Self-Incrimination in Civil Litigation: The Evolution of California's Judicially Created Immunities from *Murphy v. Waterfront Commission*

By THOMAS K. BUCK*

Introduction

Commentators have suggested that immunity should be available where the privilege against self-incrimination is invoked in the course of private civil litigation.[1] Federal courts, constrained by statute, have not adopted this suggestion.[2] In California, however, despite a lack of

* Deputy District Attorney, Orange County, California. B.A., 1971, Stanford University; J.D., 1976, Hastings College of the Law. The author wishes to thank Timothy Lee for his helpful discussions with the author and Eleanor McBride for her critical reading of the manuscript. The views expressed in this article are the author's own and do not necessarily reflect those of the District Attorney of Orange County.

1. *See* Kaminsky, *Preventing Unfair Use of the Privilege Against Self-Incrimination in Private Civil Litigation: A Critical Analysis*, 39 BROOKLYN L. REV. 121, 125 n.32 (1972); McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 231-32; Note, *Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings*, 76 COLUM. L. REV. 674, 702 (1976); Note, *Constitutional Law: Self-Incrimination and Court Granted Immunity in Civil Litigation*, 27 OKLA. L. REV. 243, 249 (1974); Note, *Penalizing the Civil Litigant Who Invokes the Privilege Against Self-Incrimination*, 24 U. FLA. L. REV. 541, 554 (1972).

2. Federal courts have no discretion to grant immunity other than as authorized by statute. *See In re* Corrugated Container Anti-Trust Litigation, 620 F.2d 1086, 1093-95 (5th Cir. 1980); *In re* Daley, 549 F.2d 469, 479 (7th Cir. 1977), *cert. denied*, 434 U.S. 829 (1978); *id.* at 483-84 (Pell, J., concurring). *See also* Ullmann v. United States, 350 U.S. 422, 434 (1956); Ellis v. United States, 416 F.2d 791, 796-97 (D.C. Cir. 1969). *But cf.* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), *see* note 43 and accompanying text *infra*; Morgan v. Thomas, 448 F.2d 1356, 1367-68 (5th Cir. 1971) (Gewin, J., concurring in part and dissenting in part) (expressing view that a state court may be compelled to grant immunity in a civil case notwithstanding an apparent lack of an authorizing state statute), *cert. denied*, 405 U.S. 920 (1972); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 426 F.2d 619 (2nd Cir. 1970) (Friendly, J.) (holding that New York city had authority to grant immunity notwithstanding the lack of an authorizing statute), *cert. denied*, 406 U.S. 961 (1972).

Under the federal immunity statute, 18 U.S.C. §§ 6001-03 (Supp. 1980), a request from the executive branch is a necessary condition for a grant of immunity in court or grand jury proceedings. *See* Ryan v. Commissioner, 568 F.2d 531, 540 (7th Cir. 1977), *cert. denied*, 439

express statutory authorization,[3] state courts have imposed immunities in civil suits between private parties.[4]

The basis of the California development is found in two decisions of the United States Supreme Court. The first, *Murphy v. Waterfront Commission*,[5] is the 1964 seminal decision on use and derivative use immunity. The second, *Marchetti v. United States*,[6] is a 1968 decision involving a constitutional attack on a federal wagering tax statute and a refusal by the Court to save the statute by implying an immunity. After a brief discussion of the constitutional character of immunity, Part II of this article examines *Murphy* and *Marchetti* for characteristics important to California's subsequent immunity decisions and then considers the first of these California decisions, *Byers v. Justice Court*.[7]

Byers, a 1971 criminal case, was followed in 1974 by *People v. Superior Court (Kaufman)*[8] and in 1977 by *Daly v. Superior Court*.[9] In both *Kaufman* and *Daly* the California Supreme Court authorized immunity grants for civil litigants. Part III initially considers how the court in *Kaufman* relied on *Byers* and *Marchetti* to imply a grant of immunity. It then examines how *Daly* extended California's immunity grants from state initiated actions to litigation between private parties.

Parts II and III also identify the two forms of immunity grants found in California decisions: (1) an automatic immunity where a statute, but for the immunity, would violate the privilege against self-incrimination, and (2) a discretionary grant where a civil litigant has specifically requested an immunity order.[10] Unlike the automatic im-

U.S. 820 (1978); United States v. Dunham Concrete Prod., Inc., 475 F.2d 1241, 1243 (5th Cir.), *cert. denied*, 414 U.S. 382 (1973). *Cf.* Earl v. United States, 361 F.2d 531, 534 n.9 (D.C. Cir. 1966) (Burger, J.) (discussing whether, in narrow circumstances, due process might require a grant of immunity for a witness called by a criminal defendant notwithstanding the absence of an executive request); 18 U.S.C. § 6003 (Supp. 1980).

3. California's immunity statutes are limited to criminal proceedings and grand jury investigations. *See* People v. Superior Court (Kaufman), 12 Cal. 3d 421, 426-27, 525 P.2d 716, 721, 115 Cal. Rptr. 812, 817 (1974); CAL. PENAL CODE § 1324 (West Supp. 1981) (felony and grand jury proceedings); CAL. PENAL CODE § 1324.1 (West 1970) (misdemeanor proceedings).

4. Daly v. Superior Court, 19 Cal. 3d 132, 560 P.2d 1193, 137 Cal. Rptr. 14 (1977); DeCamp v. First Kensington Corp., 83 Cal. App. 3d 268, 147 Cal. Rptr. 869 (1978). *See also* Note, *Immunity Grants for Discovery in Private Civil Litigation*, 66 CALIF. L. REV. 233 (1978).

5. 378 U.S. 52 (1964).

6. 390 U.S. 39 (1968).

7. 71 Cal. 2d 1039, 458 P.2d 465, 80 Cal. Rptr 553 (1969), *vacated and remanded sub. nom.* California v. Byers, 402 U.S. 424 (1971). For a discussion of *Byers*, see notes 64-97 and accompanying text *infra*.

8. 12 Cal. 3d 421, 525 P.2d 716, 115 Cal. Rptr. 812 (1974).

9. 19 Cal. 3d 132, 560 P.2d 1193, 137 Cal. Rptr. 14 (1977).

10. The two forms of judicially created immunity are analogous to two forms of immu-

munity found in *Byers*, the discretionary immunity found in *Daly* requires prior notice to federal, state and local authorities and the absence of law enforcement objection. These requirements allow for sensible accommodation of the competing interests of civil litigants and law enforcement. Because automatic immunity can substantially interfere with criminal prosecutions Part III suggests that discretionary immunity, where available, is preferred.[11]

Part IV reexamines the problems of automatic immunity in the context of *DeCamp v. First Kensington Corp.*,[12] a 1978 California appellate decision that purports to apply *Byers* where the privilege against self-incrimination is asserted in a civil pleading. It is argued that the court in *DeCamp* was mistaken to rely upon *Byers* to the exclusion of *Daly* and that the court should have employed the second form of California's immunity—a form that is discretionary and allows for prosecutorial participation.

I. Background: The Fifth Amendment and Immunity

Read literally, the Fifth Amendment protection against self-incrimination applies only in criminal cases.[13] A literal construction, however, would reduce the privilege to an empty formality, and the Supreme Court has recognized the need to permit the invocation of the privilege in a broad range of settings,[14] including a congressional hear-

nity statutes: automatic acts and claims acts. *See* McKay, *supra* note 1, at 229. "Most of the federal immunity acts before 1934 are of the automatic type, which means that a witness gains immunity from prosecution in relation to all evidence he presents in response to a subpoena and while under oath. Later federal acts have ordinarily been claim acts, so designated because immunity attaches only after a witness asserts the privilege and is directed to testify. This protects against the so-called 'immunity bath' precluding prosecution even in the absence of any conscious governmental decision that securing the information is preferable to prosecution." *Id.* at 229 (footnotes omitted). *See also* Dixon, *Comment on Immunity Provisions*, in 2 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAW 1405 (1970); Wexler, *Automatic Witness Immunity Statutes and the Inadvertent Frustration of Criminal Prosecutions: A Call for Congressional Action*, 55 GEO. L.J. 656 (1967).

11. As to the preference of commentators for discretionary immunity, see Dixon, *supra* note 10, at 1422.

12. 83 Cal. App. 3d 268, 147 Cal. Rptr. 869 (1978).

13. The Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. For the amendment's roots in English and American soil, see L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968).

14. The Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

ing,[15] a grand jury hearing,[16] and a civil proceeding.[17] The Court has also held that the privilege extends beyond directly incriminating evidence to information forming a link in a chain of evidence.[18]

When the privilege is asserted in the course of civil litigation, the party seeking the allegedly protected information may find that the information is accessible elsewhere or that the privilege is not available to the person asserting it.[19] If, however, the information sought is not otherwise accessible and the privilege is properly asserted, the party in need of the information must either proceed without it or nullify the effect of the privilege by removing the threat of incrimination. The latter alternative may be accomplished by a grant of immunity.[20]

Whether or not an immunized witness can be constitutionally compelled to testify depends on whether or not the protection provided by the immunity is at least equivalent to the protection of the privilege itself.[21] The United States Supreme Court has applied this test to three kinds of immunities: (1) transactional, (2) use, and (3) use and derivative use.

Transactional immunity bars prosecution of a witness for or on account of any transaction, matter or thing concerning which he or she testifies. The Court has consistently upheld the constitutional adequacy of transactional immunity.[22]

---

15. Watkins v. United States, 354 U.S. 178 (1957).

16. United States v. Mandujano, 425 U.S. 564 (1976); Counselman v. Hitchcock, 142 U.S. 547 (1892), *disapproved on other grounds*, Kastigar v. United States, 406 U.S. 441 (1972).

17. McCarthy v. Arndstein, 262 U.S. 355 (1923).

18. Blau v. United States, 340 U.S. 159 (1950).

19. For example, the privilege is not available if it has been waived, Garner v. United States, 424 U.S. 648 (1976); nor is the privilege available to a corporation, United States v. White, 322 U.S. 694 (1944).

20. Brown v. Walker, 161 U.S. 591 (1896). The idea of granting a witness an appropriate immunity in order to compel his testimony was inherited from England and is found in the colonial records of Pennsylvania and New York. L. LEVY, *supra* note 13, at 328, 359, 384-85, 402-03 (1968). The threat of incrimination may also be eliminated by the passage of time. Since double jeopardy bars further prosecution of all offenses charged, a completed criminal case that includes all possible charges leaves no possibility of further prosecution. Ellis v. United States, 416 F.2d 791 (D.C. Cir. 1969); United States *ex rel.* Yates v. Rundle, 326 F. Supp. 344 (E.D. Pa. 1971). Similarly, if the statutes of limitations have run as to all possible criminal charges, the possibility of self-incrimination is removed. United States v. Gebhard, 426 F.2d 965 (9th Cir. 1970).

21. Counselman v. Hitchcock, 142 U.S. 547 (1892), *disapproved on other grounds*, Kastigar v. United States, 406 U.S. 441 (1972). *See* Annot., 32 L. Ed. 2d 869 (1973).

22. Ullmann v. United States, 350 U.S. 422 (1956); United States v. Murdock, 284 U.S. 141 (1931), *disapproved on other grounds in* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Brown v. Walker, 161 U.S. 591 (1896).

