

# **Rethinking the Privilege Against Self-Incrimination in Child Abuse Dependency Proceedings: Might Parents Be Their Own Worst Witnesses?**

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## I. Introduction

In 1976, the California Legislature promulgated California Welfare & Institutions Code section 701.7 (currently California Welfare & Institutions Code section 355.1) which provided, in part: “Testimony by a parent, guardian, or other person who has the care or custody of the minor made the subject of a proceeding under Section 300 [civil child dependency proceedings] shall not be admissible as evidence in any other action or proceedings.”<sup>1</sup> California courts quickly decided parents’ Fifth Amendment privileges in dependency cases were protected by the immunity provided by California Welfare & Institutions Code section 355.1<sup>2</sup> (hereinafter “§ 355.1”).<sup>3</sup> In 1981, the court in *In re Amos L.*, in a mere 44 words, concluded that a dependency court judge did not err in failing to admonish a mother charged with abusing her child that she had a Fifth Amendment privilege against self-incrimination because her “testimony” could not be admitted “in any other action or proceeding.”<sup>4</sup> And in 1988, the court in *In re Katrina L.* determined that a dependency court judge did not abuse his discretion in denying a parent a continuance in the dependency case until after the completion of a criminal child abuse trial because the parent was granted immunity pursuant to § 355.1.<sup>5</sup>

This article analyzes the nature of legislative, executive, and judicial immunity in relation to child dependency proceedings by focusing on the legislative and judicial history of § 355.1. It raises many fundamental questions regarding immunity such as: (1) what types of immunity, if any, apply in dependency proceedings; (2) how

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<sup>1</sup> The California Legislature in 1976 renumbered California Welfare & Institutions Code section 701.7 to section 355.1 without statutory modification and renumbered it again without statutory change to its current designation, section 355.1 (hereinafter “§ 355.1”). CAL. WELF. & INST. CODE § 355.1 (West 2005).

<sup>2</sup> CAL. WELF. & INST. CODE § 355.1 (West 2005).

<sup>3</sup> See, e.g., *In re Katrina L.*, 247 Cal. Rptr. 754, 758 (Cal. Ct. App. 1988); *In re Amos L.*, 177 Cal. Rptr. 783 (Cal. Ct. App. 1981).

<sup>4</sup> *In re Amos L.*, 177 Cal. Rptr. at 787.

<sup>5</sup> *In re Katrina L.*, 247 Cal. Rptr. at 758.

does separation of powers operate to control the allocation of power among the branches of government in promulgating and reviewing grants of immunity; and (3) what canons of statutory construction are consistent with separation of powers?

## II. The Typology of Immunity

### A. *Origins of the Privilege Against Self-Incrimination*

The Fifth Amendment to the United States Constitution provides two distinct protections. First, it establishes a privilege for a defendant in a criminal case from being compelled to the stand to testify.<sup>6</sup> Second, it provides a privilege of any witness in any proceeding not to answer questions that might incriminate the witness.<sup>7</sup> Historians have traced the genesis of the privilege against self-incrimination to a resistance to the French Ordinance of 1670 that compelled self-incrimination through an inquisitorial model as well as to a reaction against the inquisitorial administration of justice by clergy in the Massachusetts colony.<sup>8</sup> In fact, the privilege

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<sup>6</sup> Lefkowitz v. Turley, 414 U.S. 70 (1973).

<sup>7</sup> People v. Matz, 80 Cal. Rptr. 2d 872, 878 (Cal. Ct. App. 1998). The basis of the Fifth Amendment privilege against self-incrimination has recently come into question in the Supreme Court's opinion in *Chavez v. Martinez*, 538 U.S. 760 (2003). The Court, in a plurality opinion by Justice Thomas and joined by Justices Rehnquist, O'Connor, and Scalia, and concurred with by Justices Souter and Breyer in the result, held that the privilege was not violated until the compelled statements were actually admitted against the witness in a criminal case. Although the full impact of *Chavez* has not yet been articulated, one commentator has argued that under *Chavez*, courts cannot litigate Fifth Amendment privilege issues until the witness' statements are attempted to be admitted in a criminal case. "Strict application of the ripeness doctrine demands that disputes over the Clause be postponed until such compelled witnessing either has occurred or is about to [in a criminal case]." Michael J. Zydney Mannheimer, *Ripeness of Self-Incrimination Clause Disputes*, 95 J. CRIM. L. & CRIMINOLOGY 1261, 1323 (2005).

<sup>8</sup> R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 764-69 (1935). "The first well-documented case involving the protection against self-incrimination came in England in 1637." Ryan McLennan, *Does Immunity Granted Equal Immunity Received?*, 91 J. CRIM. L. &

against self-incrimination was well established in the American colonies by 1650, long before its inclusion in the Fifth Amendment.<sup>9</sup> In his Pulitzer Prize-winning book, Leonard W. Levy characterized the framers' intent of the privilege as a reflection that "in a free society, based on respect for the individual, the determination of guilt or innocence by just procedures, in which the accused made no unwilling contribution to his conviction, was more important than punishing the guilty."<sup>10</sup>

Today, most states have enacted similar provisions in their state constitutions, and the scope of those privileges is sometimes broader than the protections afforded under the Fifth Amendment.<sup>11</sup> For instance, in *People v. Coleman*, the California Supreme Court held that even though the Fifth Amendment did not require exclusion of a probationer's statements at a probation revocation hearing in a subsequent criminal trial, such inadmissibility was required under California's independent state constitutional privilege against self-incrimination.<sup>12</sup> Therefore, both federal and state constitutions determine the scope of admissibility of compelled testimony.

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CRIMINOLOGY 469, 470 (2001). After the Norman Conquest, inquisitorial ecclesiastical courts compelled witnesses to take an oath "*de veritate dicenda*," even though they might not know the content of the oath, in order to learn the charges against them. "Parliament abolished the oath in the seventeenth century" and after common law courts supplanted ecclesiastical courts, the English common law recognized a right to remain silent. David Heim, Note, *Damned If You Do, Damned If You Don't – Why Minnesota's Prison-Based Sex Offender Treatment Program Violates the Right Against Self-Incrimination*, 32 WM. MITCHELL L. REV. 1217, 1225-26 (2006).

<sup>9</sup> See sources cited *supra* note 7.

<sup>10</sup> LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 432 (Macmillan Pub. Co. 1986).

<sup>11</sup> For instance, the California Constitution, Article I, section 15 provides that "[p]ersons may not ... be compelled in a criminal cause to be a witness against themselves." CAL. CONST. art. I, § 15.

<sup>12</sup> *People v. Coleman*, 13 Cal. 3d 867, 888 (Cal. 1975); see also *People v. Carter*, 23 Cal. Rptr. 2d 888, 896 (Cal. Ct. App. 1993).

### B. Types of Available Immunity

Courts have recognized three different forms of immunity: transactional, use, and derivative. Historically, the earliest form of immunity recognized by American courts was transactional immunity, and until 1970 the principal federal immunity statute provided only transactional immunity.<sup>13</sup> Some describe transactional immunity as the strongest or broadest of the varieties of immunity because “no prosecution can afterwards be had against [the witness] for any offense concerning which he testified,”<sup>14</sup> even if that testimony is never used.<sup>15</sup> But, transactional immunity is not absolute immunity since any evidence adduced can be used against the witness in proceedings not transactionally related to the original offense.<sup>16</sup> However, many prosecutors may disfavor grants of transactional immunity because they must first provide broad immunity protection *before* they determine the full value of the witness’ testimony. The state sacrifices much less in granting use and/or derivative immunity because prosecution of the witness can proceed if independent evidence is discovered.<sup>17</sup> Therefore, the modern trend has been to modify immunity statutes to merely provide use and/or derivative immunity.<sup>18</sup>

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<sup>13</sup> In 1970, 18 U.S.C. § 6002 was modified from providing transactional immunity to providing use and derivative use immunity. *See Counselman v. Hitchcock*, 142 U.S. 547, 586 (1972).

<sup>14</sup> CAL. PENAL CODE § 414a (West 2006).

<sup>15</sup> *People v. Campbell*, 187 Cal. Rptr. 340, 343 (Cal. Ct. App. 1983). “More sweeping than use/derivative use immunity is transactional immunity, which if offered precludes the State from later prosecuting an inmate for the *offense* disclosed.” *Donhauser v. Goord*, 314 F. Supp. 2d 119, 137 (N.D.N.Y. 2004).

<sup>16</sup> “Transactional immunity protects the witness against all later prosecutions relating to matters about which [the witness] testifies.” *People v. Hunter*, 49 Cal. 3d 957, 973 n. 4 (Cal. 1989). *See also*, Ryan McLennan, *Does Immunity Granted Really Equal Immunity Received?*, 91 J. CRIM. L. & CRIMINOLOGY 469, 475 (2000).

<sup>17</sup> McLennan, *supra* note 16, at 470.

<sup>18</sup> For instance, in 1970 Congress modified 18 U.S.C. § 6002 to provide use immunity rather than transactional immunity. *See Counselman v. Hitchcock*, 142 U.S. 547, 586 (1892). In addition, in 1996 the California

Use immunity provides that compelled testimony and data cannot be introduced in any subsequent criminal proceeding.<sup>19</sup>

Use immunity protects the witness only from 'the use of the specific testimony compelled from him under the grant of immunity,' but not from evidence obtained as a result of such testimony. Courts have recognized that the witnesses protected only by use immunity may be pursued by prosecutors with evidence indirectly derived from compelled testimony.<sup>20</sup>

Use immunity thus provides the least protection of the three basic forms of immunity since it neither insulates the witness from prosecution for offenses related to the compelled testimony nor prohibits the prosecution from relying on that testimony to uncover other related information that can be used in a subsequent prosecution.<sup>21</sup>

The U.S. Supreme Court and most state courts have determined that use immunity is not a functional equivalent for the Fifth Amendment privilege against self-incrimination, and will not support compelling a witness' testimony or a contempt citation for failure to testify.<sup>22</sup> The Supreme Court in *Kastigar v. United States*<sup>23</sup> held that the Fifth Amendment does not require a grant of transactional immunity before a witness' testimony can be compelled; rather, a grant of use and derivative use testimony is coextensive with the privilege against self-incrimination. However, the Court held that a mere grant of use immunity alone is not coextensive with the privilege.<sup>24</sup>

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Legislature modified Penal Code section 1324 from a transactional immunity statute into a use and derivative use statute. CAL. PENAL CODE § 1324. See *People v. Matz*, 80 Cal. Rptr. 2d 872 (Cal. Ct. App. 1998).

<sup>19</sup> *Gosling v. Commonwealth*, 415 S.E. 2d 870, 873 (Va. 1992).

<sup>20</sup> *Id.* (citation omitted).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 873; *In re J.R.U.S.*, 110 P.3d 773, 779 (Wash. Ct. App. 2005).

<sup>23</sup> *Kastigar v. United States*, 406 U. S. 441 (1972).

<sup>24</sup> See *People v. Gwillim*, 274 Cal. Rptr. 415, 422 (Cal. Ct. App. 1990).

The label of the final immunity type, derivative immunity, defines its parameters. Derivative use immunity, in essence, prohibits the use of the fruits of compelled testimony.<sup>25</sup> “Derivative use immunity prohibits use against the witness of evidence even indirectly obtained from his testimony.”<sup>26</sup> The prosecution has the burden of demonstrating that the evidence is not derived from a witness’ compelled testimony pursuant to a grant of derivative immunity, much as a prosecutor has the burden of demonstrating that evidence is not fruit of the poisonous tree under the Fourth Amendment.<sup>27</sup> “[O]nce compelled testimony is shown, the government has ‘the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.’”<sup>28</sup>

### C. Mechanisms to Compel Testimony

Functionally, immunity is a procedure for supplanting federal and/or state privileges against self-incrimination so that a defendant’s or other witness’ testimony can be compelled. The government has a variety of mechanisms available to compel testimony from reluctant witnesses who claim their Fifth Amendment privilege. The line graph in Figure A, below, illustrates the typology of the most frequently used tactics that the government utilizes in encouraging and/or compelling testimony. The spectrum proceeds from the most flexible procedural mechanisms that provide the government with less power to compel testimony to those processes that provide maximum compulsion but without great flexibility.

