

Winter 1982

Testimonial Immunity and the Privilege against Self-Incrimination: A Study in Isomorphism

Peter Lushing

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Peter Lushing, Testimonial Immunity and the Privilege against Self-Incrimination: A Study in Isomorphism, 73 J. Crim. L. & Criminology 1690 (1982)

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

CRIMINAL LAW

TESTIMONIAL IMMUNITY AND THE PRIVILEGE AGAINST SELF- INCRIMINATION: A STUDY IN ISOMORPHISM

PETER LUSHING*

I. INTRODUCTION

Prosecutors have a means of eliciting testimony from witnesses who invoke their fifth amendment privilege against self-incrimination. The witness must testify if granted immunity. Originally, immunity was construed by the Supreme Court as protecting the witness from prosecution for any matter about which he testified ("prosecutorial" or "transactional" immunity).¹ In 1972, however, the Supreme Court ruled that it sufficed to give the witness immunity only from having his testimony used against him.² An immunized witness could be prosecuted for matters about which he testified, but his testimony could not be admitted into evidence at his trial or otherwise used.³ This protection is called "testimonial" or "use and derivative use" immunity.⁴ Two ensuing

* Professor of Law, Benjamin N. Cardozo School of Law. J.D., Columbia Law School, 1965; A.B., Columbia College, 1962.

This article is dedicated to the memory of Monrad Paulsen, my dean and my friend. I gratefully acknowledge the assistance of Professor Edward Yorio with an earlier draft of this article.

¹ See *Kastigar v. United States*, 406 U.S. 441, 449-59 (1972) (citing *Counselman v. Hitchcock*, 142 U.S. 547 (1892)).

² *Id.*

³ Such other uses include, for example, use as an investigatory lead to other evidence.

⁴ *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

This article treats testimonial immunity arising exclusively from the fifth amendment privilege against self-incrimination. Testimonial immunity might also arise from that privilege in combination with other constitutional rights. See *Simmons v. United States*, 390 U.S. 377, 389-94 (1968) (testimony given by defendant at fourth amendment suppression hearing cannot be used against him at trial); cf. *United States v. Kahan*, 415 U.S. 239, 243 (1974) (assumption *arguendo* that *Simmons* applies to sixth amendment right to counsel).

Supreme Court decisions have elaborated upon the meaning of "not using" an immunized witness's testimony.⁵ These cases, however, are inconsistent and imprecise, and create the need for a full analysis of the scope of testimonial immunity. Before turning to the difficulties raised by the cases, however, a review of the mechanics of immunity is helpful.

A person subpoenaed or otherwise lawfully ordered to testify is required, under criminal penalty, to appear at the designated tribunal at the time commanded, take an oath or affirmation to tell the truth, and answer truthfully the questions put to him.⁶ The fifth amendment confers upon the witness a privilege to decline to answer a question if that answer would tend to incriminate him.⁷ The claim of privilege must be immediately announced to be exercised effectively.⁸ If the interrogator challenges the existence of the privilege, a judge determines from the context of the question whether the witness indeed faces self-incrimination.⁹ A witness who rightly claims the privilege need not answer the question, and his silence is constitutionally excused. If the interrogator nonetheless wants the question answered,¹⁰ he may apply to a court for an order of immunity.¹¹ Only attorneys representing the government are empowered to apply for immunity orders,¹² which are granted ministerially.¹³

An immunity order requires that the witness testify despite his privilege against self-incrimination. The order prohibits use of the testi-

⁵ *United States v. Apfelbaum*, 445 U.S. 115 (1980); *New Jersey v. Portash*, 440 U.S. 450 (1979).

⁶ 18 U.S.C. § 1623 (1976) (penalty for false testimony); 28 U.S.C. § 1826 (1976) (penalty for failure to testify). Even one who takes the witness stand voluntarily is under a duty to answer all questions put to him. *Brown v. United States*, 356 U.S. 148, 153 (1958).

⁷ U.S. CONST. amend. V. For the text of the privilege, see *infra* text accompanying n. 38. On the privilege generally, see *infra* authorities cited in note 38.

⁸ *Rogers v. United States*, 340 U.S. 367, 370-71 (1951); *United States v. Sullivan*, 274 U.S. 259, 264 (1927) (tax return). But see *Marchetti v. United States*, 390 U.S. 39, 41, 48-49, 60 (1968) (distinguishing *Sullivan* and allowing invocation of the privilege after indictment for failure to file gambling tax return). Criminal defendants, while on trial, cannot be ordered to take the witness stand in the first instance because of the privilege, and hence do not have to invoke the privilege. See C. McCORMICK, EVIDENCE § 130 (E. Cleary 2d ed. 1972); cf. *Carter v. Kentucky*, 450 U.S. 288 (1981) (right to jury instruction on irrelevance of failure of defendant to testify).

⁹ *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

¹⁰ The federal immunity statute authorizes application for an immunity order upon the mere belief that a prospective witness will claim his privilege. 18 U.S.C. § 6003(b)(2) (1976).

¹¹ See generally C. McCORMICK, *supra* note 8, § 143, at 306-07.

¹² 18 U.S.C. §§ 6003-6005 (1976). See *supra* note 11.

Commentators have suggested that defense counsel ought to be able to obtain immunity for defense witnesses, but the courts have reacted coldly. See generally Note, *Defense Witness Immunity*, 47 BROOKLYN L. REV. 897 (1981); Comment, *Defense Witness Immunity: Constitutional Demands and Statutory Change*, 72 J. CRIM. L. & C. 1026 (1981); Note, *Witness for the Defense: A Right to Immunity*, 34 VAND. L. REV. 1665 (1981).

¹³ *In re Lochiatto*, 497 F.2d 803, 804 n.2 (1st Cir. 1974).

mony and use of information derived from the testimony against the witness in criminal cases, except in perjury prosecutions.¹⁴ If the witness refuses to obey the order to testify, he faces contempt proceedings; if he testifies falsely, he faces a charge of perjury.¹⁵

The court enforces the grant of immunity in any ultimate prosecution of the witness (except, as stated, a prosecution for perjury, or for otherwise refusing to obey the immunity order itself¹⁶) by determining at a pre-trial hearing whether the prosecutor's evidence derives investigatively from leads supplied by the immunized testimony.¹⁷ Of course, if the immunized testimony itself were offered by the prosecutor at the trial of the witness, the judge would enforce the grant of immunity by sustaining defense counsel's objection to the offer.¹⁸

Two recent Supreme Court decisions examined the meaning of testimonial immunity. In *New Jersey v. Portash*,¹⁹ a witness testified before the grand jury under a grant of immunity, and was then indicted for official misconduct. At the subsequent trial of the witness, the judge ruled that he could be impeached through cross-examination on his immunized grand jury testimony if that testimony was materially inconsistent with his trial testimony. Ostensibly because of this ruling, the defendant did not take the stand, and was convicted. The Supreme

¹⁴ 18 U.S.C. § 6002 (1976), *quoted infra* text accompanying note 247. An immunity order excepts prosecutions for perjury "or otherwise failing to comply with the order." *Id.* Contempt, like perjury, may place an immunized witness in noncompliance with the order to testify. *See infra* text accompanying notes 236-40.

¹⁵ *In re Grand Jury Proceedings*, 644 F.2d 348 (5th Cir. 1981) (contempt); *United States v. Housand*, 550 F.2d 818, 822 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977) (perjury).

¹⁶ *See supra* note 14.

¹⁷ *Kastigar v. United States*, 406 U.S. 441, 460-62 (1972).

¹⁸ This scenario also applies to persons subpoenaed to produce documents or things, since the act of producing a document or thing in compliance with a subpoena might be privileged under the fifth amendment. *See infra* note 63. Federal immunity law therefore covered compelled "information" as well as testimony. 18 U.S.C. § 6002 (1976).

New York has two major variations from federal law. (1) Immunity is conferred on grand jury witnesses not by court order but by operation of law. N.Y. CRIM. PROC. LAW § 190.40(2) (McKinney 1971). (2) Immunity is not testimonial but prosecutorial or transactional, i.e., the witness cannot be prosecuted for matters he testifies about. *Id.* § 50.10(1) (McKinney 1981). On state immunity provisions, see generally C. MCCORMICK, *supra* note 8, § 143, at 306-08. Jurisdictions granting prosecutorial immunity apparently must also afford the witness testimonial (use and derivative use) immunity. *See* *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 53, 79 (1964). The utility of testimonial immunity to a witness who possesses prosecutorial immunity is apparent in instances where for example, he is later prosecuted for a crime not the subject of his immunized testimony. *Cf.* *Brown v. Walker*, 161 U.S. 591, 627 (1896) (Shiras, J., dissenting) (arguing that prosecutorial immunity is unconstitutional because disclosures compelled in one proceeding may give clues and hints which may be subsequently used against the witness in another proceeding).

¹⁹ 440 U.S. 450 (1979).

Court affirmed a reversal of his conviction.²⁰ Justice Stewart, writing for the Court, simply quoted *Kastigar v. United States*, the Court's 1972 decision upholding the constitutionality of testimonial immunity: "[immunity] prohibits the prosecutorial authorities from using the compelled testimony in any respect"²¹

In *United States v. Apfelbaum*,²² decided the term after *Portash*, a witness had testified under immunity before a federal grand jury, and was then indicted for committing perjury in the course of that testimony. The trial court permitted the prosecutor to introduce portions of the grand jury testimony that were not charged as perjurious to show that Apfelbaum had made the indicted false statements knowingly.²³ The third circuit reversed Apfelbaum's conviction, holding that the only immunized testimony admissible under the perjury exception to immunity is the testimony alleged to be the corpus delicti of the indicted perjury.²⁴

The Supreme Court reversed. Writing for the Court, Justice Rehnquist rejected the notion that immunity requires treating a witness as if he had been allowed to remain silent.²⁵ Silence is merely the mechanics of the privilege against self-incrimination, not the protection the privi-

²⁰ *Id.*, *affg* 151 N.J. Super. 200, 376 A.2d 950 (App. Div. 1977), *cert. denied*, 75 N.J. 597, 384 A.2d 827 (1978).

²¹ 440 U.S. at 458 (quoting *Kastigar v. United States*, 406 U.S. 441, 453 (1972)) (emphasis in original).

The Court first rejected the contention that *Portash* could not invoke his privilege because he had not testified and exposed himself to impeachment in fact. *Id.* at 453-56. It also found that the judgment below did not rest on a state ground. *Id.* at 453 n.3. Justice Brennan, joined by Justice Marshall, joined the Court's opinion and discussed the question of independent state grounds barring Supreme Court review of the case. *Id.* at 460. Justice Powell, joined by Justice Rehnquist, also joined the Court's opinion, and discussed whether *Portash* had properly invoked his privilege. *Id.* at 462. Justice Blackmun, joined by Chief Justice Burger, dissented on the ground that the Court was deciding an abstract question. *Id.* at 463.

²² 445 U.S. 115 (1980).

²³ *Id.* at 119. The Supreme Court said the testimony had also been offered to put the charged statements in context, and implied that the testimony had not been admitted on this ground. *Id.* The record, however, shows that the nonindicted testimony was offered only to show its own falsity in order to prove a pattern or design of perjury and to show a motive for perjury as well as Apfelbaum's knowledge of the falsity of his indicted testimony. Appendix at 23, 25, *United States v. Apfelbaum*, 445 U.S. 115 (1980). The trial judge did not state the grounds upon which he admitted the testimony. *Id.* at 26. During argument on admissibility, however, he did state that, concerning the question whether the witness knowingly lied, "you ought to be able to show other instances of false statements." *Id.* at 25. During a hearing on a post-trial motion the judge indicated that he had admitted the testimony to show a pattern of deceit. *Id.* at 72. *See also infra* note 24.

²⁴ 584 F.2d 1264 (3d Cir. 1978), *rev'd*, 445 U.S. 115 (1980). The court of appeals also held that immunized testimony could be admitted to show the context of the indicted testimony. *Id.* at 1270 n.9. The Supreme Court did not advert to this portion of the holding. 445 U.S. at 119, 123-24; *see supra*, n. 23.

²⁵ The Court first held that Congress intended the perjury exception to the statutory immunity to be as broad as the Constitution permits. 445 U.S. at 121-23.

lege was created to afford.²⁶ In fact, Justice Rehnquist reasoned, a perjury prosecution itself is inconsistent with the notion of treating the immunized witness as if he had remained silent.²⁷ The Court viewed the privilege as protecting the witness only with respect to matters that pose real and substantial hazards of subjecting him to criminal liability at the time he asserts the privilege. When Apfelbaum had been granted immunity, the chance that he might thereafter commit perjury was trifling and imaginary.²⁸ Hence, Apfelbaum could not have claimed his privilege on the ground that he was about to commit perjury. Absent a privilege there need not be immunity. Truthful²⁹ immunized testimony may therefore be used in a prosecution for perjury.³⁰

How is immunity to be construed after *Apfelbaum*? *Kastigar* upheld the constitutionality of testimonial immunity and stated that the immunity prohibits use of the compelled testimony in any respect. In *Portash*, the Court, relying on *Kastigar*, prohibited a state from using immunized testimony to impeach the witness. In *Apfelbaum*, the Court sympathized with lower courts who had mistakenly read *Kastigar* literally, but was silent as to its *own* literal interpretation of *Kastigar* in *Portash*.³¹ The *Apfelbaum* Court promulgated a test of isomorphism, a one-to-one correspondence test, for determining the scope of immunity: would the privilege against self-incrimination have been available to the witness on the ground that the testimony he actually gave could not have been compelled? If the privilege would not have extended to the actual testimony, then immunity does not cover that testimony.

However closer *Apfelbaum* may be than *Kastigar* and *Portash* to a principled doctrine of immunity, the decision raises serious problems

²⁶ *Id.* at 124. In *Kastigar*, however, the Court had stated that the federal immunity statute "leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege." *Kastigar v. United States*, 406 U.S. 441, 462 (1972).

²⁷ 445 U.S. at 126. Justice Rehnquist would have been more precise in stating that the third circuit's admission of the corpus delicti testimony was inconsistent with treating the witness as if he had remained silent. Since testimonial, not prosecutorial, immunity is involved, it is the admission of evidence, not the allowing of a prosecution, that is "inconsistent" with treating the witness as if he had remained silent.

²⁸ The Court based its analysis on the doctrine which excludes prospective crimes from fifth amendment protection. 445 U.S. at 128-31; see *infra* notes 85-97 and accompanying text.

²⁹ The Supreme Court assumed that the testimony in question was truthful. 445 U.S. at 123. *But cf. supra* note 23.

³⁰ See *infra* note 34 for the separate opinions in *Apfelbaum*.

In a case decided between the *Portash* and *Apfelbaum* decisions, the Court faced the use of immunized testimony to prove perjury by inconsistent statement. The case was decided without reaching that issue. *Dunn v. United States*, 442 U.S. 100, 105 (1979).

³¹ *Apfelbaum* discussed *Portash* only in a footnote, where it sympathized with lower court difficulty in applying broad generalizations from the Court's immunity opinions. 445 U.S. at 120 n.6.

and leaves application of the immunity concept uncertain. First, if the *Kastigar* opinion is overbroad, what *does* that seminal decision stand for? Second, if *Portash* was decided on an overbroad premise, is the result in *Portash* correct, and if it is, why? *Portash* limited immunity to “testimonial” use of the immunized testimony,³² but neither defined “testimonial” nor attempted to show why impeachment is a “testimonial” use. Third, both the statement of the Court’s holding and its application to the facts of *Apfelbaum* are muddled. Justice Rehnquist wrote, “we hold . . . the Fifth Amendment [does not require] that the admissibility of immunized testimony be governed by any different rules than other testimony at a trial for making false statements.”³³ The reach of this “holding” is unclear. What result follows if the immunized testimony is offered to prove perjury committed on an occasion prior to the grant of immunity? Three justices in *Apfelbaum* felt constrained to concur in result only.³⁴ Fourth, if, as *Apfelbaum* reasons, immunity does not extend to perjury prosecutions because there is no privilege to commit perjury, how can *Portash* be correct when it seemingly immunizes a witness from exposure of his perjury by prohibiting impeachment based on inconsistent statements? Fifth, if *Portash* has not been overruled on its facts as well as on its broad premise, does it follow from the premise of *Apfelbaum*—the symmetry of immunity and privilege—that *Portash* would have had a privilege not to testify on the ground that his testimony might some day impeach him?

It is clear that the Court cannot continue to decide the reach of immunity as it did in *Portash*, by virtually unlimited generalization, without considering the implications of *Apfelbaum*. If a given use of immunized testimony (e.g., impeachment) is prohibited by immunity, then based on *Apfelbaum* that conclusion entails an implied holding that the given use, impeachment, is a ground for invoking the privilege in the first place. The Court simply cannot require symmetry between immunity and privilege without examining, in every immunity case, whether the given use is a ground for invoking the privilege.

This Article accepts and will develop the Court’s isomorphic theory of immunity and privilege, and will show why *Portash* is nonetheless correct in result. A case for a broadened view of the privilege, partially because of the availability of testimonial immunity, will be made. *Apfelbaum* will be shown to be incorrect in result. This Article will also ana-

³² 440 U.S. at 458.

