

## IMMUNITY THROUGH REPORTING OIL SPILLS — A SAFE HARBOR, OR JUST THE TIP OF AN ICEBERG?

For five years after the *Exxon Valdez* disaster,<sup>1</sup> Alaska courts grappled with the issues surrounding the prosecution of the ship's captain, Joseph J. Hazelwood,<sup>2</sup> which occurred as a result of the events on the night of March 24, 1989.<sup>3</sup> An Alaskan trial court convicted

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1. Shortly after midnight on March 24, 1989, the *Exxon Valdez*, an oil tanker operated by Exxon Shipping Company, ran aground on Bligh Reef off the coast of Alaska and leaked an estimated 240,000 barrels of crude oil in the Pacific Ocean. ART DAVIDSON, *IN THE WAKE OF THE EXXON VALDEZ: THE DEVASTATING IMPACT OF THE ALASKA OIL SPILL* 37 (1990). Only three hours after the wreck, 138,000 barrels had already been lost and 20,000 barrels were escaping every hour. *Id.* at 22. By 5:30 p.m. that evening, the oil slick had spread over more than 18 square miles. *Id.* at 29.

2. Even a year after the disaster, "Joseph Hazelwood was widely viewed as America's Environmental Enemy No. 1." Paul A. Witteman, *First Mess Up, Then Mop Up: Hazelwood is Ordered to Help Cleanse Alaska's Shoreline*, *TIME*, Apr. 2, 1990, at 22. Hazelwood has also been described as "the most clear-cut villain in what may be the country's worst environmental disaster." George Hackett, *Environmental Politics*, *NEWSWEEK*, Apr. 17, 1989, at 18.

3. In addition to the criminal prosecution of Hazelwood, five criminal counts were filed against Exxon, and over 150 civil complaints against both Hazelwood and Exxon. Alain L. Sanders, *Battling Crimes Against Nature: The Exxon Indictment Spotlights a Rapidly Growing Legal Field*, *TIME*, March 12, 1990, at 54.

One commentator suggests that the Valdez tragedy actually began on Long Island, New York where, in 1985, Captain Joseph Hazelwood was convicted of drunken driving. George J. Church, *The Big Spill: Bred from Complacency, the Valdez Fiasco Goes from Bad to Worse to Worst Possible*, *TIME*, Apr. 10, 1989, at 38, 39. Part of the tragedy is that Hazelwood had a history of convictions for driving while intoxicated. *Id.* Although Hazelwood informed Exxon about his drinking problem, and eventually lost his license to

Hazelwood of criminally negligent discharge of oil.<sup>4</sup> The Alaska Court of Appeals reversed the conviction,<sup>5</sup> ruling that the statutory reporting requirements of the Federal Water Pollution Control Act (Clean Water Act) granted Hazelwood immunity because he reported the accident.<sup>6</sup>

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drive a car, he nevertheless retained his license to command an oil tanker. *Id.*

4. *State v. Hazelwood*, Nos. 3AN-S89-7217, -7218 Cr. (Mar. 23, 1990). Hazelwood was also charged with but acquitted of criminal mischief in the second degree, reckless endangerment, and operating a watercraft while intoxicated. Appellee's Brief at 6, *Hazelwood v. State*, 836 P.2d 943 (Alaska Ct. App. 1992), *rev'd*, 866 P.2d 827 (Alaska 1993) (No. A-2A52). After deliberating for just 10 1/2 hours, the jury convicted Hazelwood of negligent discharge of petroleum, a misdemeanor. He was given a suspended jail sentence, ordered to perform 1,000 hours of community service in the cleanup effort, and pay \$50,000 to the state of Alaska. *Acquitted*, NEWSWEEK, Apr. 2, 1990, at 61.

5. *Hazelwood v. State*, 836 P.2d 943, 954 (Alaska Ct. App. 1992). The court of appeals "acknowledged that its decision was likely to be 'a bitter pill for many Alaskans to swallow.'" *Fall of the Mighty*, TIME, July 20, 1992, at 15. As one commentator pointed out, the magnitude of the *Valdez* spill may have permanently shattered the belief held by most Alaskans that "the two Alaskas — one wild and the other industrial — could exist in harmony." Michael D. Lemonick, *The Two Alaskas*, TIME, April 17, 1989, at 56.

Very strong feelings guided the *Hazelwood* decisions. For example, when Hazelwood first surrendered, he was held on \$1 million bail, a figure 40 times higher than prosecutors had recommended. *Id.* at 58. On appeal, however, bail was reduced to \$25,000. *Id.* Ironically, most of Alaska's history has not been dominated by the conservation ethic. *Id.* Almost from the time it was discovered in 1741 by Vitus Berring, Alaska was seen as a land to be exploited for all it was worth. *Id.* at 59. Its initial lure was fur, and later whaling, timber, and fishing. *Id.* In 1969, when the state held an auction for oil-drilling leases, it suddenly found itself \$900 million richer. *Id.* "Now, regardless of whether it causes permanent damage, the *Exxon Valdez* spill could tip the balance of power toward environmentalists." *Id.* at 63.

6. The Clean Water Act contains both a reporting requirement and a subsequent grant of immunity. At the time of the *Exxon Valdez* oil spill, the Act provided:

Any person in charge of a vessel . . . shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel . . . , immediately notify the appropriate agency of the United States Government of such discharge . . . . Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

33 U.S.C. § 1321(b)(5) (1988) (emphasis added). The Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (codified in scattered sections of 14, 26, 33, 43, and 46 U.S.C.), modified the grant of immunity. Specifically, the Oil Pollution Act deleted the phrase "or information obtained by the exploitation of such notification" from the grant of immunity. See 33 U.S.C. § 1321 (b)(5) (Supp. II 1991).

Alaska state law provides a similar reporting requirement for oil spills. ALASKA STAT. § 46.03.755(a) (1991); ALASKA ADMIN. CODE tit. 18, §§ 75.300-75.307 (Jan. 1993). Alaska immunity provides as follows:

In any criminal action for the discharge, information given under § 18 AAC 75.300-

In effect, the court of appeals prohibited any prosecution that used evidence from Hazelwood's required report of the spill. The Supreme Court of Alaska reversed the court of appeals and held that the Clean Water Act's immunity provision should be read more narrowly.<sup>7</sup> In reaching its decision, Alaska's highest court determined that the State could prosecute by invoking the independent source<sup>8</sup> and inevitable discovery<sup>9</sup> exceptions to the exclusion of evidence under the Act's grant of immunity.<sup>10</sup>

In its present form, the Clean Water Act is silent as to what, if any, exceptions apply to its grant of immunity. However, by marginalizing the grant of immunity extended by the Act, decisions like the Supreme Court of Alaska's *Hazelwood* decision undercut the Act's goal of encouraging timely notification to government officials of hazardous discharges into the nation's waterways.<sup>11</sup> Accordingly, this Note proposes an amendment to the Clean Water Act to prohibit the use of reports of discharges in criminal prosecutions unless the government can show, with clear and convincing evidence, that it discovered the discharge through a pre-existing independent source.

Part I of this Note describes the circumstances surrounding the catastrophic 1989 oil spill and the spill's ongoing environmental impact. Part II discusses and analyzes the Clean Water Act's reporting requirement and the resulting grant of immunity within the context of the Fifth Amendment privilege against self-incrimination. Part III then provides a detailed look at current exceptions to grants of immunity in other areas of constitutional and criminal law. Part IV analyzes and discusses the decisions of the Alaska courts in the *Hazelwood* case. Finally, Part V proposes a statutory amendment for federal and state Clean Water Acts that clarifies immunity for reporting pollutant discharges and promotes the Acts' goal of prompt reporting and containment of spills.

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18 AAC 75.307, or information directly obtained through the exploitation of a notification or report regarding the discharge will not be used against any natural person who provides the notification or report.

ALASKA ADMIN. CODE tit. 18, § 75.370 (Jan. 1993).

7. *State v. Hazelwood*, 866 P.2d 827 (Alaska 1993).

8. See *infra* part III.A for a discussion of the independent source exception.

9. See *infra* part III.B for a discussion of the inevitable discovery doctrine.

10. *State v. Hazelwood*, 866 P.2d 827, 831, 834 (Alaska 1993).

11. See *infra* notes 122-24, 131-32 and accompanying text (discussing the purpose of the Clean Water Act's reporting requirement).

## I. THE SPILL

The *Exxon Valdez*<sup>12</sup> ran onto Bligh Reef while trying to sail Southbound out of Prince William Sound and into the Pacific Ocean.<sup>13</sup> Before running aground, Captain Hazelwood ordered risky maneuvers to avoid floating chunks of ice, including crossing a Northbound shipping channel and venturing into shallow waters.<sup>14</sup> After the ship ran aground, Captain Hazelwood attempted, for fifteen minutes, to force the tanker ahead and free from the reef.<sup>15</sup> Although it was too dark for Hazelwood to see, he could smell the crude oil in the air.<sup>16</sup> Hazelwood verified that the ship was losing oil by checking the control room gauges.<sup>17</sup> Finally, twenty-three minutes after running onto the reef, Hazelwood radioed the Coast Guard traffic control in Valdez, Alaska to report the spill.<sup>18</sup>

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12. The tanker returned to service in August 1990, after repairs, shipping oil from Turkey and Egypt to France and Italy under the name "*Exxon Mediterranean*." *California: Adios, Exxon Valdez*, TIME, July 16, 1990, at 28.

13. DAVIDSON, *supra* note 1, at 14-18. The ship's "hull was ripped open in eight places, sending oil surging into the water in waves that broke as high as two feet on the surface." Jerry Adler, *Alaska After Exxon*, NEWSWEEK, Sept. 18, 1989, at 50, 59.

14. DAVIDSON, *supra* note 1, at 13.

15. DAVIDSON, *supra* note 1, at 18. After the grounding, Hazelwood "ordered engines full speed ahead and began swinging the rudder back and forth. According to his lawyers, Hazelwood was trying to 'fasten' the ship to the reef to avoid the danger of capsizing. Yet the transcripts of his radio messages to the Coast Guard indicate the opposite — that he was trying to get off the reef." Adler, *supra* note 13, at 60. The Coast Guard believed that "if he had succeeded . . . the *Exxon Valdez* would probably have sunk — along with an additional 40 million gallons of [oil]." George Hackett, *They'll Never Get It All*, NEWSWEEK, May 8, 1989, at 25, 26 [hereinafter Hackett, *Never Get It All*]. Nonetheless, the ship's repairers were "amazed that Captain Joseph Hazelwood and his crew kept the tanker from sinking after it ripped into [the reef]." *Grapevine*, TIME, Dec. 4, 1989, at 48. An executive at the shipbuilding company remarked that "only the 'incredible seamanship' of the Valdez crew prevented the spill from being much worse . . . . Imagine an oil spill not of 11 million gallons but 60 million." *Id.*

16. DAVIDSON, *supra* note 1, at 18.

17. *Id.*

18. *Id.* After remarking to his Chief Mate James Kunkel, "I guess this is one way to end your career," *id.*, Hazelwood made the following report over the radio to the Coast Guard:

HAZELWOOD: Yeah, it's *Valdez* back. We should be on your radar there. We've fetched up, run aground north of Goose Island around Bligh Reef. And evidently we're leaking some oil. And we're going to be here for awhile. And if you want to say you're notified. Over.

