42, 1860, 1909 (2d ed. 1878).

16 U.S. CONST. amend. V.

17 BLACK'S LAW DICTIONARY 1191 (4th ed. 1968); *see* Emery's Case, 107 Mass. 172, 181 (1871).

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

19 For a list of federal and state immunity statutes, *see* 8 J. WIGMORE, EVIDENCE § 2281 n.11 (McNaughton rev. 1961, Supp. 1971).

For a discussion of some of the problems encountered in determining when to grant immunity, *see* Note, *Federal Immunity Statutes: Problems and Proposals*, 37 GEO. WASH. L. REV. 1276 (1969).

The test to be followed in order to determine when immunity should be given is very aptly stated in Hoffman v. United States, 341 U.S. 479, 486-87 (1951):

> The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant . . . . To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

20 The protection of these statutes can be acquired "automatically" while under oath and in response to a subpoena, by "claim" while under oath and in response to a subpoena and by "claim" of the fifth amendment privilege without the oath or the subpoena. *See* Note, *supra* note 19, at 1277, 1290-92 for the federal immunity statutes listed under the three above categories. *See also* McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 228-32 (1967).

21 J. WIGMORE, *supra* note 19, § 2281 n.11.

compelled testimony related, regardless of whether or not the evidence is independent, legitimate and untainted.[22]

The practice of granting immunity has become an increasingly effective weapon in the fight against crime.[23] Therefore, the constitutionality of section 6002 of the Organized Crime Control Act, a general immunity provision which can be invoked even though there is no violation of the Act itself, is of vital importance. The Act repealed or conformed more than fifty existing federal immunity statutes.[24] Congress, in enacting this statute, decided that the Constitution did not require that the witness be given transactional immunity and, in fact, believed that the Supreme Court had acknowledged the adequacy of use immunity.[25] The reasoning behind this Congressional choice can be traced to the disparate conclusions of the two Supreme Court decisions of *Counselman v. Hitchcock*[26] and *Murphy v. Waterfront Commission*.[27] Any discussion of the current status of the law in the area of immunity must necessarily revolve around these two cases.

Counselman, a landmark case in the area of the constitutional sufficiency of immunity statutes, involved a grand jury witness who refused to answer questions for fear that he might incriminate himself. Upon his repeated refusal to answer, a federal district court adjudged him in contempt, fined and imprisoned him until he should answer.[28]

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22 *Id.* Immunity is a matter of claim in most instances and thus the person has the right to waive his right to immunity and to testify voluntarily if he has been previously informed of his rights. Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968) (public employees required to sign waiver of immunity); C. MCCORMICK, EVIDENCE § 130, at 272-74 (1954); Note, *The Privilege Against Self-Incrimination: The Doctrine of Waiver*, 61 YALE L.J. 105 (1952).

23 In recent years, our experience in prosecuting organized crime has indicated that virtually the only means of obtaining incriminating evidence against the underworld leaders is through the testimony of minor participants who have valuable knowledge of the syndicate's operations.

SENATE COMMITTEE ON THE JUDICIARY, PERMITTING THE COMPELLING OF TESTIMONY AND THE GRANTING OF IMMUNITY WITH RESPECT TO CERTAIN CRIMES, S. REP. NO. 308, 90th Cong., 1st Sess. 17-18 (1967). *See generally* Note, *Required Information and the Privilege Against Self-Incrimination*, 65 COLUM. L. REV. 681 (1965).

24 *In re* Kinoy, 326 F. Supp. 407, 410-11 (S.D.N.Y. 1971).

25 H.R. REP. NO. 91-1549, 91st Cong., 2d Sess. 42 (1970):

It [§ 6002] is designed to reflect the use-restriction immunity concept of *Murphy* . . . rather than the transactional immunity concept of *Counselman* . . . .

See In re Kinoy, 326 F. Supp. at 411-12, where section 6002 was declared unconstitutional.

The New Jersey Model State Witness Immunity Act, N.J. STAT. ANN. § 52:9M-17 (1970), was changed from a transactional to a use immunity statute in 1968. *See In re* Addonizio, 53 N.J. 107, 114-15, 248 A.2d 531, 535-36 (1968).

26 142 U.S. 547 (1892).

27 378 U.S. 52 (1964).

28 *In re* Counselman, 44 F. 268, 269 (7th Cir. 1890).