³³ 445 U.S. at 117; *cf. id.* at 130, 131 (similar statements).

³⁴ Justice Brennan, and Justice Blackmun joined by Justice Marshall, both expressed reservations about the use of immunized testimony to help establish perjury not committed contemporaneously, and questioned whether special rules of evidence would have to limit the particular uses of immunized testimony in a perjury prosecution. *Id.* at 132, 133.

lyze the problem of immunized testimony and perjury by inconsistent statement, a problem faced once by the Court but left unresolved.³⁵ Finally, this Article will discuss the constitutional requirements of an immunity statute, and consider an immunity case presently pending before the Supreme Court, *Pillsbury Co. v. Conboy*.³⁶

II. CONSTRUING THE PRIVILEGE AGAINST SELF-INCRIMINATION

As previously noted, a prosecutor can use immunity to make a witness testify despite the existence of the fifth amendment privilege against self-incrimination. Since a grant of immunity obligates the witness to testify rather than remain silent as the constitutional privilege would otherwise allow him to do, it follows that immunity is itself required to a certain degree by the Constitution when a privileged witness is forced to speak. Hence, the Supreme Court has ruled that immunity must be "co-extensive with the scope of the privilege."³⁷

In order to frame the immunity problem, this Article will initially accept as a given the doctrine of the privilege against self-incrimination that the Supreme Court has forged in cases not involving considerations of immunity. The Court's jurisprudence of the reach of the privilege emerges most clearly from cases in which witnesses initially claimed the right to remain silent. These decisions delineate the scope of the privilege issue in its paradigmatic setting: does the witness have a privilege not to answer the question? Cases on whether proffered immunity is constitutionally sufficient to override the privilege, or whether previously conferred immunity bars a given use of testimony already given, do not lend themselves to the construction of a theory of immunity from the ground up; immunity has its origin in the privilege, not spontaneous generation. Thus, the inquiry here will begin with cases dealing with privilege, not immunity. In this section of the Article, the Court's "pure privilege" cases will be the premise for the exploration of the privilege, with a few passing exceptions identified in footnote.

The fifth amendment provides in pertinent part: "nor shall any person . . . be compelled in any criminal case to be a witness against himself . . ." ³⁸ Although the Court usually does not isolate the terms of the privilege when it frames an issue regarding the scope of the privi-

³⁵ See *supra* note 30.

³⁶ 102 S. Ct. 998 (1982), *granting cert. to In re Corrugated Container Antitrust Litigation*, 661 F.2d 1145 (7th Cir. 1981) (en banc). See *infra* text accompanying notes 143-50. The Supreme Court rendered its decision in *Pillsbury Co. v. Conboy* as this Article went to press. 51 U.S.L.W. 4061 (U.S. Jan. 11, 1983). See *infra* notes 258-61 and accompanying text.

³⁷ *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

³⁸ U.S. CONST. amend. V. On the privilege generally, see M. BERGER, *TAKING THE FIFTH* (1980), and the bibliography *id.* at 265-71. For a comparatively lengthy Supreme Court discussion of the history of the privilege, see Justice Goldberg's opinion in *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55-77 (1964). On the policies of the privilege, see generally

lege, consideration of each element of the text is useful. The Court tends to use its own terminology for the elements of the privilege, such as "testimonial" for "witness,"³⁹ and "incriminating" for "against."⁴⁰ The substitute terms add nothing to explication of the privilege, but for fluidity of prose they will occasionally be used here.

A. "NOR SHALL" ANY PERSON

The self-incrimination clause of the fifth amendment begins with the prohibition "nor shall," implying that there are no exceptions to the privilege. That there are no exceptions is not tautological, for the Court has suggested that other privileges and rights created by the Constitution might have to give way under certain circumstances.⁴¹ No language in the Court's self-incrimination opinions, however, indicates that that privilege ever bends under the weight of competing interests.

B. ANY "PERSON"

Although "person" of course includes natural individuals, it does not include corporations or associations.⁴² The exclusion is not based on the ability to speak, however, since a self-incrimination question can arise when documents are subpoenaed,⁴³ and a corporation is certainly subject to subpoena. In fact, a corporation gives (written) testimony when it answers an interrogatory.⁴⁴

C. BE "COMPELLED"

"Compelled" traditionally meant forced to testify by the law of subpoenas and contempt, and perhaps by other legal sanctions such as preclusion for failure to comply with discovery requests.⁴⁵ The threat of being imprisoned for refusing to testify truthfully is a compulsion which triggers the privilege. The Court has additionally required that the privilege be explicitly invoked before compulsion will be recognized.⁴⁶

Ayer, *The Fifth Amendment and the Inference of Guilt from Silence: Griffin v. California after Fifteen Years*, 78 MICH. L. REV. 841, 848-52 (1980); Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 679-701 (1968).

³⁹ *E.g.*, United States v. Wade, 388 U.S. 218, 222 (1967).

⁴⁰ *E.g.*, Hoffman v. United States, 341 U.S. 479, 486 (1951).

⁴¹ See *Gannett Co. v. DePasquale*, 443 U.S. 368, 391-93 (1979) (first amendment freedom); United States v. Nixon, 418 U.S. 683, 707 (1974) (executive privilege). *But cf.* Hill, *Testimonial Privilege and Fair Trial*, 80 COLUM. L. REV. 1173, 1180 (1980) (arguing against disallowance of executive privilege).

⁴² *Bellis v. United States*, 417 U.S. 85 (1974); *United States v. White*, 322 U.S. 694 (1944).

⁴³ See *Wilson v. United States*, 221 U.S. 361, 374-75 (1911); *infra* note 63.

⁴⁴ FED. R. CIV. P. 33(a). See *Holler v. General Motors Corp.*, 3 F.R.D. 296, 298 (E.D. Mo. 1944).

⁴⁵ See 8 J. WIGMORE, EVIDENCE § 2266 (McNaughton rev. 1961); *infra* note 47.

⁴⁶ *United States v. Monia*, 317 U.S. 424, 427 (1943). *But cf.* *United States ex rel. Vajtauer*

D. "IN" ANY CRIMINAL CASE

"In" does not mean that compulsion triggers the privilege only when it occurs during a person's criminal trial. The requisite compulsion can occur in any situation in which a witness is under subpoena or other legal requirement to testify: grand jury, civil trial, legislative or administrative hearing, pre-trial proceeding, or discovery.⁴⁷ Thus, "in" modifies the phrase "any criminal case," not the phrase "be compelled." "In any criminal case" means that the witness is protected by the privilege in the face of a possible criminal prosecution, present or future, in which he would be the defendant—not that the privilege exists only during the course of a "criminal case."⁴⁸

E. ANY "CRIMINAL" CASE

"Criminal" confines the privilege to hazards associated with the prosecution of the witness for a crime. The privilege does not protect against non-penal consequences such as disgrace,⁴⁹ loss of employment,⁵⁰ or betrayal of a trust.⁵¹ The line between "criminal" and non-"criminal" consequences is not always easy to draw. The Supreme Court has recently affirmed that a given law does not create "criminal" consequences if the legislature intended the consequences of violation of the law to be civil, provided that the law is not too "punitive."⁵² Whether consequences are "punitive" is determined by a multiplicity of factors.⁵³

v. Commissioner, 273 U.S. 103, 113 (1927) (failure to invoke the privilege goes to its waiver); *supra* note 8. On the unique status of criminal defendants on trial, see *id.*

It is debatable whether compulsion includes nonlegal coercion such as police brutality or some lesser degree of overbearing behavior. The police have neither subpoena power nor a privilege to assault suspects to obtain confessions, and although they do not necessarily violate a law by cajoling or tricking a suspect, or by exhausting him through questioning, they certainly have no right to impose sanctions for not answering questions. Since, therefore, police compulsion is not endorsed by law (as opposed to being "under color of law"), the Court traditionally dealt with police irregularities principally under the due process clause, not the privilege against self-incrimination. See Y. KAMISAR, *POLICE INTERROGATION AND CONFESSIONS* 27-40 (1980). In *Miranda v. Arizona*, 384 U.S. 436, 461 (1966), however, the Court wrote that "all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning." The Court has since retreated from this position. See *infra* text accompanying notes 191-94.

⁴⁷ See *In re Gault*, 387 U.S. 1, 47-48 (1967) (dictum); Comment, *Plaintiff as Deponent: Invoking the Fifth Amendment*, 48 U. CHI. L. REV. 158 (1981).

⁴⁸ For more on "in," see *infra* note 102.

⁴⁹ *Brown v. Walker*, 161 U.S. 591, 598, 604-06, 609-10 (1896) (dictum) (immunity case).

⁵⁰ *Ullman v. United States*, 350 U.S. 422, 430-31 (1956) (immunity case).

⁵¹ *Cf. Hale v. Henkel*, 201 U.S. 43, 66-67 (1906) (immunity case; impairment of reputation for probity).

⁵² *United States v. Ward*, 448 U.S. 242, 248-49 (1980).

⁵³ *Id.* at 249.

F. TO BE A "WITNESS"

The Supreme Court first construed "witness"⁵⁴ in *Holt v. United States*, decided in 1910.⁵⁵ An issue at trial was whether Holt owned a certain blouse; the government proved that he had put it on—under protest—and that it had fit. Justice Holmes termed Holt's objections based on the privilege "extravagant" and stated that "witness" concerns "communications" of the compelled person, "not an exclusion of his body as evidence"; otherwise, a jury could not even look at the defendant.⁵⁶

The notion that a "witness" is one who "communicates" was reaffirmed in the 1966 case of *Schmerber v. California*.⁵⁷ There, the Court upheld admission of the results of a blood test performed on an intoxicated driver over his objection. Justice Brennan's majority opinion found the values protected by the privilege to include the "inviolability of the human personality," but concluded that historically the privilege had been confined to verbal evidence.⁵⁸ The privilege reaches communications and responses, such as compliance with a subpoena duces tecum, that "are also communications."⁵⁹ Lower courts had excluded from the privilege fingerprinting, photographing, measuring, writing or speaking for identification, appearing in court, standing, assuming a stance, walking, and gesturing.⁶⁰ "The distinction which has emerged," wrote Jus-

⁵⁴ The word "witnesses" appears in the Constitution in article III, § 3, clause 1 (proof of treason), and twice in the sixth amendment (rights of confrontation and compulsory process in a criminal case). Since, in contrast to the use of "witness" in the privilege against self-incrimination, "witnesses" in these provisions does not refer to the person whose rights are involved, nothing can be gained from examining their interpretation. See also *infra* note 58.

⁵⁵ 218 U.S. 245 (1910).

⁵⁶ *Id.* at 252-53. The Court's reading of the privilege was technically dicta because it went on to note that there was, in any event, no rule excluding illegally obtained evidence from trial. *Id.* at 253 (citing *Adams v. New York*, 192 U.S. 585 (1904), *overruled*, *Weeks v. United States*, 232 U.S. 383 (1914) (federal trials) and *Mapp v. Ohio*, 367 U.S. 643 (1961) (state trials)).

⁵⁷ 384 U.S. 757 (1966). See generally Arenella, *Schmerber and the Privilege Against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31 (1982).

⁵⁸ *Id.* at 762-63. The Court placed no significance on the constitutional choice of the term "witness" instead of "evidence," which is used in some state constitutions, as in "no person shall be compelled to give evidence against himself." *Id.* at 761-62 note 6.

⁵⁹ *Id.* at 764. Some commentators have read *Boyd v. United States*, 116 U.S. 616 (1886), as standing against *Schmerber*, because *Boyd* protected seized papers not necessarily composed by their custodian. See Dann, *The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence from a Suspect*, 43 S. CAL. L. REV. 596, 605 (1970); Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 127. *Boyd* was cited in *Schmerber* regarding compliance with subpoenas. 384 U.S. at 763-64. The Court has repudiated *Boyd's* theory concerning the interrelationship between the privilege and the fourth amendment. See *Andresen v. Maryland*, 427 U.S. 463, 471-72 (1976); *Fisher v. United States*, 425 U.S. 391, 407 (1976); Note, *The Life and Times of Boyd v. United States (1886-1976)*, 76 MICH. L. REV. 184, 206-11 (1977).

⁶⁰ 384 U.S. at 764.

tice Brennan, "is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect the source of 'real or physical evidence' does not violate it."⁶¹ Adopting this distinction, the Court held that by being the source of his blood Schmerber had not communicated or implicated his "testimonial capacities."⁶² According to *Schmerber*, then, whether one is a "witness" turns on whether the evidence obtained is "testimonial."⁶³

The Court's most recent discussion of "witness" is in the context of a court-ordered psychiatric examination to determine competency to stand trial. In *Estelle v. Smith*,⁶⁴ the psychiatrist appeared at a death penalty sentencing proceeding to testify against the defendant. The state argued that the privilege against self-incrimination did not apply

⁶¹ *Id.* The "lawyers' distinction" between real and verbal evidence had been rejected as a touchstone for due process by Justice Frankfurter in the celebrated stomach-pumping case. *Rochon v. California*, 342 U.S. 165, 173 (1952).

⁶² 384 U.S. at 765.

⁶³ In *Fisher v. United States*, 425 U.S. 391 (1976), the Court appeared (in a rather confusing opinion by Justice White) to accept that situations exist where compliance with a subpoena duces tecum would involve being a "witness" because it would reveal the actor's belief about the documents he produced. *Id.* at 410. One who complies with a subpoena by tendering demanded documents does not, however, expressly assert anything. Perhaps the actor makes an implied assertion ("these are the documents you demanded by description in the subpoena").

Additionally, *Byers v. California*, 402 U.S. 424, 435-36 (1971) (Harlan, J., concurring); *id.* at 462-63 (Black, Douglas, and Brennan, JJ., dissenting); *id.* at 472-73 (Brennan, Douglas, and Marshall, JJ., dissenting), seems to construe the act of stopping one's car and giving one's name and address, in the context of an accident and a hit-and-run statute, as "testimonial" under the privilege because of what those acts reveal about the actor's belief that he has been in an accident. *Id.* at 435, 436. Here the privilege encompasses conduct—stopping and giving one's name and address—although such conduct does not strongly tend to reveal any incriminatory belief that is even impliedly being asserted by the actor.

Fisher examined earlier decisions which held that the actor was not a "witness" within the privilege. In *United States v. Wade*, 388 U.S. 218 (1967), the Court had ruled that being compelled to stand in a line-up wearing strips of tape and saying "put the money in the bag" did not violate the privilege because the line-up extracted no "testimonial" evidence; it involved only compulsion to exhibit physical characteristics, not compulsion "to disclose any knowledge." *Id.* at 222. In *Gilbert v. California*, 388 U.S. 263 (1967), the Court had ruled similarly regarding handwriting exemplars. Discussing these cases, the *Fisher* Court seemed to exclude obvious, or so-called "self-evident," facts from the reach of "witness," as well as facts already known to the Government. 425 U.S. at 411. Even if this exclusion from the privilege were sensible, the evidentiary characteristics of obviousness and government preknowledge relate to what kind of hazard triggers the privilege, see *infra* notes 84-118 and accompanying text (discussion of "against"), not what metaphysical type of evidence—what is it to be a "witness" or to be "testimonial"—comes within the privilege. If "witness" in the privilege relates to the type of evidence—i.e., testimonial vs. non-testimonial, ideas vs. blood or physical appearance—then "witness" does not cover the question of how helpful the evidence is to the government because of either "self-evident" characteristics or government preknowledge of the compelled information. These characteristics relate to the hazard that the evidence presents to the compelled person—a matter encompassed by the term "against" within the privilege, as will be discussed in the next section.

⁶⁴ 451 U.S. 454 (1981).

to what the defendant had told the psychiatrist because the defendant had conveyed nontestimonial information. Chief Justice Burger, writing for the Court, agreed that the privilege only covers evidence "related to some communicative act . . . [or] used for the testimonial content of what was said."⁶⁵ In essence, however, the psychiatric diagnosis was not based simply on observation of the defendant; the doctor relied largely on the defendant's account of the crime and his lack of remorse, as well as "remarks he omitted," such as, "[m]an I would do anything to have that man back alive."⁶⁶ Hence, the defendant had been compelled to be a "witness."

Estelle's reliance upon "omitted remarks" means that one can be a "witness" within the privilege through silence, if silence reveals something of one's mind. This proposition may be a commonplace in the law of evidence,⁶⁷ but in *Estelle* the revelation of the witness's mind was not necessarily even a product of his consciousness. Further, the defendant made no assertion, not even an implied one, unless one can construct a statement from the very failure to speak under such circumstances.⁶⁸

In sum, the most consistent reading of the Supreme Court's holdings and discussions suggests that a "witness" within the text of the fifth amendment's privilege against self-incrimination is a person who reveals the contents of his mind,⁶⁹ regardless of the format of revelation. Those matters which pertain to purely habitual characteristics, such as posture, voice, or handwriting, or which are obvious, uncontroverted, or already known to the government, are excepted.⁷⁰

⁶⁵ *Id.* at 463.

⁶⁶ *Id.* at 464-65 & n.9.

⁶⁷ See C. McCORMICK, *supra* note 8, § 270.

