Constitutional Consideration of Federal and State Testimonial Immunity Legislation

James E. Boren
COMMENTS

CONSTITUTIONAL CONSIDERATIONS OF FEDERAL AND STATE TESTIMONIAL IMMUNITY LEGISLATION

Introduction

The privilege against self-incrimination is embodied in both the United States Constitution1 and the Louisiana Constitution.2 Utilization of the right often thwarts investigation of other criminal activities of which the claimant may have knowledge, but prosecutors have long realized that justice might best be served by throwing back the little fish in order to catch the bigger ones. Thus, the principle developed that an individual could be compelled to give testimony incriminating himself if he were granted immunity.3 To be effective as a quid pro quo for compelled testimony, the scope of the immunity granted must be coextensive with the privilege against self-incrimination.4

Two basic types of immunity are employed in attempts to protect a witness’s privilege against self-incrimination. Transactional immunity5 precludes all prosecution relating to the subject matter of the compelled testimony. “Use plus derivative use” immunity allows prosecution of a witness who was compelled to testify, but prohibits introduction of his compelled testimony in any future prosecutions. Since “use-plus” does not confer amnesty, when it is granted the protection afforded the witness must be scrutinized carefully to

1. U.S. CONST. amend. V.
2. LA. CONST. art. I, § 16.
insure that it adequately compensates him for surrender of his constitutional rights.\textsuperscript{6}

**Federal Immunity Legislation**

*Constitutionality of the Statute on its Face*

Title II of the Organized Crime Control Act of 1970\textsuperscript{7} provides that

no testimony or other information compelled under the [court immunity] order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case \ldots \textsuperscript{8}

and confers “use-plus” immunity.\textsuperscript{9} The chief constitutional consideration is whether the statute’s language affords a witness protection coextensive with that granted by his fifth amendment privilege against self-incrimination. In *Kastigar v. United States*,\textsuperscript{10} the United States Supreme Court held the immunity statute constitutional on its face and declared that the statute’s protection is as broad as that of the fifth amendment because the compelled testimony cannot be used by any prosecutor “in any respect.”\textsuperscript{11}

The primary argument advanced against the “use-plus” statute is that, as a practical matter, determination of whether the compelled testimony was indirectly used is impossible.\textsuperscript{12} To mitigate the problem, the *Kastigar* Court imposed an affirmative duty on future prosecutors to prove that the evidence they propose to use is derived from a legitimate source wholly independent of the compelled testimony.\textsuperscript{13} The Court emphasized that the heavy burden is not limited to a

\textsuperscript{6} A third type of immunity, “pure use,” prohibits introduction of the testimony actually compelled. *Counselman v. Hitchcock*, 142 U.S. 547 (1892), held this variety not coextensive with the fifth amendment privilege. Some statutes nevertheless provide for this type of immunity as gratis. See *United States v. Goodwin*, 470 F.2d 893, 904 (5th Cir. 1972), *cert. denied*, 411 U.S. 969 (1973).


\textsuperscript{9} *Kastigar v. United States*, 406 U.S. 441 (1972) [hereinafter cited as *Kastigar*].

\textsuperscript{10} *Id.*

\textsuperscript{11} *Id.* at 453.

\textsuperscript{12} See *Kastigar*, J. Marshall dissenting at 469; *Yale Note* at 181.

\textsuperscript{13} *Kastigar* at 460.
negation of taint, but must be affirmatively demonstrated.\textsuperscript{14} Analogizing the rule excluding coerced confessions to the requisite scope of protection in immunity statutes, the Court reasoned that since a person's fifth amendment right is protected only if a coerced confession is not used to incriminate him, compelled testimony should likewise be excluded.\textsuperscript{15} In \textit{Harrison v. United States},\textsuperscript{16} the Court excluded the fruits of a coerced confession.\textsuperscript{17} By proscribing "derivative use" of compelled testimony, the Act provides the additional protection called for by \textit{Harrison}. A coerced confession does not bar subsequent prosecution; the coercion merely keeps the confession from being used against the person.\textsuperscript{18} Since the fifth amendment requires no more than that the coerced confession and its fruits be excluded, immunity statutes need not confer transactional immunity, which is tantamount to amnesty, to be constitutionally sound.

Finally, the \textit{Kastigar} theory is supported by the presumption that public officials perform their duties in the manner prescribed by law.\textsuperscript{19} If future prosecutors are presumed to abide by the use limitation, a statute granting "use plus" immunity is, on its face, coextensive with the privilege against self-incrimination.

