
Rebecca Leair

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol64/iss4/6
press access, but seemed carefully to weigh conflicting arguments and evidence before ruling, appeared to make the Court less willing to disturb his ruling.

2. Consideration of alternatives. The three judges in major Supreme Court cases who did not consider alternatives to closure have been overruled. The Court seems to think alternatives should be investigated, even if it is reluctant to supply a list of those that should be considered.

3. Reporters’ conduct. When the initial motion for closure was made in both Gannett and Richmond Newspapers, the reporters present failed to object. Several Justices spoke of their great reluctance to disturb rulings to which there had been no timely objection. In most cases surveyed by the Reporters Committee for Freedom of the Press, the reporters present did not initially object. Clearly many reporters have not been aware of developments in this area of the law or have been unsure of their standing to object. Although it is unreasonable for courts to expect reporters to have legal knowledge beyond that possessed by lay people who routinely appear in court, reporters can best ensure that courtrooms will not be arbitrarily closed by objecting at the time the closure motion is made and requesting that the judge state a reason for closing the courtroom.

LAWRENCE J. MORRIS


155. Each of the trial court judges in Sheppard, Nebraska Press and Richmond Newspapers failed to consider alternatives to closure and each was overturned. While the Court did not in Richmond Newspapers specifically point to the failure of Judge Taylor to consider alternatives to closure, there appears to be a pattern that the Court is more lenient when alternatives are considered (e.g., Gannett) than when they are not.

clash when a person is called on to testify. The first is that the public has a right to every person’s evidence. The second, embodied in the fifth amendment, is that no person shall be compelled to be a witness against himself in a criminal prosecution. The latter relieves the witness from facing “the cruel trilemma of self-accusation, perjury, or contempt.” In order to obtain testimony from a witness despite his assertion of the privilege against self-incrimination, the concept of immunity was developed. This concept replaces the privilege with a prohibition against use of the testimony, or any evidence derived from it, in a prosecution of the witness. The courts have recognized an exception to this prohibition — a prosecution for perjury committed while testifying under a grant of immunity.

A question which often arises during a prosecution for perjury committed while under a grant of immunity is how much of the defendant’s compelled, truthful testimony is admissible into evidence? There are many possible variations of this problem, depending on the nature of the statements and the use the prosecution makes of them. One of the most basic examples of the problem, however, was presented in United States v. Apfelbaum.

Stanley Apfelbaum was an administrative assistant to the district attorney of Philadelphia. A grand jury, investigating an automobile dealership, called Apfelbaum to testify. It was thought that he might be a party to a phony robbery. At first, he claimed his fifth amendment privilege. The prosecutor then obtained an order under 18 U.S.C. sections 6002-03, granting Apfelbaum immunity and compelling his testimony.

4. E.g., 18 U.S.C. § 6002 (1970). This is the general federal immunity statute. In Kastigar, 406 U.S. 441, the Supreme Court upheld its constitutionality. See notes 14-16 and accompanying text infra for a general discussion of use and derivative use vs. transactional immunity. See notes 33-36 and accompanying text infra for a discussion of Kastigar.
5. Glickstein v. United States, 222 U.S. 139 (1911).
7. 18 U.S.C. § 6002 provides:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding
Apfelbaum still refused to answer the questions. After spending six days in jail for civil contempt, Apfelbaum finally agreed to testify. However, some of his testimony was perjured.

Apfelbaum was indicted on two counts of perjury pursuant to 18 U.S.C. section 1623. During his perjury trial, the prosecution used part of Apfelbaum's truthful grand jury testimony related to the perjured statements. Apfelbaum objected to the use of these truthful statements, claiming this violated his privilege against self-incrimination. The district court overruled his objection, and the jury found him guilty. The Court of Appeals for the Third Circuit reversed and granted a new trial based on the use of those truthful statements. The United States Supreme Court reversed the court of appeals decision.

An understanding of the issue in Apfelbaum requires some familiarity with the background of immunity and with the perjury exception to immunity.

I. BACKGROUND AND HISTORY

Basically, immunity operates to supplant the fifth amendment privilege and compel self-incriminating testimony. Immunity has become a valuable law enforcement tool, especially in dealing with crimes in which the only witnesses who can supply essential evidence are often themselves implicated in the crime. Kastigar v. United States, 406 U.S. 441, 446 (1972). For a discussion of the procedure for obtaining immunity and problems with immunity, see Note, Federal Witness Immunity Problems and Practices Under 18 U.S.C. §§ 6002-6003, 14 AM. CRIM. L. REV. 275 (1976); see also Strachan, Self-In-
munity statutes, in fact, predate the Constitution, and, as the Supreme Court has noted, have become "part of our constitutional fabric." 

There are several types of immunity: use, transactional, and use and derivative use. Use immunity simply provides that the compelled testimony of the witness cannot be introduced as evidence against him in a subsequent criminal trial. Transactional immunity provides that the witness cannot be prosecuted for any crime about which he testified while under a grant of immunity. Use and derivative use immunity provides that the compelled testimony and any evidence derived from that testimony may not be used against him in a subsequent prosecution.

Counselman v. Hitchcock tested the constitutionality of use immunity. The Court found use immunity unconstitutional because it failed to protect against the derivative use of the compelled testimony; that is, use of the testimony as a lead to other incriminating evidence. The Court stated that Congress could not replace the privilege against self-incrimination with immunity unless that immunity was "so broad as to have the same extent in scope and effect" as the privilege itself.