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<sup>25</sup> Gosling v. Commonwealth, 415 S.E. 2d 870, 873 (Va. 1992).

<sup>26</sup> *Id.*

<sup>27</sup> McLennan, *supra* note 16, at 498.

<sup>28</sup> *Id.*



court to second guess either the executive branch or the legislature regarding the intended breadth of an immunity offer, since the various forms of immunity are used as “coins of the realm” in forging deals with witnesses.

The potential disadvantage of cooperation/immunity agreements, however, is that although they provide the government with great flexibility, they do not provide any power to compel the promised testimony unless the terms of the private agreement are consistent with constitutional immunity principles.<sup>35</sup> In other words, unlike most other contracts, the government cannot sue for specific performance of the immunity contract unless the contract meets constitutional Fifth Amendment protection.<sup>36</sup>

Guilty pleas provide the government with almost unlimited discretion to fashion a bargain in exchange for evidence that would otherwise violate the privilege against self-incrimination.<sup>37</sup> The terms of plea bargains are as limitless as the imagination of the prosecutor. However, plea offers do not provide the government with guaranteed access to information because the plea offer is based upon two conditions beyond the control of the government. First, the witness may reject the plea offer or counter with conditions of immunity that are unacceptable to the prosecution. Second, prior to the entry of the guilty plea the court must determine whether or not the defendant knowingly and voluntarily is waiving his constitutional rights in exchange for the benefits of the plea agreement.<sup>38</sup>

Use immunity provides the government with the flexibility to define the ambit of immunity both in terms of the data protected and the legal proceedings in which the data

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<sup>35</sup> *Sluss*, 419 S.E. 2d at 265-67.

<sup>36</sup> *Id.*

<sup>37</sup> See *Boykin v. Alabama*, 395 U.S. 238, 243 n. 5 (1969), and *In re Tahl*, 460 P.2d 449, 454-55 (Cal. 1969), for the general proposition that defendants waive the privilege against self-incrimination upon a plea of guilty.

<sup>38</sup> See *Boykin v. Alabama*, 395 U.S. at 243 n. 5; *In re Tahl*, 460 P.2d at 454-55.

cannot be presented.<sup>39</sup> For instance, the government might provide that the data cannot be used in any civil as well as in any criminal proceedings, thus providing greater protection than the Fifth Amendment provides. However, since use immunity is not coextensive with the Fifth Amendment, such agreements do not provide the government with the power to compel the testimony.<sup>40</sup> Therefore, use immunity is a procedure by which the government can attempt to entice and encourage testimony without giving up the ability to prosecute the witness or use the testimony to derive other data from the testimony to use against the witness in other proceedings.

Finally, although use/derivative immunity and transactional immunity provide the most coercive power since they are coextensive with the Fifth Amendment,<sup>41</sup> the government loses flexibility in determining the conditions and ambit of the immunity since minimal constitutional protections must be supplied.

This matrix or typology of immunity variations demonstrates that it is difficult to assign a particular motive to the executive's or the legislature's grant of witness protection absent sufficient circumstantial evidence of the government's or the legislature's explicit choice of immunity types. For example, assume that a prosecutor enters into a cooperation/immunity agreement that only provides the witness with "use immunity," or that a statute provides only that the evidence shall not be used in any proceeding against the witness. It would be erroneous to conclude that the grant of "use immunity" must have really been a grant of "use plus derivative immunity" since "use immunity" alone would not provide the government with a procedure for compelling the witness' testimony. Such a conclusion would ignore the possibility that the government or the legislature specifically chose the limited "use immunity" to provide an incentive for the witness to testify without providing the additional witness protection of "derivative" or "transactional" immunity

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<sup>39</sup> See *supra* Part A.2.

<sup>40</sup> *Kastigar v. United States*, 406 U.S. 441, 462 (1972).

<sup>41</sup> See *supra* Part A.2.

necessary to compel such testimony. There is no rational basis for concluding that prosecutors or legislators always intend to compel testimony rather than merely to create incentives to encourage witness cooperation without surrendering the ability to prosecute the witness or to discover the fruits of the witness' testimony for use in other legal proceedings.<sup>42</sup> Courts have recognized that the prosecution has legitimate reasons for only granting limited use immunity even though the scope of that immunity is insufficient to compel the witness' testimony.<sup>43</sup> Therefore, courts must examine not only the specific language of an immunity agreement or statute, but must also inquire into the government's motive and/or the legislature's intent in using a specific form of immunity in the context of the particular case.

### **III. The Interrelationship Between Separation of Powers and Rules of Statutory Construction**

#### *A. Inherent Judicial Authority to Grant Immunity*

Jurisdictions differ regarding which branch of government has inherent and/or exclusive authority regarding grants of immunity. Some courts have "rejected judicial use immunity based upon the notion that immunity is solely an executive branch discretionary decision."<sup>44</sup> Although the grant of immunity has historically been most closely associated with the executive branch through the exercise of prosecutorial discretion, some jurisdictions have found that both the judiciary and the legislature have limited authority to

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<sup>42</sup> Some academics have argued that even though statements derived from testimony cannot be admitted, physical evidence derived from immunized statements should be admissible. Michael J. Zydney Mannheimer, *Ripeness of Self-Incrimination Clause Disputes*, 95 J. CRIM. L. & CRIMINOLOGY 1261, 1297 (2005).

<sup>43</sup> *United States v. Squillacote*, 221 F.3d 542, 559 (4th Cir. 2000); *United States v. Pielago*, 135 F.3d 703, 708 (11th Cir. 1998).

<sup>44</sup> William Wesley Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 GA. L. REV. 473, 502 (1990).

grant immunity.<sup>45</sup> Even the Supreme Court has used a judicial grant of immunity to prevent due process violations,<sup>46</sup> and federal courts “may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.”<sup>47</sup>

*Baltimore City Department of Social Services v. Bouknight*<sup>48</sup> is one of the most interesting cases involving the power to grant immunity in a child dependency action. In *Bouknight*, an abused child declared a ward of the court was returned to his mother on the condition that the mother produce the child at periodic review hearings.<sup>49</sup> However, the mother refused to bring her child to the court hearing and instead asserted her privilege against self-incrimination.<sup>50</sup> The Supreme Court determined that the Fifth Amendment was inapplicable since the mother had agreed to return the child as a condition of reunification, and the Court held Ms. Bouknight in contempt of court and ordered her incarcerated.<sup>51</sup> Ms. Bouknight’s attorney argued that the Court should not balance his client’s Fifth Amendment privilege against the state’s interest in obtaining the location of the young child since a balancing test would dilute the Fifth Amendment right;

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<sup>45</sup> “In our opinion we rejected the contention that immunity cannot be granted unless expressly authorized by the Legislature.” *Daly v. Superior Court*, 137 Cal. Rptr. 14, 21 (Cal. 1977). Courts have inherent authority to grant use immunity even without statutory support if it is “consistent with both legislative intent and effective enforcement of the criminal laws.” *People v. Campbell*, 187 Cal. Rptr. 340, 345 (Cal. Ct. App. 1982).

<sup>46</sup> In *Simmons v. United States*, 390 U.S. 377, 382 (1968), the Supreme Court created a judicially declared use immunity for statements by defendants made during a suppression hearing in order to permit defendants to perfect their Fourth Amendment rights.

<sup>47</sup> *United States v. Hasting*, 461 U.S. 499, 504-506 (1983). There are three purposes underlying the exercise of judicial supervisory powers: implementation of remedies for violations of recognized rights; preservation of judicial integrity; and deterrence of illegal conduct. However, there are limits to supervisory powers. *United States v. Payner*, 447 U.S. 729 (1980).

<sup>48</sup> *Balt. City Dep’t of Soc. Services v. Bouknight*, 493 U.S. 549 (1990).

<sup>49</sup> *Id.* at 551.

<sup>50</sup> *Id.* at 551-553.

<sup>51</sup> *Id.*

however, he did not seek judicial immunity.<sup>52</sup> The state argued that immunity was not available since a grant of immunity under Maryland state law must be based upon statutory power, not inherent judicial authority.<sup>53</sup>

However, instead of deciding the immunity issue, the Supreme Court in *Bouknight* merely indicated that even though a parent can be compelled to produce a child in a dependency proceeding as part of a reunification plan, whether any evidence based upon that compulsion is admissible in a criminal child abuse trial will be determined at a later time.<sup>54</sup> The Court stated that “[w]e are not called upon to define the precise limitation that may exist upon the State’s ability to use the testimonial aspects of Bouknight’s act of production in subsequent criminal proceedings. But we note that imposition of such limitations is not foreclosed.”<sup>55</sup> Justice Marshall, in his dissenting opinion, viewed with great skepticism the state’s claim that the state did not provide courts with power to grant immunity:

I note, with both exasperation and skepticism about the bona fide nature of the State’s intentions, that the State may be able to grant Bouknight use immunity under a recently enacted immunity statute, even though it has thus far failed to do. Although the statute applies only to testimony ‘in a criminal prosecution or a proceeding before a grand jury of the state ... the State represented to this Court that ‘as a matter of law, [granting limited use immunity for the testimonial aspects of Bouknight’s compliance with the production order] would now be possible. If such a grant

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<sup>52</sup> Brief for Respondent at \*6-7, *Balt. City Dep’t of Soc. Services v. Bouknight* 493 U.S. 549 (1990) (No. 88-1182) *available at* 1989 WL 1126963. The issue regarding immunity was initially raised in Justice Marshall’s dissent. *Bouknight*, 493 U.S. at 572 n. 2 (Marshall, J., dissenting).

<sup>53</sup> *Bouknight*, 493 U.S. at 572 n. 2 (Marshall, J., dissenting).

<sup>54</sup> *Bouknight*, 493 U.S. at 560-62.

<sup>55</sup> *Id.* at 561.

of immunity has been possible since July 1989 ... I have difficulty believing that the State is sincere in its protestations of concern for [the abused child's] well-being.<sup>56</sup>

Professor Westen, one of the country's leading experts on legal immunity, has identified and rejected several state separation of powers arguments against inherent judicial immunity.<sup>57</sup> Some states argue that courts lack the raw power to issue non-statutory immunity. For instance, in *In re Noel N.*, the court held that a family court judge could not grant immunity to a juvenile witness in a delinquency proceeding since family court is a court of limited jurisdiction and cannot "grant a Corporation Counsel request to immunize its own witness in a delinquency proceeding."<sup>58</sup> Westen counters that it is clear that courts have the power of compulsory process and that without the power to grant immunity the court cannot see that justice is done.<sup>59</sup> Second, some states argue that even if courts have inherent power to grant immunity, they should not exercise that right because it abrogates the executive branch's discretion over immunity decisions.<sup>60</sup> Westen counters that judicial immunity does not abrogate executive discretion, but rather the court is merely acting in its traditional role of interpreter of the Constitution regarding Fifth Amendment rights.<sup>61</sup> Finally, Westen counters that judicial immunity is necessary to protect the integrity of the courts so that criminal prosecutors cannot illegally compel information from witnesses.<sup>62</sup>

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<sup>56</sup> *Bouknight*, 493 U.S. at 572 n. 2, (Marshall, J., dissenting) (citations omitted).

<sup>57</sup> Westen, *Incredible Dilemmas: Conditioning One Constitutional Right On the Forfeiture of Another*, 66 IOWA L. REV. 741, 762-769 (1981).

<sup>58</sup> *In re Noel N.*, 465 N.Y.S. 2d 1008, 1008 (Fam. Ct. 1983).