\textit{Mechanics of the Immunity Grant}

While the courts have upheld the constitutional validity of the statutory language of the Act, various courts have addressed the mechanics of the statute and its constitutionality as applied. Title II of the Organized Crime Control Act of 1970 repealed prior legislation in favor of a central scheme regulating grants of immunity. The legislation allows grants of immunity in proceedings before or ancillary to a court or

\begin{itemize}
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id. at 461-62.
\item \textsuperscript{16} 392 U.S. 219 (1968).
\item \textsuperscript{17} The Court used the fourth amendment "taint" analysis of \textit{Wong Sun v. United States}, 371 U.S. 471 (1963). The analogy is criticized in \textit{Yale Note at 171} because different policy considerations govern exclusion of evidence illegally seized and exclusion of coerced confessions.
\item \textsuperscript{18} United States v. Harrison, 461 F.2d 1127 (5th Cir. 1972), \textit{cert. denied}, 409 U.S. 884 (1972) (exclusion of testimony compelled at a motion to suppress hearing deemed adequate protection of defendant's fifth amendment rights).
\item \textsuperscript{19} Beverly v. United States, 468 F.2d 732, 743 (5th Cir. 1972) and cases cited therein. For exhaustive treatment of the presumption, see \textit{Lurie v. Florida St. Bd. of Dentistry}, 288 So. 2d 223 (Fla. 1973).
\end{itemize}
grand jury of the United States, an agency of the United States, either House of Congress, a joint committee, or a committee of either House. The statute provides the same scope of immunity regardless of which body seeks to compel testimony, but procedures for obtaining immunity vary.

In all cases, only a court may order testimony pursuant to immunity granted by that court. The court's function in granting the immunity is primarily ministerial; it has no discretion in granting, rejecting, or modifying a grant, but serves only as a "checkpoint for assuring proper compliance with the established procedures.

The federal statute requires that immunity be granted only when a witness refuses to testify or is likely to refuse to testify on the basis of his privilege against self-incrimination. The requirement safeguards prosecutors, precluding automatic grants of immunity to all persons who testify when requested to do so. If the witness does not claim his fifth amendment privilege, immunity is not required; moreover, if the privilege is frivolously asserted, a grant is not needed. Determination of whether the privilege has been properly claimed is one function of the judiciary in reviewing the order.

23. A wealth of case law interpreting the mechanics of granting immunity has developed. The general tenet followed in these decisions is aptly expressed in United States v. Dunham Concrete Prod., Inc., 475 F.2d 1241 (5th Cir. 1973), where the court reasoned that immunity statutes are designed to strengthen law enforcement, not to hinder it, and the statutes should be construed to effectuate this purpose.
25. App. of U.S. Senate at 1278. These procedures include constitutional considerations as well as the prerequisite formalities enumerated in the statute. For succinct analysis of the latter see In re Di Bella, 499 F.2d 1175 (2d Cir. 1974).
27. Immunity can be granted if the defendant is likely to refuse to testify. See United States v. Braasch, 505 F.2d 139 (7th Cir. 1974).
29. App. of U.S. Senate at 1278. Another function is to adequately advise the defendant of the scope of immunity protection. In re Persico, 491 F.2d 1156 (2d Cir. 1974).
As noted in *Application of the United States Senate Comm. on Presidential Campaign Activities*, another area appropriate for judicial inquiry is the subject matter of the investigation, as distinguished from the subject matter of the testimony, which should not be questioned by the court. The court should determine whether the body seeking the immunity grant has jurisdiction over the matter under investigation or with which it is otherwise concerned. If the matter is properly before that investigating body, the court infringes on the body's power by ruling on whether a witness's testimony is relevant to the inquiry.

The provisions concerning grand jury, court, and administrative proceedings require a determination that the witness's testimony "may be necessary to the public interest" before immunity is granted. Three cases have made the requirement almost meaningless by stating that the reviewing court has no discretion to determine whether a request for immunity actually meets the requirement.