Unlike transactional immunity, use immunity does not logically bar prosecution of the witness for the entire matter to which the witness has testified. Use immunity precludes the prosecution only from "using" the compelled testimony. In *Counselman v. Hitchcock*,[23] the Supreme Court held that a statutory grant of use immunity was not the equivalent of the Fifth Amendment privilege and that a witness who had been granted only use immunity was entitled to stand mute.[24] The Court suggested that use immunity permitted the prosecution to investigate leads provided by the immunized testimony and to introduce evidence derived from those leads at a subsequent criminal trial.[25] Such derived evidence would not be available to the prosecution if the witness were not compelled to testify.[26]

As its name implies, use and derivative use immunity, like use immunity, bars introduction of the compelled testimony in a criminal trial; unlike use immunity, it also bars introduction of derived evidence. Although dicta in *Counselman*[27] and subsequent court decisions had indicated that only transactional immunity was an adequate substitute for the privilege against self-incrimination, in *Kastigar v. United States*[28] the Supreme Court expressly disapproved that dicta[29] and held that a witness may be constitutionally compelled to testify when he has received a statutory grant of use and derivative use immunity.[30] The reasoning underlying the *Kastigar* decision had been developed eight years earlier in *Murphy v. Waterfront Commission*,[31] the first United States Supreme Court case to imply an immunity in the absence of a statutory grant.

II. Laying the Foundation: Immunity to Accommodate Conflicting Governmental Interests

A. *Murphy* and *Marchetti*: The Supreme Court Immunity Decisions

In *Murphy v. Waterfront Commission*,[32] the United States Supreme Court considered the constitutionality of a civil contempt judgment entered against witnesses subpoenaed to testify at a New Jersey hearing conducted by the bistate Waterfront Commission of New York Harbor.

23. 142 U.S. 547 (1892).
24. *Id.*
25. *Id.* at 586.
26. *Id.* at 585-86.
27. 142 U.S. 547 (1892).
28. 406 U.S. 441 (1972).
29. *Id.* at 454-55.
30. *Id.* at 462.
31. 378 U.S. 52 (1964).
32. *Id.*

After refusing, on grounds of self-incrimination, to answer questions concerning a work stoppage, the witnesses were granted immunity from prosecution under the laws of New Jersey and New York. Nonetheless, contending that their responses might be self-incriminating under federal law, the witnesses persisted in their refusal and were cited for contempt.[33] On certiorari, the Supreme Court vacated the judgment of contempt and remanded the case. Justice Goldberg, writing for a five-justice majority, announced the following constitutional rule: "[A] state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him."[34] Justice Goldberg then established a basis for a judicially granted immunity in the guise of an "exclusionary rule."[35]

> We conclude . . . that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity.[36]

Although Justice Goldberg speaks of an "exclusionary rule,"[37] the *Murphy* opinion actually creates an automatic immunity. An exclusionary rule typically makes evidence inadmissible if law enforcement officers obtain the evidence by means forbidden by a constitution, statute or court rule.[38] If, for instance, a witness in state court properly asserts his privilege against self-incrimination and that court nonetheless successfully compels his testimony, the resulting testimony and its fruits would

33. *Id.* at 53-54.

34. *Id.* at 79.

35. *See* notes 37-43 and accompanying text *infra*.

36. 378 U.S. at 79 (footnotes omitted).

37. *Id.*

38. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 665 (1970). Professor Oaks found Supreme Court enforcement of an exclusionary rule "in state and federal criminal proceedings as to four major types of violations: searches and seizures that violate the fourth amendment, confessions obtained in violation of the fifth and sixth amendments, identification testimony obtained in violation of these amendments, and evidence obtained by methods so shocking that its use would violate the due process clause." *Id.* at 665. Oaks cited five cases in support of this statement: United States v. Wade, 388 U.S. 218 (1967) (lineups); Gilbert v. California, 388 U.S. 263 (1967) (identifications); Miranda v. Arizona, 384 U.S. 436 (1966) (confessions); Mapp v. Ohio, 367 U.S. 643 (1961) (search and seizure); Rochin v. California, 342 U.S. 165 (1952) ("shocking" methods).

be excluded at a subsequent criminal trial in federal court.[39]

Justice Goldberg's "exclusionary rule" was not intended as a remedy to the testimonial consequences of a mistaken compulsion order, for in *Murphy* no testimony in fact had been compelled.[40] The rule was intended to permit a state court to compel testimony only when state immunity had been expressly granted.[41] Justice Goldberg's characterization has apparently led at least one trial court to believe mistakenly that federal courts have authority to grant discretionary immunity.[42] The *Murphy* holding, however, should not be viewed as an assurance that appellate courts will treat a mistake in overruling a claim of privilege as a trial court's discretionary grant of immunity. Justice Goldberg's "exclusionary rule" is, in fact, a federal immunity that arises automatically whenever state immunity is granted.[43]

39. *See* Adams v. Maryland, 347 U.S. 179, 181 (1954) (dictum); Ellis v. United States, 416 F.2d 791, 795-96 (D.C. Cir. 1969); 8 J. WIGMORE, EVIDENCE § 2270, at 417-19 (McNaughton rev. ed. 1961). *See also* Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

In *Adams v. Maryland*, a witness, Adams, appeared before a congressional committee under summons and, upon examination, confessed to having run a gambling business in Maryland. A statute had provided that no testimony of a witness in a congressional inquiry " 'shall be used as evidence in any criminal proceeding against him in any court . . . .' " 347 U.S. at 180 (footnote omitted). Notwithstanding the statute, the incriminating testimony was used in state court to convict Adams of conspiring to violate Maryland's anti-lottery laws. On certiorari, the Supreme Court reversed the Maryland conviction and held that the federal immunity statute did not require Adams to object to each question on grounds of self-incrimination. The Court stated, by way of dictum, "[A] witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute." *Id.* at 181, *quoted and discussed in* Murphy v. Waterfront Comm'n, 378 U.S. at 104 n.6 (1964) (White, J., concurring). *See also* note 42 *infra*.

40. 378 U.S. at 53-54. The Supreme Court remanded the case so that the petitioners might answer the questions for which they had invoked their Fifth Amendment right of silence. *Id.* at 80.

41. *See id.* at 79-80.

42. Ellis v. United States, 416 F.2d 791, 795-97 (D.C. Cir. 1969) (holding that a trial judge in a criminal case cannot reject a claim of privilege on the ground that the ruling will establish an immunity from subsequent prosecution). "We are confident [that the decision below] was made in good faith, and can even discern how the judge may have come to a mis-reading of *Murphy*. Nevertheless, his ruling was in the nature of a circular, self-fulfilling prophecy that in substance can only be viewed as a grant of immunity. That ruling was outside the scope of judicial authority." *Id.* at 796. *See also In re* Corrugated Container Anti-Trust Litigation, 620 F.2d 1086, 1094 & n.7 (5th Cir. 1980); *In re* Folding Carton Antitrust Litigation, 609 F.2d 867, 872 n.11 (7th Cir. 1979).

43. It has been held that federal courts have no discretion to grant immunity other than as authorized by statute. *See* note 2 *supra*. The *Murphy* holding is not contrary, except perhaps in the narrow sense that the Supreme Court exercised its own discretion in deciding it. Although creating an automatic immunity without statutory authorization, *Murphy* did not provide federal courts with discretion to grant immunity in specific instances.

The technique used in *Murphy* to accommodate state and federal law enforcement interests was considered by the Court for a similar purpose in *Marchetti v. United States*.[44] Mr. Marchetti was convicted in federal court for failing to register as a person engaged in the business of accepting wagers and for failing to pay an occupational tax required of such persons. He appealed his conviction and argued that the statutory obligation to register violated his constitutional privilege against self-incrimination.[45] On certiorari the Supreme Court reversed, holding that the federal statute requiring the defendant to register as a person engaged in the business of accepting wagers was unconstitutional.[46]

In arguing the *Marchetti* case before the Supreme Court, the government suggested that the federal statutes in question could be saved from constitutional attack "through the imposition of restrictions upon the use by federal and state authorities of information obtained as a consequence of compliance with the wagering tax requirements."[47] Justice Harlan, writing for five of a seven-member majority, agreed that the government's suggestion was "in principle an attractive and apparently practical resolution" to the problem of permitting the nation to exercise fully its taxing powers while protecting the Fifth Amendment rights of its citizens.[48] The Court concluded, however, that imposing the suggested restrictions would be, in the circumstances before the Court, "entirely inappropriate."[49] The inappropriateness was explained as follows:

> The terms of the wagering tax system make quite plain that Congress intended information obtained as a consequence of registration and payment of the occupational tax to be provided to interested prosecuting authorities. This has evidently been the consistent practice of the Revenue Service. We must therefore assume that the imposition of use-restrictions would directly preclude effectuation of a significant element of Congress' purposes in adopting the wagering taxes. Moreover, the imposition of such restrictions would necessarily oblige state prosecuting authorities to establish in each case that their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes; the federal requirements would thus be protected only at the cost of hampering, perhaps seriously, enforcement of state prohibitions against gambling. We cannot know how Congress would assess the competing demands of the federal treasury

44. 390 U.S. 39 (1968).
45. *Id.* at 41.
46. *Id.* at 41-42.
47. *Id.* at 58.
48. *Id.*
49. *Id.*

> and of state gambling prohibitions; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values. We therefore must decide that it would be improper for the Court to impose restrictions of the kind urged by the United States.[50]

As shown by the above quoted explanation, in deciding not to extend a *Murphy*-like immunity to Marchetti, the Court engaged in a two-step analysis. First, the Court addressed a narrow issue of legislative intent—whether or not Congress intended that information obtained pursuant to the statute be provided to interested prosecuting authorities.[51] On the basis of the terms of the wagering tax statute and the consistent practice of the Internal Revenue Service, the Court concluded that Congress had so intended.[52] Then the Court specifically examined the impact of use restrictions upon enforcement of state prohibitions against gambling.[53] In refusing to create an automatic immunity, the Court pointed out that imposing use restrictions "would necessarily oblige state prosecuting authorities to establish in each case that their evidence was untainted"[54] and noted that the restrictions would hamper, "perhaps seriously," state prosecution.[55]

Before turning to the California Supreme Court's use of *Murphy* and *Marchetti*, it should be noted that while the California court has used these cases to protect the interests of private litigants, the immunity developed in *Murphy* and considered in *Marchetti* was advanced to protect immediate governmental interests.

The grant of judicial immunity in *Murphy* was based on a traditional function of the Supreme Court—the accommodation of federal and state law enforcement interests.[56] Before the Court granted certiorari, New Jersey and New York authorities already had imposed immunity.[57] The Court announced its "exclusionary rule" so that those states and others could continue to use their own immunity laws "to secure information necessary for effective law enforcement."[58] Thus, the *Murphy* holding directly promoted the interests of state law en-

50. *Id.* at 58-60 (footnotes omitted).
51. *See id.*
52. *Id. See* text accompanying note 50 *supra*.
53. 390 U.S. at 59.
54. *Id.*
55. *Id.*
56. 378 U.S. at 79; *id.* at 91-92 (Harlan, J., concurring).
57. *Id.* at 53.
58. *Id.* at 79.

forcement in compelling evidence by restricting the use of state compelled evidence by federal prosecutors.[59]

The automatic immunity considered in *Marchetti* also involved an accommodation of strictly governmental interests. In *Marchetti*, the federal government proposed saving the federal statute requiring registration and payment of occupational taxes by persons engaged in the business of accepting wagers.[60] The federal government's interests included raising tax revenues; the states' interest consisted of enforcing state gambling prohibitions.[61]

It is not surprising that in neither *Murphy* nor *Marchetti* did the Court consider the interests of private parties in obtaining information.[62] In *Murphy*, the Court insured the effectiveness of an order compelling testimony requested by a governmental commission, and in *Marchetti*, the Court considered saving a federal statute compelling registration with the Internal Revenue Service.[63] In both cases, the information sought was for the direct benefit of a public agency.

B. *Byers*: California's Adoption and Extension of *Murphy*

In 1969, the year following *Marchetti*, the California Supreme Court drew upon the language of the wagering tax opinion to broaden the scope of *Murphy*'s judicially created immunity. This broadening was accomplished in *Byers v. Justice Court*,[64] a decision that was subsequently vacated by the United States Supreme Court in *California v. Byers*.[65]

In a criminal prosecution, the state of California charged Mr. Byers with violating a "hit-and-run" statute.[66] The hit-and-run law required the driver of any vehicle involved in an accident resulting in property damage to stop at the scene of the accident and to provide the owner or driver of the damaged property with certain identifying infor-

59. *Id.* Concerning whether or not state prosecutors are similarly bound by immunity granted in federal court, compare Justice Goldberg's opinion for the Court, *id.* at 77-78 with Justice Harlan's concurring opinion, *id.* at 92 n.8.

