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TO SERVE AND YET TO BE PROTECTED: THE UNCONSTITUTIONAL USE OF COERCED STATEMENTS IN SUBSEQUENT CRIMINAL PROCEEDINGS AGAINST LAW ENFORCEMENT OFFICERS¹

A police department has caught wind of rumors that certain members of its narcotics division receive kickbacks from the bolder drug dealers around town. The internal affairs division has reason to believe that Sergeant Smith, head of the department's cocaine task force, receives the lion's share of these kickbacks. An internal affairs officer approaches Corporal Jones, Smith's longtime partner. She begins by administering a *Garrity* statement² to Jones in order to discover what, if anything, he knows about the affair.

Her statement takes the following form: "I am going to ask you some narrowly-tailored questions related to your knowledge of the alleged bribes paid to members of this department who we are currently investigating. During the course of this questioning, you maintain all rights that the U.S. Constitution guarantees you, including the privilege against self-incrimination. If, however, you refuse to answer, the department will institute disciplinary action against you, including the possibility of termination of employment. If you do respond, the statements which you give will not be used against you in any future criminal proceeding." Desirous of keeping his job, Jones answers to the best of his ability. The responses of the officer, along with statements that others make in connection with this investigation, comprise a file kept by the internal affairs division.

Later, the attorney general convenes a grand jury in order to inquire further into the corruption in the department. The grand jury immediately issues a subpoena duces tecum to the head of the internal affairs division, ordering her to produce the file relating to

1. I am indebted to C. John Pleban, Esq., and Judith Ronzio, Esq., of the St. Louis Metropolitan Police Department for their insights into the process underlying internal affairs investigations conducted by police departments and to Laura Livaccari for her unflagging support.

2. The term "*Garrity* statement" derives from *Garrity v. New Jersey*, 385 U.S. 493 (1967), discussed in detail *infra* notes 24-49 and accompanying text.

its investigation. Though refusing to produce the *Garrity* statements which the department promised to safeguard, she offers to produce a sanitized version of the file.³ With its broad subpoena power at hand, the eager grand jury refuses to accept this offer.

This hypothetical scenario plays out regularly in police departments around the country. A recent and recognizable example is found in the aftermath of the Rodney King beating incident. Weeks after the episode, Federal Bureau of Investigation (FBI) agents who were looking into possible civil rights abuses ran into a stone wall.⁴ Many of the officers who initially submitted voluntarily to interviews with FBI agents, later ended the discussions with a declaration that their statements were extracted under duress.⁵ "[T]he fact that one law-enforcement agency is investigating another has focused attention on the thorny issue of a [sic] officer's professional duty to serve the law versus his legal right to protect himself against self-incrimination."⁶ The guarantee that the FBI would immunize the officers from criminal prosecution may mean that the officers would be required constitutionally to speak,⁷ but this fact only begs the questions of who would grant immunity and from what portion of the criminal proceeding the officers would receive insulation.

To decide whether the grand jury should have access to the coerced statements of police officers demands an inquiry into the nature of the statements themselves. This Note will argue that courts essentially should equate the testimony which the coercive technique of an internal affairs division produces with its own order to compel testimony. First, this Note analyzes the validity of the doctrine that the Supreme Court tacitly set forth in the 1960's, effectively allowing coerced statements taken from police officers pursuant to internal investigation to pass constitutional muster.⁸ The

3. In all likelihood, the department initially will refuse to produce any part of the file for the grand jury in an attempt to maintain the integrity and secrecy of the internal affairs division. This Note, however, will focus attention only on the statements coerced from officers pursuant to an internal affairs investigation.

4. See *Officers' Rights Hinder F.B.I. Inquiry into Beating*, N.Y. TIMES, Mar. 30, 1991, § 1, at 8.

5. *Id.*

6. *Id.*

7. See *Gardner v. Broderick*, 392 U.S. 273 (1968).

8. See *infra* notes 24-49 and accompanying text.

statements, although coerced and potentially in violation of the officer's Fifth Amendment privilege against self-incrimination,⁹ were acceptable to the Court as long as they were not introduced into the criminal proceeding.¹⁰

Assuming the validity of the *Garrity* doctrine, this Note then will address the use of such statements in the context of the grand jury proceeding.¹¹ Part II of this Note will inquire into the nature of the grand jury in order to answer whether the grand jury is indeed a part of the criminal proceeding.¹² If so, statements coerced from officers would be excluded automatically from their hearing according to the conventional constitutional standard.¹³ On the other hand, even if the grand jury is merely an investigatory body, this Note will argue that policy considerations often will preclude grounding an indictment in coerced testimony which may be unavailable at trial.¹⁴ In order to shed light on the role of the grand jury, this Note will analyze the Supreme Court's recent decision in *United States v. Williams*¹⁵ and will discuss the current, slightly confused interpretation of the grand jury's role in the criminal proceeding.¹⁶

Part III of this Note will examine the similarity of immunities and privileges that the court already recognizes at the grand jury level to the coerced *Garrity* statement.¹⁷ Part IV will suggest policy justifications for treating *Garrity* statements in a fashion similar to other immunities and privileges.¹⁸ Premised on the fact that the

9. The Fifth Amendment privilege against self-incrimination guarantees that no one "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V

10. See *Gardner*, 392 U.S. 273; *Garrity v. New Jersey*, 385 U.S. 493 (1967).

11. See *infra* notes 50-52 and accompanying text.

12. See *infra* notes 50-151 and accompanying text.

13. See *Garrity*, 385 U.S. at 500. This finding would assume a literal reading of the Fifth Amendment.

14. For example, if a grand jury were to base an indictment purely on inadmissible evidence and the government failed to unearth other evidence against the defendant, the trial court would likely dismiss the case at the close of the government's case-in-chief. Such a procedure would waste judicial resources and place an unnecessary burden on the defendant.

15. 112 S. Ct. 1735 (1992).

16. See *infra* notes 116-51 and accompanying text.

17. See *infra* notes 152-236 and accompanying text.

18. See *infra* notes 237-44 and accompanying text.

Supreme Court tacitly has delineated a method by which police departments can coerce statements from their officers, this Note proposes that a grant of immunity or recognition of a privilege co-extensive with the Fifth Amendment privilege against self-incrimination represents the only method by which the grand jury constitutionally may gain access to coerced testimony¹⁹

Because of the often muddled state of privileges analysis and the difficult question of whether a police department has standing to assert an officer's Fifth Amendment privilege, this Note will propose the use of a "projected privilege," designed to protect the rights of officers while allowing departments to conduct internal investigations.²⁰ This approach would vindicate the public desire for an honest, law-abiding police force without frustrating individuals' constitutional rights. The information contained in a *Garrity* statement is of substantial value to the government in its attempt to prosecute officers who have run afoul of the law. Permitting the use of such information in grand jury investigations, however, would discourage officers from complying with internal investigations and thus would thwart the attempts of police departments to police themselves. In addition, admission of the testimony without any duty to protect the testifying officer would violate the most basic tenets of the Fifth Amendment privilege. This Note attempts to bridge this gap in current jurisprudence and argues that this violation of testifying officers' Fifth Amendment rights demands the attention of the Supreme Court.

19. The interesting problem presented by the form deemed constitutionally permissible for the *Garrity* statement is that a police department may coerce the statement from the officer provided that the fruits thereof are not used in a subsequent criminal proceeding. See *infra* notes 152-95 and accompanying text.

The police department, however, is not the body that has the ability to use these statements in a future criminal proceeding; the government makes the selection. The standard application of the *Garrity* statement, therefore, raises an issue on which this Note will dwell—who has the duty and the power to protect the Fifth Amendment rights of the officer once he or she has given a statement.

20. Professor Kevin Reitz proposed the use of a projected privilege to permit an attorney to assert her client's Fifth Amendment privilege against self-incrimination in certain cases. Kevin R. Reitz, *Clients, Lawyers and the Fifth Amendment: The Need for a Projected Privilege*, 41 DUKE L.J. 572, 651-54 (1991). See *infra* notes 196-236 and accompanying text for a detailed discussion of the projected privilege and its application to the police department-law enforcement officer context.

Despite the long lapse since the Court last visited the *Garrity* statement issue, it appears regularly in the headlines.²¹ Perhaps most notably, a superior court judge in California ruled that the disciplinary hearings conducted against Los Angeles police officers involved in the Rodney King beating would be public with one exception: the court excluded statements that internal investigators coerced from Officer Laurence Powell that would jeopardize the fairness of his retrial.²² The prosecutors and Powell's attorney reached an agreement endorsed by the judge to prevent admission of statements Powell made under a threat of dismissal.²³ As the scrutiny under which this country places its police officers intensifies, the need to revisit these issues in order to guarantee effective law enforcement will continue to grow.

BACKGROUND OF THE GARRITY STATEMENT

Two Supreme Court decisions handed down in the 1960's, *Garrity v. New Jersey*²⁴ and *Gardner v. Broderick*,²⁵ created the theoretical basis for the *Garrity* statement as used today. In *Garrity*, the Court addressed whether statements of police officers who were under threat of dismissal were given involuntarily, and if so, whether the State's use of such statements was a violation of an individual's privilege against self-incrimination, guaranteed by the Fifth Amendment.²⁶

In *Garrity*, the attorney general of New Jersey had launched an investigation into irregularities in the disposition of traffic offense cases.²⁷ Before questioning several New Jersey police officers, the attorney general warned each of them that anything they said

21. See *supra* notes 4-6 and accompanying text; see also *Public Employees; Discharge of Policeman—Procedural Due Process*, MICH. LAW. WKLY., Nov. 30, 1992, at 6 (describing a recent Michigan case in which an officer sued his former department for constitutional violations in his discharge, including the use of coerced statements in his disciplinary hearing and criminal prosecution).

22. Leslie Berger, *LAPD Hearings in King Case to be Open; Police: Public will be Admitted to Disciplinary Proceedings for Officers Charged in Beating. Some Coerced Statements May be Kept Private Because of Powell's Pending Trial*, L.A. TIMES, June 20, 1992, at B3.

23. *Id.*

24. 385 U.S. 493 (1967).

25. 392 U.S. 273 (1968).

26. *Garrity*, 385 U.S. at 496-500.

27. *Id.* at 494.

could be used against them and that they had the privilege to refuse to respond if answering would tend to incriminate them, but if they so refused, they would be subject to removal from office.²⁸ The officers answered the questions.²⁹ Unfortunately for them, no applicable statute prohibited the use of their testimony in subsequent proceedings.³⁰ The government used some of the answers in subsequent prosecutions, resulting in the conviction of the appellant-officers.³¹

In holding that the statements were inadmissible,³² the Court focused its attention on the nature of the officers' statements.³³ Finding that coercion could include both mental and physical forms of influence,³⁴ the Court described the officers' lack of choice: "[t]he option to lose their means of livelihood or to pay the penalty of

28. *Id.* A New Jersey state statute authorized the removal of state officials and employees in the event that they "refuse[d] to testify upon matters relating to the[ir] office, position or employment," even when asserting the Fifth Amendment privilege against self-incrimination. N.J. REV. STAT. § 2A:81-17.1 (1965), *repealed by Act* effective May 21, 1970, ch. 72, § 7, 1970 N.J. Laws 381. New Jersey law currently imposes a duty upon public officials to testify before several bodies, including grand juries and courts. N.J. REV. STAT. § 2A:81-17.2a1 (1976). Failure to provide testimony subjects the employee to removal from office. *Id.* The section also guarantees the equivalent of both use and derivative use immunity: "[i]f any public employee testifies before any court [or] grand jury such testimony and the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding." N.J. REV. STAT. § 2A:81-17.2a2 (1976). This language closely tracks the holdings in *Garrity* and in *Gardner*. See *infra* notes 38-46 and accompanying text.