Although it is important to control and to facilitate the quick clean-up of any oil spill or leaked hazardous material, major administrative mistakes and delays compounded this spill's effects.<sup>19</sup> As a result, the spill destroyed not only ocean life, but also the livelihood of many fishermen and native Alaskan villagers as well.<sup>20</sup> Although the immediate effects on the wildlife became apparent soon after the incident,<sup>21</sup> the long-term effects will continue to surface for at least a

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TRAFFIC VALDEZ: *Exxon Valdez*, Valdez Traffic, roger. Are you just about a mile north of Bligh Reef?

HAZELWOOD: Yeah, that's correct. Over.

TRAFFIC VALDEZ: Roger that.

HAZELWOOD: Okay. We'll give you the status report as to the changing situation. Over.

TRAFFIC VALDEZ: Standing by.

*Id.* at 19.

19. "Everything that could go wrong did; everyone involved, including the Alaska state government and the U.S. Coast Guard, made damaging errors." Church, *supra* note 3, at 39. "The fiasco resulted from a confluence of breakdowns, both individual and organizational. . . . Sharp cuts in the size of the tanker's crew had left the Valdez shorthanded, contributing to fatigue that may have helped cause the accident. . . . [A]lthough seamen insist they rely heavily on Coast Guard monitoring in the entire sound, Coast Guard officials maintain they are *not technically required* to track ships as far as Bligh Reef." Richard Behar, *Joe's Bad Trip*, TIME, July 24, 1989, at 42, 43 (emphasis added). "Some oil-industry experts have alleged that Exxon's sluggish initial response to the Alaskan accident was partly the result of another corporate lapse: The reduction of its spill-management staff during the cost cutting in the mid-1980's. The company lost nine of its top environmental and spill-control officers." Barbara Rudolph, *An Oil Slick Trips Up Exxon*, TIME, Apr. 24, 1989, at 46. "With manpower cuts, crewmen work as much as 24 hours of overtime a week. Hazelwood was left in command despite his history of drinking problems. Said Alaska state investigator Robert LeResche: 'My sincere feeling is that (the reason for the accident) wasn't incompetence on the bridge, it was Larry, Moe and Curly in the Exxon boardroom.'" Jerry Adler, *One Way to End a Career*, NEWSWEEK, May 29, 1989, at 52.

"Despite the efforts of nearly 7,600 workmen, more than 700 miles of coastline remain[ed] polluted eight weeks after the spill." Barbara Rudolph, *Nowhere to Run or to Hide: Exxon's Chairman Gets a Grilling at a Shareholder Meeting*, TIME, May 29, 1989, at 69. While "Exxon and state officials [were] blaming one another for [delays]," Sharon Begley, *Smothering the Waters*, NEWSWEEK, Apr. 10, 1989, at 54, three Alaskan fishermen, "tired of Exxon's delays, took to the water on rubber rafts. Armed only with buckets and scoops, they recovered 5,500 gallons of crude. 'Nothing could be easier,' [said one fisherman], wondering why Exxon didn't switch to the low-tech method when its motorized skimmers began to jam on the sticky sludge." Hackett, *Never Get it All*, *supra* note 15, at 25, 26.

20. See DAVIDSON, *supra* note 1, at 290-92.

21. The following is a summary from about six months after the disaster:  
Oil spilled: 20,836,000 gallons

generation.<sup>22</sup> While most experts agree that the environment off the coast of Alaska can repair itself naturally,<sup>23</sup> the abstract injury inflicted is a loss of the wilderness value of an area once pristine.<sup>24</sup>

## II. THE CLEAN WATER ACT'S CRIMINAL PROVISIONS AND THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

### A. *The Clean Water Act*

Congress passed the Clean Water Act to improve and maintain the nation's water quality.<sup>25</sup> The Act imposes civil and criminal penalties

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Shoreline contaminated by oil: 1,090 miles  
Shoreline treated by Exxon: 1,087 miles  
Shoreline still needing cleaning, according to Alaska: At least 1,000 miles  
Number of dead birds: 33,126 (138 were eagles)  
Number of dead otters: 980  
Cost of cleanup to Exxon: \$1.28 billion (after-tax cost)  
People involved in the cleanup: 12,000  
Oil recovered: 2,604,000 gallons (est.)  
Waste from oil cleanup: 24,000 tons

Adler, *supra* note 13, at 55.

22. Of course the actual effects depend on exactly who you ask. In order to report a neutral summary of the spill's impact, a *Newsweek* team of correspondents concluded that, as of September 1989, the incident "has not been an environmental apocalypse: thousands of creatures have needlessly died and vast stretches of wild land have been defaced, but the food chain has survived." Adler, *supra* note 13, at 51. Although "Exxon claimed in March that the 'plant, animal and sea life are healthy and abundant, the water is clean and the area is well on its way to a robust recovery,' . . . the National Oceanic and Atmospheric Administration released a synopsis of some findings. They concluded that environmental damage was more lethal and pervasive than Exxon claimed . . . Economists put the damage at \$3 billion to \$5 billion." Sharon Begley, *One Deal that Was Too Good for Exxon*, NEWSWEEK, May 6, 1991, at 54 [hereinafter Begley, *One Deal*]. About 90% of the oil spilled escapes recovery and "turns into a thick black gunk that eventually sinks to the bottom." Church, *supra* note 3, at 38.

23. See DAVIDSON, *supra* note 1, at 293.

24. DAVIDSON, *supra* note 1, at 295-96.

25. Congress explained that "[t]he objective of [the Clean Water Act] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1988). Courts construe the Clean Water Act as a comprehensive regulatory scheme intended by Congress to override pre-existing federal common laws. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). States, however, can impose regulations on discharge into water that are more stringent than the federal standards. See *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (recognizing that the Clean Water Act allows source states to "require discharge limitations more stringent than those required by the Federal Government." (citing 40 C.F.R. § 122.1(f) (1986))).

After the *Exxon Valdez* disaster, Congress passed the Oil Pollution Act of 1990, which

for both negligent and intentional violations of its enforcement provisions.<sup>26</sup> To further the Act's goals, it also imposes a reporting requirement<sup>27</sup> on those persons in charge of operations who have information about the discharge into navigable waters<sup>28</sup> of oil or other hazardous substances<sup>29</sup> from a point source.<sup>30</sup> The reporting requirement is

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imposes civil liability on owners of vessels for cleanup of oil spills, creates a fund to pay for response costs, and sets minimum design standards for vessels meant to prevent spills. Pub. L. No. 101-380, 104 Stat. 484 (1990) (codified in scattered sections of 14, 26, 33, 43, and 46 U.S.C.).

26. 33 U.S.C. § 1319(c) (1988 & Supp. II 1990).

27. 33 U.S.C. § 1321(b)(5) (Supp. II 1990); *see supra* note 6 (quoting the immunity provision and the reporting requirement). Although it is general, the requirement survived a vagueness challenge because persons in charge are adequately ordered "promptly to notify a governmental agency concerned with navigable waters or environmental protection" of a discharge of oil or hazardous substances. *United States v. Kennecott Copper Corp.*, 523 F.2d 821, 823 (9th Cir. 1975).

28. The "navigable waters" language of the Act has been defined broadly by Congress to mean "the waters of the United States including the territorial seas." 33 U.S.C. § 1362(7) (1988). The U.S. Supreme Court held that Congress meant to extend federal regulation of water pollution as far as its constitutional authority to regulate interstate commerce would allow, so that almost all surface water falls under the Act. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

29. 33 U.S.C. § 1321(b)(5) (Supp. II 1990). Although oil is clearly included in the Act, hazardous substances must be specifically designated by the EPA. *United States v. Ohio Barge Lines*, 410 F. Supp. 625, 628 (W.D. La. 1975), *aff'd*, 531 F.2d 574 (5th Cir. 1976).

The EPA promulgated a "sheen test" for determining if a discharge of oil consists of "harmful quantities." *See Chevron U.S.A., Inc. v. Yost*, 919 F.2d 27, 29-30 (5th Cir. 1990) (holding that, based on a need for administrative ease, the EPA can forbid spills violating the sheen test regardless of whether the spills cause actual harm), *reh'g denied*, 925 F.2d 1461 (5th Cir. 1991); *see also United States v. Boyd*, 491 F.2d 1163, 1169 (9th Cir. 1973) (allowing the government to use the "sheen test" to show a "harmful quantity" due to its simplicity of application). Scientists debate the exact effects of oil spills, and the EPA Science Advisory Board concluded that some oil spills, although of great concern to the public, actually do not present high risks to human health or the environment. EPA SCIENCE ADVISORY BOARD, REDUCING RISK: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION (1990).

30. Congress defined a point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, . . . or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (1988) (emphasis added); *see United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979) (explaining that by "point source" Congress meant to incorporate the broadest possible definition including any identifiable conveyance from which pollutants enter navigable waters).

fortified with criminal penalties for failing to report<sup>31</sup> that are significantly greater than those for the negligent discharge of the oil itself.<sup>32</sup>

The Clean Water Act imposes criminal sanctions for the negligent, unlawful discharge of oil into navigable waters.<sup>33</sup> Other environmental crimes contain no intent requirement,<sup>34</sup> and hold persons or corporations

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31. The reporting requirement provides: "[Any person in charge] who fails to notify immediately [the appropriate Federal agency] of such discharge shall, upon conviction, be fined . . . or imprisoned for not more than 5 years, or both." 33 U.S.C. § 1321(b)(5) (Supp. II 1990).

32. The negligent discharge penalty section states: "Any person who . . . negligently [violates the prohibition against discharging oil into or upon navigable waters] . . . shall be punished by a fine for not more than 1 year, . . . or by imprisonment, or by both." 33 U.S.C. § 1319(c)(1) (Supp. II 1990).

33. 33 U.S.C. § 1319(c)(1) (1988). Similar regulatory offenses contain the same culpability standard. See *Gregory v. State*, 717 P.2d 428, 431 (Alaska Ct. App. 1986) (holding that at least criminal negligence must be found before a person can be convicted of an offense with "severe minimum penalties"); *Reynolds v. State*, 655 P.2d 1313 (Alaska Ct. App. 1982) (holding that criminal penalties for net fishing in restricted waters must be based on at least a finding of negligence).

34. Traditionally, successful criminal prosecutions required a *mens rea* or scienter element. See *Morisette v. United States*, 342 U.S. 246 (1952) (affirming the belief that scienter, criminal intent, is ordinarily needed for a criminal conviction even if an intent requirement is omitted from the definition of the crime).

However, the legislature may define the mental state required for the completion of a crime. *United States v. Balint*, 258 U.S. 250, 252 (1922) (noting that whether scienter is a necessary element of an offense is a question of legislative intent). Knowledge of regulations has not typically been a requirement for crimes described as public welfare offenses. See *United States v. Park*, 421 U.S. 658 (1975) (holding proof of evil intent unnecessary to find a criminal violation of health and safety regulations); *United States v. Dotterweich*, 320 U.S. 277 (1943) ("[Health and safety] legislation dispenses with the conventional requirement for criminal conduct — awareness of some wrongdoing.").

Courts have presumed that persons or corporations disposing of hazardous wastes know of all of the regulatory provisions that apply to such conduct. See *United States v. International Minerals & Chems. Corp.*, 402 U.S. 558, 565 (1971) (holding that handlers of dangerous devices and substances must be presumed to be aware of the applicable regulations); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1504 (11th Cir. 1986) (presuming that those who generate and dispose of hazardous wastes are aware of all relevant regulatory provisions).

