Life, Liberty, or Your Children: California Parents' Fifth Amendment Quandary between Self- Incrimination and Family Preservation

Kendra Weber

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INTRODUCTION

> "For years, the courts have been the unseen partners in child welfare—yet they are vested with enormous responsibility."[1]

At any given time in the United States, more than half a million children are in government custody.[2] One out of every twenty children will enter such custody.[3] Child protective agencies responding to allegations of child abuse and neglect routinely violate the constitutional rights of children and their parents.[4] Juvenile dependency courts must step in to formally determine whether the alleged abuse or neglect occurred and whether a child should be returned to the home.[5] These specialized courts are charged with protecting the rights of *all* parties involved, including parents.[6] However, dependency courts frequently compound the problem when they overlook and, at times, blatantly deny parents their Fifth Amendment privilege against compelled self-incrimination.[7]

Depending upon the allegations, some parents may face not only the possibility of losing their child, but also the threat of criminal prosecution.[8]

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1 THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 13 (2004) [hereinafter THE PEW COMMISSION].

2 *Id*. at 9.

3 *State Efforts to Comply with Federal Child Welfare Reviews: Hearing Before the Subcomm. on Human Res. of H. Comm. Ways & Means*, 108th Cong. 54 (2004) (statement of Rep. Baca from California), *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/28/07/29.pdf [hereinafter *State Efforts*].

4 *Id*. ("[T]he unwarranted seizure of children from non-neglectful homes has become a national problem of staggering proportions.").

5 THE PEW COMMISSION, *supra* note 1, at 13.

6 *See* NAT'L COUNCIL ON CRIME AND DELINQUENCY, JUVENILE JUSTICE POLICY STATEMENT 3 (Apr. 1991).

7 *E.g.*, *In re* Mark A., 68 Cal. Rptr. 3d 106, 108 (Ct. App. 2007); *In re* Joanna Y., 10 Cal. Rptr. 2d 422, 426 (Ct. App. 1992).

8 For example, when a dependency petition alleges domestic violence against a spouse or part-

These parents are forced into the Hobson's choice[9] between cooperating with the dependency court at the expense of their Fifth Amendment privilege or preserving the privilege and losing their child. The paramount concern of the dependency system is the best interest of the child, and it is in the best interest of the child that the parent testifies.[10] However, "[t]he mere existence of a civil regulatory system may not trump the essence of the Fifth Amendment."[11] Furthermore, without a guarantee that their testimony will not be used against them in a criminal case, many parents will decline to testify.[12] Thus, courts must be able to compel parents to testify without violating the Fifth Amendment.

Part I of this comment discusses parents' Fifth Amendment privilege and its application in dependency proceedings. Part II presents an overview of California's dependency system and exposes its true punitive nature—the focus on the alleged wrongdoing of the parent and the threat of losing his or her child. Part II further demonstrates how two fundamental rights collide when parents are essentially forced to waive their Fifth Amendment privilege or forfeit their parental rights. Part II argues that parents must be able to safely testify in dependency proceedings to ensure the disclosure of all relevant information in each child's case.

Part III analyzes how dependency courts may compel parents to testify despite their assertion of the Fifth Amendment privilege. Under California law, the only constitutional method available is to grant immunity that shields the testimony, and any evidence derived from it, from use against the parent in a subsequent criminal case. However, dependency courts may not grant such immunity on their own motion, but must instead cooperate with the very agency that may wish to prosecute the parent for a crime.[13]

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ner, a child may be removed from the home, and the allegedly offending parent may also be guilty of a felony. *In re* Heather A., 60 Cal. Rptr. 2d 315, 321 (Ct. App. 1996) (finding that domestic violence in the household where a child lives is grounds to remove the child); CAL. PENAL CODE § 243(e)(1) (West 2008) (providing increased criminal sanctions "[w]hen battery is committed against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiancé, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship"); *id*. § 273.5(a) (making it a felony to inflict corporal injury resulting in a traumatic condition upon one's spouse, former spouse, cohabitant, former cohabitant, or the parent of one's child).

9 A "Hobson's choice" refers to a choice where there really is no choice at all, because both options are unacceptable. Its use arose from the tale of Tobias Hobson, an English stable keeper who offered riders the "choice" between the horse closest to the door or no horse at all. JOHN BARTLETT, FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES, AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE 857 (Little, Brown & Co. 9th ed. 1903).

10 *See* Collins v. Superior Court, 141 Cal. Rptr. 273, 277 (Ct. App. 1977) (noting the "clear legislative policy . . . that all relevant evidence should be disclosed in proceedings of this nature in order to protect the paramount interest of the safety and welfare of the child.").

11 *In re* Ariel G., 858 A.2d 1007, 1014 (Md. 2004); *see also In re* Welfare of J.W., 415 N.W.2d 879, 883–84 (Minn. 1987) (holding that the ability to assert a constitutional right does not yield to the best interests of a child).

12 *E.g*., *In re Mark A*., 68 Cal. Rptr. 3d at 110–11 (involving a father who refused to testify despite a court order).

13 The current procedure calls for the involvement of the criminal prosecutor in the decision to grant use and derivative use immunity. CAL. CT. R. 5.548.

When the prosecuting agency prefers that such immunity not be granted, the court may be left without evidence that is crucial to an informed decision in the case.[14]

Because there is currently no avenue available that allows parents to voluntarily testify in their child's case without risking their Fifth Amendment privilege, Part IV argues for a legislative grant of blanket use and derivative use immunity for all parents in all dependency matters without involving the criminal prosecutor. This part further argues that, for such immunity to be fully effective, and to alleviate any resulting prosecutorial burden,[15] criminal prosecuting agencies must be excluded from dependency proceedings. Such protection will dissolve the unacceptable choice facing parents who wish to cooperate with the court and reunite with their children without forfeiting their Fifth Amendment privilege.

I. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION DIRECTLY APPLIES TO PARENTS IN JUVENILE DEPENDENCY PROCEEDINGS

In some circumstances, the alleged conduct that brings a child within the jurisdiction of the juvenile dependency court may also constitute a crime.[16] The Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself."[17] When parents face not only the possibility of losing their child, but the additional threat of criminal prosecution, they are afforded the same Fifth Amendment protections as a criminal defendant and may properly refuse to testify in their child's dependency case.[18]

In order to successfully invoke Fifth Amendment protection, an individual's statement must be compelled and self-incriminating.[19] The self-incrimination element is met whenever a witness's answers would merely "furnish a link in the chain of evidence needed to prosecute the [witness]" for a criminal offense.[20] The United States Supreme Court has not limited

14 The prosecutor is permitted to show cause why such immunity should not be granted. *Id*.

15 *See* Kastigar v. United States, 406 U.S. 441, 460 (1972) (affirming that a grant of immunity "imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.").

16 *See supra* note 8.

