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Civil Procedure

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II

CIVIL PROCEDURE

A. DETERMINING THE PROPRIETY OF SMALL CLAIMS CLASS ACTIONS

Blue Chip Stamps v. Superior Court.[1] This case focused on the propriety of a class action in which the class members had suffered similar injuries that were too small to have justified economically the pursuit of individual actions. The California Supreme Court directed issuance of a writ of mandamus ordering the trial court to decertify the class and dismiss the case on the grounds that the damage action was both unmanageable and without substantial benefit.[2]

In contrast to the precedent on which it relies, *Blue Chip* advances a restrictive approach to the maintenance of class action suits. The majority interprets the substantial benefits test, by which trial courts are to judge the propriety of class actions, in a way that would effectively preclude the maintenance of most small claims class actions. The court's focus on compensatory benefits, however, as opposed to other substantive goals that class suits achieve, was unnecessary for the proper resolution of the case. Since this focus stems from an interpretation of the substantial benefits test that is in fact inconsistent with earlier cases that *Blue Chip* purports to follow, the restrictive approach should be read as dicta with no significant precedential value.

This Note will criticize the court's interpretation of the substantial benefits test and argue that despite the implications of this interpretation, fluid recovery should be viewed as a viable remedy in small claims class actions. The Note concludes by arguing that the court should reject the restrictive compensatory benefits rule implied by *Blue Chip*. Since class suits further purposes in addition to that of compensation, problems in distribution of a potential recovery should have only a limited impact on a trial court's decision to certify a particular class action.

I. The Opinion

a. Factual Background

In 1971, Eleanor Botney and Thelma Daar, represented by their husband-attorneys Allen Botney and David Daar,[3] filed a class action against

1. 18 Cal. 3d 381, 556 P.2d 755, 134 Cal. Rptr. 393 (1976) (Clark, J.) (4-2-1 decision).

2. *Id.* at 386, 556 P.2d at 758, 134 Cal. Rptr. at 396.

3. Mr. Daar represented himself in the seminal class action case of Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). While the issue has been raised in other jurisdictions, *see, e.g.*, Umbriac v. American Snacks, Inc., 388 F. Supp. 265 (E.D. Pa. 1975); Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7 (D.C.D.C. 1973); Cotchett v. Avis Rent-A-Car Sys., Inc., 56 F.R.D. 549 (S.D.N.Y. 1972), the California Supreme Court has

Blue Chip Stamps. The plaintiffs sought to recover an excess sales tax reimbursement paid to Blue Chip by shoppers who redeemed the company's trading stamps for merchandise during the period commencing March 1, 1967 and ending April 28, 1970. By order of partial summary judgment, the trial court held that Blue Chip had miscalculated the sales tax reimbursement. Because Blue Chip did not retain the overcharge, but rather passed it on to the State Board of Equalization, Blue Chip cross-complained against the Board. The Board conceded its liability, and it joined Blue Chip in challenging the propriety of the class action before the trial court.

The sales tax overcharge probably cost individual class members between eighteen cents and two or three dollars. The aggregate injury to the class may have been as high as several hundred thousand dollars.[4] Since Blue Chip retained no records listing the individuals with whom it had dealt, the size of the class was unclear and was disputed by the parties. The defendants, seeking to establish that the class was too large to be manageable, claimed that ninety-five percent of the households in California saved Blue Chip stamps.[5]

After a protracted series of hearings, the trial court certified the class and set a trial date. Blue Chip and the Board of Equalization subsequently petitioned the court of appeals for a writ of mandamus compelling the trial court to vacate its certification decision. The court of appeals denied the writ. The supreme court, however, finding that the trial court had abused its discretion in certifying the class, directed the issuance of mandamus.[6]

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yet to indicate explicitly any disapproval of a class representative simultaneously appearing as a named plaintiff. It became clear to the author who was present at oral argument, however, that certain members of the court felt a distinct animosity towards this suit and Mr. Daar's role in bringing it.

4. 18 Cal. 3d at 384-85, 556 P.2d at 757-58, 134 Cal. Rptr. at 395-96. This estimate of aggregate class injury was determined by multiplying the trial court's calculation of the overcharge (six cents per book) times the number of books that were redeemed during the four year period (100 million—an estimate derived by doubling the number of books redeemed in 1969 and 1970).

5. *Id.* at 384, 556 P.2d at 757, 134 Cal. Rptr. at 395.

6. In a lengthy dissent that deliberately avoids consideration of the merits of the case, Justice Mosk argues that the use of mandamus to overturn a trial court's certification of a class sanctions a grave misuse of the writ. *Id.* at 389, 556 P.2d at 761, 134 Cal. Rptr. at 399. His argument focuses on two points: First, prerogative writs are not ordinarily to be employed as a method of interlocutory appeal of interim orders, *see* Babb v. Superior Court, 3 Cal. 3d 841, 851, 479 P.2d 379, 385, 92 Cal. Rptr. 179, 185 (1971); and second, mandamus is particularly inapplicable to control a trial court's decision regarding class certification since that decision is subject to the trial court's discretion and mandamus cannot issue to control a court's proper exercise of its discretion. 18 Cal. 3d at 391, 556 P.2d at 762, 134 Cal. Rptr. at 400 (and cases cited therein). Justice Mosk concludes that a defendant should be permitted to challenge class certifications only through the normal avenues of appeal. It is unclear why Justice Mosk failed to raise this argument in City of San Jose v. Superior Court, 12 Cal. 3d 447, 525 P.2d 701, 115 Cal. Rptr. 797 (1974), a class action case in which the court's majority simply disagreed with the lower court's exercise of its discretion. Justice Mosk dissented from the majority decision, but only on the merits.

b. The Court's Analysis

Justice Clark's majority opinion, in which three other justices joined, found the claim against Blue Chip to be inappropriate for resolution as a class action. The opinion based its refusal to certify the class on an interpretation of California law that would preclude most small claims class actions and on a distribution problem specific to the facts of the case.

The opinion begins with the premise that in order to justify the maintenance of a class action, "the representative plaintiff must show that substantial benefit will result both to the litigants and to the court."[7] In analyzing whether the class action will result in substantial benefit, Justice Clark focuses exclusively upon the potential compensation to individual class members that the action may yield. The opinion posits that one factor in judging the propriety of class actions is the probability that each member will come forward and submit to proof of claims procedures.[8] In other

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In a short footnote, Justice Clark responds to this attack. He focuses on the language of Code of Civil Procedure sections 1085 and 1086 providing that mandamus "may be issued . . . to compel the performance of an act which the law specifically enjoins" where "there is not a plain, speedy and adequate remedy, in the ordinary course of law." CAL. CIV. PROC. CODE §§ 1085-1086 (West 1955). He concludes that appeal from final judgment would be an inadequate remedy since it would subject the parties to the great cost of litigating an action by a class that an appellate court might ultimately decertify. 18 Cal. 3d at 387, n.4, 556 P.2d at, 759, n.4, 134 Cal. Rptr. at 397, n.4. The majority's justification is inadequate for it would tend to justify the issuance of mandamus as a challenge to any interim order since the petitioner will always face the potential of wasted litigation costs when the decision can only be finalized through the slower appeals process.

Sounder reasons for allowing mandamus could have been set forth. First, the court could have justified the issuance of mandamus under applicable precedent. While mandamus supposedly may not issue to alter decisions within the trial court's discretion even where the court considers that decision erroneous, *see* Oceanside Union School Dist v. Superior Court, 58 Cal. 2d 180, 185-86, n.4, 373 P.2d 439, 442, n.4, 23 Cal. Rptr. 375, 378, n.4 (1962), if the trial court fails to apply the correct criteria in making its determination, it abuses its discretion and its decision is then subject to correction by mandamus. Petherbridge v. Altadena Federal Sav. & Loan Ass'n, 37 Cal. App. 3d 193, 199, 112 Cal. Rptr. 144, 149 (4th Dist. 1974). In *Blue Chip*, the trial court explicitly refused to consider whether a potential recovery could ever be distributed. Petitioner's Brief for Hearing at 11-12 (quoting discussion from the Record of the lower court proceedings). The trial court's failure to consider the ultimate distribution of the recovery as a criterion in class certification subjected its decision to correction by mandamus.

Alternatively, the court could have distinguished class action determinations from the usual interim order. The potential liability and costs of complex class suits are so great that a class action certification often forces a defendant to settle even unmeritorious suits. *See* Comment, *Class Action Certification Orders: An Argument for the Defendant's Right to Appeal*, 42 GEO. WASH. L. REV. 621 (1974). In addition, California's standard for entertaining mandamus in these cases can be distinguished from the more rigid federal rule on the grounds that in the federal system such interim orders may be subject to interlocutory review, 28 U.S.C. § 1292(b) (1966), and in the Second Circuit, in certain circumstances, are even subject to appeal. *See* General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974).

Despite the weakness of the majority's argument, the end result appears to be that in California defendants may challenge class action certification through mandamus. This rule will no doubt add to the general confusion concerning the appropriateness of mandamus. *See generally* 32 CAL. JUR. 2d *Mandamus* §§ 1-84 (1956).

7. 18 Cal. 3d at 385, 556 P.2d at 758, 134 Cal. Rptr. at 396.

8. *Id.* at 386, 556 P.2d at 758, 134 Cal. Rptr. at 396.

words, the trial court must determine whether a successful prosecution of the suit will reward the individual class members with direct compensation. The opinion argues that when individual recoveries are small and consumed in the expense of prosecuting the suit and distributing the proceeds, it is unlikely that individual class members will bother to come forward.[9] Thus, the problem with small claims class actions—with the implied exception of those that involve little expense to prosecute and individual recoveries that exceed nominal amounts—is that the purported class member is unlikely to receive any appreciable benefit.[10] When class members are unlikely to receive any appreciable benefit, Justice Clark continues, the action must be dismissed as unmanageable and without substantial benefit. He argues further that such actions offer substantial benefit only to the class action attorney and burden the overcrowded courts with actions lacking proper purpose.[11]

In addition to basing the issuance of mandamus upon the lack of benefit inherent to small claims class actions generally, the majority also concludes that in this particular case the plaintiff's proposed remedies would fail to benefit the class. Plaintiffs proposed that damages could be distributed to the class by a method of "fluid recovery" in which the excess tax collections would be repaid by reducing the sales tax reimbursement charged on future redemptions. Given the great reduction in the redemption of Blue Chip stamps and the fact that many in the injured class had either moved from California or had died, the court concludes—and Justice Tobriner in a separate opinion concurs[12]—that the suggested method of fluid recovery would fail to provide the necessary correlation between those who were injured and those who would benefit.[13] Similarly, since the injured class may have constituted much of the citizenry of the state, the court concludes that leaving the money with the Board of Equalization, where it adds to the public treasury and thus indirectly benefits a high proportion of the injured class, accomplishes a sufficiently equitable result.[14]

II. Criticism of the Court's Analysis

The problems presented by the use of the class action in a case like *Blue Chip*, where the individual class members have suffered arguably de minimus injuries and the class as a whole has sustained sizable damages,

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9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 388, 556 P.2d at 759, 134 Cal. Rptr. at 397. Justice Sullivan joined in Justice Tobriner's opinion.

13. *Id.* at 386-87, 556 P.2d at 759, 134 Cal. Rptr. at 397; *cf.* City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 72 (D.N.J. 1971); Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338 (1971) [hereinafter cited as *Damage Calculation*].

14. 18 Cal. 3d at 387, 556 P.2d at 759, 134 Cal. Rptr. at 397.

have engendered a vituperative and copious response on the part of courts and commentators.[15] The proponents of the small claims class action have viewed it as a tool through which the "little guy" (*e.g.*, the consumer) could join forces and split costs with others similarly situated in order to force the class opponent, often a large corporation, to disgorge wrongfully obtained profits.[16] Such actions benefit society both by deterring further wrongdoing and by compensating worthy victims. While recognizing the economic and procedural benefits of certain class actions, opponents of this type of suit characterize it as a tool for legalized blackmail.[17] The enormous litigation costs and potential recoveries accompanying complex class actions force defendants to opt for settlement of even those claims totally lacking in merit. This use of the class action, so its opponents argue, metes out punishment disproportionate to the scope of the wrongdoing. Moreover, the adherents of this view argue, as does the majority in *Blue Chip*, that since the minuscule recoveries to class members are of little consequence the action effectively benefits no one other than the avaricious attorney who has in effect solicited it.[18]

The court's opinion in *Blue Chip* must be analyzed in the context of this continuing debate over small claims class actions. The majority opinion cited, without criticizing, earlier supreme court class action cases that had adopted a liberal position in small claims class actions. The holding of *Blue Chip* is sound even under the liberal approach set forth in these earlier cases. By essentially adopting the more conservative approach to small claims class actions, though, the majority's analysis radically departs from that of the cases it purports to follow. As a result, the restrictive language in *Blue Chip* should be viewed as dicta, not necessarily precluding future small claims class actions.

The court's analysis in *Blue Chip* contains two major flaws: (1) It distorts the test by which trial courts are to judge the propriety of a class action, and (2) it implies that California law has rejected the fluid recovery mechanism.

