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THE PROSPECTIVE DEFENDANT RULE AND THE PRIVILEGE AGAINST SELF-INCRIMINATION IN NEW YORK

PAUL IVAN BIRZON* AND DAVID A. GERARD**

I. INTRODUCTION: THE PRIVILEGE AGAINST SELF-INCRIMINATION

THE privilege against self-incrimination, enshrined in the Federal Bill of Rights¹ and the constitutions of forty-eight states,² of which New York is one,³ is the freedom of an individual from testimonial compulsion and is the "... result of the long struggle between the opposing forces of the spirit of individual liberty on the one hand and the collective power of the State on the other."⁴ So fundamental is this basic right to our accusatorial system of justice that the Supreme Court has proscribed its abridgement by the States as a violation of procedural due process.⁵

Historically, the privilege against self-incrimination originated in medieval England where ecclesiastical and certain royal courts, especially the notorious Court of Star Chamber, and the Court of High Commission in Causes Ecclesiastical, developed an inquisitorial procedure using a device known as the "ex officio" oath by which they would compel witnesses summoned to swear truly.⁶ Once the oath was administered, the individual was bound to testify truthfully to all questions propounded to him and the judicial body was thereby able to freely inquire into the person's past crimes, and religious or political beliefs.⁷ Growing opposition to the abuses attendant upon the use of the oath in criminal investigations resulted in its formal abolition along with that of the Star Chamber and the Court of High Commission by statute.⁸ This

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1. "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. Const. amend. V.

2. Iowa and New Jersey are the only States whose constitutions do not embody the privilege against self-incrimination. The former jurisdiction has held the privilege to be required by constitutional due process. *State v. Height*, 117 Iowa 650, 91 N.W. 935 (1902). In New Jersey, the privilege is not constitutional but is derived from common law. *State v. White*, 27 N.J. 158, 142 A.2d 65 (1958). For a comprehensive collection of the constitutional and statutory provisions relating to the privilege in every American jurisdiction, see 8 Wigmore, *Evidence* § 2252 (McNaughton rev. 1961).

3. N.Y. Const. art. I, § 6 using language similar to the Fifth Amendment, *supra* note 1; see also, N.Y. Code Crim. Proc. § 10.

4. *Brown v. Walker*, 161 U.S. 591, 637 (1896).

5. U.S. Const. amend. XIV; *Malloy v. Hogan*, 378 U.S. 1 (1964) overruling *Adamson v. California*, 332 U.S. 46 (1947) and *Twining v. New Jersey*, 211 U.S. 78 (1908).

6. 8 Wigmore, *op. cit. supra* note 2, § 2250; for other excellent historical expositions of the privilege against self-incrimination, see Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. Rev. 1 (1930); Maguire, *Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesiastical Courts in England, Essays in History and Political Theory in Honor of Charles Howard McIlwain* (1936); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. L. Rev. 763 (1935); Silving, *The Oath (pts. I, II)*, 68 Yale L.J. 1329, 1527 (1959).

7. 8 Wigmore, *op. cit. supra* note 2, § 2250.

8. 16 Car. I, cc. 10, 11 (1641).

English sentiment later found stimulated vitality in America as a consequence of popular hostility to similar abuses occurring in the prerogative courts of the colonial governors. As one scholar submits, this is perhaps "the real reason for the American insistence that the privilege against self-incrimination be made a constitutional privilege. . . ."⁹

The policy of the constitutional privilege was originally conceived as a safeguard to protect the accused in a criminal prosecution from being forced to testify against himself at the witness stand¹⁰ but was subsequently expanded to protect against eliciting incriminatory statements from a witness testifying before a grand jury investigation or other pre-trial judicial proceeding.¹¹ It has since been extended to non-judicial investigations by law enforcement officials and confers upon a mere suspect the inviolate right to remain silent.¹² Therefore what began simply as ". . . a prerogative of the defendant not to take the stand in his own prosecution . . ."¹³ has been expanded by the courts to operate as ". . . an option of a witness not to disclose self-incriminating knowledge in a criminal case, and in a civil case, and before a grand jury and legislative committee and administrative tribunal."¹⁴ Currently, the privilege has been fastened to the right to counsel expressed in the Sixth Amendment¹⁵ resulting in the suppression of admissions and confessions "compelled" from a suspect under police interrogation. The Supreme Court of the United States has recognized that as a matter of constitutional policy ". . . the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay."¹⁶

As one observes the progression of levels in a criminal proceeding, it is clearly discernible that judicial sensitivity to the individual's privilege against self-incrimination becomes highly intensified as he undergoes metamorphosis from suspect to the formally charged defendant.

II. INVESTIGATORY STAGE

A. Pre-trial Interrogation by Non-judicial Law Enforcement Officials

The first area of consideration can be categorized as the investigatory or pre-arraignment stage. Theoretically until at least the point of arrest, there

9. Pittman, *supra* note 6, at 783.

10. *E.g.*, *People v. Kelly*, 24 N.Y. 74 (1861). See Mayers, Shall We Amend the Fifth Amendment? 187-93 (1959).

11. *Counselman v. Hitchcock*, 142 U.S. 547 (1892). Even though the *Counselman* holding applied only to witnesses appearing before federal grand juries, the New York Court of Appeals followed suit two years later in *People ex rel. Taylor v. Forbes*, 143 N.Y. 219, 38 N.E. 303 (1894) expressing formal recognition of the inclusion of grand jury witnesses within the constitutional protection from testimonial compulsion. See also *People ex rel. Lewisohn v. O'Brien*, 176 N.Y. 253, 68 N.E. 353 (1903).

12. *Escobedo v. Illinois*, 378 U.S. 478 (1964); *People v. Gunner*, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965). See *People v. Sanchez*, 15 N.Y.2d 387, 207 N.E.2d 356, 259 N.Y.S.2d 409 (1965).

13. 8 Wigmore, *op. cit. supra* note 2, § 2251.

14. *Ibid.*

15. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

16. *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

are no accused at this initial phase of the proceedings. There are only suspects or persons believed by the police to possess helpful information relevant to the particular crimes then under investigation. The following reveals the problems surrounding the interrogation of persons prior and subsequent to their formal arrest.

1. *Detention.* In New York the police are expressly permitted by statute¹⁷ to "... stop any person abroad in a public place . . . and may demand of him his name, address and an explanation of his actions."¹⁸ Detention by itself does not render one an accused since only this limited interrogation is permissible; however responsive admissions by the detained individual are introducible against him at the trial.¹⁹

2. *Arrest.* One is not a defendant until he has been formally charged with the commission of a crime.²⁰ However, a person is at least an accused if he has been arrested, held in physical custody and interrogated. "[W]here . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect . . . [who] has been taken into police custody . . ."²¹ and is subject to interrogation, the suspect thereupon becomes the accused.

3. *Police Interrogation.* This proceeding is of a non-judicial character and is primarily a law enforcement inquiry. Attendance at the interrogation is obviously compulsory in the physical sense²²—somewhat like a grand jury subpoena which is "... deemed to be a form of compulsion."²³ There is no express statutory authority pursuant to which a law enforcement officer may exert legal compulsion to summon a person solely for the purpose of interrogation. Nor can the police impose legal sanctions upon a witness, prisoner or arrested individual for failure to respond to questioning.²⁴

The extraction of confessions through secret, inquisitorial techniques characterized by continuous, incommunicado interrogation has long been the source of judicial discomfort and condemnation in the courts of New York State²⁵ and in the Supreme Court of the United States.²⁶ Historically the rules surrounding the taking of confessions and the privilege against self-incrimination

17. N.Y. Code Crim. Proc. § 180-a. See *People v. Rivera*, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964) (The Court held that the right of the police to stop and question an individual in the public street under circumstances that would reasonably actuate investigation and inquiry exists independent of § 180-a, then not in force.)