17 U.S. CONST. amend. V. The Fifth Amendment applies to the states via the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6 (1964). Similar protections are guaranteed by the California Constitution and state statutes. CAL. CONST., art. I, § 15 ("Persons may not . . . be compelled in a criminal cause to be a witness against themselves."); *e.g*., CAL. EVID. CODE § 940 (West 2007) ("To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him.").

18 *In re* Mark A., 68 Cal. Rptr. 3d 106, 120 (Ct. App. 2007); s*ee also* McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (affirming that the Fifth Amendment privilege "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.").

19 Fisher v. United States, 425 U.S. 391, 408 (1976).

20 Hoffman v. United States, 341 U.S. 479, 486 (1951); s*ee also* People v. Mincey, 827 P.2d 388, 408 (Cal. 1992) (acknowledging that a person may invoke the constitutional privilege against self-

the Fifth Amendment privilege to a defendant testifying during a criminal trial, but has broadened its scope to "any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."[21] Furthermore, the California Legislature recognizes the overlap in certain classes of criminal and dependency statutes[22] and expressly acknowledges the application of the Fifth Amendment privilege in juvenile dependency proceedings.[23] Given the broad scope of the privilege and its clear implications in certain dependency matters, a parent in a juvenile dependency proceeding is entitled to the full protections afforded by the Fifth Amendment, regardless of whether criminal charges have been filed.[24]

II. CALIFORNIA DEPENDENCY PROCEEDINGS IMPROPERLY COMPEL PARENTS TO WAIVE THEIR FIFTH AMENDMENT PRIVILEGE TO PROTECT THEIR PARENTAL RIGHTS

Dependency cases are among the most difficult to manage.[25] They involve numerous participants, multiple parties with potentially conflicting interests, and a complex, ongoing court process.[26] A dependency court should "function on a socio-legal basis where the constitutional rights of children and parents are not abridged, and where the purpose of the court is therapeutic and preventive, rather than retributive and punitive."[27] Thus, not only are parents entitled to the protections afforded by the Fifth Amendment, they must also be allowed to fully participate in their child's case. However, under California dependency law, parents who face the risk of criminal prosecution are forced to choose between the two.[28] This Hobson's choice violates the fundamental rights of parents and their children and renders dependency courts ineffective.

A. Juvenile Dependency Proceedings are Quasi-Criminal in Nature

Juvenile dependency proceedings are considered civil rather than criminal, because their primary purpose is not to punish parents, but to pro-

incrimination for reasons other than guilt).

21 Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

22 *See supra* note 8.

23 *See* CAL. WELF. & INST. CODE § 311(b) (West 2007) ("In the hearing the minor, parents or guardians, have a privilege against self-incrimination."); CAL. CT. R. 5.674(d) ("At the detention hearing, the child, the parent, and the guardian have the right to assert the privilege against self-incrimination."); *id*. 5.534(k)(1)(A) & 5.682(b)(2) (2008) (both providing that the court must advise the parent in dependency cases of the right to assert the privilege against self-incrimination).

24 *Turley*, 414 U.S. at 77 (providing that the Fifth Amendment applies in "*any* other proceeding" where the testimony "*might* incriminate [the witness] in *future* criminal proceedings") (emphasis added).

25 NAT'L CENTER FOR STATE COURTS, CALIFORNIA JUVENILE COURT IMPROVEMENT PROJECT (1997), *available at* http://www.abanet.org/ftp/pub/child/carpt.txt (last visited June 3, 2008).

26 *Id*.

27 *See* NAT'L COUNCIL ON CRIME AND DELINQUENCY, *supra* note 6.

28 *See* discussion *infra* Part II.B.

tect the child's health and safety.[29] However, physically removing a child from the home interferes with the child's personal liberty and the right to remain with his or her family of origin.[30] In turn, parents face significant state interference with the fundamental right to raise their children and, ultimately, the termination of their parental rights.[31] Thus, dependency proceedings are more accurately referred to as "quasi-criminal."[32] In fact, most of the rules governing civil proceedings do not apply,[33] and the children and parents involved are endowed with rights similar to those of a criminal defendant.[34]

A dependency case typically begins when the county welfare department receives a report alleging child abuse or neglect. If the assigned social worker finds the allegations substantiated, he or she may immediately remove the child from the home.[35] Within two days after the child is removed, the worker must file a dependency petition requesting that the child be declared a dependent of the juvenile court.[36] After the petition is filed,

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29 *In re* Mary S., 230 Cal. Rptr. 726, 728 (Ct. App. 1986) ("Dependency proceedings are civil in nature, designed not to prosecute a parent, but to protect the child."); Lois R. v. Superior Court, 97 Cal. Rptr. 158, 162 (Ct. App. 1971) ("[D]ependency proceedings are civil and have been conducted without strict adherence to all the formalities of a criminal trial.").

30 *See* Santosky v. Kramer, 455 U.S. 745, 754 n.7, 760 n.11 (1982) (noting that "important liberty interests of the child . . . may also be affected by a [dependency] proceeding").

> Witnesses stated that only about three percent of the children who are seized or taken into custody were physically abused. What is even worse they said, is that the children who are taken into state custody have an eight to eleven times greater chance of being abused than those who remain in their own homes.

State Efforts, *supra* note 3, at 54.

31 *Kramer*, 455 U.S. at 753 (finding that parents have a "fundamental liberty interest . . . in the care, custody, and management of their child," which is protected by the Fourteenth Amendment). Terminating parental rights permanently deprives parents of this fundamental interest. *See* CAL. WELF. & INST. CODE § 366.26 (Deering 2008).

32 GARY C. SEISER & KURT KUMLI, CALIFORNIA JUVENILE COURTS PRACTICE AND PROCEDURE § 2.10[2] (2003) (noting that courts have characterized the dependency system inconsistently—some have viewed it as "civil in nature" while others have viewed it as "quasi-criminal"); *see also In re* Kristin H., 54 Cal. Rptr. 2d 722, 737 (Ct. App. 1996) ("While the parent in modern day dependency proceedings may not stand in the same shoes as a criminal defendant facing a loss of personal liberty . . . to say simply that dependency proceedings are civil in nature fails to acknowledge the fundamental difference between these proceedings and the ordinary civil action.").

> In most dependency matters the focus is against the parent and the prospect faced is the drastic result of loss of his child. Although legal scholars may deemphasize the adversary nature of dependency proceedings and characterize the removal of the child from parental custody as nonpunitive action in the best interests of the child, most parents would view the loss of custody as dire punishment.

Lois R. v. Superior Court, 97 Cal. Rptr. 158, 162 (Ct. App. 1971).

33 *In re* Jennifer R., 17 Cal. Rptr. 2d 759, 764 (Ct. App. 1993) ("Dependency proceedings in the juvenile court are special proceedings governed by their own rules and statutes. Unless otherwise specified, the requirements of the Civil Code and the Code of Civil Procedure do not apply.") (internal citations omitted).

34 For instance, "the parents' right not to be separated from their child entitles them to appointment of counsel [under Welfare and Institutions Code section 317], and the same degree of review of the case on appeal as criminal defendants." *In re Mary S*., 230 Cal. Rptr. at 728 n.3.