<sup>59</sup> Westen, *supra* note 57, at 762-769.

<sup>60</sup> *Id.* at 764-65; *United States v. Herman*, 589 F.2d 1191, 1200-01 (3rd Cir. 1978).

<sup>61</sup> Westen, *supra* note 57, at 762-769.

<sup>62</sup> *Id.* at 765-67.

*B. Pragmatic Rules of Application for Grants of Immunity*

Beyond any theoretical discussion of separation of powers in grants of immunity rest the pragmatic rules of application. Functionally, the executive branch through the use of prosecutorial discretion can control the application of immunity. Although the legislature can promulgate specific immunity statutes and determine the ambit of protection among the choices of use, use and derivative, and transactional immunity, unless the prosecution triggers the immunity statute by attempting to compel a witness' testimony, the court will not be in a position to grant immunity to the witness. "The prosecution alone controls the invocation of the immunity statute."<sup>63</sup> The court in *Rysdale v. Santa Barbara Superior Court*<sup>64</sup> clearly identified the separation of powers relationship between the executive and legislative branches:

[T]he immunity granted ... sprang from a prosecutorial decision to implement the People's civil enforcement of the law even at the expense of burdens that the immunity order might impose on subsequent criminal proceedings. Moreover ... the prosecuting attorney's representing the People retained complete control over the scope of immunity through the power to determine what questions would be put to the witness to whom the immunity was being granted ... [w]hen the prosecution is the party seeking the immunity order, it must accept some 'burdens that the immunity order might impose on subsequent criminal proceedings.'<sup>65</sup>

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<sup>63</sup> *People v. Campbell*, 187 Cal. Rptr. 340, 347 n. 10 (Cal. Ct. App. 1983).

<sup>64</sup> *Rysdale v. Santa Barbara Super. Ct.*, 146 Cal. Rptr. 633, 637-638 (Cal. Ct. App. 1978).

<sup>65</sup> *Id.* The court in *People v. Campbell*, 187 Cal. Rptr. 340, 347 n. 10 (Cal. Ct. App. 1983), succinctly described the prosecution's control over the ambit of immunity: "To use a common and colorful phrase, the defendant has been given an immunity bath. But that is so only because the prosecution has drawn the bathwater. It need not have done so. The prosecution alone controls the invocation of the immunity statute."

However, once a grant of statutory immunity is ripe, the court has the jurisdiction to determine whether the immunity protection is coextensive with the privilege against self-incrimination.<sup>66</sup> Just so, if the prosecution seeks compelled testimony in a jurisdiction that has no statutory immunity provision, only a minority of jurisdictions provide courts with the power to determine whether immunity is nonetheless constitutionally required.<sup>67</sup>

The rub occurs when a statute compels testimony but does not provide immunity coextensive with the Fifth Amendment or does not explicitly state the type of immunity granted. Some jurisdictions hold that “[w]hen the Legislature has directed the limits of a grant of immunity, the courts must adhere to such limitation.”<sup>68</sup> A court under that regime has two options. If the statute is not coextensive with the Fifth Amendment, the court can declare the statute unconstitutional and refuse to compel the witness’ testimony. This remedy is consistent with narrow constructs of separation of powers since the court is merely interpreting the statute and does not expand the immunity to meet Fifth Amendment requirements. However, the second remedy is to *expand* the immunity to protections consistent with the Fifth Amendment and compel the witness to testify. Many would argue that this option violates separation of powers in two ways. First, the court is rewriting the legislation in a manner inconsistent with the express language drafted by the legislature. Second, the court is granting a form of immunity broader than that relied upon or desired by the prosecution and thus, in effect, is abrogating the executive branch’s discretion of choosing whether to grant broad immunity or not call the witness to the stand so that a subsequent criminal prosecution will not be jeopardized.

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<sup>66</sup> For a discussion of the ripeness of self-incrimination claims, See Michael J. Zydney Mannheimer, *Ripeness Of Self-Incrimination Clause Disputes*, 95 J. Crim. L. & Criminology 1261, 1293-1296, 1313-1319 (2005).

<sup>67</sup> See *Ramona R. v. Super. Ct.*, 37 Cal. 3d 802, 810-11 (1985); *Gov’t of Virgin Is. v. Smith*, 615 F.2d 964, 966 (3rd Cir. 1980); *U.S. v. Cohen*, 171 F.3d 796, 801-802 (3rd Cir. 1999).

<sup>68</sup> *People v. Kaufman*, 115 Cal. Rptr. 812, 816 n. 4 (Cal. 1974).

For instance, in *Pacers, Inc. v. Superior Court*<sup>69</sup> a civil defendant sought court protection from a discovery request until after the criminal statute of limitations expired since the underlying facts in the civil case were identical to those in the criminal case. The defendant asked the court to grant him use and derivative use immunity so that his admissions in the civil discovery motion could not be used against him in the subsequent criminal case.<sup>70</sup> The trial court rejected the immunity request because the prosecution objected; however, the court granted a stay of the civil discovery until after the criminal statute of limitations expired.<sup>71</sup> The court of appeal held that judicial grants of immunity are limited by the prosecutor's objections.<sup>72</sup> "[I]f prosecutors 'most likely interested' object to a grant of immunity because they have reasonable grounds to believe the proposed immunity might unduly hamper the prosecution of a criminal proceeding, the trial court may not grant such an order."<sup>73</sup> The court noted that the stay of the civil discovery order was necessary because "[t]o allow the prosecutors to monitor the civil proceedings hoping to obtain incriminating testimony from petitions through civil discovery would not only undermine the Fifth Amendment privilege but would also violate concepts of fundamental fairness."<sup>74</sup>

Here is where the intersection of separation of powers and rules of statutory construction collide. If the court entertains liberal rules of statutory construction that permit the court to, in effect, rewrite the immunity statute to provide protection coextensive with the Fifth Amendment, the court clearly approaches an encroachment upon executive discretion and legislative prerogative. For instance, suppose that the legislature promulgates a statute compelling witness testimony in exchange for mere use immunity. Will the court strike the

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<sup>69</sup> *Pacers, Inc. v. Super. Ct.*, 208 Cal. Rptr. 743, 744 (Cal. Ct. App. 1984).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 744 n. 2.

<sup>74</sup> *Id.* at 744.

statute as unconstitutional under *Kastigar*,<sup>75</sup> or will the court use a rule of statutory construction regarding the presumptive constitutionality of statutes in which the court reads into the language the additional “derivative” immunity necessary to support compelled testimony?<sup>76</sup> Courts that use narrow rules of construction to determine the constitutionality of immunity statutes operate well within a framework of separation of powers and comity; however, such narrow construction will frequently lead to a declaration that the immunity statute is unconstitutional and/or a ruling that the witness’ testimony will not be compelled. On the other hand, courts that use liberal rules of construction may be engaging in judicial legislation, especially when they expand the scope of the immunity beyond that intended by the legislature in order to protect the immunity statute from being declared unconstitutional and in order to compel the witness’ testimony.

In *People v. Campbell*, the prosecution argued that the court should substitute one constitutionally sufficient immunity type for another.<sup>77</sup> The People stated that the court should substitute use and derivative immunity for the statutorily mandated transactional immunity provided in California Penal Code section 1324.<sup>78</sup> The court rejected the prosecution’s argument since the court must follow the intent of the legislature, even though other constitutional forms of immunity might have been selected by the legislature.<sup>79</sup>

Other courts have found that “use” immunity-only statutes are unconstitutional if they attempt to compel testimony, and those courts refused to speculate about whether the legislature would prefer a broader reading such as use and

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<sup>75</sup> *Kastigar v. United States*, 406 U.S. 441 (1972).

<sup>76</sup> *See, e.g., Personal Watercroft Coal. v. Bd. of Supervisors*, 122 Cal. Rptr. 2d 425, 431 (Cal. Ct. App. 2002) (“Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears. (Citation omitted.) In implementing these principles courts presume that a Legislature did not intend to exceed the scope of its lawful power”).

<sup>77</sup> *People v. Campbell*, 187 Cal. Rptr. 340, 344-345 (Cal. Ct. App. 1983).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 346.

derivative or transactional immunity rather than having the statute declared unconstitutional.<sup>80</sup> For instance, the Virginia court in *Gosling v. Commonwealth*<sup>81</sup> interpreted the state's immunity statute, section 19.2-270, which provided:

[I]n a criminal prosecution, other than for perjury, or in an action on a penal statute, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination, in a criminal or civil action, unless such statement was made when examined as a witness in his own behalf.<sup>82</sup>

The court determined that the legislative language merely provided use immunity, and that since such limited immunity is not coextensive with the Fifth Amendment, compelled testimony would be unconstitutional.<sup>83</sup> The court did not, however, attempt to craft new language that would have extended immunity to also cover derivative evidence so that the statute could be declared constitutional since there was no legislative history to support the legislature's desire to provide broader immunity. The immunity statute in *Gosling* is interesting because it provides immunity simultaneously broader and narrower than that required by the Fifth Amendment. It is broader because it prohibits use of the testimony in both civil and criminal proceedings. And it is narrower because it permits derivative use of the testimony.

A Washington court in *In the Matter J.R.U.S.* also found that statutory language only provided use immunity and determined that such a statute could not support compelled testimony.<sup>84</sup> The Washington immunity statute provided:

At any time prior to or during a hearing ... the court may ... order examination necessary to

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<sup>80</sup> See, e.g., *Gosling v. Commonwealth*, 415 S.E. 2d 870 (Va. 1992); *In re J.R.U.S.*, 110 P.3d 773 (Wash. Ct. App. 2005).

<sup>81</sup> *Gosling v. Commonwealth*, 415 S.E. 2d at 871.

<sup>82</sup> *Id.* at 872 n. 2.

<sup>83</sup> *Id.* at 873.

<sup>84</sup> *In re J.R.U.S.*, 110 P.3d at 779-80.

the proper determination of the case ... *No information given at any such examination of the parent or any other person having custody of the child may be used against such person in any subsequent criminal proceeding against such person or custodian concerning the alleged abuse or neglect of the child.*<sup>85</sup>

The court held that the statutory language provides only use immunity and therefore held that the trial court lacked the power to compel the parents to testify.<sup>86</sup> Just as in *Gosling*, the court did not entertain a broader interpretation of the statutory immunity statute since there was no legislative history that would support a liberal use of rules of construction to save the constitutionality of the statute.

In *Superior Court v. Polanski*, the court interpreted the language in California Code of Civil Procedure section 2033 (hereinafter “§ 2033”) to provide only use immunity, not derivative or transactional immunity.<sup>87</sup> That statute provided that “[a]ny matter admitted in response to a request for admission is conclusively established against the party making the admission ... [However, the admission] is not an admission by that party for any other purpose, and it shall not be used *in any manner* against that party in any other proceeding.”<sup>88</sup> The *Polanski* court first noted that former § 2033 merely provided that an admission under that statute cannot be “used against the party in any other action.”<sup>89</sup> The court stated that in *Smith v. Superior Court*<sup>90</sup> this former language had been declared to merely provide use immunity and was insufficient to compel information from witnesses.

However, the *Polanski* Court noted that the revised § 2033 which provides that the admission shall not be “used in

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<sup>85</sup> *Id.* at 778 (emphasis added).

<sup>86</sup> *Id.* at 779.

<sup>87</sup> Super. Ct. v. Polanski, No. B062881, 1992 WL 199369, at \*1, 12 (Aug. 20, 1992).

<sup>88</sup> *Id.* at \*1, n. 2 (emphasis added).

<sup>89</sup> *Id.* at \*6.

<sup>90</sup> *Smith v. Super. Ct.*, 110 Cal. App. 3d 422, 424-25 (Cal. Ct. App. 1980).

any manner” demonstrates that the legislature intended to extend the immunity from the prior limited use immunity to the current use and derivative immunity that provides sufficient protection to permit compelled answers.<sup>91</sup> The *Polanski* Court did not have to delve into the legislative history of § 2033 since it concluded that the plain meaning of the modified statutory language demonstrated that the legislature forbid the use of the data for any purpose, and thus provided both use and derivative immunity.

