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A PEEK INTO PANDORA'S BOX: *FOLDING CARTON* AND THE PRIVILEGE AGAINST SELF-INCRIMINATION IN CIVIL ANTITRUST ACTIONS

The proliferation of antitrust actions in the private sector¹ and the escalation of criminal penalties in the government's enforcement of antitrust legislation² have expanded the risks which antitrust violators face. Concomitantly, the detrimental effects of any ambiguities in federal procedure in antitrust cases have become more severe. Moreover, the judiciary must be concerned with the problems and policies of both criminal and civil actions at once since an antitrust violation may result in both criminal and civil liability.³ Consistent procedural safeguards to ensure a fair and expeditious resolution in both actions should be sought and procedural conflicts between civil and criminal antitrust ac-

¹ For statistical evidence of their growth, see, e.g., L. SULLIVAN, *ANTITRUST* 769 (1977); Posner, *A Statistical Study of Antitrust Enforcement*, 13 *J.L. & ECON.* 365, 371-73 (1970); *Nolo Contendere and Private Antitrust Enforcement, Hearings on S. 2512 Before the Subcomm. on Antitrust & Monopoly of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 180-324 (1966).

² For example, the Sherman Act, 15 U.S.C. §§ 1-3 (1976), has been amended to increase maximum individual criminal penalties to a \$100,000 fine or three years in prison or both. 15 U.S.C. § 1 (1976), as amended by Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (1973). The effect of a statutory expansion of the antitrust penalties historically has been an increase in the fines imposed. See Posner, *supra* note 1, at 390-94. See also U.S. Dept. of Justice Guidelines for Sentencing Recommendations in Felony Cases Under the Sherman Act, reprinted in 803 *ANTITRUST & TRADE REG. REP.* (BNA) F-1 (1977).

³ Concurrent civil and criminal proceedings against antitrust violators are possible in a variety of situations. Criminal prosecutions and government injunction suits to restrain violations may be brought simultaneously. *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912). The Sherman Act permits civil and criminal actions to be brought simultaneously. *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *United States v. J.M. Huber Corp.*, 179 F. Supp. 570 (S.D.N.Y. 1959). A suit for an injunction against future actions does not preclude a simultaneous suit for past damages. See *United States v. Oregon State Medical Soc'y*, 343 U.S. 326, 333 (1952). Government injunction actions and private treble-damage suits may be brought simultaneously under § 4 of the Clayton Act, 15 U.S.C. § 15 (1976). *United States v. Borden Co.*, 347 U.S. 514 (1954).

tions must be resolved.

Determining the appropriate parameters of the Fifth Amendment privilege against self-incrimination in antitrust litigation presents particularly acute problems of conflict and ambiguity.⁴ In a recent large antitrust case, *In re Folding Carton Antitrust Litigation*⁵ (*Folding Carton*), the court considered directly the extent of a non-corporate civil antitrust defendant's Fifth Amendment privilege against self-incrimination. The dilemma for the defendant in *Folding Carton* was his choice between refusing to testify at all in the civil case about his involvement in alleged criminal activities, thereby risking civil contempt, or testifying about his activity and facing possible subsequent criminal prosecution based on his testimony.

The purpose of this article is to examine the dimensions of an individual's Fifth Amendment privilege in a civil antitrust ac-

⁴ The Fifth Amendment provides: "No . . . person shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The scope of the privilege has been the subject of a great deal of commentary. See, e.g., Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968); Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383 (1977); Comment, *Concurrent Civil and Criminal Proceedings*, 67 COLUM. L. REV. 1277 (1967); Comment, *Federal Discovery in Concurrent Criminal and Civil Proceedings*, 52 TUL. L. REV. 769 (1978).

Several recent federal cases have considered the permissibility of an assertion of Fifth Amendment privilege in civil antitrust discovery proceedings. In *re Anthracite Coal Antitrust Litigation*, 82 F.R.D. 364 (M.D. Pa. 1979), concerned a civil antitrust action against coal producers for price-fixing in the coal industry. The court granted a plaintiff's motion to sanction for failure of the corporate defendant to comply with a discovery order even though corporate officers invoked the Fifth Amendment. The court also held that sanctions could be imposed despite an economic impact on those who invoked the privilege. *Id.* at 369. Since a corporation has no privilege under the Fifth Amendment, *Curcio v. United States*, 354 U.S. 118 (1957), the corporate defendant in *Anthracite Coal* was precluded from raising the complaint that the discovery order had an adverse impact on the officers who held an economic interest in the corporation. The court concluded:

[w]ere the court to rule otherwise, it would be giving the Defendant corporations the benefit of a Fifth Amendment privilege where none exists. It is well settled that a corporation does not enjoy the right not to incriminate itself Although imposing a sanction pursuant to F.R.Civ.P. 37(b) on the corporations may have some economic impact upon the officers of those corporations who have invoked the Fifth Amendment, because of the corporation's lack of a Fifth Amendment privilege it cannot be heard about that result.

F.R.D. at 368-69. Thus, the court held that civil sanctions may be imposed on a corporation.

In *Flavorland Industries, Inc. v. United States*, 591 F.2d 524 (9th Cir. 1979), the court considered a similar problem on the criminal side of antitrust litigation. A federal grand jury subpoenaed a corporation for discovery materials consisting of depositions of corporate employees gathered in a private antitrust action. The court held that the corporation had no standing to assert the Fourth and Fifth Amendment privileges of its employees, and compelled it to produce the discovery materials and evidence. *Id.* at 525. See also *In re Folding Carton Antitrust Litigation*, 609 F.2d 867 (7th Cir. 1979).

⁵ 609 F.2d 867 (7th Cir. 1979), *rev'g* 465 F. Supp. 618 (N.D. Ill. 1979).

tion where the person has not yet been guaranteed that criminal prosecution is no longer possible. Two issues are apparent: first, under what conditions may a civil antitrust defendant properly invoke the privilege; second, if a civil antitrust plaintiff seeks to discover information privileged under the Fifth Amendment, what is the proper response to the problem? *Folding Carton* provides an excellent example of the process of antitrust litigation and demonstrates the tensions involved. Using that case as an example, the article examines the competing interests and analyzes the various standards for protection under the Fifth Amendment in an antitrust action. Finally, the article suggests the proper rule for invocation of the privilege: Fifth Amendment rights of a civil antitrust defendant should prevail if immunity is absent and if any criminal prosecution is still possible. The proposal that an exclusionary rule be used rather than the privilege is shown to be an unsatisfactory solution because it would provide inadequate protection of an individual's Fifth Amendment rights by compromising the privilege.