35 CAL. WELF. & INST. CODE § 306 (West 2006).

36 *Id*. § 313(a); CAL. CT. R. 5.520(b)(1).

the court holds a "detention hearing" to approve the child's removal.[37] Next, there is a "jurisdictional hearing" to determine whether the alleged abuse or neglect occurred.[38] The California Welfare and Institutions Code requires the court to release the child unless there is a prima facie showing of abuse or neglect.[39] However, it also provides that evidence of an injury alone can be sufficient to declare the child a dependent of the court.[40]

When the court makes a finding of abuse or neglect, a "dispositional hearing" is held to determine the appropriate course of action.[41] The court may allow the child to return home but require the family to participate in family maintenance services, thus subjecting the family to future hearings and investigations by the social worker.[42] Generally, if the court orders that the child is to remain out of the home, the family must participate in "reunification services" to resolve the issues determined by the court before the child is returned.[43] If the parent does not successfully reunify with the child within the statutory time limit,[44] the court must terminate these services and select long-term foster care, guardianship, or adoption as a permanent plan for the child.[45] At this stage, parents may be forever deprived of the care and custody of their child.[46] These intrusions into private family life, and the potential for permanent destruction of the family unit, make it imperative that dependency courts ensure that the fundamental rights of children and their parents are not trammeled in the process of resolving sensitive family issues.

B. When Parents Cannot Safely Testify in their Child's' Dependency Case, they are Forced to Choose between Conflicting Fundamental Rights

The privilege against self-incrimination is designed to avoid the "cruel trilemma of self-accusation, perjury or contempt."[47] A parent in a depen-

37 CAL. WELF. & INST. CODE § 315 (West 2006).

38 *Id*. §§ 355, 356.

39 *Id*. § 319.

40 *Id*. §§ 355.1(a), 360(d).

41 *Id*. § 358.

42 *Id*. §§ 360(b), 362. "Family Maintenance provides support services to prevent abuse/neglect while the child remains in his or her home. Generally, these services include counseling, parent training, respite care, and temporary in-home care." Child Abuse and Neglect in California (Part I), Legislative Analyst's Office (Jan. 1996), http://www.lao.ca.gov/1996/010596_child_abuse/cw11096a.html (last visited Sept. 14, 2008) [hereinafter LAO].

43 CAL. WELF. & INST. CODE § 361.5 (West 2006). "Family Reunification provides support services to the family while the child is in temporary foster care. Typically, these services include counseling, emergency shelter care, parent training, and teaching homemaking skills." LAO, *supra* note 42.

44 CAL. WELF. & INST. CODE § 361.5 (West 2006) (providing a statutory time limit of twelve months for a child who was three years of age or older on the date of removal, and six months for a child under three years of age, but allowing for an extension up to eighteen months under specified circumstances).

45 *Id*. §§ 361.5, 366.26.

46 *Id*. § 366.26.

47 Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

dency case also faces the potential loss of the care and custody of his or her child. To expedite dependency matters, California law creates a presumption that the alleged abuse occurred if the parent does not present evidence to the contrary.[48] Thus, while the burden of proof in a *criminal* trial is on the prosecution, the initial burden in a dependency case essentially falls on the parent.[49] Because a parent's decision not to testify may be equated with a failure to present evidence,[50] which will likely result in the child being adjudged a dependent of the court,[51] parents are currently compelled to testify by the threat of losing their child. Once the court establishes jurisdiction, parents generally must admit to the problem that led to removal before the child will be returned, further compelling them to disclose potentially incriminating information.[52]

The court may also order a parent to participate in therapy as part of a family reunification plan.[53] While disclosures made in court-ordered therapy are confidential,[54] mandatory reporting laws require therapists to report incidents of child abuse to the proper authorities.[55] This leads parents to suppress potentially incriminating admissions in court-ordered therapy as well.[56] Less than full participation in therapy is contrary to the child's best interest because it renders the therapeutic process ineffective.[57] In addition, the therapist may conclude that a parent who does not admit the alleged conduct during treatment, or who appears evasive, is not meaningfully participating, and the court may refuse to return the child.[58]

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48 CAL. WELF. & INST. CODE § 355.1(a) (West 2007) ("Where the court finds that an injury, injuries, or detrimental condition sustained by a minor is of a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent, . . . that finding shall be prima facie evidence).

49 While the burden of *proof* at the initial stages of a dependency matter rests with the agency seeking jurisdiction over the child, the presumption of abuse created by Section 355.1(a) shifts the burden of *production* to the caretaker. CAL. WELF. & INST. CODE § 355.1(c) (West 2007) ("The presumption created by subdivision (a) constitutes a presumption affecting the burden of producing evidence.") Thus, the agency need not present any evidence other than the fact that an injury occurred.

50 *See In re* Mark A., 68 Cal. Rptr. 3d 106, 119 (Ct. App. 2007).

51 *See* CAL. WELF. & INST. CODE § 355.1(a) (West 2007).

52 *In re* Jessica B., 254 Cal. Rptr. 883, 890 (Ct. App. 1989) ("[R]eunification cannot occur until [the parent] admits abuse and works through appropriate remorseful feelings.").

53 CAL. WELF. & INST. CODE § 361.5(a) (West 2007).

54 CAL. EVID. CODE § 1012 (West 2008).

55 A therapist must report child abuse when he or she "has knowledge of or observes a child whom [the therapist] knows or reasonably suspects has been the victim of child abuse or neglect." CAL. PENAL CODE § 11166(a) (West 2008).

56 *E.g.*, *In re* Joanna Y., 10 Cal. Rptr. 2d 422, 425 (Ct. App. 1992) (involving a father who refused to undergo a psychological evaluation or participate in counseling due to his pending criminal case, despite the fact that he felt it "would have been helpful").

57 ELIANA GIL, CAL. HEALTH & WELFARE AGENCY, THE CALIFORNIA CHILD ABUSE REPORTING LAW: ISSUES AND ANSWERS FOR PROFESSIONALS 19 (1986) ("Some clients will never admit to the abuse, and therefore make the possibility of obtaining therapeutic help minimal.").