Programs have even been instituted that set up incentives for the reporting of information that leads to the arrest and conviction under environmental laws. See *EPA Issues Rule to Reward Citizens Who Give Information on CERCLA Violations*, 19 Env't Rep. (BNA) 45 (May 6, 1988) (describing the federal rule rewarding up to \$10,000 for such information). The Clean Water Act allows private citizen suits to enforce violations of the Act or of discharge permits granted pursuant to the Act. 33 U.S.C. § 1365 (1988). The Act also protects whistle-blowing employees of violators of the Act. 33 U.S.C. § 1367 (1988). See generally Jeffrey G. Miller, *Private Enforcement of Federal Pollution*

strictly liable for their harmful acts.<sup>35</sup> The degree to which environmental criminal sanctions further the goals of legislation like the Clean Water Act is unclear.<sup>36</sup> One commentator believes that criminal convictions for environmental wrongs are not efficient because civil remedies recover clean-up costs and more effectively deter violations.<sup>37</sup> Moreover, criminal convictions of corporations can only result in criminal fines, because the corporation as an entity cannot be imprisoned.<sup>38</sup>

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*Control Laws*, Part III, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10407 (1984) (discussing the Clean Water Act's citizen suit framework).

35. See, e.g., *United States v. Ashland Oil, Inc.*, 705 F. Supp. 270, 276 (W.D. Pa. 1989) (noting that the Refuse Act, 33 U.S.C. §§ 411, 407 (1988), is a strict liability statute).

36. Environmental crime is one of the many growing areas of criminal law. "One of the splashiest growth areas [is] . . . criminal environmental law. The Justice Department now has 20 full-time lawyers working on such prosecutions, backed up by U.S. attorneys and FBI agents across the nation, plus 50 criminal investigators at the Environmental Protection Agency." Sanders, *supra* note 3, at 54. See generally F. Henry Habicht II, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 ENVTL. L. 10478 (1987) (describing the increasing federal environmental enforcement efforts); Sarah D. Himmelhoch, *Environmental Crimes: Recent Efforts to Develop a Role for Traditional Criminal Law in the Environmental Protection Effort*, 22 ENVTL. L. 1469 (1992) (considering the effectiveness of adding criminal penalties to environmental regulations); Roger J. Marzulla & Brett G. Kappel, *Nowhere to Run, Nowhere to Hide: Criminal Liability for Violations of Environmental Statutes in the 1990s*, 16 COLUM. J. ENVTL. L. 201 (1991) (reviewing criminal enforcement policies of the various environmental statutes); Edward F. Novak & Charles W. Steese, *Survey of Federal and State Environmental Crime Legislation*, 34 ARIZ. L. REV. 571 (1992) (analyzing the broad scope of environmental crime statutes).

37. Sharaona Hoffman, *Criminal Sanctions in Accidental Oil Spill Cases - Punishment Without a Crime*, 71 NEB. L. REV. 1033, 1036 (1992). But see Larry D. Wynne, *A Case for Criminal Enforcement of Federal Environmental Law*, 38 NAVAL L. REV. 105 (1989) (advocating strict criminal enforcement as the best deterrent to environmental destruction).

38. For example, during *Hazelwood*, Judge H. Russel Holland rejected a settlement agreement requiring Exxon to pay over \$1 billion to settle federal and state civil charges. Judge Holland wrote that the fines, the largest ever proposed for environmental crime, "do not adequately achieve deterrence [and] . . . that spills are a cost of business that can be absorbed." Begley, *One Deal*, *supra* note 22, at 54.

Exxon's annual report for 1989 contained the following conclusion about the effects of the spill on the oil company's financial condition: "It is believed that the ultimate outcome . . . will not have a materially adverse effect upon the corporation's operations or financial condition." Exxon Corp. Annual Report, Dec. 31, 1989, at 15 n.14 available in LEXIS, Corp. Library, ARS File. Exxon's total sales for 1989 alone were over \$96 billion, and its net income was over \$3.5 billion. *Id.* at 1.

### B. *Immunity, The Reporting Requirement, and the Privilege Against Self-Incrimination*

Accompanying the Clean Water Act's reporting requirement is a grant of immunity for those who report discharges.<sup>39</sup> But for the subsequent grant of immunity from prosecutorial use of this information, the statute's reporting requirement would violate the Fifth Amendment privilege against self-incrimination.<sup>40</sup> To evaluate the scope of the Act's immunity provision, it is necessary to examine current Fifth Amendment law.

The Fifth Amendment to the United States Constitution protects a witness from being compelled to disclose self-incriminating information.<sup>41</sup> At times, the privilege must yield to compelling interests, like the need to control hazardous substances.<sup>42</sup> The privilege may be

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39. The section provides that "[n]otification received pursuant to this paragraph *shall not be used against any such natural person in any criminal case . . .*" 33 U.S.C. § 1321(b)(5) (Supp. II 1990) (emphasis added).

40. The Fifth Amendment to the United States Constitution provides: "No person shall be . . . compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V. Article I, section 9, of the Alaska Constitution provides: "No person shall be put in jeopardy twice for the same offense. *No person shall be compelled in any criminal proceeding to be a witness against himself.*" ALASKA CONST. art. I, § 9 (emphasis added).

Notwithstanding the Constitution of the United States of America, one author has diluted the issues of immunity discussed herein by stating "Captain Joseph Hazelwood's attorneys argued that he was immune to prosecution because of *an obscure law designed to protect ship captains who report accidents.*" DAVIDSON, *supra* note 1, at 118 (emphasis added). Furthermore, the Fifth Amendment applies to the states through the Fourteenth Amendment and the theory of incorporation. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

The privilege, however, applies only to natural persons and not to corporate entities. *George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 288-89 (1968). Corporations are "persons in charge" under the Act, and must notify the Coast Guard, or appropriate agency, upon discovering an illegal discharge of oil. *United States v. Hougland Barge Line, Inc.*, 387 F. Supp. 1110, 1113 (W.D. Pa. 1974); *cf. United States v. Reynolds Metals Co.*, 359 F. Supp. 338 (S.D. Texas 1973) (holding that the owner of a corporation is a "person in charge" and is entitled to immunity under the Clean Water Act). *But see United States v. Mobil Oil Corp.*, 464 F.2d 1124, 1128 (5th Cir. 1972) (accepting the idea that even though corporations cannot claim the Fifth Amendment privilege against self-incrimination, Congress can, and did, grant protection beyond that constitutionally required by granting corporations immunity if they report a discharge of oil from their vessel or facility as a "person in charge" pursuant to 33 U.S.C. § 1321(b)(5)).

41. *See supra* note 40 (quoting the language of the Fifth Amendment).

42. The privilege against self-incrimination "registers an important advance in the development of our liberty." *Ullmann v. United States*, 350 U.S. 422, 426 (1956).

circumvented and incriminating information compelled, however, only in return for protection from the incriminatory effects of such information.<sup>43</sup> The protections of the privilege become self-executing upon the compelled testimony of a witness.<sup>44</sup> Accordingly, government cannot compel self-incriminating statements without also offering protection against the prosecutorial use of such statements.<sup>45</sup>

The types of immunity historically offered by government to compel testimony from witnesses who invoke the Fifth Amendment can be grouped into three categories: direct use immunity, transactional

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Although the privilege is sometimes "a shelter to the guilty," it is also often "a protection to the innocent." *Quinn v. United States*, 349 U.S. 155, 162 (1955).

43. With regard to the Clean Water Act, "Congress took steps to ensure the timely discovery of abatable hazards and to facilitate the implementation of measures calculated to minimize pollution damage. Absent a requirement to report, discharges of small amounts of oil such as is the case here, might well go undetected or, at least, the possibility of abatement would be lessened." *Mobil Oil Corp.*, 464 F.2d at 1127.

Two commentators believe that the price the government must pay for such information must be no less than granting the witness full transactional immunity. Jeffrey M. Feldman & Stuart A. Ollanik, *Compelling Testimony in Alaska: The Coming Rejection of Use and Derivative Use Immunity*, 3 ALASKA L. REV. 229, 254 (1986). Feldman and Ollanik argue that full transactional immunity is warranted because "[o]ne purpose of the adversarial system is to derive the truth from the confrontation of opposing points of view . . . [and the] effectiveness of this process is undercut whenever one side is compelled to further the cause of the other." *Id.*

44. See *Adams v. Maryland*, 347 U.S. 179, 181 (1954) (holding that a statute protecting a witness from the use of self-incriminating testimony in a criminal trial is unnecessary because the Fifth Amendment guarantees that protection).

45. See *Counselman v. Hitchcock*, 142 U.S. 547 (1892) (holding that a witness may refuse to answer self-incriminating questions if the subsequent protection afforded him or her is not coextensive with Fifth Amendment protection); *Haynes v. Washington*, 373 U.S. 503 (1963) (ruling that an involuntary confession violated due process and was inadmissible in a criminal prosecution). However, the U.S. Supreme Court has drawn a significant distinction between a civil penalty and a criminal penalty. *United States v. Ward*, 448 U.S. 242, 248 (1980) ("The Self-Incrimination Clause of the Fifth Amendment, for example, is expressly limited to 'any criminal case.'). Furthermore, Congress can impose "civil penalties" that are not sufficiently criminal or "quasi-criminal" to trigger the protection against self-incrimination. *Id.* at 251-54.

A grant of immunity, however, does not protect a person from prosecution using the compelled information in a trial for perjury or for giving a false statement. See *United States v. Apfelbaum*, 445 U.S. 115 (1980) (holding that immunized testimony pursuant to the Fifth Amendment may be used at trial for perjury, because the privilege is not a license to lie with impunity).

immunity, and use plus indirect use — or simply “use immunity.”<sup>46</sup> Direct use immunity, which is no longer valid, offered the least amount of protection to a witness because it only protected against the use of a witness’ direct statement.<sup>47</sup> Transactional immunity, on the other hand, is the broadest type of protection available, and even exceeds the constitutionally mandated protection of the Fifth Amendment.<sup>48</sup> Transactional immunity is an absolute bar to subsequent prosecution because it prevents all direct or indirect prosecutorial use of a witness’s testimony.<sup>49</sup> Use immunity is similar to transactional immunity in that it prohibits the use of any evidence derived directly or indirectly from a witness’s compelled statement. Use immunity differs from transactional immunity, however, because the government may circumvent its protection by showing that the proffered evidence is derived independently from the witness’ statements or testimony.<sup>50</sup>

The U.S. Supreme Court recognized early on that immunity statutes could be used to compel a witness’s testimony. In *Brown v. Walker*,<sup>51</sup> the Supreme Court first upheld the constitutionality of a federal immunity statute. *Brown* involved a witness compelled to testify before a grand

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46. Tamara L. Boeck, Comment, *Transactional Immunity Under the California Water Code: Advance Pardon for Crimes Revealed?*, 24 PAC. L.J. 505, 513 (1993).

47. Boeck, *supra* note 46, at 513-15; see *Counselman*, 42 U.S. at 547, 564, 585-86 (invalidating an immunity statute that protected a witness only against the use of testimony obtained directly from the witness).