In its discussion, the Court went further and indicated that only transactional immunity could provide the protection necessarily coextensive with the privilege. The Court stated that no immunity which left the party "subject to prosecution after he answers the question put to him" would be adequate; the witness needed "absolute immunity against future prose-
cution for the offense to which the question relates.\textsuperscript{20}

Relying on the implication that transactional immunity would be found constitutional, Congress and state legislatures enacted transactional immunity statutes. These statutes were upheld in \textit{Brown v. Walker}.\textsuperscript{21} The Court noted that the privilege protected a person from being compelled to testify against himself in a criminal prosecution. It found that if the danger of such a prosecution was removed, the privilege ceased to apply.\textsuperscript{22} The Court therefore upheld the use of transactional immunity for the purpose of compelling self-incriminating testimony. It would be years before any attempts to change this immunity were made.

By the 1960s, the government had grown dissatisfied with the high price of transactional immunity and in 1964, by way of dicta in \textit{Murphy v. Waterfront Commission},\textsuperscript{23} the Court implied that transactional immunity might not be necessary and that a careful rereading of \textit{Counselman} might be in order. In \textit{Murphy}, the defendant refused to answer the Waterfront Commission's questions despite the state's grant of transactional immunity. He argued that he could still be prosecuted in another state or under federal laws, and that his compelled testimony could then be used to incriminate him. The Court held that a state could compel such testimony, but that other states and federal prosecutors would be prohibited from using the testimony or evidence derived from such testimony in a subsequent criminal prosecution of the witness.\textsuperscript{24} In his concurring opinion,\textsuperscript{25} Justice White indicated the emerging attitude of the Court by stating: "Immunity must be as broad as, but not harmfully and wastefully broader than, the privilege against self-incrimination."\textsuperscript{26}

The Court in \textit{Murphy} implied that it might find a statute providing use and derivative use immunity constitutional. The commission working on the revision of the federal criminal laws noted this implication and recommended a general use

\begin{footnotes}
\item[20] \textit{Id.} at 585-86.
\item[21] 161 U.S. 591 (1896).
\item[22] \textit{Id.} at 597.
\item[23] 378 U.S. 52 (1964).
\item[24] \textit{Id.}
\item[25] \textit{Id.} at 92 (White, J., concurring).
\item[26] \textit{Id.} at 107.
\end{footnotes}
and derivative use immunity statute. 27 This proposed statute included the traditional exception for perjury. 28

This theory became incorporated into legislation which Congress eventually passed as part of the Organized Crime Act of 1970. This provision is the present 18 U.S.C. section 6002. 29 The prohibition still retains the perjury exception. 30 The committee reports and hearings provide only marginal help in determining what exactly is included within the perjury exception. The committees, noting that the exception was probably unnecessary because courts were quite likely to imply it, included it only out of caution. 31 Comments in the legislative history do indicate that the perjury exception was to apply to perjury committed in the course of testifying under the immunity grant. 32


30. [B]ut no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Id. (emphasis added).


32. H. R. Rep. 91-1188, supra note 31, at 7 (reason for change in wording was to make it clear that the testimony can be used in a prosecution for perjury "committed in response to an order to testify."); Hearings Before Subcomm. No. 5, supra note 31, at 145 (comments of Rep. Biaggi: "However, perjury and contempt while testifying still remain in force against the witness."); 119 Cong. Rec. 36293 (1970) (remarks of Sen. Hruska, co-sponsor, that the prohibition meant the testimony could not be used for offenses committed prior to the testimony).

In connection with this, the court in In re Baldinger, 356 F. Supp. 153 (C.D. Cal. 1973) refused to issue an immunity grant because it construed the perjury exception to mean the testimony could be used to prove perjury committed prior to the immunity grant. The court noted that all other immunity statutes had included the limitation on perjury while testifying under the order. Id. at 157. Thus, the court concluded that the immunity, in that case, would not protect the witness from use of her testimony to prove prior false statements. This use, the court found, would be unconstitutional, so it refused to issue the order. However, the court in United States v. Doe, 361 F. Supp. 226 (E.D. Penn. 1973) and Application of the United States Senate
Kastigar v. United States\textsuperscript{33} tested the constitutionality of section 6002 and use and derivative use immunity. The Supreme Court concluded that both were constitutional. The Court stated that the problem in \textit{Counselman} had been that the statute did not protect from derivative use; the other broad language on transactional immunity had been unnecessary.\textsuperscript{34} The Court found that immunity must be as broad as the privilege against self-incrimination, but need not be broader. Transactional immunity was broader; use and derivative use immunity was coextensive with the privilege.\textsuperscript{35}

In his majority opinion, Justice Powell asserted that use and derivative use immunity was coextensive with the fifth amendment protection, stating, "It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness."\textsuperscript{36} This statement would appear again in later perjury cases.

II. PERJURY AND THE FIFTH AMENDMENT

Perjury committed while under a grant of immunity creates a certain degree of analytical confusion, whether the immunity is transactional or use and derivative use. There is a

---

Select Comm. on Presidential Campaign Activities, 361 F. Supp. 1282 (D.D.C. 1973) rejected this construction of the statute and issued the immunity orders. Judge Sirica, in \textit{Senate Select Comm.}, noted that the Baldinger interpretation was "permissible" but not "necessary." \textit{Id.} at 1283. He stated that he would follow the interpretation which rendered it constitutional and noted that it was "inconceivable that Congress, in its attempt to devise a constitutionally sound use immunity statute, should have intended or permitted exceptions to the use of compelled testimony other than the obvious ones for offenses committed in the course of testimony." \textit{Id.} at 1284. \textit{See Note, Statutory Immunity and the Perjury Exception, 10 Cal. W. L. Rev. 428 (1974).}

Also note that the reason for including the language, "or otherwise failing to comply with the order," in § 6002 was probably to insure that the testimony could be used in a contempt prosecution. Whether the perjury exception, absent that language, permitted such use for contempt proceeding was an issue in United States v. Bryan, 339 U.S. 323 (1950). The Court concluded such use was implied in the statute.

