Use Immunity and the Fifth Amendment: Maybe the Second Circuit Should Have Remained Silent

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USE IMMUNITY AND THE FIFTH AMENDMENT: MAYBE THE SECOND CIRCUIT SHOULD HAVE REMAINED SILENT

The fifth amendment privilege against self-incrimination\(^1\) has been characterized as "a reflection of our common conscience."\(^2\) To fulfill the governmental objective of obtaining pertinent evidence without offending the societal interest in the inviolability of the fifth amendment privilege, Congress adopted immunity statutes.\(^3\)

\(^1\) U.S. Const. amend. V. The amendment provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself." \(Id.\)

\(^2\) E. GRIJSWOLD, THE FIFTH AMENDMENT TODAY 73 (1955). Dean Griswold stated that the fifth amendment represents society's attempt to promote "the essential importance and dignity of the individual." \(Id.\) at 74. In Murphy v. Waterfront Comm'n, 378 U.S. 52, 55-57 (1964), Justice Goldberg provided an extensive discussion of the policies which undergird the privilege:

[The right against self-incrimination] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a "shelter to the guilty" is often a protection to the innocent." \(Id.\) at 55 (citations omitted).

Professor Berger has suggested the following three policy objectives as justification for the continued life of the fifth amendment: limitation on the enforcement powers of the state; elimination of the cruelty involved in self-accusation; and promotion of privacy and the right to be left alone. \(See\ M. BERGER, TAKING THE FIFTH 44 (1980); see also M. MELTZER, THE RIGHT TO REMAIN SILENT 16 (1972)\) (two reasons for inviolability of fifth amendment privilege: provides a check on state authority; promotes privacy rights of individuals).\(^3\)

\(^3\) See Kastigar v. United States, 406 U.S. 441, 445-46 (1972). In Kastigar, Justice Powell stated that immunity statutes are not inconsistent with the policies which underlie the fifth amendment privilege: "Rather, they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." \(Id.\) In the Supreme Court's first decision upholding a congressional immunity statute, the Court held that once the grant of immunity has insulated the witness from future prosecution, the witness is duty bound to testify as to the incriminating facts. \(See\ Brown v.
After the Supreme Court rejected an early attempt at granting witnesses limited “use immunity,” Congress opted for the more extensive coverage of a “transactional immunity” statute. Much to the chagrin of law enforcement officials and prosecutors, transactional immunity effectively provided witnesses with an “immunity bath.” In response to the need for more efficient evidence gathering and prosecutorial procedures in organized crime cases, Con-
gress adopted the present use immunity statute. The Supreme Court subsequently upheld this more streamlined grant of immunity as being coextensive with the fifth amendment privilege. Recently, in United States v. Gallo, a divided Second Circuit panel upheld a defendant's conviction notwithstanding the unauthorized use of that defendant's prior immunized testimony. The sole consensus which may be gleaned from the two concurring opinions is that any violation of the defendant's rights constituted harmless error.

In Gallo, the defendant, Julie Miron, had testified under a grant of statutory use immunity before a grand jury investigating the activities of former labor official John Cody. Subsequent to

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7 See 18 U.S.C. §§ 6001-6005 (1982). Section 6002, the use immunity section, provides:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to-

(1) a court or grand jury of the United States,
(2) an agency of the United States, or
(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but 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. at § 6002.

Upon consideration of this section of the Organized Crime Control Act of 1970, the House Judiciary Committee reported that one of its purposes was to enhance "the legal tools in the evidence-gathering process" in order to counter the increasing influence of organized crime. See H.R. Rep. No. 1549, 91st Cong., 2d Sess. 1 (1970), reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 1073 [hereinafter H.R. Rep.].

8 See Kastigar v. United States, 406 U.S. 441, 453 (1972). The Kastigar Court stated that while the Court has zealously protected those values undergirding the fifth amendment, it also has recognized the need for immunity statutes in order to effectively enforce criminal laws. See id. at 445-47. The Court held that since 18 U.S.C. § 6002 proscribed the use of "compelled testimony in any respect," the protection it afforded the witness was as broad as the scope of the fifth amendment privilege; hence, it provided the government with a constitutional method of compelling testimony. See id. at 453 (emphasis in original).


