Professor Gershowitz is quoted in an article in the *Waco Tribune Herald* regarding prosecutorial discretion and witness immunity.

The following article appeared in the *Waco Tribune Herald* on Wednesday, January 20, 2010.

**Bulls' testimony in Baker trial could open her open to prosecution, legal scholars say, but punishment, if any, wouldn't be severe**

By Cindy V. Culp

Vanessa Bulls may have opened herself up to potential criminal prosecution by testifying that she repeatedly lied to law enforcement officials looking into the death of Kari Baker. But she likely isn’t on the hook for as much as people might imagine, legal scholars said.

Bulls was granted immunity for testimony she gave to a grand jury last March. There is no indication, though, she received immunity for testimony she offered Tuesday during Matt Baker’s murder trial.

If Bulls does not have an agreement that shields her from criminal liability arising from her testimony, prosecutors could pursue charges against her.

However, the fact that she is cooperating makes potential charges unlikely, the scholars said.

**Prosecutors have sole discretion when it comes to whether to bring criminal charges,** said Adam Gershowitz, a professor at the University of Houston Law Center. **Even if there is proof a person broke the law, prosecutors are not required to pursue charge,** he said.

**Prosecutors “very, very rarely turn on their own witness,”** Gershowitz said.

**Use, transactional immunity**

The immunity agreement Bulls got for her grand jury testimony appears to have taken the form of “use immunity.” That means prosecutors cannot use anything a witness testifies to, or any evidence derived from that testimony, to pursue charges against that person, Gershowitz said.

That contrasts with “transactional immunity,” which is a guarantee that prosecutors will not pursue charges against the person for crimes testified to, period, Gershowitz said.

**Use immunity can be granted event by event, meaning there would be different agreements covering grand jury testimony and trial testimony, for example.**
Or it can be granted as a package that covers a witness’s testimony in all settings, Southern Methodist University law professor Frederick Moss said.

The public sometimes finds immunity agreements difficult to tolerate, the professors said. But they are usually the end result of a cost-benefit analysis, in which prosecutors’ desire to convict the person most responsible for a crime outweighs their hesitancy about a less-guilty party going free, they said.

“You know the expression, ‘It takes a thief to know a thief?’ Well, sometimes it takes a thief to convict a thief,” Moss said. “The prosecution often needs someone with an inside view and decides to offer immunity when they think their odds are too slim to risk going to trial without (that testimony).”

Baylor Law School professor Mark Osler agreed. Having testimony not only about a defendant’s actions but also his state of mind can be extremely important.

It also is extremely difficult to get, he added.

“Oftentimes, the only way to get a secret out is through a wiretap or someone who is inside the circle of the secret,” Osler said.

As for the type of charges Bulls could face absent an immunity agreement, the professors said they would center on her conduct after Kari Baker’s death.

Bulls testified Tuesday that Matt Baker told her before Kari Baker’s death that he planned to kill his wife. She also testified that Baker related how he killed his wife, about a week after her death.

Bulls did not pass that information on to law enforcement officials. Instead, she repeatedly denied in interviews with police and other investigators that she and Baker were having an affair or that she knew anything that would incriminate Baker.

Acts, not omissions

Assuming Bulls’ testimony Tuesday was true, she could be charged with making false reports to law enforcement officials and obstructing justice, Moss and Gershowitz said. Both are relatively minor offenses.
Bulls likely could not be prosecuted for failing to alert authorities about the alleged murder plot beforehand, the professors said. Except in certain circumstances, people are not required to take action to stop a crime before it occurs, they said.

“The law tends to punish acts, not omissions,” Gershowitz said.

The fact that Bulls wasn’t completely forthcoming with the grand jury also likely doesn’t open her up to prosecution, the professors said. Witnesses are not under a duty to tell everything they know, only to truthfully answer questions. So as long as Bulls did not lie, the fact that she withheld details is not problematic, they said.

Bulls’ testimony could cost her her job, she said Tuesday. She teaches seventh-grade language arts at Eastern Hills Middle School in Harker Heights, which is part of the Killeen Independent School District. She also coaches track and volleyball, district spokeswoman Leslie Gilmore said.

Asked if the school might fire Bulls because of her testimony, Gilmore said the district’s policy is not to comment on personnel matters.