Finally, the statute covers "any witness" summoned to testify, even if that person is a potential defendant in the subject matter of the investigation. However, immunity supplants only the claim of privilege against self-incrimination, and a witness with another testimonial privilege might still refuse to testify. Numerous types of

31. *Contra*, 2 WORKING PAPERS OF THE NAT'L COMM'N ON THE REFORM OF FEDERAL CRIMINAL LAWS 1442 (1970). The writer submits that the court need not determine relevance of the subject matter of the testimony because the more the witness talks, the broader is his protection. Significantly, *In re Kilgo*, 484 F.2d 1215 (4th Cir. 1973), declared that even the immunized witness is not entitled to be informed of the subject matter of the grand jury investigation before which he is being compelled to testify. 18 U.S.C. § 6001 (1970) is not limited in subject matter as were former statutes, but rather covers "any proceeding" brought before the respective body. *Beverly v. United States*, 468 F.2d 732, 743 (5th Cir. 1972). The fact that the statutes are part of the Organized Crime Control Act of 1970 does not limit their applicability to investigations of organized crime. *In re Kilgo*, 484 F.2d 1215, 1218 (4th Cir. 1973).
35. Tierney v. United States, 409 U.S. 1232 (1972) (claim of attorney-client privilege constituted justification for refusal). However, refusal to answer absent another privilege, often a valid immunity grant, is grounds for a trial
privilege claims have been asserted despite a grant of immunity, including husband-wife,36 fear of underworld reprisals,37 and first amendment arguments,38 but to date, only claims based on attorney-client privilege have been sustained.39

Constitutionality of the Act as Applied

Whenever a grant of immunity is conferred, the witness generally has two broad grounds for attack: that his constitutional rights have not been adequately safeguarded or that the grant does not conform with the terms of the statute. Any challenge must come from the immunized witness himself, as no other party has standing to attack the grant.40 Although the statute provides no procedure whereby a witness can contest an immunity order and seems to require an ex parte order, two cases hold that a witness who objects to giving testimony despite a grant of immunity is entitled to a hearing preceded by adequate notice.41

A witness compelled to testify under an immunity grant often demands representation by counsel during the compelled testimony. His sixth amendment right to representation by counsel should still exist since only his fifth amendment privilege against self-incrimination has been eliminated. Problems arise when the immunized witness appears before a grand jury, where attorneys cannot be present. Although one case42 left open the question of the extent of the right to counsel in grand jury proceedings, a witness has no need for counsel once he is immunized. Nothing the witness says can be used in any manner by a prosecutor in an action against the witness; therefore, an attorney’s advice as to whether to answer questions is unnecessary. The witness

NOTE:

37. Latona v. United States, 449 F.2d 121 (8th Cir. 1971).
40. United States v. Braasch, 505 F.2d 139 (7th Cir. 1974) and cases cited therein; United States v. Lewis, 456 F.2d 404, 409 (3d Cir. 1972) and cases cited therein.
41. United States v. Taubbee, 476 F.2d 804 (9th Cir. 1973); United States v. Weinberg, 439 F.2d (9th Cir. 1971).
42. In re Tierney, 465 F.2d 806 (5th Cir. 1972).
must answer, but the more information he divulges, the more difficult it becomes for future prosecutors to demonstrate an independent source of evidence.

Another argument employed in challenging orders to testify based upon immunity grants is that the witness fears future prosecution utilizing his compelled testimony in either federal or state forums. While the federal statute does not expressly prohibit a state prosecutor from using testimony obtained through a federal grant of immunity, *Murphy v. Waterfront Commission*[^37] held that such a prohibition is a constitutional requirement. Moreover, the statute arguably precludes state use of the testimony by proscribing its use "in any criminal case."[^45] Therefore, any fear of state or federal prosecutors utilizing the compelled testimony is unwarranted. On the other hand, several cases deal with fear of possible prosecution in another country based upon testimony given in a United States federal court. *Zicarelli v. New Jersey Investigation Commission*[^46] dealt with a state immunity statute, but the defendant raised the foreign prosecution issue. The Court avoided deciding the issue by noting that the fear in that case was not "real and substantial."[^48] The issue was decided in *In re Cardassi*[^49] where the court's initial inquiry was whether a reasonable fear of future foreign prosecution existed, implying that if it does, the fifth amendment protects the witness from compelled disclosure of information which would incriminate him in another country. Thus, under *Cardassi* one might refuse to testify even after a grant of immunity if the fear of foreign prosecution is reasonable, although such prosecution is not imminent.[^50]

[^44]: Accord, United States v. Armstrong, 476 F.2d 313 (5th Cir. 1973);
[^46]: Zicarelli v. New Jersey Investigation Comm'n, 406 U.S. 472 (1972);
[^48]: *Id.* at 478.
Cardassi further noted that Federal Rule of Criminal Procedure 6(e), which precludes disclosure of grand jury occurrences, relies on the good faith of public officials, which is insufficient protection to exchange for a defendant's privilege against self-incrimination. To the contrary, United States v. Armstrong, and In re Weir opine that the secrecy of the grand jury proceedings is a sufficient safeguard against any danger of foreign prosecution. The question remains unresolved, but the Cardassi position seems more sound, particularly since rule 6(e) is subject to judicial exception.