I. VALUES TO BE BALANCED

Enforcement of the federal antitrust laws through the use of criminal sanctions⁶ and both types of private damage actions⁷ has become the primary legal method of fostering competitive behavior in the American economy. The purpose of private antitrust litigation is not limited to compensation of those directly injured.⁸ Congress has encouraged private action in order to pro-

⁶ Criminal sanctions are provided under the Sherman Act, 15 U.S.C. §§ 1-3 (1976); Wilson Act, 15 U.S.C. § 8 (1976); Clayton Act, 15 U.S.C. § 20 (1976); and Robinson-Patman Act, 15 U.S.C. § 13 (1976). For an individual defendant, penalties under the antitrust laws are set with the court's discretion and may be as much as three years incarceration and a \$100,000 fine. See note 2 *supra*.

⁷ For example, the Department of Justice may secure an injunction against violation of the antitrust laws and may seek damages for injury to its business or property. 15 U.S.C. § 15(a) (1976).

A private plaintiff may secure treble damages or injunctions for violations of the federal antitrust laws. See *In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231 (9th Cir. 1976), in which the court examined the broad scope of equitable remedies under the antitrust laws.

⁸ The functions of antitrust laws are diverse. Section 4 of the Clayton Act is intended to be remedial in character. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977). Private remedies are intended to encourage private individuals to bring antitrust actions in the public interest. *Javelin Corp. v. Uniroyal, Inc.* 546 F.2d 276 (9th Cir. 1976), *cert. denied*, 379 U.S. 900 (1964); *Mach-tronics v. Zirpoli*, 316 F.2d 820 (9th Cir. 1963). Another often-expressed goal is to multiply the number of agencies which could effectively enforce antitrust laws. *Osborn v. Sinclair Ref. Co.*, 324 F.2d 566 (4th Cir. 1963). The United States Supreme Court has recognized both a deterrence and a remedial purpose in the antitrust

tect the public interest in free competition.⁹ The theory is that if a multiplicity of potential litigants can bring actions under federal antitrust laws, possible violators will be deterred by the greater likelihood of a court challenge, and consequently, by the prospect of the enormous financial costs and damaging criminal exposure which might develop.

Conflicting values arise, however, when both criminal and civil actions may be directed at the same individual. Procedural and evidentiary requirements are different in criminal and civil actions,¹⁰ and adjustments must be made to accommodate the stricter constitutional requirements of criminal proceedings. For example, if a civil plaintiff moves under the Federal Rules of Civil Procedure (FRCP) to compel deposition testimony of a witness in a civil antitrust action,¹¹ the issue is what evidence may be sought and how it should be treated in subsequent criminal actions. A determination of the parameters of the Fifth Amendment privilege against self-incrimination requires one to consider the disparate values, the proper standard, the possible legal responses, and the relative merits of the alternative policies.

Without a provision of statutory immunity,¹² the problems of the conflicting needs of civil and criminal actions become apparent. On the one hand, in civil antitrust litigation, the defense tactic of cloaking evidence behind the threat of potential criminal prosecution could hinder the full development of the plaintiff's case. The defendants would refuse to produce evidence on the theoretical or speculative possibility of criminal prosecution. Efficient civil discovery could thus be constrained whenever any prosecutor still had the power to bring a criminal action against the witness. The protection of the Fifth Amendment could, therefore, allow essential testimony to be withheld, thus bringing

laws. *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 314 (1977); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1976).

⁹ The purpose of antitrust legislation has been the subject of much discussion and argument. See, e.g., H. THORELLI, *THE FEDERAL ANTITRUST POLICY* (1955); Austin, *The Emergence of Societal Antitrust*, 47 N.Y.U.L. REV. 903 (1972); Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191 (1977). Of primary importance is the encouragement of competition and efficiency. See *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958); *Standard Oil Co. v. FTC*, 340 U.S. 231 (1956); *Hearings on S. 2028 Before Subcomm. on Antitrust & Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 28 (1975-76) (statement of Thomas E. Kauper).

¹⁰ See generally Kaminsky, *Preventing Unfair Use of the Privilege Against Self-Incrimination in Private Civil Litigation: A Critical Analysis*, 39 BROOKLYN L. REV. 121 (1972); Ritchie, *supra* note 4.

¹¹ The civil plaintiff's action would be governed by FED. R. CIV. P. 37(a)(2).

¹² See note 20 *infra*.

to a halt any antitrust litigation in which criminal liability is still possible.¹³ Expeditious and fair civil antitrust litigation calls for a narrow circumscription of the ability of a deposed witness to avoid providing testimony.

On the other hand, a broad privilege against self-incrimination is necessary to protect the individual in possible criminal prosecution. The Fifth Amendment was intended to permit the individual to avoid revealing information that could aid the government in its prosecution.¹⁴ The privilege can be invoked whenever the threat of self-incrimination in a criminal prosecution may arise. If the government is to prosecute an individual successfully, it must be able to do so without the use of compelled testimony from the defendant.

The theory is that the defendant should not be required to face the trilemma of self-incrimination, committing perjury, or facing judicial sanction in the form of civil contempt. The United States Supreme Court has forthrightly declared that "[t]he privilege [against self-incrimination] is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, whenever the answer might tend to subject to criminal responsibility him who gives it."¹⁵ The need for balancing values is clear: complete discovery of the evidence for the civil action requires a narrow interpretation of the privilege, whereas protection of individual constitutional rights regarding

¹³ The district court in *Folding Carton* predicated its denial of Fifth Amendment protection on a policy argument:

Finally, strong policy considerations support the result reached here. Federal and state criminal statutes have an expansive and omnipresent sweep in modern society. There are a multitude of situations where potential criminal and civil liability overlap. Sustaining a civil witness' refusal to testify every time an answer might give rise to some theoretically possible future criminal prosecution, no matter how remote, would signal a virtual end to discovery in civil cases. Assertions of the fifth amendment which, as a practical matter, are frivolous should not be allowed to frustrate discovery in civil cases.

In re *Folding Carton Antitrust Litigation*, 465 F. Supp. 618, 625 (N.D. Ill.), *rev'd*, 609 F.2d 867 (7th Cir. 1979).