34. \textit{Id.} at 453-54.
35. \textit{Id.} at 453. For discussion on the Burger Court’s narrow view of the privilege and focus on the use of compelled testimony rather than on the act of compulsion, see Ritchie, \textit{Compulsion That Violates the Fifth Amendment: The Burger Court’s Definition}, 61 Minn. L. Rev. 383 (1977).
36. 406 U.S. at 453 (emphasis in original).
tendency to forget that, in such a case, the testimony itself is the crime. "There is justifiable reason for the perjury exception. The crime consists of the testimony itself, without which no prosecution is possible." 37

The courts have used various theories to justify the exception which allows prosecution of a witness who perjures himself under an immunity grant and permits the use of his immunized testimony in a perjury prosecution. One theory uses a chronological distinction — only prior crimes are protected by the fifth amendment. 38 Since the witness has not testified at the time immunity is granted, his subsequent perjury is unprotected. Another theory views immunity as a bargain or exchange. Perjury violates the terms of that bargain. Because of this breach of the bargain, the perjured testimony is not immunized. 39 At other times, the courts do not really go into such analysis but seem to rely more on common sense. Perjured immunized testimony would destroy the whole purpose of immunity. 40 That purpose is to gain access to otherwise unavailable information. The courts also have noted that the fifth amendment protects the right not to answer questions, not the right to answer falsely. 41

Whatever the justification used, the courts have recognized the perjury exception. In Glickstein v. United States, 42 the Supreme Court found that the perjury exception to immunity was "not open to controversy," 43 noting that (1) the fifth amendment does not prohibit the government from compelling testimony, provided that immunity coextensive with the privilege is supplied, and (2) the sanction of an oath and imposition of punishment was part of the power to compel testi-

37. United States v. Bryan, 339 U.S. 323, 347 (1950) (Black, J., dissenting). See 8 J. Wigmore, Evidence § 2282, "for the perjured utterance is not 'evidence' or 'testimony' to a crime but is the very act of the crime itself."
40. See, e.g., Glickstein v. United States, 222 U.S. 139 (1911); Edelstein v. United States, 149 F. 636 (8th Cir. 1906).
42. 222 U.S. 139 (1911).
43. Id. at 141.
mony. As the Court stated, "In other words, this is but to say that an authority which can only extend to the licensing of perjury is not a power to compel the giving of testimony." 44

The Court relied on a common sense interpretation of the fifth amendment and the immunity statute, but it also relied on the chronological argument. Immunity related to past crimes, not to perjury that the witness might commit after obtaining immunity. 45 The Court, in conclusion, recognized the validity of the perjury exception even when not expressed in the statute and allowed the use of the immunized testimony in the perjury prosecution. 46 No issue was raised concerning truthful versus false immunized statements, and the Court appeared to make no such distinction.

In more recent cases, the Court has continued to hold that the fifth amendment does not protect perjury, even when the perjury is committed under extenuating circumstances. 47 In one case, Marchetti v. United States, 48 the Court questioned the chronological theory — that the fifth amendment only protects the witness from revealing self-incriminatory information for past, not future, crimes. The Court held that fail-

44. Id. at 142.
45. Id.
46. Accord, Edelstein v. United States, 149 F. 636 (8th Cir. 1906). The court reached this conclusion in a bankruptcy case prior to the decision in Glickstein. In reaching this conclusion, the court in Edelstein relied on the chronological theory, the common sense theory, and the breach of immunity bargain theory. Id. at 642-44.

In United States v. Bryan, 339 U.S. 323 (1950), the Court used the chronological theory to find that the testimony could be used in a contempt proceeding despite the absence of an explicit provision for this in the statute. See n.32 supra.

47. In Bryson v. United States, 396 U.S. 64 (1969), the defendant filed a false affidavit with the NLRB, saying he was not a member of the Communist Party. Although the Court questioned the constitutionality of the statute requiring such affidavits, it found that this was no excuse for lying. "A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." Id. at 72.

In United States v. Mandujano, 425 U.S. 564 (1976), the issue was whether a grand jury witness could be prosecuted for perjury when he had not been given full Miranda warnings before testifying. In the plurality opinion, Chief Justice Burger observed that "[i]n this constitutional process of securing a witness' testimony, perjury simply has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings." Id. at 576.

The Court took the same view in a later case where the witness, because of language difficulties, did not understand her right not to answer and lied instead. United States v. Wong, 431 U.S. 174 (1977).
ure to file federal wagering tax forms and assertion of the fifth amendment right not to answer questions on these forms was permissible because information called for on the forms was incriminating. The information obtained might reveal plans for future gambling.49

In ruling that the privilege against self-incrimination did provide protection for future crimes in this case, the Court declared that it refused to be bound by rigid chronological distinctions, that the privilege was not that narrow. Rather, the true test of its applicability was whether the person faced real and not imaginary dangers of self-incrimination.50 The Court noted, that in the vast majority of situations, the privilege would not provide prospective protection, but that the situation differed in this case because of a full array of state and federal gambling prohibitions which the defendant faced. It concluded that "it is not mere time to which the law must look, but the substantiality of the risks of incrimination."51 So, in at least some cases, the chronological theory used to support the perjury exception may not hold true. Usually, however, the courts have held that the fifth amendment does not supply "insulation for a career of crime about to be launched."52

The perjury exception to immunity, whether rationalized on the basis of a breach of the immunity bargain theory, common sense, or the proposition that the fifth amendment protects neither perjury nor incrimination for future crimes, is well established as constitutional. The Court appears to have taken a very stern approach to perjury. The question then becomes how much of the immunized testimony can be used in a perjury trial and for what purposes. Until Apfelbaum, the Supreme Court had not dealt directly with this issue. Two decisions of the courts of appeals, however, are especially helpful

49. Id. at 52.
50. Id. at 53-54; Brown, 161 U.S. at 600.
51. 390 U.S. at 54.
52. United States v. Freed, 401 U.S. 601, 607 (1971). This case concerned whether the National Firearms Act, 28 U.S.C. § 5845, requiring registration while providing use and derivative use immunity for the information obtained as far as prior and concurrent criminal acts were concerned, violated the privilege since it did not protect from use in prosecutions for future criminal acts. Justice Douglas, writing for the Court, concluded it did not. Justice Brennan (concurring) also agreed that immunity for future crimes was not required. Id. at 611.
in understanding Apfelbaum.