29. *Garrity*, 385 U.S. at 495.

30. *Id.* See *infra* notes 196-236 and accompanying text for a discussion of the availability of a "projected" privilege.

31. *Id.* at 495.

32. *Id.* at 500.

33. *Id.* at 496.

34. *Id.* "[T]he blood of the accused is not the only hallmark of an unconstitutional inquisition." *Id.* (quoting *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960)). The dissent, however, took issue with the majority's characterization. *Id.* at 500-01 (Harlan, J., dissenting). Justice Harlan argued that the majority, in finding coercion, necessarily decided that the statements were coerced as a matter of fact because they were given involuntarily. *Id.* at 501. He further asserted that the majority found the statements inadmissible because the department placed an unallowable condition on the privilege against self-incrimination. *Id.* Justice Harlan disagreed with both contentions, finding that the threat of dismissal was insufficient to bar the use of such questioning under either theory. *Id.* at 502-09. "The majority is apparently engaged in the delicate task of riding two unruly horses at once: it is presumably arguing simultaneously that the statements were involuntary as a matter of fact, and that the statements were inadmissible as a matter of law." *Id.* at 501 (citations omitted).

self-incrimination is the antithesis of free choice to speak out or to remain silent."³⁵ Due to the coercive environment in which the interrogation took place, the Court held that the statements were involuntary as a matter of law;³⁶ the fact that the officers ultimately chose to speak did not make the statements which ensued "voluntary" for purposes of the Fifth Amendment.³⁷

Deciding that the police officers did not give the statements voluntarily did not end the Court's inquiry into whether the department violated the rights of the officers. No violation of the Fifth Amendment privilege against self-incrimination occurs until the coerced statement is used against the declarant in a criminal proceeding.³⁸ Thus, the Court held that the protection against coerced statements prohibits their use in "subsequent criminal proceedings."³⁹

One year later in *Gardner v. Broderick*,⁴⁰ the Court built upon the theory of *Garrity* which had prohibited the use of coerced statements at trial.⁴¹ In *Gardner*, a New York County grand jury subpoenaed Gardner, a police officer, to testify concerning his involvement in alleged bribery and corruption in the New York City

35. *Id.* at 497.

36. *Id.* at 497-98.

37. *Id.* at 498-99.

38. Logically speaking, a person cannot incriminate herself in a context other than a criminal proceeding. That is, a criminal proceeding is a necessary element of a Fifth Amendment violation; the mere taking of a statement will not constitute a violation of the right against self-incrimination. This point throws into question precisely who violates the Fifth Amendment privilege: the department by taking the statement through coercive techniques or the grand jury by using it. In fact, the police department cannot be the culprit for two reasons. First, the Supreme Court effectively has given police departments permission to conduct coercive questioning through its holdings in *Garrity* and *Gardner*. Second, the grand jury is the body that forces the introduction of the statement into a judicial proceeding, creating the first infringement on the Fifth Amendment privilege.

39. *Garrity*, 385 U.S. at 500. The Court did not say that the interdiction against use in subsequent criminal proceedings was limited to use against the giver of the statement. *Id.* This fact raises the question whether the Court intended to limit its holding to prohibit use of coerced statements against the speaker, or if it intended to exclude the use of the statement against any potential party to a criminal action. Although the latter is intuitively more attractive after a reading of the opinion, the former provides the likely answer in current jurisprudence. See *infra* notes 152-81 and accompanying text (discussing use and derivative use immunity).

40. 392 U.S. 273 (1968).

41. The Court's dicta in *Gardner* provided the framework that police departments still use today to interrogate their officers. See *infra* notes 48-49 and accompanying text.

Police Department.⁴² The assistant district attorney first advised Gardner of his privilege against self-incrimination, but then required that he sign a "waiver of immunity"; his failure to acquiesce would result in termination from employment.⁴³ Upon his refusal, Gardner underwent an administrative hearing, ending in his dismissal.⁴⁴

The Court asserted that its holding in *Garrity* was not precisely on point.⁴⁵ *Garrity* had related to the attempt to coerce and ultimately to use testimony given upon threat of discharge whereas *Gardner* raised the question whether the discharge of an officer for the refusal to waive a constitutionally guaranteed right was constitutionally permissible.⁴⁶ Faced with the refusal to sign a "waiver of immunity," the Court found that requiring Gardner to forego his constitutional privilege on threat of dismissal violated his right against self-incrimination.⁴⁷

In dicta, the Court outlined the requirements that police departments all over the country have incorporated into their internal investigatory scheme.⁴⁸

If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself the privilege against self-incrimination would not have been a bar to his dismissal.⁴⁹

The implication of the *Garrity* and *Gardner* decisions taken in tandem is twofold: the Fifth Amendment will tolerate neither the use of coerced statements and their fruits in a criminal proceeding

42. *Gardner*, 392 U.S. at 274.

43. *Id.*

44. *Id.* at 274-75. The hearing was conducted pursuant to the *New York City Charter*, ch. 49, § 1123.

45. *Gardner*, 392 U.S. at 277.

46. *Id.*

47. *Id.* at 278.

48. For example, the St. Louis Metropolitan Police Department routinely administers what the internal affairs division calls a "*Garrity* statement" similar to the one outlined in the hypothetical that introduced this Note. See *supra* text accompanying notes 2-3.

49. *Gardner*, 392 U.S. at 278 (citation omitted). Use immunity and derivative use immunity are both implicated in this statement of the correct procedure. See *infra* notes 152-81 and accompanying text.

nor the requirement that officers waive their privilege against self-incrimination. The glaring fact remains that police departments do not prosecute, so they are unable to ensure that the statements that they coerce under authority of *Garrity* will not be used against an officer in a later proceeding. This situation effectively forces a waiver of the privilege that *Garrity* and *Gardner* both claim to protect.

USE OF THE *GARRITY* STATEMENT IN A GRAND JURY PROCEEDING

Even more problematic is the question of grand jury access to the coerced statements of law enforcement officials contained in internal affairs files. Grand juries have long enjoyed broad subpoena power.⁵⁰ No Supreme Court decision has squarely addressed whether a grand jury may use the fruits of a *Garrity* statement in its proceedings. Recently, however, the Court rendered a decision that attempted to define the scope and duties of the grand jury.⁵¹ Over the decades, the Court has vacillated in its characterization of the grand jury⁵² and has never held explicitly that it is an investigatory body, utterly free of the constraints of an adjudicatory body. This issue forms the point of departure for a discussion of whether a grand jury, once convened, is part of the "criminal proceeding" in which a *Garrity* statement may not be heard.

The Power of the Grand Jury to Trespass on Fundamental Rights

Several times the Supreme Court has held that a witness may not refuse to testify merely because investigators based their questions on evidence that would be inadmissible under the Fifth Amendment.⁵³ The Court's justification for this holding is that the

50. For example, in *Hale v. Henkel*, 201 U.S. 43 (1906), the Court analyzed the historical necessity of the liberal powers of investigation and subpoena that a grand jury holds. The purpose of the power is to allow the grand jury access to "everyman's evidence." *Id.* at 70. In other words, the prosecutorial system allows access to information that would not be admissible at trial in order to carry out investigatory responsibilities unimpeded.

51. *United States v. Williams*, 112 S. Ct. 1735, 1742-44 (1992).

52. See, e.g., *Hale v. Henkel*, 201 U.S. 43 (1906) (discussing the history of the role of the grand jury in both England and the United States and concluding that the grand jury has both investigatory and adjudicatory traits).

53. See, e.g., *United States v. Calandra*, 414 U.S. 338 (1974) (holding that the exclusionary rule of the Fourth Amendment does not prohibit the use of illegally seized evidence in all proceedings or against all persons, despite its broad deterrent purpose); *United States v.*

grand jury must have broad investigative power in order to carry out its duties.⁵⁴ The common sense question that follows, however, is of what use this information can be assuming that the response and the fruits thereof will never be admissible at trial. Specifically, an indictment based purely, or even in large part, on evidence not admissible at trial⁵⁵ ultimately appears to serve little purpose to the criminal justice system. Unless the government finds another source of evidence, separate and apart from the officer's statement, the court will not permit its use at trial.⁵⁶

The Basic Role of the Grand Jury in the American Criminal Justice System

The most basic, and perhaps most overworked, definition of the purpose of the grand jury proposes that it must act as the schizophrenic "shield and sword" of the criminal justice system.⁵⁷ As a shield, the grand jury must protect individuals in the event that the prosecutor requests an indictment without sufficient evidence to warrant a trial.⁵⁸ The grand jury assumes the role of a sword when examining situations at the investigatory stage.⁵⁹ In the lat-

Blue, 384 U.S. 251, 255 n.3 (1966) (stating that a defendant may suppress no more than incriminating evidence that the government acquires in violation of the Fifth Amendment, and the fruits thereof); *Lawn v. United States*, 355 U.S. 339 (1958) (validating an indictment handed down by a 1953 grand jury based entirely on evidence coerced by a 1952 grand jury in violation of the defendant's Fifth Amendment rights).

54. *Calandra*, 414 U.S. at 344.

55. For example, an indictment resting on statements taken in derogation of the Fifth Amendment privilege.

56. If the officer invokes the Fifth Amendment privilege before the grand jury, the court will ultimately grant the officer use immunity coextensive with her Fifth Amendment rights in exchange for forcing her to testify. See generally Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369 (1991) (discussing the unfortunate protection of what he calls "truth-impairing" rights); Gary S. Humble, *Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment*, 66 TEX. L. REV. 351 (1987) (arguing that the federal immunity statute and its use to overcome a witness' Fifth Amendment privilege against self-incrimination amounts to transactional immunity because of the burden on the government to show that it made neither evidentiary nor nonevidentiary use of the compelled testimony).

57. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 8.1, at 376 (2d ed. 1992).

58. *Id.*

59. *Id.*

ter role, the grand jury unearths evidence, thus helping the government to obtain a conviction.⁶⁰

Although grand jury investigations are time-consuming and cumbersome,⁶¹ they generally are much more productive than the immediate commencement of a trial upon the first suspicion focused against the defendant. The greatest advantage of the grand jury is its subpoena power enhanced by the potential for contempt sanctions and grants of immunity.⁶² The grand jury may subpoena both live testimony and tangible evidence, and subject those who refuse to comply to civil or criminal contempt.⁶³ The threat of a contempt order is particularly useful in obtaining information from potential witnesses who refuse to cooperate with police by invoking the Fifth Amendment privilege against self-incrimination.⁶⁴ Often the fear of spending time in jail in itself will cause the witness to speak freely.⁶⁵ The witness, however, can continue to invoke the privilege and risk criminal contempt sanctions.⁶⁶

To avoid this problem, the prosecutor will often grant immunity⁶⁷ against future prosecution to a witness sufficient to overcome the invoked privilege.⁶⁸ Once the prosecutor grants a witness immunity, the witness may no longer rely on the privilege against self-incrimination.⁶⁹ Prosecutors will often grant immunity to a "lower-level" participant in a crime in the hope of obtaining testimony against the greater offenders.⁷⁰ For this reason, the grant of

60. *Id.* at 376-77.