58 *In re* Mark A., 68 Cal. Rptr. 3d 106, 119 (Ct. App. 2007) ("[T]he law may legitimately require a parent to admit responsibility for wrongful acts as a condition to be fulfilled in therapy . . . [and] the parent's decision not to acknowledge his or her wrongdoing" may result in "consequences occasioned by the lack of cooperation in the reunification process"). Lack of cooperation in the reunification process is likely to lead to termination of parental rights. *See* CAL. WELF. & INST. CODE §§ 366.21(e),

Because asserting the Fifth Amendment privilege, whether in the initial stages of a dependency matter, or later in the reunification process, can interfere with parents' chances of reuniting with their children, parents must choose between the fundamental liberty interest in raising their children[59] *or* their Fifth Amendment privilege against self-incrimination. Thus, even parents who are not ordered to testify are still effectively "compelled" to do so in violation of the Fifth Amendment by the threat of losing their child.[60]

C. Allowing *All* Parents to Safely Testify in their Child's Case will Improve California's Dependency Courts

In 1997, California's Administrative Office of the Courts (AOC) released the California Juvenile Court Improvement Project Report, the culmination of a statewide analysis of the juvenile dependency court system.[61] The recommendations of the 1997 report were general in nature and designed simply to highlight areas for improvement.[62] Following the implementation phase of the initial improvement project, the AOC's Center for Families, Children and the Courts performed a reassessment in 2005.[63] Although California made substantial progress since the 1997 assessment, the 2005 reassessment found that many of the originally identified issues remained[64] and specified six guiding principles to further improve California's dependency system:

> [1] The judicial branch should take a leadership role, and partner with other stakeholders at the state and local levels, to improve the experiences of and out-

366.22(a) (West 2007) ("The failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental."); *id*. § 366.26(c)(1) ("A finding . . . under Section 366.21 or 366.22, that the court has continued to remove the child from the custody of the parent or guardian and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights.").

59 *See* Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.").

60 *See In re* M.C.P., 571 A.2d 627, 640 (Vt. 1989) (finding that "the State may not impose a penalty or sanctions against an individual for invoking the [Fifth Amendment] privilege," and "[t]here is no question that deprivation of custody of a child is a sanction for purposes of the Fifth Amendment."); *cf*. Lefkowitz v. Turley, 414 U.S. 70, 85 (1973) (holding that "answers elicited upon the threat of the *loss of employment* are compelled" and entitled to Fifth Amendment protection) (emphasis added). Surely, testimony obtained upon the threat of losing one's child is likewise "compelled."

61 NATIONAL CENTER FOR STATE COURTS, CALIFORNIA JUVENILE COURT IMPROVEMENT PROJECT REPORT (1997), *available at* http://www.abanet.org/ftp/pub/child/carpt.txt (last visited June 2, 2008). California's initial assessment took place from 1995 to 1996 and included a comprehensive review of dependency laws, procedures, and practices, as well as public hearings, focus groups, and roundtable discussions. *Id*.

62 *Id*.

63 ADMINISTRATIVE OFFICE OF THE COURTS, CENTER FOR FAMILIES, CHILDREN & THE COURTS, CALIFORNIA JUVENILE DEPENDENCY COURT IMPROVEMENT PROGRAM REASSESSMENT 1 (2005), *available at* http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/CIPReassessmentReport.pdf. The reassessment included a progress report on the original recommendations, a detailed review of dependency courts, and new recommendations for court improvement. *Id*.

64 *Id*. at 2–3.

> comes for children and families in the dependency system, increase permanency, and reduce the number of children in the system.
>
> [2] Dependency hearings must be timely and must provide each party with meaningful notice and an opportunity to be heard. Sufficient information must be accessible and available for informed judicial decision making.
>
> [3] Courthouse procedures must ensure accountability, efficiency, open communication, safety, and respect for each party's rights.
>
> [4] The dependency system must be staffed by well-trained judicial officers, attorneys, and other professionals, who are given the resources and reasonable caseloads to do their jobs effectively.
>
> [5] National, state, and local collaborative efforts should be increased.
>
> [6] California courts must ensure their compliance with all relevant state and federal laws.[65]

Consistent with these principles, parents must have a fair opportunity to communicate openly with the court and fully participate in reunification efforts without forfeiting their fundamental rights. When parents fear criminal prosecution, they are unlikely to testify in their child's case or to participate in court-ordered therapy.[66] Essentially, they hand their children over to the mercy of the court. However, the children who fall into the arms of California's dependency system deserve to have their fate decided based upon *all* relevant information, including that which may only be available from their parents' testimony. Thus, allowing all parents to safely testify in dependency matters not only protects the constitutional rights of parents; it also serves the best interests of the child and furthers the goals of the dependency system.

III. A GRANT OF USE AND DERIVATIVE USE IMMUNITY CAN SUPPLANT A PARENT'S FIFTH AMENDMENT PRIVILEGE

A court may lawfully force a witness to testify over a valid assertion of the Fifth Amendment privilege only by granting immunity that protects against the use of the testimony, and any evidence derived from it, in a subsequent criminal prosecution.[67] The limited form of testimonial immunity provided by California Welfare and Institutions Code section 355.1(f) is not enough to override an assertion of the Fifth Amendment privilege.[68] However, dependency courts frequently misinterpret the law and improperly compel parents to testify without following proper statutory procedures to immunize their testimony.[69]

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65 *Id*. at 1–2.

66 *See*, *e.g*., *In re* Mark A., 68 Cal. Rptr. 3d 106, 108 (Ct. App. 2007) (involving a father who refused to testify at a combined jurisdiction and disposition hearing); *In re* Joanna Y., 10 Cal. Rptr. 2d 422, 425 (Ct. App. 1992) (involving a father who refused to undergo psychological evaluation or counseling).

67 Kastigar v. United States, 406 U.S. 441, 444–46 (1972).

68 *See* discussion *infra* Part III.B.

69 *E.g*., *In re Mark A*., 68 Cal. Rptr. 3d at 108 (footnote omitted); *In re* Brenda M., 72 Cal. Rptr.

Under current law, dependency courts may not unilaterally grant the constitutionally required level of immunity, nor interpret the statute to expand the limited immunity originally contemplated by the legislature.[70] Even the exclusionary rule, which makes unconstitutionally obtained evidence inadmissible in a criminal case,[71] does not authorize dependency courts to compel parents' testimony merely because it would produce the same result as a grant of immunity.[72] The exclusionary rule was developed to *deter* constitutional violations, not to justify them.[73]

A. Use and Derivative Use Immunity Commensurate with the Fifth Amendment Privilege is Required Before a Dependency Court Can Compel a Parent's Testimony

The Fifth Amendment privilege is not absolute—a witness may be compelled in certain circumstances to testify even after invoking the protections of the privilege. The Supreme Court has recognized "the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime."[74] This rings painfully true in dependency matters. There is a compelling state interest in coercing parental testimony, such that all relevant information will be disclosed to ensure an informed disposition of the child's case.[75]

Immunizing parental testimony simultaneously allows dependency courts to compel a parent to testify and protects that testimony from being used against the parent in a criminal proceeding.[76] However, the Supreme

3d 686, 687 (Ct. App. 2008).

70 *See* discussion *infra* Part III.C.

71 Mapp v. Ohio, 367 U.S. 643, 655–57 (1961).

> [A] witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers *and evidence derived therefrom* in any subsequent criminal case in which he is a defendant. Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution.

Lefkowitz v. Turley, 414 U.S. 70, 78 (1973) (internal citations omitted) (emphasis added).