60. 390 U.S. at 58.

61. *Id.*

62. *See* 390 U.S. at 58-60; 378 U.S. at 79.

63. *See* 390 U.S. at 58-60; 378 U.S. 52.

64. 71 Cal. 2d 1039, 458 P.2d 465, 80 Cal. Rptr. 553 (1969).

65. 402 U.S. 424 (1971). To aid discussion, *Byers* refers to Byers v. Justice Court, 71 Cal. 2d 1039, 438 P.2d 965, 80 Cal. Rptr. 553 (1969), whereas California v. Byers, 402 U.S. 424 (1971), is referred to by the full case name. Although *Byers* was vacated, California courts rely on *Byers*' justification for use restrictions because the United States Supreme Court decision did not address the issue of judicially created immunity. *See* notes 94-97 and accompanying text *infra*.

66. CAL. VEH. CODE § 20002(a) (West Supp. 1981).

mation.[67] The state also charged Byers with unsafe passing.[68] In the course of litigation, counsel stipulated "that the alleged improper passing caused the accident from which Byers assertedly departed without providing statutorily required information."[69]

Byers demurred to the hit-and-run charge on the basis that the section requiring him to stop and identify himself violated his privilege against self-incrimination. After the justice court overruled the demurrer, the superior court granted a writ of prohibition in favor of the defendant, and the state appealed.[70]

The California Supreme Court held that the hit-and-run law compelled Byers to incriminate himself.[71] The court, however, did not declare the law unconstitutional. Instead, it chose to save the statute by imposing use restrictions such as had been employed in *Murphy* and discussed in *Marchetti*. The court precluded state prosecutors from using evidence in a criminal prosecution against a motorist when the evidence was derived from the motorist's compliance with the hit-and-run law.[72] In stating its decision, the court expressly considered whether or not it had authority to impose use restrictions and concluded that it did.[73]

The court was faced with three alternative ways to decide the case: (1) to rule that the hit-and-run statute was constitutional, (2) to rule that the statute was unconstitutional and unenforceable, or (3) to save the statute by relying on *Murphy* and *Marchetti*.

The first alternative, given that Byers enjoyed a Fifth Amendment right to refuse to stop, was untenable. The Constitution does not tolerate imposing criminal sanctions as a consequence of properly invoking the privilege against self-incrimination.[74] If the hit-and-run statute in *Byers* had resulted merely in noncriminal consequences, the court might have found both that Byers was privileged to refuse to stop and

67. 71 Cal. 2d at 1041, 458 P.2d at 467, 80 Cal. Rptr. at 555; *see* CAL. VEH. CODE § 20002(a) (West Supp. 1981).

68. CAL. VEH. CODE § 21750 (West Supp. 1981).

69. 71 Cal. 2d at 1042, 458 P.2d at 467, 80 Cal. Rptr. at 555.

70. *Id.*

71. *Id.* at 1047-49, 458 P.2d at 471-72, 80 Cal. Rptr. at 558-60.

72. *See id.* at 1055-56, 458 P.2d at 476-77, 80 Cal. Rptr. at 564-65.

73. *See id.* at 1050, 1056-57, 458 P.2d at 473, 476-77, 80 Cal. Rptr. at 561, 564-65.

74. Concerning sanctions for exercising the privilege, see Berger, *Burdening the Fifth Amendment: Toward A Resumptive Barrier Theory*, 70 J. CRIM. L. & CRIMINOLOGY 27 (1979); Noonan, *Inferences from the Invocation of the Privilege Against Self-Incrimination*, 41 VA. L. REV. 311 (1955); Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. CHI. L. REV. 472 (1957); Ritchie, *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383 (1977).

that the "juristic consequence" of the refusal was appropriate.[75] Since, however, the consequences of asserting the privilege included a criminal sanction, the Fifth Amendment would not tolerate enforcement of the hit-and-run statute as written.[76]

The second alternative—to rule the hit-and-run statute unconstitutional and unenforceable—was highly undesirable. If the statute were unenforceable, no criminal sanctions would lie where a motorist unlawfully causes a property-damaging accident and does not stop. The second option would be nothing less than hit-and-run with impunity.[77]

Because this second option would have resulted in the loss of an important criminal sanction, the court's choice of the third option—saving the hit-and-run law by implying an automatic immunity—was warranted. In choosing to save a criminal statute and to impose on the prosecution the burden of use restrictions, the court relied on *Murphy*.[78] That reliance was not, however, what one might expect. The surprise lay in the court's tacit refusal to treat *Byers* as requiring an accommodation between law enforcement interests.

While *Murphy* involved disclosure of information to the government for a direct benefit of the government, *Byers*, according to the California Supreme Court, involved the disclosure of personal identity to the owner of injured property.[79] Ignoring any direct interest of law enforcement in the hit-and-run statute, the court stated that the purpose of the required disclosure was "to protect property owners from financial loss."[80] *Murphy* addressed governmental interests, whereas

75. In civil cases, California courts have recognized appropriate "juristic consequences" of invoking the privilege against self-incrimination. *See* Sheppard v. Superior Court, 17 Cal. 3d 107, 116-17, 550 P.2d 161, 171-72, 130 Cal. Rptr. 257, 267-68 (1976) (dicta that a claim of privilege gives rise to an adverse inference in a civil proceeding); Talcott, Inc. v. Short, 100 Cal. App. 3d 504, 509-10, 161 Cal. Rptr. 63, 66 (1979) (affirming a summary judgment for plaintiff where defendants had claimed their privilege in the course of discovery and had failed to extricate themselves from the dilemma created by invoking the privilege); A & M Records v. Heilman, 75 Cal. App. 3d 554, 567, 142 Cal. Rptr. 390, 398 (1977) (affirming a judgment for plaintiff where the defendant was precluded from testifying at trial concerning matters upon which he had asserted in discovery his privilege against self-incrimination), *appeal dismissed*, 436 U.S. 952, *rehearing denied*, 439 U.S. 884 (1978). *But see* CAL. EVID. CODE § 913 (West 1966).

76. *Compare* Baxter v. Palmigiano, 425 U.S. 308, 316-20 (1976) *with* Griffin v. California, 380 U.S. 609 (1965).

77. If a hit-and-run statute concerning property-damaging accidents is unconstitutional, a similar statute concerning injury accidents would seem equally deficient, for example, CAL. VEH. CODE § 20001 (West Supp. 1981).

78. 71 Cal. 2d at 1050, 458 P.2d at 473, 80 Cal. Rptr. at 561.

79. *Id.* at 1041-42, 1047-48, 458 P.2d at 467-68, 471-72, 80 Cal. Rptr. at 555-56, 559-60.

80. *Id.* at 1048, 458 P.2d at 472, 80 Cal. Rptr. at 560.

Byers, as initially characterized by the court, concerned private interests.

Having chosen first to treat the hit-and-run statute in terms of private interests and to ignore governmental interests in the criminal sanction itself, the California Supreme Court then tied *Byers* to *Murphy* by focusing on the government's interest in a more general form. Of *Byers*, the court stated,

> The present case exemplifies . . . the conflict between the individual's right to protection under the Fifth Amendment privilege against self-incrimination and the government's substantial interest in having citizens report or otherwise divulge information to effectuate various regulatory measures designed to promote the public welfare.[81]

Thus, by emphasizing "the government's substantial interest in having citizens report or otherwise divulge information," the court linked its decision to *Murphy* and glossed over the distinction between reporting to a private party and reporting to the government. By ignoring the government's direct interest in the criminal sanction and by stating that the purpose of the hit-and-run law was "to protect property owners from financial loss,"[82] the court enhanced the precedential value of its implied immunity. The court steered what had begun in *Murphy* as an accommodation between federal and state law enforcement interests towards a new accommodation in which law enforcement interests yield to the needs of private civil litigants.

This emphasis on the government's general interest in reporting or divulging also linked *Byers* to *Marchetti*, since *Marchetti* also dealt with statutory disclosure requirements. By suggesting that Mr. Byers' disclosure was made pursuant to a "regulatory" measure "designed to promote the public welfare," the court brought *Byers* within the scope of the Supreme Court's analysis in the *Marchetti* wagering tax decision.

The California court sought to rely on the language of *Marchetti* while distinguishing that decision on its facts. As did the majority opinion in *Marchetti*, the court couched its analysis in terms of legislative intent and "hampering effect."[83] In analyzing legislative intent, the California court stated that the hit-and-run law in *Byers*, unlike the

81. *Id.* at 1049, 458 P.2d at 472, 80 Cal. Rptr. at 560. *See generally*, as cited in *Byers*, *id.*, Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103; McKay, *supra* note 1, at 204-32; Note, *Required Information and the Privilege Against Self-Incrimination*, 65 COLUM. L. REV. 681 (1965).

82. 71 Cal. 2d at 1048, 458 P.2d at 472, 80 Cal. Rptr. at 560.

83. *Id.* at 1050-52, 458 P.2d at 474-76, 80 Cal. Rptr. at 562-64.

federal wagering tax law in *Marchetti*, was intended to facilitate disclosures for only noncriminal purposes.[84] Since neither the hit-and-run law itself nor any encompassing legislative scheme was designed to facilitate ancillary criminal prosecutions, the legislature's intentions would not be contradicted by restricting the prosecutors' use of information derived from a compelled stop. Moreover, since there was no conflicting federal interest, California lawmakers were free to enact legislation permitting use of this information in criminal cases if they disagreed with the court's statutory interpretation.[85]

Concerning the "hampering effect" of the proposed use and derivative use immunity,[86] the court in *Byers* again distinguished *Marchetti*. The court's analysis first focused on the particular zone of state prosecutions in which hampering was foreseen. A large portion of state wagering-related violators was subject to the disclosure requirements of *Marchetti*. In contrast, a far lesser portion of violators of criminal laws pertaining to the highway was involved in property damage and was thus subject to the "disclosure requirements" of the hit-and-run law in *Byers*. By the California court's analysis, the imposition of use restrictions in *Marchetti* thus would have had "a much more sweeping effect" than did the analogous imposition in *Byers*.[87]

In distinguishing the hampering effect found in *Byers* with that discussed in *Marchetti*, the court also noted that the *Byers* restrictions would not be imposed *across* jurisdictional lines. In *Marchetti*, the federal government had urged the United States Supreme Court to impose a use restriction on *state* prosecution.[88] In *Byers*, on the other hand, the

84. In *Marchetti*, information obtained through the wagering tax laws was statutorily required to be provided to state and federal prosecuting authorities. 390 U.S. at 46-48.

85. 71 Cal. 2d at 1054-55, 458 P.2d at 475-76, 80 Cal. Rptr. at 563-64. If legislation were enacted permitting the use of evidence compelled by the hit-and-run law, then "the privilege could be claimed in appropriate situations." *Id.* at 1055, 458 P.2d at 476, 80 Cal. Rptr. at 564. Concerning judicial review that avoids couching a judicial solution to a constitutional problem in absolute terms and which permits a legislature to find an alternative course, see L. LUSKY, BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION (1975).

86. That its proposed immunity was not transactional was important to the court's analysis of hampering effect: "[A]n excessive concern for the government's burden of showing that evidence used in a prosecution is untainted is inherently at odds with the Supreme Court's recently clarified basic position that immunity sufficient to justify compelling a disclosure otherwise privileged need not be complete immunity from prosecution." 71 Cal. 2d at 1052-53, 458 P.2d at 474, 80 Cal. Rptr. at 562. It seems fair to say that the California Supreme Court could not have been as free-wheeling in *Byers* or in subsequent decisions had the Supreme Court not lightened the immunity vehicle to its current use and derivative use form.