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15. For both an exhaustive overview of the problems presented by the use of the class action and a helpful collection of the authority on the subject, see *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1321 (1976) [hereinafter cited as *Developments*].

16. *See, e.g.*, Pomerantz, *New Developments in Class Actions—Has their Death Knell Been Sounded?*, 25 BUS. LAW. 1259 (1970); Note, *The Cost-Internalization Case for Class Actions*, 21 STAN. L. REV. 383 (1969).

17. *See, e.g.*, Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375 (1973); Handler, *The Shift From Substantive to Procedural Innovation in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1 (1971).

18. *See In re* Hotel Telephone Charges, 500 F.2d 86, 91 (9th Cir. 1974) and the cases cited therein. The overwhelming complexity of certain small claims based class actions and the spectre of the attorney as the only ultimate compensatory beneficiary has evoked some highly emotional, negative responses from the courts. Judge Lumbard, in a dissenting opinion in *Eisen I*, referred to the underlying action as a "Frankenstein monster." Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 572 (2d Cir. 1968), *vacated*, 417 U.S. 156 (1974).

a. The Substantial Benefits Test

Section 382 of the California Code of Civil Procedure provides the statutory basis for the maintenance of class actions,[19] but fails to provide any rules governing them. The California Supreme Court has refused to delineate a set of specific guidelines controlling class actions. Instead, it has directed the trial courts to use their discretion, within certain general limits, when judging the propriety of class actions. The court has emphasized that the trial courts should be innovative in dealing with problems that may arise during the course of the litigation.[20] The court has suggested that for guidance the trial courts should look to Rule 23 of the Federal Rules of Civil Procedure and the remedy provided in the state's Consumer Legal Protection Act that is, with a few alterations, modeled after rule 23, the federal class action rule.[21]

California case law has consistently held that plaintiffs must meet two requirements in order to maintain a class action: (1) They must show the existence of an ascertainable class, and (2) they must demonstrate that a well-defined community of interest in the applicable questions of law and fact similarly affects the individual class members.[22] The ascertainable class requirement focuses upon whether the class members' individual rights to recover are based upon a similar set of facts. If not, the action would be procedurally inefficient because it would have no *res judicata* effect on absent class members. The community of interest rule relates to the ultimate manageability of the suit; *i.e.*, are the questions of law and fact as they affect individual class members sufficiently related as to render a class suit more economical than a multiplicity of individual actions?

While there was no dispute over whether the plaintiff class had met these two requirements in *Blue Chip*, it was in the context of discussing the community of interest requirement that the supreme court, in *Daar v. Yellow Cab Co.*,[23] first referred to a substantial benefits test. In *Daar*, the plaintiff class sought recovery of overcharges made by the defendant cab

19. CAL CIV. PROC. CODE § 382 (West 1973). The section provides: "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue for the benefit of all."

20. *See, e.g.*, City of San Jose v. Superior Court, 12 Cal. 3d 447, 453, 525 P.2d 701, 709, 115 Cal. Rptr. 797, 805 (1974); Vasquez v. Superior Court, 4 Cal. 3d 800, 820-21, 484 P.2d 964, 977-78, 94 Cal. Rptr. 796, 809-10 (1971); Petherbridge v. Altadena Fed. Sav. & Loan Ass'n, 37 Cal. App. 3d 193, 198, 112 Cal. Rptr. 144, 148 (4th Dist. 1974).

21. Consumer Legal Remedies Act, CAL. CIV. CODE §§ 1750-1784 (West 1973). As the court noted in *Vasquez*, the act specifically applies to deceptive practices and section 1752 clearly expresses the legislative intent not to affect class actions maintainable under other provisions of law. 4 Cal. 3d at 818, 484 P.2d at 975-76, 94 Cal. Rptr. at 807-08. The court does note, however, that trial courts may utilize procedural provisions of the act. *Id.* at 820, 484 P.2d at 977, 94 Cal. Rptr. at 809.

22. Daar v. Yellow Cab Co., 67 Cal. 2d 695, 704, 433 P.2d 732, 739, 63 Cal. Rptr. 724, 731 (1967).

23. 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

company over a four-year period. Few, if any, individuals had suffered enough damage to justify the bringing of their own suit, but the class harm involved a significant sum.[24] In both explaining why the plaintiff's complaint satisfied the general requirements necessary to maintain a class action and of defining the nature of those requirements, the court stated:

> As we are not unmindful that *substantial benefits resulting from class litigation, both to the litigants and to the court*, should be found before the imposition of a judgment binding on absent parties can be justified, our determination depends upon whether the common questions are sufficiently important to permit adjudication in a class action rather than in a multiplicity of separate suits.[25]

Linked to the community of interest requirement, the term "substantial benefit" was used in the context of procedural efficiency. In theory, where common questions predominate, the substantial benefit is clear: "[A] multiplicity of legal actions dealing with identical basic issues" in lieu of a single suit would result in "multiple burdens upon the plaintiffs, the defendant, and the court."[26]

Despite the theoretical efficiency of having only one action, the individual claims in *Daar* were too small to present an actual threat of multiple suits. The procedural benefit was illusory.[27] The court in *Daar* implied, however, that the substantial benefits test requires a second inquiry, precisely in this situation—namely, whether the class suit will further a substantive purpose that would otherwise be thwarted because individual suits are unlikely. The court concluded that allowing the class action would serve the justifiable purpose of purging the wrongdoer of its wrongfully obtained gains.[28]

The *Daar* court's affirmative endorsement of the small claims class action indicates the lack of relationship between the size of the individual class member's claim and the substantial benefit to be derived from the maintenance of the suit. *Daar* stands for the proposition that the substantial

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24. The parties negotiated a court-approved settlement of $1.4 million. *See Damage Calculation, supra* note 13, at 366, n.186.

25. 67 Cal. 2d at 713, 433 P.2d at 745, 63 Cal. Rptr. at 737 (emphasis added).

26. *Id.* at 714-15, 433 P.2d at 746, 63 Cal. Rptr. at 738.

27. In fact, if no individuals would be likely to sue on their own behalf, a small claims class suit could be viewed as causing burdensome additional costs to the courts and the defendants. *See* Hackett v. General Host Corp., 455 F.2d 618 (3rd Cir. 1972). In *Hackett*, the circuit court upheld the district court's refusal to certify a class composed of six million bread consumers. The court commented: "If in some cases . . . the individual claim [is] so small that neither private nor public lawyers think it should be litigated, then that decision of the legal marketplace may be the best reflection of a public consciousness that the time of lawyers and the court should be spent elsewhere." *Id.* at 626.

28. The court stated:

> [A]bsent a class suit, recovery by any individual taxicab users is unlikely . . . It is more likely that, absent a class suit, defendant will retain the benefits from its alleged wrongs. A procedure that would permit the allegedly injured parties to recover the amount of their overpayments is to be preferred . . . .

67 Cal. 2d at 715, 433 P.2d at 746, 63 Cal. Rptr. at 738.

benefit test involves a two-pronged inquiry directed at the class suit's procedural efficiency and substantive effect. If a suit presents an ascertainable class sufficiently connected by the requisite community of interest *and* furthers a proper substantive goal, then it should be maintainable as a class action.[29]

The supreme court's use of substantial benefit in a later case, *Vasquez v. Superior Court*,[30] follows the pattern set in *Daar*. The plaintiffs in *Vasquez* sought to maintain a class action against the defendant, a seller of meat and freezers, based on defendant's allegedly fraudulent misrepresentations. The individual class members in *Vasquez* suffered considerable damages and the court noted that the instant suit would avoid the burdens of multiple litigation. In addition, the court discussed the substantive ends furthered by small claims class actions in general.[31] Approving its earlier analysis in *Daar*, the court reaffirmed the concept that substantial benefit accrues when a class action provides the sole practical means of remedying wrongdoing. The court concluded that the instant suit would further the substantive ends of deterring fraud and curtailing illegitimate competition.[32] As in *Daar*, the court conducted its inquiry into substantial benefits in terms of both procedural efficiency and substantive effects.[33]

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29. For discussion concerning the proper substantive goal, see Section III *infra*.

30. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

31. 4 Cal. 3d at 810, 484 P.2d at 970, 94 Cal. Rptr. at 802. For other case authority indicating general support of the small claims class action, see Southern Cal. Edison Co. v. Superior Court, 7 Cal. 3d 832, 842, 500 P.2d 621, 627, 103 Cal. Rptr. 709, 715 (1972) ("[I]t is vital to prevent such chilling of class actions in light of their new importance as a litigation tool); Cartt v. Superior Court, 50 Cal. App. 3d 960, 124 Cal. Rptr. 376 (2d Dist. 1975) (permitting the maintenance of a consumer class action without individual notice so that a suit involving individual class member damages of between 50¢ and $5 could proceed).

32. 4 Cal. 3d at 808, 484 P.2d at 968-69, 94 Cal. Rptr. at 800-01.

33. In the only other supreme court case that discusses the meaning of substantial benefit, the court limits its inquiry to the question of whether the class suit meets the requirements of procedural efficiency. *See* Collins v. Rocha, 7 Cal. 3d 232, 238, 497 P.2d 225, 228, 102 Cal. Rptr. 1, 4 (1972).

Two California appellate cases that Justice Clark cites, however, do apply the substantial benefit test in a manner consistent with his approach. In Stilson v. Reader's Digest Ass'n, Inc., 28 Cal. App. 3d 270, 104 Cal. Rptr. 581 (1st Dist. 1972), plaintiffs brought an action against Reader's Digest for its unauthorized use of their names in a mailing to the public. The class consisted of somewhere between 20 million to 50 million members. The court dismissed the case of the grounds that, without individual showings of special anguish, the plaintiffs were entitled to only nominal damages that would fail to provide the requisite substantial benefit. *Id.* at 274, 104 Cal. Rptr. at 583. In Devidian v. Automotive Serv. Dealers Ass'n, 35 Cal. App. 3d 978, 111 Cal. Rptr. 228 (5th Dist. 1973), the court refused to certify a small claims class action in which plaintiffs alleged that a large class of defendants had illegally conspired to set gasoline prices and thereby damaging members of a class consisting of 250,000 gasoline purchasers. The court indicated that the potential recovery of nominal damages failed to justify either the potentially ruinous effect that an accounting might have on innocent defendants or the staggering costs to the parties and to the courts that would be expended if the case went to trial.

Neither of these cases are consistent with supreme court precedent. The substantial benefit language in *Devidian* may be distinguished as mere dictum since the court also holds that "there is [no] ascertainable class of defendants in whose contractual relationship with plaintiffs there

The gravest harm of *Blue Chip* is not the result that it reaches but rather its distortion of the substantial benefits test. The proper inquiry would have first noted that the action met the ascertainable class and community of interest requirements, and then focused upon whether the action promised to provide sufficient substantive benefit. *Blue Chip* incorrectly assumes that only substantial compensation of individual class members would afford the necessary benefits, when, in fact, the court has previously recognized that class suits fulfill the substantive ends of deterrence, disgorgement, and curtailing illegitimate competition. *Daar, Vasquez*, and the court's general direction to trial courts to be innovative demonstrate that a liberal rather than restrictive application of the test has traditionally been favored.[34]

Under the circumstances present in *Blue Chip*, the court would have reached the same result by following its earlier line of cases. The result is correct not because the stake of each class member is so small, nor because the attorney may be the sole financial beneficiary. What justifies the result is the suit's failure to further any desired substantive end. As Justice Tobriner suggests,[35] not only is there no effective means of affording class members meaningful compensation, but maintenance of the action would not serve to deter or redress any wrong committed by the defendant. Blue Chip committed an honest mistake of law and retained no portion of the overpayments.

The short majority opinion gives only summary treatment to the important principles applicable to class certification. Absent a stronger indica-

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is a manageable community of interest." *Id.* at 985, 111 Cal. Rptr. at 233. On the other hand, *Stilson* seems to present the type of situation that *Daar* viewed as most amenable to a class suit. One might attempt to distinguish the case on the grounds that the court feared that the case would be res judicata to all class members, some of whom might wish to pursue showings of special anguish and greater damages. But class action procedures may be tailored to provide for such a showing, and it is doubtful, despite the enormous size of the class, whether many of the class members would have attempted to show that the use of their names in a sweepstakes caused them special anguish. In addition, the appellate court failed to consider the suit's twin effects of deterrence and disgorgement—deterrence from future unauthorized use of names and disgorgement of the amounts that the defendant may have saved by use of the names without payment. The court's overconcern with the amount of individual damages reflected a misconception of the substantial benefits requirement. Since the action also would have resulted in compensation, albeit nominal damages, the decision lacks any sound support and should be disregarded.

34. It could be argued that *Blue Chip* is not the first supreme court case to reject the progressive approach advocated in *Daar* and *Vasquez*. In City of San Jose v. Superior Court, 12 Cal. 3d 447, 525 P.2d 701, 115 Cal. Rptr. 797 (1974), the court granted a writ of mandamus overturning a trial court's certification of a class action brought by plaintiffs seeking recovery for diminution of the value of their property caused by aircraft noise, vapor, and dust. Justice Clark's majority opinion, in which three other members joined, emphasized how courts must guard against the injustices caused by class actions. *Id.* at 459, 525 P.2d at 709, 115 Cal. Rptr. at 805. Yet the court did not attempt to alter the substantial benefits test. The rationale behind the court's decision focused upon the procedural inefficiency of the suit in that since the damage question posed by each class member's claim raised unique and complex problems of proof, the class lacked the sufficient community of interest. This case offers no justification or intimation of the departure from precedent adopted in *Blue Chip*.