72 Some California courts fail to distinguish the exclusionary rule from an official grant of immunity and erroneously rely on the possibility of future exclusion to compel a witness to testify over a valid assertion of the Fifth Amendment. Spielbauer v. County of Santa Clara, 53 Cal. Rptr. 3d 357 (Ct. App. 2007), *review granted, depublished by* 159 P.3d 29 (Cal. 2007). As noted in *Spielbauer*, this faulty assumption stems from California Supreme Court dicta in *Lybarger v. City of Los Angeles*, 710 P.2d 329, 331 (Cal. 1985) ("As a matter of constitutional law, it is well established that . . . self-incrimination rights are deemed adequately protected by precluding any use of [compelled] statements at a subsequent criminal proceeding." (citing Lefkowitz v. Turley, 414 U.S. 70, 77–79 (1973)). *Spielbauer*, 53 Cal. Rptr. 3d at 373–74.

73 Elkins v. United States, 364 U.S. 206, 217 (1960) (describing the purpose of the exclusionary rule "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.").

74 Kastigar v. United States, 406 U.S. 441, 446 (1972).

75 Collins v. Superior Court, 141 Cal. Rptr. 273, 277 (Ct. App. 1977) ("The clear legislative policy underlying [current California Welfare and Institutions Code section 355.1] is that all relevant evidence should be disclosed in proceedings of this nature in order to protect the paramount interest of the safety and welfare of the child.").

76 Peter Lushing, *Testimonial Immunity and the Privilege against Self-Incrimination: A Study in*

Court long ago declared that immunity which "does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard . . . is not a full substitute for that prohibition."[77] As such, the power to compel testimony is not absolute and must be accompanied by a *minimum level* of immunity so as not to offend the Fifth Amendment.[78] To be coextensive with the Fifth Amendment privilege, the protection afforded compelled testimony must leave both the parent and the prosecutor in a subsequent criminal case in the same position as if the parent had never testified.[79]

In 1892, the Supreme Court found that granting a witness total "transactional immunity" from prosecution satisfies the Fifth Amendment.[80] Under a grant of transactional immunity, a witness is absolutely immune from being prosecuted for any criminal offense related to the compelled testimony.[81] However, because the prosecutor's hands become permanently tied against bringing any related charge—even if the information is garnered from a wholly independent source—a witness who is granted transactional immunity is better off than if the testimony had never existed. Thus, the Supreme Court later held that transactional immunity provides more protection than the Fifth Amendment requires.[82]

In 1972, the Court shaped a narrower rule of "use and derivative use immunity," whereby a person compelled to testify may still be prosecuted, but neither the compelled statement, *nor any evidence derived from it*, can be introduced in a criminal trial.[83] The Court distinguished the requisite "use and derivative use immunity" from mere "testimonial immunity"—immunity that protects the testimony itself (but not its fruits) from being used against a witness in a criminal proceeding.[84] The Court reaffirmed that testimonial immunity alone is not coextensive with the Fifth Amendment and, therefore, testimony cannot be compelled with such a minimal grant of protection.[85] For testimony to be adequately protected, such that a dependency court may compel a parent to testify, the testimony must not be used in any manner in a subsequent criminal case—as if it never existed.[86]

Isomorphism, 73 J. CRIM. L. & CRIMINOLOGY 1690, 1691–92 (1982).

77 Counselman v. Hitchcock, 142 U.S. 547, 585–86 (1892).

78 Kastigar v. United States, 406 U.S. 441, 444–46 (1972).

79 Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

80 *Counselman*, 142 U.S. at 585–86.

81 AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 57 (Yale Univ. Press 1997).

82 *Kastigar*, 406 U.S. at 462 (finding "no justification in reason or policy for holding that the Constitution requires an amnesty grant").

83 *Id*. at 453 (holding that "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege.").

84 *See* AMAR, *supra* note 81, at 47 (explaining that under a "testimonial immunity" rule, "the compelled words will never be introduced over the defendant's objection in a criminal trial . . . but the fruits of these compelled pretrial words will generally be admissible.").

85 *Kastigar*, 406 U.S. at 453–54.

86 *Id*. at 462 (concluding that use and derivative use immunity "leaves the witness and the prose-

B. California Welfare & Institutions Code Section 355.1 Does Not Provide Immunity Commensurate with the Fifth Amendment

The California Legislature encourages parents to participate in dependency matters by providing limited testimonial immunity.[87] California Welfare and Institutions Code section 355.1(f) provides: "*Testimony* by a parent, guardian, or other person who has the care or custody of the minor made the subject of a [juvenile dependency proceeding] shall not be admissible as evidence in any other action or proceeding."[88] But Section 355.1(f) fails to provide "protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."[89]

While the testimony itself may not be admissible as evidence in a subsequent criminal prosecution under Section 355.1(f) (mere testimonial immunity), nothing prohibits the use of information gained directly or indirectly from the testimony (as would use and derivative use immunity). For example, law enforcement officers could interview potential witnesses disclosed by parents to gather information for use against the parents in a criminal proceeding. Because the statutory prohibition against the admissibility of a parent's *testimony* does not supplant their Fifth Amendment privilege, a parent's testimony cannot currently be compelled without guaranteeing that neither it nor its fruits will be used in a subsequent criminal prosecution.[90] In addition, while courts have decided that a parent's disclo-

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cutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege . . . [and] therefore is coextensive with the privilege and suffices to supplant it.").

87 CAL. WELF. & INST. CODE § 355.1(f) (West 2007). William Wesley Patton, a leading authority on California dependency law, provides a detailed and informative analysis of the legislative history of Section 355.1, explaining the addition of subsection (f) and its purpose to *encourage*, *not compel*, parental testimony. *Rethinking the Privilege Against Self-Incrimination in Child Abuse Dependency Proceedings: Might Parents Be Their Own Worst Witnesses?*, 11 UC DAVIS J. JUV. L. & POL'Y 101, 125–27 (2007).

88 CAL. WELF. & INST. CODE § 355.1(f) (West 2007) (emphasis added).

89 *See Kastigar*, 406 U.S. at 454 (internal quotes and citations omitted); *In re* Mark A., 68 Cal. Rptr. 3d 106, 108 (Ct. App. 2007).

90 *See Kastigar*, 406 U.S. at 449–54. In *Kastigar*, the Supreme Court upheld a federal immunity statute that provided use and derivative use immunity to witnesses whose testimony was compelled. *Id*. at 453. The Court also reanalyzed the Immunity Act of 1868 ("Act") that it previously criticized in *Counselman v. Hitchcock*, 142 U.S. 547 (1892). *Id*. at 453–54. The Act was similar in scope to Section 355.1(f), providing that "no evidence obtained from a party or witness by means of a judicial proceeding . . . shall be given in evidence, or in any manner used against him . . . in any court of the United States . . . ." *Id*. at 449–50 (internal quotations omitted). In *Kastigar*, the Court asserted that the Act would still be

> plainly deficient in its failure to prohibit the use against the immunized witness of evidence derived from his compelled testimony . . . because the immunity granted was incomplete, in that it merely forbade the use of the testimony given and failed to protect a witness from future prosecution *based on knowledge and sources of information obtained from the compelled testimony*.