10 See id.

11 See id. at 1082-84.

12 Id. at 1079. Miron, the president of several building supply companies, testified as to his relationship with Cody and Paul Castellano, the putative boss of the Gambino crime family. Id. Miron testified that his companies had supplied building materials for the construction of homes for Castellano's sons. Id. Miron further testified to a meeting attended by himself, Cody and Castellano which was called in response to a charge that Miron was
Cody’s conviction for labor-racketeering, the FBI inadvertently included several paragraphs of Miron’s immunized testimony in an affidavit supporting an application for an extension and expansion of a wiretap authorization at the home of reputed mob boss Paul Castellano. Through this wiretap, the government gathered evidence implicating Miron in a labor-racketeering scheme, which evidence eventually led to his conviction. Miron moved to dismiss the indictment on the grounds of an improper derivative use of his prior immunized testimony by the government. The district court denied the motion on two alternative grounds: first, the grant of immunity under 18 U.S.C. § 6002 did not apply to crimes committed subsequent to the immunized testimony; and second, even if the grant of immunity did extend to the crimes in the indictment, no violation of the defendant’s rights had occurred. A divided three judge panel affirmed Miron’s conviction.

Writing the lead opinion for the court, Judge Winter stated that since labor racketeering generally represents a scheme of ongoing criminal activity, a real and substantial danger existed at the time of Miron’s immunized testimony that he would incriminate himself as to the crimes for which he was ultimately convicted. Rejecting the reasoning of the district court, Judge Winter relied on Marchetti v. United States, 390 U.S. 39 (1968), for its rejection of a rigid chronological test in deciding whether or not the fifth amendment privilege applies. See Gallo, 859 F.2d at 1081-82. The Marchetti Court established a test for the proper invocation of the fifth amendment privilege which relies on “the substantiality of the risks of incrimination” rather than a mere “chronological formula.” Marchetti, 390 U.S. at 54. Judge Winter distinguished the subsequent case of United States v. Freed, 401 U.S. 601 (1971), which appeared to turn the tide back toward a chronological test, and held that...
ter thus concluded that the use of the defendant’s immunized testimony in the wiretap application violated both the immunity statute and the defendant’s constitutional right against self-incrimination. He affirmed Miron’s conviction, however, on the grounds that these violations represented harmless error.

In his concurring opinion, Judge Van Graafeiland agreed with Judge Winter that any alleged violation of Miron’s rights constituted harmless error, thereby mandating affirmance of the conviction. Judge Van Graafeiland argued, however, as an alternative rationale, that the fifth amendment privilege should not extend to future criminal acts unrelated to a continuous course of criminal activity. Judge Van Graafeiland stated that the district court’s findings of fact clearly established that Miron’s conviction was not based on an ongoing course of criminal conduct. He then argued that the statutory grant of immunity should not be extended to insulate the defendant’s prior immunized testimony when at the time of compulsion there existed no real or substantial danger of incrimination as to the prospective criminal acts.

Marchetti was dispositive on the facts of the present case. See Gallo, 859 F.2d at 1082.

20 Gallo, 859 F.2d at 1081-82.

21 Id. at 1082.

22 See id. at 1082-84. Judge Winter based his harmless constitutional error analysis on the seminal case of Chapman v. California, 386 U.S. 18 (1967). The Chapman Court stated that for a finding of harmless constitutional error, “the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt.” Chapman, 386 U.S. at 24. Judge Winter concluded that use of defendant’s immunized testimony in the application for the wiretap extension in no way affected the court’s decision to grant such an extension. See Gallo, 859 F.2d at 1084-85.

23 See Gallo, 859 F.2d at 1084-85 (Van Graafeiland, J., concurring).

24 See id. at 1089-90 (Van Graafeiland, J., concurring). The Supreme Court has stated on numerous occasions that there must be an actual threat that a witness’ response will be incriminating in order for the fifth amendment privilege to attach. See, e.g., Hoffman v. United States, 341 U.S. 479, 486 (1951) (fifth amendment privilege attaches only if responsive answer could reasonably be thought inculpatory); Brown v. Walker, 161 U.S. 591, 600 (1896) (prohibition against self-incrimination assumes that compelled testimony will be inculminatory). Judge Van Graafeiland relied on the requirement of a tangible and reasonable fear of incrimination and the premise that only an ongoing course of criminal activity could provide a reasonable fear of incrimination as to future criminal acts. See Gallo, 859 F.2d at 1088 (Van Graafeiland, J., concurring) (citing United States v. Quartermain, Drax, 613 F.2d 38, 42-43 (3d Cir.), cert. denied, 446 U.S. 954 (1980)).