35. 18 Cal. 3d at 389, 556 P.2d at 760, 134 Cal. Rptr. at 398 (Tobriner, J., concurring).

tion from the court that it intends to depart from the thorough and well-reasoned analysis in *Daar* and *Vasquez*, the restrictive language in *Blue Chip* that needlessly distorts the substantial benefits test should be disregarded. *Blue Chip* should be viewed as standing for the simple proposition that where a class suit fails to further any significant substantive end, the trial court should refuse to certify the class.

b. Validity of Fluid Recovery

The traditional method of distributing the proceeds of a successful class action involves the individual class members upon completion of the main action advancing their claims through court directed proof of claims procedures.[36] Such a process generally requires individuals to come forward and assert their claims. This approach envisions individual recovery as the end result of a successful class suit.

Opponents of small claims class actions argue that in many suits the fruits of victory will seldom reach the injured class members. In some cases, the class members and the defendant will lack the necessary verification of the transaction (which in all probability occurred several years earlier) to satisfy proof of claims procedures. In addition, a class member may lack the necessary incentive to come forward and collect a small claim. Since it is often possible for the court to calculate the gross damages to the class, as in *Daar* and *Blue Chip*, a successful class action of this type could conceivably leave a large unclaimed fund.

Leaving this fund with the defendant would not only leave class members uncompensated; it would also frustrate the noncompensatory substantive objectives underlying the suit. The wrongdoer would go unpunished. Others would not be deterred from engaging in similar conduct. While opponents of these actions have viewed the absence of the compensatory element as grounds for refusing to allow the maintenance of these suits, a few courts and some commentators have proposed "fluid recovery" as an innovative solution to the problem.[37]

Fluid class recovery entails a scheme by which the substantial fund consisting of the residue of damages unclaimed by individual class members may be distributed to the class as a whole.[38] Where significant amounts of class members fail to come forward and the court can calculate the gross damages to the class, fluid recovery would supplement proof of claims procedures in distributing the entire amount of class damages in some way

36. *See* Daar v. Yellow Cab Co. 67 Cal. 2d 695, 713, 433 P.2d 732, 745, 63 Cal. Rptr. 724, 737 (1967).

37. See notes 38 and 43 *infra*.

38. *See generally Developments, supra* note 3, at 1516; Note, *Managing the Large Class Action*: Eisen v. Carlisle & Jacquelin, 87 HARV. L. REV. 426 (1973); *Damage Calculation, supra* note 13; Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448 (1972).

that would benefit the class. There exist three generally suggested methods of fluid recovery: (1) Adjusting an applicable market mechanism such as reducing the future reimbursement tax charged on redemption of trading stamps as suggested in *Blue Chip*[39] or reducing taxi fares as the settlement concluded in *Daar*;[40] (2) allowing the money to escheat to the state where it will advance a more general public benefit;[41] or (3) giving the money in trust to a public agency that will distribute it in a manner that will advance the underlying purposes of the cause of action.[42] By removing the emphasis upon individual recovery and looking to class benefit, fluid recovery mechanisms accomplish the substantive goals of deterrence, disgorgement, and, even indirectly, compensation in the context of the small claims class action.

The status of fluid recovery as an available remedy in class suits, however, is unclear. Some federal courts have rejected the approach, noting that fluid recovery could alter substantive rights in violation of the Rules Enabling Act or that the statute upon which the cause of action is based fails to provide explicitly for fluid recovery.[43] A few courts have registered their approval.[44] California courts have avoided a direct confrontation with the issue.[45]

Both the majority and concurring opinions found fluid recovery inapplicable in *Blue Chip*. Because of the significant decline in the popularity of Blue Chip stamps, there was not a sufficient overlap between the injured class and those that would benefit by reducing the future reimbursement tax charged on redemption.[46] Moreover, it made no sense to collect a damage fund and, under the second form of fluid recovery, allow the money to escheat to the state since the state already possessed the overcharge fund.[47]

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39. 18 Cal. 3d at 386, 556 P.2d at 759, 134 Cal. Rptr. at 397.

40. See notes 45 and 59 *infra*.

41. *See* Blue Chip Stamps v. Superior Court, 18 Cal. 3d at 388, 556 P.2d at 760, 134 Cal. Rptr. at 398 (Tobriner, J., concurring).

42. *See* West Virginia v. Charles Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

43. *See* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1012-14 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974); *In re* Hotel Charges, 500 F.2d 86, 89 (9th Cir. 1974). Both cases base their rejection of fluid recovery on the fact that the antitrust statute upon which the underlying cause of actions are based fails to provide a fluid recovery remedy.

44. *See* Bebchick v. Public Util. Comm'n, 318 F.2d 187 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963) (court ordered that the defendant account for overcharge on transfers and that fund be applied for benefit of the transit users; however, suit was not brought as a class action); Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971), *rev'd*, 479 F.2d 1005 (2nd Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974) (district judge ordered market reduction remedy in complex small claims class action case).

45. The common identification of *Daar* as a fluid recovery case is only technically correct. The supreme court approved the cause of action maintained in *Daar*, but offered only neutral comment on a proposed scheme of fluid recovery. See text accompanying note 56 *infra*. The fluid recovery result of the case derived from a trial court approved settlement about which the supreme court has yet to comment.

46. 18 Cal.3d at 386-87, 556 P.2d 759, 134 Cal. Rptr. 397.

47. See note 67 *infra*.

Although the majority was correct in rejecting fluid recovery as an appropriate remedy in *Blue Chip*, the danger of its opinion is the inescapable implication that fluid recovery would never be an appropriate remedy. In finding that the class action would not result in substantial benefits, the majority paraphrased language found in *Daar*,[48] and later recited in *Vasquez*,[49] indicating that the feasibility of a class suit depends in part upon the probability that each class member will come forward, identify herself and prove her claim.[50] If the maintenance of a class suit depends upon this factor, classes will not be certified when there is a low probability that individual class members will come forward. Fluid recovery, a procedure designed to fashion a remedy precisely when this probability is low, might never be appropriate.

The supreme court's previous use of this proof of claim language, however, conflicts with the *Blue Chip* court's interpretation. Like the court's substantial benefits analysis, this novel proof of claim analysis was unnecessary for proper resolution of the case and should not be read as foreclosing the future use of fluid recovery in appropriate cases.

Daar and *Vasquez* did not, as *Blue Chip* implies, hold that a class should only be certified if individual members are likely to come forward and prove their claims. Rather, proof of claim problems were discussed as one factor to consider in determining whether the requisite community of interest exists.[51] Specifically, if the questions presented by individual class members who come forward to prove their claims are too complex, the necessity of individually considering these questions may outweigh the procedural benefits to be derived from the class suit.[52] Under this analysis, it is not the likelihood of individual claims but the potential questions that may be raised by individual claimants that will affect the certification decision. This analysis leaves open the question of whether fluid recovery may be appropriate to supplement the proof of claims procedure.

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48. 67 Cal. 2d at 713, 433 P.2d at 745, 63 Cal. Rptr. at 737.

49. 4 Cal. 3d at 809, 484 P.2d at 969, 94 Cal. Rptr. at 801.

50. 18 Cal. 3d at 386, 556 P.2d at 758, 134 Cal. Rptr. at 396.

51. The full passage in which the language appears in *Daar* reads:

> Thus we must examine the complaint before us in order to determine whether under the facts alleged each person's right to recover is based on questions of law and fact which are separate and distinct. The fact that each individual must prove his separate claim to a portion of any recovery by the class is only one factor to be considered in whether a class action is proper.

67 Cal. 2d at 713, 433 P.2d at 745, 63 Cal. Rptr. at 737.

In *Vasquez*, the court notes:

> The requirement of a community of interest does not depend upon an identical recovery, and the fact that each member of the class must prove his separate claim to a portion of any recovery by the class is only one factor to be considered in determining whether a class action is proper.

4 Cal. 3d at 809, 484 P.2d at 969, 94 Cal. Rptr. at 801.

52. 4 Cal. 3d at 815, 484 P.2d at 973, 94 Cal. Rptr. at 805.

There is California precedent for using fluid recovery. In the case of *Market Street Railway Co. v. Railroad Commission*,[53] the court had to distribute a fund that had accrued when the railway company had unsuccessfully challenged a reduction in its passenger fares ordered by the Railroad Commission. The railway company had petitioned for and was granted a stay of the reduction, but the order was subject to the condition that the company would post bond and keep track of the excess charges collected. Ultimately, the challenge to the reduction failed, and the court had to distribute the substantial fund that remained unclaimed after a small amount of refunds were returned to the former passengers who filed claims. On the grounds of equitable considerations, the court rejected claims of the company and the state, and implemented a fluid recovery remedy by awarding the fund to the city and county of San Francisco, which had recently acquired the railway company. The court reasoned that distributing the money to the city would ultimately benefit the citizens who had suffered from the overcharge.[54] In similar situations, fluid recovery could be an appropriate resolution of successful class actions.

The supreme court has, in fact, impliedly supported the use of fluid recovery in class actions. In a footnote in *Daar*,[55] the court discussed a fluid recovery approach proposed by the state in an *amicus curiae* brief. Although concluding that the state's position was prematurely raised, the court did not reject the approach as invalid on its face. Rather, the court left the recovery question to the trial court: "It lies within the sound discretion of the trial court, within the dictates of the applicable law to determine the manner in which any further proceedings will be conducted."[56] Since fluid recovery fails to violate any law—it has precedential support[57]—and the court has often instructed the trial courts to be innovative in dealing with problems that arise during the course of class action litigation, fashioning a scheme of fluid recovery arguably lies within the discretion and even the duty of the trial court. Prior to *Blue Chip*, the court strongly supported the small claims class action and acknowledged the desirability of recouping the gains of unjustly enriched defendants.[58] Fluid recovery provides the only sensible solution to a case like *Daar* where the court wants the case to accomplish the purposes of deterrence and disgorgement, but it is probable that the proof of claims procedure would result in the distribution of only a small portion of the total recovery. In fact, the well-publicized, court-approved settlement of *Daar* did include a provision for fluid recovery.[59]

53. 28 Cal. 2d 363, 171 P.2d 875 (1956).
54. *Id.* at 371-73, 171 P.2d at 881-82.
55. 67 Cal. 2d at 715 n.15, 433 P.2d at 746 n.15, 63 Cal. Rptr. at 738 n.15.
56. *Id.* at 715, n.15, 433 P.2d at 746, n.15, 63 Cal. Rptr. at 738, n.15.
57. See text accompanying note 53 *supra*.
58. See text accompanying notes 22-31 *supra*.
59. Of the $1.4 million agreed upon as the settlement, $950,000 was to be returned to the

The supreme court has never registered disapproval of that solution, and it has continued to rely on *Daar* as the leading case on class actions. Thus, fluid recovery is a viable remedy in California. Its inapplicability in *Blue Chip* should only be based on the peculiar facts of that case.

III. Redefining the Substantive Effect Element of the Substantial Benefits Test

The preceding discussion has demonstrated that in order to maintain a class action the plaintiff must show that the suit is procedurally efficient and substantively beneficial. A long line of cases dealing with the ascertainable class and community of interest requirements has provided trial courts with authoritative guidelines that aid them in judging the procedural efficiency of a particular suit as compared with the efficiency of multiple individual actions.[60] The California Supreme Court, however, has failed to provide similar guidelines pertaining to the likely substantive effect that a class suit must have to justify certification. The court has suggested that certain results, including compensation to the class, deterrence of illegal activity, and disgorgement of the wrongdoer's gain, may justify the maintenance of class actions. It has not indicated, however, how a trial court should determine whether a particular class suit promises to have the requisite substantive impact. The final section of this Note proposes a solution to the problems engendered by the uncertainty surrounding the class certification decision.

a. Rejection of the Compensatory Benefit Rule

The foregoing analysis demonstrated that the *Blue Chip* court need not have taken a restrictive view of substantial benefits to resolve the case and, in fact, could not have taken this view if it intended to follow its earlier reasoning in cases like *Daar* and *Vasquez*. Still unanswered is whether the court *should* restrict its view of substantial benefits to simply compensatory benefits. The following discussion argues that as a policy matter, a compensatory benefit rule should be rejected.

The assumption that the sole substantive purpose of a class suit is to provide class members with substantial compensation underlies the court's analysis in *Blue Chip*. This assumption leads the court to use language that would support the rejection of most small claim class actions and the fluid recovery mechanism that would help to facilitate such suits. This approach is not novel. It essentially follows the manageability analysis accepted in the federal courts.

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class by a reduction of taxicab fares below the then existing maximum fares. *See Damage Calculation, supra* note 13, at 366, n.186.

60. *See* Daar v. Yellow Cab Co., 67 Cal. 2d at 704, 433 P.2d at 739, 63 Cal. Rptr. at 731 and cases cited therein.