61. *Id.* § 8.3, at 382.

62. *Id.*

63. *Id.* § 8.3(a), at 382-83.

64. *Id.* § 8.3(b), at 383.

65. *Id.*

66. *Id.*

67. Specifically, the prosecutor will grant a "use" immunity, as opposed to a "transactional" immunity. The modern use immunity avoids a violation of the Fifth Amendment by forbidding the use of any testimony compelled by the court order against the defendant. See 18 U.S.C. § 6002 (1988). The use immunity narrowed the scope of transactional immunity, which forbade any future use of the compelled testimony. *E.g.*, *Hale v. Henkel*, 201 U.S. 43 (1906).

68. *LAFAVE & ISRAEL*, *supra* note 57, § 8.3(e), at 384.

69. *Id.*

70. *Id.*

immunity does not extend beyond the witness receiving immunity⁷¹

The dual role of the grand jury presents some philosophical dichotomies. As a general proposition, coerced testimony has no place in a criminal trial.⁷² The grand jury, as a shield, then should prevent a case grounded entirely on such evidence from reaching the courtroom.⁷³ In its sword capacity, however, the grand jury has the duty to probe further in order to discover whether enough other evidence exists to warrant a trial.⁷⁴ Much of the remainder of this Note will address this problem and offer some possible solutions to this tangled logic.

Early History of the Grand Jury: The Framers' Intent in Relation to the Fifth Amendment

In *Hale v. Henkel*,⁷⁵ the Supreme Court addressed the historic underpinnings of the grand jury and its role in the criminal adjudication process. Hale, the secretary and treasurer of a company under investigation, received a subpoena duces tecum commanding him to appear before a grand jury to testify and to bring corporate documents relating to the investigation.⁷⁶ Hale appeared at the designated time, but after stating his name and his position with the firm, he refused to answer any other questions, despite the prosecutor's assurance that he would receive immunity from punishment.⁷⁷ Hale persisted in his refusal to testify, and ultimately the presiding judge remanded him to the custody of the marshal until he chose to answer questions and produce the demanded papers.⁷⁸

71. See *infra* notes 152-81 and accompanying text for discussion of various immunities.

72. See, e.g., *Slochower v. Board of Higher Educ.*, 350 U.S. 551, 557-58 (1956) ("The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.").

73. *LaFAVE & ISRAEL*, *supra* note 57, § 8.1, at 376.

74. *Id.* § 8.1, at 376-77.

75. 201 U.S. 43 (1906).

76. *Id.* at 44-46.

77. *Id.* at 46.

78. *Id.*

On appeal Hale argued that the circuit court had no power to compel his testimony "No judicial matter was pending in the Circuit Court when appellant was required to attend before the grand jury, or when the orders of May 5 and May 8 were made, in or upon which he could be required to testify or produce evidence."⁷⁹ The appellant added that "[a]n *ex parte* investigation, based upon mere suspicion, without any complaint or charge, and that may be without result, is not a 'case' or 'controversy' within the meaning of the Constitution,"⁸⁰ a requirement under Article III of the Constitution without which a court has no power to act.⁸¹ In addition, Hale asserted that, as a matter of policy, possession by the grand jury of an unlimited investigatory power would exceed the bounds of the Constitution.⁸² "A grand jury does not possess, and cannot, under the constitution of this State exercise, purely inquisitorial power, because such power is in no sense a judicial one."⁸³

The United States argued, however, that "[t]he procedure of a grand jury in this country at the time of the enactment of the Fifth Amendment was, and, with unimportant exceptions, has remained quite different from that of the similar body in England."⁸⁴ A grand jury is supposed to investigate, not adjudicate, and has the broadest possible inquisitorial power.⁸⁵ "Under this procedure the grand jury proceeds, before a bill of indictment is framed, to investigate, at the instance of the court or of their own body or of the district attorney, a suspected or alleged crime and to determine whether it has been committed, and, if so, who committed it."⁸⁶

In *Hale*, the Court ultimately ruled in favor of the United States:

"[I]n this country it is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify put-

79. *Id.* at 47.

80. *Id.*

81. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] to Controversies." U.S. CONST. art. III, § 2.

82. *Hale*, 201 U.S. at 49.

83. *Id.*

84. *Id.* at 51-52.

85. *Id.*

86. *Id.* at 52.

ting the suspected party on trial, to direct the preparation of the formal charge or indictment."⁸⁷

The Court underscored the breadth of power that the grand jury held: "[T]he grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed."⁸⁸

The Court concluded that "[t]he interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply."⁸⁹ Therefore, if the defendant receives a grant of immunity in exchange for testimony before the grand jury, no violation of the Fifth Amendment privilege exists.⁹⁰

The Court, however, opened for discussion a broad swath of uncharted territory, particularly with respect to whether the grand jury hearing is a "proceeding" for purposes of immunity grants.⁹¹

While there may be some doubt whether the examination of witnesses before a grand jury is a suit or prosecution, we have no doubt that it is a "proceeding" The word should receive as wide a construction as is necessary to protect the witness in his disclosures, whenever such disclosures are made in pursuance of a judicial inquiry The word "proceeding" is not a technical one, and is aptly used by courts to designate an inquiry before a grand jury.⁹²

According to this definition of "proceeding," the promise that an officer's statement made during an internal investigation will not be used in a criminal *proceeding* should extend to the grand jury hearing in order to protect the defendant's rights. In a time when

87. *Id.* at 63 (quoting *Frisbie v. United States*, 157 U.S. 160 (1895)).

88. *Id.* at 65.

89. *Id.* at 67; see also *Counselman v. Hitchcock*, 142 U.S. 547 (1892) (holding that the grant of immunity must be absolute to replace the privilege against self-incrimination).

90. *Hale*, 201 U.S. at 67.

91. *Id.* at 66. But see *id.* at 67 ("If the testimony relate [sic] to criminal acts . . . for which he has already received a pardon or is guaranteed an immunity, the [Fifth] [A]mendment does not apply.").

92. *Id.*

defendants' rights appear to be shrinking,⁹³ however, the desire to err on the side of preservation of the rights of a defendant wanes as well.

Modern Interpretation of the Role of the Grand Jury in the Criminal Process

In *United States v. Calandra*,⁹⁴ the Court maintained that the sources of an indictment do not affect its validity.⁹⁵ Indeed, a defendant may not challenge an indictment that is "valid on its face," even if based on "information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination."⁹⁶ In so stating, the Court recognized that the burden upon the individual may be great, but the overwhelming interest of the grand jury's right to "every man's evidence" outweighed these considerations.⁹⁷

Short of a grand jury itself violating a privilege,⁹⁸ the Court indicated that the grand jury rightfully enjoys freedom from interference by the court.⁹⁹ It drew a fine distinction between issuing an indictment based purely on evidence obtained in violation of a

93. See, e.g., *United States v. Mariani*, 851 F.2d 595 (2d Cir. 1988) (refusing to prohibit the prosecution of an immunized witness, even though the prosecution may have been influenced by the immunized testimony, as long as the evidence at trial is denied from independent sources), *cert. denied*, 490 U.S. 1011 (1989); *United States v. Crowson*, 828 F.2d 1427 (9th Cir. 1987) (holding that the prosecution team's access to a defendant's prior immunized testimony does not require automatically their withdrawal), *cert. denied*, 488 U.S. 831 (1988).

94. 414 U.S. 338 (1974).

95. *Id.* at 345.

96. *Id.* (citing *Lawn v. United States*, 355 U.S. 339, 349-50 (1958)). Neither is "an indictment subject to a challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *Id.* (citing *Costello v. United States*, 350 U.S. 359, 361-63 (1956) (holding that indictment based solely on hearsay is not in violation of the Fifth Amendment's Presentment Clause)). See *infra* notes 133-45 and accompanying text for further discussion of the validity of indictments based upon faulty evidence.

97. *Id.* (citing *Branzburg v. Hayes*, 408 U.S. 680, 682-88 (1972)). This concept of the grand jury's right relates to its role as a representative of the public. *Id.*

98. The Court made no distinction between constitutional privileges and those created by statute or the common law.

99. *Calandra*, 414 U.S. at 346-47.

privilege, a permissible exercise, and compelling a witness to testify in violation of his constitutional rights.¹⁰⁰

Refusing to extend the exclusionary rule of the Fourth Amendment, which prohibits the use of evidence obtained in violation of the Fourth Amendment in a criminal proceeding against the victim of the illegal search or seizure,¹⁰¹ to grand jury proceedings, the Court envisioned the role of the grand jury not as a body that adjudicates guilt or innocence, but one free to "pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial."¹⁰² Additionally, the Court felt that the extension would deter conscientious police investigation due to the fear that evidence obtained in good faith could be excluded from the criminal process entirely.¹⁰³ At the same time, the refusal to extend the rule provided no perverse incentive to seek evidence contrary to the search and seizure clause. Any such impulse disappears in the face of its inadmissibility at trial.¹⁰⁴

The Court carved out another niche for the use of compelled testimony at the grand jury level in *United States v. Dionisio*,¹⁰⁵ in which the grand jury subpoenaed twenty people to give voice ex-

100. *Id.* "Although, for example, an indictment based on evidence obtained in violation of a defendant's Fifth Amendment privilege is nevertheless valid, the grand jury may not force a witness to answer questions in violation of that constitutional guarantee." *Id.* at 346 (citation omitted). In fact, the trial court and not the grand jury, ultimately is responsible and reigns supreme in that situation. The grand jury must turn to the court to request compulsion of a witness. *Id.* at 346 n.4.

101. *Id.* at 347.

102. *Id.* at 349.

103. *Id.* at 351.

104. *Id.* at 350-51. Foregoing the soundness of this reasoning for the moment, one could employ such a policy rationale to support the exclusion of *Garrity* statements from the grand jury altogether. Their admission would deter the ability of police departments to interrogate their officers. One easily can imagine the reluctance an officer would have to testify against his partner, even if the testifying officer were innocent, for fear that the government would use the statement to indict his partner, thereby destroying the credibility of the testifying officer in the eyes of his comrades.

Along the lines of the Court's reasoning, if the government can obtain an indictment solely on illegally seized evidence, it may pin its hopes on the possibility of finding admissible evidence, either independently or from the illegal evidence itself, in the period between seizing the evidence and trial.

105. 410 U.S. 1 (1973).

emplars for identification purposes.¹⁰⁶ Dionisio and others refused to participate, claiming that the disclosure would violate their Fourth and Fifth Amendment rights.¹⁰⁷ Because the voice exemplars were for identification rather than testimonial purposes, the Court found no infringement of Fifth Amendment rights.¹⁰⁸ The Court differentiated the use of voice exemplars from the demand that a witness testify against himself in violation of the privilege against self-incrimination, because requiring a person "to use his voice as an identifying physical characteristic, [is] not to speak his guilt."¹⁰⁹

The Court again balanced the burden that grand jury subpoenas create against their importance to the grand jury procedure, finding the balance tipped far in favor of requiring attendance.¹¹⁰ Pointing first to the historic obligation to appear and give evidence before a grand jury,¹¹¹ the Court emphasized that neither the actual nor the perceived burden of testifying was so great as to warrant an extension of the Fifth Amendment privilege.¹¹² Indeed the imposition of the subpoena was far less than the burden of an arrest:

"The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever and it remains at all times under the control and supervision of a court."¹¹³

106. *Id.* at 3.