26 See Gallo, 859 F.2d at 1088-90 (Van Graafeiland, J., concurring). Judge Van Graafei-
Dissenting, Judge Altimari agreed that a violation of the defendant's constitutional and statutory rights had occurred, for reasons similar to those propounded by Judge Winter, but attacked the majority's harmless error analysis as being deficient for two reasons. First, the harmless error rule should never be applied to a fifth amendment violation involving the improper use of prior immunized testimony, and second, the error in this case tainted all the evidence against the defendant, thereby negating the possibility of harmlessness. Judge Altimari concluded that the violation of defendant's rights required reversal of the conviction.

While two of the three judges in Gallo agreed that a constitutional violation had occurred, it is suggested that this agreement was founded upon an improper reading of Supreme Court precedent and improperly disregarded the district court's findings of fact. It is submitted that Miron's grant of immunity should not have protected his testimony from derivative use because the fifth amendment's protection does not extend to such future criminal acts. This Comment will suggest that by failing to limit the extent of the use immunity statute to situations where a proper fifth amendment claim is advanced, the court has risked stifling the enhanced evidence-gathering purpose of section 6002. This Comment will further suggest that the Gallo court paradoxically expanded the scope of the fifth amendment privilege by not properly defining it, while concomitantly derogating the value of said privilege by subjecting an alleged violation to a harmless error analysis.

**Scope of the Fifth Amendment Privilege**

The guarantee of the fifth amendment privilege extends only

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[27] Id. at 1094 (Altimari, J., dissenting). Judge Altimari stated that the RICO statute, under which Miron had been convicted, was aimed at ongoing criminal activities. Id. at 1094 n.1 (Altimari, J., dissenting). Therefore, Miron was subjected to a real and substantial danger that he would incriminate himself at the time of his immunized testimony as to his future course of criminal conduct. Id. (Altimari, J., dissenting) (citing Marchetti v. United States, 390 U.S. 39, 53 (1968)).

[28] Id. at 1095 (Altimari, J., dissenting). Judge Altimari maintained that neither the Supreme Court nor the Second Circuit had ever allowed a harmless error analysis to be applied to such a breach of an individual's privilege against self-incrimination. Id. (Altimari, J., dissenting).


to situations which present the witness with a "real and appreciable" fear of self-incrimination.Absent such fear, the witness may be compelled to testify. For years, the Supreme Court steadfastly ruled that a real and appreciable fear could exist only if the compelled testimony threatened to expose a prior or concurrent criminal act. The Court ultimately rejected this strict chronological standard in Marchetti v. United States, as it held that prospective criminal acts may raise a real and substantial risk of self-incrimination at the time of the compelled testimony. Three years later, in United States v. Freed, the Court restricted this apparent expansion of the fifth amendment privilege. The Freed Court upheld a statutory scheme whereby the transferror of a firearm was required to register all such transfers. The Court denied a transferee's claim that the requirement of his photograph and fin-

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31 See, e.g., Hoffman v. United States, 341 U.S. 479, 486 (1951) (fifth amendment protection "must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer"); Rogers v. United States, 340 U.S. 367, 373 (1951) (proper invocation of fifth amendment privilege requires "real danger of legal detriment"); see also 8 Wigmore on Evidence § 2281, at 467 (3d ed. 1940) (absent any possible legal consequences, fifth amendment privilege cannot be invoked).

32 See, e.g., Ullman v. United States, 350 U.S. 422, 439 (1956) (once grant of immunity supplants privilege witness may no longer remain silent); Brown v. Walker, 161 U.S. 591, 600 (1896) (all citizens have a duty to provide their evidence and may not hide behind invalid fifth amendment claims); see also L. Mayers, Shall We Amend the Fifth Amendment? 2 (1978) (absent valid claim of fifth amendment privilege, person obligated to respond to questioning when properly summoned).

33 See, e.g., Lewis v. United States, 348 U.S. 419, 421-23 (1955) (no fifth amendment claim with respect to federal gambling tax registration statute which was prospective in nature); United States v. Kahriger, 345 U.S. 22, 32 (1953) (privilege "has relation only to past acts, not to future acts that may or may not be committed").


35 Id. at 53-54. In Marchetti, the Supreme Court examined the constitutionality of the registration provision of a federal gambling tax statute. Id. at 41. Petitioner claimed that compliance with the federal law would subject him to prosecution under state prohibitions on wagering. See id. at 46-47. Since gambling was proscribed by law in forty-nine states, the Court concluded that the registration requirement posed a substantial threat of self-incrimination. See id. at 44-48. The Court held that the registration requirement improperly forced the petitioner to reveal his past illegal gambling activities. See id. at 52. Moreover, the Court held that the statute forced petitioner to incriminate himself as to his intent to gamble in the future. See id. at 53-54. In rejecting the strict chronological standard for applying the fifth amendment, the Court stated that "it is not mere time to which the law must look, but the substantiality of the risks of incrimination." Id. at 54.