In Daniels v. United States, the court dealt with perjury committed during the defendant's bankruptcy proceeding. At the perjury trial, the government introduced truthful portions of the defendant's immunized testimony to prove he knowingly lied as part of a scheme to defraud his creditors.

The court found that the truthful statements were relevant to the perjury prosecution and, therefore, admissible. It asserted that the immunity only applied to past crimes and that "it is manifest that, where the bankrupt is indicted for testifying falsely in one part of his examination, his testimony in other parts of the same examination, if tending to support the indictment, may be given in evidence against him." The court refused to draw an arbitrary line between perjurious statements and truthful statements, stating that the testimony "must, for the present purpose, be considered as an entirety . . . ." 

Contrast this view with that of the Third Circuit in the more recent case, United States v. Hockenberry. In Hockenberry, on cross examination in a perjury trial, the prosecution used truthful portions of a former county detective's immunized testimony to impeach his credibility. These were defendant's admissions that he had falsified affidavits for search warrants on several occasions. The court found that using these truthful admissions of prior wrongdoing, unrelated to the perjured testimony, violated the terms of the defendant's immunity and his fifth amendment privilege. They did not fall within the exception for perjury. The court concluded that the truthful statements were, indeed, compelled testimony. Perjured testimony was not compelled. Immunity applied to incriminating truth, but not to falsehoods. Therefore, the prosecution could use only the false statements and a minimal amount of truthful statements necessary to establish the corpus delicti of the offense in a subsequent perjury prosecution. To use more would violate the defendant's constitu-

53. 196 F. 459 (6th Cir. 1912).
54. Id. at 463.
55. Id.
56. 474 F.2d 247 (3d Cir. 1973).
57. Id. at 249.
58. Id.
tional rights.

The court in Hockenberry seemed to rely on a variation of the bargain theory used to justify the perjury exception to immunity. The court made a rigid distinction between compelled truthful statements and falsehoods, which it asserted were not compelled. False statements could be used in the perjury trial; truthful ones could not. The court's reasoning appears at least somewhat confusing. In essence, it requires a determination of the truthfulness or falsity of a statement before the perjury trial.69 Also noteworthy is that the court in Hockenberry never mentioned the decision in Daniels. The court could have distinguished the fact situation in Hockenberry from that in Daniels in that the former involved the use of truthful admissions in order to impeach the defendant's credibility, while the latter involved the use of truthful statements directly related to the perjured statements. The court in Hockenberry, however, did not do this. Under the broad rule which the court announced in Hockenberry — that truthful statements could not be used in a subsequent perjury prosecution — the opposite result would have occurred in Daniels. Despite any logical problems with the Hockenberry rule, the Third Circuit and other circuits proceeded to cite this rule in a variety of different fact situations.60

III. United States v. Apfelbaum

In 1978, following the rule set forth in Hockenberry, the Third Circuit reversed Stanley Apfelbaum's perjury conviction and granted him a new trial.61 The court followed the reasoning that truthful statements were compelled and could not be used in the perjury prosecution. The court had to define what it had meant by corpus delicti in Hockenberry, and defined it to include the statements alleged to be perjurious and no more than the minimal testimony essential to place the charged falsehood into context. All the testimony constituting the corpus delicti had to be incorporated in the indictment.62 The related truthful statements the prosecution had

60. See notes 93-96 and accompanying text infra.
62. Id. at 1270, n.9.
used in Apfelbaum's trial were not part of the *corpus delicti*. The court rejected the government's argument, similar to the reasoning in *Daniels*, that the statements were admissible because they were relevant to the perjury charge. The court also relied on the statements in *Kastigar* justifying use and derivative use immunity because of the prohibition against use of compelled testimony "in any respect."\(^6\)

The Supreme Court reversed.\(^6\) In the opinion, the Court noted the confusion on the use of truthful immunized statements in perjury prosecutions and the different approaches of the various circuits.\(^6\) It also acknowledged somewhat conflicting statements in two lines of its own opinions — those in the *Counselman* and *Kastigar* line (especially the statement in *Kastigar* that the prosecution cannot use compelled testimony in "any respect") and, apparently, those in the perjury line of cases such as *Glickstein*.\(^7\)

The Court then proceeded to define two key issues in *Apfelbaum*: (1) whether section 6002 permitted the use of truthful statements in a perjury prosecution; and (2) whether the fifth amendment permitted such use. It found no support for Apfelbaum's contention, either in the plain language of the statute or in its legislative history, that truthful statements cannot be used in a perjury prosecution.\(^8\) It noted that the statute makes no distinction between truthful and false statements in the perjury exception. The Court observed that the legislative purpose for the Organized Crime Act of 1970 was to strengthen evidence-gathering tools and, therefore, concluded that Congress intended the perjury exception "to be interpreted as broadly as constitutionally permissible."\(^9\)

In analyzing the fifth amendment issue, the Court stated that the lower court erred in equating the *protection* the fifth amendment afforded with the *effect* of remaining silent. Such