18. N.Y. Code Crim. Proc. § 180-a (1).

19. See *People v. Brady*, 16 N.Y.2d 186, 211 N.E.2d 815, 264 N.Y.S.2d 361 (1965).

20. N.Y. Code Crim. Proc. §§ 7, 144.

21. *Escobedo v. Illinois*, 378 U.S. 478, 490-91 (1964).

22. N.Y. Code Crim. Proc. § 171, 172.

23. *People v. Laino*, 10 N.Y.2d 161, 171, 176 N.E.2d 571, 577, 218 N.Y.S.2d 647, 655 (1961), *appeal dismissed and cert. denied*, 374 U.S. 104 (1961).

24. See text accompanying note 12 *supra* and the authorities cited therein. See also *People v. McLucas*, 15 N.Y.2d 167, 204 N.E.2d 846, 256 N.Y.S.2d 799 (1965).

25. *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963); *People v. Mummiani*, 258 N.Y. 394, 180 N.E.2d 94 (1932); *People v. Randazzo*, 194 N.Y. 147, 87 N.E. 112 (1909).

26. *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Haynes v. Washington*, 373 U.S. 503 (1963); *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Culombe v. Connecticut*, 367 U.S. 568 (1961); *Haley v. Ohio*, 332 U.S. 596 (1948); *Chambers v. Florida*, 309 U.S. 227 (1940).

have been kept distinct because of their independent origin and diverse scope of application.²⁷ However, recent constitutional developments in criminal procedure have expanded the confession rules to hold that official conduct contrived to effectively withhold from an accused an appreciation of his rights against self-incrimination and to counsel and thereby the means to assert them falls short of the standard of fundamental fairness required to be met by state law enforcement officials.²⁸ Here judicial concern focuses upon testimonial compulsion through use of coercive investigative tactics,²⁹ inducements,³⁰ deception³¹ and the like. The courts have pronounced a tangential relationship between the Fifth and Sixth Amendments and have held that effective denial of the right to advice of counsel is tantamount to testimonial compulsion.³² Furthermore, the language of recent opinions omits discussion of any distinction between the confession rules and the privilege against self-incrimination.³³ Stemming from the common law equation of voluntariness and evidentiary reliability, judicial surveillance of interrogation conducted at this level is closely directed to a concern for physical or psychological "compulsion" *i.e.*, involuntariness as distinguished from the concept of compulsion represented by the use of judicial process such as the subpoena.³⁴

In spite of the fact that the suspect held under arrest³⁵ and in police custody

27. See 8 Wigmore, *op. cit. supra* note 2, § 2266.

28. See the authorities cited in note 12 *supra*.

29. *E.g.*, Gallegos v. Colorado, 370 U.S. 49 (1962); Malinski v. New York, 324 U.S. 401 (1945).

30. Haynes v. Washington, 373 U.S. 503 (1963).

31. Massiah v. United States, 377 U.S. 201 (1964); Spano v. New York, 360 U.S. 315 (1959); People v. Leyra, 302 N.Y. 353, 98 N.E.2d 553 (1951).

32. One need only go back a decade and a half to find the seeds of this development planted by Mr. Justice Jackson in a very enlightened and realistic observation in *Watts v. Indiana*, 338 U.S. 49 (1949):

To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.

Id. at 59 (Jackson, J., concurring in part and dissenting in part).

33. See *e.g.*, Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963). Perhaps the two rules will eventually be fused into one or become coterminous in scope. Compare 8 Wigmore, *op. cit. supra* note 2, § 2252, n.27 with Paulsen, *The Winds of Change: Criminal Procedure in New York 1941-1965*, 15 Buffalo L. Rev. 297, 301 (1965): "We have learned since *Stein [v. New York]* that the true basis for excluding a 'coerced' confession is not the danger of a false confession but the need to protect the defendant's privilege against self-incrimination." (Citing *Malloy v. Hogan*.)

34. See Note, *The Privilege Against Self-Incrimination: Does It Exist in the Police Station?*, 5 Stan. L. Rev. 459 (1953). A good analysis of this distinction between the confession rules and the privilege can be found in Mayers, *op. cit. supra* note 10, at 100-08.

35. *Quaere*: whether a warrant of arrest is not a form of judicial compulsory process? See *People v. Santmyer*, 20 A.D.2d 960, 249 N.Y.S.2d 555 (4th Dep't 1964) holding that once defendant is arrested pursuant to a lawful arrest warrant, no further testimony can be sought or elicited; any that has been is held to be excludable.

is obviously a prospective defendant,³⁶ and notwithstanding the lack of certain procedural safeguards,³⁷ and also despite the fact that there is no judicial officer³⁸ present at the inquiry nor any record kept of the investigation for judicial scrutiny upon review, the courts have shown little inclination to find a violation of the privilege against self-incrimination. Again this is undoubtedly ascribable to the fact that the primary consideration at this level is the inhibition and control of the use of physical or psychological compulsion to pluck incriminating statements from the defendant's own lips and is reflective of the haunting fear of resurrecting the ancient rack and thumbscrew.³⁹

B. Pre-trial Interrogation by Judicial and Quasi-Judicial Bodies

The second phase of the investigatory stage includes such proceedings as the magisterial preliminary examination in felony cases, grand jury proceedings, special grand jury investigations, coroner's inquests and proceedings before legislative committees and administrative bodies, all of which are characterized by the power to command sworn testimony through the issuance of compulsory process. Such actions are formal investigations involving judicial and quasi-judicial bodies.

The magisterial hearing or preliminary examination is utilized in cases where an arrested individual is charged with the commission of a felony and brought before a magistrate for a determination of probable cause.⁴⁰ In essence, it is a judicial inquiry, not a prosecution,⁴¹ and any statements taken from the defendant therein are done so without oath.⁴² Consequently, problems of self-incrimination do not normally arise in this proceeding.

At the outset it is important to note the characteristics distinguishing the grand jury inquiry from that conducted by law enforcement agencies. The grand

36. See *People v. Sanchez*, 15 N.Y.2d 387, 207 N.E.2d 356, 259 N.Y.S.2d 409 (1965). See N.Y. Code Crim. Proc. § 7 which defines a "defendant." A prospective defendant therefore must be one not presently under arrest or in custody.

37. *E.g.*, the right to be informed or advised by the police prior to any interrogation of one's right to remain silent, *People v. Gunner*, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965). Here the Court of Appeals refused to extend the rule of *People v. Failla*, 14 N.Y.2d 178, 199 N.E.2d 366, 250 N.Y.S.2d 267 (1964) and its precursors

... to render inadmissible inculpatory statements obtained by law enforcement officers from a person who, taken into custody for questioning prior to his arraignment or indictment, is not made aware of his privilege to remain silent and of his right to a lawyer even where it appears that such person has become the target of the investigation and stands in the shoes of an accused.

Id. at 233, 205 N.E.2d at 855, 257 N.Y.S.2d at 929. (Emphasis added.)

But cf. *People v. Dorado*, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965), cert. denied, 381 U.S. 937 (1965); *People ex rel. Russo v. New Jersey*, 351 F.2d 429 (3d Cir. 1965).

38. Note that throughout this phase of the proceedings, the District Attorney, whose sworn duty it is to seek the truth, that is, all the evidence—even that which may favor the defendant, has general supervisory control and direction over the procedures and methods utilized.

39. 8 Wigmore, *op. cit. supra* note 2, § 2250.

40. N.Y. Code Crim. Proc. § 190.

41. *People v. Conway*, 121 Misc. 620, 202 N.Y. Supp. 104 (Sup. Ct. 1923).