107. *Id.*

108. *Id.* at 5-7.

109. *Id.* at 7 (citing *United States v. Wade*, 388 U.S. 218, 222-23 (1967)).

110. *Id.* at 10.

111. *Id.* at 9-10; see also *Blair v. United States*, 250 U.S. 273, 281 (1919) ("[T]he giving of testimony and the attendance upon court or grand jury in order to testify are public duties. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.").

112. *Dionisio*, 410 U.S. at 9-10.

113. *Id.* at 10 (quoting Judge Friendly in *United States v. Doe*, 457 F.2d 895, 898 (2d Cir. 1972), cert. denied, 401 U.S. 941 (1973)). The stigma of a police officer receiving a subpoena to appear before the court is perhaps far greater than the stigma Judge Friendly indicates may attach in a normal case.

At first glance the holding of *Dionisio* may appear to extend farther than it actually does. The Court was careful to announce that the production of a voice exemplar is not a testimonial act and therefore its compulsion is not in violation of the Fifth Amendment privilege.¹¹⁴ This holding served more as a preserver than as a destroyer of the privilege against self-incrimination before the grand jury.¹¹⁵

The Nature of the Grand Jury and Unprotected Rights: United States v. Williams

The weight of authority supports the grand jury as an investigatory body with broad subpoena and indictment power, rather than an adjudicatory body that must follow standard rules of evidence and procedure.¹¹⁶ The Court addressed this issue in *United States v. Williams*.¹¹⁷

In *Williams*, a federal grand jury indicted the respondent on seven counts of " 'knowingly mak[ing] [a] false statement or report for the purpose of influencing the action [of a federally insured financial institution].' " ¹¹⁸ The district court dismissed the indictment without prejudice, finding that the government had failed to present "substantial exculpatory evidence" to the grand

114. *Id.* at 7.

115. See *infra* notes 196-222 and accompanying text for a discussion of *Fisher v. United States*, 425 U.S. 391 (1976), which held that only the production of testimonial statements implicates the Fifth Amendment privilege against self-incrimination. The implication of these holdings is that a testimonial statement, including a *Garrity* statement, should receive the protection of the Fifth Amendment privilege.

116. Each court that has addressed this issue quickly maintains that a grand jury may in no way itself violate a privilege. See, e.g., *Boyd v. United States*, 116 U.S. 616, 633-35 (1886) (holding that a grand jury cannot compel a witness to produce books or papers that would incriminate him). It must turn instead to the court for the legal power to do so. See *United States v. Calandra*, 414 U.S. 338, 346 n.4 (1974). Perhaps because the court exercises such power through the grand jury, the court in some way extends its adjudicatory function to the grand jury level. The grand jury itself is impotent to act in a judicial capacity even though it has, as one of its roles, the ability to hand down an indictment. See *United States v. Williams*, 112 S. Ct. 1735, 1744 (1992) (emphasizing that the grand jury has no power to determine guilt or innocence but sits to assess whether enough evidence exists to bring a criminal charge). Arguably any adjudicatory function at the grand jury level must be an extension of the arm of the court.

117. 112 S. Ct. 1735 (1992).

118. *Id.* at 1737 (alterations and omissions in original) (quoting 18 U.S.C. § 1014 (1988)).

jury,¹¹⁹ and the Tenth Circuit Court of Appeals affirmed the district court decision.¹²⁰

The Supreme Court reversed, holding that a district court may not dismiss an otherwise valid indictment due to failure to present "substantial exculpatory evidence" to the grand jury.¹²¹ The Court found that, whereas federal courts of appeals may formulate procedural rules not specifically required by the Constitution or by Congress, the courts of appeals do not preside over the functioning of the grand jury, an independent body.¹²²

The power to control the procedure of the grand jury normally does not attach, except in the rare case of misconduct before a grand jury that "amounts to a violation of one of those 'few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions.'" ¹²³ From this premise, Justice Scalia, writing for the Court in *Williams*, asserted that a rule requiring the government to disclose any substantial exculpatory evidence, as applied in this case, exceeded the authority of the Tenth Circuit to make its own procedural rules.¹²⁴

Basing the Court's decision upon "[t]he grand jury's functional independence from the judicial branch . . . both in the scope of its power to investigate criminal wrongdoing, and in the manner in which that power is exercised,"¹²⁵ Justice Scalia compared the respective domains of the grand jury and the court.¹²⁶ He conceded

119. *Id.* at 1737.

120. *United States v. Williams*, 899 F.2d 898 (10th Cir. 1990), *rev'd*, 112 S. Ct. 1735 (1992).

121. *Williams*, 112 S. Ct. at 1746.

122. *Id.* at 1741 (citing *United States v. Hasting*, 461 U.S. 499, 505 (1983)).

123. *Id.* (quoting *United States v. Mechanik*, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring)). Importantly, Congress set forth one of those rules in 18 U.S.C. § 6002 (documenting the procedures for granting a witness immunity from prosecution when that witness refuses to testify based on an invocation of the Fifth Amendment privilege). *Id.* at 1741 n.6. See *infra* notes 152-81 and accompanying text for further discussion of the use immunity.

124. *Williams*, 112 S. Ct. at 1742. Note in particular that the Court, after proposing that the grand jury and the court were absolutely separate, held that this dichotomy should apply only as a rule-of-thumb.

125. *Id.*, see, e.g., *United States v. R. Enterprises*, 111 S. Ct. 722 (1991) (holding in part that the subpoenas issued by a grand jury emanate from a broader ability to compel the production of evidence than those coming from a court).

126. *Id.* at 1742-43. Justice Scalia reminded the reader that a court's jurisdiction depends on the existence of a case or controversy, whereas a grand jury can investigate on suspicion

that the provinces of grand jury and court overlapped,¹²⁷ and that the court would refuse to lend its assistance to the grand jury when it seeks to compel testimony in a fashion that would override rights accorded by the Constitution or common law privileges.¹²⁸

Several significant constitutional rights, however, would not be protected in a grand jury proceeding under Justice Scalia's test.¹²⁹ Most notably, he points to decisions holding that a violation of the Double Jeopardy Clause of the Fifth Amendment¹³⁰ is not a bar to indictment when a previous grand jury would not hand one down,¹³¹ and to the "twice suggested"¹³² position that the Sixth Amendment right to counsel does not attach when a grand jury summons an individual to appear.¹³³ The Court added rather tri-

that a law is being violated, or "even because it wants assurance that it is not." *Id.* (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950)).

127. *Id.* The grand jury cannot compel the attendance of witnesses or force production of evidence, and so must turn to the court when such a compulsion is required.

128. *Williams*, 112 S. Ct. at 1743. For example, in *Gravel v. United States*, 408 U.S. 606 (1972), upon which Justice Scalia relied for this assertion, the Court limited a grand jury subpoena to preserve the immunity accorded by the Speech or Debate Clause. Specifically, *Gravel* held that an injunction against interrogating a Senator's aide with respect to any act he performed within the scope of his employment was too broad. However, "[t]he grand jury[,] if relevant to its investigation into the possible violations of the criminal law, and absent Fifth Amendment objections, may require from [the Senator's aide] answers to questions relating to his or the Senator's arrangements" *Id.* at 628 (emphasis added).

This decision indicates that Fifth Amendment privileges ought to govern the actions of the grand jury as well as the court itself, regardless of any division between the two. Courts also have protected the marital communications privilege from the power of the grand jury subpoena. See *In re Hugel*, 754 F.2d 863 (9th Cir. 1985).

129. *Williams*, 112 S. Ct. at 1743 ("No doubt in view of the grand jury proceeding's status as other than a constituent element of a 'criminal prosecution,' we have said that certain constitutional protections afforded defendants in criminal proceedings have no application before that body.") (citations omitted).

130. The Double Jeopardy Clause provides the following: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The primary purpose of this clause is to bar the retrial of a criminal case, not for the purpose of judicial economy, but for the protection of the defendant from oppressive prosecution. See generally *LAFAVE & ISRAEL*, *supra* note 57, § 25, at 1055.

131. See, e.g., *Ex parte United States*, 287 U.S. 241, 250-251 (1932) (holding that the duty of a grand jury to return an indictment is not limited by actions taken by a previously convened grand jury); *United States v. Thompson*, 251 U.S. 407, 413-15 (1920) (reasoning that the fact that a grand jury has investigatory power necessitates a theory that a second grand jury may review and alter findings of the prior grand jury).

132. *Williams*, 112 S. Ct. at 1743.

133. See *United States v. Mandujano*, 425 U.S. 564, 581 (1976) (plurality opinion) (affirming by reference to "settled principles" that a witness possibly involved in criminal ac-

umphantly that, "[i]n view of the grand jury proceeding's status as other than a constituent element of a 'criminal prosecutio[n],' we have said that certain constitutional protections afforded defendants in criminal proceedings have no application before that body"¹³⁴

Thus, the grand jury's independence from the adjudicatory nature of the court means, for the most part, that it may use wrongfully obtained evidence but may not itself procure it. Neither concerns for the use of illegally obtained testimony nor its perceived unreliability shall keep it from the grand jury once it is obtained.¹³⁵ The bar to the subsequent use of a *Garrity* statement in a criminal proceeding, therefore, does not appear to prevent the grand jury from gaining access to such a statement. Regardless of whether the grand jury is in fact an arm of the criminal proceeding, the Court clearly enunciated the threshold test for admissibility of evidence obtained in contradiction of a constitutional right or a privilege.¹³⁶

tivity has no right to counsel before a grand jury, but maintaining that the witness has an absolute duty to answer the questions of the grand jury subject to a valid Fifth Amendment claim); *In re Groban*, 352 U.S. 330, 333 (1957) (holding that during the fire marshall's investigation of a fire that occurred on the appellant's property, the appellant did not have a right to counsel, in part due to case law holding no right to counsel before grand juries).

The *Williams* Court also cited *Calandra* with approval: "[O]ur cases suggest that an indictment obtained through the use of evidence previously obtained in violation of the privilege against self-incrimination 'is nevertheless valid.'" *Williams*, 112 S. Ct. at 1743 (citing *United States v. Calandra*, 414 U.S. 338, 346 (1974)); cf. *United States v. Payner*, 447 U.S. 727, 736 (1980) (holding that the court's supervisory power may not allow a potential defendant to invoke the Fourth Amendment rights of a third party). See also *infra* notes 198-222 and accompanying text (discussing the invocation of the Fifth Amendment rights of a third party).

134. *Williams*, 112 S. Ct. at 1743 (citation omitted). The Court rejected respondent's argument that the lower court ruling requiring the presentation of substantial exculpatory evidence amounted to an application of Fifth Amendment "common law" providing for the quality of evidence heard by the grand jury. *Id.* at 1744.

135. *Id.* at 1745-46. "'[T]he mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment, [nor will] a challenge to the reliability or competence of the evidence presented to the grand jury [be heard].'" *Id.* at 1746 (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 261 (1988)).