⁶⁸ In a footnote, the Court alluded to the question whether one is a "witness" if a psychiatrist relies on one's mannerisms, facial expressions, attention span, or speech patterns. 451 U.S. at 464 n.8. This Article discusses *Estelle* in another context, *infra* text accompanying notes 98-102.

⁶⁹ See *Curcio v. United States*, 354 U.S. 118, 128 (1957); *cf.* *Couch v. United States*, 409 U.S. 322, 327 (1973) (privilege protects a "private inner sanctum of individual feeling and thought").

⁷⁰ See *supra* note 63.

The relationship between "compelled" and "witness" in the text of the privilege—that is, the meaning of the words "to be" in the phrase "compelled . . . to be a witness"—is quite narrow under *Andresen v. Maryland*, 427 U.S. 463, 477 (1976). The Court there held that a seizure of records did not violate the privilege since, *inter alia*, there had been no compulsion to create the records. It follows that a compulsion to reveal facts to the government is not sufficient to trigger the privilege, even if those facts originate in the mind of the compelled person; there must also be compulsion to disgorge the content's of one's mind from the "inner man" to the external world. In *Andresen* the only compulsion was one requiring the revelation of facts which had already been disgorged from the mind onto paper. This analysis assumes that submitting to a police seizure is "compulsion" within the privilege, although the *Andresen* Court seems to reject that proposition. *Id.* at 473. In any event, language in the opinion supports the above analysis of "to be." *Id.* at 473, 477. For the views of various commenta-

G. "AGAINST" HIMSELF

It "witness" tells us what metaphysical type of evidence is protected by the privilege, what impact must that evidence have upon the individual to be protected by the privilege? In what manner must the witness's compelled revelations bear upon his criminal prosecution? These issues are raised by interpretation of the term "against."

"Against" encompasses statements "leading to the infliction" of criminal penalty.⁷¹ More specifically, compelled testimony is privileged if it could help bring about a conviction or enhance a sentence.⁷² Two issues now arise. The first is qualitative: does "against" encompass any causal connection between the testimony and the penalty of which the witness is in danger, or does "against" cover only certain kinds of potential prosecutorial exploitation of the testimony? The second issue is quantitative: how close does the causal connection have to be?—an issue since the privilege is passed upon when it is invoked, not when the compelled testimony is ultimately used against the witness.⁷³

Several propositions, not entirely consistent, emerge, albeit murkily, from the Court's evaluation of privileged hazards. First, there must be a "real danger" of criminal penalty to the witness in answering the question, not merely a "remote possibility out of the ordinary course of the law."⁷⁴ Apprehension of the danger must be "reasonable."⁷⁵ *Substantively*, then, the hazard must be fairly realistic. Second, the Court

tors on what "witness" means, see J. MAGUIRE, *EVIDENCE OF GUILT* § 2.04, at 22, 31-32 (1959) (voice exemplar could be privileged on a theory of "active cooperation"); E. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 158 (1963); 8 J. WIGMORE, *supra* note 43, §§ 2263-65 & p. 396 n.8 (handwriting samples involve no facts absent a voucher that the handwriting is in the actor's normal style).

One writer argues that "witness" should include conduct which can be so controlled as to be used as a means of conveying ideas. Weintraub, *Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination*, 10 Vand. L. Rev. 485, 506-08, & n.92 (1957). He excludes writing exemplars because the state could not rely on the writer's veracity, due to the impossibility of imposing a sanction for not writing in one's normal style. The impossibility of a sanction follows from a presumed lack of evidence that the exemplar was not "normal"—if the state possessed such evidence it would not need the exemplar in the first place. Weintraub admits it would be similarly impossible to prove that a witness lied about this crime, absent proof of commission of the crime itself. *Cf. infra* note 89. He also notes that the ability to imitate another's handwriting is rare, but seems to overlook the comparative ease of disguising one's own handwriting, which would be a sensible strategem for a suspect. An interesting and impassioned critique of the Supreme Court contends that one is a "witness" if one endures psychologically intrusive probing. Dann, *supra* note 59.

⁷¹ *Ullman v. United States*, 350 U.S. 422, 438-39 (1956) (immunity case, quoting *Boyd v. United States*, 116 U.S. 616, 634 (1886)).

⁷² *Estelle v. Smith*, 451 U.S. 454, 462-63 (1981).

⁷³ See generally Comment, *Self-Incrimination and the Likelihood of Prosecution Test*, 72 J. CRIM. L. & C. 671 (1981).

⁷⁴ *Heike v. United States*, 227 U.S. 131, 144 (1913) (immunity case).

⁷⁵ *Rogers v. United States*, 340 U.S. 367, 374 (1951).

weights the determination of the hazard strongly in favor of the claimant of the privilege. A judge must accept the witness's claim unless it is "perfectly clear" that it lacks foundation.⁷⁶ The Court has spoken of accepting the claim unless it is "impossible" or "incredible,"⁷⁷ and has even upheld a claim based upon the question, "What business is Mr. Smith in?"⁷⁸ *Procedurally*, therefore, the administration of the privilege is strongly favorable to the witness, in keeping with the required liberal construction of the privilege.⁷⁹ Third, the privilege has thus far been recognized only where the evidence would either tend to prove guilt or would lead to evidence that would tend to prove guilt, in the sense of proof that the witness committed a criminal act.⁸⁰ The Court has not rejected fifth amendment privilege for testimony that would bear merely upon matters unrelated to guilt, such as search and seizure; rather, the question simply has not arisen in a claim-of-privilege case.⁸¹ Hence, *Portash*, in extending immunity to testimony used for impeachment, breaks new ground.⁸²

⁷⁶ *Hoffman v. United States*, 341 U.S. 479, 488 (1951) (quoting *Temple v. Commonwealth*, 75 Va. 892, 898 (1881)).

⁷⁷ *Emspak v. United States*, 349 U.S. 190, 198-99 n.18 (1955). *Emspak* quoted an "impossible-to-say-[the-witness-has-no-privilege]" "test" from *Armdstein v. McCarthy*, 254 U.S. 71, 72 (1920). *Armdstein*, however, seemed only to be making a factual determination, not laying down a rule: "It is impossible to say . . . the question could have been answered with impunity." *Emspak* also quoted a "not-incredible-[to-believe-the-witness-is-privileged]" "test" from *United States v. Coffey*, 198 F.2d 438, 440 (3d Cir. 1952) (witness's suggested linkage to guilt does "not seem incredible in the circumstances of the particular case"). Query: is the reference to "incredible" a mere comment on the facts in *Coffey* and *Emspak*, or is it the application of a standard? See generally Comment, *supra* note 73.

⁷⁸ *Singleton v. United States*, 343 U.S. 944, *rev'g per curiam* 193 F.2d 464 (3d Cir. 1952).

⁷⁹ See *Quinn v. United States*, 349 U.S. 155, 162 (1955).

⁸⁰ The compelled evidence must "tend to show that [the witness] had committed a crime." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). There must be an "incriminating tendency of the disclosure," *Wilson v. United States*, 221 U.S. 361, 379 (1911), or a potential use of the disclosure as a "supply [of] investigatory leads." *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 78 (1965). An "investigatory lead" could even be the name of a witness who could supply evidence against the principal witness. *Hoffman v. United States*, 341 U.S. 479, 488 (1951); cf. *infra* note 82.

To be privileged the compelled evidence need not be enough to prove a prima facie case of guilt or be a source of leads for a prima facie case; the privilege protects statements that would merely furnish "a link in the chain of evidence needed to prosecute." *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (quoting *Blau v. United States*, 340 U.S. 159, 161 (1950)); see *Emspak v. United States*, 349 U.S. 190, 199 (1955) ("any one of many links").

⁸¹ The court's focus in claim-of-privilege cases upon hazards going to the merits of guilt, is typified by *Emspak*: "It is enough . . . that the trial court [passing upon the claim of privilege] be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime . . ." *Emspak v. United States*, 349 U.S. 190, 198 n.18 (1955) (quoting *United States v. Coffey*, 198 F.2d 438, 440 (3d Cir. 1952)).

⁸² The framework for "against" laid out above—namely, hazards associated with evidence of guilt or evidence which could lead to evidence of guilt—does not entail that the only hazards against which the privilege protects are those culminating (potentially) in the admis-

One generic situation presents no hazard within the ambit of the privilege. If the witness cannot be prosecuted for crimes he testifies about because of a bar such as the statute of limitations, double jeopardy, or a pardon, then he has no privilege.⁸³ A witness's innocence in fact, however, does not mean that he faces no hazard; his testimony might ensnare him in a prosecution through "ambiguous circumstances," and thus might still be privileged.⁸⁴

Quite troublesome to the Court are crimes not yet committed at the time the privilege is claimed. Originally, the Court relied on Wig-

sion of evidence at trial—so-called "evidentiary uses." "Non-evidentiary uses" of compelled testimony could include the decision to prosecute, *see* *Marchetti v. United States*, 390 U.S. 39, 52 (1968) (compelled disclosure could cause the prosecutor to "center attention" on the witness), plea-bargaining decisions, and formulation of trial strategy. *See generally* Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791, 806-10 (1978). Given that a core policy of the privilege is to require "the government in its contest with the individual to shoulder the entire load," *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964), the question of ends and means does not seem crucial here. If the witness's compelled testimony would aid in his own downfall, whether by furnishing evidence or by helping the prosecutor tactically, the Court should and would probably find the testimony privileged—at least so long as the testimony was related to the merits of guilt. At the time the privilege is claimed the distinction between evidentiary and non-evidentiary use could hardly arise, given the difficulty of hypothesizing a potential non-evidentiary use that is not co-joined with a potential evidentiary use. The issue could arise after the fact: a claim of privilege is overruled, the witness answers the question, the prosecutor exploits his answer only for non-evidentiary purposes, the witness is convicted as a result, and the claim of privilege is held on appeal to have been erroneously denied. Under these circumstances, the appellate court must decide whether non-evidentiary use of the erroneously compelled testimony is prejudicial error, or is instead a windfall to the prosecutor which does not infringe self-incrimination rights. Alternatively, the issue could arise in connection with the facial constitutionality of a statute which allowed non-evidentiary uses of immunized testimony.

An interesting case dealing with the non-evidentiary issue is *United States v. Kurzer*, 534 F.2d 511 (2d Cir. 1976). There, the immunized testimony may have caused another witness to decide to cooperate and testify against the principal witness. The compelled testimony thus may have ultimately led to evidence, although the connection between the compelled testimony and the ultimate evidence, if any, was not logical but psychological. The court held that the witness's immunity extended to use of the second witness's testimony if the immunized testimony caused the second witness to decide to testify. The court did not discuss the possibility that the witness's motive in deciding to "cooperate" and testify against Kurzer may have been irrelevant, since it is the law of subpoenas, perjury, and immunity that causes one to testify—it is not the person's decision to testify which causes him to testify. The witness's cooperation is irrelevant if it is the law that compels him to testify. One deciding to be uncooperative would not be helpful to the prosecution, but would be committing a crime if he did not truthfully testify under oath. His decision *not* to commit a crime would be irrelevant in this context since the self-incrimination clause does not protect one from the possibility that another witness will decide to obey law. (Note that in *Kurzer* the government knew about the second witness without exploiting Kurzer's immunized testimony.) In *Kurzer*, however, the second witness was immune from grand jury questioning; he himself was under indictment for matters related to Kurzer's crimes. *See* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 111.1, at 321 (2d ed. 1982). Moreover, obtaining his immunized testimony would make it almost impossible for the government to proceed with his own prosecution.

⁸³ *Brown v. Walker*, 161 U.S. 591, 598-99 (1896) (dictum) (immunity case).

⁸⁴ *Slochower v. Board of Educ.*, 350 U.S. 551, 557-58 (1956).

more,⁸⁵ flatly holding that the privilege protects only against disclosure of past and "present"⁸⁶ crimes.⁸⁷ This temporal dichotomy was discarded in *Marchetti v. United States*.⁸⁸ Marchetti was prosecuted for failure to pay a gambling tax levied before he engaged in the gambling. The Court upheld his defense of privilege, reasoning through Justice Harlan that one can face "substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination" even though the incrimination pertains to a future crime. One who must register prospectively could "reasonably expect" that registration would significantly enhance the likelihood of prosecution for the future gambling and provide evidence to facilitate conviction. Although witnesses might make insubstantial claims of privilege based on prospective acts, noted Justice Harlan, Marchetti's claim did not fall into this category.⁸⁹

The Court retreated from Justice Harlan's ringing rejection of a rigid chronological distinction in *United States v. Freed*.⁹⁰ Freed was charged with possession of an unregistered firearm, and defended on the ground that registration (the duty of his transferor) would have necessitated Freed furnishing his photograph and fingerprints for filing. Regis-

⁸⁵ 8 J. Wigmore, Evidence § 2259(c) (3d ed. 1940).

⁸⁶ A "present" crime would seem to entail a past crime that is a continuing offense, such as possession of contraband or conspiracy. Hence "present" is a redundant category: unless one commits a crime by the act of invoking the privilege, it is difficult to see what crime the witness could be committing in the present that he has not committed before he invoked the privilege, in the past. Cf. *United States v. Freed*, 401 U.S. 601, 611 (1971) (concurring opinion) (self-incrimination; possession in future is a continuation of possession in present).

⁸⁷ *Lewis v. United States*, 348 U.S. 419, 422 (1955) and *United States v. Kahrigier*, 345 U.S. 22, 32 (1953), both overruled, *Marchetti v. United States*, 390 U.S. 39, 54 (1968).

⁸⁸ 390 U.S. 39, 53-54 (1968).

⁸⁹ *Id.* The Court stated that a rigid chronological distinction could lead to easy evasion of the policies behind the privilege. The authorities cited by Justice Harlan for this proposition are conclusory. See *id.* at 53 n.12 (citing Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 37 (1949) (characterizing Wigmore's view as an "utter absurdity" which would "permit the destruction of the privilege in all or almost all situations by ingeniously drawn legislation," but without explaining further); McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 221 (Wigmore's notion is "naively artificial;" privilege "surely" covers interrogation about future criminal plans)). One commentator has suggested that under the Wigmore view the legislature could enact a statute requiring persons who commit any crime to register prospectively. Note, *Required Information and the Privilege Against Self-Incrimination*, 65 COLUM. L. REV. 681, 688-89 (1965). But would not proof that an individual had violated the registration statute require proof that he committed the predicate crime? Cf. *supra* note 70. The answer is yes, unless the registration statute covered mere intent to commit a crime, whether or not ultimately consummated. Such a statute, however, would give the government an even greater problem of proof: proof of intent to commit an uncommitted crime. The utility of the Wigmore doctrine is that it allows the federal government to obtain information about and jurisdiction over crimes simply by enacting, as in the *Marchetti* line of cases, a tax registration statute. But a non-prospective tax accomplishes the same end and avoids the future crimes issue. See *James v. United States*, 366 U.S. 213 (1961) (taxation of embezzlement income).

⁹⁰ 401 U.S. 601 (1971).

tration was required prior to possession, which was illegal under local law.⁹¹ Justice Douglas, for the majority, rejected Freed's self-incrimination defense, stating that there was no hazard of incrimination regarding future crime because government policy was not to release the registration information.⁹² Justice Douglas further wrote that the privilege does not protect against "incrimination for a career of crime about to be launched."⁹³

In *Apfelbaum*, the Court relied on *Freed's* second ground of decision. It distinguished *Marchetti* as involving a professional gambler who had already gambled, was gambling, and was likely to continue gambling.⁹⁴ *Apfelbaum*, a perjurer, apparently did not fit this profile. The difficulty with this reading of *Marchetti* is that it is unrelated to Justice Harlan's reasoning in that case.⁹⁵ Justice Harlan had emphasized a "confession of guilty purpose" preceding the prospective crime.⁹⁶ A sensible reading of *Marchetti's* facts and language—one that is consistent with the Court's rejection of the case as determinative in *Apfelbaum* and which leaves *Freed's* first alternative holding untrammelled—is that hazards in connection with crimes which might be committed after invocation of the privilege are not grounds for claiming the privilege, unless the compelled information would disclose an intent to commit such crimes.⁹⁷

The Court's most recent analysis of "against" within the privilege occurs in *Estelle v. Smith*, the competency-to-stand-trial-examination case discussed earlier in connection with "witness."⁹⁸ The state's psychiatrist, having conducted a court-ordered competency examination, testified for the prosecution at the defendant's sentencing. Chief Justice Burger wrote for the majority that had the use of the examination been confined to determining competency to stand trial—a "neutral" purpose—"no Fifth Amendment issue would have arisen."⁹⁹ Of interest is the Court's view of the competency issue as "neutral," i.e., as not "against" the person claiming the privilege. Since an incompetent person cannot be convicted, it might seem that Chief Justice Burger's dictum is incorrect, for by helping to prove his own competency the defendant is furnishing an indispensable condition for his punishment. In support of his

⁹¹ *Id.* at 603 n.3, 604.

⁹² *Id.* at 606.

⁹³ *Id.* at 606-07.

⁹⁴ *United States v. Apfelbaum*, 445 U.S. at 129-30.