On appeal, the United States Supreme Court reversed[29] on the ground that the immunity statute[30] was unconstitutional since it allowed for the use of the fruits of the compelled testimony.[31] The Court reasoned that the statute abridged the witness' constitutional privilege by placing him in a worse position than he would have been in had he refused to answer. The opinion indicated the type of immunity required to replace the constitutional privilege:

> In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.[32]

The *Counselman* requirement of "absolute immunity" was qualified by later decisions which permitted the questioning jurisdiction to compel testimony in exchange for a grant of immunity, even though this testimony could be used in prosecuting the witness in another jurisdiction.[33] In 1964, the Court, in deciding *Murphy* took a step back in the direction of "absolute immunity." The appellant, although granted full transactional immunity by the State of New Jersey, refused

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29 142 U.S. at 586.

30 Act of Feb. 25, 1868, ch. 13, § 1, 15 Stat. 37 provides that:

> [N]o answer or other pleading of a party, and no discovery, or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness: *Provided*, That nothing in this act shall be construed to exempt any party or witness from prosecution and punishment for perjury committed by him in discovering or testifying as aforesaid.

31 142 U.S. at 585-86:

> Section 860, moreover, 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.

Id. at 586.

32 *Id.* at 586. The statute condemned by *Counselman* was subsequently amended so as to conform with the reasoning of the Court. The revised statute reappeared before the Supreme Court four years later in the case of Brown v. Walker, 161 U.S. 591 (1896). Although the majority found the use immunity statute coextensive with the constitutional privilege, four dissenting Justices considered transactional immunity the minimal constitutional requirement. 161 U.S. at 610-38.

In the span of time between the *Counselman* decision and 1970, Congress wrote more than fifty immunity provisions into various federal statutes and "with one minor and unexplained exception in 1898 and two exceptions in 1970, [including 18 U.S.C. § 6002 (1970)] every provision has provided for transactional immunity" (footnotes omitted). Piccirillo v. New York, 400 U.S. 548, 571 n.11 (1971) (Brennan, J., dissenting).

33 Feldman v. United States, 322 U.S. 487 (1944), *overruled*, Murphy v. Waterfront Comm'n, 378 U.S. 52, 79-80 (1964); United States v. Murdock, 284 U.S. 141 (1931).

to testify because he was not protected against the use of his testimony by the federal authorities.[34] The Court concluded that the federal government could prosecute the appellant but, in doing so, could not use the compelled testimony or its fruits.[35] The effect of this decision was to create an inter-jurisdictional use restriction on all compelled testimony. The Court, by not specifically stipulating the type of immunity required of the questioning jurisdiction, apparently left intact, on the intra-jurisdictional level, the *Counselman* requirement of "absolute immunity."[36] Therefore, the result of *Murphy* was the development of a schism between inter- and intra-jurisdictional immunity.

The *Counselman* Court was confronted with the constitutionality of an incomplete use immunity statute,[37] and for that reason, it has been argued that the decision only provides binding precedent for the limited proposition that an incomplete use immunity statute is constitutionally defective because it does not protect against the indirect use of the compelled testimony.[38] Under this interpretation, *Counselman*'s absolute immunity language would be mere dictum. This apparently was the construction accepted in *Stewart*, since the court stated therein:

> No case has been cited in which the Supreme Court has held that *only* a transaction statute will suffice . . . .[39]

Korman, on the other hand, rejected such a limited interpretation of *Counselman* and construed the absolute immunity language as the very basis of the Court's decision.[40] The *Counselman* Court's criticism of the statute's inability to protect the witness against the subsequent use of the "fruits" of his testimony was characterized by *Korman* as "at most . . . an alternative ground for the Court's holding which does not detract from the force of the ground more specifically relied on," that

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34 Application of Waterfront Comm'n, 39 N.J. 436, 440-43, 189 A.2d 36, 39-40 (1963).

35 378 U.S. at 79.

36 For similar reasoning, *see* Sobel, *The Privilege Against Self-Incrimination "Federalized,"* 31 BROOKLYN L. REV. 1, 46 (1964).