In the federal courts, disputes over potential distribution problems arise during the trial court's determination of a given class action's "manageability."[61] Manageability is a term of legal art. It derives from a directive of rule 23: Trial courts in determining the propriety of a rule 23(b)(3) (damages) action are to consider, among other factors, "the difficulties likely to be encountered in the management of a class action."[62] Manageability has never been explicitly defined. Rather, trial courts, as part of determining whether to certify a class, will assess all aspects of the potential action from notice to distribution in an attempt to discern any problems that would render the suit unmanageable.

Disputes over manageability often center upon the ultimate compensatory benefits that class members will receive. It is a generally accepted rule among the federal courts that if the expenses of the litigation promise to consume the anticipated recovery[63] or if the problems in the potential distribution of the recovery suggest that little of it will reach the class members' pockets,[64] then the court should refuse to certify the class. Federal courts have stated various reasons for supporting a compensatory benefit approach: Only the attorneys benefit if the suit fails to result in compensation; noncompensatory suits place an added, unneeded strain on judicial resources; the statute upon which the cause of action is based fails to provide for fluid recovery; and allowing noncompensatory suits would violate the Rules Enabling Act.[65]

Prior to *Blue Chip*, no California Supreme Court class action case had dealt explicitly with distribution problems. The majority opinion in *Blue Chip* adopts the federal approach to cases that promise little or no compensatory benefit. As demonstrated above, however, previous California cases recognized that class actions often result in substantive benefits distinct from direct compensation. In his concurring opinion, Justice Tobriner takes account of this distinction. He argues that what renders *Blue Chip* an unmeritorious class action is not merely the class member's probable lack of recovery, but that the suit would neither deter future wrongdoing nor rectify a defendant's unjust enrichment since Blue Chip's actions resulted from an innocent mistake of law and it reaped no benefit.[66] Justice Tobriner's opinion reflects the sounder view that the absence of potential compensatory

61. *See generally Developments*, *supra* note 15, at 1493-1536; Comment, *Management Problems of the Class Action Under Rule 23(b)(3)*, 6 U.S.F.L. REV. 343 (1972).

62. FED. R. CIV. P. 23 (b)(3)(D) (1966).

63. *See In re* Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974); Cotchett v. Avis Rent-A-Car Sys., Inc., 56 F.R.D. 549 (S.D.N.Y. 1972); Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26 (S.D.N.Y. 1972). *See generally* Eisen v. Carlisle & Jacquelin, 417 U.S. 163, 164 (1974); Hackett v. General Host Corp., 455 F.2d 618 (3rd Cir. 1972).

64. *See* City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971).

65. *See* cases cited in note 63 *supra*.

66. 18 Cal. 3d at 389, 556 P.2d at 759-60, 134 Cal. Rptr. at 397-98.

benefit should not preclude the maintenance of a class suit if the action would accomplish other recognized substantive benefits.

Rejection of the compensatory benefit approach would have significant implications. The class suit in which the anticipated expenses would exceed the recovery could proceed if the court found that sufficient benefit flowed from a noncompensatory substantive effect such as disgorgement of wrongful gain or the curtailment of illegitimate competition. The analysis of the correlation between the injured class and the fluid recovery mechanism would similarly diminish in importance, at least with regard to the ultimate propriety of the suit. If the court could not fashion an appropriate market mechanism that would reach the injured class members,[67] allowing the fund remaining after proof of claims procedures to escheat or to pass to the state could still achieve the action's noncompensatory benefits.

In addition, the allowance of noncompensatory actions would result in an expansion of the judicial role. Both the small claims class action and the noncompensatory suit are similar to private attorney general provisions like the treble damage remedy of the antitrust statute.[68] This approach would give private citizens the opportunity to monitor business activity through court actions, and thus, in theory, would serve the important deterrent effect that the supreme court supported in *Daar* and *Vasquez*.

One problem with allowing noncompensatory suits is that they arguably usurp legislative authority. An action for damages that punishes the defendant in terms of costs or through payment to a fund that will ultimately accrue to the state resembles the enforcement of a criminal statute rather than a typical civil suit in which the injured party seeks compensatory damages.[69] Such an approach might require explicit legislative authorization.

Nevertheless, the maintenance of such suits comports with the activist role that the California Supreme Court has traditionally maintained. Furthermore, the statutory authorization of class actions in California allows the

67. The result in *Blue Chip* could conceivably be read as supporting a fluid recovery approach in which the residue left from proof of claims escheats to the state. If Blue Chip had retained the money, but there was an insufficient correlation between the class benefitted through the appropriate market mechanism and the injured class, it is arguable that the fairest result—the only result accomplishing the noncompensatory purposes of the action—would have been to give the money to the state.

On the other hand, the result in *Blue Chip* could be based on the narrower ground that leaving the money with the state is fair in this case because of the high correlation between the beneficiaries (the citizenry) and the injured class.

Requiring this type of correlation, as done in City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971), tends to frustrate the accomplishment of the noncompensatory benefits that would flow from the maintenance of the class action. Finding the best correlation should serve as a factor in the court's design of the proper recovery mechanism, but a lack of a high correlation should not cause the trial court to bar the suit, unless, as in *Blue Chip*, the suit would also fail to accomplish the requisite noncompensatory purposes.

68. *See* 15 U.S.C. § 15 (1973).

69. *See Damage Calculation, supra* note 13, at 371.

courts to determine the guidelines for such suits. The limitations imposed by the Rules Enabling Act, often cited by commentators favoring a restrictive view,[70] do not apply to state courts. Only an explicit legislative directive or a decision of the supreme court would mandate acceptance of the restrictive compensatory benefit approach.

Yet both the court and the legislature have recently exhibited a strong endorsement of the private attorney general approach. Within four days of one another, the two bodies separately granted private attorneys representing the public interest the right to collect fees from their adversaries in specified types of cases. The court decision, *Serrano v. Priest (Serrano III)*,[71] limited the right to collect fees to cases in which the suit vindicates constitutional rights. The legislature's action, Assembly Bill 1310,[72] applies in cases that involve important rights, and represents a broader extension of the private attorney general concept. These two enunciations indicate judicial and legislative recognition of the usefulness of private lawsuits in furthering important societal objectives, and by analogy would support rejection of the compensatory benefit rule.

The ultimate justification for such an approach lies in the values that it serves. Measuring the cost and benefits of the noncompensatory small claims class action entails a decisionmaking process that is neatly tailored to the supreme court's competence. Neither the noncompensatory benefits that the supreme court has recognized, such as deterrence or curtailing illegitimate competition, nor the arguments underlying the compensatory benefit rule that focus on the lack of benefits and the strain on judicial resources are subject to empirical verification. The justification for each approach lies in the endorsement of a value-laden opinion. It is the traditional role of courts to make such decisions and to leave the determinations subject to empirical research to the legislature.

Allowing the maintenance of class suits for damages that fail to accomplish compensatory results furthers certain altruistic concerns. The maintenance of such suits creates an image of protecting the citizenry from exploitation by the business community. It would add to the notion of society's ultimate fairness in helping to fulfill the legal maxim, "for every wrong there is a remedy." The California Supreme Court, particularly in its liberal approach to tort law, has consistently favored such concerns.[73] Past pronouncements in the field of class actions indicate that here, too, the

70. *See, e.g.*, Simon, supra note 17, at 386; Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842 (1974).

71. 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977).

72. CAL. CIV. PROC. CODE § 1021.5 (West Supp. 1978).

73. *See e.g.*, Rowland v. Christian, 69 Cal.2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); Dillon v. Legg, 68 Cal. 2d. 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

supreme court has directed trial courts to follow the progressive route. *Blue Chip* is a wrong turn off that path.

b. Further Refinement of the Substantial Benefit Inquiry

The California Supreme Court's failure to indicate clearly whether it has rejected the compensatory benefit rule along with the related absence of guidelines concerning the proper substantive goals of class suits has led to confusion in the courts of appeal.[74] Moreover, leaving the certification decision to the unguided discretion of the trial court, as the supreme court has done, creates significant problems. A lack of guidelines for trial court determinations that have important substantive effects leaves an improper degree of policymaking at the trial court level and represents an abdication of responsibility on the part of the supreme court. In addition, this approach gives free reign to the trial court's personal sentiments on class actions. As evidenced by the inconsistent lines of opinion at the appellate level, this lack of guidance results in arbitrary and uneven decisionmaking and contributes to uncertainty in the field of class action litigation.

As a solution to this problem, the court could adopt either of two alternatives, both of which would clarify its position of the substantial benefit rule. First, it could eschew the balancing approach and adopt a rule that would permit the maintenance of class suits whenever an action meets the necessary procedural requirements and promises to yield *any* significant substantive benefit. Such a rule would be consistent with the way the court has applied the substantial benefits test in all cases prior to *Blue Chip*. The court purports to have fashioned a rule in which the trial courts are left to measure the costs and benefits of class actions. But a close reading of the court's use of this cost and benefit approach reveals the court focusing upon potential benefits without discussing whether the suit accomplishes such benefit and without serious consideration of any costs of the suit other than in the context of procedural efficiency. A rule based on an inquiry into whether the suit promises to yield any substantive benefit would provide adequate guidance for trial courts and, because of the rule's simplicity, would result in more consistent decisionmaking. The rule's apparent arbitrariness is acceptable because it deals with a problem that is not subject to empirical analysis but rather one that inherently must be resolved by the adoption of a value-laden decision.

Since the supreme court has repeatedly emphasized the discretionary nature of the trial court's class certification decision, perhaps it might view the "any substantive benefit" rule as an unnecessary encroachment upon that discretion. As an alternative, the court could simply provide a much

74. *Compare* Devidian v. Automotive Serv. Dealers Ass'n, 35 Cal. App. 3d 978, 11 Cal. Rptr. 228 (5th Dist. 1973); Stilson v. Reader's Digest Ass'n, Inc., 28 Cal. App. 3d 270, 104 Cal. Rptr. 581 (1st Dist. 1972), *with* Cartt v. Superior Court, 50 Cal. App. 3d 960, 124 Cal. Rptr. 376 (2d Dist. 1975).

needed clarification of the substantial benefits test. Such a clarification would include whether the court has rejected the federal approach to distribution problems, what emphasis trial courts should give to the achievement of various substantive objectives, and whether trial courts have the power to fashion remedies involving fluid recovery.

Conclusion

In recent years, both the amount and scope of class action litigation have expanded. Initially, decisions of the California Supreme Court encouraged the growth of this field in recognition of benefits to be gained thereby. While the court made its sympathies clear, it failed to express them in unequivocal legal standards. The majority's reasoning in *Blue Chip* exposes these inadequacies. Rather than allowing *Blue Chip* to undo the progressive steps previously taken, however, the court should take the first available opportunity to both reaffirm the liberal approach commenced in *Daar* and to bolster this approach with unambiguous rules in order to place in proper perspective future courts' discretion in the area of small claims class actions.

Peter H. Goldsmith

B. IMMUNITY GRANTS FOR DISCOVERY IN PRIVATE CIVIL LITIGATION

Daly v. Superior Court.[1] For the first time, the California Supreme Court considered whether the plaintiff in a private civil action may obtain a protective order providing use restriction immunity[2] to a defendant who has asserted the privilege against self-incrimination in discovery proceedings. The court held that "a civil litigant is entitled to the inclusion in a protective order . . . of whatever use and derivative use immunity is required to eliminate unnecessary barriers to effectuation of the litigant's discovery rights."[3] The right to such a protective order is subject to the condition that it not "unduly hamper" subsequent criminal prosecutions.[4] The party seeking discovery must notify state and federal prosecutors of the proposed

1. 19 Cal. 3d 132, 560 P.2d 1193, 137 Cal. Rptr. 14 (1977) (Wright, J.) (unanimous decision). The former Chief Justice was sitting by designation.

2. There are two basic forms of immunity. "Transactional immunity" gives the witness freedom from criminal prosecution for any act or transaction that is the subject of the immunized testimony. "Use and derivative use immunity" or "use and fruits immunity" provides only that the testimony itself, or information derived from it, may not be used against the witness in any subsequent criminal prosecution. The latter type of immunity has also been called "use restriction immunity." Kastigar v. United States, 406 U.S. 441 (1972), established the constitutionality of use restriction immunity. The general term "immunity" is used in this Note only when the discussion is applicable to both forms of immunity.

3. 19 Cal. 3d at 147, 560 P.2d at 1202-03, 137 Cal. Rptr. at 23-24.

4. *Id.* at 147, 560 P.2d at 1202, 137 Cal. Rptr. at 23.

order.[5] If none objects, the litigant is entitled to the order.[6]

The court had previously granted public prosecutors the right to obtain immunity orders to facilitate discovery when they chose to pursue civil rather than criminal remedies;[7] *Daly* extends this principle to *all* civil litigants. The case seems certain to have a far-reaching effect on both discovery procedures and trial rights.[8]

The court's opinion is summarized in Part I of this Note. Part II examines the court's reasoning, paying particular attention to the treatment of problems of statutory construction. After considering the theoretical basis for immunity grants, Part III concludes that, while the *Daly* rule is not supported by traditional immunity doctrine, other policies may justify the use of immunity to assist private parties in obtaining discovery. Part IV discusses the separation of powers problems raised by judicial exercise of a traditional prosecutorial power, and suggests that the court should have refrained from making what is essentially a legislative decision. The Note concludes that judicial power to grant immunity on behalf of private litigants should be discretionary rather than mandatory, and that trial courts should be provided with precise standards for exercising that discretion.