87. *Id.* at 1056, 458 P.2d at 476, 80 Cal. Rptr. at 564.

88. 390 U.S. at 58-59.

California court saw "no problem of conflicting state and federal interests."[89] There would be no hampering of federal interests since "it is the state which both demands disclosure of information in 'hit-and-run' accidents and prosecutes those who commit criminal acts on the highways."[90]

On petition by the state, the United States Supreme Court granted certiorari and vacated the California decision.[91] In a four-member plurality opinion, Chief Justice Burger stated that California's hit-and-run statute did not compel Byers to disclose testimonial information tending to incriminate himself.[92] By refusing to accept the premise that Byers was privileged not to stop, the Supreme Court was free to avoid the issue of the California court's use restrictions and their consequences.[93]

Although the ultimate holding of *Byers v. Justice Court* was overturned, California courts have continued to rely on that part of *Byers* which the United States Supreme Court did not address—its justification for use restrictions on the basis of *Murphy* and *Marchetti*.[94] The capacity of California courts to graft judicially created immunity onto various species of civil litigation grew from the court's reliance in *Byers* on those two Supreme Court decisions. Indeed, California courts have claimed that "[t]he high court did not disagree with California's judicial declaration of immunity."[95] This claim is misleading at best; it seems fair to say that in removing the premise upon which the *Byers* restrictions rested, the Supreme Court was acting, at least in part, to avoid sustaining an immunity of which it did not approve. While the

89. 71 Cal. 2d at 1055, 458 P.2d at 476, 80 Cal. Rptr. at 564.

90. *Id.* In fact, the use restrictions of *Byers* could hamper federal prosecutions. If a motorist has driven a stolen vehicle across state lines or has committed some other federal offense, an obeyed requirement that he or she stop after an accident might produce evidence relevant in federal courts. Perhaps in recognition of this problem, the court may have attempted to limit its use restrictions to state prosecutions for accident-related crimes. "[W]e . . . hold that where compliance with § 20002 of the Vehicle Code would otherwise be excused by an assertion of the privilege, compliance is, as in other cases, mandatory and state prosecuting authorities are precluded from using the information disclosed as a result of compliance or its fruits in connection with any criminal prosecution related to the accident." *Id.* at 1056-57, 458 P.2d at 477, 80 Cal. Rptr. at 565.

91. California v. Byers, 402 U.S. 424 (1971).

92. *Id.* at 427, 431-32.

93. *See id.* at 425-27, 427 n.3; *id.* at 434, 458 (Harlan, J., concurring).

94. *See, e.g.*, Daly v. Superior Court, 19 Cal. 3d 132, 143-44 & n.5, 560 P.2d 1193, 1200-01 & n.5, 137 Cal. Rptr. 14, 21-22 & n.5 (1977); People v. Superior Court (Kaufman), 12 Cal. 3d 421, 428-29, 525 P.2d 716, 720-21, 115 Cal. Rptr. 812, 816-17 (1974); Tarantino v. Superior Court, 48 Cal. App. 3d 465, 470, 122 Cal. Rptr. 61, 63 (1975).

95. DeCamp v. First Kensington Corp., 83 Cal. App. 3d 268, 147 Cal. Rptr. 869, 876 (1978); Tarantino v. Superior Court, 48 Cal. App. 3d 465, 470, 122 Cal. Rptr. 61, 63 (1975).

Supreme Court's four-member plurality did not expressly consider the issue of judicially declared immunity, Justice Harlan squarely addressed this issue in a concurring opinion.[96] This article considers Justice Harlan's discussion[97] after first examining how the California Supreme Court built upon *Byers* to authorize discretionary immunities in civil litigation.

III. Judicially Created Immunities in the Civil Context

A. *People v. Superior Court (Kaufman)*

In 1974, three years after *California v. Byers*, the California Supreme Court relied on *Byers v. Justice Court* to find authority for discretionary immunity in the context of civil discovery. In *People v. Superior Court (Kaufman)*,[98] the state brought a civil action against Kaufman and others, alleging that the defendants had engaged in consumer fraud and unfair competition. The state took the oral deposition of defendant Kaufman and questioned him about the alleged fraud; he refused to answer, invoking his privilege against self-incrimination.[99]

The state moved for an order limiting use of the deposition to the civil proceeding and providing "an effective grant of immunity."[100] The superior court denied the motion on the ground that it lacked jurisdiction to make such an order. The state ultimately sought a writ from the California Supreme Court and contended that California Code of Civil Procedure section 2019(b)(1) grants the trial court the necessary jurisdiction.[101] Section 2019(b)(1), which is part of California's civil discovery law, relates to oral depositions; it provides in part, "the court may make any . . . order which justice requires to protect

96. *See* 402 U.S. at 434-59.

97. *See* notes 152-59 and accompanying text *infra*.

98. 12 Cal. 3d 421, 525 P.2d 716, 115 Cal. Rptr. 812 (1974).

99. *Id.* at 424, 525 P.2d at 718, 115 Cal. Rptr. at 814.

100. *Id.* at 425, 525 P.2d at 718, 115 Cal. Rptr. at 814.

101. *Id.*; CAL. CIV. PROC. CODE § 2019(b)(1) (West Supp. 1981). The court in *Kaufman*'s reliance on § 2019(b)(1) for granting immunity has been criticized for its failure to show how an immunity order protects a party or witness from "annoyance, embarrassment or oppression." *See* Note, *Immunity Grants for Discovery in Private Civil Litigation*, 66 CALIF. L. REV. 233, 238-39 (1978). *But see* Note, *New Limitations on the Privilege Against Self-Incrimination*, 64 CALIF. L. REV. 554, 558-60 (1976). In *Daly v. Superior Court* the California Supreme Court explained that "[t]he protective order approved in *Kaufman* was not for the benefit of the witness, who would have preferred to stand on the privilege, but was for the protection of the right of the party seeking the order (the People) to obtain discovery without being blocked by a claim of privilege that the protection order could effectively dispel." 19 Cal. 132 at 147 n.9, 560 P.2d 1193 at 1203 n.9, 137 Cal. Rptr. 14 at 24 n.9 (1977) (citation omitted). For the federal rule analogous to § 2019(b)(1), see FED. R. CIV. P. 26(c). *See also* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2035-2044 (1970).

the party or witness from annoyance, embarrassment, or oppression." The court held that section 2019(b)(1) vests the trial court with jurisdiction to issue a protective order providing Kaufman with use and derivative use immunity.[102] A peremptory writ then was issued directing the trial court to fashion a protective order and to compel Kaufman "to respond on deposition and trial[103] to all proper inquiries including those which, except for the protective order, would tend to incriminate him."[104]

Unlike the immunity proposed in *Marchetti* and declared in *Byers*, the immunity authorized in *Kaufman* was neither automatic nor designed to save an otherwise unconstitutional statute. The *Kaufman* grant was a discretionary protective order authorized to facilitate discovery.[105] In finding authority for this immunity, the court in *Kaufman* rested its decision on section 2019(b)(1) and *Byers v. Justice Court*.

The court's interpretation of section 2019(b)(1) consisted of three parts. First, the court relied on precedent which indicated that section 2019(b)(1) vests discretion in the trial court to control the scope and use of a deposition in circumstances arguably analogous to *Kaufman*.[106] Next, it distinguished decisions which suggested that immunity could not be granted unless rooted in specific legislative authorization distinct from the general authorization of section 2019(b)(1).[107] Finally, the court turned to *Byers* for the general principle that immunity may be implied from a statute and that no express statutory authorization is required.[108] The court, however, not only drew from this general principle of *Byers* to establish in *Kaufman* that the trial court has discretionary authority to grant immunity, but also employed the criteria used in *Byers* for the imposition of automatic use restrictions.[109] In doing so, the court incorporated into a discretionary context the criteria for implying an automatic immunity.

102. 12 Cal. 3d at 429, 433, 525 P.2d at 721, 724, 115 Cal. Rptr. at 817, 820.

103. Concerning the extension of the order beyond the deposition to trial and the use of § 2019(b)(1) outside the context of a deposition, see note 183 *infra*.

104. 12 Cal. 3d at 433, 525 P.2d at 724, 115 Cal. Rptr. at 820.

105. The grant, it seems, was more than authorized—it was required. The trial court was left with no discretion other than the fashioning of the precise order. *Id.* Presumably, the record before the California Supreme Court established that the plaintiff in *Kaufman* was entitled to a protective order and that a refusal to issue the order would have been an abuse of discretion.

106. *Id.* at 425-26, 525 P.2d at 718-19, 115 Cal. Rptr. at 814-15.

107. *Id.* at 426-28, 525 P.2d at 719-20, 115 Cal. Rptr. at 815-16.

108. *Id.* at 427-28, 525 P.2d at 720-21, 115 Cal. Rptr. at 815-16.

109. *Id.* at 428-29, 525 P.2d at 721, 115 Cal. Rptr. at 817.

In *Byers*, the California Supreme Court had couched its use restriction analysis in *Marchetti's* language concerning the hampering of criminal prosecutions and the determination of legislative intent.[110] With respect to legislative intent, the court had built on *Marchetti* by suggesting that if the legislature disagreed with the court's implied immunity, the lawmakers were free to enact contrary legislation.[111] In *Kaufman*, the court summarized *Byers* in the following terms:

> It was concluded in *Byers* that as the imposition of use restrictions would not (1) frustrate any apparent legislative purpose behind the "hit and run" statute, (2) unduly hamper criminal prosecutions of drivers involved in such accidents, or (3) preclude the Legislature from overriding the judicial grant of immunity if it wished to do so, the court was authorized to grant immunity and impose a proper use limitation without infringing constitutional rights against self-incrimination and notwithstanding the absence of any specific legislative authorization.[112]

In applying the *Byers* rationale, the court in *Kaufman* concluded first that the requested immunity grant "would not frustrate but would further the legislative purpose of suppressing deceptive advertising,"[113] and second that the immunity grant would not unduly hamper the prosecution of persons who, in the judgment of law enforcement officials, should be subjected to criminal proceedings.[114] Finally, as in *Byers*, the court stated that if its statutory interpretation "does not conform to legislative intent, [the legislature] remains free to redefine the limits of authorization."[115]

In applying the three criteria of *Byers*, the court in *Kaufman* ostensibly was determining only whether or not the trial court had jurisdiction under section 2019(b)(1) to grant immunity. In fact, however, without discussing further the propriety of an immunity grant, the court ruled that an immunity order should issue.[116] The failure of the *Kaufman* court to go beyond the expressed jurisdictional issue and to discuss the discretional propriety of the protective order suggests that the court collapsed into a single discussion the issues of jurisdiction and discretion.[117] Of the three points considered in that discussion, only the

110. *See* notes 83-90 and accompanying text *supra*.

111. 71 Cal. 2d at 1056, 458 P.2d at 477, 80 Cal. Rptr. at 565.

112. 12 Cal. 3d at 428, 525 P.2d at 721, 115 Cal. Rptr. at 817 (citations omitted).

113. *Id.* at 428-29, 525 P.2d at 721, 115 Cal. Rptr. at 817.

114. *Id.* at 429, 525 P.2d at 721, 115 Cal. Rptr. at 817.

115. *Id.*

116. *See id.* at 429-33, 525 P.2d at 721-24, 115 Cal. Rptr. at 817-20.