37 See id. at 606-07; see also Lushing, Testimonial Immunity and the Privilege Against Self-Incrimination: A Study in Isomorphism, 73 J. CRIM. L. & CRIMINOLOGY 1690, 1705 (1982) (the Freed Court "retreated from . . . [the Marchetti Court's] ringing rejection of a rigid chronological distinction").

38 See Freed, 401 U.S. at 605-07.
gerprints on the registration constituted potential self-incrimination regarding his future illegal possession of the firearm.\footnote{See id. In rejecting the transferees' argument that the statute required self-incrimination as to the future possession, the Court stated that this line of reasoning "assumes the existence of a periphery of the Self-Incrimination Clause which protects a person against incrimination not only against past or present transgressions but which supplies insulation for a career of crime about to be launched. We cannot give the Self-Incrimination Clause such an expansive interpretation." Id. at 606-07. In his concurring opinion, Justice Brennan stated that the transferees were sufficiently protected against charges of future illegal possession of a firearm because possession constitutes a "continuing violation." Id. at 610-11 (Brennan, J., concurring). The violation, therefore, would occur concurrently with the filing of the registration application and the statute's use immunity provision would insulate the registration information from law enforcement agencies. Id. at 611 (Brennan, J., concurring). Justice Brennan also maintained that the fifth amendment privilege would not protect the registration information from being used in connection with a future criminal act committed with the firearm. Id. at 611-12 (Brennan, J., concurring).} Without rejecting the possibility that certain prospective criminal acts credibly raise a real and substantial risk of present self-incrimination, courts have limited the Marchetti doctrine to continuous courses of criminal activity.\footnote{See, e.g., United States v. Apfelbaum, 445 U.S. 115, 128-29 (1980) (narrowly reading Marchetti as case involving ongoing gambling activity that was likely to continue); United States v. Quartermain, Drax, 613 F.2d 38, 42-43 (3d Cir.) (for future conduct to create substantial risk of incrimination it must be part of continuing course of criminal conduct), cert. denied, 446 U.S. 954 (1980); DeSimone v. United States, 423 F.2d 576, 582 (2d Cir.) (fifth amendment does not protect against different future criminal act), cert. denied, 400 U.S. 842 (1970). The Marchetti Court added, in dictum, that a prospective criminal act entirely different from the prior course of criminal conduct would necessarily raise an invalid claim of the privilege. See Marchetti, 390 U.S. at 54.} Prospective criminal acts which are part of a continuing course of criminal conduct can create a real and substantial danger of self-incrimination if they represent the same criminal acts as those committed prior to, or contemporaneously with, the grant of immunity.\footnote{See Freed, 401 U.S. at 611 (Brennan, J., concurring). Justice Brennan stated that the crimes of possession are continuing violations; therefore, the future criminal act was merely one aspect of the crime committed prior to or concurrent with the grant of immunity. See id. (Brennan, J., concurring). When the future criminal act represents one aspect of the overall conspiracy charge, the prospective act is covered by the fifth amendment privilege. See United States v. Phipps, 600 F. Supp. 830, 831-32 (D. Md. 1985); see also United States v. Hosbach, 518 F. Supp. 759, 770-71 (E.D. Pa. 1980) (drug conspiracy occurring post-immunity sufficiently interrelated to conspiracy about which defendant testified to raise valid claim of privilege as to future acts).} Additionally, a real and substantial danger is raised when a compulsion order forces a witness to reveal a necessary element of a consummated future crime.\footnote{See Lushing, supra note 37, at 1707-08. In determining whether prospective criminal acts are entitled to the fifth amendment privilege, the inquiry must focus on whether or not the information sought would cause the witness to divulge an intent to commit the crime.} In the various opinions of the
Gallo court discussing the fifth amendment issue, the focal point of contention was whether or not Miron's immunized testimony and later conviction related to one and the same continuous course of criminal activity. While Judge Winter stated that the grand jury before which Miron testified in 1980 was investigating ongoing criminal activity, Judge Altimari took the position that RICO violations, of which Miron was ultimately convicted, are by definition continuing courses of criminal conduct. The district court's finding of fact, however, was that Miron was not engaged in the criminal activity for which he was eventually convicted at the time of his immunized testimony. Judge Van Graafeiland accepted these factual findings and noted that no real and substantial danger existed when Miron testified that he might incriminate himself as to the crimes for which he was eventually convicted.