Harris v. New York, which allows impeachment use of a confession obtained without proper Miranda warnings, creates another problem related to immunity grants: whether testimony of an immunized witness can later be used to impeach him. Few courts have ruled definitively on the issue. Kastigar analogized compelled testimony to coerced confessions, not to confessions infirm by Miranda guidelines. In re Tierney failed to decide whether compelled testimony could be used to impeach, but held sub silentio that the mere possibility of use for impeachment is not sufficient grounds to refuse to testify after a grant of immunity. However, the Third Circuit in United States v. Hockenberry distinguished Harris as setting the line for protection of Miranda procedural rights, noting that 18 U.S.C. § 6001 et seq. confer immunity from any use of the testimony. The use of immunized testimony to impeach would erode fifth amendment protection and was thus ruled impermissible.

A heated debate exists over the desirability of making exception to the "forbidden use" rule in prosecutions for perjury, giving a false statement, or otherwise failing to comply

51. 351 F. Supp. at 1082. FED. R. CRIM. P. 6 (e) establishes the obligation of secrecy regarding almost all matters before federal grand juries.
52. 476 F.2d 313, 316 (5th Cir. 1973).
53. 495 F.2d 879 (9th Cir. 1974).
57. YALE NOTE at 176.
58. See, e.g., United States v. Huss, 482 F.2d 38 n.5 (2d Cir. 1973) which specifically left the issue open.
59. 465 F.2d 806 (5th Cir. 1972).
60. 474 F.2d 247 (3d Cir. 1973).
61. Id. at 250.
with the order.” Such an exception, some witnesses claim, allows use of the compelled testimony to incriminate the witness and thus should preclude compulsion of testimony because the grant of immunity is not coextensive with the forfeited privilege against self-incrimination. The lone champion of their cause is In re Baldinger, in which a federal district court held 18 U.S.C. § 6002 unconstitutional as applied since it would allow the witness’s compelled testimony to be used in a prosecution under 18 U.S.C. § 1001 for false statements made to F.B.I. agents prior to the grant of immunity. The court interpreted the false statement exception as not limited to statements made during the course of the compelled grand jury testimony, and thus not coextensive with the fifth amendment privilege. The correctness of the decision is questionable. Statutes should be interpreted to uphold their constitutionality, and the exception could have been interpreted as encompassing only false statements made during or after the compelled testimony. The weight of opinion is that Baldinger’s expansive interpretation is erroneous. Two decisions held that allowing use of compelled testimony for prosecution for perjury is constitutional, but failed to assign reasons for so holding. The fifth amendment simply prohibits a person from being forced to testify to facts which prove he committed a crime; its protection does not extend to statements made by the person which are in themselves criminal. The immunized witness is forced to testify and ordered to speak the truth; statements he makes cannot be used to prove he previously committed a crime, but can be used to show the fact of utterance which constitutes a new crime, such as perjury or false statement. One court recently declared that in exchange for his testimony, the immunized witness is

64. 356 F. Supp. at 162.
66. United States v. Alter, 482 F.2d 1016 (9th Cir. 1973); United States v. Hockenberry, 474 F.2d 247 (3d Cir. 1973); In re Bottari, 453 F.2d 370 (1st Cir. 1972); United States v. Doe, 361 F. Supp. 226 (E.D. Penn. 1973), affd, 485 F.2d 682 (3d Cir. 1973); App. of U.S. Senate at 1283. The issue was left open in United States v. Huss, 482 F.2d 38 n.5 (2d Cir. 1973). Moreover, the statute upheld in Kastigar contained the perjury exception; see United States v. Tramunti, 500 F.2d 1334, (2d Cir. 1974).
promised that he will not be prosecuted based on the inculpatory evidence he gives in exchange. However, the bargain struck is conditional upon the witness who is under oath telling the truth. If he gives false testimony, it is not compelled at all.68

**Future Prosecution of the Immunized Witness**

As discussed previously, *Kastigar* announced that an immunized witness is protected by barring any use of his compelled testimony. The witness may still be prosecuted for offenses related to the subject matter of the testimony, but the prosecutor must affirmatively show that his evidence did not directly or indirectly emanate from the compelled testimony. The determination often takes place at a pretrial evidentiary hearing on a motion to suppress.69 The issue being whether the evidence the government will use in the prosecution is tainted by the compelled testimony, a necessary inquiry is what constitutes forbidden use and how the government proves an independent legitimate source.