See also *Kastigar v. United States*, 406 U.S. 441, 452-53 (1972). Statutes must grant “immunity from the use of compelled testimony and evidence derived therefrom” in order to match the scope of the Fifth Amendment privilege. *Id.* (emphasis added). When the level of “immunity granted is not as comprehensive as the protection afforded by the privilege,” a person may refuse to answer a question or make a required report without being found in contempt. *Id.* at 449.

48. Boeck, *supra* note 46, at 516-18. As of 1986, two commentators believed that the Alaska Supreme Court preferred transactional immunity, and that a new Alaskan Statute (ALASKA STAT. § 12.50.01 (1984)), which afforded only use and derivative use immunity, would be ruled unconstitutional under the Alaska Constitution. Feldman & Ollanik, *supra* note 43, at 266.

49. Ohio has determined that the granting of transactional immunity is the best means to acquire the details of the crime. Anthony J. Celebrezze, Jr., et al., *Criminal Enforcement of State Environmental Laws: The Ohio Solution*, 14 HARV. ENVTL. L. REV. 217, 248 n.151.

50. Boeck, *supra* note 46, at 518-19.

51. 161 U.S. 591 (1896).

jury pursuant to the Interstate Commerce Act.<sup>52</sup> The Court held that the government could force the witness to testify, despite his claim that his testimony would tend to incriminate him, because the statute shielded him with immunity.<sup>53</sup> The immunity approved in *Brown* was transactional in nature, and until 1970,<sup>54</sup> Congress enacted similar immunity provisions in regulatory laws.<sup>55</sup>

Prior to *Brown*, the Supreme Court held that a witness may refuse to testify if the government fails to provide protection against self-incrimination that is coextensive with the privilege against self-incrimination.<sup>56</sup> In *Counselman v. Hitchcock*,<sup>57</sup> the Court struck down a direct use immunity statute that would have allowed prosecutors to use evidence indirectly derived from a witness's involuntary, incriminating statements.<sup>58</sup> The Court reasoned that such an immunity statute would

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52. *Id.* at 592. The act of Congress of February 11, 1893, 27 Stat. 443, stated: [N]o person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify . . .

*Id.*

53. 161 U.S. at 610. The Supreme Court reasoned: If . . . witnesses standing in *Brown's* position were at liberty to set up an immunity from testifying, the enforcement of the Interstate Commerce law or other analogous acts, wherein it is for the interest of both parties to conceal their misdoings, would become impossible, since it is only from the mouths of those having knowledge of the inhibited contracts that the facts can be ascertained. While the constitutional provision in question is justly regarded as *one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity, and we are therefore of opinion that the witness was compellable to answer . . .*

*Id.* (emphasis added).

54. In 1970, Congress enacted the Organized Crime Control Act, Pub. L. 91-452, 84 Stat. 926 (1970) (codified at 18 U.S.C. §§ 6001-6005 (1988 & Supp. IV 1992)), which granted only use and derivative use immunity. The United States Supreme Court upheld this type of immunity in *Kastigar v. United States*, 406 U.S. 441 (1972). See *infra* part III.A.

55. Feldman & Ollanik, *supra* note 43, at 237 n.54.

56. *Counselman*, 142 U.S. 547 (1892), presented the Court with its first opportunity to address a constitutional challenge to a direct use immunity statute. Boeck, *supra* note 46, at 513.

57. 142 U.S. 547 (1892).

58. *Id.* at 584-86.

impermissibly leave the witness subject to prosecution even after the witness answered the incriminating question.<sup>59</sup> Accordingly, the Court concluded that an immunity statute "must afford absolute immunity against future prosecution for the offence to which the question relates."<sup>60</sup>

In *Murphy v. Waterfront Comm'n*,<sup>61</sup> the Supreme Court added an additional layer of protection to involuntary witness statements. The petitioners in *Murphy* were granted transactional immunity from prosecution under state law.<sup>62</sup> The petitioners nevertheless refused to testify, under threat of contempt, because they feared prosecution under federal law.<sup>63</sup> The *Murphy* Court concluded that the then-existing rule, which allowed one jurisdiction to compel a witness to give testimony that officials in another jurisdiction could use to convict him of a crime, contravened the Fifth Amendment privilege against self-incrimination.<sup>64</sup> The *Murphy* Court further noted that the petitioners could not be prosecuted under federal law unless federal officials could prove that they obtained the proffered evidence from a legitimate source independent from either the compelled testimony or its fruits.<sup>65</sup>

*Brown* and *Counselman* suggest that the absolute protection from prosecution offered by transactional immunity is the only constitutionally acceptable condition for compelling a witness's testimony.<sup>66</sup> *Murphy*,

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59. *Id.* at 585. The *Counselman* Court further noted that although the statute did not compel testimony, it failed to "supply a complete protection from all the perils against which the constitutional prohibition was designed to guard . . ." *Id.* at 586.

60. *Id.* at 586.

61. 378 U.S. 52 (1964).

62. *Id.* at 53-54.

63. *Id.* at 54.

64. *Id.* at 77-78. The *Murphy* court reasoned "that there is no continuing legal vitality to, or historical justification for, the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction." *Id.* at 77.

65. *Id.* at 79. This rule, which has been coined "the fruit of the poisonous tree doctrine," is an exclusionary rule that courts originally applied to police violations of the Fourth Amendment. See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

66. Such extensive protection has strong roots in both American and English law. See, e.g., *United States v. Saline Bank of Virginia*, 26 U.S. 100 (1828) (acknowledging the rule that a party cannot be bound to give answers that would expose him to penalties); *United States v. McRae*, 3 L.R.-Ch. App. 79 (Ch. App. 1867) (sustaining the defendant's argument that answering questions under compulsion in an English court violates his

on the other hand, implies that a witness who is compelled to testify under a grant of immunity may still be prosecuted so long as the evidence is not derived from the witness's statements.

At the time of the *Exxon Valdez* spill, the Clean Water Act clearly provided use and derivative use immunity.<sup>67</sup> In 1990, in legislation motivated by several large spills, Congress amended the immunity provision.<sup>68</sup> As amended, the statute appears to immunize only the required report.<sup>69</sup> Such an interpretation overlooks the constitutional minimum set for immunity.<sup>70</sup> Regardless of the changes Congress wanted in the Act's immunity provision, it could not grant less than use immunity.<sup>71</sup> Thus, it is necessary to examine the avenues available to prosecutors to convict polluters who have made immunized reports.<sup>72</sup>

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privilege against self-incrimination because it would expose him to liability or penalty in an American court); *Brownsword v. Edwards*, 2 Ves. Sen. 243, 244-45, 28 Eng. Rep. 157, 158 (1750) (holding that a witness should not be compelled to confess an act that would render him or her liable to prosecution elsewhere); *East India Co. v. Campbell*, 1 Ves. Sen. 246, 247, 27 Eng. Rep. 1010, 1011 (1749) (explaining that one court should not force a witness to answer a question that would subject him to the punishment for a crime in another jurisdiction).

67. 33 U.S.C. § 1321(b)(5) (1988). The Act explicitly stated that neither a spill report nor information derived from it could be used in a criminal prosecution. *See supra* note 6 (quoting the statute).

68. 33 U.S.C. § 1321(b)(5) (Supp. II 1990); *see* S. REP. NO. 94, 101st Cong., 1st Sess. 2 (1987), *reprinted in* 1990 U.S.C.C.A.N. 722, 723-24 (discussing the spills that motivated Congress to enact the Oil Pollution Act).

69. 33 U.S.C. § 1321(b)(5) (Supp. II 1990). Congress deleted reference to information derived from the required report. *Id.*

70. *See supra* note 47 and accompanying text (explaining that direct use immunity violates the Fifth Amendment).

71. While the legislative history of the Oil Pollution Act does not discuss the immunity provision, some elements of the legislative history suggest that Congress may have wanted to deter polluting activities. *See* S. REP. NO. 94, 101st Cong., 1st Sess. 2-3 (1989), *reprinted in* 1990 U.S.C.C.A.N. 724 (stating that without technology capable of containing major spills, prevention is the only alternative).

72. Some commentators suggest that the Oil Pollution Act's removal of the phrase "or information obtained by the exploitation of such notification" from the Clean Water Act means that the immunity statute no longer forbids the use of information derived from the actual oil spill report. Mark B. Harmon & Harry T. Gower, III, *Prosecuting Marine Pollution Crimes*, 5 U.S.F. MAR. L.J. 241 (1993); Bernard Penner, *Immunity and Oil Spill Reporting Statutes*, 3 U. BALT. J. ENVTL. L. 34 (1993).

However, Congress is presumed to have acted constitutionally in passing legislation. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979). For the Clean Water Act to be constitutional as it stands today, the immunity provision must continue to grant

### III. JUDICIALLY CREATED EXCEPTIONS TO IMMUNITY

Currently, the government may still prosecute a witness granted immunity in exchange for his or her incriminating statement if the government successfully invokes either the independent source doctrine or the inevitable discovery doctrine.<sup>73</sup> These doctrines circumvent the witness's immunity protection by allowing the prosecution to prove that its proffered evidence is not derived from the witness's protected statement.<sup>74</sup> Both the independent source and inevitable discovery doctrines developed as exceptions to the "fruit of the poisonous tree" rule, which excludes from trial any illegally obtained evidence and its fruits.<sup>75</sup> Although the poisonous tree rule and its related exceptions

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"use immunity" with its derivative evidence component. *See supra* note 47 and accompanying text.

The change to the immunity provision does not materially alter the level of immunity actually granted pursuant to the Fifth Amendment privilege against self-incrimination. *See Kastigar v. United States*, 406 U.S. 441, 443 (1972) ("[I]mmunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege."). Of course, exceptions to the exclusionary rule would still apply. *See infra* Part III (discussing the independent source and the inevitable discovery doctrines as exceptions to the exclusionary rule).

73. In *Hazelwood*, the State of Alaska invoked both the independent source and inevitable discovery doctrines in order to circumvent the immunity granted under the Clean Water Act. *See infra* part IV (discussing the Alaska courts' treatment of these doctrines).

Attenuation is a third exception to exclusionary rules but the State of Alaska in *Hazelwood* did not raise it. Attenuation allows the government to admit tainted evidence that is far removed from an illegal search or act. *See Brown v. Illinois*, 422 U.S. 590 (1975). For a more complete discussion of attenuation, see WILLIAM E. RINGEL, *SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS* § 3-3(c) (2d ed. 1993).

74. *See Kastigar v. United States*, 406 U.S. 441, 460 (1972) (describing the use of these exceptions). However, *Kastigar* failed to clearly define the term "derivative use" and lower courts must interpret the Fifth Amendment's privilege on their own. *See Jerome A. Murphy, Comment, The Aftermath of the Iran-Contra Trials: The Uncertain Status of Derivative Use Immunity*, 51 MD. L. REV. 1011 (1992) (discussing lower court derivative use decisions).