117. *See* People v. Superior Court (Taylor), 53 Cal. App. 3d 996, 1001, 126 Cal. Rptr. 297, 300 (1975) (reversing a trial court that in the course of discovery in a civil action, refused to grant immunity upon the People's request, and stating, "*Kaufman* intimates that the trial court has no discretion to flatly refuse to immunize a defendant against prosecution").

first two—conformity with legislative intent and absence of undue hampering of criminal prosecutions—seem to have application beyond the jurisdictional issue.[118] Both these elements of the *Byers* rationale were inherited from the language of *Marchetti* and here were applied as apparent criteria for granting a discretionary protective order in the course of civil litigation. The second criterion, the absence of undue hampering, received only cursory consideration. Presumably, the court did not consider hampering of criminal prosecutions a problem, since the state itself both had brought the action and had requested the immunity order.[119] That the second criterion would require elaboration became apparent in *Daly v. Superior Court*.[120]

B. *Daly v. Superior Court*

In *Daly*, the plaintiffs filed an action for wrongful death and other torts[121] against certain labor organizations and union personnel. Having alleged that the defendants killed the decedent because he had refused to participate in a newspaper strike,[122] the plaintiffs proceeded to depose certain individual defendants. In the course of these depositions, each of the defendants, like Mr. Kaufman in the prior case, invoked his privilege against self-incrimination. The plaintiffs responded by asking the superior court to grant an immunity order nullifying the claim of privilege asserted by the deponents. When the trial court denied their request, the plaintiffs sought a writ of mandate directing issuance of an immunity order.[123]

In seeking the writ from the California Supreme Court, the plaintiffs relied on *Kaufman*. The California Supreme Court distinguished *Kaufman*, noting that the *Daly* litigation was between private par-

But cf. Rysdale v. Superior Court, 81 Cal. App. 3d 280, 146 Cal. Rptr. 633 (1978) (holding that in a zoning violation action brought by the city of Santa Barbara, a city requested immunity grant to only two of several defendants was an abuse of discretion).

118. The third point, that the legislature should remain free to "redefine the limits of [the court's] authorization," 12 Cal. 3d at 429, 525 P.2d at 721, 115 Cal. Rptr. at 817, seems a consideration in statutory interpretation rather than in application of a predefined statute.

119. *See* Appeal of Starkey, 600 F.2d 1043, 1047 (8th Cir. 1979) (stating that the state attorney general in a related action conceded that the deposition testimony he was seeking would be tainted by prior grand jury testimony). *See also In re* Corrugated Container Anti-Trust Litigation, 620 F.2d 1086, 1092 n.5 (5th Cir. 1980) (suggesting that the concession in *Starkey* may have operated as a grant of immunity where the state attorney general was "the only potential prosecutor").

120. 19 Cal. 3d 132, 560 P.2d 1193, 137 Cal. Rptr. 14 (1977).

121. Plaintiffs sought damages for battery and intentional infliction of emotional distress as well as for wrongful death. *Id.* at 138, 560 P.2d at 1197, 137 Cal. Rptr. at 18.

122. *Id.* at 138-39, 560 P.2d at 1197, 137 Cal. Rptr. at 18.

123. *See id.* at 137-39, 560 P.2d at 1196-97, 137 Cal. Rptr. at 17-18.

ties.[124] While in *Kaufman*, the state had chosen both to file a civil action and subsequently to seek an immunity order, in *Daly* neither the decision to file nor the decision to seek immunity had been made by a representative of the State.[125]

The court in *Daly* stated that prosecuting authorities have an interest in any decision to grant immunity to a deponent,[126] observing that in any subsequent criminal proceeding the prosecution would bear the "heavy burden" of proving that its evidence was untainted by testimony compelled under an immunity grant.[127] The court concluded that "to interpose such an obstacle to criminal proceedings over the objection of prosecuting authorities would constitute improper judicial interference with prosecutorial discretion."[128]

The court held that in order to avoid improper judicial interference, use and derivative use immunity[129] under section 2019(b)(1) should not be granted unless detailed conditions are met. Although the conditions *Daly* placed on the granting of immunity cannot be found in *Kaufman*, the criteria used in *Kaufman* were not repudiated. In *Daly*, as in the prior decision, conformity with legislative intent and the absence of undue hampering of criminal prosecutions constituted the criteria for determining both the jurisdiction and the propriety of an immunity grant.[130]

---

124. *Id.* at 138, 560 P.2d at 1197, 137 Cal. Rptr. at 18.

125. *Id.* Although both the California Attorney General and the Appellate Committee of the California District Attorneys Association had filed *amicus* briefs, *id.* at 141 n.3, 560 P.2d at 1199 n.3, 137 Cal. Rptr. at 20 n.3, no representative of the state had appeared before the trial court, *id.* at 138, 560 P.2d at 1197, 137 Cal. Rptr. at 18.

126. *Id.*

127. *Id.* (citing Kastigar v. United States, 406 U.S. 441, 460-61 (1972)).

128. *Id.*

129. The court noted that use and derivative use immunity was sufficient to replace the privilege against self-incrimination and rejected the argument that § 2016(b) of the California Code of Civil Procedure, which limits the right of discovery to matters "not privileged," bars discovery from a witness protected by such immunity. *See* 19 Cal. 3d at 142-43, 151, 560 P.2d at 1200, 1205, 137 Cal. Rptr. at 21, 26. For arguments that use and derivative use immunity is insufficient to replace the privilege, see generally Kastigar v. United States, 406 U.S. 441, 462-71 (1972) (Douglas and Marshall, JJ., dissenting); Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791 (1978). For the view that § 2016(b) may bar discovery notwithstanding a grant of immunity, see Note, *Immunity Grants for Discovery in Private Civil Litigation*, 66 CALIF. L. REV. 233, 238-39 (1978); Note, *New Limitations on the Privilege Against Self-Incrimination*, 64 CALIF. L. REV. 554, 558-60 (1976).

130. The third criterion inherited from *Byers*—that the legislature not be precluded from overriding the authorization of the immunity grant—was not mentioned in *Daly*. Perhaps the absence of this third factor reflects an emphasis on application of a pre-established statutory interpretation. If the distinction between criteria for jurisdiction under § 2019(b)(1) and criteria for the exercise of discretion under that section is more than semantics, the emphasis of *Daly* seems to rest with the latter. *See* note 118 and accompanying text *supra*.

The absence of undue hampering of criminal prosecutions was the principal concern in *Daly*.[131] In the context of the hit-and-run statute in *Byers*, any use restrictions, by necessity, arose automatically; the court did not have the option of developing rules to protect prosecution interests or to limit the granting of immunity.[132] Though the grant was discretionary in *Kaufman*, the court apparently saw no immediate need to develop rules protecting prosecutorial interests, possibly because the request for use restrictions had been made by a representative of the state.[133] The court in *Daly*, however, was justifiably concerned that if use restrictions were available to private litigants without specific protections, the public's interest in effective prosecution of crime would be jeopardized.

In formulating conditions for discretionary use restrictions, the court declined the proposals both of the plaintiffs, who favored easy access to use restrictions, and of *amici curiae*, who represented law enforcement interests and were protective of traditional prosecutorial prerogatives. The plaintiff had suggested that prosecutorial interests would be adequately protected by an order sealing disclosed information so that statements otherwise privileged would not be disclosed beyond the confines of the civil suit.[134] In rejecting this proposal, the court noted that further evidence may be developed on the basis of sealed testimony and that ultimately, at time of trial, both sealed evidence and its fruits may be introduced.[135] The court stated that the existence and possible availability of such evidence could force prosecutors to prove that their own evidence is untainted, and the court de-

131. The court also expressed concern for legislative intent but related this concern to the issue of hampering criminal prosecutions. Plaintiffs had argued that the trial court was compelled to grant immunity under the general rule that discovery statutes are to be liberally construed in favor of disclosure in the absence of a well-established cause for denial. *See* Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 377-78, 364 P.2d 266, 276, 15 Cal. Rptr. 90, 100 (1961). In response to plaintiffs' argument, the court stated in *Daly*, "[W]e do not find in the discovery statutes any legislative preference for imposing the burdens of use immunity upon prosecuting authorities whenever necessary to the obtaining of discovery by private parties." 19 Cal. 3d at 144, 560 P.2d at 1201, 137 Cal. Rptr. at 22. Although rejecting the plaintiffs' extreme view of legislative preference, the court reached its holding "in light of the legislative policies promotive of discovery." *Id.* at 147, 560 P.2d at 1202, 137 Cal. Rptr. at 23.

132. The dilemma of an accident-involved motorist is immediate. The motorist must either stop and thus subject himself to possible criminal charges or drive on and thereby violate the hit-and-run law. The motorist's choice must be made promptly and does not permit judicial or prosecutorial participation.

133. *See* 12 Cal. 3d at 425, 525 P.2d at 717-18, 115 Cal. Rptr. at 813-14.

134. *Daly*, 19 Cal. 3d at 145, 560 P.2d at 1201, 137 Cal. Rptr. at 22.

135. *Id.*, 560 P.2d at 1201-02, 137 Cal. Rptr. at 22-23.

clined to impose this burden on them.[136] The court also declined the suggestion of the California Attorney General and the California District Attorneys Association that the request of a prosecuting agency is a precondition of an immunity grant. Although noting that in California a prosecution request is statutorily required for a grant of transactional immunity to a witness in a criminal proceeding,[137] the court stated that in a civil context no such request is required.[138]

To accommodate both the private interest of a civil litigant and the public interest in effective prosecution, the court in *Daly* constructed a set of procedural rules for discretionary immunity. Under these judicially created rules, prior to the issuance of use restrictions, the party seeking the order has the burden of notifying three prosecution agencies: (1) the district attorney of the county,[139] (2) the California Attorney General, and (3) the United States Attorney for the district in which the county is located.[140] In order that prosecutors may know the scope of the immunity sought, each notice must state "the subject matter of the inquiries to which the witness' answers are to be immunized from use or derivative use."[141] Further, the statement, when incorporated into an ultimate immunity order, must "provide the witness with a clear guide to what questions are within and what are without the

136. *Id.*

137. *Id.* at 146, 560 P.2d at 1202, 137 Cal. Rptr. at 23. *See* CAL. PENAL CODE §§ 1324, 1324.1 (West 1970 & Supp. 1981). *Cf.* Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966) (Burger, J.) (holding that a judicial creation of witness immunity rights for a criminal defendant would violate principles of separation of powers), *cert. denied*, 388 U.S. 921 (1967); Note, *Defense Witness Immunity*, 9 HASTINGS CONST. L.Q. 199 (1981); Note, *"The Public Has a Claim to Every Man's Evidence": The Defendant's Constitutional Right to Witness Immunity*, 30 STAN. L. REV. 1211 (1978) (arguing that a criminal defendant, like the prosecution, should have the right to request and obtain witness immunity). *But cf. Earl*, 361 F.2d at 534 n.1 (dicta that such witness immunity rights nonetheless may be available in narrow circumstances).

138. 19 Cal. 3d at 147, 560 P.2d at 1202, 137 Cal. Rptr. at 23. "The protection of prosecutorial interests in the granting of use and derivative use immunity in aid of discovery by a private litigant lies not in any rigid requirement of a prosecutorial request for immunity but in the more general condition stated in *Kaufman* and *Byers* that the granting of immunity not 'unduly hamper' subsequent criminal prosecutions." *Id.*

139. The court in *Daly* did not specify which county; presumably, it is the county where the civil action is pending. If criminal charges could be brought in one or more counties, the California Attorney General could be expected to notify other district attorneys as necessary. *Id.* at 149 & n.14, 560 P.2d at 1204 & n.14, 137 Cal. Rptr. at 25 & n.14. Additionally, "the trial court can exercise its . . . discretion to require that notice be sent to one or more designated prosecuting officials [including district attorneys, city attorneys, and city prosecutors]." *Id.* at 149-50 n.14, 560 P.2d 1204 n.14, 137 Cal. Rptr. at 25 n.14.

140. *Id.* at 149, 560 P.2d at 1204, 137 Cal. Rptr. at 25.