Regarding “forbidden use,” *Kastigar* explained that “use-plus” immunity creates a “total prohibition on use ... [which includes use as] an ‘investigatory lead’ and also ban[s] the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.”70 Thus, the prohibition extends beyond introduction of the compelled testimony itself, and includes use in focusing the investigation, in deciding whether to initiate prosecution, in refusing to plea

---

68. United States v. Tramunti, 500 F.2d 1334, 1342 (2d Cir. 1974) (emphasis added).
70. Kastigar at 460.
bargain, in interpreting evidence, in planning cross-examination, and in preparing general trial strategy.\footnote{1}

In the analogous problem of coerced confessions, all fruits derived from such confessions are excluded from the trial.\footnote{2} While exclusion alone is not the extent of the protection called for by \textit{Kastigar}, the analysis utilized for determining "taint" where a coerced confession is involved should be applicable in immunity cases.\footnote{3} \textit{United States v. Seiffert},\footnote{4} an immunity case, in holding fourth and fifth amendment "taint" cases applicable, announced the inquiry to be whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.\footnote{5}

In immunity cases and in cases involving coerced confessions, introduction of testimony obtained in derogation of a defendant's fifth amendment rights constitutes a violation of those rights. Introduction of illegally seized evidence does not violate the defendant's fourth amendment rights; the illegal seizure violates the right.\footnote{6} Such distinction notwithstanding, the analysis originating in fourth amendment "taint" cases rests upon the same inquiry used in "use-plus" immunity cases: whether the proposed evidence is derived from a legitimate independent source.

The government must meet a stringent burden to prove an independent and legitimate source for its evidence. \textit{Kastigar} announced the test:

\[ \text{The federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent legitimate source for the disputed evidence. This burden of proof, which we reaffirm as ap-} \]

\footnote{1}{United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973); Goldberg v. United States, 472 F.2d 513 (2d Cir. 1973).}
\footnote{2}{Harrison v. United States, 392 U.S. 219 (1968).}
\footnote{3}{See generally \textit{YALE NOTE} at 176-80.}
\footnote{6}{Mapp v. Ohio, 367 U.S. 643 (1961). To implement the right, \textit{Mapp} made the exclusionary rule applicable to the states.}
propriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.\textsuperscript{77}

Exactly how the burden is discharged is unsettled. In \textit{Lego v. Twomey},\textsuperscript{78} the United States Supreme Court stated that the government is required to show by a preponderance of the evidence that a confession is voluntary.\textsuperscript{79} If the coerced confession test is carried over into the field of immunity, a recognizable quantum of proof can be established for discharging the affirmative duty of proving independent source. The preponderance of the evidence test is utilized in \textit{United States v. Seiffert}.\textsuperscript{80} However, once the preponderance test is deemed appropriate, problems arise in applying the test to various situations.

Several courts have implied that a greater standard of proof exists if the sovereign which granted immunity is the same sovereign wishing to prosecute,\textsuperscript{81} distinguishing the situation where a separate sovereign seeks to prosecute following compelled testimony in another jurisdiction.\textsuperscript{82} Other courts have approached the problem on what seems to be an ad hoc basis. In \textit{United States v. First Western},\textsuperscript{83} the government discharged its burden by proving it had no access to state grand jury testimony, by introducing testimony that the government had no knowledge of compelled testimony, and by introducing F.B.I. and grand jury reports as independent sources. \textit{United States v. Seiffert}\textsuperscript{84} held that a prosecutor's statements merely denying use of the compelled testimony are insufficient, and that a demonstration of the source of \textit{all} evidence presented is required. On remand, the trial court held that testimony and cross-examination of all