136. In response to the Court's position, perhaps the proper question to ask is at what point does the violation of the Fifth Amendment occur in the case of the *Garrity* statement? Accepting the premise that a basic and indispensable requirement of a violation of the Fifth Amendment privilege against self-incrimination is the presentment of the evidence to a body other than the internal affairs division, and that the Court in *Garrity* and *Gardner* was correct in permitting the coercion of such statements so long as the statements are not used

Justice Stevens, writing in dissent and joined by Justices Blackmun, O'Connor and Thomas, outlined an entirely different approach to the categorization of the grand jury's role. Rather than the investigatory-adjudicatory dialectic that the majority constructs, the dissent proceeded from the premise that courts ought to be able to exercise some measure of authority over the grand jury proceeding.¹³⁷ Misconduct, here in the form of the failure of the U.S. Attorney to present exculpatory evidence, is not foreign to the grand jury,¹³⁸ but in the eyes of the dissenting Justices, it is impermissible.¹³⁹

The dissent echoes Justice Sutherland's condemnation of such intolerable behavior in *Berger v. United States*.¹⁴⁰

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."¹⁴¹

The dissent posits that the prosecutor equally holds a duty to refrain from using improper methods of obtaining an indictment.¹⁴² This responsibility takes on special significance in a grand jury

in a subsequent criminal proceeding, it may be argued that when a grand jury forces a witness to present testimony, with or without the assistance of the court, the grand jury is in fact the first violator of the Fifth Amendment privilege.

137. *Williams*, 112 S. Ct. at 1752-53 (Stevens, J., dissenting).

138. *Id.* at 1749. Prosecutors have presented perjured testimony. *E.g.*, *United States v. Basurto*, 497 F.2d 781, 786 (9th Cir. 1974). They have failed to inform the grand jury of its authority to subpoena witnesses. *United States v. Samango*, 607 F.2d 877, 884 (9th Cir. 1979). They also have misstated the law. *United States v. Roberts*, 481 F. Supp. 1385, 1389 (C.D. Cal. 1980).

139. *Williams*, 112 S. Ct. at 1749-51 (Stevens, J., dissenting).

140. 295 U.S. 78 (1935).

141. *Williams*, 112 S. Ct. at 1750 (Stevens, J., dissenting) (quoting *Berger*, 295 U.S. at 88).

142. *Id.* Part of Justice Stevens' concern is that grand juries cannot perform their function as the protectors of the innocent from malicious and random prosecution if they may

proceeding during which a prosecutor proceeds unchecked by judge or opposing counsel. "For while in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo."¹⁴³ The dissent in *Williams* recognized the impact, avoidable by imposing controls on the grand jury proceeding, that the stigma of an indictment may have upon a person,¹⁴⁴ an effect that the Court quickly dismissed in *Calandra* and *Dionisio*.¹⁴⁵

To avoid this result, the dissent rejected the relatively stringent separation between court and grand jury in favor of a grand jury at the service of the court.¹⁴⁶ On this count, the dissent emphasized a point that the majority discounted:

"A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, *because powerless itself to compel the testimony of witnesses*. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so."¹⁴⁷

be misled by prosecutors "on whose knowledge of the law and facts of the underlying criminal investigation the jurors will, of necessity, rely." *Id.* at 1753.

143. *Id.* at 1750 (quoting *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979)).

144. *Id.*

145. *United States v. Calandra*, 414 U.S. 338, 350-51 (1974); *United States v. Dionisio*, 410 U.S. 1, 9-10 (1973); see also *supra* notes 110-13 and accompanying text (discussing this stigma).

146. *Williams*, 112 S. Ct. at 1751-53. "Although the grand jury has not been 'textually assigned' to 'any of the branches described in the first three Articles' of the Constitution, it is not an autonomous body completely beyond the reach of the other branches. '[A] grand jury is neither an officer nor an agent of the United States, but a part of the court.'" *Id.* at 1752 (citation omitted) (quoting *Williams*, 112 S. Ct. at 1742; *Falter v. United States*, 23 F.2d 420, 425 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928)).

147. *Id.* at 1752 (emphasis added) (quoting *Brown v. United States*, 359 U.S. 41, 49 (1959)). The majority recognized the power of the Court to "invoke its supervisory authority to fashion and enforce privilege rules applicable in grand jury proceedings and suggest[ed] that it may also invoke its supervisory authority to fashion other limited rules of grand jury procedure." *Id.* at 1753 (citation to majority opinion omitted). The dissent felt that the Court could equally fashion rules regarding standards of prosecutorial conduct without compromising the historical role of the grand jury as an independent, inquisitorial institution. *Id.* at 1753. A court could also employ such a power to create a "new" privilege in certain evidence by extending protection to the statements taken in accord with *Garrity*.

In fact, the investigatory traits to which the majority pointed have often been held to be adjudicatory in nature: " 'the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States.' " ¹⁴⁸

The dilemma left unresolved after *Williams* is precisely what the role of the grand jury may be in violating the Fifth Amendment privilege. As is clear from the decision, the grand jury may have access to statements protected by the Fifth Amendment only when the grand jury itself is not the culprit.¹⁴⁹ The court steps in on behalf of and at the behest of the grand jury to produce the demanded testimony ¹⁵⁰ Although an indictment based on testimony coerced from a witness is valid as long as the grand jury did none of the coercing, no law should permit a court to coerce a statement for the benefit of the grand jury's curiosity in precisely the same way that the grand jury is prohibited from doing. Perhaps a more satisfactory answer, where the court preserves the privilege while obtaining the information for the grand jury, lies in the use of immunity as provided for by 18 U.S.C. § 6002.¹⁵¹

USE OF COMPELLED TESTIMONY: IMMUNITIES AND PRIVILEGES

Federal Creation of Use and Derivative Use Immunities

In order to overcome the potentially chilling effect of the Fifth Amendment privilege—the silence of a vital witness—while preserving the constitutional rights of the holder of the privilege, Congress enacted a statute that provides:

148. *Id.* at 1752 (quoting *Blair v. United States*, 250 U.S. 273, 280 (1919)); see also *Calandra*, 414 U.S. at 346 & n.4. The operations of the grand jury are unrestrained "because Congress and the Court have generally thought it best not to impose procedural restraints on the grand jury; it is not because they lack all power to do so." *Williams*, 112 S. Ct. at 1752.

149. *Williams*, 112 S. Ct. at 1743.

150. The Court has not addressed directly whether the imposition of the trial court's power results in a Fifth Amendment violation. After *Williams*, it is relatively clear that the grand jury does not violate the Fifth Amendment by asking the trial court to intercede.

151. 18 U.S.C. §§ 6001-6005 (1988) (creating a federal statutory use and derivative use immunity). See also *infra* notes 152-81 and accompanying text.

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—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(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.¹⁵²

Because a grand jury cannot force testimony despite its ability to subpoena a witness or records, the grand jury is for practical purposes powerless to compel testimony that would violate the Fifth Amendment. A federal statute permits the court, at the request of the grand jury, to issue an order requiring the witness to testify¹⁵³ If the witness fails to do so, she will be held in contempt of the court order and jailed until such time as she decides to testify¹⁵⁴ The witness, however, is not left unprotected. The court issuing the order also grants the witness an immunity that is coextensive with the Fifth Amendment privilege against self-incrimination, called a "use immunity"¹⁵⁵ In effect, this type of immunity mandates that the prosecution make no use of the compelled testimony against the witness.¹⁵⁶ Application of this rule can be difficult. For example, the issue arises whether the prosecutor violates the de-

152. 18 U.S.C. § 6002 (1988). Sections 6001-6005 were enacted and became effective in 1970.

153. *Id.* § 6003.

154. *Id.* §§ 6001-6005.

155. *Id.* § 6002. Such immunity accommodates the government's interest in obtaining otherwise unavailable evidence, but simultaneously protects the privilege against self-incrimination. *Kastigar v. United States*, 406 U.S. 441, 445-46 (1972). The principle involved is called the doctrine of coextensiveness. *Id.* at 449. The statute forces testimony, but confers upon the witness protection at least tantamount to the protection that the Fifth Amendment provides, technically resulting in no violation of the privilege. *Id.*

156. *Id.*

fendant's immunity if he learns discreet, incriminating facts about either the defendant or another party purely from the immunized testimony¹⁵⁷

Under several common law decisions, the prosecutor could override the Fifth Amendment privilege of a witness, but only by a grant of transactional immunity¹⁵⁸ This variety of immunity was much more extensive in its limitation on the use of the compelled testimony¹⁵⁹ Transactional immunity was in effect complete. Section 6002 narrowed the scope of this immunity by prohibiting use and derivative use of the testimony, thereby removing immunity as a complete defense to prosecution.¹⁶⁰ This statute followed the Supreme Court's trend of narrowing the extent of the Fifth Amendment privilege.¹⁶¹ Ultimately, in enacting the statute, Congress restricted the proscription of the Fifth Amendment privilege against self-incrimination to use immunity and derivative use immunity¹⁶² Theoretically, derivative use immunity prevents the government, after hearing the compelled testimony protected by the use immunity, from using that testimony to seek out other information that would incriminate the defendant or other parties.¹⁶³

157. Concerns surrounding just such a case have given rise to the "derivative use" immunity, discussed *infra* notes 162-68 and accompanying text.

158. Transactional immunity protects a witness compelled to testify from prosecution for any crimes related to information disclosed in the course of his testimony. See, e.g., *Counselman v. Hitchcock*, 142 U.S. 547, 585-86 (1892) ("[L]egislation cannot abridge a constitutional privilege, and it cannot replace or supply one, at least unless [the new privilege] is so broad as to have the same extent in scope and effect.").

159. Compare *id.* with *New Jersey v. Portash*, 440 U.S. 450 (1979) (holding that the impeachment of any testimony at trial is among the uses the government may *not* make of immunized testimony).

160. 18 U.S.C. § 6002 (1988).

161. See, e.g., *United States v. Blue*, 384 U.S. 251 (1966) (holding that a defendant may suppress no more than incriminating evidence which the government acquires in violation of the Fifth Amendment, and the fruits thereof); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (finding that the application of a state immunity statute does not preclude the federal prosecution of the witness).

162. 18 U.S.C. § 6002 (1988). The idea was to limit the protection, which was perceived to exceed the Fifth Amendment under the older case law and statutes, to no more than the scope of the Fifth Amendment. H.R. REP. NO. 1549, 91st Cong., 2d Sess. 32-33 (1970), reprinted in 1970 U.S.C.A.N. 4007, 4008.

163. Although the use/derivative use immunity structure gives government prosecutors much more leeway in conducting their investigations than transactional immunity, they also face the difficult decision whether to put a witness on the stand whom they know will invoke the Fifth Amendment privilege. The government will want to know the extent of the testi-

The immunity that protects the defendant is therefore no longer a complete one. This incompleteness presents the trial court with a difficult decision: exactly how much protection will the testimony receive? The derivative use immunity creates this gray area. From the letter of the statute, the court clearly cannot permit use of the testimony itself, neither the words spoken nor the documents produced.¹⁶⁴ The Supreme Court also has held that the government cannot use the compelled testimony to impeach any testimony at trial¹⁶⁵ or to develop other evidence.¹⁶⁶ Despite Professor Humble's convincing argument supporting the use of compelled testimony for nonevidentiary purposes,¹⁶⁷ courts are split on the question of

mony before the witness testifies because the immunity statute prohibits evidentiary use of compelled testimony even if it is not incriminating. 18 U.S.C. § 6002 (1988). The government also will have the burden of showing that other testimony is not a result of a derivative use of the protected testimony. See generally Warren D. Wolfson, *Immunity—How It Works in Real Life*, 67 J. CRIM. L. & CRIMINOLOGY 167, 179-80 (1976) (concerning the application of the use of voluntary and involuntary immunity). The statute effectively gives the government a choice. The government can seek an order from the district court compelling the witness to testify, in which case the government will have to show later at trial that it did not use the testimony against the witness at trial, or, the government may elect to leave the testimony of the witness behind in favor of seeking other routes of proof to avoid this pitfall. Gary S. Humble, *Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment*, 66 TEX. L. REV. 351, 352 (1987).