¹⁴ The privilege against self-incrimination stemmed from a tradition of accused persons refusing to testify in the English Star Chamber. For an examination of the historical developments and policies of the privilege, see 8 J. WIGMORE, EVIDENCE §§ 2250-51 (McNaughton Rev. 1961); Friendly, *supra* note 4, at 677-98; Kaminsky, *supra* note 10; McNaughton, *The Privilege Against Self Incrimination; Its Constitutional, Raison d'Entre and Miscellaneous Implications*, 51 J. CRIM. L.C. & P.S. 138 (1960); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949); Pitman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935).

¹⁵ *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924). See also *Spevack v. Klein*, 385 U.S. 511 (1967); In re *Daley*, 549 F.2d 469 (7th Cir. 1977).

possible criminal prosecution requires a broad interpretation of the privilege.

II. THE PROCEDURAL HISTORY OF *Folding Carton*

In 1976, a Department of Justice investigation of the folding carton industry resulted in the criminal indictment of twenty-three folding carton producers and fifty individual executives of folding carton manufacturers on one Sherman Act misdemeanor count which charged a conspiracy to fix prices from 1960 to 1974.¹⁶ R. Harper Brown, who at the time of the indictment was the President and Chief Operating Officer of the Container Corporation of America, a major producer of folding cartons, pleaded *nolo contendere*, and the district court imposed a sentence of fifteen days incarceration, a \$15,000 fine, and a mandatory probation period. Brown completed his sentence and paid the fine.¹⁷

In addition to the indictment, the Department of Justice filed a civil action for alleged violations of the antitrust laws and the False Claims Act.¹⁸ The civil action brought by the government and various treble-damage actions filed by private parties against the folding carton producers were consolidated.¹⁹ After consolidation, the government facilitated discovery by granting immunity under federal immunity statutes²⁰ to several deponents who had invoked the Fifth Amendment. The government's civil action was settled and dismissed by stipulation.²¹

In his first deposition in the civil action before the district court, Brown provided only his name and address but refused to

¹⁶ *United States v. Consolidated Packaging Corp.*, 575 F.2d 117 (7th Cir. 1978).

¹⁷ *See In re Folding Carton Antitrust Litigation*, 609 F.2d 867, 869 (7th Cir. 1979).

¹⁸ *United States v. Alton Box Board Co.*, No. 76-1638 (N.D. Ill., filed April 30, 1976). *See In re Folding Carton Antitrust Litigation*, 609 F.2d 867, 869 (7th Cir. 1979).

¹⁹ *See Folding Carton*, 609 F.2d at 869 (7th Cir. 1979).

²⁰ 18 U.S.C. §§ 6002-6003 (1976). In 1970, Congress consolidated previous federal immunity statutes into the Federal Immunity of Witnesses Act. Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. II, § 201(a), 84 Stat. 926 (codified at 18 U.S.C. §§ 6001-6005 (1976)). The Supreme Court has recognized that immunity statutes are essential to the enforcement of criminal statutes, *see, e.g.*, *Hale v. Henkel*, 201 U.S. 43, 70 (1906), and has observed that immunity has "become a part of our constitutional fabric." *Ullman v. United States*, 350 U.S. 422, 438 (1956). The Court has also held that a grant of immunity allows the state to compel testimony. In *Kastigar v. United States*, 406 U.S. 441 (1972), the Supreme Court affirmed a district court order holding in contempt grand jury witnesses who refused to testify after immunity was granted. *See also Gardner v. Broderick*, 392 U.S. 273 (1968) (immunity is required to compel a police officer to testify before a grand jury investigating alleged bribery and corruption); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (holding that a person may be held in civil contempt if he refuses to testify after a grant of immunity).

²¹ *Folding Carton*, 465 F. Supp. at 622.

answer any additional questions on Fifth Amendment grounds. The private plaintiffs moved to compel the testimony of twenty-one other witnesses who had refused to testify on Fifth Amendment grounds. The district court granted the motion to compel the testimony of several witnesses in a pretrial order. The court then released a subsequent order directing Brown to testify under a federal recalcitrant witness statute.²² At the deposition held after the district court's order, Brown appeared for questioning, but refused to answer certain questions on the basis of an assertion of Fifth Amendment privilege. The district court granted plaintiffs' motion to hold Brown in contempt.

On appeal, the issue was whether he could assert the privilege since immunity had never been granted and criminal prosecution remained possible.²³ The United States Court of Appeals for the Seventh Circuit held that Brown was protected under the Fifth Amendment. The division between the district and appellate courts in *Folding Carton* indicates judicial uncertainty about the proper standard for protection under the Fifth Amendment in civil antitrust actions.

III. DEVELOPING THE PROPER FIFTH AMENDMENT STANDARD

A. The "Reasonable Fear of Criminal Prosecution" Test

The district court in *Folding Carton* held that a witness could assert the Fifth Amendment privilege only if he has a "reasonable fear of prosecution."²⁴ The essential element of the test is ostensibly an assessment of the risk that the witness faces: if the probability of prosecution is sufficiently high to give reasonable cause to fear prosecution, he may properly assert the privilege. The right to invoke the privilege, however, is not based solely on

²² *Folding Carton*, Pretrial Order No. 51 (N.D. Ill. June 11, 1979) (order directing deponent to testify). 28 U.S.C. § 1826(a) (1976) provides:

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

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

²³ *Folding Carton*, 609 F.2d 867 (7th Cir. 1979).

²⁴ *Folding Carton*, 465 F. Supp. at 621.

the witness' own estimation of the risk of criminal prosecution. Rather, the court must determine whether the witness silence is justified based on the particular facts of the situation. Such a determination, however, requires a standard. The court applied a standard previously applied by the United States Supreme Court in *Zicarelli v. New Jersey State Commission of Investigation*,²⁵ a criminal case concerning organized crime, racketeering, and political corruption: "[i]t is well established that the privilege [against self-incrimination] protects against real dangers, not remote and speculative possibilities."²⁶ The question remains, however, what constitutes a "real danger."²⁷ In *Folding Carton*, the district court created its own calculus of risk. The threshold inquiry facing the court in such a calculus is whether the answer which would be given in the civil proceeding might indicate that the witness was involved in criminal activities.²⁸

Second, the court must consider whether the answers which might indicate criminal involvement could expose the witness to any theoretically possible criminal prosecution.²⁹ If some circumstance precludes criminal prosecution — such as the running of the statute of limitations,³⁰ a grant of immunity,³¹ or the pres-

²⁵ 406 U.S. 472 (1972). In *Zicarelli*, the Court carefully examined whether disclosure might expose the defendant to criminal liability under either domestic or foreign law before allowing him to be held in contempt after he asserted his Fifth Amendment privilege. In order to sustain the assertion, the Court has required that the question be evaluated "in the setting in which it is asked." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). See *Ryan v. Comm'r*, 568 F.2d 531, 539 (7th Cir. 1977); *United States v. Melchor Moreno*, 536 F.2d 1042, 1046-47, 1050 n.10 (5th Cir. 1976); *Folding Carton*, 465 F. Supp. at 621.