42. N.Y. Code Crim. Proc. § 198. See also N.Y. Code Crim. Proc. § 196 which provides that the defendant may not be compelled to make a statement at all if he chooses not to.

jury's primary function is that of investigating criminal activity. It must be clearly understood that as an investigative body the grand jury functions in two distinct ways. In the vast majority of cases the grand jury will act on the basis of an investigation already performed by others and the results of such investigation will be presented to it. In this instance there already exists an individual who has been formally accused of a crime. It is clear that in this type of situation the person who has been formally accused at some earlier stage of the proceeding and held by a magistrate for grand jury action is an "actual defendant" and cannot be subpoenaed to give testimony.⁴³

In the more extraordinary situation, where proof of criminal conduct is extensive, complex and involves interwoven relationships among many persons, the grand jury will act as a truly investigative body and conduct its own investigation. It is in instances such as special grand jury investigations into conspiratorial activities,⁴⁴ gambling⁴⁵ or public corruption,⁴⁶ where there is as yet no actual defendant, that the prospective defendant rule has emerged.

Traditionally, the grand jury inquiry is regarded as an inquest: to discharge its function, grand jurors are empowered to compel testimony for the purpose of a formal interrogation. Anyone summoned before this body is *compelled* to appear by subpoena process under pain of penal sanction for noncompliance.⁴⁷ Once the subpoenaed individual appears, he is compelled to take the oath and must answer all questions with complete veracity.⁴⁸ The grand jury is authorized to engage the enforcement machinery of the courts to punish any duly summoned and sworn witness for contumacious behavior⁴⁹ or perjurious testimony.⁵⁰ The only way a person may frustrate the grand jury interrogation is either by asserting his privilege against self-incrimination in response to a pertinent question or, if he occupies the exemptory status of a prospective defendant, by simply refusing to testify at all.⁵¹

The critical distinction then between the grand jury and the police as investigative agencies is the difference in degree and nature of "legal power"⁵² to compel responses to their respective inquiries.

In contrast to investigations performed by police, the grand jury proceeding is a secret, *ex parte* inquisition wherein a prosecutor is always present and

43. N.Y. Code Crim. Proc. § 250(2) permits a defendant to voluntarily appear before the grand jury to give testimony after the execution of a waiver of immunity. *But see* Williams v. Ball, 23 Misc. 2d 78, 196 N.Y.S.2d 291 (County Ct. 1960).

44. N.Y. Pen. Law § 584.

45. N.Y. Pen. Law § 381.

46. N.Y. Pen. Law § 996.

47. Mayers, *op. cit. supra* note 10, at 37-38. Failure to appear constitutes criminal contempt of court; see note 49 *infra*.

48. *Ibid.*

49. N.Y. Judiciary Law § 750(a)(5); N.Y. Pen. Law § 600, reenacted as N.Y. Revised Penal Law § 215.50, N.Y. Sess. Laws 1965, ch. 1030. (Effective Sept. 1, 1967.)

50. N.Y. Pen. Law § 1620(1), reenacted as N.Y. Revised Penal Law § 210.00, N.Y. Sess. Laws 1965, ch. 1030. (Effective Sept. 1, 1967.)

51. See text accompanying notes 73-81 *infra*.

52. Mayers, *op. cit. supra* note 10, at 37-38.

actively participates in and to a large extent controls the proceedings. Defendants or witnesses are not permitted to be accompanied by counsel in the grand jury chambers.⁵³ As if to compensate for the unilateral nature of this stage of the action, a more exquisite degree of judicial sensitivity with respect to the right to be free from testimonial compulsion is evidenced by the operation of a strict exclusionary rule. The rule is applied when a witness has been compelled to criminate himself by the use of judicial process in violation of his privilege against self-incrimination. Where a grand jury investigation is aimed against a particular individual in such a way that it becomes apparent that the main objective is to extract incriminating evidence from his own lips, the court considers that he stands in the same position as a defendant at his own trial.⁵⁴ The effect of the violation of the witness' privilege is the judicial exclusion of any testimony so compelled and a dismissal of an ensuing indictment based upon such testimony.⁵⁵ Stated simply this is the prospective defendant rule operative in connection with the grand jury investigatory process. In contrast with the law enforcement inquiry, the witness may have fully availed himself of his right to consult with counsel prior to his appearance before the grand jury, he may have been advised in advance of the proceeding of his privilege to refuse to respond to questions if the answers tend to incriminate him and indeed he may even testify without ever interposing his privilege.⁵⁶ Nevertheless the courts will disallow any incriminating testimony elicited from him in any subsequent prosecution resulting from that investigation. With the application of the prospective defendant rule in the grand jury phase, judicial reaction against testimonial compulsion is conspicuously more intense than at the law enforcement level. Here the touchstone to judicial sensitivity is the concept of legal compulsion externalized in the subpoena.

III. ACCUSATORY STAGE

At the trial, where the prosecution ceases to be investigatory, but has become transformed into a highly formalized accusatory proceeding, judicial sensitivity toward testimonial compulsion appears in its most extreme form. Not only does the privilege of the defendant, who is now unquestionably the accused, protect him from being called to the witness stand,⁵⁷ but the Supreme Court has recently held that constitutional due process prohibits any comment by the prosecutor or the judge, in the presence of the jury, regarding the failure of

53. See N.Y. Code Crim. Proc. § 255, which indicates which persons are permitted to be present in the grand jury room during the investigation.

54. *People v. Bermel*, 71 Misc. 356, 128 N.Y. Supp. 524 (Sup. Ct. 1911).

55. *People v. Gillette*, 126 App. Div. 665, 111 N.Y. Supp. 133 (1st Dep't 1908).

56. It should be noted preliminarily that failure to assert one's privilege in this situation constitutes a waiver thereof in the federal courts. This rule is followed by a majority of American jurisdictions. New York, a minority view, is committed to a policy in which no doctrine of waiver is recognized in grand jury or *ex parte* proceedings. See Sobel, *Self-Incrimination "Federalized,"* 31 Brooklyn L. Rev. 1, 22-25 (1964).

57. U.S. Const. amend. V.

the defendant to take the stand.⁵⁸ It is therefore at this stage where the defendant receives absolute insulation from testimonial compulsion in any form.

IV. GRAND JURY PROCEEDING: THE ELEMENT OF COMPULSION

Though lacking crystal clarity, recent decisions have indicated that compulsion is not defined in terms of lack of voluntariness as that term has been used in the traditional evidentiary sense, but rather that compulsion arises at least at the point where the prospective defendant is examined by the grand jury in relation to his own conduct pursuant to subpoena issued by that body.⁵⁹ To perhaps formulate a more perspicacious conception of compulsion, a negative analysis at this point is necessary to crystallize the discussion.

A. Waiver

The privilege against self-incrimination can be waived by an individual at all stages of the criminal proceeding. At the arrest stage, absent a violation of the arrested individual's rights,⁶⁰ he may *voluntarily* surrender any inculpatory information to the police.⁶¹ At the grand jury phase, a person voluntarily requesting to appear and testify,⁶² or a subpoenaed witness (notwithstanding the fact that he may even be a prospective defendant) may execute a written waiver of immunity.⁶³ This procedure is the exclusive means by which a prospective defendant witness may waive his privilege against self-incrimination in New York.⁶⁴ The federal courts and a majority of the states recognize a theory of "implied" or "constructive" waiver, by means of which even an obvious prospective defendant who, if subpoenaed, testifies incriminatingly without timely interposing his privilege, is deemed to have waived it.⁶⁵ The reason for the divergence between New York and the federal courts in the concept of waiver is basically that the former deems the subpoena to be compulsion *per se* whereas the latter does not. At the trial stage, a waiver is automatically effected if the defendant voluntarily takes the witness stand.⁶⁶

58. *Griffin v. California*, 380 U.S. 609 (1965). The Court, however, has refused to give the *Griffin* rule retroactive application: *Tehan v. United States ex rel. Shott*, 86 Sup. Ct. 459 (1966).

59. *People v. Laino*, 10 N.Y.2d 161, 170-71, 176 N.E.2d 571, 577, 218 N.Y.S.2d 647, 655 (1961), *appeal dismissed and cert. denied*, 374 U.S. 104 (1963).