Professor Humble argues persuasively that to follow the spirit and letter of 18 U.S.C. § 6002, protection extends only to evidentiary uses of the compelled testimony. *Id.* He states that:

[t]he nonevidentiary use of a defendant's compelled testimony does not threaten these policies underlying the fifth amendment. The federal immunity statute requires the government to develop its evidence without the aid of the defendant's compelled testimony and to prove that all its evidence has been independently obtained. The reliability of a defendant's compelled testimony is not a concern when the government obtains all its evidence independently and not derivatively.

Id. at 372.

164. 18 U.S.C. § 6002 (1988).

165. See *New Jersey v. Portash*, 440 U.S. 450, 459-60 (1979).

166. See *Counselman v. Hitchcock*, 142 U.S. 547, 564 (1892) (holding unconstitutional a state immunity statute that would have allowed the use of a witness' compelled testimony to discover other evidence against the witness in violation of the witness' Fifth Amendment rights). Professor Humble gives the following example: if a witness testifies under compulsion of an order to the existence of a previously unknown coconspirator, the government cannot seek out that individual to testify against the defendant. Humble, *supra* note 163, at 353.

167. See *supra* note 163 and accompanying text.

whether the use immunity statute forbids only evidentiary uses or extends to other uses as well.¹⁶⁸

The court in *United States v. McDaniel*¹⁶⁹ opted to disallow any use of the compelled testimony. The defendant had received immunity and testified before a grand jury.¹⁷⁰ Before the trial, an assistant U.S. attorney read the transcript of McDaniels' testimony before the grand jury that contained his admissions to various crimes.¹⁷¹ The trial court determined in an evidentiary hearing that the government had established independent and legitimate sources for its evidence.¹⁷² On appeal, the court found that the government's burden was "virtually undischageable"¹⁷³ because the prosecution would have to show that the evidence read before trial was not used in any fashion to aid the preparation for trial.¹⁷⁴ The court held that for immunity to be coextensive with the Fifth Amendment, "it must forbid *all* prosecutorial use of the testimony, not merely that which results in the presentation of evidence before the jury."¹⁷⁵

168. See, e.g., *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973) (holding that compelled testimony cannot be used for any purpose); *United States v. Byrd*, 765 F.2d 1524 (11th Cir. 1985) (allowing for some use of compelled testimony). See also Jerome A. Murphy, Comment, *The Aftermath of the Iran-Contra Trials: The Uncertain Status of Derivative Use Immunity*, 51 MD. L. REV. 1011 (1992) (discussing recent, high-profile cases that demonstrate the inconsistent standards applied by lower courts with regard to permissible derivative use of immunized testimony). The hope, of course, is that after application of the use immunity statute, the government will be no better off and the witness/defendant will be no worse off strategically than before the court compelled the testimony. To assure this end, Professor Strachan suggests several evidentiary uses that are impermissible yet beneficial to the government: use in the decision whether to prosecute or plea bargain; aid in preparation for trial, including the development of questions and trial strategy; use to motivate the search for independent sources of information (similar to a garden-variety derivative use); and use as a psychological threat of a perjury prosecution if trial testimony differs from immunized testimony. Kristine Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791, 807-09 (1978).

169. 482 F.2d 305 (8th Cir. 1973).

170. *Id.* at 307.

171. *Id.*

172. *Id.* at 309.

173. *Id.* at 312.

174. *Id.* at 310-11.

175. *Id.* at 311 (emphasis added). Other circuits have cited *McDaniel* with approval. See, e.g., *United States v. Pantone*, 634 F.2d 716, 723 (3d Cir. 1980); *United States v. Barker*, 542 F.2d 479, 483 (8th Cir. 1976).

On the other hand, some circuits have agreed with Professor Humble, holding that the Fifth Amendment does not prohibit non-evidentiary uses of compelled testimony.¹⁷⁶ These cases are premised mainly on the belief that it would be nearly impossible for the government to "demonstrate by a preponderance of the evidence that the immunized testimony did not directly enter into a subsequent decision to prosecute."¹⁷⁷ As a result, to rule that section 6002 immunizes compelled testimony against all uses, including nonevidentiary ones, is tantamount to giving the defendant transactional immunity and runs contrary to the intent of Congress when it adopted section 6002 with the purpose of eliminating transactional immunity completely.¹⁷⁸

To inject an analysis of the Fifth Amendment privilege against self-incrimination into this quagmire of interpretation would only serve to obscure the issues further.¹⁷⁹ Instead, in an effort to better preserve the Fifth Amendment rights of police officers subjected to coercion, the Court or Congress could permit use immunity to develop upon performance of the coercive act by the government. Such an extension of the doctrine of use and derivative use immunity is not complicated conceptually. Accepting as a necessary premise that the taking of a *Garrity* statement involves real coercion,¹⁸⁰ this coercion is no different than the order of the court

176. *E.g.*, *United States v. Mariani*, 851 F.2d 595 (2d Cir. 1988), *cert. denied*, 490 U.S. 1011 (1989); *United States v. Crowson*, 828 F.2d 1427 (9th Cir. 1987), *cert. denied*, 488 U.S. 831 (1988). *United States v. Byrd*, 765 F.2d 1524 (11th Cir. 1985).

177. *Byrd*, 765 F.2d at 1531.

178. H.R. REP. NO. 1549, 91st Cong., 2d Sess. 4-6 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4017-18. *See supra* note 162 and accompanying text.

179. This Note has not ventured to address the full range of issues that muddy this area. One other issue worth brief mention is the possible application of the reasoning in *State v. Olwell*, 394 P.2d 681 (Wash. 1964), to the internal affairs divisions of police departments. *Olwell* held that an attorney may be required to come forward with evidence that incriminates her client. *Id.* at 684. A court could extend this theory to justify the enforcement of a subpoena of *Garrity* statements that would tend to incriminate an officer. For further analogy of attorney-client relations and internal affairs-officer interaction, see *infra* notes 182-95 and accompanying text.

180. Of course, Justice Harlan would have taken issue with this premise. Harlan, dissenting in *Garrity v. New Jersey*, 385 U.S. 493 (1967), argued that no coercion existed, either as a matter of fact or as a matter of law. In fact, the threat of dismissal from office was a permissible condition imposed by the State in order to obtain information from its employees. *Id.* at 506-07.

forcing testimony.¹⁸¹ The incentive to give protection coextensive with the Fifth Amendment privilege is perhaps greater in the case of the police department coercing testimony because then it is state action that results in the deprivation of a fundamental right. Such an interpretation of use immunity would streamline the process, informing both the government and the witness before a grand jury investigation ever commenced.

Garrity Statements as Privilege

Even if no right is violated until the injection of court action,¹⁸² by the very nature of the relationship between the officer and the department, some sort of special relationship exists. The promise to prevent use of the statement at a subsequent criminal proceeding adds to the perception of required heightened protection. Reinforced and legitimized by the decisions in *Garrity* and *Gardner*, the guarantee amounts to a type of privilege that the court could decide not to disturb and thus deny admission of such evidence.

The Court, in fact, may have thought the same thing. On the same day that it decided *Garrity v. New Jersey*, it also ruled on *Spevack v. Klein*.¹⁸³ Spevack, a member of the New York Bar, faced disciplinary proceedings for professional misconduct, including the refusal to honor a subpoena duces tecum served upon him.¹⁸⁴ He raised as his only defense the fact that compliance would tend to incriminate him.¹⁸⁵ Explicitly overturning *Cohen v.*

181. Courts should be reluctant to begin categorizing coercions as more or less violative of the Fifth Amendment. If the inquisition of a police officer pursuant to an internal investigation gives rise to a compelled statement contrary to the privilege against self-incrimination, the court should recognize it as such. Violations of the Fifth Amendment should not come in different sizes and flavors.

182. See *supra* note 38 and accompanying text for a discussion of the timing of the constitutional violation.

183. 385 U.S. 511 (1967).

184. *Id.* at 512-13.

185. *Id.*

Hurley,¹⁸⁶ the Court held that lawyers are not relegated to a "watered-down" version of constitutional rights.¹⁸⁷

In so holding, the Court in *Spevack* emphasized that the threat of disbarment was a coercive force equal in strength to that described in *Garrity*.¹⁸⁸ The Court expressed moral disdain for the use of threats to coerce statements.¹⁸⁹ It approached the question of the privilege to be free from self-incrimination from an angle almost opposite that of the Court in *United States v. Williams*.¹⁹⁰ Underlying the Court's attitude was the idea that the Fifth Amendment privilege is truly a privilege.¹⁹¹ The relationship created between lawyer and state bar association lays the foundation for the imposition of a "sanction which makes assertion of the Fifth Amendment privilege 'costly'."¹⁹² In fact, the Court's decision in *Spevack* makes clear, as it did in its twin *Garrity*,¹⁹³ that even though a police officer is an employee of the state with commensurate duties, the prosecution may not use testimony given under fear of dismissal in a criminal proceeding.¹⁹⁴

186. 366 U.S. 117 (1961) (ruling that to disbar an attorney solely based on the invocation of the privilege against self-incrimination was not a violation of the Due Process Clause of the Fourteenth Amendment).

187. *Spevack*, 385 U.S. at 514. This holding uses almost the same language as that in *Garrity v. New Jersey*, 385 U.S. 493 (1967): "We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Id.* at 500.

188. *Id.* at 515-17.

189. The Court cited *Boyd v. United States*, 116 U.S. 616 (1886):

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."

Spevack, 385 U.S. at 515 (quoting *Boyd*, 116 U.S. at 635).

190. 112 S. Ct. 1735 (1992). For a discussion of *Williams*, see *supra* notes 116-51 and accompanying text.

191. The Court invoked the then-recent memory of *Miranda v. Arizona*, 384 U.S. 436 (1966), for the proposition that it should construe liberally the Fifth Amendment privilege. *Spevack*, 385 U.S. at 516.

192. *Spevack*, 385 U.S. at 515 (quoting *Griffin v. California*, 380 U.S. 609, 614 (1965)).

193. 385 U.S. 493 (1967).

194. See *Spevack*, 385 U.S. at 514 (holding that the Fifth Amendment privilege extends to all individuals and shall not be weakened by the cost of losing one's livelihood). Justice Fortas, concurring in the result, felt that a lawyer's right to remain silent should be distinguished from that of a police officer's, an employee of the state: "The special responsibilities that he [the lawyer] assumes as licensee of the State and officer of the court do not carry

The question remains whether the government created a use immunity in the testimony of the police officer the moment that it coerced the statement. The intent of the department not to use the statements against the officer is clear, but if the coercive power of the internal affairs division is as strong as that of the court, then the court should extend a use immunity to the statements as an alternative to excluding them altogether.¹⁹⁵ This solution would serve the dual purpose of promoting justice and preserving the rights of the individual.