Finally, in *DeCamp v. First Kensington Corporation*<sup>92</sup> the court delineated several factors that must be present before a court can imply a scope of immunity not expressly stated in a statute. In *DeCamp*, the plaintiffs sued the defendant for fraud.<sup>93</sup> California Code of Civil Procedure sections 431.30 and 446 required that the defendant verify his answer; however, the defendant argued to the court that his answer would criminally implicate him and violate his Fifth Amendment privilege.<sup>94</sup> The court held that since the legislature compelled the defendant’s answer, the legislature must have intended that the defendant be granted immunity coextensive with the privilege against self-incrimination.<sup>95</sup> The court, therefore, implied use and derivative immunity in order to uphold the constitutionality of the statute.<sup>96</sup>

The *Decamp* Court held that two elements must be present before the court can imply the scope of immunity into a statute: (1) the legislature must have compelled the witness’ incriminatory statements; and (2) the prosecution will not be “substantially hampered by use and derivative use immunity.”<sup>97</sup> Thus, courts cannot infer a minimally constitutional standard of immunity in a statute that does not compel testimony since it is the element of compulsion that

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<sup>91</sup> *Polanski*, 1992 WL 199369 at \*7-8.

<sup>92</sup> *DeCamp v. First Kensington Corp.*, 147 Cal. Rptr. 869 (Cal. Ct. App. 1978).

<sup>93</sup> *Id.* at 870-71.

<sup>94</sup> *Id.* at 871.

<sup>95</sup> *Id.* at 874-75.

<sup>96</sup> *Id.* at 872-875.

<sup>97</sup> *Id.* at 875.

suggests that the legislature intended and would want the statute to provide sufficient constitutional protection.

#### IV. Legislative History of § 355.1

Although § 355.1 provides some form of immunity, no court has expressly determined the ambit of that immunity. In addition, none of the legislative history clarifies the legislature's intent on providing parents protection against testimony adduced during the dependency proceeding.

The statutory precursor to § 355.1, California Welfare & Institutions Code section 701.7, was introduced as California Senate Bill 1045 (hereinafter "SB 1045") on April 17, 1975.<sup>98</sup> That bill did not contain any language granting parents testimonial immunity. The initial impetus of SB 1045 was to streamline dependency proceedings in cases where there was no percipient witness to child abuse so that child abuse victims and medical experts would not have to testify in every such case.<sup>99</sup> "SB 1045 has two general objectives: (1) To eliminate the need to put a child on the witness stand in the initial Juvenile Court civil hearing to testify as an adverse witness against his or her parent ... [and]; (2) To make possible intervention of the Juvenile Court for the protection of the child ... without reliance on the highly specialized expert witness who is generally not available in rural counties."<sup>100</sup>

A previous bill, California Senate Bill 2084 (hereinafter "SB 2084"), failed passage in 1974 because the Senate Judiciary Committee determined that the presumption of child abuse created by the bill was a violation of due

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<sup>98</sup> This legislative history is derived from the following sources: (1) CAL. TABLE OF LAWS ENACTED, 1975-1976; (2) LEGISLATIVE SUMMARY DIGEST, 1975-1976; (3) ASSEMBLY COMMITTEE BILL ANALYSES, 1975-PRESENT; and (4) CALIFORNIA LEGISLATURE SENATE FINAL HISTORY AND CALENDAR, REGULAR SESSION 1975-1976, EXTRAORDINARY SESSIONS 1975-1976.

<sup>99</sup> ASSEM. COMM. ON CRIMINAL JUSTICE, BILL DIGEST 3 (Feb. 25, 1976).

<sup>100</sup> *Id.*

process.<sup>101</sup> SB 2084 created a presumption that if an injury to the child was one that normally does not occur without negligence, the burden shifts to the parent to rebut the presumption.<sup>102</sup> However, SB 2084 did not specify whether the presumption shifted the burden of proof or only the burden of persuasion onto the parent, and the Legislative Counsel of California determined that the presumption “as introduced, is in violation of the due process guarantees of the Federal and State Constitutions.”<sup>103</sup> SB 1045 cured that constitutional problem by specifying that the presumption merely shifts the burden of presenting evidence to rebut the presumption to the parents rather than shifting the burden of proof.<sup>104</sup> In effect, the bill created a presumption akin to *res ipsa loquitur* (the thing speaks for itself).<sup>105</sup>

The testimonial immunity provision of SB 1045 was not added by amendment in the California Assembly<sup>106</sup> until March 9, 1976, just nine days before both houses of the legislature approved the bill.<sup>107</sup> SB 1045 was passed in the Assembly by a vote of 28 to 2 and in the Senate by a vote of

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<sup>101</sup> See Letter from Senator Walter W. Stiern, to Ralph B. Jordan, County Counsel (Jan. 31, 1975) (Whittier Law School Library).

<sup>102</sup> SB 2084, Legislative Counsel of California, June 14, 1974, at 1-3.

<sup>103</sup> *Id.*

<sup>104</sup> SB 1045 “would allow prima facie evidence of the [alleged abuse] ... to be established by proof of injury or a detrimental condition which would not ordinarily be sustained except as a result of unreasonable or neglectful acts or omissions of a person having care or custody of the child.” Senate Committee on the Judiciary, History, Jan. 6, 1976, at 4. The Legislative Counsel of California declared that the amended section relating to the rebuttable presumption “will be constitutional.” Legislative Counsel of California letter to Governor Edmund G. Brown, Jr., at 1 (March 25, 1976).

<sup>105</sup> George Wright Quick helped draft SB 1045. He noted that the presumption was a modified version of *res ipsa loquitur* that had been upheld as constitutional in New York in *In re Young*, 270 N.Y.S. 2d 250 (1970) and in *In re S.*, 322 N.Y.S. 170 (1971). Letter from George Quick, Deputy County Counsel, Kern County Counsel to Senator Stiern (April 1, 1975) (Whittier Law School Library).

<sup>106</sup> California Legislature, Senate Final History, Regular Session 1975-1976, Extraordinary Sessions 1975-1976.

<sup>107</sup> *Id.*

65 to 1.<sup>108</sup> The bill was approved by the governor and enrolled by the secretary of state on April 2, 1976, as Chapter 89, Statutes of 1976 that created California Welfare & Institutions Code section 701.7.<sup>109</sup> Although a great deal of legislative history exists regarding the general purposes of SB 1045, almost all of that history pertains to the rebuttable presumption of child abuse, and almost none of the history illustrates the legislature's intent regarding what scope of immunity the statute would provide parents who testify.

Several organizations battled over the proposed rebuttable presumption. Those strongly supporting the presumption included the California District Attorneys Association;<sup>110</sup> Kern County Counsel;<sup>111</sup> California Peace Officers' Association; California State Sheriffs' Association; California Probation, Parole & Correctional Association; California Parent Teacher Association; California Association of Adoption Agencies;<sup>112</sup> Department of Health; Volunteer Advocates for Children; and the Los Angeles Police Department.<sup>113</sup> Those organizations in opposition to the rebuttable presumption included the Western Center on Law and Poverty,<sup>114</sup> the American Civil Liberties Union of Northern California,<sup>115</sup> and the Legal Aid Foundation of Long Beach.<sup>116</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> ASSEM. COMM. ON CRIMINAL JUSTICE, BILL DIGEST 2 (Feb. 25, 1976).

<sup>111</sup> Letter from George Quick, Deputy County Counsel, Kern County Counsel, to Senator Stiern (April 1, 1975) (Whittier Law School Library).

<sup>112</sup> SENATE COMM. ON JUDICIARY, HISTORY OF SB 1045, at 8 (Jan. 19, 1976).

<sup>113</sup> SB 1045, ENROLLED BILL MEMORANDUM TO GOVERNOR, at 1 (April 1, 1976).

<sup>114</sup> Letter from W. Kenneth Rice, Western Center on Law and Poverty, to Senator Walter W. Stiern (May 22, 1975) (Whittier Law School Library).

<sup>115</sup> Letter from Mary Willians-Izett, Northern California Civil Liberties Union, to the Honorable Walter W. Stiern, California Senate (Feb. 23, 1976) (Whittier Law School Library).

<sup>116</sup> Letter from Ronald S. Javor, Legal Aid Foundation of Long Beach, to Governor Edmund G. Brown, Jr. (March 26, 1976) (Whittier Law School Library).

However, none of the organizations either in support or in opposition to SB 1045 in the dozens of pages analyzing the bill even mentioned the amendment adding the testimonial immunity provision.<sup>117</sup>

Prior to its passage, SB 1045 cleared the Committee on the Judiciary and the Committee on Criminal Justice; however, neither of the committees' reports analyzed the statutory language granting parents the right not to have dependency adjudication testimony introduced in other legal proceedings.<sup>118</sup> The January 19, 1976 Senate Committee on the Judiciary report, "History of SB 1045" does not even mention the immunity provision.<sup>119</sup> In addition, the February 25, 1976, Assembly Committee on Criminal Justice's Bill Digest not only omits any discussion of immunity, but also states that SB 1045 "has no application whatsoever to criminal cases and does not affect in any way the grounds upon which a Juvenile Court dependency petition is to be brought. This bill relates only to evidentiary procedure in civil Juvenile Court proceedings where the protection by the court is the issue."<sup>120</sup> One would assume that the Committee on Criminal Justice would have understood that a grant of immunity to parents who testify in dependency proceedings might have an effect on concurrent or subsequent criminal prosecution of parents

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<sup>117</sup> See Letter from Mary Williams-Izett, *supra* note 115; Letter from Ronald S. Javor, *supra* note 116; SENATE COMMITTEE ON JUDICIARY, SB 1045: INJURIES TO MINORS (Jan. 19, 1976); ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE, SB 1045: PRESUMPTIONS – JUVENILE COURT (Feb. 25, 1976).

<sup>118</sup> See SENATE COMMITTEE ON JUDICIARY, SB 1045: INJURIES TO MINORS (Jan. 19, 1976); ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE, SB 1045: PRESUMPTIONS – JUVENILE COURT (Feb. 25, 1976).

<sup>119</sup> On January 20, 1976, the Senate Democratic Caucus first mentioned an assembly amendment that would add "a provision to provide that testimony of a parent, guardian, or other person who has the care or custody of a minor made the subject of a related hearing shall not be admissible as evidence in any other action or proceedings." SENATE DEMOCRATIC CAUCUS REPORT, UNFINISHED BUSINESS, 1 (Jan. 20, 1976); *see also* Senate Democratic Caucus Third Reading File on the January 6, 1976, version of SB 1045.

<sup>120</sup> ASSEM. COMM. ON CRIMINAL JUSTICE, *supra* note 110, at 3.

for child abuse, but no analysis of the Fifth Amendment protection and its application to criminal trials was presented.

On March 9, 1976, at the assembly's third reading of SB 1045, the Assembly Committee on Criminal Justice approved the bill unanimously.<sup>121</sup> The committee's digest of the bill indicated that it "provides that testimony by a parent, guardian, or other person who has care or custody of the minor made the subject of a proceeding adjudging such person to be a dependent child of the court shall not be admissible as evidence in any other action or proceeding."<sup>122</sup> However, the digest provides no legislative history on why the legislature merely excluded "testimony" rather than also excluding the "fruits" of such testimony, or why the legislature did not provide transactional immunity.<sup>123</sup> And as late as March 31, 1976, just two days before the governor signed SB 1045 into law, the governor's own Legal Affairs Department report did not even mention the provision excluding parents' testimony from other proceedings.<sup>124</sup> It was not until the day before the governor signed SB 1045 that an executive memorandum indicated that the bill would protect "parent's right against self-incrimination."<sup>125</sup>

It is also interesting that although no California Senate or Assembly Committees specifically mentioned that SB 1045 provided parents a form of Fifth Amendment protection, *after the bill was signed by the governor*, the bill's sponsor, Senator Walter W. Stiern and Dave Jensen, associate press secretary to the governor, issued inconsistent press releases concerning the scope of the testimonial immunity.<sup>126</sup> The governor's press

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<sup>121</sup> Assembly Office of Research, Assembly Third Reading, SB 1045, as amended, March 9, 1976.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Alice Lytle, Analyst, Legal Affairs Department, Governor's Office, Enrolled Bill Report on SB 1045, at 1 (March 31, 1976).