⁹⁵ *But see Garner v. United States*, 424 U.S. 648, 660 (1976) ("basis" of *Marchetti* was that disclosure was required only of gamblers).

⁹⁶ *Marchetti v. United States*, 390 U.S. at 53-54.

⁹⁷ One could read *Marchetti* more narrowly, since, unlike the defendant in *Apfelbaum*, *Marchetti* invoked the privilege as a defense to a charge of failing to furnish information, and not as a shield to prevent use of testimony he had given.

⁹⁸ 451 U.S. 454 (1981); see *supra* text accompanying notes 64-68.

⁹⁹ 451 U.S. at 465, 467.

proposition, the Chief Justice cited lower court cases which held that one who raises the defense of insanity must submit to an examination by the prosecutor's psychiatrist.¹⁰⁰ Hence, the Court might have assumed that one who claims insanity or incompetency to stand trial has waived his fifth amendment privilege not to speak to a government or court-appointed psychiatrist.¹⁰¹

The defendant in *Estelle*, however, had not defended on incompetency or insanity grounds. Hence, waiver cannot account for the Court's "neutral purpose" dictum. To determine if Chief Justice Burger is correct, one should consider the possibilities once a compulsory competency examination has occurred. If the doctor testifies that defendant is *competent* to stand trial, nothing sought has been lost by the defendant, who, by hypothesis, did not "defend" on the ground of incompetency, and did not attempt to disturb the assumption that a criminal defendant is competent. (One could logically maintain, of course, that the defendant has still been compelled to hurt himself, the assumption of competency notwithstanding.) If the doctor testifies that defendant is *incompetent*, such evidence tends to avoid conviction, and is not "against" the witness. Although the evidence might cause incarceration in a mental institution, the privilege protects only against "criminal" consequences.¹⁰²

In sum, the most consistent reading of the Court's holdings and discussions suggests that a person is a witness "against" himself within the text of the privilege against self-incrimination when there is a non-remote chance that his testimony, by revealing information that helps to show commission of a crime, or by revealing information which could lead to such information, would increase the likelihood of conviction or

¹⁰⁰ 451 U.S. at 465, 468.

¹⁰¹ Whether this waiver theory is sound is not a matter of the intrinsic reach of the privilege, but is a question of waiver and conditioning of constitutional rights, and is beyond the scope of this article. See generally Westen, *Incredible Dilemmas: Conditioning a Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741 (1981).

¹⁰² See *supra* text accompanying notes 49-53. See also *Vitek v. Jones*, 445 U.S. 480, 491-93 (1980) (due process protection from incarceration in a mental hospital). Arguably, commitment to a mental institution is a "criminal" consequence within the meaning of the fifth amendment. See *In re Gault*, 387 U.S. 1, 49-50 (1967) (juvenile delinquency proceedings are "criminal" within the privilege despite the "civil" label the state attaches to the proceedings). See generally Aronson, *Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?*, 26 STAN. L. REV. 55, 78-80 (1973); Note, *Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination*, 83 HARV. L. REV. 648 (1970).

Another approach would be to reason that competency to stand trial is not an issue that arises "in" a criminal case, as "in" is used in the text of the privilege. The argument would be that competency is a matter of whether the defendant is subject to the criminal justice system; competency is a transcendental issue, not a question that arises "in" a criminal case, i.e., goes to matters of guilt or procedural defenses.

enhancement of his sentence. With regard to crimes not yet committed at the time of invocation of the privilege, the privilege exists only if the compelled information would disclose an intention to commit such a crime.

III. THE SCOPE OF CONSTITUTIONALLY REQUIRED IMMUNITY

A. THE ISOMORPHIC RELATIONSHIP OF IMMUNITY AND THE PRIVILEGE

1. *The Court's Acceptance of Testimonial Immunity*

The power to compel testimony over a valid claim of fifth amendment privilege against self-incrimination by conferring immunity was first recognized by the Supreme Court in 1892 in *Counselman v. Hitchcock*.¹⁰³ The statute examined in *Counselman* afforded immunity from admission of the compelled testimony into evidence—"use immunity"—but not immunity from a prosecutor following up investigatory leads suggested by the testimony—"derivative use immunity."

The *Counselman* Court approved immunity in principle as a means of supplanting the silence the privilege permits. According to the Court, immunity must protect against that which the privilege protects against; immunity is isomorphic with the privilege. The *Counselman* statute, which provided use immunity but not derivative use immunity, was held unconstitutional. The Court stated that only immunity from prosecution for the offense to which the compelled testimony relates would be constitutionally sufficient. Immunity from prosecution—"prosecutorial" or "transactional" immunity—was thus held to be the only immunity which could eliminate the "perils."¹⁰⁴

Subsequent immunity statutes did afford transactional immunity.¹⁰⁵ Four years after *Counselman*, in *Brown v. Walker*,¹⁰⁶ the Court upheld a transactional immunity statute, reasoning that a witness who cannot be prosecuted for that about which he testifies can in no way incriminate himself by testifying.¹⁰⁷ In 1972, the Court in *Kastigar v. United States*¹⁰⁸ read the *Counselman* requirement of transactional immu-

¹⁰³ 142 U.S. 547 (1892). For a discussion of the Court's principal immunity decisions, see Mykkeltvedt, *To Supplant the Fifth Amendment's Right Against Compulsory Self-Incrimination: The Supreme Court and Federal Grants of Witness Immunity*, 30 MERCER L. REV. 633, 636-53 (1979). On immunity generally, see *Kastigar v. United States*, 406 U.S. 441, 443-47 (1972), and authorities cited; Symposium, *The Granting of Witness Immunity*, 67 J. CRIM. L. & C. 129 (1976).

¹⁰⁴ 142 U.S. at 585-86.

¹⁰⁵ See generally Note, *Federal Immunity Statutes: Problems and Proposals*, 37 GEO. WASH. L. REV. 1276 (1969).

¹⁰⁶ 161 U.S. 591 (1896).

¹⁰⁷ *Id.* at 596-601. But see *id.* at 627 (dissent) (the testimony might be useful against the witness in a prosecution for a crime about which he did not testify).

¹⁰⁸ 406 U.S. 441 (1972).

nity as a dictum because the statute held unconstitutional in that case did not even afford derivative use (investigatory lead) immunity. If *Counselman's* requirement of transactional immunity was a dictum, however, the constitutionality of the new federal immunity statute,¹⁰⁹ which afforded only testimonial immunity—use and derivative use—was an open question. The *Kastigar* Court concluded that such immunity affords protection “coextensive with the privilege.”¹¹⁰ The Constitution did not require immunity broader than the protection afforded by the privilege itself, which does not afford immunity from prosecution, but only protection against being “forced to give testimony leading to the infliction of ‘penalties.’”¹¹¹

For the Court, then, testimonial immunity is a constitutional ground for compelling a privileged witness to answer questions. This immunity is neither compensation for deprivation of the privilege nor restitution of the benefit conferred upon the interrogator. Nor is immunity an injunction prohibiting the government from taking advantage of destruction of the privilege. Instead, immunity removes the basis of the privilege and thereby makes the privilege non-existent. This *tour de force* is accomplished by tampering with the future so as to make legally certain that the witness's words cannot be “against him in any criminal case,” thus dissolving the privilege. The privilege exists to protect the witness against a future harm brought about by presently-compelled testimony; insuring that no harm can come about in the future removes the foundation for invocation of the privilege.

2. *Analysis of Immunity in Terms of the Privilege*

If immunity must remove the peril against which the privilege protects, no constitutional justification exists for extending immunity to a use of compelled testimony if that use is not a danger within the ambit of the privilege.¹¹² Just as the privilege does not protect against mere invasion of privacy¹¹³ or disgrace,¹¹⁴ immunity need not prevent testimony from causing discomforting publicity through public release. Again, as the privilege extends only to disclosure of the compelled per-

¹⁰⁹ 18 U.S.C. §§ 6001-6005 (1976) (enacted 1970).

¹¹⁰ 406 U.S. at 462.

¹¹¹ *Id.* at 453 (quoting *Ullman v. United States*, 350 U.S. 422, 438 (1956) (quoting *Boyd v. United States*, 116 U.S. 616, 634 (1886))).

¹¹² Compare *Heike v. United States*, 227 U.S. 131, 142-43 (1913) (immunity statute construed not to apply where no incriminating testimony was in fact given) and *Shapiro v. United States*, 335 U.S. 1, 16-20, 22 (1948) (immunity statute is not operative where the compelled information was not privileged) with *Smith v. United States*, 337 U.S. 137, 152-53 (1949) (immunity statute is operative because the testimony was not solely exculpatory).

¹¹³ See *Schmerber v. California*, 384 U.S. 757 (1966) (blood extraction).

¹¹⁴ *Brown v. Walker*, 161 U.S. 591, 598, 605-06, 609-10 (1896) (dictum) (immunity case).

son's thoughts,¹¹⁵ a use of testimony that does not exploit these thoughts need not be accompanied by immunity.

This absence of immunity is constitutional even if the compelled testimony tends to incriminate and therefore must be immunized against those uses which *do* exploit the witness's thoughts. The Supreme Court has recognized this dichotomy in stating that "the immunity granted need only remove those sanctions which generate the fear justifying invocation of the privilege."¹¹⁶ For example, assume that a witness is questioned about his participation in a bank robbery. He is obviously privileged not to testify about his role in the robbery. He does not, however, have a privilege to decline to furnish a voice exemplar.¹¹⁷ If he invokes his privilege and is immunized, the immunity must protect against use of the thoughts his testimony reveals, but not against use of his voice as a means of identifying him. This bifurcation of compelled testimony into privileged and unprivileged uses was apparently accepted by the *Portash* Court when it limited immunity to "testimonial" uses of the testimony.¹¹⁸ The compelled person is a "witness" within the context of the privilege insofar as his testimony is used to prove his guilt by exploiting the content of the testimony, but is not a "witness" when his testimony is used simply to identify him by his voice characteristics.¹¹⁹

3. *The Ambiguous Constitutional Status of Kastigar*

In *Kastigar*, the Supreme Court's most complete statement on immunity thus far, Justice Powell wrote for the majority that a federal statute which granted testimonial immunity prohibited the prosecutor from using the compelled testimony in "*any*" respect.¹²⁰ From the opinion's context it is unclear whether Justice Powell was simply construing the statute, which provided that "no" testimony compelled under an immunity order could be "used against the witness in any criminal case,"¹²¹ or was interpreting the fifth amendment self-incrimination clause as well, since the statute had been challenged as unconstitutional. If the Court was deciding the constitutional question, it read into the

¹¹⁵ See *supra* text accompanying notes 54-70.

¹¹⁶ *Ullman v. United States*, 350 U.S. 422, 430-31 (1956); see *supra* note 112.

¹¹⁷ *United States v. Dionisio*, 410 U.S. 1, 5-7 (1973).

¹¹⁸ 440 U.S. at 459.

¹¹⁹ Another bifurcation of testimony into privileged and unprivileged exploitations revolves around the "against" term in the privilege. It is conceptually possible that a prosecutor might wish to use damaging immunized testimony and yet not be proposing to use the testimony "against" the witness, as that word is construed in the privilege, because the testimony was exculpatory when given. Cf. *supra* note 112; *infra* note 122.

¹²⁰ 406 U.S. at 453 (emphasis in original).

¹²¹ 18 U.S.C. § 6002 (1976).

fifth amendment an immunity from even non-“witness” exploitation of the testimony (e.g., voice identification), and also from use of testimony that was not “against” the witness in a fifth amendment sense.¹²²

Despite *Kastigar*'s ambiguity as a constitutional decision, the *Portash* Court blithely quoted *Kastigar* in determining what immunity a state must afford, stating that *Kastigar* made a “broad statement of the necessary constitutional scope of testimonial immunity.”¹²³ If, however, *Kastigar* is deemed a constitutional case in its “broad statement”—prohibiting use of compelled testimony in “any” respect—then the Court is committed to a total prohibition of any use (or at least “testimonial” use, as *Portash* held¹²⁴) of testimony obtained under grant of immunity.¹²⁵

4. *Psychology and Symmetry in Kastigar and Portash*

One can easily discern why the Court created a sweeping scope of immunity in *Kastigar*, an immunity cut loose from its relationship to the privilege against self-incrimination. Consider first the Court's perspective in the “pure privilege” cases, in which a witness refuses to answer and is not offered immunity. Here, danger to the witness must appear, or at least not be merely an absurd hypothesis. The Court applies this standard for determining whether the privilege exists in a concrete setting—the question put to the witness is on the record, along with

¹²² Despite the use of fifth amendment terms in the immunity statute, it does not follow that the statute is no broader than the constitutional privilege. “Witness” in the statute simply identifies the immunized person, whereas the privilege speaks of persons who are compelled to be a “witness.” In short, while every immunized person is a “witness” within the statute, not every person compelled to do something is a “witness” within the privilege. See *supra* text accompanying notes 54-70.

“Against,” as used in the statute, prohibits uses in the criminal proceeding after the testimony is given, whereas “against” in the privilege applies to reasonably possible future uses. A use “against” somebody at his trial might not have been reasonably predictable at the time he invoked the privilege. See *supra* text accompanying notes 74-82.

Another issue regarding *Kastigar*'s meaning is whether the Court intended to preclude use of immunized testimony for non-evidentiary uses. Concerning evidentiary and non-evidentiary uses, see *supra* note 82. Justice Powell indicated that the statute provided “a sweeping proscription of any use” and a “total prohibition on use,” while seeming to limit these phrases to evidentiary uses, such as obtaining evidence through focusing on the witness because of his testimony. 406 U.S. at 460. Furthermore, the Court placed a burden on the prosecutor to show affirmatively that an immunized witness is being prosecuted with evidence derived from “legitimate independent sources,” but said nothing about requiring the prosecutor to prove that he was not exploiting the immunized testimony in a non-evidentiary way. *Id.*

¹²³ 440 U.S. at 458.

¹²⁴ *Id.*

¹²⁵ This prohibition ignores the traditional perjury exception to immunity which was in the *Kastigar* statute and is not now relevant.

whatever facts might illuminate the danger the witness faces in answering.

With this situation, contrast that in *Kastigar*: the witness has not yet been questioned and is attacking the facial validity of the immunity statute which requires that he speak, on the ground that the proffered immunity is not sufficiently broad. A judge confronting a challenge to an immunity statute is naturally inclined to think it equitable and convenient to rule that any use of the compelled testimony would be unconstitutional.¹²⁶ Intuitively, it seems unfair¹²⁷ to force the witness to speak, yet leave open the possibility of prosecutorial exploitation of the testimony, especially if the litigants are not raising fine points about “witness” and non-“witness” uses.

The sweeping language in *Kastigar* and *Portash* created, at least until *Apfelbaum*, a fundamental conceptual problem: if, as the Court states, immunity is “commensurate” or “coextensive” with the privilege,¹²⁸ and immunity prohibits any use of compelled testimony (as modified by *Portash*’s “testimonial” use), it must follow that a witness can invoke the privilege based on potential use of his testimony against him, even though such use would not be a “witness” use or “against” him as those terms are used in the fifth amendment. Like a law of commutativity holding that if A equals B then B equals A,¹²⁹ the *Kastigar-Portash* doctrine that immunity is as broad as the privilege implies that the privilege is as broad as immunity. The statement of the content of immunity is, however, broader than the Court’s previous statements on the content of the privilege. This logic allows a witness to cite *Portash*’s result and claim the privilege because he fears supplying impeachment material for some future prosecution, a situation not necessarily absurd, but certainly not addressed when *Portash* extended immunity to impeachment uses. As in *Kastigar*, the *Portash* Court saw an “obvious unfairness” in betraying the grant of immunity, without considering the consequences of its holding for future claims of privilege. *Kastigar* and *Portash* demonstrate that the act of compelling a witness through a grant of immunity often makes it difficult to concentrate on the nuances of the privilege.

¹²⁶ Previously, in another case where a pre-testimony challenge to an immunity statute was mounted, the Court had stated that states must offer testimonial immunity against federal use of both immunized testimony and the “fruits” of the testimony “in any manner.” *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 79 (1964). The term “fruits” derives from fourth amendment jurisprudence. *See Nardone v. United States*, 308 U.S. 338, 341 (1939) (per Frankfurter, J.) (“fruit of the poisonous tree”).

¹²⁷ This assumes that the privilege can be said to be part of one’s intuition. *But see S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE* 368-71 (1980) (arguments against every reason given for fifth amendment privilege).

¹²⁸ *Kastigar*, 406 U.S. at 453.

¹²⁹ *See* 5 ENCYCLOPEDIA OF PHILOSOPHY 60 (P. Edwards ed. 1967).

5. *An Obvious Rationalization of Portash Rejected*

The obvious escape from the *Kastigar-Portash* paradox is to say that immunity *does* prohibit any use, but only in cases in which there is a traditionally recognized ground for invoking the privilege. The *Kastigar* Court rightly assumed that *Kastigar* had a valid claim of privilege, since it was the prosecutor's sole duty to determine whether immunity should be conferred.¹³⁰ Under this analysis broad immunity can not be said to entail expanded ground for claiming the privilege. Similarly, in *Portash*, the witness presumably had a traditional ground for invoking the privilege. Hence, under this formulation immunizing impeachment uses would not entail a holding that impeachment is a ground for invoking the privilege.