I. The Court's Treatment of the Case

a. The Factual Context

The case arose out of incidents surrounding a strike against the Independent Journal, a newspaper in San Rafael, by the International Typographers Union (ITU) and two of its local union affiliates (Local 21 and Local 18). Allen W. Daly, an Independent Journal employee, continued to work during the strike. His home was firebombed and, two weeks later, two assailants beat and fatally shot Daly in the presence of his wife and children. A member of Local 18 was convicted of the murder.[9] Daly's widow, his minor children, and the administrator of his estate sued the ITU employee in charge of the strike, the president of Local 21, and the shop steward of Local 18, as well as the Marin County Labor Council, the San Francisco Labor Council, and their numerous member unions,[10] for wrongful death, battery, and intentional infliction of mental distress.[11]

The individual defendants refused to answer certain questions on deposition, asserting the privilege against self-incrimination.[12] The trial court

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

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

7. People v. Superior Court (Kaufman), 12 Cal. 3d 421, 525 P.2d 716, 115 Cal. Rptr. 812 (1974).

8. See text accompanying notes 50-52 *infra*.

9. 19 Cal. 3d at 138-39, 560 P.2d at 1197, 137 Cal. Rptr. at 18.

10. *Id.* at 139, 560 P.2d at 1197, 137 Cal. Rptr. at 18.

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

12. U.S. CONST. amend. V. 19 Cal. 3d at 137, 560 P.2d at 1196, 137 Cal. Rptr. at 17. Two defendants apparently based their refusals on the possibility of prosecution for murder; one of

twice declined to grant a protective order providing immunity for the deposition testimony, but granted an alternative order providing that unless defendants filed timely waivers of their privilege for purposes of discovery, they would be precluded from testifying at trial.[13] The plaintiffs then sought a writ of mandate directing issuance of the immunity order.[14] By the time of the supreme court's decision, the action had been settled.[15] As no discovery proceedings were pending, the court discharged the writ. It directed, however, that should the plaintiffs later be blocked in obtaining discovery in the same litigation through exercise of a witness's privilege against self-incrimination, they would be entitled, under conditions stated in the opinion, to an order compelling answers and granting use and derivative use immunity.[16]

b. The Court's Decision

The court based its decision on two recent cases. *Byers v. Justice Court*[17] established that a legislative grant of immunity may be inferred from statutes treating other subjects. *People v. Superior Court (Kaufman)*[18] relied on this theory to find in the discovery statute[19] implied authority for courts to grant immunity in aid of discovery in a civil prosecution for deceptive advertising brought by a public prosecutor. The court in *Daly* assumed, without specifically discussing the point, that *Kaufman* made immunity orders available to all civil litigants.

The court recognized that a request for immunity by a private litigant is quite different from a request for immunity by a prosecutor who chooses to pursue a civil rather than a criminal remedy. In either case a grant of immunity imposes on the prosecution in a subsequent criminal action "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."[20] But in *Kaufman*, the decision to seek immunity was made by prosecutors who had already made the judgment that the burdens on future criminal proceedings were justified, and who could control the scope of immunity through

these additionally cited possible federal charges of conspiracy and of use of the mails and instrumentalities of interstate commerce to commit crimes of violence. The third denied that his claim of privilege was based on the possibility of a murder charge; he had refused to answer questions that might have led to federal prosecution for running a lottery. *Id.* at 140, 560 P.2d at 1198, 137 Cal. Rptr. at 19.

13. 19 Cal. 3d at 139, 560 P.2d at 1197, 137 Cal. Rptr. at 18.

14. *Id.* at 138, 560 P.2d at 1196, 137 Cal. Rptr. at 17.

15. The action was settled as to all defendants except six local unions against which default judgments had been entered, and over 100 other local unions that were granted a summary judgment from which the plaintiffs' appeal was still pending. *Id.* at 140, 560 P.2d at 1198, 137 Cal. Rptr. at 19.

16. *Id.* at 151, 560 P.2d at 1205, 137 Cal. Rptr. at 26.

17. 71 Cal. 2d 1039, 458 P.2d 465, 80 Cal. Rptr. 553 (1969), *vacated sub nom.* California v. Byers, 402 U.S. 424 (1971).

18. 12 Cal. 3d 421, 525 P.2d 716, 115 Cal. Rptr. 812 (1974).

19. CAL. CIV. PROC. CODE § 2019(b)(1) (West Supp. 1977).

20. Kastigar v. United States, 406 U.S. 441, 460 (1972).

the questions asked of the witness.[21] Where the litigation is wholly among private parties these legitimate interests of law enforcement have not been taken into account in the decision to request immunity.

Therefore, in order to obtain a protective order granting use and derivative use immunity, a private litigant must show that the order will not "unduly hamper" subsequent prosecutions.[22] The court established a fairly detailed procedure for making this showing. Notice of the proposed order, including a specification of the areas the interrogation is intended to cover, must be sent to the district attorney for the county in which the litigation is taking place, the California Attorney General, and the United States Attorney for the district in which the trial court is located, and to such other prosecuting authorities as the trial court believes might have an interest in prosecution of the witness.[23] Any objection by a prosecutor will be treated as "conclusively establishing" that immunity would unduly hamper prosecution.[24] The court is forbidden to inquire into the prosecutor's reasons for objecting, or to form its own judgment as to whether prosecutorial interests will be harmed by the grant of immunity.[25] To prevent routine objections, the prosecutor must personally declare "that he is familiar with the notice and has reasonable grounds to believe that the proposed grant of immunity *might* unduly hamper the prosecution of a criminal proceeding."[26] If no prosecutor objects, the protective order will be issued.[27]

Justice Wright's opinion presents the decision as merely a straightforward application of *Byers* and *Kaufman*. The bulk of the opinion is devoted to distinguishing immunity requests by private litigants from similar requests by public prosecutors, and to devising the notice and objection procedure to overcome the problem of potential burdens of prosecution. As a result of these priorities, the opinion obscures more than it illuminates.

Far from simply applying well established discovery principles, *Daly* fundamentally changes the relationship of the privilege against self-incrimination to the discovery rules. For the first time in California, and perhaps in the country, immunity orders may—and indeed must—be granted at the request of a private individual. The court arrived at this novel result by adopting an unjustified statutory construction and by ignoring the violation

21. 19 Cal. 3d at 144, 560 P.2d at 1203, 137 Cal. Rptr. at 22. *See* Zicarelli v. New Jersey Investigation Comm'n, 406 U.S. 472, 476 (1972) (use and derivative use immunity does not extend to statements witness does not in good faith understand to be responsive to questions asked); *In re* Kilgo, 484 F.2d 1215, 1219-21 (4th Cir. 1973).

22. 19 Cal. 3d at 147, 560 P.2d at 1202, 137 Cal. Rptr. at 23.

23. *Id.* at 149, 560 P.2d at 1204, 137 Cal. Rptr. at 25. The opinion specifies in some detail the content of the required notice. *Id.* at 148, 560 P.2d at 1203, 137 Cal. Rptr. at 24.

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

25. *Id.*

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

27. *Id.* at 147, 560 P.2d at 1202-03, 137 Cal. Rptr. at 23-24. The opinion suggests that the trial court may not have discretion to deny or modify the proposed order if no prosecutorial objection is interposed.

of the doctrine of separation of powers that arguably is inherent in purely judicial grants of immunity. More seriously, the court failed to consider whether immunity orders in the context of private civil litigation are supported by any of the policy reasons justifying the substitution of immunity for the right to remain silent in criminal prosecutions. Finally, the court has formulated a rigid procedure that deprives trial courts of discretion to withhold or limit immunity grants and so to control possible abuse of the procedure by litigants or prosecutors.

II. Immunity Grants Under the Discovery Statute

Byers established the principle that in the absence of express statutory authorization, immunity may be implied from other statutes. This holding was the court's solution to a constitutional dilemma. The case involved a "hit and run" statute[28] that required drivers involved in accidents resulting in property damage to provide identifying information to the owner of the damaged property or to the police. The statute clearly required disclosure of specific information under stated circumstances. But in the court's view this information was protected by the privilege against self-incrimination.[29] The court analyzed the statute and concluded that the legislature's primary purpose was to help the property owners recover through civil actions.[30] Therefore, it saved the statute by construing it to give the drivers immunity for the compelled disclosures. The court in *Byers* enumerated three criteria that must be satisfied before an implied legislative grant of immunity may be found in the statute as an alternative to invalidating it. First, immunity must not "frustrate any apparent legislative purpose" underlying the statute from which immunity was to be implied. Second, it must not "unduly hamper" criminal prosecutions. Third, it must not preclude the legislature from overriding the judicial grant of immunity.[31]

In *Kaufman*, the court purported to apply the *Byers* test to find in the discovery statute[32] authorization for the trial court to grant immunity to "further the legislative purposes of suppressing deceptive advertising."[33] But *Kaufman* is simply a misapplication of the *Byers* test.[34] In *Byers* the

28. CAL. VEH. CODE § 20002(a) (West 1971).

29. 71 Cal. 2d at 1047, 458 P.2d at 471, 80 Cal. Rptr. at 559. The United States Supreme Court held that the information was not protected. California v. Byers, 402 U.S. 424 (1971).

30. 71 Cal. 2d at 1055, 458 P.2d at 476, 80 Cal. Rptr. at 564.

31. *Id.* at 1056, 458 P.2d at 477, 80 Cal. Rptr. at 565.

32. CAL. CIV. PROC. CODE § 2019(b)(1) (West Supp. 1977), which provides in part:

> Upon motion seasonably made by any party or by the person to be examined . . . or upon the court's own motion and after giving counsel an opportunity to be heard, and in either case for good cause shown, the court in which the action is pending . . . may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

33. 12 Cal. 3d at 429, 525 P.2d at 721, 115 Cal. Rptr. at 817.

34. *See* Note, *New Limitations on the Privilege Against Self-Incrimination*, 64 CALIF. L. REV. 554 (1976).

statute in question clearly reflected a legislative intent to compel disclosure of certain information by drivers involved in accidents. By contrast, a specific legislative purpose of suppressing deceptive advertising can hardly be read into the discovery statute,[35] nor do the statutes prohibiting deceptive advertising require disclosure of any information.[36] In *Byers*, moreover, the statute defined the required disclosures specifically and substantively. The immunity inferred from the statute was therefore restricted. Immunity grants founded on the discovery statute are subject to no such limitation. After *Daly*, the reach of the immunity grant made available by the discovery statute extends to any information whatever that a party may seek to discover.

While *Byers* created a narrowly limited immunity in order to protect a constitutional interest otherwise irreconcilable with the statute, the holdings of *Kaufman* and *Daly* do not purport to be constitutionally required. Indeed, the court arguably invaded the constitutional interests of those who claim the privilege against self-incrimination, without any indication that the legislature intended to force disclosure of such privileged information.[37]

A careful reading of the statute suggests precisely the opposite legislative intent. Both *Kaufman* and *Daly* relied on the statutory language providing that "the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression."[38] This section is subject[39] to section 2016,[40] the general provision governing pretrial deposition for discovery purposes. That section makes privileged information nondiscoverable and cautions that the discovery statutes shall not be interpreted to change the state law on the existence of any privilege.

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35. Indeed, in *Daly* the court did not proport to find in the discovery statute a legislative purpose to protect private parties having wrongful death claims; rather it found that getting information for use in civil litigation was the legislative purpose justifying the power to grant immunity. 19 Cal. 3d at 144, 560 P.2d at 1201, 137 Cal. Rptr. at 22.

36. CAL. BUS. & PROF. CODE §§ 17500-35 (West Supp. 1977); CAL. CIV. CODE §§ 3369-70 (West Supp. 1977).

37. Where important personal rights are at stake, it seems reasonable to require a specifically stated legislative policy to abrogate the right. *Cf.* Coates v. City of Cincinnati, 402 U.S. 611 (1971); Edwards v. South Carolina, 372 U.S. 229 (1963) (cases involving the first amendment).

38. CAL. CIV. PROC. CODE § 2019(b)(1) (West Supp. 1977).

39. *See* Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961) (interpretation of any section of discovery statute requires consideration of the entire article).

40. CAL. CIV. PROC. CODE § 2016(b) (West Supp. 1977), which provides in part:

> [U]nless otherwise ordered . . . [under] Section 2019 . . . the deponent may be examined regarding any matter, not privileged . . . . All matters which are privileged against disclosure upon the trial under the law of this State are privileged against disclosure through any discovery procedure. This article [Depositions and Discovery] shall not be construed to change the law of this state with respect to the existence of any privilege . . . .

The court overcame this difficulty by reasoning that the privilege may be replaced by a grant of immunity. Apparently, the information would then conceptually cease to be privileged, so section 2016 would be inapplicable.[41] The argument is unconvincing. Section 2016's command that the discovery statutes should not collaterally affect the availability of evidentiary privileges is too explicit to be thus "modified" by an inference drawn from the vague language of a catchall section.