<sup>125</sup> See Enrolled Bill Memorandum to Governor, Bill No. 1045, at 1 (April 1, 1976).

<sup>126</sup> Press Release, Office of Senator Walter W. Stiern, *SB 1045, For Immediate Release* (April 2, 1976); Press Release, Dave Jensen, Associate Press Secretary, Office of the Governor, *Release: Immediate #122* (April 2, 1976).

release indicated that SB 1045 protected “the parent’s right against self-incrimination” even though those words exist nowhere in the statute and nowhere in the legislature’s hearings or reports.<sup>127</sup> In contrast, Senator Stiern’s press release stated that “Senate Bill 1045 *would encourage testimony* from a parent of a battered child by making such testimony inadmissible as evidence in any other court proceeding.”<sup>128</sup> Senator Stiern’s choice of the words “encourage testimony” is the most interesting language in the legislative history regarding the testimonial exclusionary rule promulgated by SB 1045. One would expect that if the legislature thought that the language of SB 1045 was coextensive with the Fifth Amendment privilege against self-incrimination that Senator Stiern would have used the words “compel testimony” rather than merely “encourage testimony.”

The question thus remains whether the exclusion in SB 1045 is coextensive with the full protection of the Fifth Amendment privilege against self-incrimination in light of the California Legislature’s use of very specific language merely providing for an evidentiary exclusion of parents’ dependency court testimony in all other proceedings. If it is not coextensive, then a host of California appellate opinions delineating the scope of parents’ immunity and the scope of admissible evidence in child dependency proceedings must be reexamined. For instance, if SB 1045 did not provide protection coextensive with the Fifth Amendment, then juvenile court judges could not compel the parents’ testimony upon threat of being held in contempt of court and might have to inform parents of their Fifth Amendment rights.<sup>129</sup> Moreover, it may be necessary to require exclusion of prosecutors from dependency court proceedings and restrict their access to juvenile court files.

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<sup>127</sup> Press Release, Dave Jensen, Associate Press Secretary, Office of the Governor, *Release: Immediate #122* (April 2, 1976).

<sup>128</sup> Press Release, Office of Senator Walter W. Stiern, *SB 1045, For Immediate Release* (April 2, 1976) (emphasis added).

<sup>129</sup> See *In re Amos L.*, 177 Cal. Rptr. 783 (Cal. Ct. App. 1981).

## V. The Rules of Statutory Construction as Applied to SB 1045

California rules of statutory construction begin analysis in a manner most consistent with the doctrine of separation of powers. “Respect for the political branches of our government requires us to interpret the laws in accordance with the expressed intention of the Legislature, and we have ‘no power to rewrite the statute ... to make it conform to a presumed intention [that] is not expressed.’”<sup>130</sup> Rather than permitting courts to speculate about legislative intent or to second-guess the wisdom of legislation, California requires courts to attempt to divine the *plain meaning* of the statutory language and to apply that language in a manner consistent with the legislature’s express language:

Because the statutory language is generally the most reliable indicator of that [legislative] intent, we look first at words themselves, giving them their usual and ordinary meaning and construing them in context. If the plain language of the statute is clear and unambiguous, our inquiry ends, and we need not embark on judicial construction. If the statutory language contains no ambiguity, the Legislature is presumed to have meant what it said, and the plain meaning of the statute governs.<sup>131</sup>

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<sup>130</sup> Songstad v. Superior Court, 113 Cal. Rptr. 2d 729, 733 (Cal. Ct. App. 2001). “The California Constitution ... requires that no law be made except by statute and no statute enacted except by bill.” Russell Holder, *Say What You Mean and Mean What You Say: The Resurrection of Plain Meaning in California Courts*, 30 U.C. DAVIS L. REV. 569, 581 (1997).

<sup>131</sup> People v. Johnson, 121 Cal. Rptr. 2d 197, 200 (Cal. 2002) (citations omitted). “Where the words of the statute are clear, we may not add to or alter them, and need not have recourse to rules of statutory construction.” Dep’t of Indus. Relations. v. Lee, 86 Cal. Rptr. 2d 710, 713 (Cal. Ct. App. 1999). “If the clear and unambiguous language can resolve a question of statutory interpretation, California law requires the court to look no further to search for legislative intent. The words of the statute are given ‘their

In addition, the plain meaning rule is consistent with separation of powers because it forbids courts from redrafting statutory language to reach what the court may decide is a better or fairer result:

Where the words of a statute are clear, [the court] cannot add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. In construing a statutory provision, we are not authorized to insert qualifying provisions and we may not rewrite the statute to conform to an assumed intention which does not appear from its language, but are limited to the construction of the plain language of the statute as enacted and the intention therein expressed.<sup>132</sup>

A court may look to extrinsic aids, such as legislative history, if statutory language is ambiguous or if a plain meaning would lead to absurd results.<sup>133</sup> Plain meaning is not controlling in the “*rare* cases [in which] the literal application of a statute will produce a result demonstrably at odds with the

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usual and ordinary meaning.” *County of Orange v. Fuji Sec., Inc.*, 31 F. Supp. 2d 768, 774 (C.D. Cal. 1998) (citations omitted).

<sup>132</sup> *Rowan v. City and County of San Francisco*, 53 Cal. Rptr. 88, 92 (Cal. Ct. App. 1966) (citation omitted). “Since there is no ambiguity in the statute’s plain language, we need not and may not indulge in judicial construction.” *People v. Walker*, 102 Cal. Rptr. 2d 637, 640 (Cal. Ct. App. 2000). Because the statute is “unambiguous on its face, we need not resort to legislative history to construe it ... we do not consult extrinsic sources when the language of a statute is unambiguous.” *Williams v. Superior Court*, 111 Cal. Rptr. 2d 918, 924-25 (Cal. Ct. App. 2001). When the language is unambiguous “[s]peculation and reasoning as to legislative purpose must give way to expressed legislative purpose.” *Scheffield Med. Group, Inc. v. Worker’s Comp. Appeals Bd.*, 83 Cal. Rptr. 2d 71, 79 (Cal. Ct. App. 1999).

<sup>133</sup> *Helping Hand Home for Children v. San Diego County*, 79 P.2d 778, 781 (Cal. App. 1938). “It is a settled rule of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.” *Astaire v. Best Film & Video Corp.*, 116 F.3d 1297, 1301 (9th Cir. 1997).

intentions of the drafters.”<sup>134</sup> Sometimes in the rush of the legislative process a literal interpretation of statutory language leads to irrational results and the statutory language “may be so *fantastic* in its necessary consequences, if literally applied, that it is impossible to give to it any rational meaning.”<sup>135</sup> However, scholars have noted that the absurdity exception should be narrowly construed or else the exception will swallow the rule.<sup>136</sup> “Courts should examine their use of legislative intent in absurdity arguments with great skepticism.”<sup>137</sup>

#### A. *The Plain Meaning of § 355.1*

California Welfare & Institutions Code § 355.1 is dissimilar in many ways to other California statutes that provide immunity. First, unlike most of the immunity provisions in the California Penal Code that restrict the introduction of immunized testimony only in criminal proceedings, § 355.1 prohibits the introduction of dependency court testimony “in any other action or proceeding.”<sup>138</sup> Therefore, the protection provided pursuant to § 355.1 is broader than that provided under most other California immunity statutes.<sup>139</sup> Second, § 355.1 differs from most other California immunity statutes because it does not expressly use the word “immunity” and because it does not use any of the traditional words to describe the type of immunity, such as “use,” “derivative,” or “transactional” immunity.<sup>140</sup>

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<sup>134</sup> *In re S.S. Retain Stores Corp. v. S.S. Retain Stores Corp.*, 211 B. R. 699, 703 (Cal. 1997) (emphasis added). Of course, a number of mutually antithetical rules of statutory construction have developed. In 1950, Karl N. Llewellyn termed these the “thrust” and “parry” of statutory construction. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Cannons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

<sup>135</sup> *Helping Hand Home for Children*, 79 P.2d at 781 (emphasis added).

<sup>136</sup> Holder, *supra* note 130, at 608.

<sup>137</sup> *Id.*

<sup>138</sup> CAL. WELF. & INST. CODE § 355.1 (West 2006).

<sup>139</sup> *See infra* pp. 38-41.

<sup>140</sup> *See infra* pp. 38-41.

The language of § 355.1 contains no ambiguity. It simply provides that “[t]estimony by a parent, guardian, or other person who has the care or custody of the minor made the subject of a proceeding under Section 300 *shall not be admissible as evidence in any other action or proceeding.*”<sup>141</sup> First, there is no ambiguity regarding the type of evidence that is protected by the statute. The statute does not state that all evidence presented at the dependency proceeding shall be protected, but rather it only shields testimony. Second, there is no ambiguity regarding the scope of proceedings in which such statements are protected. For instance, the protection does not apply to statements made prior to or subsequent to the dependency court proceeding.<sup>142</sup> Thus, the court in *In re Jessica B.*<sup>143</sup> gave that language a plain meaning construction in holding that the protection of § 355.1 does not apply to parents’ statements made during court-ordered reunification services.<sup>144</sup> The court held that the statements made in therapy sessions were not “testimony,” and thus the therapy sessions were not within the ambit of § 355.1 protection that is limited to in-court statements.<sup>145</sup>

Finally, and most importantly, § 355.1, unlike all other California immunity statutes, does not *compel* testimony, but only provides that if the witness *voluntarily* chooses to testify that the testimony may not be admitted in any other proceeding.<sup>146</sup> This difference is critical because both functionally and constitutionally § 355.1 does not share the two seminal characteristics of most immunity statutes: (1) state compulsion, and (2) constitutionally required protection

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<sup>141</sup> CAL. WELF. & INST. CODE § 355.1 (West 2006) (emphasis added).

<sup>142</sup> *In re Jessica B.*, 254 Cal. Rptr. 883, 891-92 (Cal. Ct. App. 1989).

<sup>143</sup> *Id.*

<sup>144</sup> For a discussion of *In re Jessica B.*, 254 Cal. Rptr. 883 (Cal. Ct. App. 1989) and the role of immunity in court-ordered dependency reunification, see William Wesley Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 GA. L. REV. 473, 510-523 (1990).

<sup>145</sup> *In re Jessica B.*, 254 Cal. Rptr. at 891-892.

<sup>146</sup> See, for example, discussion comparing CAL. WELF. & INST. CODE § 355.1 (West 2006) with CAL. PENAL CODE § 1324 (West 2006), *infra* pp. 38-39.

against the use of that compelled testimony. Since § 355.1 does not compel parents' testimony, a court interpreting that language need not engage in any constitutional inquiry concerning whether the exclusion of testimony also includes a prohibition from introduction of the fruits of that testimony.<sup>147</sup> Thus, any cases that have implied a grant of use and derivative use immunity from a statute that compels testimony protected under the Fifth Amendment or an independent state constitutional privilege against self-incrimination are clearly distinguishable. In those cases, the court had a choice of declaring the statute unconstitutional or reading into it the legislature's desire to save the statute by imputing the necessary constitutional use and derivative use protections.<sup>148</sup>

But even if the testimony protected under § 355.1 were compelled, the express language of the statute would not permit a court to infer both use and derivative use immunity since the court would be merely speculating regarding the scope of immunity intended by the legislature. California and out-of-state courts have held statutes unconstitutional if they expressly provided only "use" immunity without indicating whether they provide "derivative" immunity as well.<sup>149</sup> Section B, *supra*, analyzed several appellate court opinions that interpreted statutes whose language merely provided

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<sup>147</sup> In order for the Fifth Amendment to be violated, the government must both coerce and use testimony. See John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation After Chavez v. Martinez*, 39 GA. L. REV. 733, 745 (2005). And "[t]he test for compulsion under the Fifth Amendment is 'whether, considering the totality of the circumstances, the free will of the witness was overborne.'" Ronald J. Allan and M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 250 (2004).