The Supreme Court and lower federal courts have had numerous opportunities to examine the scope of the privilege in cases of perjurious immunized testimony. Although the immunity statute explicitly exempts from its purview situations where the immunized witness commits perjury, courts have analyzed these perjurious acts as prospective crimes outside the scope of the fifth amendment's protections. The Supreme Court, in United States v. Gallo, 859 F.2d at 1081-82; Gallo, 859 F.2d at 1189 (Van Graafeiland, J., concurring); Gallo, 859 F.2d at 1094 n.1 (Altimari, J., dissenting).

See id. When courts examine self-reporting statutes against a claim of fifth amendment privilege, the deciding factor is usually whether or not a responsive answer would cause the one reporting to admit an element of a crime. See Comment, "Hollow Ritual[s]": The Fifth Amendment and Self-Reporting Schemes, 34 UCLA L. Rev. 467, 483-84 (1986).

See Gallo, 859 F.2d at 1081-82; Gallo, 859 F.2d at 1189 (Van Graafeiland, J., concurring); Gallo, 859 F.2d at 1094 n.1 (Altimari, J., dissenting).

Id. at 1081-82.

Id. at 1094 n.1 (Altimari, J., dissenting). However, Judge Altimari presented no particular evidence that Miron was engaged in the same ongoing criminal activity for which he was convicted at the time he was granted immunity. See id. (Altimari, J., dissenting).


Gallo, 859 F.2d at 1089 (Van Graafeiland, J., concurring).


See 18 U.S.C. § 6002 (1982). The exception allows for the use of the immunized testimony in a prosecution for perjury in providing such testimony. Id.

See Apfelbaum, 445 U.S. at 130. The Apfelbaum Court stated that the fifth amendment privilege could not have attached to the perjurious testimony because at the time of the grant of immunity the witness could not have been confronted with a substantial risk of incrimination. See id. at 130-31; see also United States v. Tramunti, 500 F.2d 1334, 1343-44 (2d Cir.) (perjury not covered by fifth amendment because "immunity does not extend in futuro"), cert. denied, 419 U.S. 1079 (1974); United States v. Seltzer, 621 F. Supp. 714, 716-
v. Apfelbaum,\(^5\) sanctioned the use of the defendant's immunized testimony in a prosecution for perjury in providing that testimony.\(^6\) The Apfelbaum Court stated that this was a narrow exception to the general rule of fifth amendment protection for immunized testimony because at the time of the grant of immunity, the defendant could not have incriminated himself as to the future crimes.\(^5\) In factual settings establishing crimes other than perjury, lower federal courts have applied the principle that a witness' fear of self-incrimination as to future crimes is necessarily illusory in cases not involving ongoing criminal activity; hence, the fifth amendment privilege never arises.\(^5\)

**Scope of the Use Immunity Statute**

The Supreme Court, in Kastigar v. United States,\(^5\) recognized that immunity statutes constitute a necessary element in the efficient enforcement of criminal laws.\(^5\) In upholding section 6002 against a constitutional challenge, the Court declared the statute

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\(^{52}\) See id. at 130.

\(^{53}\) See id. at 127-132.

\(^{54}\) See, e.g., United States v. Brimberry, 779 F.2d 1339, 1346-47 (8th Cir. 1985) (charges of improperly concealing assets after grant of immunity); United States v. Flores, 753 F.2d 1499, 1501-03 (9th Cir. 1985) (shipping firearms without registering them represents future crime at time of registration); United States v. Phipps, 600 F. Supp. 830, 831 (D. Md. 1985) (threatening prosecution witness after giving immunized testimony). The court in Phipps stated that: "[I]n all but a few exceptional and rare cases, the Fifth Amendment does not immunize a witness from the use of his testimony in a prosecution for an act committed subsequent to the date of the testimony." Id.

\(^{55}\) 406 U.S. 441 (1972).

\(^{56}\) See id. at 447; see also supra note 3. Several commentators have praised the value of the present use immunity statute in aiding the efficient enforcement of criminal laws. See, e.g., Humble, Non-evidentiary Use of Compelled Testimony: Beyond the Fifth Amendment, 66 Tex. L. Rev. 351, 352 (1987) ("[C]ompulsion orders are essential in white collar conspiracy cases"); Thornburgh, Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture" or "A Rational Accommodation?", 67 J. CRIM. L. & CRIMINOLOGY 155, 158 (1976) (present use immunity statute has provided a more effective method of criminal prosecution).
was coextensive with, but no broader than, the fifth amendment privilege. The legislative history of the use immunity statute clearly exhibits an intent to limit the protection afforded an immunized witness to the scope of the fifth amendment privilege. Congress adopted the statute for the stated purpose of enhancing evidence gathering procedures in the battle against organized crime. The Supreme Court's interpretation of the statute as proscribing any and all use of compelled testimony presupposes a valid assertion of the fifth amendment privilege. The legislative history of the statute also assumes a proper assertion of the privilege. Since Judge Winter and Judge Altimari believed that the defendant in Gallo was engaged in a continuous course of criminal conduct, they concluded that he had validly asserted his fifth amendment privilege, thereby entitling him to the protection of the immunity statute.