141. *Id.* at 148, 560 P.2d at 1203, 137 Cal. Rptr. at 24.

immunity grant."[142] Once notice is received by the essential agencies, the burden of objecting to the proposed grant rests with the prosecutors.[143] After adequate notice, if no prosecutor objects to the proposal, the immunity order may issue.[144]

To protect the interests of law enforcement, the court in *Daly* stated that if a prosecuting attorney does object to the proposed grant and supports the objection with a proper declaration, the court may not grant immunity. In his declaration, the prosecuting attorney must state "that he is familiar with the notice and has reasonable grounds to believe that the proposed grant of immunity *might* unduly hamper the prosecution of a criminal proceeding."[145] The court specifically noted that undue hampering may be found in either a current or future criminal proceeding[146] and that the trial court may *not* require a prosecutor "to amplify or justify the submitted declaration"[147] or "to assess the nature or degree of the impact the immunity grant would have upon prosecutorial functions."[148] The court stated that if a private litigant considers a prosecutor's objection unjustified, the litigant's remedy is either to persuade the prosecutor to withdraw the objection, to reframe the proposed immunity order, or to postpone examination of the witness until the grounds for claiming the privilege have been removed.[149]

C. A Critique of *Byers* and *Kaufman* in Light of *Daly*

Daly is a welcome development in California law. The *Daly* rules for discretionary use restrictions are well designed to balance relevant interests. The procedure provides civil litigants whose discovery has been blocked by a valid claim of privilege with an opportunity, though not a guarantee, of obtaining needed information. While private interests in discovery yield to governmental interests where a prosecutor properly objects to a granting of use restrictions, in many cases objection should be unnecessary. Even where a prosecutor initially objects, the requesting party has created an opportunity for discussion. In some cases, the mere fact of notice may enable an agency to insulate an in-

142. *Id.*

143. *Id.* An alternative policy of requiring an affirmative request from a prosecution agency is regarded by the court as impractical. Consideration of matters pertaining to private litigation "is not one of the official duties to which busy prosecuting attorneys feel constrained to devote their attention." *Id.*

144. *Id.*

145. *Id.* at 148, 560 P.2d at 1203-04, 137 Cal. Rptr. at 24-25.

146. *Id.* at 148 & n.12, 560 P.2d at 1204 & n.12, 137 Cal. Rptr. at 25 & n.12.

147. *Id.* at 148, 560 P.2d at 1204, 137 Cal. Rptr. at 25.

148. *Id.*

149. *Id.* at 149 & n.13, 560 P.2d at 1204 & n.13, 137 Cal. Rptr. at 25 & n.13.

vestigation from possible taint. Although the prosecutor's ultimate decision is not subject to direct judicial review, the prosecutor has an ethical obligation to act in furtherance of justice.[150] By demonstrating both the unfair consequences of his or her opponent's claim of privilege and a willingness to assist in protecting prosecution interests, the requesting party may persuade a prosecutor to withdraw an initial objection.

In light of *Daly*, the law created by *Kaufman* may require refinement. While *Kaufman* permits the trial court to protect the interests of all immediate parties, the decision fails to protect the interests of prosecution agencies not before the court. It may be argued, therefore, that the *Daly* requirements should apply equally to the *Kaufman* context. On the other hand, informal cooperation between federal, state and local prosecutors may remove any need for the formal notice and objection rights found in *Daly*.[151]

In comparing *Daly* with *Byers*, the latter displays a relative lack of concern for the impact of automatic use restrictions on criminal prosecutions. This negative impact is squarely addressed in Justice Harlan's concurring opinion in *California v. Byers*.[152] The California court's use restrictions would, he writes, "significantly impair the State's capacity to prosecute drivers whose illegal behavior caused accidents."[153] In responding to Justice Brennan, who would affirm the California decision, Harlan states:

150. "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1979).

151. Arguably, Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), would confer use and derivative use immunity in federal court where a state prosecutor, without notice to federal authorities, obtains a state immunity grant pursuant to *Kaufman*. *See* 19 Cal. 3d at 150, 560 P.2d at 1205, 137 Cal. Rptr. at 26; Tarantino v. Superior Court, 48 Cal. App. 3d 465, 470, 122 Cal. Rptr. 61, 63 (1975); City of New York v. Marchese, 74 Misc. 2d 367, 343 N.Y.S. 2d 547 (1973).

152. As Justice Harlan's vote was necessary to the five-to-four decision, his concurring opinion, 402 U.S. at 464, refutes the claim that the Supreme Court "did not disagree with California's judicial declaration of immunity [in *Byers*] . . . ." Tarantino v. Superior Court, 48 Cal. App. 3d 465, 471, 122 Cal. Rptr. 61, 63 (1975). *See* note 95 and accompanying text *supra*. Harlan's opinion has won praise for its intelligence and candor. *See* Meltzer, *Privileges Against Self-Incrimination and the Hit-and-Run Opinions*, 1971 SUP. CT. REV. 1, 3. *See also* C. MCCORMICK, MCCORMICK ON EVIDENCE § 142, at 303 n.85 (2d ed. 1972) ("In view of the strong arguments that can be made against the reasoning of the plurality opinion . . . Justice Harlan's analysis seems more satisfactory and consistent with Fifth Amendment policies"). Justice Harlan was the author of the majority opinion in United States v. Marchetti, 390 U.S. 39 (1968). *See* notes 44-50 and accompanying text *supra*.

153. 402 U.S. at 447.

> Apparently my Brother Brennan maintains that imposition of a use restriction in the circumstances of this case will not, in fact, significantly interfere with the State's ability to enforce criminal sanctions relating to driving behavior where that behavior culminates in an accident causing property damage.
>
> That is a most difficult position to maintain. By compelling Byers to stop, the State compelled Byers to focus official attention on himself in circumstances which, I agree, involved for Byers a substantial risk of self-incrimination. In this circumstance, the State, if it is to prosecute Byers after the coerced stop, will bear the burden of proving that the State could have selected Byers out from the general citizenry for prosecution even if he had not stopped. With respect to automobile drivers, that would be a heavy burden indeed. I doubt this burden could be met in most cases of this sort consistent with a good-faith judicial application of the rules relating to proof of an independent source of evidence.[154]

By adopting a balancing approach, Justice Harlan ultimately concludes that the purposes of the Fifth Amendment do not warrant imposition of use restrictions as a condition on the enforcement of the hit-and-run statute.[155] The consequences of imposing such use restrictions, in fact, force Harlan to take this position notwithstanding the "substantial risk of self-incrimination"[156] imposed by the hit-and-run law.

Would Justice Harlan similarly have opposed the immunity grant in *Daly*? While Justice Harlan opposed the *Byers* automatic immunity, his balancing approach leaves open the possibility of use restrictions in other circumstances.[157] If the Supreme Court today were faced with the discretionary immunity grant of *Daly*, its fear of burdening government with the task of proving the independence of its evidence would be assuaged by the notice and objection procedure of that decision.[158] Such a procedure is not available in the *Byers* context in which only automatic immunity will suffice.[159] Where this procedure is available,

154. *Id.* at 443-44 & n.4.

155. *Id.* at 458.

156. *Id.* at 444 n.4, *quoted in* text accompanying note 154 *supra*.

157. *See id.* at 458.

158. *Cf.* Daly v. Superior Court, 19 Cal. 3d at 150, 560 P.2d at 1205, 137 Cal. Rptr. at 26 (the court suggests, in dicta, that the immunity granted in *Daly* will be binding in federal prosecutions: "If accommodation to state governmental interests in prosecuting crime is sufficient to subject federal prosecutors to the burden of use immunity conferred without prior notice or consultation [Murphy v. Waterfront Comm'n, 378 U.S. 52], surely accommodation to the state's interest in the orderly resolution of civil disputes justifies the far lesser burden of use immunity granted only after the federal prosecutor as well as state prosecuting officials have been given adequate notice and opportunity to interpose a conclusive objection").

159. *See* note 132 *supra*.

however, it is preferable to the inflexible and burdensome restrictions of *Byers*.

IV. The Progeny of *Byers*: *DeCamp v. First Kensington Corporation*

Read broadly, *Byers v. Justice Court* stands for the proposition that a statute compelling disclosure of potentially incriminating information may give rise to automatic use restrictions. Under this liberal reading, a party or witness disclosing information pursuant to a statute in the course of civil litigation would be entitled to use and derivative use immunity in any criminal prosecution. Thus, where civil litigation precedes or accompanies a criminal prosecution, the government could be forced to prove that its evidence has not been tainted by information disclosed pursuant to statute.[160] Arguably, when a statute compels disclosure, the discretionary grants of *Kaufman* and *Daly* would be unnecessary because statutorily compelled information and its fruits would be automatically subject to use restrictions.[161]

160. The investigation and prosecution of white-collar crime enhances the likelihood of related criminal and civil litigation. *See* Bennett, *Representing a Defendant in Simultaneous Criminal and Administrative Proceedings: A Practical Approach*, 27 AM. U.L. REV. 381 (1978); Fiske, *Foreword to White Collar Crime: A Survey of Law*, 18 AM. CRIM. L. REV. 165, 165-67 (1980). For a discussion of problems of concurrent litigation from a defense perspective, see Bennett, *supra*; Brodsky, *Self-Incrimination in White-Collar Fraud Investigations: A Practical Approach for Lawyers*, 12 CRIM. L. BULL. 125 (1976). *See also* Note, *Concurrent Civil and Criminal Proceedings*, 67 COLUM. L. REV. 1277 (1967); Note, *Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings*, 76 COLUM. L. REV. 674 (1976). Concerning the possibility of criminal non-support charges following a civil determination of paternity, see Salas v. Cortez, 24 Cal. 3d 22, 28-29, 593 P.2d 226, 230-31, 154 Cal. Rptr. 529, 533-34 (1979), Gonzales v. Superior Court, 117 Cal. App. 3d 57, 178 Cal. Rptr. 358, (1980); Smith v. Superior Court, 110 Cal. App. 3d 422, 168 Cal. Rptr. 24 (1980).

161. The danger of automatic restrictions is apparent in the history of the first federal immunity statute, as documented by Robert G. Dixon, Jr. *See* Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 GEO. WASH. L. REV. 447, 450-54 (1954). *See also* Dixon, *Comment on Immunity Provisions*, *in* 2 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAW 1405, 1406-07 (1970). The statute, enacted by the thirty-fourth Congress in 1857, was intended to aid an investigation of alleged congressional corruption. The Act provided in part, "No person examined and testifying before either House of Congress, or any committee of either House, shall be held to answer criminally in any court of justice, or subject [sic] to any penalty or forfeiture for any fact or act touching which he shall be required to testify . . . ." *Id.* at 1407. Under this formula, a witness could acquire transactional immunity simply by testifying before a congressional committee and without invoking the Fifth Amendment. *Id.* at 1406-07. Dixon writes, "In their zeal to give investigating committees effective power to compel testimony, the members of the thirty-fourth Congress had phrased an immunity provision which could be, and soon was, abused. By cleverly provoking an inquiry and getting the right questions and answers into the record, a criminal could take advantage of the clause extending immunity '. . . for any

While it may seem that a reading of *Byers* which supports automatic immunity for civil litigants would be unwarranted,[162] such a reading has been adopted by a California appellate court. In *DeCamp v. First Kensington Corporation*,[163] the California Court of Appeal, Second District, imposed automatic use restrictions for the benefit of noncorporate defendants in civil actions. In considering the automatic immunity of *DeCamp*, it will be argued that this immunity, unlike the discretionary grants of *Kaufman* and *Daly*, unduly hampers criminal prosecutions and that *Daly*-like procedures should be employed in the *DeCamp* context.