²⁶ *Zicarelli v. New Jersey Investigation Comm'n*, 406 U.S. 472, 478 (1972) (footnote omitted).

²⁷ For examples of the way various courts have determined whether "real danger" exists, see *Priebe v. World Ventures, Inc.*, 407 F. Supp. 1244 (C.D. Cal. 1976), in which defendants in a civil action refused to answer oral depositions and written interrogatories. The court examined different expressions for the level of risk required and held that *any conceivable danger* is sufficient.

²⁸ *Folding Carton*, 465 F. Supp. at 621.

²⁹ *Id.*; *Zicarelli v. New Jersey Investigation Comm'n*, 406 U.S. 472, 480 (1972); *United States v. Seewald*, 450 F.2d 1159, 1162 (2d Cir. 1971).

³⁰ In *United States v. Goodman*, 289 F.2d 256 (4th Cir.), *vacated and rem'd on other grounds mem.*, 368 U.S. 14 (1961), the court held that a witness in a tax court proceeding could be compelled to testify if the statute of limitations precluded criminal prosecution. "[I]f by reason of the statute of limitations there remains *no possibility* that a prosecution of the witness may result from or be assisted by his answers to questions, he is not justified in refusing to answer." *Id.* at 259 (emphasis in original). See *Hale v. Henkel*, 201 U.S. 43 (1906); *Brown v. Walker*, 161 U.S. 591 (1896).

³¹ In *Kastigar v. United States*, 406 U.S. 441 (1972), the Court held that where a grant of immunity bars criminal prosecution, a grand jury witness may not invoke the Fifth Amendment privilege. "If [the immunity granted] . . . is coextensive with the scope of the privilege . . . , refusals to answer based on the privilege were unjustified, and the judgments of contempt were proper, for the grant of immunity has removed the dangers

ence of double jeopardy³² — a witness may not assert the privilege.

Third, the court must determine that the threat of an actual prosecution is not too remote or speculative a possibility.³³ The "reasonable fear of prosecution" test thus makes it incumbent upon the court to assess the possible behavior of various governmental agencies charged with enforcing the antitrust laws. The test is clearly based on numerous factors which are subject to wide variation and are inherently difficult to predict.

The salient factors in *Folding Carton* were five-fold. First, the government had completed an exhaustive criminal prosecution.³⁴ The complexity and interdependency of the action would have made it impractical for the government to divide its case and bring a subsequent and separate criminal action against each defendant.³⁵

Second, although the statute of limitations on the original price-fixing suit had not completely run, there was "no indication that any federal prosecutorial authority has conducted, is conducting, or contemplates an investigation aimed towards producing new indictments against any potential defendant in the folding carton industry."³⁶ The absence of a current or planned investigation apparently was sufficient for the district court to ignore the fact that legal liability was still possible.

Third, the statute of limitations on criminal actions *had* run in most state jurisdictions.³⁷ In those states in which the statute had not yet run, the court found no indication of a planned crim-

against which the privilege protects." *Id.* at 449. See generally *United States v. Calandra*, 414 U.S. 338, 346 (1974); *In re Special Sept. 1978 Grand Jury (II)*, 590 F.2d 245 (7th Cir. 1979); *In re Bonk*, 527 F.2d 120 (7th Cir. 1975).

³² The Fifth Amendment provides that "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. A conviction for the crime ends all liability to the state and any subsequent testimony which relates to the crime cannot tend to incriminate. "It is well established that once a witness has been convicted for the transactions in question, he is no longer able to claim the privilege of the Fifth Amendment and may be compelled to testify." *United States v. Romero*, 249 F.2d 371, 375 (2d Cir. 1957). This exception is limited under federal antitrust prosecution because a violator can be criminally liable under both federal and state statutes for the same activity. "[A] federal prosecution does not bar a subsequent state prosecution of the same person for the same acts . . ." *United States v. Wheeler*, 435 U.S. 313, 317 (1978). See notes 56-58 and accompanying text *infra*.

³³ *Folding Carton*, 465 F. Supp. at 621. See notes 25-26 and accompanying text *supra*.

³⁴ At the close of the criminal trial, the government stated that the "case involved the greatest number of defendants of any case in history which had ever been tried to a conclusion." *United States v. Consolidated Packaging Corp.*, 575 F.2d 117, 119 n.1 (7th Cir. 1978).

³⁵ *Folding Carton*, 465 F. Supp. 618, 622-23 (N.D. Ill. 1979).

³⁶ *Id.* at 622.

³⁷ *Id.*

inal prosecution. Moreover, the court asserted that the likelihood that a state would have the resources, time, and interest to initiate an investigation and prosecution to be "trifling" at best.³⁸

Fourth, the district court found that because five of the witnesses had previously given immunized testimony before the federal grand jury which had returned the original indictments, the prosecution was probably unable to indict and convict them.³⁹ Although a grant of immunity under federal statutes does not confer transactional immunity⁴⁰ and a person may still be prosecuted,⁴¹ courts have been careful to protect witnesses from impermissible "derivative use" of immunized testimony in subsequent prosecutions.⁴² A federal prosecutor would, therefore, be severely limited in his power to use testimony obtained in a previous civil proceeding.

Fifth, the district court found that remedial action could mini-

³⁸ *Id.* In *Marchetti v. United States*, 390 U.S. 39 (1968), the Court stated that "[t]he central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Id.* at 53.

³⁹ *Folding Carton*, 465 F. Supp. at 622-23.