Under a quite different analysis, Judge Van Graafeiland echoed the district court's finding that Miron's crimes represented prospective acts, but he believed that the fifth amendment attached to Miron's 1980 testimony solely because it was given under a grant of immunity. This reasoning, however, appears to be in-

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67 See Kastigar, 406 U.S. at 452-53. Since the statute proscribes the use of the compelled testimony in "any" way, it sufficiently supplants the privilege. See id.
65 See H.R. Rep., supra note 7, at 42; S. Rep., supra note 50, at 145. The Judiciary Committee Reports from both houses of Congress described the grant of use immunity as being "as broad as, but no broader than, the privilege against self-incrimination." H.R. Rep., supra note 7, at 42; S. Rep., supra note 50, at 145. Implicit in these reports is the desire of Congress to strike from the criminal procedure law overextensive grants of transactional immunity. See H.R. Rep., supra note 7, at 42; S. Rep., supra note 50, at 145. The Supreme Court has accepted this as the intent of Congress. See, e.g., Pillsbury Co. v. Conboy, 459 U.S. 248, 253-54 n.8 (1983) (Congress sought to make grant of immunity less expansive and no broader than fifth amendment); Kastigar, 406 U.S. at 452 n.36 (same) (citing NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS OF THE COMMISSION 1446 (1970)); see also Humble, supra note 56, at 359-60 (Congress adopted reasoning of Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), and streamlined grant of immunity to breadth of privilege).
66 See H.R. Rep., supra note 7, at 1. In a message from President Nixon to Congress recommending adoption of the new use immunity statute, the President stated: "With this new law, government should be better able to strike at the leadership of organized crime and not just the rank and file." Special Message to Congress on a Program to Combat Organized Crime in America, PUBLIC PAPERS OF RICHARD NIXON 315, 319 (Apr. 23, 1969).
67 See Kastigar, 406 U.S. at 452-53. It is submitted that absent a real and appreciable danger required to raise the privilege, the statute affords no protection.
68 See supra note 55 and accompanying text.
66 See Gallo, 859 F.2d at 1082; id. at 1094 n.1 (Altimari J. dissenting).
69 See Id. at 1089 (Van Graafeiland, J., concurring). Judge Van Graafeiland stated that "since the testimony was given under a grant of immunity, it is entitled to Fifth Amend-
verse and an improper reading of Supreme Court precedent. It is submitted that while a valid fifth amendment claim is a prerequisite to the protection of the immunity statute, a naked grant of immunity is insufficient to raise the fifth amendment protection. It is further submitted that the fifth amendment privilege never arose with respect to the subsequent use of Miron's prior immunized testimony and therefore the protection of the immunity statute should have been deemed inapplicable. By failing to limit definitively the breadth of the immunity statute, it is suggested that the Second Circuit sanctioned overbroad protection for grants of immunity in the future, thereby raising the specter of judicially-created transactional immunity.

HARMLESS CONSTITUTIONAL ERROR

The doctrine of harmless error originated in response to the tendency of appellate courts to reverse otherwise valid judgments on the basis of trivial errors. These courts were stigmatized as "impregnable citadels of technicality." Notwithstanding the fall of the citadel through the development of the harmless-error doc-

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64 See Maness v. Meyers, 419 U.S. 449, 474-75 (1975) (White, J., concurring). Justice White argued that if a witness is compelled to testify without immunity because a trial judge does not believe that the testimony will be incriminating, the witness does not waive his claim to fifth amendment protection. See id. (White, J., concurring). If, after the witness testifies, it becomes apparent that the testimony is self-incriminating, the fifth amendment mandates that this testimony be immunized. See id. (White, J., concurring). Justice White was referring to a situation where after the testimony is given it becomes apparent that at the time of the compulsion the testimony was self-incriminatory. See id. (White, J., concurring). Thus, the situation in Maness may be distinguished from that of Gallo where, at the time of compulsion, Miron's testimony was in no way self-incriminatory. See Gallo, 859 F.2d at 1089 (Van Graafeiland, J., concurring). It is submitted, therefore, that merely granting immunity does not create a fifth amendment privilege where none existed ab initio.