Id. at 453–54 (internal quotations omitted).

sures in therapy are also protected by Section 355.1(f),[91] the statute does not provide the necessary level of immunity to compel parents to make such disclosures.

C. California Dependency Courts Cannot Unilaterally Grant the Necessary Immunity to Compel a Parent's Testimony

A dependency court that unilaterally grants a parent use and derivative use immunity inappropriately overrides the intent of the legislature and possibly the will of the executive.[92] For nearly twenty years, dependency courts have incorrectly assumed that a parent's Fifth Amendment privilege is sufficiently protected by Section 355.1(f) and have compelled parents to testify over a valid assertion of their Fifth Amendment privilege.[93] A California dependency case recently reached the appellate level where it was finally confirmed that Section 355.1(f) *does not* provide immunity commensurate with the Fifth Amendment.[94] The appellate court also correctly decided that a dependency court cannot unilaterally grant the necessary level of immunity to compel parents to testify[95] absent a clearly expressed grant of such authority by the legislature.[96]

The power to write laws rests with the legislature, and the courts must adhere to the express intent of the legislature when it grants mere testimonial immunity.[97] A dependency statute that does not attempt to provide

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91 *In re* Jessica B., 254 Cal. Rptr. 883, 893 (Ct. App. 1989).

92 *See* CAL. CONST. art. III, § 3 (2007) ("The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others."); *In re* Weber, 523 P.2d 229, 240 (Cal. 1974) (finding that "the power to provide for the exercise of a grant of immunity [is] essentially a legislative function" and "the decision to seek immunity is an integral part of the *charging* process," left to the prosecuting attorneys); People v. Honig, 55 Cal. Rptr. 2d 555, 595 (Ct. App. 1996) (noting that "the separation of powers doctrine . . . precludes courts from interfering with the executive decisions of prosecutorial authorities.").

93 *E.g.*, *In re Jessica B.*, 254 Cal. Rptr. at 893–94; *In re* Mark A., 68 Cal. Rptr. 3d 106, 108 (Ct. App. 2007).

94 *In re Mark A.*, 68 Cal. Rptr. 3d at 108 (finding that the "statutory immunity provided by section 355.1(f) is more limited than the Fifth Amendment privilege the statute purports to replace").

95 *Id.* at 113 ("[I]f immunity were to be requested by [the social services agency] under [California Rule of Court] 5.548(d), the court must require notice to be given to the district attorney, particularly where, as here, there is a pending criminal prosecution.")

96 *See id.* at 112 ("We are not prepared to *infer* that section 355.1(f) provides full use and derivative use immunity for compelled testimony, contrary to the explicit language of the statute.") (internal quotations omitted); People v. Campbell, 187 Cal. Rptr. 340, 345 (Ct. App. 1982) (finding that the court is bound by the conditions and scope of immunity as provided in the statute). Even *Kastigar* does not authorize a judicial grant of immunity absent statutory authority.

> [*Kastigar*] held only that, pursuant to statutory authority to confer such immunity, the *Government* may constitutionally compel incriminating testimony in exchange for immunity from use or derivative use of that testimony. *Kastigar* does not hold that a trial judge, acting without statutory authority to grant immunity, may . . . overrule an otherwise valid assertion of the Fifth Amendment privilege.

Pillsbury Co. v. Conboy, 459 U.S. 248, 267 (1983) (Marshall, J. concurring) (citing Kastigar v. United States, 406 U.S. 441, 462 (1972)).

97 *Campbell*, 187 Cal. Rptr. at 345; CAL. CIV. PROC. CODE § 1858 (West 2007) ("In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms

the court with authority to compel testimony need not grant use and derivative use immunity.[98] Thus, if the legislature intended to compel testimony, the statute would expressly say so and would provide for the requisite use and derivative use immunity.[99] Because Section 355.1(f) says nothing about compelling testimony and only grants limited testimonial immunity, it is reasonable to infer that the legislature did not intend to grant the court authority to compel parents to testify.[100] A dependency court must not read such broad immunity into the statute, but "should stay its hand and let the legislature decide whether the statute needs to be amended."[101]

Similarly, a unilateral judicial grant of immunity may encroach upon the discretion of the executive branch.[102] A prosecutor, like the legislature, may have legitimate reasons for granting limited testimonial immunity, even though the scope of that immunity is insufficient to compel a witness's testimony.[103] If a witness is compelled to testify under a grant of use and derivative use immunity, the prosecution in a subsequent criminal proceeding has an "affirmative duty to prove that the evidence . . . is derived from a legitimate source wholly independent of the compelled testimony,"[104] thereby increasing the prosecutorial burden.[105] Thus, a prosecutor may wish to forgo a grant of such immunity. Furthermore, the criminal prosecutor is often not a party to the dependency matter and may have little interest, if any, in granting immunity to parents in dependency proceedings.[106] As such, it makes sense that current California law involves the prosecutor in the decision to grant immunity.[107]

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or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted").

98 *See* Fisher v. United States, 425 U.S. 391, 408 (1976) (acknowledging that the Fifth Amendment is not implicated unless testimony is compelled).

99 *E.g.*, CAL. CT. R. 5.548(b) (*expressly* granting a judge the authority to compel a witness's testimony by following specified procedures and providing the necessary use and derivative use immunity therefor).

100 *See* Patton, *supra* note 87, at 122–27 (demonstrating that the California legislature was not attempting to *compel* parents to testify, but was merely trying to ease the harsh presumption of abuse that a parent must overcome under the statute).

101 *In re* Elan E., 102 Cal. Rptr. 2d 528, 532 (Ct. App. 2000).

102 *See supra* note 92; s*ee also In re* Mark A., 68 Cal. Rptr.3d 106, 113 (Ct. App. 2007) (confirming that "law enforcement and the prosecution of crimes is part of the executive branch of government").

103 *See*, *e.g.*, United States v. Pielago, 135 F.3d 703, 710 (11th Cir. 1998) (regarding a valid proffer agreement which permitted the government to pursue investigative leads derived from a witness's testimony and to use the evidence derived from those leads against the witness in a subsequent criminal proceeding).

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

105 *See* United States v. Turkish, 623 F.2d 769, 775 (2d Cir. 1980) (indicating that "while the prosecution remains theoretically free under *Kastigar* to prosecute a witness granted use immunity, the obstacles to a successful prosecution can be substantial").

106 *In re Mark A.*, 68 Cal. Rptr. 3d at 113 n.4 ("The appearance of the district attorney in a juvenile dependency case is rare, at least in Orange County.").

107 CAL. CT. R. 5.548(d) (requiring the dependency court to give the prosecution notice and an opportunity to be heard before granting immunity to a parent).