⁴⁰ Transactional immunity guarantees that a witness will be free from prosecution for any act discussed in the compelled testimony. Federal immunity statutes at one time granted full transactional immunity. *See, e.g.*, Narcotic Control Act of 1956, Pub. L. No. 728, tit. II, § 201, 70 Stat. 574 (codified at 18 U.S.C. § 1406) (prior to 1970 repeal) which provided that "no . . . witness shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence" The Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. II, § 201(a), 84 Stat. 926 (codified at 18 U.S.C. §§ 6001-6005 (1976)), replaced transactional immunity with the narrower protection of use immunity. The use immunity proscribes the use or derivative use of the witness' compelled testimony; the government can still prosecute, but cannot use the testimony or any new evidence obtained from leads derived from the compelled testimony in a later prosecution. *See* note 42 and accompanying text *infra*.

⁴¹ *See, e.g.*, *Kastigar v. United States*, 406 U.S. 441 (1972); *United States v. Thanasouras*, 368 F. Supp. 534 (N.D. Ill. 1973).

⁴² "[N]o testimony . . . 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" 18 U.S.C. § 6002 (1976). In a later prosecution of a witness granted immunity, the government has the burden of proving "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar v. United States*, 406 U.S. 441, 460 (1972). *See, e.g.*, *United States v. Murzer*, 534 F.2d 511, 517 (2d Cir. 1976) (subsequent prosecution of an immunized grand jury witness for aiding and abetting the filing of fraudulent federal corporate income tax returns); *United States v. First Western State Bank*, 491 F.2d 780 (8th Cir.), *cert. denied*, 419 U.S. 825 (1974) (subsequent prosecution of an immunized grand jury witness for illegal campaign contributions); *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973) (convictions for embezzlement and misapportionment of funds vacated because the prosecutor had seen defendant's immunized testimony); *United States v. Dornau*, 359 F. Supp. 684 (S.D.N.Y. 1973) (indictments for fraud dismissed because the prosecutor read immunized testimony from bankruptcy proceedings).

mize the detrimental effect of incriminating testimony if a criminal prosecution were subsequently brought. The evidence could be suppressed in the criminal trial and could not be used directly in an ensuing criminal prosecution. The "use or derivative use of any incriminating testimony given in the compelled deposition answers in a subsequent criminal proceeding would be impermissible."⁴³ Moreover, the trial court asserted that it could place the deposition answers under seal until the time of trial and place them under protective order.⁴⁴

Under the "reasonable fear" test, as applied in *Folding Carton*, the completion of the massive criminal prosecution, the absence of any plans to investigate further, and the availability of remedial measures were sufficient to overcome the risk to the witness of self-incrimination and to override his Fifth Amendment privilege.

B. The "Possibility of Criminal Prosecution" Test

The determination of whether a defendant may be compelled to testify in a civil antitrust action does not necessarily require an assessment of the probability of prosecution. The Seventh Circuit Court of Appeals in *Folding Carton* applied an alternate test: when the possibility of criminal prosecution exists, one may not compel testimony.⁴⁵ To justify an assertion of the Fifth Amendment privilege under this test, the witness need only establish that two conditions are present. First, the court must find that the answer to the deposition question might indicate that the deponent was involved in criminal activities. The primary requirement is that the answer actually tends to incriminate.⁴⁶ Second, the court must find that a criminal prosecution is still possible.⁴⁷ Once any risk *at all* of prosecution is established, a deponent who has not been granted immunity may invoke the privilege.

Under this analysis, a careful weighing of risks, costs, and benefits becomes unnecessary. Only if one can prove that the deponent has a mere fanciful possibility of prosecution is an assertion of the privilege rejected under this test.⁴⁸ The burden, however,

⁴³ *Folding Carton*, 465 F. Supp. at 624.

⁴⁴ *Id.* at 624 n.5.

⁴⁵ *Folding Carton*, 609 F.2d at 871.

⁴⁶ See notes 25-29 and accompanying text *supra*.

⁴⁷ *Folding Carton*, 609 F.2d at 871.

⁴⁸ *Id.* ("only when there is but a fanciful possibility of prosecution that a claim of fifth amendment privilege is not well taken."); *In re Brogna*, 589 F.2d 24, 27 (1st Cir. 1978) (the issue is "whether there is a genuine rather than a spurious danger of self-incrimina-

remains on the witness to show that he is still exposed to criminal prosecution.⁴⁹ The constitutional right not to testify does not depend upon an uncertain and ambiguous judicial interpretation of the relative risk of criminal prosecution which the witness faces.⁵⁰ The "possibility of prosecution" test leaves the court a very limited degree of latitude. The test essentially demands that the court find a bar to subsequent prosecution in order to compel testimony after an assertion of Fifth Amendment privilege.

Assessing the probability of prosecution under the "possibility of prosecution" test is far simpler than under the "reasonable fear" test. The central issue becomes whether the statute of limitations,⁵¹ a grant of immunity,⁵² the prohibition against placing a person in double jeopardy,⁵³ or another bar has precluded criminal antitrust prosecution.⁵⁴

The conclusion of a large criminal investigation and prosecution was not sufficient for the Seventh Circuit in *Folding Carton* to deny the deponent his Fifth Amendment privilege.⁵⁵ Criminal liability could continue despite the conclusion of such an investigation. First, a state indictment could be filed and could cover any activity which occurred within the applicable statute of limitations.⁵⁶ Since discrepancies exist among state statutes of limitations,⁵⁷ it may be a very long time before all possibility of lia-

tion"); In re Master Key Litigation, 507 F.2d 292, 294 (9th Cir. 1973) ("[i]f the answers could possibly provide such a link [in the necessary chain of evidence], the witness may refuse to answer."); United States v. Seaver, 472 F.2d 607, 611 (6th Cir. 1973) (the privilege must be upheld if "the power . . . to prosecute . . . was not such an imaginary or unsubstantial contingency"); United States v. Goodman, 289 F.2d 256, 259 (4th Cir.), *vacated and rem'd on other grounds mem.*, 368 U.S. 14 (1961) (if . . . there remains no possibility that a prosecution . . . could result . . . he is not justified in refusing to answer.").

⁴⁹ "When a witness can demonstrate any possibility of prosecution which is more than fanciful he has demonstrated a reasonable fear of prosecution sufficient to meet constitutional muster." *Folding Carton*, 609 F.2d at 871.

⁵⁰ The right to assert the Fifth Amendment privilege "does not depend upon the likelihood, but upon the possibility of prosecution." In re Master Key Litigation, 507 F.2d 292, 293 (9th Cir. 1974) (emphasis in original).

⁵¹ See note 30 and accompanying text *supra*.

⁵² See note 31 and accompanying text *supra*.