<sup>148</sup> For instance, in *DeCamp v. First Kensington Corp.*, 147 Cal. Rptr. 869, 872 (Cal. Ct. App. 1978), the court analyzed California Code of Civil Procedure section 446, which required a defendant to verify his answer. The statute did not expressly provide any immunity even though the defendant would be at risk of the use of those admissions in a separate criminal trial. Since the admissions were statutorily compelled, in order to save the constitutionality of the statute, the court implied a requirement of use and derivative use immunity.

<sup>149</sup> See *supra* Part A.2.

“use” immunity without specifying whether the scope of immunity also extended to “derivative” immunity.<sup>150</sup> In each of those cases (*Gosling v. Commonwealth, In the Matter of J.R.U.S.*, and *Superior Court v. Polanski*)<sup>151</sup> the courts determined that the statutes did not provide sufficient immunity to support compelling witnesses’ testimony and refused to impute a broader legislative intent in order to save those statutes. The statutes in those cases provided that the testimony could not be “used” in other proceedings.<sup>152</sup> Since the word “use” had specific historical significance in relation to both mere use and/or derivative immunity, the courts could determine that the scope of the immunity in those cases was ambiguous.<sup>153</sup> Further, since the U.S. Supreme Court in *Kastigar* held that mere use immunity was constitutionally insufficient without the correlative derivative immunity,<sup>154</sup> the courts could have determined that the legislature either intended that both use and derivative use immunity were to be inferred or that the legislature would prefer the expansion of the immunity as an alternative to declaring the statutes unconstitutional violations of the Fifth Amendment.

The language of § 355.1 that testimony “shall not be admissible” is the functional equivalent to the “use” immunity language in the statutes in the cases above; however, unlike those statutes, § 355.1 does not compel testimony by its own terms. In addition, the historical ambiguity inherent in the term “use immunity” does not exist in the proscription “shall not be admissible.” Unlike the statutes in the above cases, § 355.1 is very clear about what must be excluded – it only excludes the parents’ “testimony” and does not directly or through implication indicate that the exclusion applies to the

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<sup>150</sup> See *supra* Part B.

<sup>151</sup> *Gosling v. Commonwealth*, 415 S.E. 2d 870 873-74 (Va. 1992); *In re J.R.U.S.*, 110 P.3d 773, 775 (Wash. Ct. App. 2005); *Superior Court v. Polanski*, No. B062881, 1992 WL 199369, at \*6-8 (Aug. 20, 1992) (noting former version of the statute had been held as providing insufficient immunity).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> See discussion of *Kastigar v. United States*, 406 U.S. 441 (1972), *supra* Part A.2.

fruits of that testimony. It would be ludicrous to read into § 355.1 a requirement of use and derivative use immunity since the courts reviewing statutes with ambiguous language that compel testimony have refused to do so under analogous circumstances.<sup>155</sup> Therefore, since § 355.1 is neither ambiguous nor constitutionally suspect, courts do not have the power to inquire into its legislative history. As the court stated in *Guardianship of Elan E.*, an appellate court should not act as a “super-legislature” and rewrite statutes where “the result is not absurd and does not frustrate the legislative purpose ... an appellate court should stay its hand and let the Legislature decide whether the statute needs to be amended.”<sup>156</sup>

Thus, under the plain meaning rule, the legislature’s intent for § 355.1 was not to compel parents’ testimony, but rather to merely provide that if they choose to take the stand, their testimony cannot be used in any other proceeding. The plain meaning has several direct consequences upon other appellate court opinions and upon the state’s and parents’ trial tactics. For instance, since the legislature did not intend § 355.1 to provide use and derivative use immunity, the prosecution cannot compel the parents’ testimony during the government’s case in chief. Further, courts might be required *sua sponte* to admonish parents of their Fifth Amendment rights. Finally, dependency courts cannot summarily refuse to consider granting a reasonable continuance to parents until the criminal case statute of limitations runs or until the parents can seek a ruling in the criminal court concerning the admissibility of their dependency court testimony. Further, if § 355.1 does not provide both use and derivative use immunity, their attorneys will have to fully explain their Fifth Amendment rights and the consequences should they decide to voluntarily testify.

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<sup>155</sup> See discussion *supra*, Part B.2.

<sup>156</sup> *In re Elan E.*, 102 Cal. Rptr. 2d 528, 531-32 (Cal. Ct. App. 2000).

*B. Assuming, arguendo, that the Plain Meaning Rule Does Not Constrain the Analysis of § 355.1, Does the Legislative History Lead to a Different Conclusion?*

If a court determines that statutory language is ambiguous, leads to absurd results, or would violate constitutional dictates, a host of statutory construction techniques and data are available for determining the legislature's intent.<sup>157</sup> However, these different aids often carry different degrees of weight. For instance, the court in *Martin v. Szeto*<sup>158</sup> held that although statements by legislators to other legislators or to members of the executive branch that were actually considered by the legislature are admissible on the question of intent, such statements that could not have affected the legislation, such as post-passage statements, have little or no "weight ... because they have little probative value on the Legislature's contemporaneous understanding of the bill that became [the statute]."<sup>159</sup> Thus, data that has actually been considered by the legislators carries more weight than statements of intent by legislators, executive officers, or interested third parties that were never considered for legislative debate and that could not have actually affected the vote of the statute.

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<sup>157</sup> "Where [statutory language] is susceptible of more than one meaning, it is the duty of the courts to accept that intended by the framers of the legislation, so far as its intention can be ascertained." *Smith v. Santa Rosa Police Dep't*, 119 Cal. Rptr. 2d 72, 80 (Cal. Ct. App. 2002). "Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears." *Personal Watercraft v. Bd. of Supervisors*, 122 Cal. Rptr. 2d 425, 431 (Cal. Ct. App. 2002). "And a court may disregard the plain meaning of a statute and resort to its legislative history to aid in interpretation when applying the literal meaning of the statutory language 'would inevitably (1) produce absurd consequences which the Legislature did not intend or (2) frustrate the manifest purposes which appear from the provisions of the legislation when considered as a whole in light of its legislative history ... [but] 'if the legislative history gives rise to conflicting inferences as to the legislation's purposes or intended consequences, then a departure from the clear language of the statute is unjustified.'" *Lewis v. County of Sacramento*, 113 Cal. Rptr. 2d 90, 100 (Cal. Ct. App. 2002) (citations omitted).

<sup>158</sup> *Martin v. Szeto*, 9 Cal. Rptr. 3d 687, 691-92 (Cal. 2004).

<sup>159</sup> *Id.* at 692.

The California Supreme Court refused to take judicial notice of a memorandum prepared by the Office of the Attorney General, the sponsor of the bill, because the statutory language was clear and there was insufficient evidence to demonstrate that the legislature as a whole was aware of the Attorney General's position on the bill.<sup>160</sup> Likewise, a California appellate court rejected a letter from the State Bar Taxation Section to the governor in part because its contents were not expressed to the legislature.<sup>161</sup> An author's statement of intent was similarly rejected because it was made after the bill's passage.<sup>162</sup> In contrast, courts have considered the legislative author's intent for the statute if that intent was "expressed in testimony or argument to either house of the Legislature or one of its committees."<sup>163</sup> In order to better educate attorneys regarding the types of legislative materials subject to judicial notice in determining legislative intent, the California Court of Appeal for the Third District published a catalogue of different types of legislative data. The court noted that documents that will not be judicially noticed include:

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<sup>160</sup> *People v. Johnson*, 121 Cal. Rptr. 2d 197, 202 (Cal. 2002).

<sup>161</sup> *Heavenly Valley v. El Dorado County Bd. of Equalization*, 101 Cal. Rptr. 2d 591, 603-604 (Cal. Ct. App. 2000); *see also* *Casterson v. Super. Ct.*, 123 Cal. Rptr. 2d 637, 646 (Cal. Ct. App. 2002).

<sup>162</sup> *Brown v. Brown (In re Estate of Bryant)*, 52 Cal. Rptr. 2d 755, 758 n. 4 (Cal. Ct. App. 1996).

<sup>163</sup> *South Bay Creditors Trust v. General Motors Acceptance Corp.*, 82 Cal. Rptr. 2d 1, 7 (Cal. Ct. App. 1999) (quoting *McDowell v. Watson*, 59 Cal. App. 4th 1155, 1161 n. 3 (Cal. Ct. App. 1997)). However, courts have been cautious in applying this principle. *See* *Collins v. State Dept. of Transp.*, 8 Cal. Rptr. 3d 132, 139 n. 11 (Cal. Ct. App. 2004) ("We generally do not consider materials showing the subjective intent of interested parties, or even the subjective intent of a single legislator."); *In re S.B.*, 13 Cal. Rptr. 3d 786, 792 n. 3 (Cal. 2004) ("[W]e generally 'do not rely on evidence of the individual views of proponents of legislation.'" (citations omitted)); *People v. Starr*, 131 Cal. Rptr. 2d 616, 620 (Cal. Ct. App. 2003) ("Comments by legislators are important, but they are not always dispositive on legislative intent. They do not 'have the force of law, for the interpretation of the law is a judicial function.'" (citations omitted)). *See also* *People v. Rodgers*, 144 Cal. Rptr. 602, 605 (Cal. Ct. App. 1978) (although author's non-contemporaneous statements may be admissible, their weight must be considered).

- (1) “Authoring Legislator’s Files, Letters, Press Releases and Statements Not Communicated to the Legislature as a Whole”;<sup>164</sup>
- (2) “Letters from Bill’s Author to Governor Without an Indication the Author’s Views Were Made Known to the Legislature as a Whole;”<sup>165</sup>
- (3) “Letters to Governor Urging Signing of Bill;”<sup>166</sup> and,
- (4) “Postenrollment Documents Regarding Bill.”<sup>167</sup>

As was stated in Section C, *supra*, very little legislative history exists regarding the legislative intent of the provision in § 355.1 providing that parents’ testimony in dependency court hearings is inadmissible in all other proceedings since that section of the statute was added just days before passage and since the section creating a *res ipsa* presumption received the bulk of legislative debate.<sup>168</sup> However, there are a few pieces of legislative history that provide limited insight into the legislature’s intent.

The most salient evidence of legislative intent that is consistent with the plain meaning of the statute is the author’s comment regarding the reasoning for excluding parents’ testimony in other proceedings. The bill’s author, Senator Stiern, immediately after passage of the bill, declared that:

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<sup>164</sup> Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc., 34 Cal. Rptr. 3d 520, 528 (Cal. Ct. App. 2005).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 529. “Generally, ‘enrolled bill’ refers to a bill that has passed both houses of the Legislature and that has been signed by the presiding officers of the two houses ... [A]n ‘enrolled bill report’ is prepared by a department or agency in the executive branch that would be affected by the legislation. Enrolled bill reports are typically forwarded to the Governor’s office before the Governor decides whether to sign the enrolled bill.” *Id.* at 530.

<sup>168</sup> See, e.g., Letter from Ann Mackey, Principal Deputy, Legislative Counsel, to Honorable Walter W. Stiern, Senate Chamber, *Minors – (S.B. 2084) - #10570* (June 14, 1974).