75. Courts developed the "poison tree" rule by balancing the need to punish wrongdoers against the need for law enforcement officials to gather information and evidence within constitutional bounds. *Nix v. Williams*, 467 U.S. 431, 442-43 (1984). The *Nix* Court stated that it:

Accepted the argument that the way to ensure such protections is to exclude evidence seized as a result of such violations *notwithstanding the high social cost of letting persons obviously guilty go unpunished* for their crimes. On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired.

initially appeared in cases involving Fourth Amendment violations,<sup>76</sup> the U.S. Supreme Court has also applied the doctrines to cases involving Fifth and Sixth Amendment violations.<sup>77</sup> Courts continue to debate whether the independent source and inevitable discovery doctrines, created as exceptions to an exclusionary rule, are appropriate exceptions for a governmental grant of immunity.<sup>78</sup>

#### A. *The Independent Source Doctrine*

In *Kastigar v. United States*,<sup>79</sup> the U.S. Supreme Court held that the government could prosecute an immunized witness if it proved by a preponderance of the evidence that the information it wished to use came from a source wholly independent of the compelled testimony. In *Kastigar*, the Government granted unwilling witnesses use immunity in exchange for their testimony.<sup>80</sup> The witnesses nevertheless refused to testify on the grounds that the Government had not granted them immunity coextensive with the Fifth Amendment privilege.<sup>81</sup> The Court rejected the argument that governmental immunity is constitutionally valid only if it is transactional — if it grants immunity from prosecution

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... When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

*Id.* at 443 (emphasis added); see *infra* note 127 and accompanying text (discussing the Alaska Supreme Court's adoption of the reasoning in *Nix*).

76. See *Wong Sun v. United States*, 371 U.S. 471 (1963) (invoking the "poisonous tree" doctrine to remedy Fourth Amendment violations); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (developing, for the first time, the "fruit of the poisoned tree" doctrine in the context of evidence tainted by Fourth Amendment violations). For a detailed analysis of exceptions to the exclusionary rule, see 4 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 11-4 (2d ed. 1987).

77. See *Kastigar v. United States*, 406 U.S. 441 (1972) (reaffirming the use of the independent source doctrine in the Fifth Amendment context); *United States v. Wade*, 388 U.S. 218 (1967) (applying the "fruit of the poisonous tree" doctrine to violations of the Sixth Amendment); *Miranda v. Arizona*, 384 U.S. 436 (1966) (applying the rule to Fifth Amendment violations); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (applying the Fifth Amendment to hold that federal authorities must show that evidence against a witness who testified under state immunity was from an independent, legitimate source).

78. See *infra* part IV for a discussion of the debate.

79. 406 U.S. 441 (1972).

80. *Id.* at 442; see *supra* note 50 and accompanying text (discussing use immunity).

81. 406 U.S. at 442.

for offenses related to the compelled testimony.<sup>82</sup> Rather, the Court held that if a defendant testifies under a grant of immunity the government must affirmatively prove that it derived its evidence legitimately from an independent source.<sup>83</sup>

The *Kastigar* Court realized the importance of receiving immunized testimony from those best suited to provide vital information needed to enforce many criminal statutes.<sup>84</sup> Thus, under *Kastigar*, although the government may grant transactional immunity, it is only required to afford the same amount of protection granted by the Fifth Amendment

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82. *Id.* at 453. The *Kastigar* Court explained: "Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege." *Id.* at 453.

In his dissent, Justice Douglas argued for the transactional immunity test employed by the Court in *Counselman*. *Id.* at 463 (Douglas, J., dissenting). Specifically, Douglas argued that the majority's holding implicitly interpreted *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964), as overruling *Counselman sub silentio*. 406 U.S. at 463 (Douglas, J., dissenting). Douglas, however, distinguished *Murphy* from *Kastigar* and *Counselman* by arguing that the rule adopted in *Murphy* applies only when the prosecuting government is different from the government that compelled testimony. *Id.* at 464-65. Douglas concluded that the government's attempt to dilute the self-incrimination clause by offering less than absolute transactional immunity to compelled testimony was unconstitutional. *Id.* at 467. Similarly, Justice Marshall believed that "an immunity statute must be tested by a standard far more demanding than that appropriate for an exclusionary rule fashioned to deal with past constitutional violations." *Id.* at 471 (Marshall, J., dissenting).

Many state courts have rejected statutes that grant immunity less protective than the transactional immunity they believe their respective constitutions require. See, e.g., *State v. Graf*, 835 P.2d 934 (Or. Ct. App. 1992), *aff'd*, 853 P.2d 277 (Or. 1993); *D'Elia v. Pennsylvania Crime Comm'n*, 555 A.2d 864 (Pa. 1989); *Attorney General v. Colleton*, 444 N.E.2d 915 (Mass. 1982); *Wright v. McAdory*, 536 So.2d 897 (Miss. 1988); *State v. Miyasaki*, 614 P.2d 915 (Haw. 1980); *Gilliam v. State*, 267 So.2d 658 (Fla. 1972).

83. *Kastigar*, 406 U.S. at 460 (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. at 79 n.18); see 406 U.S. at 461-62 (holding that immunity that leaves "the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege" is coextensive with constitutional protection). See generally John A. Darrow, *White Collar Crime: Fifth Survey of Law — Immunity*, 26 AM. CRIM. L. REV. 1169 (1989) (discussing the countervailing interests of the government introducing evidence and the witness claiming immunity pursuant to his or her Fifth Amendment right).

84. 406 U.S. at 446-47. Federal immunity statutes have existed since 1857. See Act of Jan. 24, 1857, 11 Stat. 155; see also George D. Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 ST. LOUIS U. L.J. 327 (1966); Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568 (1963).

privilege.<sup>85</sup> The Court believed that the prosecution should receive an opportunity to prove that the evidence it offers came from a source wholly legitimate and independent from the compelled testimony.<sup>86</sup> The Court reached this conclusion because the basic purpose of a grant of immunity is to leave the witness and the government in the same position as they would be had the witness chosen to invoke his or her Fifth Amendment privilege.<sup>87</sup>

### B. *Inevitable Discovery Doctrine*

In *Nix v. Williams*,<sup>88</sup> the Supreme Court held that the prosecution may offer otherwise inadmissible evidence or testimony if the prosecution can prove that it would have discovered the evidence ultimately or inevitably by lawful means.<sup>89</sup> In *Nix*, police officers violated the Sixth Amendment by unlawfully interrogating the defendant out of the presence of his attorney.<sup>90</sup> Although the defendant ultimately led police to the victim's body, a massive search for the body had begun before the defendant was taken into custody.<sup>91</sup> The *Nix* Court determined that

85. *Kastigar*, 406 U.S. at 453.

86. *Id.* at 460.

87. *Kastigar*, 406 U.S. at 458-60. However, only one year prior to *Kastigar*, the Third Circuit Court of Appeals remarked:

[T]he record of what the Supreme Court has done and various Justices have said over almost eighty years seem[s] to warrant the conclusion that it has become authoritative constitutional doctrine that no less than a grant of full transactional immunity can justify compelling a witness who has asserted his Fifth Amendment privilege to testify about suspected criminal wrongdoing.

*United States ex rel. Catena v. Elias*, 449 F.2d 40, 43 (3d Cir. 1971), *rev'd*, 406 U.S. 952 (1972).

88. 467 U.S. 431 (1984).

89. *Id.* at 444.

90. *Id.* at 435-36.

91. *Id.* at 435. The Court described the search as follows:

Two hundred volunteers divided into teams began the search 21 miles east of Grinnell, covering an area several miles to the north and south of Interstate 80. They moved westward from Poweshiek County, in which Grinnell was located, into Jasper County. Searchers were instructed to check all roads, abandoned farm buildings, ditches, culverts, and any other place in which the body of a small child could be hidden.

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The officers directing the search had called off the search at 3 p.m. [to join the officers who had obtained the location of the body from the defendant]. . . . At that time, one search team near the Jasper County-Polk County line was only two and

evidence the police found with the victim's body was admissible because discovery of the body was inevitable given the body's location in relation to various search teams.<sup>92</sup>

The government relies on the inevitable discovery exception whenever a defendant can show unlawful government conduct and the evidence offered would otherwise not be admitted under the exclusionary rule.<sup>93</sup> The Supreme Court's simple test is whether the prosecution can show by a preponderance of the evidence<sup>94</sup> that the evidence offered would have been ultimately or inevitably discovered through lawful means.<sup>95</sup> The lower courts disagree, however, whether the government must actually be in the process of finding the evidence at the time of the compelled statement in order for it to be deemed "inevitably discoverable."<sup>96</sup>

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one-half miles from where [the defendant] soon guided [the police officers] to the body.

*Id.* at 435-36.

92. *Id.* at 449-50.

93. *Id.* at 438. The defendant argued that the "evidence of the body's location and condition [was] 'fruit of the poisonous tree,'" and should be excluded under the exclusionary rule. *Id.* at 441; *see Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (holding that illegally obtained evidence and other incriminating evidence derived from it must be excluded, although proof may be made that the information was obtained from an independent source); *Wong Sun v. United States*, 371 U.S. 471 (1963) (explaining that evidence obtained as the indirect product or "fruit" of the illegally procured evidence must also be excluded). The *Nix* Court noted that the inevitable discovery doctrine had been accepted by every Federal Court of Appeals having jurisdiction over criminal matters. *Id.* 467 U.S. at 440 n.2.

94. 467 U.S. at 444. The dissent in *Nix* argued that the prosecution must show inevitability by "clear and convincing" evidence because of the importance of the underlying constitutional rights of the defendant. *Nix*, 467 U.S. at 459-60 (Brennan, J., dissenting).

95. 467 U.S. at 444. The basic purpose of the inevitable discovery exception "is to block setting aside convictions that would have been obtained without police misconduct." *Id.* at 443 n.4. The Court rejected the test used by the Eighth Circuit Court of Appeals below which included an additional requirement that the prosecution show an absence of bad faith by the police in illegally obtaining the evidence. *Id.* at 445.

96. The majority of the circuits considering this issue require a pre-existing search or process, that would have produced evidence that may have been, or was, also gained through illegal means, be underway at the time of the illegal questioning or search. *See, e.g., United States v. Eng*, 997 F.2d 987 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 693 (1994); *United States v. Seals*, 987 F.2d 1102 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 155 (1993); *United States v. Ivey*, 915 F.2d 380 (8th Cir. 1990); *United States v. Buchanan*, 904 F.2d 349 (6th Cir. 1990); *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984);

#### IV. THE COURTS OF ALASKA DEBATE THE ISSUE

In *Hazelwood*, the parties disputed whether either the inevitable discovery or independent source exceptions should apply. *Hazelwood* argued that the inevitable discovery exception should not apply because the government had not initiated an investigation prior to his required reporting of the accident and resulting spill.<sup>97</sup> It is not clear, however, that either exception properly applies to the facts of *Hazelwood*.<sup>98</sup> Initially, violations of the Fourth and Sixth Amendments occur at the time of the government's wrongdoing, while Fifth Amendment violations occur during a criminal trial; the remedies for such different problems may not be the same.<sup>99</sup> Furthermore, exceptions for a judicially created

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and *United States v. Romero*, 692 F.2d 699 (10th Cir. 1982). Other circuits hold that the inevitable discovery doctrine applies regardless of whether authorities began to search prior to the illegal activity. *See United States v. George*, 971 F.2d 1113 (4th Cir. 1992); *United States v. Buchanan*, 910 F.2d 1571 (7th Cir. 1990); *United States v. Ramirez-Sandoval*, 872 F.2d 1392 (9th Cir. 1989); *United States v. Silvestri*, 787 F.2d 736 (1st Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988).

97. Appellant's Opening Brief at 23, *Hazelwood v. State*, 836 P.2d 943 (Alaska Ct. App. 1992) (No. A-3452). *Hazelwood* argued that "this is not a case like *Nix* where a physical process was already in motion that would have inevitably led to one result. . . . Nor is it a case . . . where routine procedures would inevitably have uncovered specific evidence. Here, there was no set procedure for what to do if a vessel failed to report." *Id.* at 28.