65 See Strachan, Self-Incrimination, Immunity, and Watergate, 56 Tex. L. Rev. 791, 832-34 (1978). Professor Strachan suggests that a grant of use immunity potentially provides a witness with broader protection than a grant of transactional immunity. See id.; see also Lushing, supra note 37, at 1737. The author proposes a reworded use immunity statute definitively limiting the scope of immunity to the extent of the privilege. Id. It is suggested that a proper reading of the present statute and relevant Supreme Court cases obviates the need for drafting such a statute.

66 See W. LaFave & J. Israel, Criminal Procedure § 26.6, at 995 (1985); R. Traynor, The Riddle of Harmless Error 3-4 (1970). In 1880, for example, the California Supreme Court reversed an otherwise valid verdict because the word "larceny" was misspelled in the indictment. See People v. St. Clair, 56 Cal. 406, 407 (1880).

trine, constitutional violations continued to be treated as per se prejudicial. Eventually, however, the Supreme Court recognized that certain constitutional violations might be subject to a harmless-error analysis.

This harmless constitutional error theory has been the subject of considerable criticism. Some critics have expressed concern that the Supreme Court has failed to establish lucid standards for harmless constitutional error review, while others have condemned the eagerness with which many courts apply the doctrine. Two justifications have been advanced for limiting the ap-

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66 See R. TRAYNOR, supra note 66, at 4-17. The development of harmless-error analysis led to the enactment of numerous harmless-error statutes. See, e.g., 28 U.S.C. § 2111 (1982) (harmless-error statute applicable to all cases in all federal courts); CAL. PEN. CODE §§ 960, 1258, 1404 (West 1956) (California harmless-error statute applicable to criminal cases).

69 See, e.g., Hamilton v. Alabama, 368 U.S. 52, 55 (1961) ("[W]hen one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted"); Payne v. Arkansas, 356 U.S. 560, 568 (1958) (improper admission of coerced confession per se prejudicial). A tacit assumption of per se prejudice existed as to constitutional errors. W. LAFAVE & J. ISRAEL, supra note 66, § 26.6, at 1000. Justice Frankfurter once stated that harmless-error statutes were "intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict." Bruno v. United States, 308 U.S. 287, 294 (1939).

70 See Chapman v. California, 386 U.S. 18, 22 (1967). The Chapman Court stated that some violations of a defendant's constitutional rights may be considered harmless, but found that the violation in this particular case was not harmless to these defendants. Id. at 21-22, 24-26. The Court announced as a standard for determining harmlessness, "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Id. at 23 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)).

71 See infra notes 72-75 and accompanying text.

72 See, e.g., R. TRAYNOR, supra note 66, at 43-49 (unclear whether appellate court's level of scrutiny must be beyond a reasonable doubt or some lesser standard); Field, Assessing the Harmlessness of Federal Constitutional Error — A Process in Need of a Rationale, 125 U. PA. L. REV. 15, 16 (1976) (identifying three of the approaches appearing in Supreme Court opinions upon which constitutional harmless-error analysis may proceed); Saltzburg, The Harm of Harmless Error, 59 VA. L. REV. 988, 1014-18 (1973) (noting inability of Supreme Court to apply single standard in harmless constitutional error review).

73 See Rose v. Clark, 478 U.S. 570, 586, 106 S. Ct. 3101, 3110-12 (1986) (Stevens, J., concurring). Justice Stevens argued that the Court, in Chapman, merely recognized that certain constitutional errors were subject to harmless-error analysis, and was not overruling the presumption of prejudice for constitutional errors. See id. (Stevens, J., concurring). He criticized the majority in Rose for creating a presumption in favor of harmlessness for constitutional violations. See id. (Stevens, J., concurring); see also Note, Harmful Use of Harmless Error in Criminal Cases, 64 CORNELL L. REV. 538, 539-40 (1979) (abuse of harmless-error doctrine has led to lack of circumspection by courts in its application); Comment, The Harmless Constitutional Error Rule in Washington: What It Was, What It Is, and What It Should Be, 20 GONZ. L. REV. 429, 477 (1984/85) (harmless constitutional error rule, narrow at its inception, "has expanded . . . into a doctrine which threatens . . . [the] subtle erosion of constitutional procedural rights of criminally accused").