⁵³ See note 32 and accompanying text *supra*.

⁵⁴ *Folding Carton*, 609 F.2d at 872.

⁵⁵ See generally *id.* at 870-72.

⁵⁶ A state statute may have a broader scope than federal antitrust laws. See, e.g., *State v. Mobil Oil Corp.*, 38 N.Y.2d 460, 484, 344 N.E.2d 357, 359 (1976), an antitrust action brought against an oil company for alleged price discrimination, in which the New York Court of Appeals accepted the argument that the state antitrust law, N.Y. GEN. BUS. LAW § 340 (McKinney 1968), had a wider sweep than the Sherman Act, 15 U.S.C. § 1 (1976).

⁵⁷ Compare CAL. BUS. & PROF. CODE § 16755(b) (Deering Supp. 1979) (four years) with

bility ends. Second, other federal and state charges arising out of the same facts but requiring an additional element of proof could be brought.⁵⁸ Furthermore, federal prosecutors could use the evidence to substantiate claims of a felony conspiracy or to bring a case concerning violations in product lines not included in the original indictment.⁵⁹ Third, tangential criminal charges which are ancillary to the main antitrust charge, e.g., mail fraud, could be brought.⁶⁰ Finally, the absence of pending grand jury proceedings does not foreclose the possibility of future prosecution.⁶¹ A criminal action could still be brought, even though a grand jury is not yet formed or has been formed and dissolved. The past and present behavior of prosecutorial authorities is not a sufficiently accurate indicator of the risk of criminal prosecution on which to base a decision to compel self-incriminating testimony under the "possibility of prosecution" test.

IV. THE PROPER RULE

Compulsory full disclosure in civil antitrust discovery when immunity from criminal prosecution has not been granted is inimical to the constitutional right to remain silent. Alternatives to the privilege against self-incrimination are unsatisfactory. Where statutory immunity is absent, the judiciary is unable to

COLO. REV. STAT. § 6-4-104 (1979) (six years). See also ILL. REV. STAT. ch. 38, § 60-6(2) (1977) (four years); MASS. ANN. LAWS ch. 93, § 9 (Mitchie/Law. Co-op 1975) (the statute is governed by the general six year limitations provision, MASS. ANN. LAWS ch. 277, § 63 (Mitchie/Law. Co-op 1975)); MICH. COMP. LAWS § 750.151 (1968) (the statute is governed by the general six year limitations provision, MICH. COMP. LAWS § 767.24 (1968)); N.Y. GEN. BUS. LAW § 341 (McKinney 1968) (three years); OHIO REV. CODE ANN. § 1331.12 (Page 1979) (no limitation); TEX. BUS. & COM. CODE ANN. tit. 2, § 1533 (Vernon 1968) (the statute is governed by the general three year limitations provision, TEX. CRIM. PRO. CODE ANN. § 1201 (Vernon 1977)).

⁵⁸ See, e.g., *Gore v. United States*, 357 U.S. 386 (1958), in which the Supreme Court held that a person may be convicted on three separate sections of federal law for a single sale of narcotics; *United States v. Fishbein*, 446 F.2d 1201 (9th Cir. 1971), in which the court held that a defendant who was convicted of conspiring to defraud in the sale of securities could be subsequently prosecuted for the substantive offenses relating to the same transaction; and *United States v. Miranti*, 253 F.2d 135 (2d Cir. 1958), in which the court allowed defendants who had been convicted of conspiring to obstruct justice to assert the Fifth Amendment privilege because of the possibility of future prosecution for the substantive crime. But see *Brown v. Ohio*, 432 U.S. 161, 170 (1977) (Brennan, J., concurring); *Ashe v. Swenson*, 397 U.S. 436, 448-60 (1970) (Brennan, J., concurring); *Krulewitch v. United States*, 336 U.S. 440, 445-58 (1949) (Jackson, J., concurring); *United States v. Vaught*, 434 F.2d 124, 125 (1970) (Ely, J., concurring).

⁵⁹ *Folding Carton*, 609 F.2d at 871.

⁶⁰ See *United States v. Fishbein*, 446 F.2d 1201 (9th Cir. 1971); *United States v. Miranti*, 253 F.2d 135 (2d Cir. 1958).

⁶¹ *Folding Carton*, 609 F.2d at 872 n.10; *In re Master Key Litigation*, 507 F.2d 292, 293 (9th Cir. 1974); *United States v. Miranti*, 253 F.2d 135 (2d Cir. 1958).

protect the witness from subsequent prosecution. If the possibility of prosecution remains, the Department of Justice policy and the double jeopardy provision afford the witness insufficient protection. Furthermore, adoption of an exclusionary rule would be an inadequate and unacceptable method of protecting the constitutional privilege against self-incrimination. In the balance, then, the Fifth Amendment right should prevail if immunity is absent and prosecution is still possible.

A. *Absence of Immunity*

Congress adopted the federal immunity statutes to provide an acceptable method to compel desired but possibly incriminating testimony by proscribing its subsequent use against the witness.⁶² The decision whether to grant immunity thus obviously depends on the value of the desired testimony.⁶³ A court's decision to demand testimony and then protect it under the "reasonable fear" test does not reflect a balancing of the public need for the testimony against the social cost of precluding the use of the testimony against the witness. Even if the court had discretion to protect a witness, which it does not,⁶⁴ under the "reasonable fear" test the court weighs the needs of the private plaintiffs for civil discovery against the probability of subsequent criminal prosecution. These are not the proper interests and considerations to weigh.

Furthermore, the decision to compel testimony despite the ab-

⁶² See *Kastigar v. United States*, 406 U.S. 441 (1972); Note, "The Public Has a Claim to Every Man's Evidence": The Defendant's Constitutional Right to Witness Immunity, 30 STAN. L. REV. 1211 (1978).

⁶³ In re Daley, 549 F.2d 469, 478-79 (7th Cir. 1977). The court stated:

[o]nce the bar of the privilege against self-incrimination has been raised by the witness, the decision whether to confer immunity in order to facilitate the government's investigation is the product of the balancing of the public need for the particular testimony or documentary information in question against the social cost of granting immunity and thereby precluding the possibility of criminally prosecuting an individual who has violated the criminal law.