37 142 U.S. at 586. The Act of Feb. 25, 1868, ch. 13, § 1, 15 Stat. 37, provided no protection against the "use" of the compelled testimony in order to gain other information which could be employed to convict the testifying witness. *Id.*

38 United States *ex rel.* Catena v. Elias, 449 F.2d 40 (3d Cir. 1971). In his dissenting opinion, Judge Van Dusen stated that:

> The majority rejects the conclusions that the Court followed the traditional practice of deciding constitutional cases on the narrowest possible ground . . . .

Id. at 47. This was also the government's argument in *In re* Korman, 449 F.2d at 35 and *In re* Kinoy, 326 F. Supp. at 412.

39 440 F.2d at 956.

40 449 F.2d at 35.

is, absolute immunity as a constitutional prerequisite.[41] The Third Circuit recently expressed a similar viewpoint:

> [T]hough a narrower ruling might have been made, the [Counselman] Court used this case as a vehicle for deciding that nothing less than full transactional immunity . . . would suffice. That decision cannot properly be disregarded as inconsequential dictum . . . .[42]

In *Brown v. Walker*,[43] decided just four years after *Counselman*, the Court, in a 5-4 decision, held a transactional immunity statute constitutionally sufficient to supplant the fifth amendment privilege of silence. The four dissenters argued that even the protection afforded by transactional immunity was not coextensive with the fifth amendment guarantee.[44] *Korman*, in an attempt to substantiate its interpretation of *Counselman*, pointed out that of these four dissenters, two were members of the unanimous *Counselman* Court.[45] District Judge Motley, in the case of *In re Kinoy*,[46] stated that:

> If the "absolute immunity" from prosecution language in *Counselman* was mere *dictum*, it took on new life in Brown v. Walker . . . as settled doctrine.[47]

In the intervening years between *Brown* and *Murphy*, the Supreme Court reiterated the necessity of transactional immunity.[48] However,

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41 *Id.*

42 449 F.2d at 42.

43 161 U.S. 591 (1896).

44 *Id.* at 610-38; Boyd v. United States, 116 U.S. 616, 634-35 (1886).

45 449 F.2d at 36 n.7.

46 326 F. Supp. 407 (S.D.N.Y. 1971).

47 *Id.* at 414 (footnote omitted).

48 The Supreme Court once again invoked *Counselman* in Reina v. United States, 364 U.S. 507 (1960) (federal grant of transactional immunity protecting against both state and federal prosecution held coextensive with the constitutional privilege); Ullmann v. United States, 350 U.S. 422 (1956) (state transactional immunity statute upheld); Adams v. Maryland, 347 U.S. 179 (1954) (failure to claim privilege did not deprive him of the statutory protection); Smith v. United States, 337 U.S. 137 (1949) (where witness' testimony was not wholly exculpatory, federal transaction immunity will be granted); United States v. Monia, 317 U.S. 424 (1943) (automatic grant of transactional immunity under Sherman Act without claim of privilege against self-incrimination); United States v. Murdock, 284 U.S. 141 (1931) (the privilege must be claimed when the information is sought and refused); McCarthy v. Arndstein, 266 U.S. 34 (1924) (full disclosure under bankruptcy laws not warranted unless Congress grants "full" as opposed to use immunity); Jack v. Kansas, 199 U.S. 372 (1905) (state transactional immunity statute upheld even though it does not protect against federal prosecution). *See* Hale v. Henkel, 201 U.S. 43 (1906), where the Court stated that if the statute of limitations for the offense had run or the act was one for which he had already received immunity or a pardon then the fifth amendment ceased to apply because there was no "present

the continued vitality of this requirement became suspect after the *Murphy* Court decided that inter-jurisdictional use immunity was constitutionally sufficient. The Ninth Circuit, in *Stewart*, not only declined to interpret *Counselman* as mandating transactional immunity, but construed *Murphy* as definitively resolving the question in favor of use immunity.[49] *Korman*, on the other hand, did not interpret *Murphy* as overruling or undermining *Counselman*,[50] and placed considerable reliance upon the case of *Albertson v. Subversive Activities Control Board*,[51] in reaching this determination.[52]

The *Albertson* case is of particular importance since it involved a statute providing only a limited use immunity. The Court adjudged the statute to be unconstitutional on the basis of the *Counselman* standard, and stated that

> no [immunity] . . . which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the [fifth amendment] privilege . . . .[53]

The Court's reliance on the "absolute" immunity language, rather than the narrower prohibition against use of the fruits of the coerced testimony has been interpreted as repudiating the position that *Murphy* had overruled the broad requirement of *Counselman:*

> Those who claim that the transactional immunity requirement in the *Counselman* situation has been *sub silentio* overruled by *Murphy*, or other subsequent cases, must explain away the Court's

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danger of prosecution." *Id.* at 66-67. The Court's reasoning would certainly indicate that only transactional immunity would be coextensive with the fifth amendment protection, since use immunity would not be equivalent to the protection afforded by the running of the statute of limitations or a pardon. *See also* Piccirillo v. New York, 400 U.S. 548, 563 (1971) (Brennan, J., dissenting).