60. See text accompanying notes 17-39 *supra*.

61. N.Y. Code Crim. Proc. § 395.

62. N.Y. Code Crim. Proc. § 250(2). Here the compulsion of the subpoena is absent.

63. N.Y. Pen. Law § 2446. It should be noted, however, that the recent case of *Stevens v. Marks*, 86 S. Ct. 788 (1966) announces the right to withdraw the written waiver of a constitutional right executed in the absence of counsel and on pain of loss of employment. *Quaere* whether the prosecutor is now constitutionally required to advise the subpoenaed prospective defendant of whom he requests a written waiver of immunity of his right to the assistance of counsel? Cf. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

64. See *People v. Laino*, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d 647 (1961), *appeal dismissed and cert. denied*, 374 U.S. 104 (1963); *People v. DeFeo*, 308 N.Y. 595, 127 N.E.2d 592 (1955); *People v. Ryan*, 7 A.D.2d 198, 180 N.Y.S.2d 1018 (3d Dep't 1958), *aff'd*, 6 N.Y.2d 975, 161 N.E.2d 393, 191 N.Y.S.2d 169 (1959); *People v. Freistadt*, 6 A.D.2d 1053, 179 N.Y.S.2d 633 (2d Dep't 1958) (per curiam).

65. *Rogers v. United States*, 340 U.S. 367 (1951).

66. N.Y. Code Crim. Proc. § 393.

THE PROSPECTIVE DEFENDANT RULE

B. Statutory Immunity

Statutory immunity should not be confused with the exclusionary rule⁶⁷ which is operative upon a violation of one's privilege against self-incrimination. The former is essentially a creature of the legislatures devised to mitigate the impact of the constitutional privilege upon the governmental need for information.⁶⁸ The statutes in general provide for the "exchange" of the witness' testimony, which would otherwise be inaccessible to the governmental body because of the privilege from testimonial compulsion, for freedom from criminal repercussions which might flow from the testimony if it were in fact incriminating.

Procedurally, there are two basic types of immunity statutes commonly known as the "claim" and the "automatic" statutes. The latter becomes operative automatically upon the witness' appearance before the grand jury or other investigatory body pursuant to subpoena.⁶⁸ These enactments confer blanket immunity upon *all* witnesses who do not execute a written waiver of immunity. To prevent the inadvertent conferral of immunity baths upon anyone who testifies, a second type of immunity device was drafted by legislatures and are characterized as "claim" statutes. Under this statutory scheme, the immunity is not triggered into operation until the witness first "claims" his privilege against self-incrimination to a question propounded to him, is directed to answer by a competent authority and subsequently testifies.⁶⁹ Only after these procedural requirements are met, does the witness have immunity⁷⁰ under these acts.

The immunity statute presently in force in New York, section 2447 of the Penal Law, a "claim" statute, affords a recipient complete immunity from *prosecution* for all past substantive crimes that would have otherwise been within the purview of the investigation. In other words, once section 2447 immunity is properly conferred, no indictment against the immunized witness can issue for any *substantive* crime that is discoverable by direct or indirect usage of any responsive testimony adduced by the interrogation, notwithstanding that the crime is not the immediate subject of the inquiry.⁷¹

The crucial distinction between statutory immunity and the constitutional exclusionary rule is that the former specifically excepts nonsubstantive crimes such as perjury and bribery, which may be committed by the immunized

67. See Note, 65 Colum. L. Rev. 681 (1965).

68. Examples of this type of statute in the federal jurisdiction are discussed in Note, 72 Yale L.J. 1568 (1963). Until 1953, these types of statutes were in effect in New York but were repealed and replaced by a "claim" statute: N.Y. Pen. Law § 2447.

69. N.Y. Pen. Law § 2447 is representative of this group of immunity statutes and is the sole method by which a witness may receive immunity in New York.

70. *People v. Laino*, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d 647 (1961), *appeal dismissed and cert. denied*, 374 U.S. 104 (1963).

71. *Comm'n of Investigation v. Lombardo*, 7 A.D.2d 48, 54, 180 N.Y.S.2d 496, 502 (1st Dep't 1958), *aff'd* 5 N.Y.2d 1026, 158 N.E.2d 250, 185 N.Y.S.2d 550 (1959), *cert. denied sub nom. Castellano v. Comm'n of Investigation*, 360 U.S. 930 (1959), *appeal dismissed and cert. denied sub nom. Mancuso v. Comm'n of Investigation*, 361 U.S. 10 (1959).

witness during the investigation, from its protective cloak.⁷² However, in the case of the witness whose constitutional privilege has been violated because of his sanctifying status as a prospective defendant, he is protected from any indictment for either contempt or perjury, as well as any substantive crime, if such indictment is based in any manner upon any of the testimony compelled from him.

There remains to discuss the precise character and actual operation of the prospective defendant as articulated by the courts in New York State.

V. THE PROSPECTIVE DEFENDANT RULE

In unmistakably clear language, the Court of Appeals of the state of New York has held that a prospective defendant, or one who is within the target area of investigation,⁷³ whose attendance before a duly constituted grand jury⁷⁴ is compelled by subpoena and who is examined under oath by that body in relation to his own conduct,⁷⁵ with respect to which statutory immunity⁷⁶ has not been conferred and no written waiver of immunity⁷⁷ has been executed, is constitutionally insulated against prosecution for any substantive crime,⁷⁸ perjurious testimonial assertion⁷⁹ or contemptuous conduct⁸⁰ predicated upon direct or indirect use⁸¹ of evidence thus secured.

The exclusion of such evidence for any purpose is mandated as a result of the offense committed upon the privilege against self-incrimination enjoyed solely by virtue of article I, section 6 of the New York Constitution.⁸² This is

72. Contempt and perjury are expressly excluded from immunization in this State: N.Y. Pen. Law § 2447.

73. *People v. Steuding*, 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959).

74. Although this paper concerns itself principally with the application of the prospective defendant rule in relation to grand jury investigation, the constitutional prohibition against the use of compelled testimony recognizes no such limitation. *Cf. People v. Sharp*, 107 N.Y. 427, 14 N.E. 319 (1887) (State Senate Committee investigation).

75. *People v. Laino*, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d 647 (1961), *appeal dismissed and cert. denied*, 374 U.S. 104 (1963).

76. N.Y. Pen. Law § 2447.

77. N.Y. Pen. Law § 2446.

78. *People v. Laino*, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d 647 (1961), *appeal dismissed and cert. denied*, 374 U.S. 104 (1963); *People v. Steuding*, 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959). See *People v. Freistadt*, 6 A.D.2d 1053, 179 N.Y.S.2d 633 (2d Dep't 1958) (per curiam); *People v. Baumer*, 136 Misc. 17, 241 N.Y. Supp. 733 (Sup. Ct. 1930).

79. *People v. Laino*, *supra* note 78, at 172, 176 N.E.2d at 578, 218 N.Y.S.2d at 656; *People v. Gillette*, 126 App. Div. 665, 111 N.Y. Supp. 133 (1st Dep't 1908); *People v. Tomasello*, 48 Misc. 2d 156, 264 N.Y.S.2d 686 (Sup. Ct. 1965); *People v. Bermel*, 71 Misc. 356, 128 N.Y. Supp. 524 (Sup. Ct. 1911).

80. *People v. Ryan*, 6 N.Y.2d 975, 161 N.E.2d 393, 191 N.Y.S.2d 169 (1959), *affirming* 7 A.D.2d 198, 180 N.Y.S.2d 1018 (3d Dep't 1958); *People v. DeFeo*, 308 N.Y. 595, 127 N.E.2d 592 (1955).

81. *People v. Laino*, 10 N.Y.2d 161, 173, 176 N.E.2d 571, 578, 218 N.Y.S.2d 647, 657 (1961), *appeal dismissed and cert. denied*, 374 U.S. 104 (1963). *Cf. Counselman v. Hitchcock*, 142 U.S. 547 (1892).