---

63. *Id.* at 1271.
64. *Id.* at 1269, quoting *Kastigar*, 406 U.S. at 453 (emphasis in original).
65. 445 U.S. 115 (1980). The Court was unanimous in the decision to reverse. Justice Rehnquist wrote the majority opinion; Justice Brennan wrote a concurring opinion; Justice Blackmun also wrote a concurring opinion in which Justice Marshall joined.
66. 445 U.S. at 119 n.5.
67. *Id.* at 120-21 and n.6.
68. *Id.* at 121.
69. *Id.* at 121-23 and n.7. See notes 30-32 and accompanying text *supra*. 
an analysis would not only bar any prosecution for perjury, the Court observed, but would also bar the compulsion of testimony under any kind of immunity grant because immunity would not prevent, for example, the use of compelled testimony in a civil procedure. The Court rejected such a "but-for" analysis.\(^{70}\) Constitutional immunity grants "need not treat the witness as if he had remained silent."\(^{71}\)

One difference between the effect of remaining silent and the effect of testifying under immunity is, of course, the possibility of a perjury prosecution. The Court relied on the cases involving perjury, discussed earlier, to conclude that the fifth amendment does not protect perjury. Indeed, the Court found that the "statement has been so often repeated . . . as to be firmly established constitutional law."\(^{72}\) Therefore, prosecutions for perjury committed while testifying under immunity are permissible, and the Court found "no principle or decision that limits the admissibility of evidence in a manner peculiar only to them."\(^{73}\) This is still a narrow exception because the testimony remains inadmissible in any prosecution for any other crimes committed prior to immunity.

The Court then discussed the chronological justification for the perjury exception. It stated that the test for applicability of fifth amendment protection is whether the witness is faced with a substantial and real danger of incrimination.\(^{74}\) The Court acknowledged that Marchetti had somewhat abolished the rigid chronological distinction. But the Court found that in most cases, including this one, the danger of incrimination was not substantial enough for the fifth amendment to protect the witness in the event he proceeded to lie while under immunity.\(^{75}\) The Court found that Apfelbaum’s perjury was in the future when immunity was granted.\(^{76}\)

The Court then held that immunized truthful statements

\(^{71}\) Id. at 127.
\(^{72}\) Id.
\(^{73}\) Id. at 128.
\(^{74}\) Id. [quoting Marchetti v. United States, 390 U.S. 39, 53 (1968), where the Court cited Rogers v. United States, 340 U.S. 367, 374 (1951) and Brown v. Walker, 161 U.S. 591, 600 (1896)].
\(^{75}\) Id. at 129-30.
\(^{76}\) Id. at 131.
could be used in a perjury prosecution if they conformed to other rules of evidence. It concluded, "The exception of a perjury prosecution from the prohibition against the use of immunized testimony may be a narrow one, but it is also a complete one." 77

Justice Brennan, in his brief concurring opinion, agreed with the reversal of the court of appeals decision. 78 He based this on several propositions. First, the fifth amendment does not condone perjury. Second, it requires a grant of immunity to place the witness in a position "similar" to the one he would have been in had he exercised the privilege. This does not bar a perjury prosecution because the privilege does not protect false testimony. Also, to hold that it does bar such a prosecution would destroy the whole purpose of immunity. These propositions, he declared, were sufficient to decide this issue — that the prosecution could use truthful statements "to prove elements of the offense of perjury." 79

Brennan believed that the rest of the Court's opinion went too far. He was not prepared to say there were no constraints on other uses of truthful statements in a perjury prosecution. He also expressed doubt that the result would be the same if the perjury occurred sometime after the immunized testimony. He characterized any such implications in the Court's opinion as dicta. 80

Justice Blackmun, in his concurring opinion, 81 also doubted that there were no special rules governing the admissibility of immunized testimony at a perjury trial. 82 He, too, was troubled because the Court failed to distinguish between a prosecution for perjury committed while testifying under immunity and perjury committed at some other time. 83 Fur-

77. Id. at 131-32.
78. Id. at 132 (Brennan, J., concurring).
79. Id. (emphasis added).
80. Id. at 132-33.
81. Id. at 133 (Blackmun, J., concurring).
82. Id.
83. It is not clear whether the Court's opinion contemplated such use. However, it would not seem under perjury committed prior to the immunity grant. Such use would probably violate the fifth amendment. Moreover, the opinion, given its statements that immunity and the fifth amendment cover past, not future, crimes; implicitly seems to disapprove of such use to prove past perjury. Id. at 129-32. See note 32 supra; United States v. Alter, 482 F.2d 1016 (9th Cir. 1973).
thermore, Blackmun thought that how the testimony was used might require special analysis, mentioning the use of truthful admissions of prior perjury. Although he did not cite Hockenberry, he seemed to refer to the situation there — where the admissions of prior false statements were used to impeach the defendant's credibility.

Blackmun's most serious disagreement with the majority concerned its distinction between the protection of the privilege and the effect of invoking it. He noted that the “privilege is defined in terms of its incriminating effect . . . .” He agreed immunity need not exactly duplicate this effect, but felt the comparison between silence and immunity often could be useful.

Nevertheless, Blackmun concluded that the court of appeals had too narrowly confined the use of immunized testimony. Perjury violated the immunity bargain, and the fifth amendment did not protect perjury. Thus, reversal was required.

IV. Analysis

The use of truthful immunized testimony in Apfelbaum does seem to fall into the narrow exception to immunity. It was a prosecution for perjury in the course of immunized testimony. The truthful testimony was closely related to the false testimony. In fact, it does appear that it was used mainly to prove the elements of the crime. Thus, the case more closely resembles Daniels than Hockenberry. It is important to keep the exact fact situation in mind when analyzing the Supreme Court's decision.

There are problems with certain broad statements in the Court's opinion if they are applied to fact situations differing from Apfelbaum. The Court finds that there is no need for special analysis concerning the admissibility of truthful immunized testimony. Both Brennan and Blackmun, however, point to valid considerations which may require such special

84. 445 U.S. at 134 (Blackmun, J., concurring).
85. Id. at 135.
86. Id. at 134.
87. Id. at 133.
88. Id. at 135.
89. 445 U.S. at 128.
analysis — when the perjury occurred and how the truthful testimony is used. There seem to be a number of chronological combinations of perjury and immunity: perjury, then immunized testimony; perjury in the course of immunized testimony (Apfelbaum); immunized testimony, then perjury. Complicating things further is a prosecution for inconsistent declarations, where the government need not prove which of the two statements is false.\textsuperscript{90} There is also the possibility that the witness’s truthful statements might be used for impeachment purposes in any of these situations. Special analysis may be called for, and the comparison of the effect of silence versus immunity may then be appropriate.