\begin{itemize}
\item \textsuperscript{77} Kastigar at 460. See \textit{generally} Note, 58 VA. L. REV. 1099 (1972); \textit{YALE NOTE} at 171.
\item \textsuperscript{78} 404 U.S. 477 (1972).
\item \textsuperscript{79} \textit{Id.} at 489.
\item \textsuperscript{80} 357 F. Supp. 801, 804 (S.D. Tex. 1973) (rejected the "beyond a reasonable doubt" standard). The same suggestion is made in Note, 58 VA. L. REV. 1099, 1115 (1972).
\item \textsuperscript{81} United States v. McDaniel, 449 F.2d 832 (8th Cir. 1971); First Western at 783. \textit{See also} Note, 17 \textit{VILL. L. REV.} 559, 565 (1972).
\item \textsuperscript{82} Cf. \textit{Murphy v. Waterfront Comm'n}, 378 U.S. 52 (1964).
\item \textsuperscript{83} 491 F.2d 780 (8th Cir. 1974).
\item \textsuperscript{84} 463 F.2d 1089, 1092 (5th Cir. 1972).
\end{itemize}
government investigators can discharge the burden.\footnote{United States v. Seiffert, 357 F. Supp. 801, 809 (S.D. Tex. 1973).} Other cases have declared that an affidavit by the government attesting “non-use” is insufficient\footnote{In re Minkoff, 349 F. Supp. 154, 157 (D.R.I. 1972).} but that an F.B.I. report made prior to the time the witness is compelled to testify is sufficient.\footnote{United States v. McDaniel, 352 F. Supp. 585 (D.N.D. 1972).} From the hodge-podge of jurisprudence, a rule can be gleaned: the trial court must satisfy itself that the facts indicate that the witness’s compelled testimony was not used by the prosecution. The problem which prompted Justice Marshall’s dissent in \textit{Kastigar}, that the witness’s rights are contingent on the good faith of the prosecutor, can be diminished significantly by intense judicial scrutiny and zealous cross-examination by defense counsel.

The courts have developed several methods to insure compliance with their “use-plus” immunity orders. \textit{In re Minkoff}\footnote{349 F. Supp. 154, 157 (D.R.I. 1972).} ruled that a witness has the right to a copy of his grand jury testimony to facilitate protection of his privilege against self-incrimination. The practice was followed in \textit{United States v. Dornau},\footnote{356 F. Supp. 1091, 1100 (S.D.N.Y. 1973).} but was rejected in \textit{In re Bottari},\footnote{453 F.2d 370 (1st Cir. 1972).} which held that the witness’s demand that he be given a copy as a precondition to testifying was premature, and such a demand is proper only if he is subsequently prosecuted. The case is correct so long as the transcript is made available when properly requested, since the secrecy of the grand jury is thereby maintained.

Courts have formulated other safeguards bearing upon tainted evidence and affirmative proof of nonuse. Some have held that when an immunized witness testifies before a grand jury, a separate body of grand jurors should consider whether to indict the immunized witness, as the witness’s testimony cannot be erased from the first jurors’ minds.\footnote{Goldberg v. United States, 472 F.2d 513, 516 (2d Cir. 1973). \textit{Cf.} Bruton v. United States, 391 U.S. 123 (1968).} Other courts require that a prosecutor who has not had access to compelled testimony prosecute the cases, even though another prosecutor in the same office has read the testimony,\footnote{United States v. Dornau, 491 F.2d 473, 477 (2d Cir. 1974) and cases cited therein.} eliminating the possibility that the prosecutor will use the
testimony in some subtle or unconscious way.\textsuperscript{93} Such an approach is better than one calling for non-prosecution if any prosecutor has read the testimony. One writer's\textsuperscript{94} suggestion that the government seal and certify its evidence against a witness before compelling him to testify is cited with approval in \textit{Goldberg v. United States}.\textsuperscript{95}

One problem which has recently arisen concerns whether the judge must give jury instructions regarding the probative value and weight to be given immunized testimony. \textit{United States v. Leonard}\textsuperscript{96} held that failure to caution the jury that testimony of an immunized witness must be received with circumspection is reversible error. \textit{Leonard} relied on an earlier United States Supreme Court decision, \textit{On Lee},\textsuperscript{97} which had held that cautionary instructions are required when paid informers testify, because such persons are of a genus whose testimony is suspect. The analogy is wisely carried over to testimony of immunized witnesses.