49 No case has been cited in which the Supreme Court has held that *only* a transaction statute will suffice, and we have found none. On the contrary, it appears that Murphy . . . has decided the issue . . . .

440 F.2d at 956.

50 449 F.2d at 39.

Since the Supreme Court has assumed that *Counselman* was not overruled by *Murphy*, we are unwilling to anticipate the Supreme Court and rule that the *Murphy* opinion had that effect.

Id.; Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 164 (1966):

Murphy did not hold that it would satisfy the privilege if the jurisdiction demanding incriminating information only gave assurance that it would not make prosecutory use of the information, and did not give immunity from prosecution for the matters disclosed.

51 382 U.S. 70 (1965). The *Korman* court also relied on the case of Stevens v. Marks, 383 U.S. 234 (1966).

52 449 F.2d at 39.

53 382 U.S. at 80 (quoting from Counselman v. Hitchcock, 142 U.S. at 585).

> decision in *Albertson* . . . which precisely presented the *Counselman* situation . . . .[54]

The debate concerning the impact of *Murphy* on *Counselman* basically consists of two opposing arguments. Some maintain that the *Murphy* Court found use immunity to be sufficient between jurisdictions, and it therefore must be equally sufficient when applied intra-jurisdictionally, because on either level, the immunity must be coextensive with the fifth amendment privilege.[55] The opposing position adopts the view that the fifth amendment need not be the same on both levels of threatened prosecution due to:

(a) Considerations of federalism: The possible repercussion of a grant of transactional immunity between jurisdictions would be to

> deprive a state of the right to prosecute a violation of its criminal law on the basis of another state's grant of immunity [which] would be gravely in derogation of its sovereignty and obstructive of its administration of justice.[56]

(b) The threat of future prosecution is being diminished on the dual jurisdictional level:

> This danger, substantial when a single jurisdiction both compels incriminating testimony and brings a later prosecution, may fade when the jurisdiction bringing the prosecution differs from the jurisdiction that compelled the testimony. Concern over informal and undetected exchange of information is also correspondingly less when two different jurisdictions are involved.[57]

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[54] *In re* Kinoy, 326 F. Supp. at 419. The *Kinoy* court further stated:

> [T]hat *Counselman* is still the law, that it has not been *sub silentio* overruled or eroded by more recent opinions, [and] that transactional immunity is constitutionally required as between the questioning sovereign and the witness . . . .

Id. at 412; United States v. McDaniel, 10 Crim. L. Rep. (8th Cir. Oct. 14, 1971) (court viewed Counselman as requiring that the questioning jurisdiction grant transactional immunity).

[55] *In re* Zicarelli, 55 N.J. 249, 261 A.2d 129 (1970), *prob. juris. noted,* 401 U.S. 933 (1971). The court stated unequivocally that the *Murphy* Court:

> [A]greed that the [state immunity] statute should be upheld, but upon the ground that the witness would indeed be protected in a federal prosecution by virtue of the Fifth Amendment itself. This conclusion had to reject the thesis that the Fifth Amendment required an immunity from prosecution rather than an immunity from the use of the coerced testimony.

Id. at 268, 261 A.2d at 139; United States *ex rel.* Catena v. Elias, 449 F.2d at 49.

[56] 449 F.2d at 44; *In re Kinoy,* 326 F. Supp. at 416.

[57] Piccirillo v. New York, 400 U.S. 548, 568 (1970) (Brennan, J., dissenting) (upheld the New York transactional immunity statute as necessary in order to replace the privilege against self-incrimination); United States *ex rel.* Catena v. Elias, 449 F.2d at 43.

Surely if the Supreme Court had intended to overrule *Counselman,* it could have manifested that intent in a much clearer and more direct manner. It appears more likely that *Korman* was correct in viewing *Murphy* as an extension of the fifth amendment guarantee, 449 F.2d at 37-38.