“Senate Bill 1045 would *encourage testimony* from a parent of a battered child by making *such testimony* inadmissible as evidence in any other court proceeding.”<sup>169</sup> Senator Stiern’s statement is relevant for two reasons. First, it indicates that the legislature did not intend SB 1045 as a weapon to compel testimony, but rather as an incentive to convince parents to testify so that reunification services could more timely be provided. Second, Senator Stiern’s statement expressly states that the ambit of inadmissible evidence is limited to the parents’ “testimony,” and does not extend to evidence derived from that testimony. However, Senator Stiern’s statement does not carry as much weight as it would have had he published his comment to the legislature *prior to* the bill’s passage.

Dave Jensen, the governor’s associate press secretary, made the statement most inimical to the plain meaning of SB 1045. He indicated in a press release that the bill would protect “the parent’s right against self-incrimination.”<sup>170</sup> However, under California’s rules of statutory construction, Jensen’s statement has much less weight than that of Senator Stiern, the author of the bill, for four reasons: (1) none of the express language of § 355.1 supports the inference that the legislature intended the exclusionary protection to be coextensive with the federal or state constitution; (2) the statement was made post-passage of SB 1045;<sup>171</sup> (3) it was never considered by the legislature; and (4) it was not even a statement by a member of the legislature, but rather was a statement of the executive branch. In *Kaufman & Broad Communities, Inc.*, the court noted the separation of powers problems inherent in appellate courts relying on post-passage statements by the executive branch regarding legislative intent since such reliance “gives the executive branch an unwarranted opportunity to determine the meaning of

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<sup>169</sup> Press Release, Office of Senator Walter W. Stiern, *SB 1045, For Immediate Release* (April 2, 1976) (emphasis added).

<sup>170</sup> Press Release, Dave Jensen, associate press secretary, Office of the Governor, *Release: Immediate #122* (April 2, 1976).

<sup>171</sup> *Id.*

statutes.<sup>172</sup> This is the proper and exclusive duty of the judicial branch of government.”

*C. Additional Rules of Statutory Construction Supporting the Plain Meaning of § 355.1*

Finally, two other rules of statutory construction support the plain meaning of § 355.1. First, the legislature is presumed to know of relevant law.<sup>173</sup> Therefore, when the California Legislature drafted SB 1045 in 1975, it is assumed that it was aware of the 1972 United States Supreme Court decision in *Kastigar*<sup>174</sup> requiring a grant of either transactional immunity or a grant of both use and derivative use immunity before testimony can be compelled. “A venerable rule of statutory construction informs that when a term of art has been judicially construed, a subsequent legislative enactment using that term is presumed to employ that judicial construction, absent some indication in the statute to the contrary, particularly where the statutes touch on the same area of law.”<sup>175</sup>

Had the legislature intended to compel parents’ testimony, the statute would not only have expressly described the testimony as compelled, but we must assume that the legislature would also have provided the ambit of protection required by *Kastigar*. However, since the express language of § 355.1 does not compel testimony, one cannot conclude or infer into the statute the legislature’s desire to provide *Kastigar*-type Fifth Amendment protection, since *Kastigar*

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<sup>172</sup> *Kaufman & Broad Communities, Inc. v. Performance Plastering*, 34 Cal. Rptr. 3d 520, 531 (Cal. Ct. App. 2005).

<sup>173</sup> “[W]e must assume that the Legislature has in mind existing laws when it enacts a statute. We must also interpret a statute in context, examining other legislation on the same or similar subjects, to ascertain the Legislature’s probable intent. Therefore we may attempt to gain insight into the intended meaning of a phrase or expression by examining use of the same or similar language in other statutes.” *Quarterman v. Kefauver*, 64 Cal. Rptr. 2d 741, 744-45 (Cal. Ct. App. 1997) (citations omitted).

<sup>174</sup> *Kastigar v. United States*, 406 U.S. 441 (1972).

<sup>175</sup> *Prof’l Engineers in Cal. Gov’t v. State Pers. Bd.*, 109 Cal. Rptr. 2d 375, 393 (Cal. Ct. App. 2001).

does not require use and/or derivative use immunity for non-compelled statements.

Second, courts should compare existing statutes on similar topics to determine whether the legislature's use of different words in the similar statutes indicate a differing intent.<sup>176</sup> Perhaps the easiest statutory construction involves separate statutes regulating similar conduct. If the legislature uses the same language in both statutes, that "language should be given the same interpretation in both statutes."<sup>177</sup> Equally important are cases in which the legislature uses different words or phrases in different statutes that refer to the same subject. "Where a statute referring to one subject contains a critical word or phrase, omission of that word or phrase from a similar statute on the same subject generally shows a different legislative intent."<sup>178</sup>

In 1953, the California Legislature passed an assembly bill creating current California Penal Code section 1324 that provides for compelled testimony and for use and derivative immunity of that testimony.<sup>179</sup> The title of the section states that it concerns an "order compelling testimony" and the statutory language provides procedures for the court upon the government's request "to order that person to answer the question or produce the evidence."<sup>180</sup> In addition, the

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<sup>176</sup> *Id.*

<sup>177</sup> *In re Do Kyung K.*, 106 Cal. Rptr. 2d 31, 36 (Cal. Ct. App. 2001).

<sup>178</sup> *In re Young*, 12 Cal. Rptr. 3d 48, 52 (Cal. 2004) (quoting from *Craven v. Crout*, 163 Cal. App. 3d 779, 783 (1985)) ("Had the Legislature wished to import the standard of culpability set forth in section 14604 into section 14602.6, it easily could have done so."); *Smith v. Santa Rosa Police Dept.*, 119 Cal. Rptr. 2d 72, 86 (Cal. Ct. App. 2002). ("[T]he omission of any reference to attorney's fees in the summary judgment state is to show a different legislative intent."); *Collins v. State Dept. of Transp.*, 8 Cal. Rptr. 3d 132, 140 (Cal. Ct. App. 2004). ("We also must endeavor to harmonize, both internally and with each other, separate statutory provisions relating to the same subject."); *Lewis C. Nelson & Sons v. Clovis Unified School Dist.*, 108 Cal. Rptr. 2d 715, 719 (Cal. Ct. App. 2001); *see also Gebremicael v. Cal. Comm'n on Teacher Credentialing*, 13 Cal. Rptr. 3d 777, 783 (Cal. Ct. App. 2004); *Songstad v. Super. Ct.*, 113 Cal. Rptr. 2d 729, 734 (Cal. Ct. App. 2001).

<sup>179</sup> CAL. PENAL CODE § 1324 (West 2006).

<sup>180</sup> *Id.*

legislature specifically listed the protection witnesses receive if required to provide compelled testimony: “[N]o testimony or other information compelled under the order or any information directly or indirectly derived from the testimony or other information may be used against the witness in any criminal case.”<sup>181</sup>

The legislature could have used the prophylactic language of California Penal Code section 1324 in § 355.1; however, it did not choose to do so. Further, the protection under California Penal Code section 1324 is narrower in some respects than the protection under § 355.1 because it only excludes evidence in a criminal trial, whereas § 355.1 excludes testimony from any proceeding, civil or criminal.<sup>182</sup> Therefore, even though both statutes provide protection to witnesses who testify, the legislature’s different language in the two statutes indicates two different purposes per the rules of statutory construction. A broader use and derivative use immunity was required in California Penal Code section 1324 because the statute compelled testimony. Also, since the use and derivative use immunity was provided as a constitutional equivalent to the protections under the Fifth Amendment, that immunity only applied in criminal cases. However, in § 355.1, the legislature had a different purpose and therefore used different language in protecting parents who choose to testify in dependency proceedings. That statute did not compel testimony, but rather “encouraged” testimony; such encouragement does not require use and derivative use immunity. Further, in order to encourage parents to testify, the legislature extended the protection beyond the constitutional requirement of application in criminal cases, and instead extended the testimony exclusion to civil cases as well.

Although one can disagree with the legislature upon the level of encouragement necessary to convince most parents to testify in a dependency action, the court’s remedy of

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<sup>181</sup> *Id.*

<sup>182</sup> See CAL. PENAL CODE § 1324 (West 2006); CAL. WELF. & INST. CODE § 355.1 (West 2006).

providing exclusion of the dependency testimony in both criminal and civil cases is certainly not irrational. The legislature might have thought that parents would be very concerned with the introduction of their admissions in at least three civil trials based upon the identical child abuse. First, if the child abuse resulted in marital dissolution, the offending parent would not want the dependency admission to be introduced in the divorce case. Second, the parent would not want the admission admitted in any tort action by the child against the parent. And finally, the parent would not want the dependency court admission admitted in a civil action against his or her insurance company for denial of insurance coverage of any physical injury to the child.<sup>183</sup> Therefore, the legislature might have thought that such “use” immunity, if extended to criminal and civil proceedings, even without an extension of derivative immunity, might provide a sufficient incentive or encouragement for parents to testify in dependency proceedings.

The cases interpreting the California rules of statutory construction lead to but one conclusion – no credible legislative history supports an inference that the California Legislature in § 355.1 intended to compel parents’ testimony or to provide both use and derivative use immunity for such testimony. On the contrary, the plain language of the statute, as well as rules of construction comparing analogous statutes, support the view that the parents’ testimony is voluntary, yet should they testify they have use immunity in both criminal and civil proceedings. Finally, the plain language is supported by three cases discussed in Section B, *supra*. The California case of *Superior Court v. Polanski*<sup>184</sup> interpreted a statutory proscription against “use” of admissions as mere use immunity, not derivative immunity. The recent Washington case, *In the Matter of J.R.U.S.*,<sup>185</sup> interpreted language in a

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<sup>183</sup> It is likely that a home insurer will argue that since the child abuse was an intentional tort or a crime, it need not cover the physical injury to the child under the insurance policy.

<sup>184</sup> *Super. Ct. v. Polanski*, No. B062881, 1992 WL 199369, at \*6-8 (Aug. 20, 1992).

<sup>185</sup> *In re J.R.U.S.*, 110 P.3d 773 (Wash. Ct. App. 2005).

dependency statute almost identical to that in § 355.1 to only provide use immunity, not derivative immunity. Finally, a Virginia court in *Gosling v. Commonwealth*<sup>186</sup> determined that a statutory prohibition from giving evidence against an accused of any statement made during legal examination provides only use and not derivative immunity.

## VI. Suggestions for Statutory Modification of § 355.1

Although § 355.1 is not unconstitutional on its face, since it does not compel parents to testify, this does not mean it cannot be amended to better achieve the legislature's goal that parents be able to freely testify and cooperate in order to achieve the public policy of expedited reunification or other timely permanency plans that are in a child's best interests.<sup>187</sup> Since § 355.1 only provides use immunity, some parents are placed in a *Hobson's* choice of testifying and waiving their Fifth Amendment rights or remaining silent and possibly losing custody of their children if the court concludes that they are uncooperative. First, under some circumstances, criminal prosecutors have access to dependency court hearings and access to juvenile court file information.<sup>188</sup> That access has

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<sup>186</sup> *Gosling v. Commonwealth*, 415 S.E. 2d 870 (Va. 1992).

<sup>187</sup> See *In re Celine R.*, 31 Cal. 4th 45, 53 (2003), and *In re Zeth S.*, 31 Cal. 4th 396, 410 (2003), regarding public policy in child dependency proceedings.