It is the failure of the Court to distinguish \textit{Apfelbaum} from these other possibilities which is somewhat troubling and confusing. This failure is particularly noticeable in its footnote analysis of the different positions that the various circuits have taken on this issue.\textsuperscript{91} Referring to these cases, one finds that the fact situations do differ from that in \textit{Apfelbaum}.

The Court’s failure to distinguish the differences in these cases, noted in its footnote, however, does not match the failure of the Court of Appeals for the Third Circuit to do so. The court of appeals, to a large degree, relied on these cases in making its decision in \textit{Apfelbaum}. Other than the cases from the Sixth and Eighth Circuits,\textsuperscript{92} none of the cases really involved a situation analogous to \textit{Apfelbaum}. Each case often relied on the others decided before it for authority, often citing to dicta. The real origin of their rationale appears rooted in \textit{Hockenberry} and its theory that false testimony was not immunized, but truthful testimony was. \textit{Hockenberry}, as noted earlier, can be distinguished from the situation in \textit{Apfelbaum}. A review of some of these cases reveals not only their differences from \textit{Apfelbaum}, but also the need for special analysis of these other issues.

These situations included the use of immunized testimony to prove perjury under a prior grant of immunity,\textsuperscript{93} as the ba-
sis for an inconsistent declarations prosecution, where the state need not prove which statement — earlier or later, immunized or not immunized — is false; or for impeachment purposes. One other difficulty is that many of these cases testified under immunity before a grand jury, leading to the indictments of several others. At their trial, the defendant refused to answer despite a second grant of immunity. He argued that his truthful testimony then could be used to convict him of perjury in the earlier testimony. The court found that truthful immunized testimony could not be used to prove either an earlier or later perjury. The perjury exception only applied to false testimony which was not immunized.

94. Id. at 28-29. See also United States v. Patrick, 542 F.2d 381 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977), where a witness refused to answer questions while under immunity for fear his answers could be used with prior statements as the basis for an inconsistent declarations prosecution. The court found that such a prosecution would not be possible. The perjury exception, it concluded, applied only to future perjury, not for statements made prior to the latest grant of immunity. To permit an inconsistent declarations prosecution violated the exception because of the possibility that the immunized testimony was true and the prior statements were false. Id. at 385-86. In United States v. Dunn, 577 F.2d 119 (10th Cir. 1978), rev’d on other grounds, 442 U.S. 100 (1979), the court allowed such a prosecution. However, this was because the defendant had admitted, at a hearing on his indictment, that his immunized testimony was false. Thus, the court admitted it did not really decide if immunized statements could be used as the basis of an inconsistent declarations indictment. Id. at 125-26. In United States v. Housand, 550 F.2d 818 (2d Cir.), cert. denied, 431 U.S. 970 (1977), the court noted, by way of dicta, that a prosecution for a contradiction between immunized testimony and subsequent testimony would not stand up because the immunized testimony would not be admissible until it was shown to be false. Id. at 823. The court there upheld a witness’s refusal to answer questions at a subsequent trial (not under immunity) for fear that this subsequent testimony could be used to prove the prior immunized testimony was perjured. This view that immunized testimony is not admissible until proven false seems also to bar its use to prove subsequent perjury. Accord, Cameron v. United States, 231 U.S. 710 (1914).

95. United States v. Frumento, 552 F.2d 534 (3d Cir. 1977). In Frumento, the court upheld a witness’s contempt conviction, rejecting his argument that his immunized statements might be used to impeach his credibility in a future criminal prosecution. The court held that this use of truthful statements was not allowed. Id. at 542-43. Accord, United States v. Pantone, 634 F.2d 716 (3d Cir. 1980). However, following the view that false statements are not immunized, the Court of Appeals for the Second Circuit has allowed impeachment use of immunized testimony which the defendant admits, or the court concludes, was false in a subsequent criminal prosecution — not limiting such use only to perjury prosecutions. See also United States v. Tramunti, 500 F.2d 1334 (2d Cir.), cert. denied, 419 U.S. 1079 (1974) (false immunized testimony used for impeachment in trial for perjury committed after immunized testimony); United States v. Moss, 562 F.2d 155, 165 (2d Cir. 1977), cert. denied, 435 U.S. 914 (1978) (immunized testimony used for impeachment in cross examination, then defendant admitted it was false); cf. United States v. Kurzer, 534 F.2d 511, 518 (2d Cir. 1976) (government’s contention that some of immunized testimony was false does not abrogate immunity and permit use of all the testimony as basis for a criminal prosecution). The Supreme Court may have resolved this issue in New Jersey v. Portash, 440 U.S. 450 (1979) (plurality opinion) when it ruled that
involved appeals from contempt convictions, where the defendants refused to answer despite immunity because they feared the state might make some use of their testimony. The court, in a sense, then had to rule on the constitutionality of a hypothetical situation. If the defendants' propositions were possible and unconstitutional, then they were justified in refusing to testify. Again, Apfelbaum differed from these in that it involved the actual use of immunized testimony rather than just a feared possible use. This might have made Apfelbaum easier to resolve than the other cases.

The Supreme Court, in Apfelbaum, wanted to clear up the confusion and differing approaches in these cases. It failed to do this clearly. These cases, presenting issues not quite the same as those in Apfelbaum, support Blackmun's and Brennan's view that special analysis of them may be needed. The many possible combinations of perjury and immunity, coupled with variations as to the time of each and the use to be made of the testimony, do not lend themselves to easy answers.