The State argued that Alaska should follow the Ninth Circuit's rule that the inevitable discovery doctrine does not require a "previously initiated, independent investigation." Appellee's Brief at 23, *Hazelwood v. State*, 836 P.2d 943 (Alaska Ct. App. 1992) (No. A-3452); *see United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1399 (9th Cir. 1989) (holding that a pre-existing investigation need not be in place at the time of the illegal receipt of evidence).

98. For example, in dissenting to the *Kastigar* decision, Justice Marshall pointed out that any grant of immunity short of full transactional immunity leaves protection of the witness' Fifth Amendment right in the hands of the prosecution:

First . . . [t]he good faith of the prosecuting authorities is thus the sole safeguard of the witness' rights. Second, even their good faith is not a sufficient safeguard. For the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony. *Kastigar*, 406 U.S. at 469 (Marshall, J., dissenting).

99. In his dissent to the Alaska Supreme Court's decision, Justice Compton noted: Violations of Fourth and Sixth Amendment rights are "fully accomplished" at the time of the offending government conduct.

In contrast, a violation of the Fifth Amendment is not "fully accomplished" until

exclusionary rule may be inappropriate in the context of a statutory grant of immunity.<sup>100</sup> Despite the defendant's argument, the Supreme Court of Alaska incorporated the two exceptions into the Clean Water Act's grant of immunity through its ruling in *Hazelwood*.<sup>101</sup>

The trial court in *Hazelwood*<sup>102</sup> found that Hazelwood's radio report contained two parts: 1) information required by a grounding reporting regulation,<sup>103</sup> and 2) information required under the Clean

the compelled evidence is used against the citizen at trial. . . . Thus the exclusion of the evidence both *effectuates* the constitutional right *and prevents* the constitutional violation.

*State v. Hazelwood*, 866 P.2d 827, 835-36 (Compton, J., dissenting in part) (citations omitted).

100. In his brief to the Court of Appeals of Alaska, Hazelwood answered: The exclusionary rule is judicially created. When the Supreme Court became uncomfortable with the rule, it modified it with a judicially created exception, the inevitable discovery doctrine. The exclusionary rule created by section 1321(b)(5)'s immunity provision on the other hand, was *not created by the courts*. The balancing of society's interests was performed by the legislature creating the immunity. A choice was made that the benefits of granting immunity outweighed the costs.

Appellant's Opening Brief at 20, *Hazelwood v. State*, 836 P.2d 943 (Alaska Ct. App. 1992) (No. A-3452) (emphasis added). Hazelwood argued that "frustrated at the prospect of having to honor Congress' promise of immunity, state prosecutors have strenuously argued for a 'Hazelwood exception' to well-settled principles of law." Opposition to Petition for Hearing at 2, *State v. Hazelwood*, 866 P.2d 827 (Alaska 1993) (No. S-55311). However, a previous decision has considered a similar grant to be use and derivative use immunity only. See *United States v. General American Transp. Corp.*, 367 F.Supp. 1284 (D.N.J. 1973) (explaining that the Clean Water Act provides use immunity and not transactional immunity so that the government can show an independent source of evidence to prove the illegal oil spill).

101. 866 P.2d at 831, 833-34.

102. *State v. Hazelwood*, Nos. 3AN-S89-7217, -7218 Cr. (Dec. 12, 1989).

103. See *supra* note 18 (discussing the content of Hazelwood's radio report). The U.S. Coast Guard regulation states:

The owner, agent, master or person in charge of a vessel involved in a marine casualty shall give notice as soon as possible to the nearest Coast Guard Marine Safety or Marine Inspection Office whenever the casualty involves any of the following:

(a) All accidental groundings and any intentional grounding which also meets any of the other reporting criteria or creates a hazard to navigation, the environment, or the safety of the vessel;

. . .

(f) An occurrence not meeting the above criteria but resulting in damage of property in excess of \$25,000.

46 C.F.R. § 4.05-1(a), (f) (1993). Failure to report results in civil penalties. 46 U.S.C. § 6103 (1988). Additional Coast Guard regulations mandate that the Coast Guard

Water Act.<sup>104</sup> The court ruled that under federal and state law, Hazelwood received use and derivative use immunity by reporting the spill.<sup>105</sup> In addition, the court found that the Coast Guard corpsman on duty expected to hear from the *Exxon Valdez* at certain intervals, and would have located the ship no later than 12:45 a.m. after the grounding.<sup>106</sup>

Before the trial court, the State of Alaska argued that it should be able to use the evidence against Hazelwood because the State derived it from an independent source, the unshielded report of the grounding, and

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investigate after a report of a marine casualty. 46 C.F.R. § 4.07-1, § 4.07-5 (1993).

104. The trial court explained why it concluded Hazelwood's report should be separated into two distinct portions for a determination of the extent of the grant of immunity:

The report of a marine casualty does not necessarily include an oil spill, nor does the report of an oil spill necessarily include a marine casualty.

. . .

Whether a source is independent of a compelled disclosure should be determined by reference to the purposes and legal requirements for making the disclosure. As noted above, the reporting of a grounding and the report of an oil spill are each based on distinct social policies and goals, and required by independent provisions of law. Nos. 3AN-S89-7217, -7218 Cr. slip op. at 10-12 (Dec. 12, 1989).

The State of Alaska argued to the Court of Appeals that this interpretation should prevail because "the goal of the statutes will not be seriously undercut by finding that the required report of a major marine casualty is an independent source." Appellee's Brief at 17, *Hazelwood v. State*, 836 P.2d 943 (Alaska Ct. App. 1992) (No. A-3452). Hazelwood argued that "it is hard to imagine a tanker spilling oil which would not be required to report under this regulation." No tanker captain would ever have immunity for reporting an oil spill. Appellant's Reply Brief at 6, *Hazelwood v. State*, 836 P.2d 943 (Alaska Ct. App. 1992) (No. A-3452) (citing *The Southwark*, 191 U.S. 1, 9 (1903); *The Silvia*, 171 U.S. 462, 464 (1898)). Consequently, the trial court's reasoning actually "swallows up" the grant of immunity. *Id.* at 7 n.3.

105. *State v. Hazelwood*, Nos. 3AN-S89-7217, 7218 Cr., slip op. at 8 (Dec. 12, 1989).

106. *State v. Hazelwood*, Nos. 3AN-S89-7217, 7218 Cr., slip op. at 3 (Dec. 12, 1989). Coast Guard civilian Bruce Blandford was on duty that evening and testified:

If we had not made contact with the *Exxon Valdez*, I suppose we would have called probably the next inbound tanker. We may have called the pilot vessel. . . . I may have — this is all pure speculation on my part. We — I was not confronted with that circumstances, (sic) I'm purely speculating here. But I may have asked him to go out and take a look to see if he could spot anything. But, again, this is really speculating.

Opening Brief of Appellant, Appeal from Judgment of Conviction and Sentence, at 26; *Hazelwood v. State*, 836 P.2d 943 (Alaska Ct. App. 1992) (No. A-3452). The trial court concluded that the Coast Guard would have responded in the same manner, even if Hazelwood had not subsequently mentioned the oil spill. *State v. Hazelwood*, Nos. 3AN-S89-7217, -7218 Cr., slip op. at 11 (Dec. 12, 1989).

not from the immunized reporting of the spill.<sup>107</sup> Hazelwood argued that the court should not separate the required reports of the grounding and of the spill to find a source independent from the oil spill reporting.<sup>108</sup> Based on its findings, the trial court ruled that the independent

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107. *State v. Hazelwood*, Nos. 3AN-S89-7217, -7218 Cr., slip op. at 8 (Dec. 12, 1989).

An early case analyzing the Clean Water Act immunity provisions explained that the grant of immunity does not affect a prosecution "based on evidence other than notification or information obtained by exploitation of such notification. A prosecution based on any other evidence is unaffected by [the immunity provisions]." *United States v. Republic Steel Corp.*, 491 F.2d 315, 318 (6th Cir. 1974).

108. *State v. Hazelwood*, Nos. 3AN-S89-7217, -7218 Cr., slip op. at 10 (Dec. 12, 1989). Hazelwood argued "that all evidence used by the state in investigating and charging him was derived directly or indirectly from his notification, in violation of 33 U.S.C. § 1321 (b)(5), 18 AAC 75.180, and the principles of *Kastigar v. United States*." Opening Brief of Appellant at 2, *Hazelwood v. State*, 836 P.2d 943 (Alaska Ct. App. 1992) (No. A-3452). On appeal, Hazelwood claimed that because the trial court analyzed the purposes and requirements of the reporting provisions, it made a legal determination when it considered that "one part of Hazelwood's sentence can be considered 'independent' of another part, without violating Hazelwood's constitutionally mandated and statutorily granted immunity" and it should be reviewed by the appellate court as such. Appellant's Reply Brief at 2-3, *Hazelwood v. State*, 836 P.2d 943 (Alaska Ct. App. 1992) (No. A-3452).

Moreover, the grounding statute only imposed civil penalties for which immunity need not have been given pursuant to a required reporting. *See* 46 U.S.C. § 6103 (1988); *see also supra* note 103 and accompanying text (discussing the United States Coast Guard Regulation); *United States v. Atlantic Richfield Co.*, 429 F. Supp. 830 (E.D. Pa. 1977) (explaining that even "civil penalties" imposed by the legislatures do not implicate the constitutional protections that criminal punishment does).

Hazelwood distinguished the two reporting requirements:

Significantly, [the grounding statute] only requires a report to be filed within 5 days of a casualty, and provides a maximum penalty of a civil \$1,000 fine for failing to comply. In contrast, 33 U.S.C. § 1321(b)(5) provides for a criminal conviction with a maximum fine of \$10,000 or imprisonment for one year, or both.

Opposition to Petition for Hearing at 4 n.4, *State v. Hazelwood*, 866 P.2d 827 (Alaska 1993) (No. S-55311) (citations omitted).

Furthermore, the trial court's interpretation of the statutory grant of immunity was so unexpected, according to Hazelwood, that it amounted to an *ex post facto* law. Appellant's Reply Brief at 10, *Hazelwood v. State*, 836 P.2d 943 (Alaska Ct. App. 1992) (No. A-3452). Thus, "the legal nature of Hazelwood's acts was changed after he acted." *Id.* *See Bouie v. City of Columbia*, 378 U.S. 347 (1964) (holding that a state supreme court decision might violate the *ex post facto* clause and due process if the decision is an unforeseeable and retroactive judicial expansion of precise statutory language).

source<sup>109</sup> and inevitable discovery<sup>110</sup> exceptions applied, and that the government had met the requirements for both.<sup>111</sup> The court's ruling admitted crucial evidence which contributed to Hazelwood's conviction of criminally negligent discharge of oil.<sup>112</sup>

The Alaska Court of Appeals reversed Hazelwood's conviction on July 10, 1992.<sup>113</sup> Although the appellate court believed the independent source exception could possibly apply in a statutory immunity situation, it ruled that the inevitable discovery doctrine could never justify admitting evidence from an immunized report.<sup>114</sup> The court of

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109. *State v. Hazelwood*, Nos. 3AN-S89-7217, -7218 Cr., slip op. at 12 (Dec. 12, 1989) ("The defendant's initial report of a grounding constitutes an independent source for the information-gathering process and that all information gathered, except for the defendant's report of the spill itself, is otherwise from a source wholly independent from his protected report.").