Difficulties exist with the integrity of this rationalization. Compare these situations: Witness Smith claims the privilege because his testimony would admit a crime, and he receives immunity (even from use of his testimony to impeach him) should he testify in his defense in an unrelated criminal case. Witness Jones has been under suspicion for a bank robbery; he fears answering even questions unrelated to the robbery because his answers may supply impeachment material useable against him if he goes on trial for the robbery (impeachment by inconsistent statement or by prior non-criminal acts adversely reflecting on his character for truthfulness).¹³¹ Smith's privilege is upheld, and he receives a possible windfall immunity—immunity from a use which might not have grounded a claim of privilege standing by itself. Jones' claim of privilege is denied, and he is forced to furnish the prosecutor with impeachment ammunition which might eliminate him as a witness in his own defense some day, no minor consequence in a criminal case. Reliance on traditional grounds of privilege has led to broad immunity for Smith and to unequal treatment of two witnesses who faced the same hazard by testifying: furnishing impeachment material.

6. *An Unlimited Privilege Rejected*

Can limitless expansion of the privilege cut the Gordian knot of this problem? A plausible argument exists that, regardless of the facts, anyone should be allowed to claim the privilege against self-incrimination, given the post-Bill of Rights developments in the law of immunity. The government can always obtain a privileged witness's testimony by conferring testimonial immunity. On the other hand, granting such immu-

¹³⁰ See *supra* text accompanying notes 10-13.

¹³¹ FED. R. EVID. 608(b) ("instances of conduct . . . probative of untruthfulness"). Extrinsic evidence—the testimony—cannot be used, but the testimony could supply a lead for cross-examination. *Id.*

nity is said to preclude the government from prosecuting the witness, since the prosecution's burden of proving non-exploitation of immunized testimony is considered onerous.¹³² This point is suspect, however, because the statistics cited to support it concern prosecution of witnesses for crimes which their testimony disclosed.¹³³ These witnesses had a traditional ground of privilege; thus, expanding the privilege would not have impact on their cases. Further, nothing is wrong with the government's inability to prosecute witnesses for the very crimes their compelled testimony disclosed; where the government contemplates prosecution for certain crimes, forgoing questions about those crimes would not be burdensome. New York, for example, still grants automatic transactional immunity to all grand jury witnesses.¹³⁴

Concerning witnesses whose testimony would not disclose a crime, the third circuit has recently ruled that "lack of relationship between compelled testimony and a later prosecution may aid [the prosecutor] in proving the absence of indirect use" of the testimony.¹³⁵ In other words, the witness's testimony and the prosecutor's burden of proving non-exploitation of that testimony are interrelated: as the incriminating nature of the testimony decreases, the prosecutor's burden also lightens. Expanding the privilege should hardly increase the prosecutor's burden, since the less substantial the ground of the privilege measured in traditional terms, the less likely the government could ultimately find the ensuing testimony useful against the witness—and this would be determined at the pre-trial "taint" hearing.

One also doubts that the number of claimants of the privilege would increase if the privilege's scope were made unlimited. Persons actually invoking the privilege despite a lack of incrimination would be

¹³² See Thornburgh, *Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture" or "A Rational Accommodation?"*, 67 J. CRIM L. & C. 155, 161-62 (1976); cf. *United States v. Turkish*, 623 F.2d 769, 775 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981) (difficulties of avoiding tainting prosecutor's case with immunized testimony). But see Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 169 (1974) (minimal inconvenience to prosecutor); cf. Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 HARV. L. REV. 1266, 1273-79 (1978) (in many situations the burden on prosecutor to prove absence of taint will not be insurmountable).

¹³³ See Flanagan, *Compelled Immunity for Defense Witnesses: Hidden Costs and Questions*, 56 NOTRE DAME LAW. 447, 456-63 (1981); Mykkeltvedt, *supra* note 103, at 656, 658-59 (in seven year period in the 1970's the Attorney General received only three requests to prosecute immunized witnesses, prosecuting only one such witness; these statistics concern prosecutions for crimes disclosed by the immunized testimony); Mykkeltvedt, *Ratio Decidendi or Obiter Dicta?: The Supreme Court and Modes of Precedent Transformation*, 15 GA. L. REV. 311, 336-39 (1981); Note, *Federal Witness Immunity Problems and Practices under 18 U.S.C. §§ 6002-6003*, 14 AM. CR. L. REV. 275, 282-86 (1976) (immunized witnesses are not prosecuted for crimes disclosed in their testimony).

¹³⁴ See *supra* note 18.

¹³⁵ *United States v. Pantone*, 634 F.2d 716, 721 (3d Cir. 1980).

those having reasons for not wanting to testify other than sheer laziness or the universal desire not to "get involved." Because the privilege must be claimed when a question is asked,¹³⁶ claimants would still have to go down to the courthouse when subpoenaed. Those currently invoking the privilege on what are insubstantial grounds probably do so anyway with a fair degree of success.¹³⁷ Such individuals might lie if their claim is overruled, and might still lie if granted immunity. Hence, a broadened privilege would have no impact upon perjurers. Persons who are encouraged to testify truthfully by the laws of perjury and contempt would still be subject to those laws if immunized.¹³⁸

Subsequent testimony from a witness who frivolously claimed an unlimited privilege would, if useable, help to prosecute the witness, in which case the witness did not "beat the system" in forcing a grant of immunity. If, on the other hand, the testimony would not be helpful against the witness, immunity will have cost the government nothing, since proving non-exploitation of useless testimony should not be difficult.¹³⁹

A privilege of unlimited scope, matching *Kastigar's* expansive definition of immunity, should not be allowed, because, in the case of defense witnesses, exculpatory testimony may be lost by honoring a claim of privilege. Since defense counsel cannot have witnesses immunized,¹⁴⁰ expansion of the privilege would cause severe prejudice to some criminal defendants.¹⁴¹ At least some people who would claim an insubstantial privilege nonetheless would testify truthfully if their claim were overruled. Thus, an expanded privilege against self-incrimination, at least theoretically, could cost a number of innocent defendants their freedom.

7. *The Breadth of Constitutionally Required Immunity*

The privilege should not be expanded merely to accommodate *Kastigar's* twin demands of broad immunity and a commensurateness of immunity and privilege. *Kastigar's* sweeping language (immunized

¹³⁶ See *supra* text accompanying note 8.

¹³⁷ Recall that administration of the privilege is heavily weighted in favor of the witness. See *supra* text accompanying notes 74-79.

¹³⁸ See *infra* text accompanying notes 202-46.

¹³⁹ One should not automatically think of conferral of testimonial immunity as an event of great magnitude. The Supreme Court has held that states have the power to confer testimonial immunity binding on the federal government. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964).

¹⁴⁰ See *supra* note 12.

¹⁴¹ Cf. Hill, *Testimonial Privilege and Fair Trial*, 80 COLUM. L. REV. 1173 (1980) (expressing skepticism regarding defendant's entitlement to a remedy for losing a privileged witness's testimony). Given the realities of reluctant witnesses, less prejudice may occur than one might expect.

testimony cannot be used in “any respect”) should be construed as mere statutory interpretation despite the *Portash* Court’s reliance on it in a state case. *Kastigar* read earlier “constitutional” language in *Counselman v. Hitchcock* as dicta in light of the narrow immunity statute at issue in that earlier case, and therefore held that transactional immunity was not required by the Constitution.¹⁴² Reading *Kastigar*’s references to constitutional requirements as dicta in light of the broad immunity statute passed upon there, will similarly return immunity to its privilege roots.

Since the constitutional purpose of immunity is only to remove the perils which the privilege guards against, constitutionally required immunity is no broader than what one is willing to read the privilege as covering. Whether immunity must extend to matters that the Court has not yet considered as bases for invoking the privilege can be answered only by determining whether such matters would indeed form a basis for the privilege. Immunity cannot be expanded simply because the witness had a recognized ground of privilege; such expansion is lawless, given that the Constitution requires immunity only from the dangers against which the privilege protects. Surely, immunity cannot be constitutionally required merely because, as a matter of mechanics, it was in fact conferred upon a witness; this would be constitutionalization of a windfall.

8. *Application of Isomorphism: Pillsbury Co. v. Conboy*

A case awaiting decision by the Supreme Court will serve to illustrate the isomorphic approach to solution of problems concerning the scope of immunity. In *Pillsbury Co. v. Conboy*¹⁴³ (known below as *In re Corrugated Container Antitrust Litigation*) Conboy testified under a grant of immunity before a federal grand jury investigating price fixing. After completion of the resulting criminal prosecutions, civil actions were brought, and plaintiffs subpoenaed Conboy for his deposition. Plaintiffs, having somehow obtained a copy of Conboy’s grand jury testimony,¹⁴⁴ attempted to question him on it. Conboy, however, invoked his privilege. The district court overruled the claim and ordered Conboy to testify; he refused and was held in civil contempt.¹⁴⁵

¹⁴² See *supra* text accompanying notes 103-11.

¹⁴³ 102 S. Ct. 998 (1982), *granting cert. to In re Corrugated Container Antitrust Litigation*, 661 F.2d 1145 (7th Cir. 1981) (en banc). The Supreme Court rendered its decision in *Pillsbury Co. v. Conboy* as this Article went to press. 51 U.S.L.W. 4061 (U.S. Jan. 11, 1983). See *infra* notes 258-61 and accompanying text.

¹⁴⁴ The record does not show how plaintiffs obtained the grand jury transcript, but they may have done so by court order. 661 F.2d at 1147 n.1.

¹⁴⁵ *In re Corrugated Container Antitrust Litigation*, MDL 310 (S.D. Tex. May 20, 1981), *aff’d*, 655 F.2d 748, *rev’d*, 661 F.2d 1145 (1981) (en banc). In *Conboy*, numerous civil antitrust suits were consolidated by the Judicial Panel on Multi-District Litigation and assigned to

On appeal, the Court of Appeals for the Seventh Circuit rejected the district court's conclusion that Conboy faced no possibility of prosecution, finding that federal conspiracy and state antitrust prosecutions were not time-barred. Hence, Conboy had made a sufficient initial showing of the potential for prosecution to support a claim of self-incrimination.¹⁴⁶ The immunity issue was thus reached: did Conboy's grand jury testimonial immunity extend to future civil disposition testimony, in which case he did not have a privilege? Note the reverse juxtaposition of the usual positions: the witness, who wished to remain silent at the deposition, was taking the government's usual position that he had no immunity under the circumstances, while the interrogator, who was exploiting the immunized testimony by using it as a springboard for deposition questions, was claiming that the witness *did* have immunity for the answers he might now give.

The court of appeals found that Conboy had a privilege, and reversed the contempt order. It reasoned that Conboy was being forced to give incriminating evidence not covered by the immunity grant because the deposition testimony derived not from the immunized testimony, but from the witness's "*current, independent memory of events.*"¹⁴⁷ This analysis, however, avoids the essence of immunity—protection against self-incrimination resulting from compelled testimony. The better question was: "Did Conboy have a privilege not to answer the grand jury questions on the ground that his testimony might cause a future plaintiff to ferret out incriminating evidence?" This formulation reflects the isomorphism between the danger now complained of (incriminating answers at a deposition) and the privilege possessed when the immunized testimony was given (was the deposition foreseeable within the terms of the privilege?). If one answers the question affirmatively, then the immunity must extend to anything the future plaintiff could obtain from Conboy. In that event, Conboy, being immunized from use of his civil deposition, would not at the time of the deposition have a privilege to refuse to answer, just as a person who cannot be prosecuted for the crimes to which he testifies has no privilege.¹⁴⁸

During the pendency of a criminal antitrust investigation civil actions are usually imminent. If it is reasonably possible ("non-remote"¹⁴⁹) that a civil plaintiff will be able to obtain and exploit the

Chief Judge John V. Singleton, Jr., of the Southern District of Texas. Conboy subsequently appeared before the United States District Court for the Northern District of Illinois pursuant to a subpoena. 655 F.2d at 750.

¹⁴⁶ 661 F.2d at 1151-53. The en banc decision on rehearing reversed the original disposition of the appeal, which had affirmed the district court's holding. See 655 F.2d 748.

¹⁴⁷ *Id.* at 1155 (emphasis in original).

¹⁴⁸ See *supra* text accompanying note 83.

¹⁴⁹ See *supra* text accompanying notes 74-75.

grand jury testimony of the immunized witness, a reasonable possibility exists that the transcript will be useful to that plaintiff and lead to self-incrimination by the witness, since the witness's deposition testimony can easily become available to a prosecutor. Hence, if grand jury testimony is likely to become available to civil litigants, the grand jury witness at the time of his interrogation faces a danger from a future civil deposition. He therefore has a privilege to refuse to answer in order to avoid that danger, and hence must be immunized against that danger. Under this analysis, a witness presumably would not be able to waive his privilege in the grand jury insofar as future depositions are concerned; otherwise, such a stratagem would allow him to avoid the extension of immunity to the depositions, thereby preserving his privilege at those depositions.

This analysis is a simple chain of reasonably foreseeable events, a notion akin to that of proximate cause. The seventh circuit's approach relies on a purely conclusory premise that the deposition would not be derived from the deposition questions, which concededly derived from the immunized testimony. Whether one thing derives from a given earlier thing is not, however, a matter of conclusion but one of logic and policy. Certainly, under a "but for" analysis Conboy's deposition testimony is caused by his grand jury testimony. As a matter of policy, the liberal reach of the privilege, as well as a desire to make immunity effective and immunized witnesses therefore forthcoming and candid, argues for liberal immunity.¹⁵⁰

¹⁵⁰ An interesting fallacy in the seventh circuit's opinion is its notion that the district court's decision that Conboy had immunity was an unauthorized judicial grant of immunity. The court of appeals reasoned that courts cannot grant immunity on their own motion, and that the district court, by forcing Conboy to testify, insured that his testimony would be unuseable—and therefore immunized—because Conboy's fifth amendment privilege would be improperly overridden. This was said to amount to "de facto immunity," improper even if the district court were correct in concluding that the grand jury immunity reached the deposition testimony. 661 F.2d at 1156. The court of appeals said "the critical feature of de facto immunity is that it occurs even when a court's analysis is 'correct,' " *id.*, without explaining why. If the district court correctly construed the scope of immunity, it merely applied a pre-existing immunity, and did not create a new one. The district court's possible error in its application of the law of immunity is hardly a reason not to decide the matter, or to fashion a rule that a judge may never pass upon the scope of pre-existing immunity when a witness invokes the fifth amendment. Someone must decide these matters. The court of appeals feared that the district judge was simply "predicting that in a future criminal prosecution of Conboy, another court will agree with the district court's determination that the deposition testimony should be excluded." *Id.* at 1157. The district court, however, no more engaged in prediction than any court subject to appellate review when making a decision. It must decide the case, and if legal method involves predicting what another court will do, that is hardly unrespectable. A fortiori, since the district court was not subject to appellate review by a future criminal court prediction does not seem to enter into the matter. The court of appeals was troubled by the government's absence as a party, evidently because the government would therefore not be collaterally estopped by the district court's finding. *Id.* But the rules

B. NON-MERITS USES OF IMMUNIZED TESTIMONY

1. Portash is not a Ruling on Ineffectiveness of Limiting Instructions

A witness's prior inconsistent statement is offered for impeachment purposes when it is used to cast doubt upon the witness's credibility. This occurs by demonstrating that the witness previously said something different from his present testimony, and therefore is not a reliable relater of facts.¹⁵¹ If the witness is the defendant, the hearsay rule does not bar such earlier statements from also being used to prove the truth of the assertions contained in the statements, because statements of an adversary party are outside the bar of the hearsay rule.¹⁵² If, however, the statement was immunized, the immunity doctrine obviously prevents the prosecution from using it for its truth value against the witness in a criminal case.

Yet immunity is not violated ipso facto by use of immunized testimony to impeach a criminal defendant-witness. The jury can be instructed to use the immunized testimony only to cast doubt upon the

of compulsory joinder should have resolved this problem. See FED. R. CIV. P. 19. In any event, a prosecutor would have no apparent way to use Conboy's grand jury or deposition testimony. If the immunity extends to the deposition, then by definition it cannot be used. If it does not, then Conboy had a valid claim of privilege, albeit erroneously overruled, and future courts could belatedly enforce the privilege without disrupting the legal process. *But see* 661 F.2d at 1157 ("dilemma"). In fairness to the seventh circuit, one should note that that court saw probable admissibility of the grand jury testimony at the civil trial, so plaintiff would not be hurt by allowing Conboy to invoke the fifth. *Id.* at 1158-59.