Just as the criminal prosecutor is often not a party to dependency matters, dependency judges act within a specialized court system entirely distinct from the adult criminal system.[108] Dependency judges may be more interested in the resolution of the dependency matter and less interested or familiar with criminal prosecution. When this is the case, a unilateral decision to immunize or compel a parent's testimony may not account for the increased burden imposed on the criminal prosecution or the statutory plan approved by the citizenry. Rather, the decision may focus primarily upon the preferences and interests of the parties involved in the dependency matter (e.g., the minor or guardian ad litem acting on behalf of the minor, the social services agency, another parent or guardian, potential foster or adoptive parents, or prospective placements for the child) and the judicial officer's interest in hearing all available evidence necessary to make an informed disposition of the case.[109] Thus, a dependency court should not endeavor to immunize or compel a parent's testimony on its own motion and without statutory authority.

D. The Exclusionary Rule is meant to Deter Constitutional Violations, Not to Supplant a Parent's Fifth Amendment Privilege

When parents are improperly compelled to testify absent a grant of the proper level of immunity, their Fifth Amendment privilege may be protected by the exclusionary rule. Under this rule, when a witness is compelled to answer in violation of the right to remain silent, he or she may object to the admission of the compelled answers, and any evidence derived from them, in a subsequent criminal action.[110] Thus, a parent who is ordered to testify against a valid claim of Fifth Amendment privilege may be automatically vested with protection coextensive with the Fifth Amendment.[111] However, reliance on the exclusionary rule as a tool to compel self-incrimination contradicts the Fifth Amendment mandate. The fact that the Fifth Amendment may be violated in a case that never reaches trial demonstrates that the privilege is more than a constitutional rule of evidentiary admissibility or exclusion.[112] Furthermore, the exclusionary rule is

108 *See supra* note 29; *cf*. *In re* Noel N., 465 N.Y.S.2d 1008, 1008 (N.Y. Fam. Ct. 1983) (finding that a family court has limited jurisdiction and a family court judge may not grant immunity to a witness in a delinquency proceeding).

109 *E.g*., *In re* Joanna Y., 10 Cal. Rptr. 2d 422, 426 (Ct. App. 1992) (improperly stating that "the privilege against self-incrimination is inapplicable in child welfare proceedings because all relevant evidence should be disclosed to protect the paramount interest of the safety and welfare of the child."). *But see In re Mark A*., 68 Cal. Rptr. 3d at 118 (finding that the above statement in *Joanna Y*. was "clearly wrong.").

110 Lefkowitz v. Turley, 414 U.S. 70, 78 (1973) (noting that where a witness is not granted use and derivative use immunity, but "he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution.").

111 Adams v. Maryland, 347 U.S. 179, 181 (1954) ("A witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute.").

112 *See* Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977) (finding that, when the government compels testimony by threatening to inflict sanctions and does not guarantee immunity, "that testimony

meant to *deter unlawful violations* of the Fifth Amendment,[113] and is in no way a substitute for a guaranteed grant of immunity sufficient to compel a parent's testimony.[114] As such, a dependency court cannot rely on the exclusionary rule to support its own violation of the Constitution.

E. California Dependency Courts may Currently Compel a Parent's Testimony by Following the Procedure Set Forth in California Rules of Court 5.548

California Rule of Court 5.548 sets forth the procedure to grant parents use and derivative use immunity and authorizes the dependency court to compel their testimony.[115] Although this procedure has been on the books for over a decade, parents have not been consistently afforded its protection.[116] This may be due to the false assumption that Section 355.1(f) of the California Welfare & Institutions Code provides the necessary level of immunity,[117] or simply because dependency courts have erroneously found the Fifth Amendment privilege inapplicable.[118] In addition, the Social Services Agency and the criminal prosecution essentially control the initiation of the immunity statute,[119] and both are more likely to benefit where the parent remains silent.[120]

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is *obtained* in violation of the Fifth Amendment") (emphasis added); *see also Turley*, 414 U.S. at 83 (holding that disqualification from public contracting as a penalty for asserting the privilege, without a guarantee of immunity, violates the Fifth Amendment).

113 Elkins v. United States, 364 U.S. 206, 217 (1960).

114 As the Supreme Court eloquently stated in *Maness v. Meyers*: "[R]eliance upon a later objection or motion to suppress would 'let the cat out' with no assurance whatever of putting it back." 419 U.S. 449, 463 (1975). In *Pillsbury Co. v. Conboy*, the Supreme Court elaborated that a civil trial court lacks the power to grant immunity (except as authorized by statute), and a "[c]ourt's compulsion order . . . cannot not be justified by the subsequent exclusion of the compelled testimony." 459 U.S. 248, 261–62 (1983). In *In re Mark A.*, the California court of appeal agreed:

> [R]ules of evidence—applicable in a subsequent criminal proceeding—do not constitute an automatic grant of use and derivative use immunity sufficient to *compel* testimony over a Fifth Amendment objection; they do not represent the decision of the executive to request immunized testimony; and they do not give absolute assurance to the witness that another court on a later date will agree that information arguably derived from that testimony will be excluded.

68 Cal. Rptr. 3d 106, 117 (Ct. App. 2007).

115 CAL. CT. R. 5.548(d).

116 Prior to January 1, 2007, California Rule of Court 1421 provided a similar procedure. Originally effective beginning January 1, 1990, the statute was amended in 1998 to clarify that "no testimony or other information compelled under the order [to testify] or information directly or indirectly derived from the testimony or other information, may be used against the witness in any criminal case." CAL. CT. R. 5.548.

117 *See, e.g., In re Mark A.*, 68 Cal. Rptr. 3d at 108; *In re* Brenda M., 72 Cal. Rptr. 3d 686, 688 (Ct. App. 2008); *In re* Jessica B., 254 Cal. Rptr. 883, 892 (Ct. App. 1989).

118 *See, e.g., In re* Joanna Y., 10 Cal. Rptr. 2d 422, 426 (Ct. App. 1992).

119 CAL. CT. R. 5.548(c).

120 *See* CAL. WELF. & INST. CODE § 355.1(a) (West 2007) (providing for a presumption of abuse against a parent who does not present evidence to the contrary); Turkish v. United States, 623 F.2d 769, 775 (2d Cir. 1980) (noting that, under a grant of immunity, "the obstacles to a successful prosecution can be substantial.").

Pursuant to Rule 5.548, the Social Services Agency or the prosecuting attorney may request that the court order a parent to testify or to present evidence.[121] If the Social Services Agency *and* the prosecuting attorney jointly make the request, the judge must generally grant it.[122] Rule 5.548 further provides that, "any answer given, evidence produced, or information derived there from must not be used against the witness in a . . . criminal proceeding,"[123] thus granting "protection commensurate with that afforded by the [Fifth Amendment] privilege."[124] However, if the request is made solely by Social Services, the criminal prosecutor "must be given the opportunity to show why immunity is not to be granted."[125] The current procedure ensures that the criminal prosecutor has notice and an opportunity to be heard before the dependency court can compel a parent's testimony and grant the requisite immunity. If immunity is granted, the increased burden on the criminal prosecution attaches, serving as a disincentive for the prosecutor to seek such immunity.[126] In addition, the Social Services Agency benefits from the presumption of abuse against a parent where the parent is unable to present evidence to the contrary.[127] Thus, it is not surprising that this procedure is under-utilized.