Even if we assume that *Counselman* is no longer binding on the courts, it is settled that before the privilege can be constitutionally supplanted, the government must furnish the witness with an adequate substitute, namely, a replacement which is coextensive with the original protection.[58] In adopting this premise and assuming the nonexistence of precedent, the *Korman* court commented:

> Even if we regarded this an open question, we believe that the language of the fifth amendment requires that any jurisdiction which seeks to compel a witness to testify grant full transactional immunity and that Congress is powerless under the Constitution to detract from that requirement by legislation.[59]

The absolute immunity adherents present various arguments to refute the contention that use immunity is coextensive with the fifth amendment guarantee. They maintain that although the witness is protected from the use of his compelled testimony, there is still the possibility of future prosecution. Even though in such circumstances the government would have the burden of proving that the evidence presented in the subsequent prosecution is completely independent from the compelled testimony,[60] this is a vacuous safeguard when considering: (1) the government's ostensible credibility; (2) the government's vast investigatory resources;[61] (3) the *Murphy* Court's failure to stipulate or characterize the government's burden of proof;[62] and (4) the uncertainties of the fact-finding process which make it arduous to establish that a succeeding prosecution was derived in some manner from the coerced testimony.[63]

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58 449 F.2d at 39-40.

59 *Id.* (footnote omitted).

60 Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 n.18 (1964).

> Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, 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.

Id.

61 *In re* Kinoy, 326 F. Supp. at 419.

> To say that a witness can successfully rebut the Government's proof that its source is untainted is to be naive about the imbalance which daily attends the resources of Government as opposed to those of the average defendant in a criminal case.

Id.

62 378 U.S. at 79 n.18.

63 Piccirillo v. New York, 400 U.S. 548, 567-68 (1971).

> [T]he uncertainties of the factfinding process argue strongly against "use" immunity and in favor of transactional immunity.

Id. at 567.

The witness may be aided in the event of future prosecution by an immunity provision requiring the grant to be recorded. Note, *supra* note 19, at 1281-82. *See Hearing*

Another argument in opposition to use immunity concerns the chilling effect it may have on a witness in a later prosecution. Because of an awareness of his prior incriminating testimony, the witness may be reluctant to take the witness stand in his own defense. He might fear that:

> The prosecutor [would] . . . tailor his questions, consciously or otherwise, on the basis of his knowledge of the defendant's prior testimony and [he could] do so without any overt reference to the testimony given under immunity.[64]

In light of these inequities, the argument that a witness receives adequate protection through a grant of use immunity loses its validity. The fifth amendment privilege, by giving the witness the right to remain silent, affords absolute protection from both of the weaknesses inherent in use immunity. Since there is no compelled testimony in existence, the witness can neither be prosecuted nor suffer a chilling effect because of such testimony.[65]

It has been argued that transactional immunity is not constitutionally required since it exceeds the protection afforded by the fifth amendment guarantee.[66] This argument can best be illustrated by the following hypothetical. John Smith, a criminal suspect, was being investigated on the local law enforcement level. Evidence obtained as a result of that investigation was sufficient to convict him of various criminal activities. Local authorities decided not to make an immediate arrest and one week later, on the state level, Mr. Smith was called to testify in the course of a grand jury investigation. There was absolutely no exchange of information between the local authorities and the grand jury regarding Mr. Smith's criminal activities. The grand jury was completely unaware of the incriminating evidence obtained on the local level. As a witness, Mr. Smith refused to testify—exercising his fifth amendment privilege. He was granted transactional immunity, testified, and in the course of his testimony, mentioned the crimes of which the local authorities had sufficient evidence to obtain a conviction. Under his grant of transactional immunity, he can no longer be prosecuted for those crimes. Had he not been given transactional immunity and been allowed to assert his constitutional privilege, Smith

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on Organized Crime and Illicit Traffic in Narcotics Before the Subcommittee on Investigation of the Senate Committee on Government Operations, 88th Cong., 1st Sess., pt. 1, at 338-41 (1963). *See generally* Gutterman, *The Informer Privilege*, 58 J. CRIM L. 32 (1967).

64 449 F.2d at 45 (Seitz, C. J., concurring).

65 400 U.S. at 568-69.