110. *Id.* at 14. The trial court allowed the evidence, despite the grant of immunity, because "[n]either *Kastigar* nor *Williams* requires that law enforcement authorities be placed in a worse position than they would have been absent an error or violation of a defendant's Fifth or Sixth Amendment rights." *Id.* at 13. The trial court acknowledged that "[t]he intent of Congress in enacting 33 U.S.C. § 1321(b)(5) was to 'prevent harmful spills and to minimize the damage caused by such spills.'" *Id.* at 14 (quoting *United States v. LeBeouf Bros. Towing Co.*, 537 F.2d 149, 152 (5th Cir. 1976)).

However, the trial court decided that the "[a]pplication of the inevitable discovery doctrine to cases involving oil spills would not defeat these policies." *State v. Hazelwood*, Nos. 3AN-S89-7217, -7218 Cr., slip op. at 14 (Dec. 12, 1989). The defendant later noted to the Court of Appeals that the inevitable discovery doctrine had not been used previously by Alaska courts in any context, and should definitely not be invoked within the immunity context presented by this case. Opening Brief of Appellant at 15, *Hazelwood v. State*, 836 P.2d 943 (Alaska Ct. App. 1992) (No. A-3452).

111. *State v. Hazelwood*, Nos. 3AN-S89-7217, -7218 Cr., slip op. at 14 (Dec. 12, 1989). The trial court determined that the grounding report was an independent source because the response to the report would have been the same for either report. *Id.* at 11. The trial court further determined that the purposes of the two requirements were separate and distinct, and that using the grounding report would not undermine the spill report purposes. *Id.*

112. Ultimately, the trial court excluded only Hazelwood's report "evidently we're leaking some oil." *Id.* at 15. The court admitted all other evidence subject only to other proper objections. *Id.*

113. *Hazelwood v. State*, 836 P.2d 943 (Alaska Ct. App. 1992).

114. *Id.* at 953. *But see United States v. Streck*, 958 F.2d 141 (6th Cir. 1992) (holding that the government can show it would have inevitably discovered the information without the defendant's immunized testimony); *United States v. Kiser*, 948 F.2d 418 (8th Cir. 1991) (holding that the government would clearly have discovered the information even if the defendant did not provide the information under a grant of immunity); *United States v. Rinaldi*, 808 F.2d 1579 (D.C. Cir. 1987) (finding that despite the grant of immunity to

appeals determined that a prosecutor should receive a chance to prove that the evidence used in the trial had not been tainted by the immunized testimony.<sup>115</sup> The court, however, also found that Hazelwood had clearly demonstrated that his report to the Coast Guard belonged within the protection of the federal statute's immunity provision.<sup>116</sup> Unlike the trial court, the court of appeals refused to separate Hazelwood's statement into a Clean Water Act report and a marine casualty report.<sup>117</sup> The court of appeals, therefore, held the trial court's finding of an independent source incorrect as a matter of law.<sup>118</sup>

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the defendant, the government had been in a position to identify the other witnesses without the benefit of the defendant's testimony).

115. *Hazelwood*, 836 P.2d at 946; see *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990) (requiring a trial court to hold a "*Kastigar* hearing" to allow the government to demonstrate an independent source for evidence that was also compelled under a grant of immunity); *United States v. De Diego*, 511 F.2d 818 (D.C. Cir. 1975) (holding that the government must be given a chance to prove that its evidence is untainted by immunized testimony, although a heavy burden exists for so proving). Hazelwood stressed that "there is a 'heavy burden' on the state to prove 'that all of the evidence it proposes to use was derived from legitimate independent sources . . . wholly independent of the compelled testimony.'" Opening Brief of Appellant at 7, *Hazelwood v. State*, 836 P.2d 943 (Alaska Ct. App. 1992) (No. A-3452) (quoting *Kastigar v. United States*, 406 U.S. 441, 460-62 (1972)).

116. 836 P.2d at 947. The captain of a vessel involved in the unauthorized discharge of a noxious liquid substance, including oil spills, must report the following information:

- (1) The identity of the ship;
- (2) The time and date of the occurrence of the incident;
- (3) The geographic position of the ship when the incident occurred;
- (4) The wind and sea condition prevailing at the time of the incident;
- (5) Relevant details respecting the condition of the ship; and
- (6) A statement or estimate of the quantity of oil or oily mixtures discharged or likely to be discharged into the sea.

33 C.F.R. § 151.15(f) (1994).

117. *Hazelwood*, 836 P.2d at 950. The State argued that Hazelwood had two separate legal duties to report — one that included immunity and the other that did not. Therefore, it could meet the elements of the independent source doctrine, and derive evidence from a source wholly independent from the required Clean Water Act oil spill report. *Id.* at 948.

Hazelwood argued, however, that "the simple existence of another legal requirement to make the disclosure [should not] negate the congressionally granted immunity . . . [and] [i]t can not seriously be argued that one clause in Hazelwood's report was, as a matter of fact, independent of or collateral to another clause in the same sentence." Opening Brief of Appellant at 10-11, *Hazelwood v. State*, 836 P.2d 943 (Alaska Ct. App. 1992) (No. A-3452).

118. 836 P.2d at 950. The appellate court explained that "[g]iven the coextensive nature of these two reporting requirements, however, the most that can be said is that they

The court of appeals concluded that the inevitable discovery doctrine, a judicially created exception to the exclusionary rule, should not be applied to statutory grants of immunity.<sup>119</sup> The U.S. Supreme Court, in *Nix v. Williams*,<sup>120</sup> implemented the inevitable discovery doctrine to give some recourse to prosecutors when a court suppresses important evidence. The Alaska Court of Appeals, therefore, distinguished the inevitable discovery doctrine's use in illegal search and seizure cases<sup>121</sup> from the immunity context involved in *Hazelwood*.<sup>122</sup> The *Hazelwood* court noted that the real reason for the grant of immunity in 33 U.S.C. § 1321(b)(5) is that a forced reporting of self-incriminating information requires in return a guarantee that the information will not be used against the witness.<sup>123</sup> The court of appeals concluded that if anyone was to approve using the inevitable discovery doctrine in the immunity context, it should be Congress, the body which enacted the seemingly unconditional grant of immunity.<sup>124</sup>

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amounted to *wholly interdependent, not wholly independent*, sources of the state's evidence." *Id.* (emphasis added) (footnote omitted).

119. *Id.* at 953. The court of appeals rejected application of the inevitable discovery rule on two grounds. First, the court determined that basic fairness requires that "[h]aving gained its evidence from the exploitation of information it obtained by a promise of immunity, the state should not be free to renege merely because, in retrospect, the promise appears to have been unnecessary." *Id.* Second, the court determined that "[t]he congressional purpose in granting immunity for the immediate report of a spill was to encourage prompt notice in as many cases as possible, so that abatement efforts could be undertaken without unnecessary delay, and so that the government would become aware of smaller spills that might otherwise go undetected." *Id.*; *cf.* *United States v. Mobil Oil Corp.*, 464 F.2d 1124, 1127 (5th Cir. 1972) (ruling that the goal of a similar reporting requirement was to ensure the timely discovery of oil discharges and that immunity granted should be defined broadly).

120. 467 U.S. 431 (1984); *see supra* part III.B. (discussing the inevitable discovery doctrine under *Nix v. Williams*).

121. For an in-depth discussion of search and seizure law, see generally WAYNE R. LAFAYE, *SEARCH AND SEIZURE* (2d ed. 1987).

122. *Hazelwood*, 836 P.2d at 951.

123. *See* *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 57 (1964); *Brown v. Walker*, 161 U.S. 591 (1896).

124. *Hazelwood*, 836 P.2d at 954. *Hazelwood* argued that "[c]ourts should not read in exceptions to congressionally granted immunity." Opening Brief of Appellant at 12, *Hazelwood v. State*, 836 P.2d 943 (Alaska Ct. App. 1992) (No. A-3452) (citing *United States v. Monia*, 317 U.S. 424, 430 (1942)); *cf.* *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 644 F.2d 594 (7th Cir. 1981) (deferring to the legislature for the decision whether to allow punitive damages for certain causes of action); *United States v. Capeletti Bros., Inc.*, 621 F.2d 1309 (5th Cir. 1980) (recognizing that courts can allow

A year and a half later, the Supreme Court of Alaska affirmed the court of appeals' ruling on application of the independent source doctrine to the facts of the case, but reversed the appellate court's holding that the inevitable discovery doctrine could not be used under the framework of a legislative grant of immunity.<sup>125</sup> The Supreme Court of Alaska felt that *Nix v. Williams*<sup>126</sup> required it to use the exception to determine the boundaries of the use and derivative use immunity granted by 33 U.S.C. § 1321(b)(5).<sup>127</sup> The supreme court feared placing the State in a worse position than it would have been without the statutory grant of immunity.<sup>128</sup> Thus, the court remanded the case to the court of appeals to apply the inevitable discovery doctrine as outlined in *Nix v. Williams*.<sup>129</sup>

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causes of action only if legislatively created, since courts are not the proper policy-making body).

Under this analysis, any determination of inevitability by the court would not be a reasonable interpretation of the statute. Hazelwood warned the appellate court that "[t]o interpret the regulatory scheme as withdrawing with one hand the immunity it appears to give with another would be a violation of due process." Opening Brief of Appellant at 13, *Hazelwood v. State* (No. A-3452); see also *United States v. Hooten*, 662 F.2d 628, 631 n.1 (9th Cir. 1981) (requiring that the government give specific notice before withdrawing immunity).

125. *State v. Hazelwood*, 866 P.2d 827 (Alaska 1993).

126. 467 U.S. 431 (1984).

127. *Hazelwood*, 866 P.2d at 834.

128. *Id.* at 833. The court held that "when the evidence at issue inevitably would have been discovered without reference to immunized statements, 'there is no nexus sufficient to provide a taint and the evidence is admissible.'" *Id.* (quoting *Nix*, 467 U.S. at 448). See also *United States v. Kiser*, 948 F.2d 418 (8th Cir. 1991) (holding that despite a grant of immunity in order to get testimony from the witness, the government proved legitimate and independent sources for its evidence, and that the government would have inevitably discovered the information through lawful means). But see *New Jersey v. Portash*, 440 U.S. 450 (1979) (holding that compelled statements taken from a defendant in violation of *Miranda*, may not be used against him in a criminal trial, nor may courts balance off the government's and defendant's interests).

129. *Hazelwood*, 866 P.2d at 834. Because the trial court found that the accident would have been inevitably discovered by the Coast Guard no later than 12:45 a.m., Hazelwood's conviction in all likelihood will stand.

The dissent disagreed with the majority that the Alaska Supreme Court was even required to apply *Kastigar* or *Nix* to the statutory grant of immunity in the Clean Water Act. *Hazelwood*, 866 P.2d at 834 (Compton, J., dissenting).