IV. GRANTING USE AND DERIVATIVE USE IMMUNITY TO *ALL* PARENTS WHILE EXCLUDING PROSECUTORS FROM DEPENDENCY MATTERS WILL ALLOW DEPENDENCY COURTS TO LAWFULLY ACCESS ALL RELEVANT INFORMATION WITHOUT INTERFERING WITH THE PROSECUTION OF CRIMES

Parents are currently unable to *voluntarily* testify in their child's case without risking their Fifth Amendment privilege.[128] In addition, dependency courts may not *compel* parents' testimony without involving the criminal prosecutor.[129] Because the interests of dependency courts, prosecutors, and parents often conflict, it is unlikely that immunity will be granted in exchange for parental testimony under the current statutory scheme.[130] To ensure that dependency courts can routinely hear such testimony, California Welfare and Institutions Code section 355.1 should be amended to provide *all* parents blanket use and derivative use immunity.

121 CAL. CT. R. 5.548(c).
122 *Id*. at 5.548(d).
123 *Id*. at 5.548(d)(3).
124 Kastigar v. United States, 406 U.S. 441, 453 (1972).
125 CAL. CT. R. 5.548(d)(1).
126 *Kastigar*, 406 U.S. at 460.
127 *See* CAL. WELF. & INST. CODE § 355.1(a) (West 2007).
128 *Compare id*. § 355.1(f) (providing mere testimonial immunity to a parent who *voluntarily* testifies), *with* CAL. CT. R. 5.548(d)(3) (providing use and derivative use immunity when a parent is *compelled* to testify).
129 CAL. CT. R. 5.548(d).
130 *See supra* notes 120–120, 126–127 and accompanying text.

For such immunity to be effective, prosecuting agencies should be completely excluded from dependency proceedings to ensure they cannot access a parent's testimony. While such agencies currently have a strong interest in the decision to immunize a parent's testimony, their exclusion will alleviate the accompanying prosecutorial burden.[131] A prosecuting agency that receives notice of a parent's alleged abuse or neglect from law enforcement or the social worker, but is denied access to the child's dependency case file, remains free to base its investigation solely on independent sources without question as to how the information was discovered.

California law allows prosecuting agencies to be immensely involved in dependency matters. When a parent is charged with criminal acts against a child, the prosecuting attorney may step in to represent the minor on behalf of the state in the dependency matter.[132] The prosecutor may also represent both the child in the dependency proceeding and the state in a criminal proceeding against the parent, based on the same set of facts.[133] Even if the prosecutor is not involved in the dependency matter, the prosecutor and law enforcement have statutory rights to access the minor's case file, including the parent's testimony.[134] This creates a risk that the testimony will be used against the parent in a criminal proceeding, regardless of whether the parent accepts mere testimonial immunity or is compelled to testify under a grant of use and derivative use immunity. The legislative intent to *encourage* parental testimony is thus undermined if parents refuse to testify out of fear that their testimony may be used against them.[135] Furthermore, parents who are unaware that their testimony has been accessed will also be unaware if any information derived from it is admitted in their criminal case. Consequently, even the exclusionary rule will not protect parents if they do not know to object.[136]

Parental testimony and psychological reports should not be discoverable by prosecutors. However, the prosecutor should be allowed to petition the dependency court for access to the parents' dependency-related disclosures for impeachment purposes[137] or, if the parent chooses to testify in the criminal matter, for purposes of prosecution for perjury.[138] The juvenile

131 Kastigar v. United States, 406 U.S. 441, 461–62 (1972) (establishing that the prosecution has a "heavy burden" to prove that its evidence has not been obtained as a result of a defendant's immunized testimony). If the trier of fact finds that the prosecution had no means to access immunized testimony, such a burden could easily be lifted.

132 CAL. WELF. & INST. CODE § 681(b) (West 2007).

133 *Id*. § 317(c) (providing that such an arrangement "is not in and of itself a conflict of interest.").

134 *Id*. § 827(a)(1)(B), (E).

135 *E.g*., *In r*e Mark A., 68 Cal. Rptr. 3d 106, 110–11 (Ct. App. 2007) (involving a father who refused to testify despite a court order).

136 *See* cases cited *supra* note 114.

137 *See* People v. Hathcock, 95 Cal. Rptr. 221, 223. (Ct. App. 1971) ("[A] witness who testifies at a trial waives his privilege against self-incrimination as to any question which is thereafter asked to test the credulity of his testimony").

138 *See* Mackey v. United States, 401 U.S. 667, 705 (1971) ("[E]ven when the privilege against self-incrimination permits an individual to refuse to answer questions asked by the Government, if false answers are given the individual may be prosecuted for making false statements."); CAL. PENAL CODE §

court should confidentially determine whether the parent's testimony in the dependency and criminal proceedings truly conflict and limit access to the relevant portions of the testimony. This method will shelter the testimony from prosecutorial misuse, lessen the burden on prosecutors to prove that the evidence came from an independent source, and prevent abuse by perjuring parents.

A statutory scheme limiting mandated disclosure requirements will also foster parents' openness in court-ordered therapy. Statements relating to the children in the dependency matter should be disclosed to the dependency court, rather than to law enforcement or the district attorney. This will allow the dependency court to protect the children while preventing the unconstitutional use of the compelled incriminating statements against a parent in a subsequent trial. Furthermore, parents will more fully participate in rehabilitative services when they trust that their disclosures will remain confidential, and they will provide the dependency court with the information it needs to resolve the case in the best interests of the child.

CONCLUSION

California's dependency law currently compels parents to testify upon the threat of losing their children. Parents who face both the possibility of losing their child and the threat of criminal prosecution are forced to choose between cooperating with the dependency court to preserve their parental rights *or* risking the loss of their child to preserve their Fifth Amendment privilege. When parents invoke the Fifth Amendment privilege in their child's dependency case, California dependency courts currently have only two options: (1) proceed without the testimony to resolve the child's case; or (2) involve the prosecutor and grant parents the necessary use and derivative use immunity to compel them to testify.

Failure to provide parents with use and derivative use immunity violates their Fifth Amendment privilege and runs contrary to the best interests of the child, who deserves to have his or her case decided based upon all relevant information. Thus, *all* parents should be granted statutory use and derivative use immunity so that they may fully participate in dependency proceedings and court-ordered therapy. For such immunity to be effective, and to alleviate any potential prosecutorial burden, prosecutors must be excluded from dependency matters. The dependency court will have increased access to all relevant information to protect California's most vulnerable children; and prosecutors will be as free to prosecute as if the testimony never existed.

14 (West 2007); CAL. CT. R. 5.548(e) (expressly stating that where parents are granted immunity and compelled to testify in a dependency matter, they still "may be subject to proceedings under the juvenile court law or to criminal prosecution for perjury"); *In re* Joanna Y., 10 Cal. Rptr. 2d 422, 426 n.10 (Ct. App. 1992) ("[T]he purpose of use immunity is to secure truthful testimony, not to license perjury").