66 449 F.2d at 49 (Van Dusen, J., dissenting); *In re* Zicarelli, 55 N.J. 249, 267, 261 A.2d 129, 138 (1970). *See* Murphy v. Counselman, 378 U.S. at 107 (White, J., concurring).

would have been subsequently prosecuted and convicted on the basis of the previously discovered evidence.

Under this hypothetical transactional immunity exceeds the protection afforded by the fifth amendment. Under a grant of use immunity, however, the result would have been the same as if he had remained silent. The conclusion to be reached is that transactional immunity is exceedingly broad, while use immunity is coextensive with the fifth amendment's protection. Basically, this argument illustrates that transactional immunity exceeds the fifth amendment privilege, since it protects a witness from prosecution on the basis of completely independent evidence—evidence having absolutely no connection with the witness' compelled testimony. This argument is also, necessarily, an endorsement of use immunity, since the seemingly unjust result is avoided by a grant of use protection.

The premise of the preceding argument is that the fifth amendment protects a witness against only *self*-incrimination and not every incrimination. Therefore, a witness could be compelled to testify if protected against the use of his testimony or its "fruits." At first glance, this argument appears quite valid, but closer inspection reveals its defect—a theoretical foundation. The argument ignores the practicalities involved in criminal prosecutions.[67] As previously illustrated the government's burden of proof, with respect to establishing the independence of its evidence, is insufficient protection. Ultimately, the witness who has been compelled to forsake his constitutional privilege might be faced with the difficult task of refuting the government's assertion that their evidence is completely independent from his coerced testimony.[68] The nebulous nature of the connective link is the crux of the immunity controversy, and this link becomes even more difficult to establish in the absence of bad faith on the part of the government.

> [T]his argument does not depend upon assumptions of misconduct or collusion among government officers. It assumes only the nor-

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67 400 U.S. at 568 (Brennan, J., dissenting); United States *ex rel.* Catena v. Elias, 449 F.2d 40, 43-44 (3d Cir. 1971).

68 After *Murphy* placed the burden of proof on the government in all subsequent prosecutions, the court in their concern for the witness' constitutional rights expressed the witness' difficulty in proving a link between the compelled testimony and the supposedly independent evidence as the witness' burden of proof. This is not to be confused with the government's burden. The government has the ultimate burden of proof which never shifts to the witness; however, the witness has a production-burden of producing evidence that will effectively counteract that of the government. 449 F.2d at 34-35 n.5.

> mal margin of human fallibility. Men working in the same office or department exchange information without recording carefully how they obtained certain information; it is often impossible to remember in retrospect how or when or from whom information was obtained. . . . Moreover, the possibility of subtle inferences drawn from action or non-action on the part of fellow law enforcement personnel would be difficult if not impossible to prove or disprove.[69]

Hence, the overbreadth of transactional immunity can be justified on the grounds that: (1) it is an adequate means of ensuring that a witness' compelled testimony is not subsequently used against him; and (2) the mere possibility of such future use is a danger which the witness cannot be forced to accept, since the fifth amendment's right of silence would have negated such a threat. It is this threat, this danger, which prevents use immunity from being coextensive with the fifth amendment privilege and which makes transactional immunity the preferable alternative.

The questions involving immunity have been a bone of contention since *Counselman*, and have continued to divide the Supreme Court. Justices White and Stewart, concurring in *Murphy*, stated their position on immunity as follows:

> In [our] view it is possible for a federal prosecution to be based on untainted evidence after a grant of federal immunity in exchange for testimony in a federal criminal investigation. . . . It is precisely this possibility of prosecution based on untainted evidence that we must recognize. . . .
>
> . . . [We] believe the State may compel testimony incriminating under federal law, but the Federal Government may not use such testimony or its fruits in a federal criminal proceeding. Immunity must be as broad as, but not harmfully and wastefully broader than, the privilege against self-incrimination.[70]

Justice Stewart, concurring with retired Justice Harlan, in *Stevens v. Marks*,[71] argued that the sufficiency of the New York use immunity statute should not be decided before a thorough study of the law, since such a decision might "invalidate one or more federal statutes."[72] They also questioned the continued validity of *Counselman* after the *Murphy* and *Malloy* decisions, stating that:

> In addition, this Court has recently extended the Fifth Amendment to the States, *Malloy v. Hogan*, 378 U.S. 1, and abolished the "two

69 400 U.S. at 568 (Brennan, J., dissenting).