The Grant of a "Projected Privilege" to the Statements of Law Enforcement Officers

United States v Fisher and Whether a Police Department Has Standing to Assert the Fifth Amendment Privilege of the Officer

To gain access to *Garrity* statements, a grand jury often will subpoena the internal affairs division for an officer's file. The reason for directing the subpoena to the department is clear: the internal affairs division holds the written report of the investigating officer. A grand jury will presume that the record of the officer's statements is more accurate than his live testimony. This presumption is valid for two reasons. First, the report was made shortly after the interview and thus is not tainted and obscured by time or the opportunity for the officer to reflect on his responses.¹⁹⁶ Second, if the grand jury obtains the file without argument, it will not need a court order compelling the officer to testify in exchange for a grant of immunity, thus saving time and not limiting the government's ability to use the contents of the file against the officer.¹⁹⁷

with them a diminution, however limited, of his Fifth Amendment rights." *Id.* at 520 (Fortas, J., concurring).

195. New Jersey, in the wake of the *Garrity* decision, enacted a statute extending this variety of protection to public officers. N.J. REV. STAT. § 2A:81-17.2a2 (1988) (enacted in 1970).

196. The possibility that the investigating officer taped the conversation further enhances the reliability of the record.

197. For discussion on the immunity grant generally, see *supra* notes 152-81 and accompanying text.

A grand jury has an additional reason to issue a subpoena to the internal affairs division, one that is trickier and places another roadblock in the path of an officer's Fifth Amendment privilege. Upon receiving the subpoena, the internal affairs division typically will file a motion to quash it. The division will assert that complying with the subpoena would violate the officer's Fifth Amendment privilege. When defending against this motion, the prosecutor can argue persuasively that the department lacks standing to assert the officer's privilege against self-incrimination.¹⁹⁸ Because neither the grand jury nor the court has compelled the officer to do anything in this hypothetical situation, the court can rule that the officer's Fifth Amendment privilege was not implicated.¹⁹⁹

The Court followed this line of analysis in a case in which an attorney refused to comply with a summons from the Internal Revenue Service demanding tax records of his client.²⁰⁰ In *Fisher v. United States*, two taxpayers had transferred to their respective attorneys documents related to the preparation of their tax returns.²⁰¹ The Internal Revenue Service, upon discovering the whereabouts of the documents, served each of the attorneys with subpoenas for the records.²⁰² The attorneys refused to comply.²⁰³

After the Court ruled that the subpoenas directed at the attorneys did not implicate the taxpayers' Fifth Amendment privileges,²⁰⁴ the Court raised sua sponte the question of whether the attorney-client privilege protects documents that would have been shielded from a summons had the documents remained in the client's hands.²⁰⁵ The Court immediately answered affirmatively: "Confidential disclosures by a client to an attorney made in order

198. The Supreme Court announced, as a general rule, that the Fifth Amendment provides only a personal privilege that third parties cannot raise. *Couch v. United States*, 409 U.S. 322, 328 (1973).

199. The Supreme Court so held when an attorney attempted to assert his client's Fifth Amendment privilege to justify his resistance to an Internal Revenue Service summons for documents related to his client's taxes. *Fisher v. United States*, 425 U.S. 391, 397-98 (1976).

200. *Id.*

201. *Id.* at 394.

202. *Id.*

203. *Id.* at 395.

204. *Id.* at 396.

205. *Id.* at 402.

to obtain legal assistance are privileged."²⁰⁶ The purpose of this privilege is "to encourage clients to make full disclosures to their attorneys."²⁰⁷ Practically speaking, if a client believed that information in the hands of his attorney was vulnerable to a summons despite its safety in his own hands, then the client would be highly reluctant to confide in his attorney.²⁰⁸ The Court feared that such an incentive would lead to misinformed or uninformed counsel, resulting in inadequate protection of criminal defendants.²⁰⁹

To avoid this unwanted result, the Court ruled that when a client transfers documents to an attorney for the purpose of obtaining legal advice, the privilege not to comply with a summons or a subpoena extends to the lawyer.²¹⁰ To claim the privilege, the attorney must make two showings: that the attorney-client privilege exists, and that the client, if subpoenaed, would be able to invoke the Fifth Amendment privilege.²¹¹ In *Fisher*, the Court easily found that the transfer was incident to the client's receipt of legal advice and thus implicated the attorney-client privilege.²¹² The second prong of the test, whether the client could invoke the Fifth Amendment privilege, proved a more intricate inquiry

In order to decide if the documents while in the client's hands would be protected by the Fifth Amendment privilege, the Court focused not on the content of the documents, but on the act of producing them.²¹³ From the record, the Court first found that the preparation of the documents was not compelled testimony.²¹⁴ The

206. *Id.* at 403 (citing 8 JOHN H. WIGMORE, EVIDENCE § 2292 (John T. McNaughton rev. ed., 1961)).

207. *Id.*

208. *Id.*

209. *Id.* at 404-05.

210. *Id.*

211. In other words, the attorney must demonstrate first, that the subpoenaed documents are protected by the attorney-client privilege, and second, that forcing the *client* to produce documents would violate the client's privilege against self-incrimination. The former determination will depend largely on how the attorney obtained the evidence from his client, such as whether the transfer was part of an attempt to obtain legal advice. See *id.*

212. *Id.* at 405.

213. See *id.* at 409-13. Prior to *Fisher*, the availability of the privilege turned on the contents of the document, not on the act of producing them. See *Boyd v. United States*, 116 U.S. 616 (1886) (holding that the compelled production of an invoice for goods allegedly imported by the defendants violated the Fifth and Fourth Amendments because the compelled production was equivalent to forcing the witnesses to testify against themselves).

214. *Fisher*, 425 U.S. at 409-10.

Court reasoned that the creation of the documents was "wholly voluntary," and that "[t]he taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence contains incriminating writing."²¹⁵ The Court stated that merely writing the document in question did not create a Fifth Amendment violation.²¹⁶ Once written, the Court asked whether the mere act of producing the documents violated the Fifth Amendment. The Court conceded that the act of producing the documents may have a communicative aspect which could be a testimonial event.²¹⁷ In this case, however, giving the papers over to the IRS only showed their existence and location and did not rise to the level of testimony.²¹⁸ In holding that a summons directed at the taxpayers would not have violated their Fifth Amendment privilege, the Court apparently differentiated between a testimonial event, either spoken or written, which itself was compelled, and a document that may contain incriminating facts but the preparation of which is not compelled.²¹⁹

Important in the case of a *Garrity* statement, the Court carves out an exception to the general rule that written documents are not necessarily testimonial for purposes of the Fifth Amendment.²²⁰ When an internal affairs officer takes a *Garrity* statement, a government agent has in fact compelled the creation of the document. This fact alone would seem to satisfy the *Fisher* Court's requirement that the act of producing the document must be testimonial in order to find a violation of the officer's Fifth Amendment privilege. Moreover, the police department could argue that but for the coercion of the department the document would not exist, and

215. *Id.* The Court then tempered its aggressive venture into previously uncharted waters. It acknowledged that in some limited cases, acts of producing evidence are in themselves communicative, and if so categorized would be in violation of the Fifth Amendment privilege. *Id.* at 410.

216. *Id.* at 410-411. The Court gives the compulsion of handwriting exemplars as an example of potentially incriminating evidence that, though compelled, would not violate the Fifth Amendment because they are not testimonial in nature. *Id.* at 411.

217. *Id.* at 410.

218. *Id.* at 411.

219. *Id.* at 409-11.

220. *Id.* at 410 n.11. The Court asserted that, "unless the Government has compelled the subpoenaed person to write the document," the fact that a document was written should not control the inquiry into a Fifth Amendment violation. *Id.*

therefore the act of production would necessarily violate the privilege of the officer.²²¹

The hypertechnical and murky distinctions the Court in *Fisher* drew between testimonial and nontestimonial acts of production have created uncertain results.²²² At a minimum, the law should not permit the government to circumvent an officer's privilege against self-incrimination by successfully subpoenaing a file that contains statements coerced by a different segment of the same government. This undesirable state of affairs requires a more unified, prospective approach in order to protect the interests of both officers who undergo the coercive effects of the internal affairs division and the police departments that need to carry out internal investigations in order to maintain their integrity

The Preservation of Fifth Amendment Rights Through a "Projected Privilege"

An interesting solution to the immunity dilemma is the "projected privilege" suggested by Professor Reitz.²²³ Because of the inequities between the "theoretical legal abilities of an unrepresented suspect to conduct a defense consistent with constitutional guarantees, on the one hand, and the comparable abilities of a suspect represented by counsel on the other .[,] a suspect's rights should not change when a lawyer enters the case."²²⁴

221. A successful attempt to block access to the subpoenaed file would not entirely defeat the government's ability to obtain the evidence under current federal law. The government could grant statutory use immunity to the witness under 18 U.S.C. §§ 6002 and 6003. The immunity grant forces compliance with the subpoena, but guarantees that the government will make no direct or derivative use of the incriminating testimony. The government, however, may still lose on another level. The form of the evidence, live testimony as opposed to written records, may not help the government's case as much as would the internal affairs file with its detail and proximity to the events in question.

222. Subsequent decisions of the Court have not helped to clarify matters. *See, e.g., Doe v. United States*, 487 U.S. 201 (1990) (holding a court order compelling defendant to sign consent form for release of subpoenaed documents not testimonial and thus not protected by the Fifth Amendment); *United States v. Doe*, 465 U.S. 605 (1984) (holding that the act of producing subpoenaed documents is testimonial and thus protected by the Fifth Amendment).

223. Reitz, *supra* note 20. Professor Reitz' proposed projected privilege would protect communications between criminal defense attorneys and their clients. *Id.* at 575-76.

224. *Id.* at 650.

Professor Reitz' concern arose from a string of cases that imposed a duty upon defense counsel to come forward with any "relevant, client-incriminating" information.²²⁵ In addition, the government increasingly has begun using grand jury subpoenas directed at defense counsel to unearth evidence intended to incriminate the defendant.²²⁶ The latter case implicates the same concerns that this Note has raised, in particular, whether such a subpoena circumvents the defendant's Fifth Amendment privilege against self-incrimination.

The solution Professor Reitz suggests is the "projected privilege,"²²⁷ defined as follows:

A lawyer should be permitted to assert her client's privilege against self-incrimination with respect to all evidence and information that might implicate the client in past crimes when such evidence and information was lawfully acquired by the lawyer in the scope of the representation.²²⁸

The projected privilege seeks to preserve the status quo as defined by the Fifth Amendment rights that a client has before seeking counsel. The privilege would extend to the lawyer the ability to resist disclosure of evidence whenever the client would be able to assert that right.²²⁹ As such, the client's Fifth Amendment privilege would be projected onto the attorney²³⁰

Importantly, the projected privilege is not intended to permit the attorney to assist the client in the commission of a new wrong, nor is it designed to create new obstacles to the investigation of crime.²³¹ Essentially, evidence in the hands of a lawyer is to be no

225. *Id.* at 573 (citing *State v. Olwell*, 394 P.2d 681 (Wash. 1964) (holding that a defense attorney has a duty to produce physical evidence of a violent crime)).