82. *People v. Steuding*, 6 N.Y.2d 214, 216, 160 N.E.2d 468, 469, 189 N.Y.S.2d 166, 167 (1959). Insofar as New York's prospective defendant rule refuses to recognize any form of waiver save a written executed waiver of immunity (N.Y. Pen. Law § 2446), it is not mandated by federal constitutional principles and is contrary to the rule applicable in the federal courts and the vast majority of the states which deem even the prospective defendant

not to say that total absolution is likewise commanded. Complete immunization is exclusively conferrable by operation of statute while the constitutionally anchored exclusionary rule does not prohibit re-indictment by a freshly impanelled grand jury if the supporting evidence is wholly "... independent of the evidence, links, or leads furnished by the prospective defendant. . . ."83

The articulation of the exclusionary rule thus formulated has been an easier judicial task than its application; for the creature to which it has given birth has proven to be of lubricous quality and eludes precise definition.

This was not always the case.

A. The Seeds of the Rule

1. Early Stages of Development

Although the interrogation of the accused at his trial in eighteenth century New York was not a remarkable occurrence,⁸⁴ by the middle of the nineteenth century the common law maxim *nemo tenetur prodere seipsum del accusare* was firmly rooted in connection with pre-trial interrogation by investigative bodies.⁸⁵ Through application of an admixture of this maxim and long-honored concerns for evidentiary reliability, there emerged the rule that sworn, testimonial confessions of the *party accused* produced by compulsory process during the course of pre-trial interrogation conducted by a body possessed of judicial character were involuntary and thus inadmissible for use as evidence upon the trial, notwithstanding the failure to assert the privilege against self-incrimination.⁸⁶ The involuntary character of such evidence was deemed to be the result of the disturbed and agitated state of mind of one who has been charged with a crime and compelled nonetheless by judicial oath to recount his participation in the event.⁸⁷ But apprehensions concerning the uncertainty of applying a rule which rendered inadmissible declarations made under consciousness of suspicion led to a frozen definition of the "party accused," who was soon strictly held to be none other than one who was in custody as a *prisoner* under arrest for the crime with regard to which the inquiry addressed itself.⁸⁸ One who was neither a

witness to have waived his privilege when he voluntarily testifies pursuant to subpoena and after being fully informed and appraised of his right. *Rogers v. United States*, 340 U.S. 367, 370-71 (1951); *Smith v. United States* 337 U.S. 137 (1949); *United States v. Cleary*, 265 F.2d 459 (2d Cir. 1959).

83. *People v. Laino*, 10 N.Y.2d 161, 173, 176 N.E.2d 571, 578, 218 N.Y.S.2d 647, 657 (1961), *appeal dismissed and cert. denied*, 374 U.S. 104 (1963). *Quaere* whether the so-called *Steuding-Laino* immunity (*i.e.* the exclusionary rule) "... constitutes the 'absolute immunity against further prosecution' about which the Court spoke in *Counselman v. Hitchcock*, . . . and which the Court said was necessary if the privilege were to be constitutionally supplanted." *Stevens v. Marks*, 86 S. Ct. 788, 794 (1966).

84. Goebel and Naughton, *Law Enforcement in Colonial New York* 655-59 (1944).

85. *Hendrickson v. People*, 10 N.Y. 13 (1854).

86. *People v. McMahon*, 15 N.Y. 384 (1857).

87. "... I hold it to be clear, that when the law rejects a disclosure made under oath by a person charged with crime, it does so, not because any right or privilege of the prisoner has been violated, but because it is deemed unsafe to rely upon it as evidence of guilt." *Id.* at 390.

88. *People v. Mondon*, 103 N.Y. 211, 8 N.E. 496 (1886); *Teachout v. People*, 41 N.Y. 7 (1869).

prisoner nor under arrest but advised by the examining body that he was in imminent danger of arrest for the crime under investigation could not claim refuge into the sclerotically hardened lines of the class of party accused.⁸⁹ He was, rather, a "mere witness" who was obliged to claim his privilege to achieve constitutional protection.⁹⁰

Though the rule in its earlier developmental stages could scarcely be characterized as extravagantly tender toward the rights of the announced but not formally accused party, it did hold the virtue of certainty and ease of application.⁹¹

2. Recent Developments

The first signs of judicial willingness to decalcify the lines bounding the class of accused persons and to expand the constitutional privilege to persons not in custody appear in *People ex rel. Hummel v. Davy*⁹² wherein three members of the court,⁹³ reviewing a denial of a Writ of Prohibition, agreed that the lower court should have dismissed an indictment returned against the person who was subpoenaed and testified before a grand jury conducting an investigation directed in fact though not in form against him.⁹⁴ Significantly, the opinion written for the majority clings to the vestigial but gravitational pull of earlier notions equating compulsion with lack of voluntariness and holds the question of compulsion to be one of fact.⁹⁵

In the landmark case of *People v. Gillette*,⁹⁶ the doctrinal position assumed

89. *Teachout v. People*, *supra* note 88, at 9. The fact that suspicion had expressly focused upon one would enable him to refuse to testify on grounds of self-incrimination. *People v. Ferola*, 215 N.Y. 285, 109 N.E. 500 (1915). As late as 1901, the tendency to disregard the emerging doctrinal basis of the privilege as the ground for exclusion and revert to the test of voluntariness is observable. *People v. Molineux*, 168 N.Y. 264, 331, 61 N.E. 286, 308-09 (1901).

90. *People v. Mondon*, 103 N.Y. 211, 222, 8 N.E. 496, 500-01 (1886).

91. "Nor can the exclusion of the evidence depend on the question whether there was any suspicion of the guilt of the witness lurking in the heart of any person, at the time the testimony was taken. That would be the most dangerous of all tests, as well because of the readiness with which proof of such suspicion might be procured, as of the impossibility of refuting it." *Hendrickson v. People*, 10 N.Y. 13, 25 (1854).

92. 105 App. Div. 598, 608-16, 94 N.Y. Supp. 1037, 1044-50 (1st Dep't 1905), *aff'd* 184 N.Y. 30, 76 N.E. 732 (1906).

93. Laughlin, J., concurred in result, *id.* at 607-08, 94 N.Y. Supp. at 1043-44; Ingraham, J., and O'Brien, P.J., dissented; *id.* at 608-16, 94 N.Y. Supp. at 1044-50.

94. During the course of a grand jury investigation into the conspiracy of persons in unlawfully procuring the dissolution of a divorce obtained against one Dodge and the subornation of Dodge to commit perjury for which he stood indicted, the relator, who had been Dodge's attorney in the divorce proceeding, was subpoenaed to testify and sworn. Before the administration of the oath, the grand jury refused to advise the relator of the object of the investigation although he had requested them to do so declaring that he was aware that the proceedings could be directed against himself. During the examination however, he was informed that the investigation was to ascertain who was privy to the commission of the perjury committed by his client. The relator asserted his privilege in connection with certain questions but answered others. An indictment, on which his name was inscribed as a witness, was returned against him for subornation of perjury and conspiracy.

95. *People ex rel. Hummel v. Davy*, 105 App. Div. 598, 604, 94 N.Y. Supp. 1037, 1041 (1st Dep't 1905).

96. 126 App. Div. 665, 111 N.Y. Supp. 133 (1st Dep't 1908).

by the minority in the *Davey* case found expression in the opinion written for the *Gillette* majority,⁹⁷ and a clear delineation was made between the rights of one called to testify as a witness where the investigation was directed against others and where the proceedings were directed against the witness himself.⁹⁸

Gillette was a highly positioned officer of a life insurance company doing business in New York County. He was subpoenaed and sworn as a witness before a grand jury conducting an investigation “. . . for the purpose, among other things, of ascertaining whether officers or employees of any description of life insurance companies . . .” in New York State had violated the criminal laws of the state.⁹⁹ Noting that although the investigation was ostensibly directed against others whose names were inscribed on a subpoena, his relationship to the scope of the investigation was such that he was held to be one of the defendants against whom the investigation was directed as though he had been designated by name. Thus equating *Gillette*’s position with that of a named defendant, whose rights had been fixed in earlier cases,¹⁰⁰ the court dismissed the indictment for the crime of perjury holding it to be a violation of the defendant’s constitutional right to have been required to attend before the grand jury and take the oath.