Even if an immunity order may be issued under section 2019, it would be authorized only if necessary to protect a party or witness from annoyance, embarrassment, or oppression. It might be argued that the order protects the witness from the embarrassment, annoyance or oppression resulting from the use of the compelled testimony in a subsequent criminal prosecution.[42] In *Kaufman*, for example, the prosecutor sought the order to "provide Kaufman 'with all possible protections against criminal prosecutions . . . .' "[43] As long as the privilege may be asserted, however, the witness does not have to answer and therefore cannot be subject to annoyance, embarrassment, or oppression. Thus the statutory predicate for the court's action is lacking.

Daly specifically rejected the theory that a *Kaufman*-type grant of immunity protects the witness. "The protective order approved in *Kaufman* was not for the benefit of the witness . . . but was for the protection of the right of the party seeking the order (the People) to obtain discovery without being blocked by a claim of privilege . . . ."[44] *Daly's* gloss on *Kaufman* is not supported by a reading of the case. The prosecutor clearly sought the order for the protection of the witness, and there is no indication that the court proceeded on a different theory.[45] Moreover, the policies of the privilege against self-incrimination argue against finding a *prosecutor* "oppressed" by the assertion of the privilege.

Even a private litigant cannot claim that a witness who invokes the privilege causes him "annoyance, embarrassment, or oppression." No matter how liberally the policies favoring full disclosure in civil discovery may be construed, the words "annoyance, embarrassment, or oppression" must be given a meaning that comports with their purpose as a serious limit on the trial court's discretion. The frustration experienced by the party

41. Compare the inapplicability of the privilege if the witness has been pardoned for the offense or if the statute of limitations has run. Brown v. Walker, 161 U.S. 591, 598, 599 (1896). *See* Note, *Immunity from Prosecution and the Fifth Amendment: An Analysis of Constitutional Standards*, 25 VAND. L. REV. 1207 (1972).

42. The amicus brief submitted by the Appellate Committee of the California District Attorneys Association assumes that the immunity order is for the protection of the witness, not of the party seeking discovery. The brief never addresses the latter possibility. *See* Brief for Amicus Curiae in Support of Appellee.

43. 12 Cal. 3d at 425, 525 P.2d at 718, 115 Cal. Rptr. at 814.

44. 19 Cal. 3d at 147 n.9, 560 P.2d at 1203, 137 Cal. Rptr. at 24.

45. 12 Cal. 3d at 425-26, 525 P.2d at 718-19, 115 Cal. Rptr. at 814-15.

seeking discovery should be unusual, unreasonable, or unfair when compared with the customary experience of similarly situated litigants.[46] While the party seeking discovery will be inconvenienced by the assertion of this or any other privilege, refusal to answer on the basis of a privilege is an accepted hazard of discovery. Indeed, the right to discovery is riddled with common law and statutory privileges. These privileges can be waived, but once they are invoked, discovery cannot be had. Of course, the non-constitutional privileges cannot be replaced by grants of immunity, but they can be abolished. Their existence indicates that a claim of privilege should not be considered to constitute "annoyance, embarrassment, or oppression."[47] This conclusion is reinforced by section 2016's recognition of privileged material as beyond the scope of a protective order, no matter how much inconvenience results for the party seeking that information.

Moreover, immunity orders are not "required" to protect the party. Other judicial sanctions are available to compensate a party for a witness's refusal to answer, though such sanctions may be more limited in California than in some other jurisdictions.[48] For example, in *Daly* the trial court

46. " 'Oppression' has a well established meaning. It means subjecting a person to cruel and unjust hardship in conscious disregard of his rights." Richardson v. Employers Liab. Assur. Corp., 25 Cal. App. 3d 232, 246, 102 Cal. Rptr. 547, 556 (2d Dist. 1972) (discussing award of punitive damages under Civil Code § 3294). *Accord*, Kendall Yacht Corp. v. United Calif. Bank, 50 Cal. App. 3d 949, 958, 123 Cal. Rptr. 848, 854 (4th Dist. 1975) (requires "evil motive"); Roth v. Shell Oil Co., 185 Cal. App. 2d 676, 681, 8 Cal. Rptr. 514, 517 (4th Dist. 1960) ("cruel and unjust hardship").

Discussing the federal rule on which the California provision was modeled, Wright and Miller say, "The harrassment or oppression should be unreasonable to justify restricting discovery . . . ." 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2036 (1970). Note that the treatise assumes protective orders will be issued to protect *witnesses* who do not wish to answer.

47. The California discovery statute was modeled on the Federal Rules of Civil Procedure, and the federal rules may be used as a guide for interpreting the California statute. Gorman Rupp Indus., Inc. v. Superior Court (Roy), 20 Cal. App. 3d 28, 30, 97 Cal. Rptr. 377, 379 (2d Dist. 1971). Rule 26(c), which contains language identical to the section 2019(b)(1) language relied on by the court, has not been interpreted to permit grants of immunity at the request of civil litigants. In fact, it has been applied only to *limit* discovery, not to expand it into areas previously protected by evidentiary privileges.

See C. WRIGHT & A. MILLER, *supra* note 46, at § 2036. "Since Rule 26(c) provides that discovery may only be had of matter that is 'not privileged,' the discovery rules cannot reach information that is protected by the privilege against self-incrimination." *Id.* at § 2018.

California, however, did not adopt the Federal Rules unchanged, and the purpose of the alterations that were made was to make discovery less restrictive than under the federal rules. Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961).

48. For a general discussion of sanctions for exercise of the privilege, see Kaminsky, *Preventing Unfair Use of the Privilege Against Self-Incrimination in Private Civil Litigation: A Critical Analysis*, 39 BROOKLYN L. REV. 121 (1972); Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. CHI. L. REV. 472 (1957); Comment, *The Privilege Against Self-Incrimination in Civil Litigation*, 1968 U. ILL. L.F. 75; Note, *Use of the Privilege Against Self-Incrimination in Civil Litigation*, 52 VA. L. REV. 322 (1966).

In California, no comment may be made on the exercise of the privilege, nor may the trier of fact draw an unfavorable inference from the assertion of the privilege. CAL. EVID. CODE § 913(a) (West 1966). This rule may be regarded as yet another indication of the legislature's intention to protect the exercise of the privilege in civil litigation.

ordered that if the defendants did not waive the privilege and submit to discovery before trial, they would be precluded from testifying.[49]

A final reason not to interpret section 2019(b)(1) to authorize immunity grants for the purposes of obtaining discovery is that such a rule would extend beyond discovery to effect a major change in the availability of the privilege against self-incrimination at the trial itself. California law does not give a trial judge authority to order immunity to force a witness or a party to testify in a civil trial. But a deposition of a party taken in the same action is admissible for any purpose by any party.[50] The deposition of a non-party witness is admissible if the witness is unavailable,[51] and the exercise of a valid privilege constitutes "unavailability."[52] Therefore, the party who wishes to remain silent at the trial will be faced with the choice of either seeing the compelled deposition testimony introduced without being able to challenge or add to it, or waiving the privilege and possibly being obliged to reveal even more information that would otherwise be privileged. A similar dilemma would arise where a witness who has been deposed invokes the privilege at the trial. The trial testimony could not be protected by a judicially granted immunity order, because *Daly* applies only to discovery proceedings (and could not be extended since it is implied from a discovery statute).

Thus *Daly*, in the guise of construing a statute regulating the process of discovery, blasts a wide hole in the availability of the privilege against self-incrimination in civil trials. By enlarging the judge's powers during discovery, the decision may create problems at trial that are beyond the judge's control. These problems may in turn require new and even more tenuous constructions of the discovery statute as implying further powers of courts to grant immunity during civil trials. The possibility of such bizarre results suggests that the finding of a legislative intent to authorize immunity grants under the discovery statute is incorrect.

III. Theoretical Basis for Immunity Grants

a. The Traditional Model

Aside from the difficulty of finding in the discovery statutes evidence of legislative intent to authorize grants of immunity on behalf of private litigants, such grants are not supported by policies traditionally advanced to justify immunity in criminal prosecutions.

Immunity is a legal concept of fairly recent development.[53] Its purpose is to resolve the conflict between the individual's constitutional right not to

49. 19 Cal. 3d at 139, 560 P.2d at 1197, 137 Cal. Rptr. at 18.

50. CAL. CIV. PROC. CODE § 2016(d)(2) (West Supp. 1977).

51. *Id.* § 2016(d)(3) (West Supp. 1977).

52. CAL. EVID. CODE § 240(a)(1) (West 1966).

53. The privilege against self-incrimination was absolute until the enactment of the first federal immunity statute in 1857. The statute provided automatic immunity from prosecution

testify against himself and society's interest in obtaining information that the government deems essential and that may not otherwise be available. In return for testimony to be used in the criminal prosecution of others, or in legislative investigations,[54] the individual is given the equivalent of the right to remain silent. The government is forbidden to take advantage of the testimony in criminal proceedings against the witness;[55] this, it is said, puts

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for "any fact or act" communicated by a witness in compelled testimony before Congress or a congressional committee. Compulsory Testimony Act of 1857, ch. 19, §§ 1-3, 11 Stat. 155-56. This automatic transactional immunity led to the abuse of "immunity baths," in which a witness would testify to unrelated crimes in order to gain immunity from prosecution. Congress responded with a statute providing narrow use immunity; that is, the witness was protected only against introduction into evidence of the compelled testimony itself. Compulsory Testimony Act of 1862, ch. 11, 12 Stat. 333; Act of Feb. 25, 1868, ch. 13, 15 Stat 37.

The Supreme Court held such statutes unconstitutional in Counselman v. Hitchcock, 142 U.S. 547 (1892). The Court stated: "In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." *Id.* at 586. Congress then enacted the first of a series of laws providing for transactional immunity. Compulsory Testimony Act of 1893, ch. 83, 27 Stat. 443. This was the prototype for federal immunity statutes up to 1970. Transactional immunity was upheld in Brown v. Walker, 161 U.S. 591 (1896).

Use and derivative use immunity has been accepted as constitutionally valid only quite recently. In 1964 the Court held that the fourteenth amendment made the privilege against self-incrimination binding on the states. Malloy v. Hogan, 378 U.S. 1 (1964). In the same term, the Court held that evidence gathered under a state grant of immunity could not be used in a federal prosecution, but endorsed, at least as to the non-immunizing jurisdiction, the concept of use and derivative use immunity. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964). The result may have been compelled by *Malloy*. Under that decision the privilege against self-incrimination is binding on the states, requiring them to grant immunity to witnesses compelled to provide incriminating information. But the doctrine of federalism forbids the states from prohibiting federal prosecutions, which would be the effect of grants of transactional immunity. If the Constitution were held to require transactional immunity, states could not adopt immunity statutes that would both fulfill this requirement and comport with the doctrine of federalism. The Court was unwilling to interfere to this degree with state prosecutions, particularly since the states bear the main responsibility for enforcement of the criminal laws. The argument that transactional immunity was still required for the granting jurisdiction was laid to rest in Kastigar v. United States, 406 U.S. 441 (1972), where the Court upheld use and derivative use immunity as provided for in the Crime Control Act of 1970, 18 U.S.C. § 6002 (1970).

For an historical discussion, see Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 GEO. WASH. L. REV. 447, 554 (1954).

54. Historically it has been recognized that the legislature, or at least Congress, must have the power to grant immunity in order to secure information necessary to carry out the legislative function. The earliest federal immunity legislation treated only witnesses before Congress or congressional committees. See note 53 *supra*. Since the legislature needs the power to grant immunity in order to carry out its constitutional functions, the doctrine of separation of powers requires that the executive branch not be permitted to interfere with legislative grants of immunity. This is especially true since the executive branch itself, particularly the Attorney General, may be the subject of the congressional investigation.

Daly does not rest on the premise that the judicial branch needs the power to grant immunity in order to carry out its function. Instead, it holds that the legislature has granted courts the power to order immunity to further the legislative aim of helping private parties get information. Therefore, the theoretical basis of legislative immunity grants is not applicable to the *Daly* problem. For this reason, and because judicial grants of immunity cannot hinder legislative processes, this Note will not discuss legislative grants of immunity further.

55. Transactional immunity precludes subsequent criminal proceedings. Even under use restriction immunity, neither the compelled testimony nor its fruits may be used in subsequent

the witness in the same position as if the testimony had never been given.

A grant of immunity is therefore a coerced bargain between the government and the witness. The government gives up the right to prosecute the witness (or, in the case of use restriction immunity, to use the testimony or its fruits against the witness) in exchange for information. From the government's view, the decision to make the bargain is properly an exercise of prosecutorial discretion, since the price of the testimony is a "heavy burden"[56] on subsequent prosecution of an admitted criminal. "Immunity is the fixed price which the government must pay to obtain certain kinds of information, and only the government can determine how much information it wants to 'buy' in the light of the fixed price."[57] Against the need for the information, the government must balance not only the social cost of granting immunity to the individual witness, but also the credibility of the system, which could be endangered if too many criminals are granted immunity.