In contrast to some of these other situations, the Apfelbaum situation seems simpler to resolve. The question is whether the Court's broad statements in Apfelbaum will be applied to these differing situations. One could readily distinguish these other situations from Apfelbaum. The Court's troubling broad statements in Apfelbaum could easily be characterized as dicta, as the concurring opinions noted. The question of whether this will be done or whether the Court's opinion will be broadly applied to all kinds of immunity-perjury situations remains unanswered.

Rebecca Leair

immunized testimony could not be used for impeachment in a subsequent trial for misconduct in office and extortion by a public official. The Court made no distinction between false and truthful statements. Since that was not an issue there, it is not totally clear whether this prohibits such use of false statements.


97. 445 U.S. at 119 and n.5.

98. In re Grand Jury Proceedings, Horak, 625 F.2d 767 (8th Cir. 1980) provides some clue as to the courts' likely reluctance to apply Apfelbaum to different situations. That case, decided after the Supreme Court's decision in Apfelbaum, involved a grand jury witness who refused to testify despite immunity. Defendant argued that
his immunized testimony could be used to convict him of giving false testimony at an earlier time. The court rejected this. *Id.* at 770. In a footnote, the court found that *Apfelbaum* held that the state could use truthful and false immunized testimony in a perjury trial if the fifth amendment did not prohibit such use. *Id.* at 770 n.2. Ironically, that was the very issue the Court sought to clarify in *Apfelbaum*.
MARQUETTE LAW REVIEW

INDEX
VOLUME 64
1980-1981

Published by Students and Faculty of
The Marquette University Law School
Milwaukee, Wisconsin
INDEX

VOLUME 64

LEAD ARTICLES — AUTHORS

Bellace, Janice R. & Samoff, Bernard L., Expediting Refusal to Bargain Charges Through Regional Administration .................................................. 61
Boden, Robert F., Dean, In Memoriam — Reverend Thomas E. Davitt, S.J. .... vii
Clune, William H., III & Hyde, Patrick, Final Offer Interest Arbitration in Wisconsin: Legislative History, Participant Attitudes, Future Trends ......... 455
Daskal, Dean S., Assertion of the Constitutional Privilege Against Self-Incrimination in Federal Civil Litigation: Rights and Remedies .................. 243
Estes, R. Wayne, A Review of Labor and Employment Law Decisions: United States Supreme Court, October 1979 Term .................................. 1
Ghiardi, James D., Computing Time in Tort Statutes of Limitation .......... 575
Gitt, Cynthia E., The 1978 Amendments to the Age Discrimination in Employment Act — A Legal Overview ........................................... 607
Klitze, Ramon A., The Uniform Trade Secrets Act............................ 277
Mazurak, Steven A., Effects of Unemployment Compensation Proceedings on Related Labor Litigation ............................................. 133
Samoff, Bernard L. & Bellace, Janice R., Expediting Refusal to Bargain Charges Through Regional Administration ............................................. 61
Weinstein, Yerachmiel E., Recent Developments Under Section 304 of the Internal Revenue Code ....................................................... 311
Zimmer, Michael J., Title VII: Treatment of Seniority Systems .............. 79

LEAD ARTICLES — TITLES

A Review of Labor and Employment Law Decisions: United States Supreme Court, October 1979 Term. R. Wayne Estes ........................................... 1
Assertion of the Constitutional Privilege Against Self-Incrimination in Federal Civil Litigation: Rights and Remedies. Dean S. Daskal .................... 243
Computing Time in Tort Statutes of Limitation. James D. Ghiardi ........ 575
Effects of Unemployment Compensation Proceedings on Related Labor Litigation. Steven H. Mazurak ............................................... 133
Expediting Refusal to Bargain Charges Through Regional Administration. Janice R. Bellace & Bernard L. Samoff ........................................... 61
The 1978 Amendments to the Age Discrimination in Employment Act — A Legal Overview. Cynthia E. Gitt ............................................. 607
Recent Developments Under Section 304 of the Internal Revenue Code. Yerachmiel E. Weinstein ...................................................... 311
Title VII: Treatment of Seniority Systems. Michael J. Zimmer .............. 79
<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Tort of Bad Faith Breach of Contract: When, If At All, Should It Be Extended Beyond Insurance Transactions? Thomas A. Diamond</td>
<td>425</td>
</tr>
<tr>
<td>The Uniform Trade Secrets Act. Ramon A. Klitzke</td>
<td>277</td>
</tr>
</tbody>
</table>

**IN MEMORIAM**

In Memoriam — Reverend Thomas E. Davitt, S.J. Dean Robert F. Boden .... vii

**COMMENTS**

The Best Interest of the Child Doctrine in Wisconsin Custody Cases. Ronald R. Hofer ................................................................. 343

Challenges to State Takeover Laws: Preemption and the Commerce Clause. Donald W. Layden, Jr. ............................................................. 657

The Repercussions of Weingarten: An Employee's Right to Representation at Investigatory Interviews. José A. Olivieri .................................... 173

Shareholders' Rights in Short-Form Mergers: The New Delaware Formula. Catherine L. Curran ............................................................... 687

**NOTES**


Constitutional Law — Closure of Trials — The Press and the Public Have a First Amendment Right of Access to Attend Criminal Trials, Which Cannot Be Closed Absent an Overriding Interest. (Richmond Newspapers, Inc. v. Virginia). Lawrence J. Morris ........................................... 717

Constitutional Law — First Amendment — A Newspaper Cannot Constitutionally Be Compelled to Publish a Paid Advertisement Designed to Be an Editorial Response to Previous Newspaper Reports. (Wisconsin Association of Nursing Homes, Inc. v. Journal Co.). Donald W. Layden, Jr. .... 361