In *DeCamp*, the plaintiff filed a verified complaint naming an individual and a corporation as defendants and seeking compensatory and punitive damages. The verified complaint alleged that the defendants, by false promises, had induced the plaintiff to give $35,000 to the defendant corporation.[164] After filing demurrers, which were overruled, the defendants filed a general denial, which was not verified.[165] The answer contained an explanation for this failure to verify and, presumably, for the failure to file a specific denial: "[T]o require these answering Defendants to file a verified answer to portions of Plaintiff's Complaint could and would violate these answering Defendants' rights afforded under the Fifth and Fourteenth Amendments of the United States Constitution."[166]

The plaintiff filed a motion to strike the answer or, alternatively, for either a judgment on the pleadings or a summary judgment. In making this motion, the plaintiff relied on California Code of Civil

---

fact or act touching which [sic] he shall be required to testify.' It was stated in Congress that 'every day persons are offering to testify before the investigating committees of the House in order to bring themselves within the pardoning power of the act of 1857.' " Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 GEO. WASH. L. REV. 447, 453-54 (1954) (footnotes omitted).

While an automatic transactional immunity such as that found in the 1857 Act creates a greater potential for abuse than an automatic use immunity, both lack the requirement that the privilege be expressly asserted, and both seem to deny the government control over the scope of the immunity imposed. *See* Dixon, *Comment on Immunity Provisions*, *supra*, at 1406, 1416-17, 1422. "All commentators recommend, and principle and logic seem to dictate, abolishing all 'automatic' immunity language [from federal immunity statutes] and adopting 'claim language' as the proper mode for a compulsory testimony act." *Id.* at 1422. *See also* United States v. Monia, 317 U.S. 424 (1943).

162. At least it would seem unwarranted from this author's reading of *Byers* for the reasons discussed in text following note 174 *infra*.

163. 83 Cal. App. 3d 268, 147 Cal. Rptr. 869 (1978).

164. *Id.* at 271, 147 Cal. Rptr. at 870-71.

165. *Id.*

166. *Id.*

Procedure sections 431.30 and 446.[167] Section 431.30 provides, in part, that a general denial is permitted only when a complaint is not verified;[168] section 446 provides, in part, that when a complaint is verified the answer shall also be verified.[169] In response to the plaintiff's motion, the court first gave the defendants further opportunity to conform to the verification requirement of section 446. When the defendants did not comply, the trial court granted the plaintiff's motion to strike the unverified answer and, upon entry of default against the defendants, issued judgments for the plaintiff.[170]

On appeal, the appellate court affirmed the default judgment against the corporate defendant on the grounds that a corporation enjoys no privilege against self-incrimination.[171] As to the individual defendant, the court reversed and ruled that the defendant was entitled to another opportunity to file a verified answer.[172] The court based its ruling first on a determination that section 446, like the hit-and-run statute in *Byers*, violates the privilege against self-incrimination, and second by a decision, as in *Byers*, to save the statute by implying use and derivative use immunity.[173] The implied immunity extended to the contents of the verified answer and its fruits.[174] Since the *DeCamp* immunity was implied from a statute, it is automatic and apparently extends to all defendants enjoying the privilege who file potentially self-incriminating verified answers in California courts.

The decision in *DeCamp* contained at least two errors. Central to both of these errors is a mistaken application of *Byers*. By treating *DeCamp* as analogous to *Byers*, the appellate court ignored the *Daly* procedures designed to protect law enforcement interests. By imposing an automatic immunity where it was not needed and did not further law enforcement interests, the court exceeded its jurisdiction.

The court in *DeCamp* first erred in failing to ask whether the individual defendant had effectively asserted his privilege against self-incrimination. The defendant had filed a general denial. He had justified the failure to file a verified answer on the basis of a general claim of privilege "under the Fifth and Fourteenth Amendments of the

167. *Id.* at 272, 147 Cal. Rptr. at 871.
168. CAL. CODE CIV. PROC. § 431.30 (West Supp. 1981).
169. CAL. CODE CIV. PROC. § 446 (West Supp. 1981).
170. 83 Cal. App. 3d at 271, 272, 147 Cal. Rptr. at 871.
171. *Id.* at 280-82, 284, 147 Cal. Rptr. at 876-78, 879.
172. *Id.* at 284, 147 Cal. Rptr. at 879.
173. *Id.* at 274-80, 147 Cal. Rptr. at 872-76.
174. *Id.* at 277-78, 147 Cal. Rptr. at 874-75.

United States Constitution."[175] Even if all the allegations in the complaint called for an incriminatory response, the defendant should have been required to assert separately his privilege in response to particular allegations.[176] The court might have interpreted section 446 to require verification of those responses which could be answered without infringing upon the privilege; as to the remaining matters, a general denial might have been permitted. While such an interpretation may not be apparent in the language of the statute or its legislative history, it is no less logical—and substantially less hazardous—than creating automatic use restrictions for a broad class of noncorporate defendants.

175. 83 Cal. App. 3d at 271, 147 Cal. Rptr. at 871. Apparently, both the individual and corporate defendants relied totally on federal law; no claim of privilege was asserted on independent state grounds. *See* People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976) (asserting independent state grounds and refusing to follow Harris v. New York, 401 U.S. 222 (1971)); CAL. CONST. art. I, § 15 (West Supp. 1981); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

176. The time at which a defendant may assert his privilege against self-incrimination depends upon the nature of the proceedings. A defendant in a criminal case may assert his privilege prior to any interrogation of him, since the privilege protects an accused in a criminal case from being called to the witness stand and testifying. *See* CAL. EVID. CODE § 930 (West 1966). This is similarly true of juvenile proceedings, which are regarded as "criminal" for purposes of the privilege against self-incrimination, *In re* Gault, 387 U.S. 1, 49 (1967), and of contempt proceedings, which in California are made criminal by statute, Killpatrick v. Superior Court, 153 Cal. App. 2d 146, 148-49, 314 P.2d 164, 165-66 (1957). *See* CAL. PENAL CODE § 166 (West 1970).

Where a privilege has been asserted by someone other than the defendant in a "criminal" trial, California courts have held that the privilege may be invoked only in response to particular questions. *See* Black v. State Bar, 7 Cal. 3d 676, 688, 499 P.2d 968, 974, 103 Cal. Rptr. 288, 294 (1972) (dicta that attorney in disciplinary proceeding may not refuse to be called to testify); *Ex parte* Stice, 70 Cal. 51, 53, 11 P. 459, 460 (1886) (nondefendant witness in a criminal case refuses to be sworn; finding of contempt upheld); McComb v. Superior Court, 68 Cal. App. 3d 89, 98-99, 137 Cal. Rptr. 233, 237-38 (1977) (justice in judicial fitness proceeding may not refuse to submit to deposition on grounds of self-incrimination; contempt order vacated on other grounds); Fielder v. Berkeley Properties Co., 23 Cal. App. 3d 30, 40, 99 Cal. Rptr. 791, 797 (1972) (privilege does not permit subpoenaed witness to refuse to appear and testify at an administrative hearing); People v. Whelchel, 255 Cal. App. 2d 455, 461, 63 Cal. Rptr. 258, 263 (1967) (privilege does not permit person subject to narcotic addiction rehabilitation proceeding to refuse to be called as a witness or to refuse to testify).

Where the privilege is reasonably asserted in response to particular questions, however, contempt citations and orders to compel are improper. *See* Zonver v. Superior Court, 270 Cal. App. 2d 613, 76 Cal. Rptr. 10 (1969) (writ issued restraining trial court from compelling answers to identified interrogatories and generically described questions on deposition); Peck's Liquor, Inc. v. Superior Court, 221 Cal. App. 2d 772, 34 Cal. Rptr. 735 (1963) (writ issued prohibiting trial court from compelling answers to questions posed on deposition); *In re* Leavitt, 174 Cal. App. 2d 535, 345 P.2d 75 (1959) (petitioner discharged where trial court had held petitioner in contempt for refusing to answer questions posed in course of a judgment-debtor's examination); Cohen v. Superior Court, 173 Cal. App. 2d 61, 343 P.2d 286 (1959) (writ granted restraining trial court from holding Mickey Cohen in contempt for refusing to answer questions posed in a civil trial). *See also* Overend v. Superior Court, 131 Cal. 280, 63 P. 372 (1900).

The court's failure to consider the lack of specificity in the defendant's claim of privilege apparently rests on a tendency to view the facts in *DeCamp* as analogous to those in *Byers*. In *Byers*, a motorist engaged in an accident refused to stop; the manner in which he asserted his privilege was not open to refinement.[177] In *DeCamp*, on the other hand, a litigant served with a verified complaint refused to file a verified answer. The litigant had access to the court and was represented by counsel. Refinement in this context was both possible and necessary.

The tendency to view the immunity issue in *DeCamp* as analogous to that in *Byers* also apparently explains the court's second error—its treatment of section 446 as a substantive statute. Section 446, when read with section 431.30, is like other sections in the California Code of Civil Procedure that require litigants to make sworn or verified statements.[178] Although section 446 requires a verified statement at the pleading stage, it appears to be conceptually no different from statutes requiring verified or sworn responses from a party during discovery or trial.[179] Each of the statutes is designed to encourage truthful responses to questions or assertions. Unlike the substantive hit-and-run statute examined in *Byers*, these procedural statutes do not require a statement of any particular content. The content of a response to a verified complaint, interrogatory, deposition question, or question in trial is determined not by statute, but by the content of the allegations or questions to which the response is directed.

When section 446 is viewed as a procedural statute, the parallels between *DeCamp* and *Daly* become evident. The plaintiff in *Daly*, as in *DeCamp*, sought compliance with a procedural statute which required truthful responses to questions or assertions. The defendants in both cases objected by asserting their Fifth Amendment rights. The difference between the cases is that in *Daly* the objection arose during discovery, while in *DeCamp* it occurred at the time of pleading. That difference, however, does not warrant immunity grants of different forms.

---

177. *See* note 132 *supra*.

178. *See, e.g.*, CAL. CIV. PROC. CODE § 2019(c) (West Supp. 1981) (oath required of deponent in oral or written deposition); CAL. CIV. PROC. CODE § 2030(a) (West Supp. 1981) (interrogatories must be answered "separately and fully in writing under oath"); CAL. CIV. PROC. CODE § 2033(a) (West Supp. 1981) (sworn statement required to deny matters of which an admission is requested or to set forth reasons why such matters cannot truthfully be admitted or denied).

179. *See* CAL. EVID. CODE § 710 (West 1966) ("Every witness before testifying shall take an oath or make an affirmation or declaration in the form provided by law"); CAL. CIV. PROC. CODE §§ 2094-2097 (West 1955) (form of oath).

Had the appellate court considered the parallels between *DeCamp* and *Daly*, it might have examined the possibility of employing a *Daly*-like procedure in the context of *DeCamp*. Without such a procedure, "undue hampering" of criminal prosecutions is a practical certainty.[180] If *DeCamp* is the law in California, then virtually all incriminatory verified answers of noncorporate defendants are enshrouded with use and derivative use immunity. No invocation of the privilege need appear in the answer; the immunity arises automatically, as in *Byers*. If the party signing the verified answer is charged with a criminal offense related to the civil action, the prosecution will have the burden of proving that its evidence is untainted by the immunized document.[181]

180. The court in *DeCamp* took the opposite view and noted that "[a]nswers do not require a statement of evidentiary facts." 83 Cal. App. 3d at 278, 147 Cal. Rptr. at 875. While general pleading rules may only require the pleading of ultimate facts, *see id.*, the proper question seems to be not what is required, but what is permissible. Unless the *DeCamp* immunity were limited to the required statements, any statements included in the pleading presumably would be covered by use and derivative use immunity. Hence, by choosing which statements to include in his pleadings, the answering party would control the scope of his own immunity. *But see* Daly v. Superior Court, 19 Cal. 3d at 144, 560 P.2d at 1201, 137 Cal. Rptr. at 22. Even if the *DeCamp* immunity were limited to required statements—thus raising a question of what is necessary and what is superfluous in any particular pleading—the prosecutor would not control the scope of immunity; control would rest instead with the plaintiff. Thus, a collusive suit appears possible. *See* Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 GEO. WASH. L. REV. 447, 453-54 (1954).