It would be misleading, however, to focus exclusively on the government side of the immunity equation. For while the government is giving up something in granting immunity, the individual is also giving up something in being compelled to accept it. The witness, no matter how reluctant, has no alternatives other than accepting the "bargain" or going to jail. The unilateral substitution of immunity for the right to remain silent is assertedly justified because immunity is "coextensive" with the privilege against self-incrimination.[58] Nevertheless, the witness may not be indifferent as to which of these protections is given. The immunized witness who is forced to testify has been deprived of an important measure of human dignity. The privilege expresses shared values about the importance of the right of privacy and the belief that it is cruel and degrading to force a person to accuse himself, regardless of the practical consequences.[59] As Justice Douglas observed, "The guarantee against self-incrimination contained in the Fifth Amendment is not only a protection against conviction and prosecution but a safeguard of conscience and human dignity and freedom of expression as well."[60] Justice Douglas thought these values so important that no grant

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criminal proceedings. The prosecution has a "heavy burden" of showing that the evidence used was independently obtained. Kastigar v. United States, 406 U.S. 441, 461 (1972).

56. *Id.*

57. II WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 1405, 1434 (1970) (hereinafter cited as WORKING PAPERS).

58. Kastigar v. United States, 406 U.S. 441, 462 (1972).

59. The privilege against self-incrimination is also a constitutional facet of the right of privacy. . . . The privilege reflects the . . . principle . . . that a person's own knowledge of whether or not he has any connection with a criminal act is private to him and should not be subject to compulsory disclosure. The dignity of the individual is thereby protected from the degradation of enforced response to questions concerning possible wrongdoing.

Ratner, *supra* note 52, at 488-89.

60. Ullmann v. United States, 350 U.S. 422, 445 (1956) (dissenting opinion). Justice Douglas wrote that the "right of silence . . . decreed that the law could not be used to pry open

of immunity could be coextensive with the privilege—that is, it could not fully compensate for the loss of the privilege.

The constitutionality of use restriction immunity is now firmly established,[61] but that does not mean it should be considered routinely—or conceptually—interchangeable with the privilege against self-incrimination. In the criminal context, the prosecutor's interest in seeing to it that criminals are brought to justice provides a safeguard against too-frequent or inessential grants of immunity. This check on immunity grants is not present in the civil context. So it is even more important to make sure that immunity is not granted unless the values associated with dignity and privacy are clearly outweighed by the need for the information.

A full discussion of the meaning and extent of the privilege against self-incrimination is beyond the scope of this Note.[62] Of course, one could posit a fifth amendment theory that the privilege contains nothing beyond the right not to be prosecuted criminally on the basis of compelled testimony. Under this theory there is no reason not to substitute immunity for the privilege wherever it is asserted. The only restraint on the granting of immunity would then be the potential interference with subsequent prosecutions, and the critical issue would become how much the prosecution has to show to demonstrate that its evidence is not tainted.[63] If it will be difficult to

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one's lips and make him a witness against himself." *Id.* at 446. The privilege, according to Justice Douglas, protects not only from criminal consequences of self-accusing testimony, but from the social consequences of "all compulsory testimony 'which would expose him to infamy and disgrace' . . . ." *Id.* at 449, (quoting Brown v. Walker, 161 U.S. 591, 631 (1896) (Field, J., dissenting)).

61. Kastigar v. United States, 406 U.S. 441, 467 (1972).

62. *See, e.g.*, E. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955); WORKING PAPERS, *supra* note 61; Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971); Dixon, *supra* note 53; Ratner, *supra* note 48; *Symposium: The Granting of Witness Immunity*, 67 J. CRIM. L. & C. 129 (1976); Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 ST. LOUIS U.L.J. 327 (1966); Note, *Immunity Statutes and the Constitution*, 68 COLUM. L. REV. 959 (1968); Note, *Immunity from Prosecution and the Fifth Amendment: An Analysis of Constitutional Standards*, *supra* note 41; Comment, *The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of* Kastigar, 19 VILL. L. REV. 470 (1974); Comment, Kastigar v. United States: *The Required Scope of Immunity*, 58 VA. L. REV. 1099 (1972).

63. *See* United States v. De Diego, 511 F.2d 818 (D.C. Cir. 1975); United States v. Catalano, 491 F.2d 268, 272 (2d Cir. 1974); United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973); United States v. Henderson, 406 F. Supp. 417 (D. Del. 1975); United States v. Strachan, Crim. No. 74-110 (D.D.C. 1975) (dismissal order noted in United States v. De Diego, 511 F.2d 818, 825 n.9 (D.C. Cir. 1975)); United States v. Dornau, 359 F. Supp. 684, 687 (S.D.N.Y. 1973), *rev'd on other grounds*, 491 F.2d 473 (2d Cir. 1974); United States v. Thanasouras, 368 F. Supp. 534 (N.D. Ill. 1973); United States v. Meyers, 339 F. Supp. 1154 (E.D. Pa. 1972); United States v. Riviera, 23 U.S.C.M.A. 430, 50 C.M.R. 389 (1975) (if prosecutor was exposed to transcript, legally impossible to prove non-taint); *Symposium: The Granting of Witness Immunity*, 67 J. CRIM. L. & C. 129, 134, 160 (1976); Note, *Immunity Legislation: Making Better Use of a Valuable Law Enforcement Tool*, 9 COLUM. J.L. & SOC. PROB. 197 (1973); Comment, *Testimonial Immunity Adopted in* Kastigar v. United States *to Supplant Prior Federal Immunity Grants*, 4 LOY. CHI. L.J. 193 (1973); Note, *The Scope of Testimonial Immunity Under the Fifth*

establish the absence of taint, immunity should be granted cautiously in civil litigation. If the burden in practice is light, immunity can regularly be substituted for the privilege.[64] In any case, the decision to grant immunity need not be complicated by privacy concerns. The court's failure in *Daly* to give consideration to the witness' interest in remaining silent may indicate that it proceeded on a theory similar to this one. While such a theory may be consistent with current United States Supreme Court doctrine, it runs counter to the California court's usual concern for individual rights, and to the legislative policies expressed in the evidence and civil procedure codes.[65]

b. Immunity in Private Civil Litigation

1. Policies against immunity. Even if *Kaufman* is based on an incorrect construction of the discovery statute, the policies traditionally thought to underlie immunity support the result. A public prosecutor's decision to seek immunity in a civil prosecution is analytically the same as in a criminal prosecution. Given a choice of civil or criminal remedies, the prosecutor can elect to forego or burden the criminal remedy in favor of pursuing the civil remedy more vigorously. The government receives a benefit from the grant, and the interests of law enforcement are not jeopardized because it is the prosecutor who decides that the bargain is "worth it." If the witness is the civil defendant, immunity simply puts him in the position of the typical civil defendant, since parties normally are required to furnish complete information even if it will adversely affect their cause.

The supreme court in *Daly* appeared to assume that it was only a minor step to extend *Kaufman* to permit private individuals, as well as public prosecutors, to obtain immunity orders in civil litigation. Analytically,

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Amendment: Kastigar v. United States, 6 LOY. L.A.L. REV. 350 (1973); Note, In re Koota: *The Scope of Immunity Statutes*, 61 NW. U.L. REV. 654 (1966); Comment, *The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of Kastigar, supra* note 62; Note, Kastigar v. United States: *The Required Scope of Immunity*, 58 VA. L. REV. 1099 (1972); Note, *Standards for Exclusion in Immunity Cases after* Kastigar *and* Zicarelli, 82 YALE L.J. 171 (1972); Note, *Self-Incrimination and the States: Restriking the Balance*, 73 YALE L.J. 1491 (1964).

64. *See* Kastigar v. United States, 406 U.S. 441, 467, 469 (1972). Justice Marshall observes in his dissent that, in practice, a grant merely of use or derivative use immunity places no great burden on the prosecution, since the control by police and prosecutors of most relevant evidence makes it relatively easy to establish the apparently independent origin of evidence subsequently sought to be used against the witness. *Id.* at 469 (Marshall, J., dissenting). In such circumstances, the grant of immunity is worth little to the witness. Needless to say, the state has no proper interest in prosecutorial circumvention of immunity grants by means of perjurious or contrived showings that its evidence is independently obtained. If it is for this reason that the prosecution's burden is light, immunity should perhaps be substituted for the privilege less frequently.

65. *See* CAL. EVID. CODE § 913(a) (West 1966) (forbids comment on or unfavorable inference from exercise of privilege against self-incrimination); CAL. CIV. PROC. CODE § 2016 (West Supp. 1975) (privileged matter not discoverable; discovery statute to leave law regarding privilege unchanged); text accompanying notes 38-47 *supra*.

however, it is more accurate to view *Kaufman* as authorizing prosecutors to grant immunity in both civil and criminal actions. Extending this right to private individuals is a major step that is not supported by the policies that justify traditional prosecutorial grants of immunity.

In the private context, the government does not strike the immunity bargain; in fact, the government is unrepresented in the bargaining process.[66] The terms of the bargain are determined by the private parties. The benefit of obtaining information goes not to the government, but to a private individual, while the prosecutor continues to assume the entire detriment of the bargain. Moreover, the burden imposed on the government is greater in the private context. Since the government is not conducting the interrogation it cannot control the scope of the immunity by choosing what questions to ask.[67] The private litigant has no real interest in preserving the possibility of future criminal prosecution. The litigant's interest, particularly at the pretrial stage, is in obtaining the greatest possible amount of information in the hope that some of it may prove useful. The prosecutor, having given up something in exchange for nothing, may not even be able to determine with certainty what has been given up.

Furthermore, private litigation provides an obvious potential for abuse of immunity grants. A witness may welcome immunity in the expectation that the burden of proving the absence of taint cannot be overcome; in that case use immunity would amount to transactional immunity. The *Daly* procedure is not limited to plaintiffs' examination of defendants. It is available to any party in the examination of any witness.[68] Parties could collusively immunize potential criminal codefendants and thus frustrate the ends of the criminal justice system.[69]

2. Policies favoring immunity. The prosecutor's interest in law enforcement and the witness's interest in privacy are not the only interests to be considered in private litigation. There is a generalized public interest in ensuring that victims of civil wrongs are compensated, as well as the interest of the judicial system in having the discovery process function smoothly and fairly. These interests are disserved when discovery becomes a "one way

66. Even under the *Daly* procedure, the prosecutor is relegated to a passive role. The prosecutor's only official role is to exercise a veto over a bargain already struck. In practice, of course, the prosecutor is likely to be more active. An initial, perhaps fairly routine, veto would be followed by negotiations between the prosecutor and the party requesting immunity. Thus the prosecutor's interests would be represented in some rough fashion in the final order. Nevertheless, this process would be unofficial and prosecutorial participation indirect. Rather than initiating and controlling the bargain process, the prosecutor would negotiate a secondary bargain with the litigant on the strength of his ability to veto the desired order. Of course, the ability to conduct these secondary bargains, following immunity requests thrust upon the prosecutor involuntarily, depends on the availability of necessary prosecutorial resources.

67. See note 21 *supra*.

68. 19 Cal. 3d at 147, 560 P.2d at 1202-03, 137 Cal. Rptr. at 23-24.

69. See note 75 *infra*.

street" because of the assertion of a privilege that is only available to a wrongdoer.[70] When, as in *Daly*, the party seeking discovery is the victim of a tort founded on the same conduct that forms the basis of the crime as to which the privilege is claimed, the victim's individual interest in compensation may be important enough to justify a burden on later criminal prosecution. The plaintiffs in *Daly* asserted that the victim of a crime "has a right of social importance equal to that of the criminal accused to a fair trial."[71] It is not necessary to adopt this view to conclude that immunity may be justified when it is the victim of the alleged crime who seeks discovery. The argument is particularly attractive as applied to the *Daly* facts. Over six years had gone by since the murder and no prosecution had been initiated against the defendants.[72] By asserting the privilege against self-incrimination in the civil action and thereby depriving the plaintiffs of crucial information, the defendants might literally "get away with murder." There seemed little for the prosecuting agencies to lose, and perhaps much for the civil plaintiffs to gain.

Furthermore, in the context of private litigation immunity poses less of a threat to privacy and dignity. The principal reason that the privilege was incorporated into the Bill of Rights was the fear of Star Chamber-like abuses of the coercive power of the state. As Chief Justice Warren put it, "[T]he government seeking to punish an individual [must] produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."[73] A contest between private individuals does not raise the spectre of government coercion of a powerless individual. The possibility of oppression is further minimized by the fact that the private litigant is pursuing a personal cause of action. Unlike a public prosecutor, the private plaintiff is unlikely to have a large number of actions against many defendants. Even if a particular plaintiff abuses the discovery process, the effects will be limited. And the private litigant is likely to be more adversely affected by the opponent's exercise of the privilege than the government, which, with its ample investigatory resources, can usually obtain the desired information in other ways.

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70. *See* Kaminsky, *supra* note 48; Note, *Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings*, 76 COLUM. L. REV. 674, 700-02 (1976); Note, *Concurrent Civil and Criminal Proceedings*, 67 COLUM. L. REV. 1277 (1967); Note, *Stay of Discovery in Civil Court to Protect Proceedings in Concurrent Criminal Action—The Pattern of Remedies*, 66 MICH. L. REV. 738 (1968).