226. Reitz, *supra* note 20, at 574.

227. *Id.* at 575.

228. *Id.* at 651. Professor Reitz bases this theory on *United States v. Fisher*, 425 U.S. 391 (1976). *Fisher* created what Reitz calls a "simulated Fifth Amendment privilege" that extends to evidence that an attorney receives in connection with a communication protected by the attorney-client privilege. Reitz, *supra* note 20, at 651 n.343. His projected privilege expands on this idea, reaching all evidence acquired during representation of the client, as long as the evidence is obtained lawfully. *Id.*

229. *Id.* at 651-52.

230. *Id.* at 652.

231. *Id.* at 653-54.

more and no less accessible to the government than it would be if it were in the hands of the client alone.²³²

This proposed system lends an interesting possible application to the *Garrity* statement situation. In a fashion very similar to the attorney-client relationship, the internal affairs department is the caretaker of the document that results from the coerced testimony, i.e., the report.²³³ The department has a great practical incentive to assert the officer's Fifth Amendment rights, namely, the need for the ongoing cooperation of officers in internal investigations and good will in the department. Conveniently, the court has sanctioned this sort of relationship in both *Garrity* and *Gardner*,²³⁴ making its application that much more feasible.

The style of Professor Reitz' delineation of the projected privilege as applied to a *Garrity* statement can be mimicked as follows:

An internal affairs division should be permitted to assert the privilege against self-incrimination held by its officers with respect to all evidence and information that might implicate an officer in past crimes when such evidence and information was lawfully acquired (according to the dictates of *Garrity*) by the internal affairs division in the scope of the questioning of the officer.

In no way does such a privilege extend the rights that an officer has against self-incrimination. It merely assures that despite the coercive techniques used to obtain information, the system will leave the officer in no worse a position constitutionally than if she had never been the subject of the interview.²³⁵ The purpose of the

232. *Id.* at 654.

233. This comparison makes the parallel between *Spevack v. Klein*, 385 U.S. 511 (1967), and *Garrity v. New Jersey*, 385 U.S. 493 (1967), so interesting and fortuitous.

234. See *supra* notes 24-49 and accompanying text.

235. For instance, if a grand jury, through its investigation, had reason to suspect the hypothetical Sergeant Smith, it still would have the power to subpoena him and to call on the assistance of the court if he refused to testify. In concert with the court's power to hold Smith in contempt if he chose not to comply with the order, and finally the ability to extend a use immunity co-extensive with the Fifth Amendment privilege against self-incrimination, the grand jury could effectively receive the desired testimony.

Under a projected privilege, the grand jury would have the same access without requiring that the statement be subjected to subpoena, etc. This scheme, in theory, would protect the interests of the grand jury to have a broad subpoena power, the department's power to conduct internal investigations, and the officers' Fifth Amendment rights.

inquisition is not to deprive the officer of her rights, but rather to obtain information.

Professor Reitz emphasizes the fact that such a system does not summarily abolish all the obligations of a defense attorney

The privilege is designed simply to inject Fifth Amendment issues into consideration when defense lawyers are obliged to come forward and supply active cooperation to the government.

The outcome of each case is a matter of less importance than the fact that the result will be the same regardless of whether the client or lawyer has been asked to come forward.²³⁶

This approach brings a greater measure of honesty to the taking of *Garrity* statements. The internal affairs officer suddenly would have the ability to carry out the promise made; namely, statements given in the course of an investigation would not be used against the officer. In this way, the discipline of officers could proceed independently of criminal proceedings with no threat of violation of the participating officer's Fifth Amendment privilege. In addition, neither the department nor the officer would need to depend on the whim of the prosecutor or the trial court; either party could assert the privilege with equal effectiveness.

PROTECTION OF *GARRITY* STATEMENTS AS A MATTER OF POLICY

The Truth in Constitutional Rights

Certainly, the criminal process has as its ultimate end the "truth." Many of the rights that the Court vigorously protects, however, impair the ability of lower courts in their attempts to find the truth.²³⁷ Professor Thomas Stacy classifies constitutional rights accorded in criminal procedure as "truth-impairing" or "truth-furthering."²³⁸ He categorizes the privilege against self-incrimination as a truth-furthering guarantee because of the general conception that compelled confessions are less likely to be truthful than are voluntary ones.²³⁹ The privilege, however, also prevents the government from arriving at the truth because the inadmissibility of co-

236. Reitz, *supra* note 20, at 652-53.

237. See Stacy, *supra* note 56, at 1370-71.

238. *Id.*

239. *Id.* at 1376-77.

erced statements complicates the information gathering process.²⁴⁰ In addition, one can envision a scenario where a witness gives a coerced statement that is true, but the government has no other source from which to collect or establish that fact in an admissible form, thus barring the statement from entering the proceeding.

Although the exclusion of the statement clearly harms the government's case, the Fifth Amendment intentionally created this impediment to preserve the rights of a defendant. For purposes of finding the truth, attention must focus on how the Court attempts to define a "coerced statement" or "compelled confession." Several decisions point to a tendency to construe the coercion and involuntariness narrowly.²⁴¹ In some instances where contents of a document are at issue, the Court has determined that a particular statement is not "testimonial" for Fifth Amendment purposes.²⁴² The Court may well use this sort of reasoning to protect internal affairs files of a police department, and by analogy, allow the district court to issue an order granting use immunity to the officer that made the statements in the file and forcing her to testify

Social Concerns

The main policy concern is the ability of police departments to conduct internal investigations while maintaining the integrity of their respective departments. If *Garrity* statements are routinely admitted into grand jury hearings, the deterrent effect on internal investigations would be at least twofold. First, the officers would stop giving statements as a matter of course. The fear of retribution for "ratting" on a fellow officer and the subsequent inability to depend on fellow officers for help would tear apart police departments. Second, the rights of those officers who have already

240. *Id.* at 1377.

241. *Id.* at 1377-78. In his analysis, Professor Stacy cites *Colorado v. Connelly*, 479 U.S. 157 (1986) (asserting that in order to hold a confession involuntary for purposes of the Due Process Clause and the privilege against self-incrimination, the Court must find some coercive activity on the part of law enforcement officials), and *Arizona v. Fulminante*, 111 S. Ct. 1246, 1261-63 (1991) (Rehnquist, C.J., dissenting) (finding no coercion because of lack of evidence of fear or forced detention where an inmate admitted to the murder of his daughter to an undercover FBI agent who the inmate believed to be a powerful underworld figure).

242. *See, e.g., United States v. Doe*, 465 U.S. 605, 612 (1984) (finding that although an "act of production" privilege exists, the contents of those documents are not protected).

given their statements under the expectation that the department would and could protect them would be put in jeopardy²⁴³ Perhaps most importantly, the courts would set a frightening precedent if they denied the Fifth Amendment privilege against self-incrimination to those who assume as a career the protection of the rights of others.

These interests must be balanced against those of the public. Specifically, the rights of individual officers must not outweigh the public interest in investigating and prosecuting criminal activity. This interest is especially strong in the case of corruption in the field of law enforcement. In fact, a relatively strong argument can be made that internal investigations result in cover-ups more than convictions or solutions. Therefore, anything that inhibits the internal investigatory function is positive for the public.

In the end, the balance must tip in favor of the officer. To justify the infringement of an individual's fundamental rights for theoretical gains is always a difficult venture. The American criminal justice system rests upon an "innocent until proven guilty" axiom. To deviate from this course in the interest of "busting bad cops" neglects the fact that officers must not receive "watered-down"²⁴⁴ versions of constitutional rights merely because their misdeeds seem morally more egregious.

In the face of the verdict in the Rodney King trial and the outpouring of anger that followed, the easy path is that of untrammelled condemnation of the responsible police officers. Instead, the courts and the public must be willing to permit the exercise of Fifth Amendment rights in the hope that justice will follow and that the innocent will receive the protection that the framers of the Constitution intended for them.

243. A potential for equal protection problems may arise here, depending on the reading of the statements themselves. No court has addressed this issue. Applying constitutional analysis, the right burdened is a fundamental one, so the state likely would need to show a compelling justification for the change in policy. The department may or may not convince the court that the change serves the interest in criminal justice, but either way, the department would have difficulty proving a need to make such a change effective retroactively.

244. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

CONCLUSION

A violation of the Fifth Amendment privilege against self-incrimination occurs each time a grand jury successfully subpoenas the internal affairs files of a police department without extending immunity at least coextensive with that privilege. The Supreme Court has allowed almost three decades to pass without revisiting this particular issue;²⁴⁵ meanwhile, the law has evolved unsupervised. Confusion exists in relation to how a court should apply the standards enunciated in *Garrity* and *Gardner*, and indeed whether these cases should apply at all.²⁴⁶ For all intents and purposes, *Garrity* and *Gardner* are still good law, and as such they should be afforded consideration when reviewing a grand jury's subpoena power over internal affairs files.

This consideration reveals concerns on two levels: first, the protection of the Fifth Amendment rights of police officers who have placed their faith in the department when answering questions and second, the promotion of exemplary integrity and lawfulness in the police departments, the first line of defense against crime. In an attempt to balance these interests, the most vital factor to remember is that officers should not receive a "watered-down version of constitutional rights"²⁴⁷ merely because they are law enforcement officials. The protection of the individual against the use of coerced statements "extends to all, whether they are policemen or other members of our body politic."²⁴⁸ The public correctly may hold police officers to a higher level of moral and legal responsibility in a desire that they be role models for the community. This goal should not interfere with the fundamental right to be free from self-incrimination.

To solve the dilemma, this Note has suggested that if the public supports the continuation of internal investigations, the rest of the legal system must acquiesce. If the system maintains the status

245. See *Gardner v. Broderick*, 392 U.S. 273 (1968) (representing the most recent case in which the Court heard arguments on these issues).

246. See, e.g., *State ex rel. Jackson County Grand Jury v. Shinn*, 835 S.W.2d 347, 349 (Mo. Ct. App. 1992) (declining to inquire into the constitutional ramifications of the grand jury subpoena of a Kansas City Police Department internal affairs file in enforcing the grand jury's subpoena power).

247. *Garrity*, 385 U.S. at 500.

248. *Id.*

quo, prosecutors must realize that statements taken from officers pursuant to *Garrity* would violate the Fifth Amendment if injected into the criminal proceeding. Courts also must acknowledge that the effect of permitting their use in grand jury hearings violates the privilege in some circumstances. Even more beneficial would be the statutory adoption of a "projected privilege" that would protect the statement from the time the officer speaks the words.

The time for a change has come. With increasing tension between police departments and the public, every effort to foster a feeling of trust and honesty must be made. If officers believe courts will violate their Fifth Amendment privilege as a reward for their cooperation with the internal affairs division, they will be far less inclined to assist the department in its efforts to self-police. Officers, for reasons of safety and mutual reliance, tend to want to protect one another, making the job of investigating wrong-doing much harder. Officers are acutely aware of any potential deprivation of their rights, and will become more isolated and unified against investigation if they believe that the courts and prosecutors will treat them unfairly. As this country tries to unravel the cloak of mystery that envelops the Rodney King beating and the subsequent action against the officers for deprivation of civil rights, the people will serve themselves well to ask how the Fifth Amendment privilege might best serve the ends of justice for everyone, police officers and citizens alike.

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