⁶⁴ The power to grant immunity is not within the purview of a court; it is an executive function. This is appropriate because the prosecutor is in a better position to assess the relative benefits of immunized testimony and the need to prosecute. Thus, the decision to grant immunity to a witness is best left to the prosecutor. "[T]he relative importance of particular testimony to federal law enforcement interests is a judgmental rather than a legal determination, one remaining wholly within the competence of appropriate executive officials" In re Daley, 549 F.2d 469, 479 (7th Cir. 1977). See *Ryan v. Comm'r*, 568 F.2d 531, 540 (7th Cir. 1977); *Ellis v. United States*, 416 F.2d 791, 796-97 (D.C. Cir. 1969). The judicial decision to compel testimony under the "reasonable fear of criminal prosecution" test would reflect an analysis inconsistent with the criteria and principles appropriately used by prosecutorial agencies to determine whether to compel testimony through a grant of immunity from prosecution.

sence of immunity generally reflects the supposition that no use could be made of the compelled deposition testimony against the deponent in a criminal prosecution. While language in previous cases exists to support that position,⁶⁵ the principle espoused in those cases is nothing more than an application of the exclusionary rule against evidentiary use of information obtained in violation of a defendant's constitutional rights. The language in the cases and the exclusionary rule, however, clearly reflect the principle that evidence which stems from judicial error in application of the Fifth Amendment will be suppressed.⁶⁶ The principle is solely ameliorative, however, and is designed only to rectify *nunc pro tunc* a constitutional violation already committed.⁶⁷

B. *The Possibility of Prosecution*

In *Hoffman v. United States*,⁶⁸ the United States Supreme Court stated that to deny the Fifth Amendment privilege to a witness, it must be "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness who asserted the privilege is mistaken, and that the answer *cannot possibly* have such tendency to incriminate."⁶⁹ If criminal prosecution under the criminal antitrust statutes is legally possible, an individual should fall within the privilege. The "possibility of criminal prosecution" test in antitrust actions thus comports with the requirements of *Hoffman*.

The fact that the Department of Justice has already prosecuted an individual for a particular substantive crime provides scant protection from further prosecution.⁷⁰ Because the Depart-

⁶⁵ *Maness v. Meyers*, 419 U.S. 449, 474-75 (1975) (White, J., concurring); *Adams v. Maryland*, 347 U.S. 179, 181 (1954). See also *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 221-22 (1968).

⁶⁶ In *Maness v. Meyers*, 419 U.S. 449 (1975), the Court held that a lawyer is not subject to a contempt penalty for advising his client, during the trial of a civil case, to assert a Fifth Amendment privilege when he believed in good faith that the evidence might tend to incriminate his client. The Court concluded that suppression of the evidence in a subsequent criminal trial would provide inadequate protection of the Fifth Amendment privilege. *Id.* at 461-62.

Furthermore, the legal authority for such an exclusionary rule is predicated upon the assumption that it applies to judicial errors and not to systematic attempts to compel testimony. See *id.* at 474 (White, J., concurring). See also *Adams v. Maryland*, 347 U.S. 179, 181 (1954).

⁶⁷ See *Folding Carton*, 609 F.2d at 872 n.11. See also notes 74-84 and accompanying text *infra*.

⁶⁸ 341 U.S. 479 (1951).

⁶⁹ *Id.* at 486-87.

⁷⁰ Fifth Amendment protection should remain intact because subsequent criminal prosecutions may occur, despite a government policy of avoiding multiple actions against

ment's policy can be changed with executive discretion not subject to judicial review,⁷¹ its present policy of avoiding sequential prosecutions of the same individual is not a sufficient safeguard for an individual already convicted of a substantive crime who is then called to testify further about the same transaction. The status of current criminal prosecutions and plans to prosecute should not affect the decision whether to compel self-incriminating testimony.

Furthermore, the principle of double jeopardy does not prevent a first prosecution for the substantive offense and a subsequent prosecution for conspiracy to commit the substantive offense.⁷² The existence of a multiplicity of closely related federal and state crimes stemming from the same set of circumstances also diminishes the protection of the double jeopardy principle. For example, an individual could be prosecuted in a series of trials which concerned different product lines.⁷³ As a result, an individual should be afforded the Fifth Amendment privilege even though a prosecution has been completed. The possibility that disclosure *could* be incriminating and that prosecution may *yet* occur should be sufficient to allow invocation of the Fifth Amendment.

C. *The Exclusionary Rule*

As an alternative to giving a witness in a civil suit who faces possible criminal prosecution the full privilege, a court might compel the testimony but adopt an exclusionary rule, which would require the exclusion of the testimonial evidence in any subsequent criminal prosecution. This proposal, however, would be inadequate and unacceptable.

First, as the Seventh Circuit in *Folding Carton* recognized, ex-

the same individual. See *United States v. Leviton Mfg. Co.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,077 (D. Conn. 1978) and *United States v. Electric Fuse Mfrs. Guild*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (D. Mass. 1978), which concern the consecutive prosecutions of George Byrne, who is currently under yet another investigation. *Am. Metal Market*, May 21, 1979, at 1, col. 3.

⁷¹ *United States v. Seewald*, 450 F.2d 1159, 1164 (2d Cir. 1971) (Oakes, J., concurring). The government has the power to try several offenses which arise out of the same transaction, but it is not compelled to do so because of departmental policies. See *Petite v. United States*, 361 U.S. 529 (1960); *United States v. Williams*, 431 F.2d 1168, 1175 (5th Cir. 1970).

⁷² See, e.g., *United States v. Johnson*, 488 F.2d 1206, 1209 (1st Cir. 1973); *United States v. Fishbein*, 446 F.2d 1201, 1204-05 (9th Cir. 1971); *United States v. Chase*, 281 F.2d 225, 229 (7th Cir. 1960); *United States v. Miranti*, 253 F.2d 135, 138 (2d Cir. 1958); *United States v. Ward*, 314 F. Supp. 261, 263 (E.D. La. 1970).

⁷³ See note 59 and accompanying text *supra*.

clusion of the tainted evidence does *not* rectify the initial violation: "[t]he exclusionary rule is solely remedial and cannot be used as a rationale to support a judicial decision which contravenes the fifth amendment's protection."⁷⁴ The American judiciary should not adopt a policy which, in effect, deliberately violates an individual's constitutional rights and then promises simply that the worst aspect of the violation, the possibility that a criminal prosecution will be based on the evidence derived, will be subsequently prevented.⁷⁵ Such a policy would essentially have the courts condone and participate in the violation of constitutional rights, a rather anomalous and disconcerting result.⁷⁶

Second, a policy which allows compulsory testimony in the civil antitrust litigation and adopts an exclusionary rule for criminal proceedings eviscerates the central value of the privilege to the individual. The purpose of the Fifth Amendment is to ensure that an individual would not be required to produce evidence for the governmental machinery which is used to enforce federal criminal antitrust laws against him.⁷⁷ Assurances that the

⁷⁴ *Folding Carton*, 609 F.2d at 872 n.11.