\textit{Louisiana Immunity Legislation}

In 1972, the Louisiana Legislature amended the Code of Criminal Procedure to include article 439.1, which allows immunity grants for “any individual . . . called to testify . . . before . . . a grand jury, . . . a court, . . . or in response to any subpoena by the attorney general or district attorney. . . .”\textsuperscript{98} Section (A) of article 439.1 makes it mandatory that the judge in the district where the proceeding is held issue an order compelling a witness to testify or provide other information\textsuperscript{99} if three prerequisites are met: (1) the request must be made by both the attorney general and the district attorney,\textsuperscript{100} (2) the information or testimony compelled must be necessary to the public interest,\textsuperscript{101} and (3) the individual must have refused or be likely to refuse to give such testimony or information on the basis of his privilege against self-incrimination.\textsuperscript{102}

\textsuperscript{94} \textit{YALE NOTE} at 181-88. \textit{See also} Note, 58 VA. L. REV. 1099, 1116 (1972).
\textsuperscript{95} 472 F.2d 513, 516 n.5 (2d Cir. 1973).
\textsuperscript{96} 494 F.2d 955 (D.D.C. 1974).
\textsuperscript{97} 343 U.S. 747 (1952).
\textsuperscript{98} \textit{LA. CODE CRIM. P. art. 439.1(A)} (Supp. 1974).
\textsuperscript{99} \textit{Id.}
\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textit{LA. CODE CRIM. P. art. 439.1(B)(1)} (Supp. 1972).
\textsuperscript{102} \textit{LA. CODE CRIM. P. art. 439.1(B)(2)} (Supp. 1972).
The third requirement precludes inadvertent automatic immunity to anyone who testifies. The party must claim his privilege to trigger operation of article 439.1; otherwise, the testimony is not "compelled" as contemplated by the privilege against self-incrimination.\(^{103}\)

The crucial part of the statute is found at section 439.1(C):

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.

The language creates several dubieties, the most important of which concerns the nature of the immunity established. The section clearly creates "use-plus" immunity but may go further and create transactional immunity. The problem is in the language: "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."\(^{104}\) The underscored phrase might indicate that no information can be introduced against that witness at a future trial, an interpretation tantamount to a grant of amnesty. However, that interpretation is undermined by an overview of the legislation. The order permitted by article 439.1(A) is not limited to testimony but allows the court to order the witness to "provide other information which he refuses to give or provide."\(^{105}\) Hence, the preclusion of article 439.1(C) encompasses only "other information" produced by compulsion, such as documents obtained by subpoena duces tecum,\(^{106}\) and does not set up an absolute bar against introduction of any evidence against the witness in a future criminal case.

The most logical interpretation of the Louisiana statute is that it exchanges "use-plus" immunity for the fifth

\(^{103}\) State v. Wallace, Nos. 55-661, 55-662 (La. S.Ct., on rehearing Nov. 4, 1975). See also State v. Nattin, 316 So. 2d 115 (La. 1975) (if defendant voluntarily waives fifth amendment privileges, he does not testify under compulsion.)

\(^{104}\) LA. CODE CRIM. P. art. 439.1(C) (Supp. 1972) (emphasis added).

\(^{105}\) Id.

\(^{106}\) Cf. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
amendment right; therefore, future prosecutions would not be barred. The Kastigar requirement that the government demonstrate that its evidence is independent of the compelled testimony thus becomes extremely important because it was discussed as a matter of fundamental fairness and grounded in constitutional considerations. Consequently, if the immunizing state district attorney seeks to prosecute the witness who has been compelled to testify, he must reckon with independent source consideration.

Whether article 439.1 provides “use-plus” or transactional immunity, the effect of the grant on federal and other state prosecution is the same. Either type of immunity bars both sovereigns from the use of the testimony or any fruits derived therefrom. Murphy v. Waterfront Commission dealt with a state grant of transactional immunity and held that the federal government was prohibited from making any use of the compelled testimony or its fruits. Murphy made it clear that the supremacy clause precludes the states from absolutely banning a federal investigation by a grant of immunity. However, a state can place an onerous burden on future federal prosecution because of the “independent source” requirement. The same theory should apply to future prosecution in another state.

Although article 439.1(C) provides that after the grant of immunity a witness cannot refuse to testify “on the basis of his privilege against self-incrimination,” he might still refuse to answer questions or provide information on the basis of