## V. A STATUTORY PROPOSAL TO SET THE BOUNDARIES OF IMMUNITY

To determine the proper scope of immunity for reporting environmental accidents, policy makers must decide whether environmental regulations exist to punish and deter or to quickly and effectively clean up spills.<sup>130</sup> In the grant of immunity, Congress made a deal to get information quickly, demonstrating that it is more important to contain and clean up spills than to prosecute polluters.<sup>131</sup> Similar environmental laws use reporting requirements to promote quick remedies and clean-up, not to facilitate the criminal prosecution of polluters.<sup>132</sup> Additionally, if the thrust of the Clean Water Act is to punish persons in charge of facilities where spills occur, the government should make its enforcement program stronger and more accurate. If the government chooses not to work with the responsible parties after an accident occurs, the government should be prepared to gather prosecutorial evidence on its own. But when the government compels those involved in accidents to help the government discover information that could incriminate them, the

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130. It may be argued that Congress chose the former, punishment, when it amended the immunity provision in 1990. *See supra* note 6 (describing the amendment, which changed § 1321(b)(5) so that it appears to grant only direct use immunity). This argument assumes that the change was a calculated move and that Congress wished to change the policy of environmental legislation. The clear policy of environmental law has been to reduce pollution, not facilitate punishment. *See infra* note 132 (discussing other environmental statutes). Such an argument also ignores the United States Supreme Court's decision in *Counselman v. Hitchcock*. *See supra* note 47 and accompanying text.

131. The Alaska Court of Appeals has described promises of immunity as analogous to contractual agreements. Moreover, the Alaska Court of Appeals has held that "immunity agreements are subject to constitutional restraints, foremost of which is the due process clause's overriding guarantee of fundamental fairness to the accused." *Closson v. State*, 784 P.2d 661, 665 (Alaska Ct. App. 1989). Borrowing from previous appellate decisions, *Hazelwood* argued to the Court of Appeals that "it is unfair to make a deal, obtain the benefits, and then avoid performing one's part." Appellant's Reply Brief at 8, *Hazelwood v. State*, 836 P.2d 943 (Alaska Ct. App. 1992) (No. A-3452).

132. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) addresses hazardous discharges by any vessel or an offshore or on shore facility, and contains a reporting requirement and grant of immunity identical to those provided by the Clean Water Act. 42 U.S.C. § 9603 (1988). CERCLA's reporting provision, 42 U.S.C. § 9603(b), has been considered as a parallel provision to, and serves the same purpose as, the Clean Water Act's requirement, 33 U.S.C. § 1321(b)(5). *United States v. Carr*, 880 F.2d 1550, 1553 (2d Cir. 1989). Under both statutes, the legislative purpose is to "ensure that the government, once timely notified, will be able to move quickly to check the spread of a hazardous release." *Id.* at 1552.

government should allow them to receive the benefit of their bargain.<sup>133</sup>

Attempting to determine the scope of immunity in a particular case based on the size of the spill would prove unworkable. The purpose of the reporting requirement might be to get reports of small spills that would otherwise go undetected.<sup>134</sup> A spill of over 20,000,000 gallons of oil near the shore will evidence itself fairly soon regardless of any reporting, but complete immunity is necessary to get persons in charge to report small spills. Because remedial measures must begin as soon as possible after a spill, however, reporting major spills is just as essential as that of small spills.<sup>135</sup> Furthermore, the government could not consistently classify accidents into small and large.<sup>136</sup> Any exception

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133. The exceptions used by the Alaska Supreme Court were meant for *Miranda*-type violations, not for compelled reporting of oil spills. Noting this difference, the U.S. Supreme Court has explained that:

[A] defendant's compelled statements, as opposed to statements taken in violation of *Miranda*, may not be put to any testimonial use whatever against him in a criminal trial.

Balancing of interests was thought to be necessary . . . when the attempt to deter unlawful police conduct collided with the need to prevent perjury. Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. *Balancing, therefore, is not simply unnecessary. It is impermissible.*

New Jersey v. Portash, 440 U.S. 450, 459 (1979) (emphasis added).

134. See *United States v. Mobil Oil Corp.*, 464 F.2d 1124, 1127 (5th Cir. 1972) (explaining that without the reporting requirement and immunity, small discharges of oil might not be found). A spill of only 2,000 gallons of oil or another hazardous substance out at sea would probably never be found if not reported. Without a reporting, the spill could not be cleaned up and would cause environmental damage.

135. See *United States v. Republic Steel Corp.*, 491 F.2d 315, 317-18 (6th Cir. 1974) (stating that the purpose behind the grant of immunity is to create an incentive for the polluter to make an immediate report). In his reply brief to the Court of Appeals, Hazelwood stressed that courts should not distinguish between the size of spills:

Both the state and the trial court posited a distinction between large and small spills, implicitly arguing that the reporter of a large spill is entitled to lesser immunity. In fact, there is no legal or factual support for such a distinction. Nothing in the statute's history, or on its' [sic] face points in this direction.

While Congress undoubtedly wanted small spills reported, it would be ludicrous to suggest it was not concerned with the reporting of large spills. *While large spills might ultimately be detected without self-reporting, self-reporting ensures the earliest possible response and abatement efforts.*

Appellant's Reply Brief at 7, *Hazelwood v. State*, 836 P.2d 943 (Alaska Ct. App. 1992) (No. A-3452) (emphasis added).

136. See *supra* note 1 (describing the rapid increase in the amount of oil spilling from the *Exxon Valdez*).

for "big spills" would simply swallow-up any possible grant of immunity.

Determining the scope of the Clean Water Act's immunity provision by applying the judicially created exceptions to the exclusionary rule presents a complex problem. Courts must decide whether other reporting requirements constitute independent sources. Both the Alaska Court of Appeals and Supreme Court realized the illogic of dividing *Hazelwood's* report to find an independent source for the evidence.<sup>137</sup> Additionally, a court trying to apply the inevitable discovery doctrine in the context of spill reporting must choose between two interpretations. A court could apply the Eleventh Circuit rule that a process must already be underway at the time of the reporting.<sup>138</sup> Alternatively, applying the Ninth Circuit rule, a court could find inevitability without a preinitiated process.<sup>139</sup>

The facts of *Hazelwood* do not justify finding an existing process.<sup>140</sup> If an established policy existed or other facts showed that discovery was imminent, then a court might allow the evidence if the government proved by a preponderance of the evidence that it would have discovered the spill absent the required reporting. In *Hazelwood*, however, it was not "more likely than not" that the Coast Guard would have discovered the spill soon after the accident.<sup>141</sup> The events in *Hazelwood* seem too tentative and variable for the prosecution to successfully prove that the government would have inevitably discovered the spill. The spill occurred shortly after midnight and might not have been evident to other sailors, fishermen, or the Coast Guard until well into the next day. Although a spill of such a magnitude, and a huge oil tanker stranded on a reef, would have inevitably been found, when it would have been found remains unclear. Because the purpose of the

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137. See *supra* notes 107-12 and accompanying text (explaining how the trial court attempted to split *Hazelwood's* report into two separate "sources").

138. See *supra* note 96 and accompanying text. The time of the reporting is analogous to the time of illegal compelling of evidence from a witness or defendant.

139. See *supra* note 96 (discussing cases following the minority approach by applying the inevitable discovery doctrine even if no pre-existing search was underway at the time of illegal government activity).

140. See *supra* note 96 (discussing cases following the majority approach by applying the inevitable discovery doctrine only if a pre-existing search that would have produced incriminating evidence was underway at the time as illegal questioning or search).

141. See *supra* note 97 and accompanying text.

reporting requirement is to get a clean-up process begun quickly<sup>142</sup> "inevitable" must be applied to mean "nearly as fast as the reporting to the Coast Guard would have accomplished."

As *Hazelwood* demonstrates, the Clean Water Act immunity clause should not be held analogous to the judicially created exclusionary rule,<sup>143</sup> or the legislative grant of immunity pursuant to grand jury or congressional testimony.<sup>144</sup> Environmental crimes, meant to deter pollution and prevent damage to the Earth, occur in a different context than common law crimes. Environmental protection should remain more important than imprisoning a polluter, and courts should respect a deal made to receive information. No matter how invidious a spill is, government should focus its energies and resources on the clean-up effort. Civil fines and penalties should, of course, still apply and require a polluter to pay for his "crimes."

To eliminate ongoing uncertainty about the scope of Clean Water Act immunity, Congress should amend 33 U.S.C. § 1321(b)(5) as follows:

Any person in charge of a vessel . . . shall, as soon as he has knowledge of any discharge of oil . . . from such vessel . . . , immediately notify the appropriate agency of the United States Government of the discharge . . . Notification received pursuant to this paragraph shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement, or when the prosecution has proven clearly and convincingly<sup>145</sup> that —

(A) it had discovered the discharge of oil through an independent source or independent investigation — wholly separate from the immunized statements of the person in charge; and

(B) such discovery facilitated remedial clean-up efforts as quickly as the actual reporting of the discharge by a person in

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142. The Fifth Circuit concluded "[T]he multipurpose statutory framework of the [Clean Water Act] . . . suggests that Congress thought removing the threat of criminal prosecution a sufficient inducement for the 'person in charge' to report spills." *United States v. LeBeouf Bros. Towing Co., Inc.*, 537 F.2d 149, 153 (5th Cir. 1976).

143. See *supra* notes 75-78 and accompanying text.

144. See 18 U.S.C. § 6002 (1988).

145. A clear and convincing standard would incorporate the approach preferred by the dissent in *Nix*. See *supra* note 94 (discussing the *Nix* dissent).

*charge would have accomplished.*<sup>146</sup>

This proposal would still provide an incentive for polluters to notify authorities, provided the penalties for not reporting are high enough.<sup>147</sup> As long as an investigation has already started at the time of the defendant's reporting, he or she may already have been "caught" despite the reporting, and therefore would not be able to report the spill simply in order to become immune. The prosecution must prove, however, that the *reporting* actually did not incriminate the defendant in any way. The proposed amendment would force the government, if it wishes to punish hazardous waste leaks more stringently, to increase investigatory and policing functions rather than rely on incriminating evidence from self-reporting provisions.

### CONCLUSION

Considering the need to mitigate and correct any environmental damage that has occurred, the reporting requirements of the Clean Water Act should grant use plus derivative use immunity. However, the exceptions to such immunity, outlined in *Kastigar* and *Nix*, should be interpreted and applied very narrowly. Oil spills, large and small, will probably continue to occur. Nonetheless, the consequences of too easily allowing exceptions to reporting immunity make the decision to report a spill a real dilemma for persons in charge. To better accomplish the ideals of environmental regulations, Congress and the courts should take immunity seriously.<sup>148</sup>

*James M. Paul\**

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146. 33 U.S.C. § 1321 (b)(5) (Supp. II 1990) (proposed additions in italics). The Alaskan regulations should grant immunity similar to, if not more broad than, the Clean Water Act provisions. Arguably, the State Constitution of Alaska requires grants of transactional immunity in return for compelling self-incriminatory statements. See *supra* notes 43, 55-56 and accompanying text.

147. With the threat of criminal sanctions for failing to report, a person in charge of a vessel has a great incentive to immediately report a spill. See *supra* notes 31-32 and accompanying text (explaining the extent of criminal penalties involved in this type of case).

148. In the words of the Alaska Court of Appeals [B]y requiring immunity today, the federal statute encourages immediate reporting in the event of a spill tomorrow. If this encouragement averts catastrophic environmental losses in future incidents, then Congress' decision to favor immunity over prosecution may, in the long run, prove to be a wise one. It is not for this court to say otherwise.

*Hazelwood v. State*, 836 P.2d 943, 954 (Alaska Ct. App. 1992).

\* J.D. 1995, Washington University.



## **RECENT DEVELOPMENTS**