⁷⁵ Systematic violation of the privilege against self-incrimination presents both the individual and society with an unacceptable policy. In *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964), the Court summarized the policy of the privilege:

The privilege against self-incrimination "registers an important advance in the development of our liberty — 'one of the great landmarks in man's struggle to make himself civilized.'" It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load"; our respect for the inviolability of human personality and of the right of each individual "to a private enclave where he may lead a private life"; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Id. at 55 (citations omitted). See E. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 7-9, 61, 75 (1955).

⁷⁶ This argument necessarily assumes either that the act of compulsion itself is prohibited, see *Counselman v. Hitchcock*, 142 U.S. 547 (1892), or that evidence from the compelled testimony will be used in some way by the prosecutor. See text accompanying notes 82-84 *infra*.

Active participation by the courts in compelling a person to testify against himself undermines the integrity of the judicial system. In *Tehan v. Shott*, 382 U.S. 406 (1966), which concerned a violation of a state securities law, the Court asserted that "the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.'" *Id.* at 415.

⁷⁷ See note 14 and accompanying text *supra*.

specific testimony being compelled in a civil trial will not be used in subsequent criminal proceedings is not a sufficient protection. The individual is still compelled to testify publicly as to his criminal activities.

Third, as a practical matter, the adoption of a federal rule of criminal procedure which excluded self-incriminating evidence compelled in a civil antitrust trial would be an inferior substitute for the broad scope of the privilege against self-incrimination. The most difficult practical problem is the multiplicity of antitrust statutes under which a violator may be prosecuted.⁷⁸ The national scope of American business and the attendant national scope of the effects of antitrust violations mean that an individual violator may be subject to criminal prosecution in numerous state jurisdictions.⁷⁹ Adoption of a federal exclusionary rule might ameliorate the problems of admissions of evidence in federal court, but would not provide protection from actions in state courts under state antitrust laws. In *Folding Carton*, the Seventh Circuit emphasized that the Fifth Amendment privilege had to be upheld since the statute of limitations had not run in all states.⁸⁰ A similar argument could be made if the proposed exclusionary rule were not adopted in all jurisdictions.⁸¹

Finally, even if the evidence compelled in a civil action could be fully excluded from subsequent prosecutions based on that evidence, it would still be known to criminal prosecutors. Though the testimony itself would be inadmissible, knowledge of the testimony might prove to be very useful to the government. In tangentially related criminal antitrust proceedings, such as crimes of conspiracy and mail fraud,⁸² the compelled testimony from the civil proceeding may provide fresh ideas, theories, or starting points for the prosecution.⁸³ The only recourse after tes-

⁷⁸ See notes 6-9 and accompanying text *supra*.

⁷⁹ See notes 56-57 and accompanying text *supra*.

⁸⁰ *Folding Carton*, 609 F.2d at 871 & 871 n.8.

⁸¹ Unlike a grant of statutory immunity which precludes prosecution in all jurisdictions, *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79-80 (1964), a federal exclusionary rule would not apply to the states and would create an untenable trilemma for the civil antitrust defendant: to refuse to testify and face sanctions for contempt, to commit perjury, or to testify and risk providing self-incriminating evidence in subsequent criminal antitrust prosecutions at the state level.

⁸² See notes 59-60 and accompanying text *supra*.

⁸³ In *Blau v. United States*, 340 U.S. 159 (1950), which concerned a witness' assertion of the privilege before a grand jury, the Court recognized the risk of providing criminal prosecutors with leads:

Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner Prior decisions of this Court have clearly established that under

timony has been wrongfully compelled is to suppress any evidence which stems from the violation.⁸⁴

CONCLUSION

The manifold increase in civil and criminal antitrust proceedings instituted today has escalated the level of problems and uncertainty with which antitrust violators must cope. But constitutional rights must be protected. The Fifth Amendment privilege against self-incrimination has been a particularly troublesome area in which ambiguity should not be tolerated. Once a civil antitrust proceeding has been initiated, the possibility of criminal liability remains until a legal bar — the statute of limitations, a grant of immunity, or double jeopardy — has arisen. In order to ensure that an individual receives complete protection of his constitutional rights, it is imperative that he not be compelled to testify against himself if the possibility of criminal prosecution remains. The constitutional privilege against self-incrimination should not depend upon a trial court's calculus of the risk of criminal proceedings, since the court cannot be sure that prosecution will not occur until an absolute bar has been imposed. Moreover, the court probably cannot completely prevent the subsequent use of the compelled testimony under current law. The best response is simply to allow the defendant to invoke the Fifth Amendment privilege in the civil suit. Tinkering with the rules of criminal procedure would be, at best, an incomplete and unsatisfactory response. The privilege against self-incrimination requires vigilant and careful protection; the vindication of constitutional rights deserves no less.

—David D. Gregg

such circumstances, the Constitution gives a witness the privilege of remaining silent.

Id. at 161. See also *Gulf Oil Corp. v. Tug Kate Mulloy*, 291 F. Supp. 816, 818 (E.D. La. 1968); *In re Commonwealth Financial Corp.*, 288 F. Supp. 786, 789 (E.D. Pa. 1968), *aff'd*, 408 F.2d 640 (3d Cir.), *cert. denied*, 395 U.S. 961 (1969).

⁸⁴ In *Maness v. Meyers*, 419 U.S. 449 (1975), a prosecutor attempted to subpoena materials in a civil proceeding which might have been used in a criminal prosecution. The Court observed:

[T]he City Attorney argued that if petitioner's client produced the magazines he was amply protected because in any ensuing criminal action he could always move to suppress, or object on Fifth Amendment grounds to the introduction of the magazines into evidence. Laying to one side possible waiver problems that might arise if the witness followed that course, *cf. Rogers v. United States*, 340 U.S. 367 (1951), we nevertheless cannot conclude that it would afford adequate protection. Without something more "he would be compelled to surrender the very protection which the privilege is designed to guarantee."

Id. at 461-62 (footnotes omitted).