In Note, *Prospective Determinations of Derived Use in Civil Proceedings: Upsetting the Immunity Balance*, 50 FORDHAM L. REV. 989 (1982), the author supports the seventh circuit on several grounds: (1) The witness can be protected by his invocation of the fifth amendment, and hence does not need a determination of scope of immunity. Yet such reasoning gives no weight to plaintiff's interest in obtaining the witness's testimony. (2) Only at a criminal trial of the witness can the witness raise immunity as a bar. This, however, overlooks the fact that it is not the witness who is claiming that immunity exists, but rather his interrogator. (3) By determining immunity, the civil court hamstringing the prosecutor, who may have purposely limited his grand jury interrogation of the witness to matters not covered in the subsequent civil deposition; the "hamstringing" results from the enormous increase in the prosecutor's burden to disprove taint in any subsequent prosecution of the witness. This, however, overlooks the witness's privilege not to answer, even if he does not have immunity, because he is invoking the fifth amendment. The witness has either the fifth amendment privilege or immunity, irrespective of what the civil court believes. An erroneous expansion of immunity by the civil court simply means an erroneous overruling of the witness's present claim of privilege. The prosecutor should realize this, and should not attempt to use the deposition testimony, since the witness obviously did not have to answer, either because of present privilege or prior immunity (unless, of course, there was no immunity and the answer would not tend to incriminate the witness, an unlikely possibility given the context of the civil antitrust litigation). (4) If a later criminal court disagrees with the civil court, and rejects its determination of immunity, the witness will have waived his privilege by giving the deposition. Yet this scenario is impossible, because the deposition will have been given under court order and would therefore hardly constitute a "waiver."

¹⁵¹ C. McCORMICK, *supra* note 8, § 34, at 68.

¹⁵² *E.g.*, FED. R. EVID. 801(d)(2)(A).

oscillating witness's credibility and not to use the prior statement for its truth value. Such a limiting instruction was impliedly upheld in *Harris v. New York*,¹⁵³ where a *Miranda*-violative statement was admitted for impeachment purposes only. Although petitioner argued that the limiting instruction would not be obeyed by the jury,¹⁵⁴ the Court held that the statement was admissible for impeachment. *Jackson v. Denno*¹⁵⁵ and *Bruton v. United States*¹⁵⁶ hold that limiting instructions are insufficient to prevent a jury from using evidence in a manner which would violate the defendant's constitutional rights. These cases can be distinguished from the later *Harris* decision on the ground that the evidence involved in *Jackson* and *Bruton* was not admissible against the petitioners for any purpose.¹⁵⁷

In *Watkins v. Sowders*, the most recent Supreme Court decision on the constitutional effectiveness of limiting instructions, the Court found that such instructions work, even when they might require the jury not to use the evidence for any purpose, if the limiting instructions track a juror's natural inclination to reject evidence as not probative.¹⁵⁸ Thus, one must be careful to avoid making conclusions based upon the assumed fruitlessness of limiting instructions when analyzing the *Portash* problem (use of immunized testimony to impeach).¹⁵⁹ Although one could reasonably rationalize *Portash* as a case where limiting instructions simply would not work, the Supreme Court, rightly or wrongly, has held that jurors are able and willing to obey limiting instructions if the evidence is admissible for at least one purpose or is inadmissible because not probative. In *Portash* the evidence could have been found admissible for impeachment if a contrary holding had resulted, and in fact the Court said nothing about effectiveness of limiting instructions.

¹⁵³ 401 U.S. 222 (1971).

¹⁵⁴ Brief for Petitioner at 17, *Harris v. New York*, 401 U.S. 222 (1971).

¹⁵⁵ 378 U.S. 368 (1964) (coerced confession).

¹⁵⁶ 391 U.S. 123 (1968) (co-defendant's confession).

¹⁵⁷ *Cf.* *Walder v. United States*, 347 U.S. 62, 64 (1954) (trial judge "carefully" charged jury to consider illegally seized evidence only on credibility issue; instructions upheld). *But cf.* *California v. Green*, 399 U.S. 149, 164 (1970) ("*Bruton's* refusal to regard limiting instructions as capable of curing the error, suggests that there is little difference as far as the Constitution is concerned between permitting prior inconsistent statements to be used only for impeachment purposes, and permitting them to be used for substantive purposes as well." Note, however, that here the Court was construing the confrontation clause, which pertains to witnesses other than defendant himself; defendant would not have the opportunity to explain away the prior inconsistent statement, since the witness in question is not himself).

¹⁵⁸ 449 U.S. 341, 347 (1981).

¹⁵⁹ *But see* Hoffman, *The Privilege Against Self-Incrimination and Immunity Statutes: Permissible Uses of Immunized Testimony*, 16 CRIM. L. BULL. 421, 446-48 (1980).

2. *Impeachment and the Privilege Against Self-Incrimination*

Does the privilege against self-incrimination require that immunity extend to use of compelled testimony for impeachment? Under the isomorphic concept of immunity, the issue becomes whether the privilege against self-incrimination would arise when compelled testimony would be a hazard to the witness only through its potential use as impeachment material.

a. "Witness"

First, it must be determined if one is a "witness" within the meaning of the privilege when one supplies inconsistent statement impeachment material.¹⁶⁰ Testimony which could be used to impeach in other ways, such as testimony regarding conduct probative of untruthfulness,¹⁶¹ would certainly be "witness" testimony since it is exploited for its explicit factual content.

Inconsistency bears upon credibility because it reveals either untruthfulness or vacillation and, hence, a capacity to err.¹⁶² At the time the immunized testimony is given, neither untruthfulness nor vacillation of belief is apparent; these traits become manifest only at the later trial of the witness when he testifies inconsistently.¹⁶³ The witness may not have been untruthful when giving the immunized testimony—he may have told the truth, or innocently misstated the facts.¹⁶⁴

Given that the jury is passing upon the witness's credibility at trial when comparing his testimony with his earlier, immunized testimony, the jury is obviously exploiting the earlier testimony insofar as the speaker was a "witness" within the scope of the privilege. One's belief can change between the time the immunized and trial testimonies were given. The jury might nonetheless infer that the witness was untruthful at trial, given the probable inculpatory nature of the earlier, immunized, testimony and the jury's doubt that the witness's belief as to his guilt could have changed. The crucial fact is that the jury's inference of untruthfulness may be caused by nothing more than a witness's mere change of belief. If the witness did have a mere change of belief, his

¹⁶⁰ See *supra* text accompanying notes 54-70.

¹⁶¹ See *supra* note 131.

¹⁶² 3A J. Wigmore, *supra* note 45, § 1017 (Chadbourne rev. 1970).

¹⁶³ Since "self-evident" matters are excluded from the privilege, *supra* note 63, arguably the universal human trait of vacillation of belief is excluded from the privilege. This argument is unpersuasive because, universal or not, to a jury the inference of the defendant-witness's incredibility is devastating, and not "self-evident."

¹⁶⁴ If the immunized testimony were initially ruled to be insincere, it would undoubtedly be useable for any purpose, as perjury is not protected by the privilege. See *infra* text accompanying note 202-09.

revelation of the contents of his mind at the time of his immunized testimony may be the cause of the jury's inference of untruthfulness and its conclusion that he is not a credible trial witness. Contrast the case of the witness whose compelled testimony is used to identify his voice:¹⁶⁵ whether or not he revealed his beliefs when he spoke, his voice nevertheless gives him away.

With impeachment by prior inconsistent statement, it is the revelation of belief that leads to the impeachment, whether the factfinder bases its conclusion on an inference of untruthfulness or a dubious capacity to perceive, remember, or relate. A person is therefore a "witness" within the scope of the privilege concerning his statements used to impeach him through inconsistency—*Portash's* "testimonial" use of the immunized testimony.¹⁶⁶

b. "Against"

Is a person who gives testimony which can later be used to impeach him by prior inconsistent statement or other method of impeachment compelled to be a witness "against" himself within the meaning of the privilege?¹⁶⁷ There is little doubt that impeachment is a major prosecutorial weapon, as demonstrated by the Court's heightened focus in recent years on the subject of impeachment.¹⁶⁸ A jury which finds that a defendant has been impeached not only rejects his testimony, but also has affirmative proof of guilt as well, since the witness's exculpatory testimony has been shown to be untrue.¹⁶⁹

Earlier it was shown that "against" has been construed to exclude from the scope of the privilege dangers that are "remote possibilit[ies] out of the ordinary course of the law."¹⁷⁰ Yet the danger that a witness is supplying impeachment material is hardly remote. One could argue that a witness can control whether his present (compelled) and future (trial) testimony will be inconsistent, and thus can avoid any danger of supplying impeachment material. To say, however, that a person can "control" whether he testifies at all at his trial is to diminish the consti-

¹⁶⁵ *United States v. Dionisio*, 410 U.S. 1, 5-7 (1973).

¹⁶⁶ *See supra* text accompanying note 124.

¹⁶⁷ *See supra* text accompanying notes 71-102.

¹⁶⁸ *See Fletcher v. Weir*, 102 S. Ct. 1309 (1982); *Anderson v. Charles*, 447 U.S. 404 (1980); *Jenkins v. Anderson*, 447 U.S. 231 (1980); *Doyle v. Ohio*, 426 U.S. 610 (1976); *United States v. Hale*, 422 U.S. 171 (1975); *Oregon v. Haas*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971); *see also United States v. Salvucci*, 448 U.S. 83, 93 & n.8 (1980); *cf. United States v. Havens*, 446 U.S. 620 (1980) (use of illegally seized evidence to impeach).

¹⁶⁹ *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952) (L. Hand, J.) (dictum) (jury may believe the opposite of disbelieved testimony), *quoted with approval in NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962) (per curiam).

¹⁷⁰ *See supra* text accompanying note 74.

tutional right to testify in one's own behalf.¹⁷¹ Moreover, the hazard of inconsistency in one's trial testimony is not actually within one's control since, as discussed above, inconsistency can arise from a change of belief.¹⁷² The changing of one's belief is not under one's control, as is recognized by the right of a witness to explain prior inconsistent statements.¹⁷³ Change of testimony can be perfectly innocent, caused by improved or deteriorated memory, reflection, discussion or investigation, or simply the human tendency to relate events differently on different occasions.

To hold that one is a witness against himself when one furnishes testimony that can possibly be used for impeachment would, of course, make it possible for all witnesses to invoke the privilege against self-incrimination despite the fact that they are not being questioned about a crime.¹⁷⁴ Testimony not related to a crime could be exploited for purposes of inconsistent impeachment since an inconsistent statement need not be material in order to be used for impeachment (unless the statement is proven by extrinsic evidence).¹⁷⁵ A witness testifying on any subject, no matter how unincriminating, could be questioned about the same subject at his subsequent criminal trial, and thus face a chance of innocent contradiction and self-discrediting. Alternatively, a witness not being asked about a crime might be required to reveal conduct relevant to his character for untruthfulness and thereby threaten his credibility as a witness at a subsequent criminal trial.¹⁷⁶ Further, a witness's testimony might reveal criminal conduct which, although covered by a bar to prosecution, nevertheless is relevant to prove his poor character for truthfulness; under these circumstances, revelation of the criminal conduct would not furnish a traditional ground for the privilege¹⁷⁷ but would furnish a basis for impeachment.

3. *Toward a Broader Privilege Against Self-Incrimination*

There is a way to protect those who are likely to furnish impeachment material, without expanding the privilege beyond reason. The key

¹⁷¹ *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975) (dictum).

¹⁷² See *supra* text accompanying notes 165-66.

¹⁷³ FED. R. EVID. 613(b) (the right to explain is inapplicable to statements received as admissions for their truth, but immunity would prevent admission for that purpose); 3A J. WIGMORE, *supra* note 45, § 1044 (Chadbourn rev. 1970) (witness's error may have been based upon a "temporary misunderstanding").

¹⁷⁴ Cf. *United States v. Hockenberry*, 474 F.2d 247, 250 (3d Cir. 1973) (use of immunized testimony which admitted perjury, to show a pattern of deceit and thereby discredit the witness, is unconstitutional).

¹⁷⁵ 3A J. WIGMORE, *supra* note 45, § 1023 (Chadbourn rev. 1970).

¹⁷⁶ See *supra* note 131 and accompanying text.

¹⁷⁷ See *supra* text accompanying note 83.

to a reasonable privilege in the impeachment area is to require a reasonable danger of prosecution before the privilege attaches; everyone is likely to contradict himself on occasion, but not everyone is reasonably likely to set up a possible contradiction of himself while a defendant in a criminal trial, since not everybody can reasonably anticipate being prosecuted.

Criminal defendants, persons under investigation by law enforcement officials, and other persons who are suspected of crime should be able to protect themselves against being made to furnish a prosecutor with impeachment ammunition. Given the chance that a prosecutor might show a contradiction by *any* defendant-witness who has previously testified, none of the persons in these categories should be compelled to testify. During the initial proceedings, they face a non-remote hazard of injuring themselves in a later criminal prosecution, regardless of what they are questioned about.

Under my interpretation of "against" within the text of the privilege, the privilege would accord with intuitive notions of unfairness in allowing a prosecutor to interrogate people who are in jeopardy of prosecution, and would also protect against compulsory testimony in any non-prosecutorial forum for those who face criminal litigation. "Against" within the fifth amendment privilege should mean a non-remote chance of increasing the likelihood of conviction or enhancing a sentence. "Non-remote" means that a prosecution is reasonably likely because (1) the compelled testimony would be evidence of the witness's past crime, is an investigatory lead for such evidence, or expresses an intent to commit a crime; (2) the witness is a defendant in a criminal case, is being investigated or interrogated by law enforcement officials, or is suspected of crime by such officials; or (3) other circumstances make prosecution of the witness substantially more likely than prosecution of a randomly selected person.

Under this proposed definition, the privilege is triggered (insofar as the term "against" is concerned) not only by the nature of the testimony (part (1))—as is the case in existing law (except for criminal defendants on trial)—but also by the nature of the witness (parts (2) and (3)). It follows from the definition that testimony which could some day be used by a prosecutor to defeat procedural defenses, such as motions to suppress illegally seized evidence or to dismiss charges for failure to afford a speedy trial, is also privileged, if the witness originally faced a reasonable hazard of prosecution. All forms of impeachment uses—indeed *any* use of such a witness's testimony—would form a ground of privilege. Prosecutors who nonetheless wished to obtain the testimony would have to confer immunity. Under the principle of isomorphism, this immunity would cover any use of the testimony that would exploit the immunized

individual as a "witness" within the meaning of the privilege. The increase in the number of witnesses receiving immunity would not impede prosecutors.¹⁷⁸ Further, immunity would not be a license to commit perjury, because, as shown below, perjurious testimony is not a "witnessing";¹⁷⁹ hence, it is not privileged and need not be immunized.

As an expansion of the privilege, the proposed definition would hamper some criminal defendants in obtaining evidence.¹⁸⁰ This trade-off is, however, necessary to protect those who realistically face self-incrimination. As previously discussed, expanding the privilege probably would not significantly increase the number of witness who are "lost" to criminal defendants.¹⁸¹

4. *Miranda-Violative Statements Indistinguishable*

Is a case which determined the permissible use of statements obtained in violation of *Miranda*,¹⁸² a precedent for the constitutionally required scope of immunity? The *Portash* opinion was largely concerned with distinguishing cases that allowed *Miranda*-violative statements to be used for impeachment. Is the distinction reasonable?

In *Miranda*, the Court "readily perceive[d] an intimate connection between the privilege against self-incrimination and police custodial questioning."¹⁸³ "[W]ithout proper safeguards the process of in-custody interrogation . . . contains inherently compelling pressures which work . . . to compel him to speak . . ." ¹⁸⁴ Hence, *Miranda* held that before custodial interrogation can proceed, the fifth amendment self-incrimination clause requires that the now well-known *Miranda* warnings be given and that the interrogated individual be given an opportunity to exercise the rights conveyed by the warnings.¹⁸⁵ If the warnings were not given or the rights not granted (unless waived), statements obtained through custodial interrogation could not be "use[d]."¹⁸⁶

¹⁷⁸ See *supra* text accompanying notes 132-39.

¹⁷⁹ See *infra* notes 203-46 and accompanying text.

¹⁸⁰ Civil litigants, who similarly have no power to confer immunity, might also be hindered.

¹⁸¹ See *supra* text accompanying notes 136-41.

¹⁸² *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁸³ *Id.* at 458; see *supra* note 46.

¹⁸⁴ 384 U.S. at 467.

¹⁸⁵ The warnings are that the individual has the right to remain silent, that any statement made may be used against him, and that he has a right to have an attorney present, either retained or appointed. *Id.* at 444.