In broad, bold strokes, the court disempowered the grand jury from administering the oath to one against whom an investigation was being directed and in sweeping language, wholly unnecessary to the decision, committed to decisional form the striking proposition that an indictment for a substantive crime may not be predicated upon the testimony of even a “mere witness” who has been thus subpoenaed.¹⁰¹

The *Gillette* decision has cast a giant shadow and in its doctrinal path have followed a progression of decisions which have consistently refused to sustain the validity of a conviction for contempt or an indictment for any crime predicated upon the testimony of one against whom the court has found to be a prospective defendant,¹⁰² or in the target area, though not necessarily the bull’s eye,¹⁰³ of a grand jury investigation.

97. Although the *Gillette* case has been commonly considered as the bedrock upon which the prospective defendant rule was constructed, *People v. Laino*, 10 N.Y.2d 161, 172, 176 N.E.2d 571, 578, 218 N.Y.S.2d 647, 656 (1961), *appeal dismissed and cert. denied*, 374 U.S. 104 (1963), only two judges concurred on the ground of the opinion which called for a dismissal of the indictment by reason of the violated privilege. Interestingly, Judge McLaughlin, who wrote for the majority in *Davey* and there viewed compulsion as a question of fact also wrote the opinion in *Gillette*. His endeavor to distinguish the two cases is somewhat less than persuasive. *People v. Gillette*, *supra* note 96, at 668-69, 111 N.Y. Supp. at 135-36.

98. *People v. Gillette*, *supra* note 96, at 668-69, 111 N.Y. Supp. at 135-36.

99. *Id.* at 666, 111 N.Y. Supp. at 133.

100. See notes 86-91 and the cases cited therein.

101. *People v. Gillette*, 126 App. Div. 665, 669, 111 N.Y. Supp. 133, 136 (1st Dep’t 1908).

102. *People v. Laino*, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d 647 (1961), *appeal dismissed and cert. denied*, 374 U.S. 104 (1963); *People v. Ryan*, 6 N.Y.2d 975, 161 N.E.2d 393, 191 N.Y.S.2d 169 (1959); *People v. Steuding*, 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959); *People v. DeFeo*, 308 N.Y. 595, 127 N.E.2d 592 (1955).

103. *People v. Laino*, *supra* note 102.

B. *Application of the Rule*

1. *When Does a Person Become a Prospective Defendant?*

Since the exclusionary rule is a necessary ingredient of the constitutional privilege which has been held to be violated upon the exertion of compulsion upon the prospective defendant in *People v. Steuding*¹⁰⁴ and since compulsion in this context has been construed to mean attendance and examination before the grand jury pursuant to subpoena, the status of the individual must be identified at the time he is compelled to testify against himself, that is, at the point in time when he appears before the grand jury pursuant to subpoena and is examined under oath by that body.¹⁰⁵ Thus conceived, any event which occurs subsequent to the administration of the oath and the commencement of the examination of one who has been subpoenaed before the grand jury cannot effect the transformation of a "mere witness" into a "prospective defendant."¹⁰⁶

Neither the enlargement of the scope of the inquiry,¹⁰⁷ the nature of the questions addressed to the individual so postured, or to previously or subsequently called witnesses¹⁰⁸ nor the fact of indictment for the criminal conduct to which the investigation was addressed¹⁰⁹ would serve to alter the status fixed at the moment at which the individual is compelled to testify against himself.¹¹⁰

2. *Can a Prospective Defendant Be "Compelled" To Testify Notwithstanding His Status?*

The marking of the examination as the point at which the prospective defendant's privilege against self-incrimination is deemed violated by the *Steuding* court represents a measured though significant departure from the concept of compulsion as announced in *Gillette*. Were *Gillette* correct in postulating that the grand jury lacks power to administer the oath to a prospective defendant, it would logically follow that all subsequent proceedings must be deemed a nullity resulting in the denial to the prosecuting attorney of the opportunity to confer immunity in exchange for valued information necessary to preserve vital societal interests in the investigation, detection, and effective prosecution of criminal behavior. This result has been flatly rejected and it is now clear that even a prospective defendant may be subpoenaed, sworn and, if properly immunized from future prosecution, may be directed to answer on

104. 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959).

105. *People v. Laino*, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d 647 (1961), *appeal dismissed and cert. denied*, 374 U.S. 104 (1963); *People v. Dooling*, 14 Misc. 2d 907, 180 N.Y.S.2d 618 (County Ct. 1958).

106. *But see Sobel, op. cit. supra* note 56.

107. *People v. Laino*, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d 647 (1961), *appeal dismissed and cert. denied*, 374 U.S. 104 (1963).

108. *People v. Tomasello*, 48 Misc. 2d 156, 264 N.Y.S.2d 686 (Sup. Ct. 1965).

109. *People ex rel. Hummel v. Davy*, 105 App. Div. 598, 94 N.Y. Supp. 1037 (1st Dep't 1905).

110. These factors may of course be crucially relevant to the determination of other considerations.

pain of contempt.¹¹¹ Likewise a prospective defendant who appears before a grand jury pursuant to subpoena and elects to sign a waiver of immunity will be required to respond to examination, unless he is held to have effectively withdrawn the waiver.¹¹²

3. To Which Proceedings Does the Prospective Defendant Rule Apply?

As an integral component of a constitutional right, the applicability of the rule of exclusion extends to all pre-trial interrogative proceedings where compulsory legal process has been employed.¹¹³ The character of the proceedings is relevant only to the question of the procedural vehicle by which the relief contemplated by the exclusionary rule may be achieved.

4. Who Is a Prospective Defendant?

a. *The Consequence Test*: Attaching themselves to obiter dictum in the *Gillette* case,¹¹⁴ some decisions¹¹⁵ and authors¹¹⁶ have cursorily and flatly adopted the proposition that if, as a consequence of a witness' sworn testimonial assertions given pursuant to subpoena before a grand jury, an indictment for a substantive crime is returned by that body, a motion to dismiss the indictment must perforce be granted. According to one view, the consequence of the indictment gives rise to the conclusive presumption that the witness was in fact a prospective defendant when subpoenaed.¹¹⁷ In this posture there can be absolutely no problem in identifying a prospective defendant in the context of the substantive crime area. He is simply anyone who has not executed a waiver of immunity and who has testified under oath before a grand jury pursuant to subpoena without immunity and against whom an indictment for a crime other than perjury and criminal contempt has been returned. But if the witness' exemption is accomplished as a result of a presumption that he was all the time in fact a prospective defendant, there is no sound reason for denying to him an exemptive status for perjurious testimony or contemptuous conduct which may have preceded the return of the indictment for the substantive crime.

Despite the attractive feature of easy workability it is suggested that the consequence test is historically and analytically insupportable.¹¹⁸ As a neces-

111. *People v. Breslin*, 306 N.Y. 294, 118 N.E.2d 108 (1954), *cert. denied*, 374 U.S. 1014 (1954).

112. *Stevens v. Marks*, 86 S. Ct. 788 (1966) distinguishing *People v. Regan*, 306 N.Y. 747, 117 N.E.2d 921 (1954), *aff'd*, 349 U.S. 58 (1955).

113. *People v. Ferola*, 215 N.Y. 285, 109 N.E. 500 (1915); *People v. Sharp*, 107 N.Y. 427, 14 N.E. 319 (1887).