70 378 U.S. at 106-07 (White, J., concurring).

71 383 U.S. 234 (1966).

72 *Id.* at 249-50.

> sovereignties" rule, *Murphy v. Waterfront Comm'n*, 378 U.S. 52, so that an expansive reading of the privilege could have a far more serious impact than was true in the days of *Counselman*.[73]

Three Justices, Brennan, Douglas and Marshall, in their dissenting opinion in *Piccirillo v. New York*,[74] confidently supported transactional immunity as the "minimal constitutional guarantee." Justice Brennan, speaking for the three, stated:

> I believe that the Fifth Amendment's privilege against self-incrimination requires that any jurisdiction that compels a man to incriminate himself grant him absolute immunity under its laws from prosecution for any transaction revealed in that testimony. Such transactional immunity, in my view, steers a well-conceived middle path between, on the one hand, a position that no immunity statute can supplant the constitutional privilege and, on the other, a position that affords the individual the altogether too narrow protection of use immunity as applied to the very government that has compelled him to incriminate himself. . . . Mere use immunity which protects the individual only against the actual use of his compelled testimony and its fruits, satisfies neither the language of the Constitution itself nor the values, purposes, and policies that the privilege was historically designed to serve and that it must serve in a free country. Finally, this Court's decisions in the course of the past century have consistently read the Constitution as requiring no more, but no less, than transactional immunity.[75]

Justice Douglas' position on the issue can be inferred from his dissenting opinion in *Ullman v. United States*,[76] in which he stated:

> My view is that the Framers put it beyond the power of Congress to *compel* anyone to confess his crimes. . . . The Framers, therefore, created the federally protected right of silence and decreed that the law could not be used to pry open one's lips and make him a witness against himself.[77]

Justice Douglas would possibly find that even a grant of transactional immunity by the questioning jurisdiction, which leaves the witness subject to prosecution in other jurisdictions on the basis of independent evidence, is not coextensive with the fifth amendment privilege and therefore unconstitutional.[78] It would appear, however, that Jus-

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73 *Id.* at 250. *See In re* Zicarelli, 55 N.J. 249, 266-67, 261 A.2d 129, 138 (1970).

74 400 U.S. 548 (1971).

75 *Id.* at 562-63 (footnote omitted).

76 350 U.S. 422 (1956).

77 *Id.* at 445-46 (Douglas, J., with whom Black, J. concurs, dissenting).

78 *Id.* at 445-46, 449, 454.

tices White, Brennan and Marshall would uphold the granting of transactional immunity thus leaving the witness open to prosecution in other jurisdictions. Therefore, while transactional immunity might be constitutionally required of the questioning sovereign, there might well be no such necessity regarding inter-jurisdictional immunity.[79]

The Supreme Court, by granting certiorari[80] in the *Stewart* case, is now in the position to eliminate the plethora of contradictory inferences and deductions encompassing the *Counselman* and *Murphy* decisions. Hopefully, the Court will refuse to accept the semantic equality of use immunity and the privilege of silence, and will not be content to merely define the government's burden of proof with respect to the untaintedness of its evidence. If the Court acknowledges that it is unable to ensure that the questioning jurisdiction will not use the witness' coerced words in any manner, then it is possible for the Court to conclude that the fifth amendment demands the protection afforded by a grant of transactional immunity, at least on the intra-jurisdictional level.

It is also possible that the Court will reevaluate the *Murphy* requirement of use immunity between jurisdictions. In noting probable jurisdiction in *In re Zicarelli*,[81] the Court concerned itself with the following question:

> Whether the immunity statute . . . can supplant the Fifth Amendment privilege when it fails to provide immunity against foreign prosecution, with respect to an individual who has real fear of such foreign prosecution?[82]

Whatever the Court ultimately decides, its decision will undoubtedly aid in measuring the circumference of the fifth amendment's protective umbrella, as embodied in a constitutional grant of immunity.

Linda A. Palazzolo

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79 400 U.S. at 562-63 (Brennan, J., dissenting, with Marshall, J., joining); Murphy v. Waterfront Comm'n, 378 U.S. at 92, 106-07 (White, J., concurring).

80 Kastigar v. United States, 402 U.S. 971 (1971) (*sub nom.*).

81 401 U.S. 933 (1971).

82 *Id.*