<sup>188</sup> For instance, California Welfare & Institutions Code section 681 provides that when a juvenile court petition alleging that a child comes within the court's dependency court jurisdiction, if the caregiver "is charged in a pending criminal prosecution based upon unlawful acts committed against the minor, the prosecuting attorney shall, with the consent or at the request of the juvenile court judge, represent the minor in the interest of the state at the juvenile court proceeding." CAL. WELF. & INST. CODE § 681 (West 2005). However, if the prosecuting attorney has represented the state against the minor in a juvenile delinquency or status offense allegation, "neither that prosecuting attorney nor any attorney from the office of that prosecuting attorney shall represent the minor in a juvenile court proceeding" alleging that the child is neglected or abused. CAL. WELF. & INST. CODE § 681.5 (West 2005). Further, California Welfare & Institutions Code section 827, subdivision (a)(1)(B), provides access to the juvenile court file by "[t]he district attorney, a city attorney, or city prosecutor authorized to prosecute criminal or juvenile cases under state law." CAL. WELF. & INST. CODE § 827(a)(1)(B) (West 2005).

one of two potential effects: (1) the fear that the prosecutor will discover their statements nullifies the limited inducement provided to parents by the use immunity in § 355.1, and/or (2) the parents' testimony may actually be used by the prosecutor to discover investigative leads in the parents' criminal case. Second, since a *res ipsa* presumption affecting the production of evidence will arise in some cases in which the abuse and/or neglect would not normally occur without parental negligence, if the parent remains silent, the court could find that the *res ipsa* instruction is sufficient evidence to support the juvenile dependency petition.<sup>189</sup> Therefore, the legislature's goal of providing enough protection and incentive in § 355.1 to convince parents to testify will not be realized in a substantial number of cases in which the prosecutor has access to the proceedings and/or the juvenile court file, especially where a *res ipsa* presumption applies.

Some states hold that penalties for testifying, such as rebuttable presumptions or the potential discovery by the prosecution of testimony, do not violate the Fifth Amendment.<sup>190</sup> For instance, a Massachusetts court held that

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<sup>189</sup> California Welfare & Institutions Code section 355.1, subdivision (a), provides that "[w]here the court finds, based upon competent professional evidence, that an injury, injuries, or detrimental condition sustained by a minor is of a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent ... that finding shall be prima facie evidence that the minor" comes within the jurisdiction of the juvenile dependency court. CAL. WELF. & INST. CODE § 355.1(a) (West 2005).

<sup>190</sup> Many courts have determined that the Fifth Amendment is not violated and immunity is not required merely because a witness will lose a benefit by not testifying. For instance, in *McKune v. Lile*, 536 U.S. 24, 31, 47-48 (2002), the state's sexual abuse treatment program for prisoners required prisoners to admit their sexual abuse as a precondition to entering a treatment program that made the prisoner eligible for visitation with family members. The court held that since such statements were not compelled, the loss of visitation privileges was not such a serious liberty deprivation to implicate the Fifth Amendment. *Id.* at 37-41. See also *Johnson v. Baker*, 108 F.3d 10, 11 (2d Cir. 1997) (requiring inmate to admit sexual abuse in order to enroll in a family reunification program was not a Fifth Amendment violation); *Wolfe v. Pennsylvania Dep't of Corrections*, 334 F. Supp. 2d 762, 773 (E.D. Penn. 2004). However, in *Donhauser v. Goord*, 314 F. Supp. 2d 119, 122, 137 (S.D.N.Y. 2004), the court held that denying

the privilege against self-incrimination was not implicated in a child dependency proceeding even though the court was permitted to draw a negative inference from the parent's failure to testify because of fear that the prosecutor could use that evidence in a criminal case.<sup>191</sup> New York courts have consistently denied continuances in dependency proceedings to parents who argued that they could not testify because the prosecutor might discover their dependency court statements.<sup>192</sup> New York courts have held that parents' Fifth Amendment rights were not violated by having to suffer a *res ipsa* presumption because there was no automatic penalty following the exercise of their privilege against self-incrimination since they could rebut the *res ipsa* presumption with evidence other than by their own testimony.<sup>193</sup>

However, California courts have liberally protected witnesses from the danger of having to testify without immunity. For instance, in *In re Dolly A.*<sup>194</sup> the court held:

[W]here a denial of a continuance forced defendant to elect between giving up his right not to be deposed as a criminal defendant and his right to testify on his own behalf in the proceeding to deprive him custody of his daughter, we find it was an abuse of discretion to deny the continuance. The risk of possible injury to Dolly [the child] ... was relatively slight, whereas the infringement upon

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a prisoner good time credits for failing to admit sexual abuse is sufficient to trigger the Fifth Amendment and immunity must therefore be granted.

<sup>191</sup> *In re Two Minors*, 396 Mass. 610, 616-618 (Mass. 1986). Other states provide parents no protection from the use of their testimony by prosecutors. Walker, *A Functional Approach to the Representation of Parents and Children in Abuse and Neglect Proceedings*, in FOSTER CHILDREN IN THE COURTS 30, 30 (M. Hardin ed. 1983).

<sup>192</sup> *New York City Comm'r of Social Servs. v. Elminia E.*, 521 N.Y.S. 2d 283, 285-286 (N.Y. App. Div. 1987); *In re Vance A.*, 432 N.Y.S. 2d 137, 139-143 (N.Y. Fam. Ct. 1980); *In re Ramon*, 405 N.Y.S. 2d 899, 904 (N.Y. Fam. Ct. 1978).

<sup>193</sup> *In re Vance A.*, 432 N.Y.S. 2d 137 at 140-141 (N.Y. Fam. Ct. 1980); *In re Roman*, 405 N.Y.S. 2d 899 at 904 (N.Y. Fam. Ct. 1978).

<sup>194</sup> *In re Dolly A.*, 222 Cal. Rptr. 741 (Cal. Ct. App. 1986).

defendant's rights was a clear and serious danger.<sup>195</sup>

Subsequently, the court in *In re Katrina L.* stated that a refusal to grant a continuance in the *Dolly A.* context would not be an abuse of discretion as long as the parent was granted immunity.<sup>196</sup> However, as was demonstrated, *supra*, since § 355.1 immunity is not coextensive with the Fifth Amendment privilege against self-incrimination, the *Dolly A.* conclusion is erroneous. Nevertheless, this constitutional defect can be cured by merely extending the use immunity in § 355.1 to also include derivative immunity.<sup>197</sup>

One further issue remains regarding the scope of immunity provided by § 355.1. That immunity only extends to caretakers of the allegedly abused child and does not extend to the testimony by the children subject to the dependency petition.<sup>198</sup> This raises a serious consequence regarding the court's ability to hear all relevant evidence in order to determine a child's best interest. This scenario occurred in *In re J.R.*<sup>199</sup> when a mother was alleged to have neglected her children because an older sibling sexually abused a younger sibling. Assume that the Children's Services Department or

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<sup>195</sup> *Id.* at 744.

<sup>196</sup> *In re Katrina L.*, 247 Cal. Rptr. 754, 758 (Cal. Ct. App. 1988). In *In re Joanna Y.*, 10 Cal. Rptr. 2d 422, 422 (Cal. Ct. App. 1992), the court held that as long as a parent receives immunity under § 355.1 the privilege against self-incrimination is protected.

<sup>197</sup> California courts have often extended immunity protection to witnesses in circumstances in which the Fifth Amendment might not provide any protection while testifying. *See, e.g.*, *People v. Coleman*, 13 Cal. 3d 867, 885-889 (Cal. 1975) (the court noted that even if not required by the Fifth Amendment, under California law a defendant's testimony at a probation revocation hearing cannot be used against him in a subsequent criminal trial); *Ramona R. v. Superior Court*, 210 Cal. Rptr. 204, 206-207 (Cal. 1985) (a minor's statements at a juvenile court fitness hearing cannot be used against him in the juvenile delinquency hearing); *In re Jessica B.*, 254 Cal. Rptr. 883, 893-894 (Cal. Ct. App. 1989) (statements made by parents during court-ordered dependency court therapy not admissible in criminal proceedings).

<sup>198</sup> *See* CAL. WELF. & INST. CODE § 355.1 (West 2006).

<sup>199</sup> *In re J.R.*, No. E037708, 2005 WL 3086889, at \*1-2 (Cal. Ct. App., Nov. 18, 2005).

the accused parent calls the older sibling to the stand to investigate the older sibling's sexual abuse and the relationship of the mother's conduct in not sufficiently protecting the younger sibling from her brother. Since the older sibling could be tried in juvenile delinquency court for sexually abusing his sibling, his attorney advised him to assert his privilege against self-incrimination since § 355.1 does not provide children with even limited use immunity. The mother asked the court to grant her older son immunity so that she would have the opportunity to ask him questions in order to demonstrate that she did not negligently fail to protect the younger sibling.

However, the trial court refused to grant the child immunity because compelling the child's dependency court testimony would have violated his Fifth Amendment rights.<sup>200</sup> As such, the child never testified, the court did not receive what might have been highly relevant data, and the mother was denied an opportunity to demonstrate, through the testimony of the alleged child abuser, her son, her reasonable parenting skills. If the legislature extends the immunity in § 355.1 to also cover children subject to the dependency petition, the legislature will better perfect its intent of assisting the juvenile court with ascertaining all relevant evidence in order to determine whether the petition should be sustained and, if it is, to determine the appropriate family plan.

In order to provide parents and children subject to the jurisdiction of the juvenile dependency court sufficient Fifth Amendment protection, I propose the following changes to § 355.1:

No testimony or other information provided by a child, parent, guardian, or other person having the care and custody of the minor made the subject of a proceeding under Section 300, or any information directly or indirectly

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<sup>200</sup> In *In re Tahbel*, 46 Cal. App. 755, 761-62 (Cal. Ct. App. 1920), the court determined that holding a minor in contempt of court for not testifying in a child dependency proceeding would be an unconstitutional coercion in violation of the Fifth Amendment.

derived from that testimony or other information shall be admissible as evidence in any other action or proceeding.

This suggested modification of § 355.1 not only includes an express legislative intent that immunity covers both use and derivative immunity, but also extends that immunity to all information supplied during dependency court testimony. The amendments also extend the immunity protection to those children who are the subject of the dependency petition in order to provide the court with the information from their testimony and in order to protect those abused children from all uses of that data in a subsequent juvenile delinquency or criminal trial.

## VII. Conclusion

This article has demonstrated the intimate association between separation of powers and rules of statutory construction in the analysis of dependency immunity statutes. It has further shown that § 355.1 is not unconstitutional because neither the express statutory language nor the legislative intent support a finding that it compels parents to testify in contravention to the Fifth Amendment privilege against self-incrimination. However, since § 355.1 merely provides use and not derivative immunity, that statute cannot form the basis for appellate court opinions requiring parents to testify or justify opinions holding that juvenile dependency court judges need not *sua sponte* inform parents of their Fifth Amendment rights prior to their decision to testify. The current statute also does not require judges to seriously entertain parents' continuance motions when there are parallel criminal proceedings pending.<sup>201</sup>

Although the statutory amendments suggested, *supra*, may cure all the problems with the appellate cases, given that § 355.1 would then provide a form of immunity consonant

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<sup>201</sup> See *In re Amos L. v. Hazel L.*, 177 Cal. Rptr. 783, 787 (Cal. Ct. App. 1981); *In re Johanna Y.*, 10 Cal. Rptr. 2d 422, 422 (Cal. Ct. App. 1992); *In re Dolly A.*, 222 Cal. Rptr. 741, 744 (Cal. Ct. App. 1986); *In re Katrina L.*, 200 Cal. App. 3d 1288, 1295-1296 (Cal. Ct. App. 1988).

with the protection under the Fifth Amendment, without those amendments both judges and parents' counsel need to consider the consequences. Judges must now attempt to protect parents' Fifth Amendment rights through admonition. Parents' attorneys must now counsel their clients about the risk of voluntarily testifying, since such non-compelled testimony may waive the Fifth Amendment rights of parents and render them their own worst witnesses.<sup>202</sup>

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<sup>202</sup> *People v. Matz*, 80 Cal. Rptr. 2d 872, 879 (Cal. Ct. App. 1998); *Regents of the Univ. of Cal. v. Super. Ct.*, 19 Cal. Rptr. 568, 570-571 (Cal. Ct. App. 1962); *People v. Bercume*, 789 N.Y.S. 2d 664, 672 (N.Y. Sup. Ct. 2004).