107. Kastigar at 453.
108. The independent source problems with the federal statute discussed in text at notes 70-96, supra, should be similar under the state statute. Since the state statute is identical to the federal statute in all essential elements, the federal cases will serve as at least persuasive authority. See generally State v. Macaluso, 235 La. 1019, 106 So. 2d 455 (1958).
110. Id. at 71.
111. A witness compelled by the state to testify under an immunity grant can simply allege that the federal prosecutor has access to and used the witness's state testimony. The federal prosecutor would then presumably be forced to prove an independent source or disprove use of state testimony. The reverse situation existed in State v. Wallace, Nos. 55-661, 55-662 (La. S.Ct., on rehearing Nov. 4, 1975), in which the state used testimony given before a federal grand jury.
112. Significantly, the Louisiana Supreme Court noted in an early decision, State ex rel. Doran v. Doran, 215 La. 151, 39 So. 2d 894 (1949), that the privilege against self-incrimination was validly raised for fear of prosecution in another state.
one of Louisiana's many testimonial privileges arising from special relationships. In *Tierney v. United States*, the United States Supreme Court stated,

The fact remains . . . that the 'leads' obtained from testimony given after [the] "use" immunity has been granted can be used to indict and convict the applicants . . . therefore . . . the attorney-client privilege does continue. . . .

The court hints that a different result might be obtained under a transactional immunity statute because all future prosecution is proscribed. In fact, one case interpreting the old federal transactional immunity statute refused to allow the claim of the husband-wife privilege. The analysis upon which the result is grounded is confusing and its validity is questionable. The problem arises from a blurring of the underlying bases of the two privileges. Husband-wife and attorney-client privileges protect relationships; immunity protects the privilege against self-incrimination. The two varieties of privilege should not be equated. While the result of successfully claiming either is exclusion of relevant evidence, the underlying principles are vastly different and not interchangeable. Thus, privileges based on special relationships should be allowed whether the immunity granted is "use-plus" or transactional.

Another problem with the Louisiana statute deserves attention. The provision states that the compelled testimony can in no way be used "except [in] a prosecution for perjury, giving a false statement or otherwise failing to comply with the order." As previously discussed, the federal provision has a similar exception which has been subject to conflicting interpretations, although the jurisprudential trend seems to be to interpret the statute as allowing use only in future trials for perjury committed or false statements given while immunized.

The constitutionality of article 439.1 might be questioned

115. *Id.* at 1233.
118. See analysis of Baldinger problem in text at notes 63-68, *[supra]*.
119. See cases in note 67, *[supra]*.
under the 1974 Louisiana constitution. The rationale underlying immunity grants is that the immunized witness does not really lose his privilege against self-incrimination. He does not provide evidence which can incriminate him since the compelled testimony cannot be used against him in any way by any jurisdiction, i.e., immunity is the quid pro quo for relinquishment of the privilege against self-incrimination. While article 1, section 16 of the 1974 Louisiana constitution provides that "no person shall be compelled to give evidence against himself," and would thus be compatible with the prior discussion of immunity, article 1, section 13 in the "Rights of the Accused" section states that "[a] person . . . arrested or detained . . . shall be advised fully of . . . his right to remain silent, [and] his right against self-incrimination." The Federal Constitution confers no right to remain silent, nor was there a state right of that nature under the 1921 Louisiana constitution. The new constitution may create such a right for persons accused, and if it does, a grant of immunity is not coextensive with the right to remain silent. Such an interpretation would eviscerate article 439.1 because its primary use is to compel accused criminals to testify against cohorts in crime. The better interpretation of article 1, section 13 is that the provision requires only that a person be advised of his Miranda rights, and that once trial begins, article 1, section 13 is supplanted by the article 1, section 16 privilege against self-incrimination.

A related issue is raised in State v. Soukup, in which a conviction was reversed because the state's witness, while being cross-examined by the defendant, repeatedly claimed the privilege against self-incrimination and thereby prevented effective cross-examination. The authors of a recent article state:

Today's answer to such a quandary on the part of the prosecution would presumably be for the state either not to call the witness, or under the authority of Louisiana's recently adopted compelled testimony statute [CODE CRIM. P. article 439.1] to require him to testify fully and thus deny itself future use of such testimony.
Faced with a similar problem in federal court, *United States v. DeSena* 124 specifically left open the question of whether a defendant could compel the government to grant immunity to an essential defense witness.

Louisiana's statute follows the federal immunity statute in all essential elements. Thus, the plethora of federal cases should provide guidelines for interpretation of problem areas in Louisiana's legislation. 125

*James E. Boren*

124. 490 F.2d 692 (2d Cir. 1973).

125. The general rule of statutory construction is that the adoption of a statute of the federal government or of another state includes all the previous authoritative interpretations and constructions of that statute. See, e.g., State v. Macaluso, 235 La. 1019, 106 So. 2d 455 (1958); Standard Oil Co. v. Collector of Revenue, 210 La. 428, 27 So. 2d 268 (1946).