114. *People v. Gillette*, 126 App. Div. 665, 669, 111 N.Y. Supp. 133, 135-36 (1st Dep't 1908).

115. See *People v. Rauch*, 140 Misc. 691, 251 N.Y. Supp. 454 (Ct. Gen. Sess. 1931).

116. Sobel, *op. cit. supra* note 56, at 28.

117. *Id.* at 28.

118. Though it is true that in no recent case in New York State except *People v. Dooling*, 14 Misc. 2d 907, 180 N.Y.S.2d 618 (County Ct. 1958), has an indictment for a substantive crime (other than perjury or criminal contempt) against one who has given testimony before the indicting grand jury ever survived a motion to dismiss, this does not confirm either the validity or the reasoning of the test.

sary corollary to the protections embraced by the privilege against self-incrimination, the exclusionary rule was clearly designed to operate as a bulwark against oppressive, inquisitorial techniques designed to extract declarations of guilt from those accused or suspected of crime. It is the containment of prosecutorial and investigatorial abuse of the immense power to compel testimony through the issuance of compulsory judicial process that is the essential ambition of the rule. There is little justification for declaring as abusive those efforts by an investigatory body to obtain valuable information from persons who cannot reasonably be cast as suspected or accused persons at the time of the exertion of compulsion.

The consequence test imposes a burden upon the prosecutor which the most sensitive concern for individual rights would find difficult to hold tolerable. Despite the absence of reasonable grounds of suspicion within the knowledge of the prosecutor at the time of the issuance of compulsory process, the investigatory agency nevertheless risks providing effective inoculation for any substantive crime which may be detected during the course of the examination. As none but a written waiver of the constitutional privilege is recognized in connection with the operation of the prospective defendant rule, it would obviously behoove any witness subpoenaed before a grand jury to testify freely without asserting his privilege and still remain secure in the knowledge that any information which he may impart to the grand jury may never be used as a predicate for an indictment for at least a substantive crime.

b. *The Prosecutorial Constructive Knowledge Test*: The key to accommodating the right of one under suspicion of complicity in criminal conduct to be free from judicial compulsion to testify against himself and the interests of society in having its prosecutorial representative at liberty to ferret out miscreants by assembling relevant information from knowledgeable witnesses would seem to lie with the prosecutor's awareness or consciousness of the witness' status. Although the subjective state of the prosecutor's mind, much like consciousness of guilt on the part of the witness,¹¹⁹ cannot control the question of the witness' status,¹²⁰ it is nevertheless the prosecutor's knowledge, actual or constructive, in advance or at the time of his exertion of compulsion which is determinative of whether he has abused this power and thus transgressed the witness' privilege.¹²¹

There are certain observable factors by which the prosecutor's knowledge of the witness' status may be objectively ascertained. The scope of the inquiry may render a witness a possible defendant¹²² and the closer the witness'

119. *Teachout v. People*, 41 N.Y. 7, 11 (1869).

120. *People v. DeFeo*, 284 App. Div. 622, 627, 131 N.Y.S.2d 806, 812 (1st Dep't 1954), *rev'd on other grounds*, 308 N.Y. 595, 127 N.E.2d 592 (1955). See *People v. Freistadt*, 6 A.D.2d 1053, 179 N.Y.S.2d 633 (2d Dep't 1958) (per curiam).

121. *People v. DeFeo*, 308 N.Y. 595, 604, 127 N.E.2d 592, 596 (1955). Cf. *People v. Riela*, 7 N.Y.2d 571, 578, 166 N.E.2d 840, 844, 200 N.Y.S.2d 43, 47 (1960).

122. *People v. Laino*, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d 647 (1961), *appeal dismissed and cert. denied*, 374 U.S. 104 (1963) citing *People v. DeFeo*, 284 App. Div. 622, 627, 131 N.Y.S.2d 806, 812 (1st Dep't 1954).

calling is identified with the scope of the inquiry, the more compelling his status as a prospective defendant will become. Once a reasonable nexus between witness and scope of the inquiry is established, a disclosure in the minutes of the grand jury that the examination related to the witness' own conduct and affairs will almost invariably result in the finding that the prosecutor "must have known in advance" that the witness was in fact a prospective defendant. Thus, such an inquiry coupled with the following relational patterns resulted in the finding, express or implied, of prospective defendant status: officer of an insurance company headquartered in New York County subpoenaed by a grand jury investigating violations committed by employees or officers of insurance companies in New York County;¹²³ officer and stockholder of insurance company which was, by name, under grand jury surveillance;¹²⁴ attorneys specializing in negligence practice in Kings County called by grand jury investigating unlawful solicitation of negligence cases and conspiracy in Kings County;¹²⁵ attorney for client indicted for perjury in connection with divorce proceedings subpoenaed by grand jury investigating subornation of client's perjury;¹²⁶ "guest" at Appalachian meeting of 1957 subpoenaed to testify before investigation to determine whether any crimes have been committed or planned at the gathering;¹²⁷ former plain clothes police officer called before grand jury investigating bribery of plain clothes policemen;¹²⁸ employee of company selling products to county subpoenaed to testify before grand jury investigation of corruption of public officers in the same county;¹²⁹ co-partner and principal vendor of tires to city called before grand jury investigating official corruption in county, within which city is located, regarding purchase of tires without competitive bidding;¹³⁰ insurance broker examined by grand jury investigating alleged violations of insurance law and penal law;¹³¹ employees of contracting company and engineering firm under contract for work on a roadway called to testify

123. *People v. Gillette*, 126 App. Div. 665, 111 N.Y. Supp. 133 (1st Dep't 1908). See *Counselman v. Hitchcock*, 142 U.S. 547 (1892) (owner of grain and commission business called to testify before grand jury investigating violations by agents of railroad servicing area of owner's business.)

124. *People v. DeFeo*, 284 App. Div. 622, 131 N.Y.S.2d 806 (1st Dep't 1954), *rev'd on other grounds*, 308 N.Y. 595, 127 N.E.2d 592 (1955).

125. *Matter of Grand Jury (Cioffi)*, 8 N.Y.2d 220, 168 N.E.2d 663, 203 N.Y.S.2d 841 (1960).

126. *People ex rel. Hummel v. Davy*, 105 App. Div. 598, 94 N.Y. Supp. 1037 (1st Dep't 1905).

127. *People v. Riela*, 7 N.Y.2d 571, 166 N.E.2d 840, 200 N.Y.S.2d 43 (1960). See *Comm'n of Investigation v. Lombardozzi*, 7 A.D.2d 48, 180 N.Y.S.2d 496 (1st Dep't 1958), *aff'd*, 5 N.Y.2d 1026, 158 N.E.2d 250, 185 N.Y.S.2d 550 (1959), *cert. denied sub nom. Costellano v. Comm'n of Investigation*, 360 U.S. 930 (1959), *appeal dismissed and cert. denied sub nom. Mancuso v. Comm'n of Investigation*, 361 U.S. 10 (1959).

128. *People v. Regan*, 306 N.Y. 747, 117 N.E.2d 921 (1954), *aff'd*, 349 U.S. 58 (1955); *People v. Breslin*, 306 N.Y.2d 294, 118 N.E.2d 108 (1954), *cert. denied*, 347 U.S. 1014 (1954).

129. *People v. Ryan*, 6 N.Y.2d 975, 161 N.E.2d 393, 191 N.Y.S.2d 169 (1959); *People v. Steuding*, 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959).

130. *People v. Laino*, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d 647 (1961), *appeal dismissed and cert. denied*, 374 U.S. 104 (1963).