¹⁸⁶ *Id.* The Supreme Court has not discussed whether, if a court determines that a confession was coerced or obtained in violation of *Miranda*, there should be a *Kastigar* hearing, *supra* text accompanying notes 16-17, at which the government should have to prove that its case is not tainted by the illegally obtained confession. *Cf. Kastigar v. United States*, 406 U.S. 441, 461-62 (1972) (discussing suppression of fruits of coerced confession, but not discussing burden of proof on whether fruits taint prosecutor's case). *But cf. Harrison v. United States*, 392

Nonetheless, in *Harris v. New York*,¹⁸⁷ a decision vigorously criticized on methodological grounds¹⁸⁸ as well as on the merits,¹⁸⁹ the Court held that statements obtained in violation of *Miranda*'s strictures could nonetheless be used to impeach the interrogated suspect at his trial. *Harris* thus stands for the proposition that statements obtained in violation of the fifth amendment privilege are still admissible when used to impeach. *Harris* harkened toward the use of immunized statements for impeachment, since immunity would not have to reach a hazard that the privilege does not protect against.¹⁹⁰

After *Harris*, however, the Court in *Michigan v. Tucker* revised *Miranda* by putting its fifth amendment foundation in doubt, holding that failure to comply with *Miranda* is merely a failure to afford "procedural safeguards" of the privilege against self-incrimination and is not a deprivation of the privilege itself.¹⁹¹ The Court stated that the custodial interrogation in *Tucker*, even though not in conformity with *Miranda*, did not involve "compulsion sufficient to breach the right against compulsory self-incrimination."¹⁹² *Tucker* in a sense had been presaged in *Harris*, where the Court noted that the *Miranda*-violative statements were not claimed to be coerced or involuntary.¹⁹³ Since *Tucker*, the Court has resumed its references to *Miranda*, perhaps reflexively, in a constitutional context.¹⁹⁴ Whether *Miranda* warnings are constitutionally required, and how that decision can bind the states if the warnings are

U.S. 219, 225 n.12 (1968) (government has burden of proof that defendant's trial testimony was not caused by the admission of his illegally obtained confession). Note that the requirement *vel non* of a hearing, with the burden of proof on the prosecutor, is a separate issue from the substantive reach of the remedy of suppression, i.e., the decision whether to suppress a given fruit of the illegality. Cf. *Michigan v. Tucker*, 417 U.S. 433 (1974) (no suppression of testimony of witness who was learned of because of *Miranda*-violative statements). See also *United States v. Ceccolini*, 435 U.S. 268 (1978) (reluctance to suppress testimony of witness who was found as a result of a fourth amendment violation). Cf. 18 U.S.C. § 2518(10)(a) (1976) (suppression of "evidence derived," as well as contents, of illegal wiretaps); *Alderman v. United States*, 394 U.S. 105, 183 (1969) (concession that government has burden of persuasion that its evidence is not tainted by illegal search).

¹⁸⁷ 401 U.S. 222 (1971); see *Oregon v. Haas*, 420 U.S. 714 (1975).

¹⁸⁸ Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971).

¹⁸⁹ *The Supreme Court 1970 Term*, 85 HARV. L. REV. 40, 44-53 (1971).

¹⁹⁰ See Ritchie, *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 415 n.163 (1977); cf. Dershowitz & Ely, *supra* note 188, at 1223 & n.98 (reasoning that if immunized testimony is useable to impeach, then testimonial immunity may be unconstitutional).

¹⁹¹ 417 U.S. 433, 444 (1974); see Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 118, 123.

¹⁹² 417 U.S. at 445.

¹⁹³ 401 U.S. at 224.

¹⁹⁴ See *Edwards v. Arizona*, 451 U.S. 477, 481-82 (1981); *Estelle v. Smith*, 451 U.S. 454, 466 (1981); cf. *Jenkins v. Anderson*, 447 U.S. 231, 237-38 (1980) (reading *Harris* as a gloss on the fifth amendment).

not, are questions outside the scope of this Article. Of importance for present purposes is that the *Portash* Court's distinction of *Harris* is unsound.

Portash read *Harris* as limited to statements which were not "coerced or involuntary."¹⁹⁵ *Harris* balanced society's interest in preventing perjury against the *Miranda* interest in deterring unlawful police conduct, and had favored the anti-perjury side of the scale. The *Portash* Court held that immunized testimony is "the essence of coerced testimony," and that in other cases the Court had held that "compelled" testimony cannot be put to any "testimonial" use.¹⁹⁶ The *Portash* Court concluded that balancing is impermissible when dealing with the privilege against self-incrimination "in its most pristine form."¹⁹⁷ Hence, *Portash's* immunized testimony, by definition "compelled" in the "most pristine" sense of the fifth amendment privilege, could not be used to impeach him despite the permissible uses of *Miranda*-violative statements.

Such reasoning, however, is mere semantics. Immunized testimony hardly seems "coerced" as that term is normally used and was presumably used in *Harris*. *Kastigar* itself had contrasted coerced confessions with immunized testimony.¹⁹⁸ "Coercion" suggests images of unreliable confessions brought on by pressure to speak certain words or suffer immediate and serious penalties.¹⁹⁹ By contrast, an immunized witness may not like the idea of having to speak, but to think that he might falsely incriminate himself because he fears the alternative of instant reprisal or continuing penalties, is unrealistic. "Coercion" and "involuntary" are rife with connotations of unlawfulness and overbearing behavior. Immunized testimony, which is authorized by statute, obtained under court order, and given in the presence of a judge or grand jury, does not evoke such negative connotations.²⁰⁰ *Harris* explicitly saw the untrustworthiness of immunized testimony as the key to its inadmissibility for impeachment;²⁰¹ untrustworthiness simply is not a character-

¹⁹⁵ 440 U.S. at 458-59. See *Harris v. New York*, 401 U.S. at 224; *Oregon v. Haas*, 420 U.S. at 722-23.

¹⁹⁶ *Portash*, 440 U.S. at 458. The Court cited *Mincey v. Arizona*, 437 U.S. 385 (1978), which, as shown by its quotation in *Portash*, spoke not of "testimonial" use of "compelled" statements but of "any" use of "involuntary" statements. *Portash*, 440 U.S. at 459 (quoting 437 U.S. at 398 (emphasis in originals)). *Mincey* involved impeachment statements obtained by the police from a suspect who was lying on the edge of consciousness in a hospital bed. 437 U.S. at 398.

¹⁹⁷ 440 U.S. at 459.

¹⁹⁸ 406 U.S. at 461-62.

¹⁹⁹ See Y. KAMISAR, *supra* note 46, at 11-12.

²⁰⁰ See *Kastigar v. United States*, 406 U.S. 441, 470-71 (1972) (Marshall, J., dissenting).

²⁰¹ 401 U.S. at 224.

istic of immunized testimony, especially inculpatory immunized testimony.

As for *Portash's* privilege in "its most pristine form," the notion that there are differing qualitative degrees of the privilege is novel and was unanalyzed in *Portash*; "pristine" was a *deus ex verbum* to lift the Court from the *Harris* morass. If *Miranda* warnings derive from the fifth amendment, the Court has not yet stated a distinction between *Harris* and *Portash*. Nor can I offer one.

C. PERJURY

1. Generally

The Supreme Court first took the position that the fifth amendment privilege does not sanction witness perjury in *Glickstein v. United States*, decided in 1911.²⁰² The Court reasoned that the government has the power to compel testimony, and that such power must include the right to obtain truthful testimony. Therefore, the privilege against self-incrimination relates only to past acts and does not license a witness to commit perjury.²⁰³

The Court has adhered to *Glickstein's* pronouncement that the privilege does not excuse perjury, insisting that the privilege creates a mechanism for silence, not false testimony.²⁰⁴ The Court is obviously correct: while perjury *does* avoid that which a witness is privileged not to do—self-incriminate—so would assault of one's interrogator. A witness's invocation of the privilege and ensuing silence (or truthful testimony under immunity) accomplishes the same end and is less disruptive. No one who understands the privilege will be misled by a witness's silence following a claim of privilege, especially since inferences from a claim of privilege are forbidden.²⁰⁵ Perjury on the other hand, disables the tribunal which hears it.²⁰⁶

This reasoning demonstrates that a witness can be guilty of perjury even though he was privileged not to speak. Grounds also exist for concluding that (1) the perjurious testimony of a privileged witness is not privileged from use as evidence of the unprivileged crime of perjury, and (2) the privilege is not triggered by the intention of the witness to per-

²⁰² 222 U.S. 139 (1911).

²⁰³ *Id.* at 142 (citing *Counselman v. Hitchcock*, 142 U.S. 547 (1892) and *Brown v. Walker*, 161 U.S. 591 (1896), both of which upheld immunity statutes containing perjury exceptions without, however, considering those exceptions).

²⁰⁴ *United States v. Wong*, 431 U.S. 174 (1977).

²⁰⁵ See generally Ayer, *The Fifth Amendment and the Inference of Guilt From Silence*: Griffin v. California After Fifteen Years, 78 MICH. L. REV. 841 (1980).

²⁰⁶ See generally Westen & Mandell, *To Talk, To Balk, or To Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response,"* 19 AM. CRIM. L. REV. 521 (1982).

jure himself. These propositions follow from the fact that a person who commits perjury was not "compelled" under the privilege, because fifth amendment compulsion is a legal requirement to testify truthfully. Further, the perjurer is not a "witness" under the fifth amendment because his testimony does not reveal the contents of his mind.²⁰⁷ Moreover, perjurious testimony is not "against" the witness under the fifth amendment; such testimony neither aids in the prosecution of crimes committed prior to the interrogation, nor facilitates the prosecution of crimes subsequent to interrogation through disclosure of intent to commit the future crime.²⁰⁸

If a witness has no privilege to commit perjury or to have perjury suppressed as evidence of itself, and if intent to commit perjury does not trigger the privilege, then there need be no immunity against use of perjurious testimony under the isomorphic concept of immunity.²⁰⁹ *Glickstein* was therefore sound in reading a perjury exception into the immunity statute applied in that case.²¹⁰ Yet *Glickstein* is silent on the *Apfelbaum* problems: (1) what immunized testimony, if any, is useable in a prosecution for perjury, and (2) for what purposes may admissible immunized testimony be used in the witness's perjury prosecution?²¹¹

The second issue was raised in separate opinions in *Apfelbaum*, but with no explanation of why it is a problem.²¹² Since there seems no reason to surround the admissibility of useable immunized testimony with particular hedges beyond those provided by the law of evidence,²¹³ I will turn exclusively to the first problem.

2. *Non-Perjurious Testimony Given Before, During, and After Perjury and Before and After Immunity is Conferred*

Justice Rehnquist's statement of the Court's holding in *Apfelbaum* was quite broad: the privilege does not govern admissibility of immu-

²⁰⁷ Perjury itself reveals an ability to speak and to understand English, and therefore a capacity to commit the present or prior perjury, but these abilities are too obvious to be protected by the privilege. See *supra* note 63.

²⁰⁸ See *supra* text accompanying notes 85-97.

²⁰⁹ See *supra* text accompanying notes 112-19.

²¹⁰ See 222 U.S. at 143.

²¹¹ In *Cameron v. United States*, 231 U.S. 710 (1914), the defendant argued that his immunized testimony was admissible at his perjury trial only to show the fact that the perjurious words were uttered, that is, to establish the *corpus delicti*. *Id.* at 718. The Court disagreed, stating that the testimony—not characterized as either entirely or only partially perjurious—could be used in a perjury prosecution for "any legitimate purpose in establishing the charge made." *Id.* at 721. The Court also construed the immunity statute involved as forbidding the testimony from being used to prove perjury committed on a different occasion. *Id.* at 723-24.

²¹² See *supra* note 34.

²¹³ Cf. *supra* note 211.

nized testimony "at a trial for making false statements."²¹⁴ If, however, the perjured testimony was given prior to truthful testimony, there is no reason why the witness does not have the usual privilege to refuse to answer if his truthful answer would tend to show him guilty of perjury—even perjury committed one question earlier. Here is the basic fallacy in *Apfelbaum*: Justice Rehnquist saw the grant of immunity as a line of temporal demarcation after which any perjury somehow voids the privilege, and hence the immunity, for all subsequent testimony, whether perjurious or not. The Court errs in viewing the conferral of immunity as a freeze of the witness's fifth amendment rights as of a given moment in time. Actually, the privilege may arise any time a question is asked, depending on what the truthful answer would be. The text of the privilege, not the text of an immunity statute, creates the privilege. The compulsion to answer each question creates a discrete instance of privilege. That the witness has been immunized and hence forbidden to invoke his privilege are merely mechanical consequences imposed by the immunity statute—he still has his privilege each time a question is asked, whether or not the privilege is physically claimable at that moment. Ironically, Justice Rehnquist, who viewed silence as merely an "effect" of the privilege and not a protection afforded by the privilege,²¹⁵ did not realize that the prohibition against invoking the privilege is merely an effect of immunity, not an actual nullification of the privilege.²¹⁶

Once the immunized witness commits perjury—either before or after the grant of immunity—he may still thereafter be privileged, precisely because his truthful answer would tend to reveal or help prove that perjury.²¹⁷ If the reasoning of *Apfelbaum* were correct, then an immunized witness would be worse off than a non-immunized witness, since only he could be compelled to "play detective" in uncovering his own prior perjury.

Hence, testimony which would, through revelation of the contents

²¹⁴ 445 U.S. at 117; *cf. id.* at 130, 131 (similar statements).

²¹⁵ *Id.* at 124.

²¹⁶ Justice Rehnquist also flirted with a contract theory that seems entirely inappropriate. He characterized immunity as a "bargain" and "exchange" between the witness and his interrogator; the witness's perjury excuses nonperformance of the contract by the government. *Id.* at 130. The contract is elusive, though, when one considers that the witness asked not for immunity, but for his privilege to remain silent, and had no power to decline the grant of immunity which overrode that privilege. *United States v. Kates*, 419 F. Supp. 846, 858 n.25 (E.D. Pa. 1976). Moreover, the bargain theory fails to explain the Court's broad holding, which does not distinguish perjury committed *prior* to the grant of immunity.

²¹⁷ Similarly, a witness, when questioned regarding a subject about which he testified a year earlier, may have a privilege not to reveal that his testimony on the prior occasion was perjurious by giving a truthful answer that would discredit his earlier testimony. *See United States v. Housand*, 550 F.2d 818, 823 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977).

of the witness's mind, aid the prosecutor in detecting or proving prior perjury is clearly privileged and must be immunized, even in a perjury prosecution and despite the fact the perjury was committed after the grant of immunity. This approach is correct regarding answers which tend to show either falsity or the witness's knowledge of his falsity.

Immunizing post-perjury testimony would not cause insurmountable practical problems for prosecutors who believe the truthful testimony is necessary to show the context of the perjurious testimony at the perjury trial.²¹⁸ Context will often appear from testimony given prior to the perjury, and is hence unprivileged because evidence of a prospective crime does not fall within the privilege. If testimony given subsequent to the perjury is what *makes* the indicted testimony perjurious—e.g., “What I meant earlier was”—then the subsequent testimony can be deemed part of the perjury itself since it is necessary to understand earlier, perjurious testimony. Later testimony explicating earlier perjury is part of the perjury because the reasonably understood meaning of the testimony is an element of perjury.²¹⁹ By explaining the earlier testimony, the later testimony helps create the crime of perjury. The privilege reaches only proof of a prior crime, not its commission. The witness may always modify his earlier testimony as he explains it to make it true, and thus avoid the compelled commission of a crime.

Truthful testimony given prior to perjurious testimony is not privileged insofar as it tends to prove the subsequent perjury, and hence need not be immunized. This follows from the absence of privilege for prospective crimes (with the exception of testimony that would disclose an intent to commit the future crime).²²⁰ Truthful testimony interwoven with perjurious testimony must be evaluated on the basis of whether it is privileged because of prior perjury—the answer to each question may be privileged, depending upon the witness's previous testimony.

Determining which immunized testimony is truthful, and hence possibly privileged and not useable if given subsequent to perjury, does not present an insurmountable problem. It appears that the matter cannot be left to a jury unless one trusts the effectiveness of an instruction such as: “Do not use any immunized testimony for any purpose unless you first determine that the testimony was willfully false.” The

²¹⁸ See *United States v. Apfelbaum*, 584 F.2d 1264, 1270 n.9 (3d Cir. 1978) (admitting immunized testimony essential to show context of perjury), *rev'd on other grounds*, 445 U.S. 115 (1980). Offering testimony to show context would be a “witness” use under the privilege, since the context is a matter of the words' meaning, and meaning is bound up with the ideas of the speaker.

²¹⁹ “Materiality” as an element of perjury is a matter of affecting the proceedings. MODEL PENAL CODE § 241.1(1), (2) & Commentary (Official Draft and Rev. Comments 1980). The meaning of testimony is one factor determining the effect on proceedings.

²²⁰ See *supra* text accompanying notes 85-97.

Supreme Court has indicated that if the jury would naturally wish to use evidence which might ultimately be found inadmissible for any purpose, such evidence cannot be admitted, even conditionally.²²¹ Nevertheless, the practical problem of administering immunity in this context—i.e., determining whether testimony was willfully false before letting the jury hear it—did not overwhelm those courts whose handling of the *Apfelbaum* issues differed from that of the Supreme Court in that case. These lower courts ruled that the judge may make the determination of falsity at various stages of the case.²²² Indeed, in *Apfelbaum* itself the trial judge determined at a post-verdict hearing that the testimony in question was false.²²³ A determination of truthfulness might cause a mistrial, depending upon whether the immunized testimony, now “discovered” to be truthful, prejudiced the verdict under the harmless error standard.²²⁴ Even testimony charged in the indictment to be perjurious could ultimately be found truthful and prejudicial to the defendant. If a jury convicted a defendant regarding indicted testimony, however, a judge’s finding of truthfulness would be rare. Further, if a limiting instruction has been given, one could easily infer from the jury’s acquittal a lack of prejudice to the guilty portion of the verdict. Here, the defendant would get two opportunities at a finding of truthfulness, before both the jury and the judge. The result is that prosecutors must be somewhat conservative in offering *any* immunized testimony in a perjury trial. Such is an unavoidable consequence of the fifth amendment.