Constitutional Law — Privilege Against Self-Incrimination — Truthful Statements May Be Used in a Perjury Prosecution. (United States v. Apfelbaum). Rebecca Leair ............................................................... 744


Labor Law — Unemployment Compensation — Voluntary Termination Not Found Where There Is Meritorious Excuse for Refusal to Pay Union Dues Based on Religious Grounds. (Nottelson v. ILHR Department). Kathleen A. Gray ................................................................. 203

Property — Caveat Emptor — Duty to Disclose Limited to Commercial Vendors. (Ollerman v. O'Rourke Co. and Kanack v. Kremski). Frederick C. Wamhoff ................................................................. 547

Property — Landlord-Tenant — Landlord No Longer Immune From Tort Liability for Failure to Exercise Reasonable Care in Maintaining Premises. (Pagelsdorf v. Safeco Insurance Co. of America). Patricia Jones D'Angelo ............................................................... 563
Uniform Commercial Code — Articles 3 and 4 — Bank Required to Disburse Funds After Final Payment. (Northwestern National Insurance Co. v. Midland National Bank). Michael J. Morse .................408
INDEX - DIGEST

ARBITRATION
Final Offer Interest Arbitration in Wisconsin: Legislative History, Participant Attitudes, Future Trends ........................................... 455

BANKING
Uniform Commercial Code — Articles 3 and 4 — Bank Required to Disburse Funds After Final Payment ........................................... 408

CIVIL PROCEDURE
Assertion of the Constitutional Privilege Against Self-Incrimination in Federal Civil Litigation: Rights & Remedies ................. 243
Civil Procedure — Jurisdiction — State May Not Assert Quasi In Rem Jurisdiction Over An Insurance Company’s Contractual Obligations to Defend and Indemnify Its Insured .................. 374

COMMERCIAL LAW
Uniform Commercial Code — Articles 3 and 4 — Bank Required to Disburse Funds After Final Payment ........................................... 408

CONSTITUTIONAL LAW
Assertion of the Constitutional Privilege Against Self-Incrimination in Federal Civil Litigation: Rights and Remedies ................. 243
Challenges to State Takeover Laws: Preemption and the Commerce Clause .................. 657
Constitutional Law — Closure of Trials — The Press and the Public Have a First Amendment Right of Access to Attend Criminal Trials, Which Cannot Be Closed Absent an Overriding Interest ........................................... 717
Constitutional Law — First Amendment — A Newspaper Cannot Constitutionally Be Compelled to Publish a Paid Advertisement Designed to Be an Editorial Response to Previous Newspaper Reports ........................................... 361
Constitutional Law — Free Speech — Granting Access to Private Shopping Center Property for Free Speech Purposes on the Basis of a State Constitutional Provision Does Not Violate the Shopping Center Owner’s Federal Constitutional Property Rights or First Amendment Free Speech Rights .................. 507
Constitutional Law — Privilege Against Self-Incrimination — Truthful Statements May Be Used in a Perjury Prosecution .................. 744

CORPORATIONS
Challenges to State Takeover Laws: Preemption and the Commerce Clause .................. 657
Shareholders’ Rights in Short-Form Mergers: The New Delaware Formula .................. 687

DISCRIMINATION
The 1978 Amendments to the Age Discrimination in Employment Act — A Legal Overview .................. 607
Title VII: Treatment of Seniority Systems ........................................... 79

DOMESTIC RELATIONS
See Family Law

FAMILY LAW
The Best Interest of the Child Doctrine in Wisconsin Custody Cases ........................................... 343

INSURANCE
The Tort of Bad Faith Breach of Contract: When, If At All, Should It Be Extended Beyond Insurance Transactions? .................. 425

LABOR LAW
Effects of Unemployment Compensation Proceedings on Related Labor Litigation .................. 133
Expediting Refusal to Bargain Charges Through Regional Administration .................. 61
Labor Law — Fair Representation — Punitive Damages in Fair Representation Actions .................. 224
### Labor Law — Unemployment Compensation
- Voluntary Termination Not Found Where There Is Meritorious Excuse for Refusal to Pay Union Dues Based on Religious Grounds...203

### The Repercussions of Weingarten: An Employee's Right to Representation at Investigatory Interviews..................173

### A Review of Labor and Employment Law Decisions: United States Supreme Court, October 1979 Term.........................1

### Title VII: Treatment of Seniority Systems..........................79

### Wisconsin's Municipal Labor Law: A Need for Change...........103

### LANDLORD-TENANT LAW
- **Property — Landlord-Tenant** —
  Landlord No Longer Immune from Tort Liability for Failure to Exercise Reasonable Care in Maintaining Premises...........563

### MUNICIPAL LAW
- Wisconsin's Municipal Labor Law: A Need for Change...........103

### PROPERTY, REAL
- **Property — Caveat Emptor** —
  Duty to Disclose Limited to Commercial Vendors.............547

### TAX
- Recent Developments Under Section 304 of the Internal Revenue Code..................311

### TORTS
- Computing Time in Tort Statutes of Limitation .......................575
- The Tort of Bad Faith Breach of Contract: When, If At All, Should It Be Extended Beyond Insurance Transactions?.............425

### TRADEMARKS
- The Uniform Trade Secrets Act........277

### TRIALS
- Constitutional Law — Closure of Trials — The Press and the Public Have a First Amendment Right of Access to Attend Criminal Trials, Which Cannot Be Closed Absent an Overriding Interest...............717

### UNEMPLOYMENT COMPENSATION
- Effects of Unemployment Compensation Proceedings on Related Labor Litigation............133
- Labor Law — Unemployment Compensation — Voluntary Termination Not Found Where There Is Meritorious Excuse for Refusal to Pay Union Dues Based on Religious Grounds...203

### UNIFORM COMMERCIAL CODE
- Uniform Commercial Code — Articles 3 and 4 — Bank Required to Disburse Funds After Final Payment.........................408