71. Letter from Frederick E. Watson, attorney for petitioners, to the Honorable Donald R. Wright, Chief Justice, and the Honorable Associate Justices, dated Nov. 30, 1976, filed Dec. 2, 1976, at 6.

72. 19 Cal. 3d at 139, 560 P.2d at 1197, 137 Cal. Rptr. at 18.

73. Miranda v. Arizona, 384 U.S. 436 (1966).

IV. Standards for Judicial Grants of Immunity.

a. The Separation of Powers Problem

While immunity orders to aid private litigants in obtaining discovery in civil actions do not fit the traditional model of prosecutorial grants of immunity in the investigation and prosecution of crime, the arguments in favor of making such orders available may be strong enough to justify departing from the traditional model. By permitting trial courts to order immunity without a request from a prosecutor, however, the court has changed the allocation of functions among the branches of government, conferring upon trial courts a power formerly reserved to the executive. The decision thus raises serious problems under the doctrine of separation of powers.

Traditionally, the decision whether to charge an individual with a crime is entirely within the discretion of the prosecutor.[74] Because the decision to grant immunity is considered to be an integral part of the charging process, it too is a matter of prosecutorial discretion.[75] Thus, an immunity order granted by a court on its own initiative may be considered beyond the court's power and therefore invalid.[76] To the argument of amici that grants of immunity in the absence of a prosecutorial request would violate the doctrine of separation of powers, the supreme court responded that all that is required is that the immunity not unduly hamper prosecutions.[77] But no amount of attention to prosecutorial interests can validate a grant of immunity if it is not within the court's *power*. The state constitution forbids courts from exercising non-judicial functions.[78] If the decision to grant immunity

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74. *See In re* Weber, 11 Cal. 3d 703, 720, 523 P.2d 229, 240, 114 Cal. Rptr. 429, 440 (1974). *See also* United States v. Nixon, 418 U.S. 683, 693 (1974) and authorities cited therein.

75. *In re* Weber, 11 Cal. 3d at 720, 523 P.2d at 240, 114 Cal. Rptr. at 440. The statute providing for immunity in criminal proceedings, which permits only transactional immunity, makes such grants available only on the request of the prosecutor. CAL. PENAL CODE §§ 1324, 1324.1 (West 1970).

Even a criminal defendant may not obtain immunity for defense witnesses. United States v. Nixon, 418 U.S. at 693; United States v. Alessio, 528 F.2d 1079 (9th Cir. 1976); United States v. Bautista, 509 F.2d 675 (9th Cir. 1975). *See also* Earl v. United States, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966).

76. Isaacs v. United States, 256 F.2d 654, 661 (8th Cir. 1958) (contempt citation reversed because court had ordered immunity on own initiative; "[t]he attempt to grant . . . immunity was not within the judicial power but was an attempted exercise of executive or legislative power").

Federal immunity legislation providing for immunity orders to be issued by a court on application of the appropriate executive or legislative officer was attacked as violating the doctrine of separation of powers by giving the courts an extra-judicial function in passing on the merits of the request. The United States Supreme Court held the statute valid by construing it to confer on the courts purely "ministerial" functions. Ullmann v. United States, 350 U.S. 422 (1956). Even this slight degree of judicial involvement has been criticized as an invasion of the prerogatives of the executive. *See* Rogge, *The New Federal Immunity Act and the Judicial Function*, 45 CALIF. L. REV. 109 (1957); WORKING PAPERS, *supra* note 57, at 1408, 1433-35.

77. 19 Cal. 3d at 147, 560 P.2d at 1202, 137 Cal. Rptr. at 23.

78. CAL. CONST. art. 3, § 3 provides: "The powers of state government are legislative,

represents the exercise of a purely executive function, the court has no power to make it.[79] Put another way, prosecutors may be removed from the immunity-granting process only if courts are sufficiently accountable as institutions to the interests at stake, and have adequate standards to guide them in making the decision.

Under the traditional model of immunity, the power is executive and cannot be given to courts. Judicial grants of immunity, with or without provision for prosecutorial review, undermine the bargained nature of the immunity process and burden prosecution, yet the courts have no responsibility for investigation and prosecution and so are not accountable for the possible adverse effects of their actions. Further, the courts, not being involved in prosecutorial decisionmaking, do not have adequate standards for weighing the advantages and disadvantages of immunity in particular cases. "This is a 'law enforcement bargain situation,'—a naked policy judgment—in regard to which courts have no legal standards for judgment. . . . [A] court has nothing on which to base a determination whether a given immunity grant is 'right' or 'wrong', whether it should be made, or whether it should not be made."[80]

But there are other policies supporting the availability of immunity orders to aid private litigation that may not be served if immunity is deemed a matter solely of prosecutorial discretion. To the extent that the interests of the private litigants and the institutional process for resolving private disputes must be taken into account, the decision is not within the prosecutor's competence. Rather, it is precisely the kind of decision that courts exist to make. Courts, far more than prosecutors, are accustomed to balancing competing claims and to fashioning remedial and protective orders that will accommodate, as sensitively as possible, conflicting interests in individual cases. In making a rule permitting immunity orders in civil litigation, then, it may be both necessary and desirable to alter the traditional relationship of the courts and the executive.

When a decision may redefine the allocation of powers among the branches of government, the legislature is normally the appropriate institution to act.[81] In this case, the legislature seems practically as well as theoretically better equipped to make the rule. The legislature is in a better position than the supreme court to seek out and evaluate relevant informa-

executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

79. The legislature should not be precluded from authorizing judicial grants of immunity, as long as the courts are provided with judicially manageable standards for exercising their discretion.

80. WORKING PAPERS, *supra* note 57, at 1434.

81. The opinion presents the decision as a legislative one by purporting to find the rule through statutory construction. It is clear, however, that the court is engaged in making its own rule; the limited evidence of the legislature's intent points to a rule denying immunity orders to private litigants. See text accompanying notes 38-49 *supra*.

tion from many sources.[82] It can make procedures during discovery and trial symmetrical. It can draw fine distinctions, creating, if it desires, different rules for plaintiffs and defendants, for witnesses and parties, and even for different causes of action. *Daly* is troublesome not merely because the court chose to act when the separation of powers doctrine, or at least principles of deference to other branches of state government, should have counseled caution, but because the court chose to make the new rule in a case that was moot.[83] In a case where a judicial ruling may reallocate the powers of the separate branches of government, the principle that courts should avoid unnecessary decisions seems especially apt.

b. Judicial Discretion in Immunity Grants.

To say that the legislature should make the rule is not to say that it should prescribe the procedure announced in *Daly*. The *Daly* rule gives prosecutors an absolute veto over immunity grants, but in the absence of a prosecutorial objection the court apparently lacks discretion to modify or deny the proposed order. Values of equality and consistency support a nondiscretionary rule. Reluctance to invade the prosecutorial function and the view that courts may lack judicially manageable standards for the exercise of discretion provide additional support. Nevertheless, the arguments for discretion are more persuasive.

The statute providing for protective orders in discovery gives a broad discretion to the trial court to fashion orders in light of the circumstances of each case. A nondiscretionary rule thus runs counter to the general operation of the statute. It does not adequately protect the interests of the witness or other parties, or permit the court to take into account other considerations, such as the possibility of undue publicity or harrassment, that normally go into the framing of a protective order. By contrast, permitting the court to exercise discretion would be consistent with the view that the essence of the immunity-granting function is the balancing of interests and the making of a bargain judgment in a particular case. Finally, placing the decision in the court's discretion would avoid the irrationality of the *Daly* rule, which gives a party an absolute right to the order, but subjects that right to the unexamined whim of any state or federal prosecutor. While the court is required to override the witness's objection to answering without even inquiring whether the information is really necessary, a routine[84] or even frivolous

82. In *Daly*, the supreme court adopted a quasi-legislative procedure; it sent a letter to the parties and amici outlining a proposed rule and inviting comment.

83. See note 15 *supra*. The California Supreme Court has the power to decide a moot case, if it involves "an issue of continuing public interest that is likely to recur in other cases." 19 Cal. 3d at 141, 560 P.2d at 1199, 137 Cal. Rptr. at 20. Even had the case not been moot, the rule announced in *Daly* would not have led to relief for the plaintiffs, since the motion for a protective order was opposed by the California Attorney General and the Association of District Attorneys as amici.

84. In an effort to prevent routine objections, *Daly* requires that the objection be accompanied by the prosecutor's declaration "that he is familiar with the notice and has

objection by a prosecutor who has no interest whatever in the civil litigation is sufficient to frustrate even the most urgent need for the information.

Daly itself demonstrates this irrationality. The plaintiffs argued that the likelihood of subsequent prosecution was remote because over five years had gone by and no steps had been taken to indict the civil defendants, therefore immunity would pose no realistic threat to prosecutorial interests. The California District Attorneys Association, as amici, vigorously opposed immunity. Their argument was not that immunity would interfere with an active investigation, but that it was *possible* that the convicted murderer would implicate his co-conspirators sometime in the future, perhaps to obtain favorable consideration for parole, or that the defendants might decide to confess, or that unforeseeable scientific advances might make a later prosecution possible.[85] Taking the allegations of the complaint as true, it seems that a sound discretion would place the family's interest in recovering for wrongful death above the vague and problematical interests asserted by the district attorneys.

One defendant refused to answer because he feared federal prosecution on charges of running a lottery. Here again, a court might properly decide that the family's interest in recovery outweighed any prosecution interest in a gambling conviction. On the other hand, if the action were for breach of an installment contract and the privilege asserted as to the crime of murder, a court might, after considering the need for the information and the seriousness of the crime, wish to permit the witness to stand on the privilege.

While a prosecutor's consent, objection, or failure to object might be highly persuasive to a court, it should not be determinative in every case. Plainly, notice of any proposed order must be given to all possibly interested prosecutors. This part of the process might look much like the *Daly* procedure. If a prosecutor objects in good faith to the order, ordinarily it should not issue, especially if the prosecutor states that the order may interfere with an investigation or prosecution that is presently in progress. But some circumstances would justify a court in granting immunity even over objection.

A rule permitting discretionary grants of immunity, if it is to be administrable, should also provide trial courts with sufficiently precise standards for exercising such discretion. Courts might be instructed to take

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reasonable grounds to believe" that immunity might interfere with prosecution. 19 Cal. 3d at 148, 560 P.2d at 1203-04, 137 Cal. Rptr. at 24-25. There is no reason why routine procedures cannot be developed to allow prosecutors to meet this requirement and enter objections in nearly all cases, if they believe this to be the proper policy. An instructive parallel may be found in the provision for disqualifying judges for prejudice upon affidavit of a party, CAL. CIV. PROC. CODE § 170.6 (West 1977). Apparently it is a common practice among both prosecutors and defense attorneys to challenge certain judges routinely and as a matter of policy. Solberg v. Superior Court, 19 Cal. 3d 182, 561 P.2d 1148, 137 Cal. Rptr. 460 (1977); McCartney v. Commission on Judicial Qualifications, 12 Cal. 3d 512, 526 P.2d 268, 116 Cal. Rptr. 260 (1974).

85. Brief for Amicus Curiae in Support of Appellee at 13-15.

into account such factors as the seriousness of the alleged crime, the party's need for the information, the position taken by prosecuting authorities, how antisocial the behavior complained of in the civil action is, whether the witness is a defendant, whether the same behavior constitutes the basis for both the civil and the criminal complaints, the probability of future prosecution, the possibility of serious or unnecessary invasion of the witness's privacy or dignity interests, and the presence or absence of other considerations relevant to "annoyance, embarrassment, or oppression." Immunity might more readily be granted to defendants than to nonparty witnesses or plaintiffs, to aid victims of crime seeking civil recovery, or in certain types of causes of action such as certain torts and breaches of fiduciary duty.[86]

Conclusion

Daly authorizes judicial grants of use restriction immunity in aid of discovery at the request of private litigants. The traditional model of immunity is not consistent with giving private individuals the right to obtain immunity grants, and the constitutional values expressed in the privilege against self-incrimination suggest that such an erosion of the privilege should be resisted. On the other hand, there are strong arguments for extending the courts' power to grant immunity in private civil actions. The inflexible rule announced in *Daly*, however, is not a desirable way to give private litigants access to immunity as a discovery tool. *Daly* apparently gives judges no discretion either to modify a proposed order on their own motion or to evaluate the relative interests of the requesting party, the reluctant witness, and the objecting prosecutor. Trial courts should be given broad discretion in issuing such orders in order to accommodate the competing interests at stake in light of the facts of particular cases, guided by precise, thoughtful standards for exercising that discretion.

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86. It may be argued that even an express statutory authorization for immunity grants by trial courts would not obviate the separation of powers problems inherent in judicial exercise of this traditionally executive function. At the very least, this theory would suggest that, to minimize intrusion into the executive function, immunity grants should be permitted only with the consent of interested prosecutors. Narrow exceptions, such as for victims of certain torts, could be carved out, but other civil litigants confronted with prosecutorial objections would simply have to get along without discovery, just as they do when other evidentiary privileges are asserted.