A knottier problem is the fifth amendment right not to cause a prosecutor to focus upon oneself and not to supply investigatory leads through one’s compelled testimony.²²⁵ An immunized witness’s truthful testimony may alert the prosecutor that the witness recently committed perjury. To say the prosecutor must ignore possible perjury is not absurd. He must always look the other way when dealing with immunized witnesses.²²⁶ The privilege is not forfeited merely because it is the witness who both committed the crime and then reveals it—such is the paradigmatic case of immunity in operation. Under accepted immunity analysis, a prosecutor cannot be permitted to draw evidentiary leads

²²¹ See *supra* text accompanying notes 156-58; *cf.* FED. R. EVID. 104(a) (judge determining admissibility). *But see* *United States v. Anzalone*, 555 F.2d 317, 320 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978).

²²² See *United States v. Berardelli*, 565 F.2d 24, 29 (2d Cir. 1977), and cases cited therein.

²²³ Appendix at 79, 76, 23, 25, *United States v. Apfelbaum*, 445 U.S. 115 (1980); see *supra* note 23.

²²⁴ *Chapman v. California*, 386 U.S. 18 (1967).

²²⁵ See *supra* note 82; *cf.* *Kastigar v. United States*, 406 U.S. 441, 460 (1972) (immunity extends to use of evidence obtained by “focusing investigation on a witness as result of his compelled disclosure”).

²²⁶ See *Kastigar v. United States*, 406 U.S. 441, 460-62 (1972); *infra* note 241.

from the truthful testimony.²²⁷

The "focussing" effect can occur because the truthful testimony is sufficiently inconsistent with prior testimony to attract attention. It would then seem psychologically impossible for the prosecutor to avoid suspecting the witness to be a perjurer; how the problem can be handled is discussed below in connection with inconsistent perjury.²²⁸ A witness might draw attention to himself not by inconsistency but by unconvincing testimony. In such cases, the testimony will usually be willfully false and therefore not immunized. If truthful testimony somehow draws attention to earlier perjury, however, the prosecutor simply cannot be allowed to violate the privilege by deciding to prosecute because of a chain of events commencing with truthful, compelled, incriminatory, immunized testimony. That a crime has earlier been committed in the prosecutor's presence and is now being revealed in his presence does not create an exception to the fifth amendment. Neither is there an exception for grand jury perjurers who suddenly tell the truth. The most brazenly obstreperous witnesses can be dealt with, however, as will now be explained.

3. *Inconsistent Perjury*

Inconsistent perjury is perjurious testimony whose falsity is shown by proving that the witness has made irreconcilably contradictory declarations.²²⁹ The indictment need not specify which declaration is false if each declaration was material and made within the statute of limitation for the offense charged.²³⁰

Taking the witness-defendant's statements in chronological order, if statement 1 was given under immunity but is perjurious, it is nonetheless admissible because it is not privileged.²³¹ If the statement is *not* perjurious, it is not privileged regarding a crime committed thereafter, namely, the subsequent false, inconsistent statement.²³² Note that while

²²⁷ See *supra* note 17 and text accompanying.

²²⁸ See *infra* text accompanying notes 236-40.

²²⁹ 18 U.S.C. § 1623(c) (1976).

²³⁰ *Id.* In *Dunn v. United States*, 442 U.S. 100 (1979), the Court had granted certiorari on the question whether immunized testimony may be used to prove inconsistent perjury, but disposed of the case without reaching that issue. *Id.* at 105.

²³¹ See *supra* text accompanying note 209.

²³² See *supra* text accompanying notes 85-97.

There is no contradiction between holding that the first statement is not privileged regarding inconsistent perjury (or any other prospective crime) and stating that certain persons are privileged from supplying material for impeachment by inconsistent statement. See *supra* text accompanying notes 160-81. Under the thesis argued in this Article, individuals who are privileged regarding impeachment material face a reasonable possibility of prosecution for a crime already allegedly committed. See *supra* text accompanying notes 177-81. By contrast, the likelihood of being prosecuted for inconsistent perjury committed after invocation of the

the indictment need not proceed on the theory that the second statement was false, actual falsity would still be perjury and therefore a prospective crime.

If statement 2 was given under immunity it is not admissible because the witness had a privilege not to expose his prior perjury.²³³ An exception is that if the court determines that statement 2 was willfully false, it would be admissible, as would any perjurious testimony.²³⁴ A judge must find perjuriousness *in limine*, since a jury might otherwise use beliefs, truthfully revealed through statement 2, in violation of the privilege for concluding that the witness was *willfully* false in statement 1.²³⁵

If a witness dares to contradict himself on a single immunized occasion—a problem that apparently does not seriously concern the Justice Department²³⁶—the necessity for proving statement 2 to be false as a condition of admissibility will not leave the prosecutor helpless. When a witness's testimony tends to obstruct justice by closing off avenues of inquiry,²³⁷ or the testimony shows "beyond any doubt whatever" that he is refusing to tell what he knows,²³⁸ the witness has committed the crime of contempt. The contradictor has "closed off avenues of inquiry" because he gives his interrogator and the tribunal no path to follow. The testimony also shows beyond "any doubt whatever" that he is not telling what he knows: he is telling nothing while not affirming that he knows nothing. Using statement 2 to prove contempt would not violate the privilege, because we can infer that one who blatantly contradicts himself on a single occasion is acting with criminal intent when each statement is given.²³⁹ Just as the privilege does not cover willfully false statements, so should it not cover statements made pursuant to a plan to

privilege is not strong enough to warrant fifth amendment protection, since it involves a prospective crime. *See supra* text accompanying notes 85-97. Of course, both types of individuals, those who have allegedly committed a prior crime and those who have not, face an equal chance of innocent self-contradiction, but that is hardly reason to suppose they face equal chances of prosecution; compare the chance of being prosecuted for perjury based on an innocent contradiction, with the chance of first being prosecuted for an already suspected crime allegedly committed prior to the contradiction and then being impeached by the contradiction at one's trial.

²³³ *See* United States v. Housand, 550 F.2d 818, 823 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977).

²³⁴ *See supra* text accompanying note 209.

²³⁵ Even in an inconsistent perjury prosecution the jury must find that the witness acted knowingly. 18 U.S.C. § 1623(a) (1976).

²³⁶ *See* Brief for the United States at 67-68 & n.24, *Dunn v. United States*, 442 U.S. 100 (1979) ("it would require a particularly brazen witness" to give two contradictory answers to every grand jury question; example is apparently given to diagram the problem raised by immunity and inconsistent perjury).

²³⁷ *United States v. Griffin*, 589 F.2d 200 (5th Cir.), *cert. denied*, 444 U.S. 825 (1979).

²³⁸ *United States v. Appel*, 211 F. 495 (S.D.N.Y. 1913) (L. Hand, J.).

²³⁹ Compare the likelihood that innocent change of belief was the cause of different testimony given on *different* occasions. *See supra* text accompanying notes 173-74.

commit a crime by using words; the speaker is a "witness" under the privilege only when he is revealing his beliefs, not when he is using words as an instrument of crime with disregard for whether he is revealing his beliefs. Thus, the single-occasion self-contradictor cannot by contemptuous inconsistency evade the duty to give testimony. Statement 2 is admissible in this situation to prove the statement was indeed made and to prove the witness's criminal intent in its making. Neither of these uses would be a "witness" use of the statement because neither use exploits the witness's beliefs, which presumably did not change between contradictory statements 1 and 2 if they were made on a single occasion and without explanation.²⁴⁰ There would, moreover, be no problems with using statement 1 to prove contempt for the reasons given above in connection with inconsistent perjury.

Finally, if statement 2 is immunized on an occasion other than that when statement 1 was given, the above analysis would not excuse prosecutorial focus on the witness.²⁴¹ Since, however, statement 2 is inadmissible unless perjurious in itself, no perjury prosecution can result in any event absent reason to believe the statement was false; mere contradiction with a prior statement will be insufficient. This gutting of the inconsistent perjury statute is unavoidable but understandable when one considers that if a perjurer has a change of heart and wishes to be honest the next time he testifies, he has the usual privilege not to expose his crime, and must receive the usual immunity if nonetheless compelled to speak.²⁴² If a prosecutor is concerned that a grand jury witness whom he has "turned" will recant at trial,²⁴³ the prosecutor should not work with this witness through testimonial immunity, but should use an agreement not to prosecute,²⁴⁴ which can be conditioned on the witness's non-contradiction of his interview statements. Prosecutorial immunity usually gives away nothing additional, as many witnesses who currently receive testimonial immunity would not have been prosecuted

²⁴⁰ See *supra* note 239.

²⁴¹ Cf. *United States v. Housand*, 550 F.2d 818, 823 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977) (apprehension of focusing on witness because of truthful statement contradicting earlier statement triggers the privilege; logical implication is that focusing is forbidden if witness is immunized during second statement).

²⁴² See *United States v. Housand*, 550 F.2d 818, 823 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977); cf. *United States v. Patrick*, 542 F.2d 381, 385 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977) (perjury exception to immunity does not extend to inconsistent perjury prosecution based in part on statement prior to immunity); *In re Grand Jury Proceedings*, 644 F.2d 348 (5th Cir. 1981) (same).

²⁴³ Inconsistent perjury statutes are designed for those who testify and thereafter retract their testimony. See MODEL PENAL CODE, *supra* note 219, § 241.1 commentary at 134-35.

²⁴⁴ See, e.g., *In re Corrugated Container Antitrust Litigation*, 661 F.2d 1145, 1147, *cert. granted sub nom. Pillsbury Co. v. Conboy*, 102 S. Ct. 998 (1982).

anyway because of their cooperation.²⁴⁵ In fact, it is extremely unlikely that a witness who has testified about his crime under testimonial immunity can be prosecuted for that crime.²⁴⁶ In the case of witnesses who are compelled to testify under testimonial immunity and who would not cooperate with the prosecution, the subsequent testimony furnishes evidence and reason to focus upon them for perjury and is not immunized if found to be false. If the latter testimony is true, then nothing substantial has been lost to the prosecutor through inability to use the inconsistent perjury statute. This follows because truthful testimony, by hypothesis, has been given on the second, usually more important, occasion (e.g., trial following earlier grand jury testimony).

D. IMMUNITY STATUTES

The Constitution does not require that immunity be as broad as the construction given the current federal immunity statute in *Kastigar*. That statute provides:

[N]o testimony or other information compelled under the [immunity] order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.²⁴⁷

Kastigar said the statute forbids prosecutors from "using the compelled testimony in *any* respect,"²⁴⁸ but, as we have seen, an immunity that broad is not constitutionally compelled. Indeed, there is no constitutional reason for an immunity statute to immunize all compelled testimony from later use as proof of guilt.²⁴⁹ Only privileged testimony must be immunized.

Unlike the non-immunity situation, in which the witness who claims the privilege is entitled to keep his proposed testimony secret when he argues his right to the privilege,²⁵⁰ once a witness testifies under immunity the information is made public. There is thus no reason not to use the testimony itself to determine whether in fact the privilege existed. If an answer did not imperil the witness protected by the privilege, the Constitution does not require that the answer receive immunity from *any* use. An immunized witness could be made to demonstrate the privileged nature of each answer, just as non-immunized witnesses must claim and demonstrate privilege, *seriatim*, as to each question.²⁵¹

²⁴⁵ See Wolfson, *Immunity—How it Works in Real Life*, 67 J. CRIM. L. & C. 167, 167 (1976).

²⁴⁶ See *supra* text accompanying notes 132-33.

²⁴⁷ 18 U.S.C. § 6002 (1976).

²⁴⁸ 406 U.S. at 453 (emphasis in original).

²⁴⁹ See *supra* note 122.

²⁵⁰ *Hoffman v. United States*, 341 U.S. 479, 48-87 (1951).

²⁵¹ See *id.*

If Congress wishes to grant the minimal immunity constitutionally required,²⁵² two possibilities exist. One is for the Court, at the next opportunity, to reinterpret the existing statute so that the terms "against" and "witness" have the same meaning as they do in the text of the privilege. The statutory language would be applied from the perspective of the situation existing when the questions were asked, thereby imposing symmetry between immunity and privilege.

If the Court is recalcitrant, Congress should enact a replacement statute: "No testimony or other information compelled under an immunity order which the witness would have been privileged under the fifth amendment to the United States Constitution not to give may be used in any manner which would violate that privilege."²⁵³ The present exceptions to the existing statute, including perjury, are omitted as superfluous.²⁵⁴ The "derived" provision of the present statute is similarly omitted because derivative use is encompassed by the incorporation of the privilege. The proposed statute would simply immunize those persons who in fact had a privilege from uses of their testimony which would violate their privilege.²⁵⁵ The statute might be unwise as a matter of policy,²⁵⁶ but Congress has apparently already chosen that policy.²⁵⁷ An examination of policy is beyond the scope of this Article, which has dealt with the constitutionally required scope of testimonial privilege.

IV. CONCLUSION

The Supreme Court in *New Jersey v. Portash* made an impermissible leap from *Kastigar*—a precedent which construed and upheld a federal statute on the grounds that the scope of immunized testimony is as broad as the fifth amendment privilege against self-incrimination—to a conclusion which framed a constitutional requirement that a witness

²⁵² The Supreme Court has already held that Congress indeed intended this. *Apfelbaum v. United States*, 445 U.S. 115, 121-23 (1980).

²⁵³ The Court has not objected to the drafting technique of incorporating the Constitution as an element of a statute. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (validity of 18 U.S.C. § 3731 (1976), which allows government appeals unless prohibited by "double jeopardy clause of the United States Constitution;" drafting issue apparently not raised).

²⁵⁴ *See Heike v. United States*, 227 U.S. 131, 141 (1913) (perjury exception is superfluous); *Glickstein v. United States*, 222 U.S. 139, 143 (1911) (reading perjury exception into statute).

²⁵⁵ A logical extension of this statute would be to prohibit invocation of the privilege and grant everybody immunity to the extent their privilege is violated. This might cause unnecessary "taint" hearings, however, under *Kastigar*.

²⁵⁶ *See Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE* 765-66 (5th ed. 1980) (witnesses might be more responsive if counsel can advise them their testimony cannot be used in any circumstances).

²⁵⁷ *See supra* note 252.

can not be impeached by use of his immunized grand jury testimony. Shortly afterward, the Court in *United States v. Apfelbaum* imposed a requirement of isomorphism between immunity and privilege. That requirement was a sound analysis, but left *Portash's* justification groundless: had the *Portash* Court intended to create a privilege grounded on impeachment, or did the Court simply prohibit all testimonial uses of immunized testimony on the theory that no one receives immunity without a prior attachment of the privilege? The problem is a lack of principle; *Apfelbaum* correctly precludes granting blanket immunity merely because the witness had a privilege on *some* ground.

This Article has shown that the *Portash* result can be justified by recognizing the isomorphic relation between the privilege and immunity. This Article, then, extends the Court's finding of isomorphism to its logical conclusion: a view of privilege somewhat broader than recognized by case law, but one that has not been rejected by the courts. Most troublesome is Justice Rehnquist's careless application of the isomorphism principle he quite properly expounded in *Apfelbaum*. To say that perjury sweeps away immunity entirely evades the (not too difficult) analysis which must be performed in every perjury-immunity case. The privilege has its genesis in the Bill of Rights; immunity comes only from legislatures and prosecutors. Surely the latter cannot indiscriminately blot out the former.

Postscript

While this Article was in the galley stage, the Supreme Court decided a case discussed herein, *Pillsbury Co. v. Conboy*.²⁵⁸ In a five-to-two decision, the Court held that when a previously immunized witness is subpoenaed to give a civil deposition in response to questions based on his immunized testimony, the federal immunity statute does not authorize the civil judge to compel his testimony over his invocation of the fifth amendment privilege. The Court reasoned that the immunity does not extend to the deposition, even if the deposition were inadmissible at a subsequent criminal trial of the witness—a matter not passed upon by the Court.²⁵⁹ The reasons given for this conclusion were: (1) cross-examination at the deposition might be broader than the direct examination; (2) the government, not the court, has exclusive power to shape the scope of immunity; and (3) the civil court, by adjudicating the scope of immunity, would merely be predicting what a future criminal court might determine on the issue of taint of the prosecutor's evidence.

The Court rejected the parties' position that the issue was whether

²⁵⁸ 51 U.S.L.W. 4061 (U.S. Jan. 11, 1983); see *supra* text accompanying notes 143-50.

²⁵⁹ 51 U.S.L.W. at 4063 n.13; *id.* at 4064, text accompanying n.22.

the deposition "derived" from the immunized testimony within the meaning of the immunity statute. For the Court, the issue was whether the grant of immunity "itself compelled" the witness to give the deposition.²⁶⁰ For the sake of brevity, it can only be said that the Court's avowed "interest" analysis is, in the word of dissenting Justice Stevens, "puzzl[ing]."²⁶¹ Once the majority separated the scope-of-immunity issue from the admissibility of the deposition at a subsequent prosecution of the witness, all hope for isomorphism between immunity and the privilege against self-incrimination was lost.

²⁶⁰ *Id.* at 4063.

²⁶¹ *Id.* at 4070.