One commentator has gone so far as to suggest purging the harmless error doctrine
plication of harmless constitutional error analysis: first, that it promotes misconduct by prosecutors in the belief that any violation of the defendant's constitutional rights may be deemed harmless; and second, that it inhibits the development of important constitutional issues by giving judges an alternative to deciding constitutional questions. Although a wealth of precedent has accumulated supporting the harmless constitutional error analysis, it is suggested that such an analysis should never be applied to violations of constitutional guarantees which affect fundamental precepts of our jurisprudence and call into question the integrity of the judicial process. It is further suggested that disregarding completely from our constitutional jurisprudence. See Goldberg, Constitutional Sneak Thief, 71 J. CRIM. L. & CRIMINOLOGY 421, 421-22 (1980).

See Goldberg, supra note 73, at 438-39. Professor Goldberg argued that the proliferation of harmless constitutional errors increases courtroom misconduct (intentional or otherwise) because of the existence of precedent finding the error harmless. See id.; see also Comment, Harmless Error: Abettor of Courtroom Misconduct, 74 J. CRIM. L. & CRIMINOLOGY 457, 468 (1983) (increased application of harmless-error rule to any violation promotes courtroom misconduct). Professor Goldberg has stated that an inherent irony exists in the harmless constitutional error doctrine. See Goldberg, supra note 73, at 440-41. The original purpose of the harmless-error doctrine was to promote judicial economy. Id. However, this doctrine encourages courtroom misconduct in hopes that any error will be deemed harmless. See id. Such misconduct will inevitably result in an appeal, and, if the appellate court should decide that the violation was not harmless, an additional trial will be required. See id.

See Goldberg, supra note 73, at 434-36; see also Field, supra note 72, at 20 (declaring a constitutional right subject to harmless-error rule threatens existence of that constitutional guarantee).


See Rose v. Lundy, 455 U.S. 509, 543-44 (1982) (Stevens, J., dissenting). Justice Stevens stated that some constitutional guarantees "are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained." Id. at 544 (Stevens, J., dissenting). Justice Stevens concluded that these types of violations require a remedy. Id. (Stevens, J., dissenting). In another opinion, Justice Stevens listed certain areas where harmless error analysis should never be applied, one being "when an independent value besides reliability of the outcome suggests that such analysis is inappropriate." United States v. Lane, 474 U.S. 438, 474 (1986) (Stevens, J., dissenting). The Supreme Court has held, in a plurality opinion, that "discrimination in the [selection of a] grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless error review." Vásquez v. Hillery, 474 U.S. 254, 263-64 (1986); see also Rose v. Mitchell, 443 U.S. 545, 555-56 (1979) (discrimination in grand jury selection requires automatic reversal). Some commentators have espoused the view that cer-
the protection of a proper grant of immunity adversely impacts on the integrity of the judicial process by allowing law enforcement agents to double-talk a witness into incriminating himself.

The Supreme Court, in *Kastigar*, held that the invocation of the fifth amendment guarantees that compelled testimony will not be used against the witness in any manner. The Court established an exacting standard for prosecutors, requiring proof that any evidence sought to be used in a subsequent prosecution must be from wholly independent and legitimate sources. Upon examination of the policies which undergird the fifth amendment, it becomes apparent that a harmless-error analysis applied to this type of violation would derogate the integrity and propriety of the judicial system. It is submitted that the *Gallo* majority's consensus on the harmless constitutional error issue provides an impetus for a broad expansion of this potentially insidious doctrine.

CONCLUSION

The *Gallo* court failed to define properly the scope of the fifth amendment and streamline the protection of the use immunity statute, thereby thwarting the congressional intent underlying the statute. Furthermore, the court detracted from the value of the privilege by subjecting it to a harmless-error analysis. While a

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79 *Id.* at 460.
80 *See supra* note 2.
81 *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). Some of the key policy considerations underlying the fifth amendment are privacy, the preference for an accusatorial system, and the idea that the prosecution must be put to its proof. *Id.* It has been stated that the fifth amendment does not increase the reliability of the truth seeking function but "stands in the Constitution for entirely independent reasons." *Allen v. Illinois*, 478 U.S. 364, 375, 106 S. Ct. 2988, 2995 (1986). Professor Field has asserted that if these types of constitutional guarantees are subjected to a harmless-error rule analysis, they will eventually be engulfed by it. *See Field, supra* note 72, at 20. In his dissenting opinion in *Gallo*, Judge Altimari stated that once prosecutors are allowed to breach grants of immunity "the constitutional privilege will have been sacrificed." *Gallo*, 859 F.2d at 1095 (Altimari, J., dissenting).
baseless assertion of the fifth amendment should afford an immunized witness no protection, a proper assertion of the privilege must be zealously guarded and never dismissed as harmless.

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