131. *People v. Saperstein*, 2 N.Y.2d 210, 140 N.E.2d 252, 159 N.Y.S.2d 160 (1957), *cert. denied*, 353 U.S. 946 (1957).

before a grand jury investigating corruption of public officials in connection with roadway contracts;¹³² recipient of top soil during time of construction of expressway called to testify before grand jury investigating alleged crimes of grand larceny in connection with same expressway;¹³³ superintendent of highways subpoenaed before grand jury investigating acts of official impropriety;¹³⁴ borough president's brother who previously testified before grand jury investigating alleged bribery in brother's borough called in before grand jury and examined relative to previous testimony;¹³⁵ possessor of stolen property subpoenaed before grand jury investigating burglary charges against others;¹³⁶ one of two complainants testifying before a grand jury investigating cross-complaints for assault;¹³⁷ dealer in second hand specialties examined by grand jury investigating theft of goods by dealer's employee.¹³⁸

Prior evidence produced at the investigation¹³⁹ including the nature of the questions asked of earlier witnesses is highly probative of the prosecutor's actual or constructive awareness of the defendant's role at the time of the use of compulsory process. Less convincing but nevertheless relevant to the determination of the nature and extent of the prosecutor's advance knowledge of the witness' true role as a prospective defendant is the nature of the evidence adduced subsequent to the subject's attendance.¹⁴⁰ Least suasive because of its presence in every case when the status of the witness is in issue, except when he is charged with contempt or perjury, is the fact of the return of an indictment for the substantive crime with regard to which the investigation was focused.¹⁴¹

Notwithstanding the conceptual propriety of this test, serious functional problems are at once observable. If all the circumstances surrounding the investigation must be considered in determining whether the prosecutor knew in advance of the issuance of compulsory process that the witness was cast in the role of the prospective defendant, can the decisional process be limited to a review of the grand jury proceedings or must not the entirety of the investigation, including that conducted by investigators attached to the prosecutor's office, be laid bare upon pre-trial motion? If such disclosure is required, the prosecutor would be faced with the harsh election of providing the defendant

132. *People v. Yonkers Contracting Co.*, 24 A.D.2d 641, 262 N.Y.S.2d 298 (2d Dep't 1965).

133. *People v. Tomasello*, 48 Misc. 2d 156, 264 N.Y.S.2d 686 (Sup. Ct. 1965).

134. *People v. Seaman*, 174 Misc. 792, 21 N.Y.S.2d 917 (Sup. Ct. 1940).

135. *People v. Bermel*, 71 Misc. 356, 128 N.Y. Supp. 524 (Sup. Ct. 1911). See *People v. Luckman*, 164 Misc. 230, 297 N.Y. Supp. 616 (Sup. Ct. 1937).

136. *People v. Baumer*, 136 Misc. 17, 241 N.Y. Supp. 733 (Sup. Ct. 1930).

137. *People v. Werkes*, 46 Misc. 2d 1020, 261 N.Y.S.2d 726 (Sup. Ct. 1965).

138. *People v. Rauch*, 140 Misc. 691, 251 N.Y. Supp. 454 (Ct. Gen. Sess. 1931).

139. *People v. Freistadt*, 6 A.D.2d 1053, 179 N.Y.S.2d 633 (2d Dep't 1958) (per curiam).

140. "[I]t is whether the scope of the inquiry, fairly considered in the light of all the circumstances, might involve the witness by reason of his testimony." *People v. Yonkers Contracting Co.*, 24 A.D.2d 641, 642, 262 N.Y.S.2d 298, 302 (2d Dep't 1965).

141. *People v. Tomasello*, 48 Misc. 2d 156, 157-58, 264 N.Y.S.2d 686, 688-89 (Sup. Ct. 1965).

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with an unprecedented discovery device by exposing the entirety of his evidence developed within and without the grand jury, or consenting to the dismissal of the indictment.¹⁴² If such latitudinous review is disallowed, will not the defendant be deprived of a judicial determination based upon all relevant information?

From the point of view of the witness, how does he arrest the prosecution before the stigma of indictment?¹⁴³ If all the circumstances including the nature of the examination of the witness must be considered, a motion to quash the subpoena would seem premature.¹⁴⁴

It may be argued that if the witness can too easily determine his status as a prospective defendant in advance of examination he is placed in the unique position, by simply not claiming his privilege and thus keeping dormant the immunity machinery, to frustrate an investigation by testifying falsely or in engaging in contumacious conduct—all without the slightest risk of penalty. On the other hand, if the certainty of his status is less well known to him prior to examination, wisdom would presumably dictate the avoidance of all risk by asserting his privilege and leaving to the prosecutor the opportunity to engage the immunity statute. Of course if the prosecutor chooses not to confer immunity, the individual's risk is not the greater since the return of any valid indictment would necessarily be predicated upon independent evidence and as such could be secured in any case.¹⁴⁵

In large scale investigations involving official corruption for example it is perfectly apparent that in order to prosecute at least some of the wrongdoers, others will have to be given an exemptory status. In this circumstance there is some force to the reasoning that the prosecutor should be permitted to so position himself so as to make an intelligent choice. This would require allowing the proceedings to progress at least to the point where there is a confrontation of the witness by the prosecutor.

CONCLUSION

It is difficult to escape the fact that the very act on the part of the prosecutor in calling a witness reflects a pre-supposition that the witness is possessed of some knowledge or information concerning the subject of the inquiry. This alone would seem sufficient to place the individual close enough

142. Even if made in good faith, the prosecutor's protestations that the defendant was called before the grand jury not as a prospective or even possible defendant but solely as an ordinary witness will avail him little if at all. *People v. Tomasello*, *supra* note 141 at 157, 264 N.Y.S.2d at 689.

143. "[T]hese provisions of the [New York] Constitution are to protect the individual, not against a judgment or conviction, but against a criminal prosecution, except one in which the rights secured to him by these provisions of the Constitution are respected." Ingraham, J., dissenting in *People ex rel. Hummel v. Davy*, 105 App. Div. 598, 609, 94 N.Y. Supp. 1037, 1044 (1st Dep't 1905).

144. *Williams v. Ball*, 23 Misc.2d 78, 196 N.Y.S.2d 291 (County Ct. 1960). *But see* Sobel, *op. cit. supra* note 56, at 28.

145. *People v. Laino*, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S. 647 (1961), *appeal dismissed and cert. denied*, 374 U.S. 104 (1963).

to the subject of the investigation so as to justify his classification as a possible defendant or at least one in the target area. By creating this classification of protected persons, whose boundary is today as diaphanous as it once was rigid,¹⁴⁶ the courts have stricken the balance between individual rights and investigatorial necessity in favor of the former. It is submitted that the result is sound. By calling one who is later judicially determined to be a prospective defendant, at most the prosecutor has allowed a single fish to elude the net, and if testimony is adduced he has received the benefit of information which may be instrumental in successfully prosecuting others. It is the occasion when witnesses refuse to testify without asserting their privilege against self-incrimination, thus preventing the operation of the immunity statute, and are later held to be exempt from contempt action because of prospective defendant status that the prosecutor has lost both the fish and the net.

Under either test uncertainty continues to plague both witness and prosecutor and each must measure the risk of his action carefully lest on the one hand an ordinary witness find himself an actual defendant by virtue of incriminating testimony and on the other the prosecutor find his investigation frustrated by the unwitting inoculation of a wrongdoer without the benefit of his testimony. For all the certainty of the consequence test, it fails to affect the case of a person who is accused of contemptuous conduct or giving perjurious evidence. As to these areas the courts are still left to an objective determination under the constructive knowledge test.

As it is the abuse of prosecutorial powers that the exclusionary rule attempts to keep in check, it would seem that an effective deterrent would be the requirement that the prosecutor set forth all of the evidence which his investigation has assembled upon the raising of the status question by the witness either upon a motion to dismiss the indictment returned for a substantive crime or perjury or upon proceedings in contempt. With the knowledge that the innermost secrets of his investigation be exposed to the searing light of the defendant's scrutiny, it is likely that the issuance of every subpoena will be reviewed with the greatest care—thus preserving the integrity of the investigation and at the same time avoiding the violation of precious constitutional rights.

146. See notes 87-91 *supra* and the accompanying text.