The court's view in *DeCamp* that criminal prosecutions would not be substantially hampered by use and derivative use immunity was also supported by the claim that an admission in an answer would not operate to disclose the defendant's connection with the offense charged in the complaint since "such connection is already fully disclosed by the complaint." 83 Cal. App. 3d at 278-79, 147 Cal. Rptr. at 875. An answer, however, may contain leads not included in the complaint. Moreover, where prosecutors are faced with limited resources and a multitude of possible investigations, not all leads will receive equal priority. All else being equal, an allegation coupled with an admission would appear to be a more fruitful lead than would a mere allegation. It would seem empirically inaccurate to say that prosecutors rely upon allegations and ignore admissions. On the other hand, the court in *DeCamp* is perhaps suggesting that, as a matter of law, the fruit of an immunized answer will be protected from taint when the immunized answer is responsive to allegations independently known by the prosecution, such as allegations found in a complaint. Such a principle, however, may not square with *Kastigar v. United States*, which imposes an affirmative duty on prosecutors to prove that proferred evidence is derived from a source "*wholly* independent" of immunized testimony. 406 U.S. 441, 460 (1972) (emphasis added).

181. *See* Kastigar v. United States, 406 U.S. 441, 460-62 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 57, 79 n.18 (1964); United States v. Romano, 583 F.2d 1 (1st Cir. 1978) (affirming conviction and upholding finding that the prosecution's evidence was not obtained in violation of use immunity granted under 18 U.S.C. §§ 6001-6005); United States v. Nemes, 555 F.2d 51 (2d Cir. 1977) (reversing conviction on ground that the prosecution had not satisfied its burden of proving that its evidence had been derived from sources independent of state-immunized grand jury testimony); United States v. Hinton, 543 F.2d 1002, 1006-10 (2d Cir. 1976) (reversing conviction of one appellant on the ground, *inter alia*, that the prosecution had not satisfied its burden of proving that its evidence had been derived from

If *Daly*-like procedures were employed in the *DeCamp* context, judicial interference with the executive function of criminal prosecution would be avoided or minimized.[182] With that end in mind, the following is proposed:

(1) If an individual defendant in a civil suit responds to an allegation of a complaint by asserting his privilege against self-incrimination, any grant of immunity should be preceded by a request. The burden of filing the immunity request may be placed, as in *Daly*, on the party seeking an informative response or, in the alternative, on the

---

sources independent of federal grand jury testimony immunized under 18 U.S.C. §§ 6001-6005; several appellants whose convictions were not reversed by the Second Circuit unsuccessfully petitioned for certiorari to the Supreme Court, 430 U.S. 982, 429 U.S. 1051, 1066 (1977); 429 U.S. 980 (1976)); United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976) (reversing trial court's dismissal of an indictment and remanding to allow prosecution further opportunity to prove that the testimony of the key prosecution witness was not derived from defendant's own immunized testimony); People v. Lawrence, 25 Cal. App. 3d 498, 510, 102 Cal. Rptr. 16, 24 (1972) (affirming a murder conviction where defendant, prior to his state trial, had testified in federal court under an immunity grant, and where the immunized testimony had "no bearing or relation whatsoever" to the state prosecution). *See also* United States v. Cella, 568 F.2d 1266, 1285 (9th Cir. 1977) (citing United States v. Kurzer, 534 F.2d at 516, and approving *Kurzer*'s "perceptive discussion" of why the government's burden in proving the untainted character of its evidence is higher where immunity has been granted than where evidence has been unlawfully seized); Brennick v. Hynes, 471 F. Supp. 863 (N.D.N.Y. 1979) (denying preliminary injunction sought against state prosecutors who allegedly were using immunized testimony given by plaintiff under the Bankruptcy Act to obtain an indictment against plaintiff); *In re* Folding Carton Antitrust Litigation, 465 F. Supp. 618 (N.D. Ill.) (granting motion to compel depositions where prospective deponents could not reasonably fear criminal prosecution due to their prior immunized testimony and the scope of resulting "taint"), *vacated*, 609 F.2d 867 (1979).

182. By its terms, § 2019(b)(1) pertains to depositions, not pleadings. It may be argued, therefore, that *Daly*-like procedures, adopted in furtherance of the court's discretion under § 2019(b)(1), are beyond the court's jurisdiction where proposed for use in the context of pleadings. In *Kaufman*, however, which also involved § 2019(b)(1), the trial court was directed to fashion an immunity order which protected Kaufman at trial as well as at his deposition. 12 Cal. 3d at 433, 115 Cal. Rptr. at 820. Since trials, like pleadings, lie outside the confines of discovery, *Kaufman* appears to authorize an extension of § 2019(b)(1) immunity to the trial itself and arguably supports a discretionary immunity order at the pleading stage as well. But regardless of whether or not *Daly*-like procedures at the pleading stage are available pursuant to § 2019(b)(1), a trial court should have jurisdiction to employ the rules at the pleading stage and in other contexts. The judiciary would seem to have inherent power "to protect a party . . . from annoyance, embarrassment or oppression." *Id.* at 426, 115 Cal. Rptr. at 815. Where a protective order is needed, the apparent limitation of § 2019(b)(1) to depositions should not bar its use in other contexts. *See* Gonzales v. Superior Court, 117 Cal. App. 3d 57, 178 Cal. Rptr. 358 (1980) (authorizing the issuance of a *Kaufman* immunity order in paternity suits initiated by a district attorney where the defendants asserted their privilege against self-incrimination in response to written interrogatories); People v. Superior Court (Taylor), 53 Cal. App. 3d 996, 126 Cal. Rptr. 297 (1975) (authorizing the issuance of a *Kaufman* immunity order in a Red Light Abatement action where the defendant asserted his privilege against self-incrimination in response to written interrogatories).

party asserting the privilege and wishing to avoid a later summary judgment[183] or other injurious consequences.[184]

(2) Regardless of which party initiates the request, prosecuting authorities, as in *Daly*, should be given adequate notice and the opportunity to object.

(3) If no prosecuting authority objects, the trial court should issue an order for use and derivative use immunity limited in scope to the terms of the notice to prosecutors. If a prosecuting authority does object and an accommodation cannot be reached between the prosecutor and the requesting party, the trial court should be left with discretion to fashion an order which respects the constitutional prerogatives of the executive branch as well as the constraints of the Fifth Amendment.[185]

183. *See* James Talcott, Inc. v. Short, 100 Cal. App. 3d 504, 510, 161 Cal. Rptr. 63, 66 (1979) (holding that civil defendants who had asserted their privilege against self-incrimination in a private civil suit and who had failed to seek immunity from a federal prosecutor were not excused from their burden of producing evidence in opposition to a motion for summary judgment; partial summary judgment affirmed).

184. Notwithstanding dicta at least suggesting the contrary, *see, e.g.*, Spevack v. Klein, 385 U.S. 511, 515 (1967), stating that the Fifth Amendment prohibits imposing any sanction that makes the assertion of the privilege "costly," civil litigants have suffered injurious consequences as a result of invoking the Fifth Amendment. Where a complaining party asserts his privilege against self-incrimination in the course of discovery, the action may in some circumstances be dismissed. Lyons v. Johnson, 415 F.2d 540 (9th Cir. 1969); Geldback Transport, Inc. v. Delay, 443 S.W.2d 120 (Mo. 1969). *See also* Jones v. B.C. Christopher & Co., 466 F. Supp. 213 (D. Kan. 1979); Annot., 4 A.L.R. 3d 545 (1965). *But see* Wehling v. C.B.S., 608 F.2d 1084 (5th Cir. 1979); Campbell v. Gerrans, 592 F.2d 1054 (9th Cir. 1979). Where it is the defendant who asserts the privilege in the course of discovery, it is not uncommon for courts to bar the defendant from waiving the privilege and testifying at time of trial concerning the previously privileged matters. *See* A & M Records, Inc. v. Heilman, 75 Cal. App. 3d 554, 142 Cal. Rptr. 390 (1977), *appeal dismissed*, 436 U.S. 952 (1978); Myers v. Second Judicial Dist. Court, 95 Nev. 176, 591 P.2d 259 (1979); Costanza v. Costanza, 66 N.J. 63, 328 A.2d 230 (1974); Annest v. Annest, 49 Wash. 2d 62, 298 P.2d 483 (1956) (holding that in a custody hearing the trial court erred in denying the husband's motion to strike his wife's testimony where the respondent-wife asserted privilege in the course of cross-examination; error was not reversible due to lack of prejudice); Levin v. Levin, 129 N.J. Super. 142, 144, 322 A.2d 486, 488 (1974) (holding husband-defendant, who had asserted privilege in response to interrogatories in divorce proceeding, subject to the same sanctions as any other litigant refusing to make discovery, "short of being held in contempt for his refusal to answer"). *But see* CAL. EVID. CODE § 913 (West 1966) (prohibiting a trier of fact from drawing any inferences from assertion of privilege in a criminal or civil matter).

185. The trial court apparently cannot, as in *DeCamp*, insist that the defendant file a verified answer pursuant to § 446 and, if none is forthcoming, enter judgment for the plaintiff. CAL. CODE CIV. PROC. § 446 (West Supp. 1981). Although the Fifth Amendment may permit a defendant ultimately to suffer adverse consequences as a result of invoking his privilege, it would seem not to permit an immediate judgment against him at the pleading stage. *See generally* note 184 *supra*. The court, however, might grant a stay in order to allow for the eventual removal of the threat of self-incrimination. *See* Wehling v. C.B.S., 608 F.2d 1084 (5th Cir. 1979); A & M Records, Inc. v. Heilman, 75 Cal. App. 3d 554, 142

Conclusion

Use and derivative use immunity removes the threat of self-incrimination and permits the compulsion of otherwise privileged testimony. It does so by barring the prosecution from the use of compelled testimony and its fruits. Since the privilege against self-incrimination may block a civil litigant's access to needed information, the availability of discretionary use and derivative use immunity advances the just resolution of civil disputes.

The California Supreme Court has authorized discretionary grants of immunity following assertions of the privilege made in the course of depositions. Whether by case law or legislation, an expansion of this authorization is needed. The opportunity to seek an immunity grant should extend to most pretrial contexts, including pleading and civil discovery in general.

As developed in California, discretionary immunity permits an advancement in the resolution of civil disputes without a compensating loss in the fair prosecution of public offenses. California's discretionary immunity protects law enforcement with rights of notice and conclusive objection. Automatic immunity, on the other hand, provides no such protection. Although it may be used, as in *Murphy*, to accommodate conflicting governmental interests, courts should not employ this immunity to aid civil litigants at the expense of criminal prosecutions. To do so constitutes improper judicial interference with an executive function.

Cal. Rptr. 390 (1977). Where a stay is not practical or is not desired by the plaintiff and an immunity order is opposed by the executive branch (i.e., a prosecutor), it would seem appropriate for the court to permit the filing of an unverified general denial notwithstanding § 446. Assuming that the court in *DeCamp* is correct in its interpretation of the legislative history of § 446, *see* 83 Cal. App. 3d at 275-76, 147 Cal. Rptr. at 873-74, and given the constraints of the Fifth Amendment, either the intent of the legislature or the constitutional perogatives of the executive must give way. By permitting the filing of an unverified denial only when the executive opposes a requested grant of immunity, the judiciary minimizes the occasions when the legislature's will is frustrated. *Cf.* King v. Terwilliger, 259 A. D. 437, 19 N.Y.S.2d 657 (1940) (holding that a defendant may file an unverified answer where the privilege against self-incrimination precludes the filing of a verified response); David Webb, Inc. v. Rosenstiel, 66 Misc. 2d 29, 31, 319 N.Y.S.2d 877, 880 (Sup. Ct. 1970); Gullo v. Courtright, 62 Misc. 2d 721, 723, 309 N.Y.S.2d 735, 737 (Monroe County Ct. 1970).