

Conclusion

The importance of *Bozung* thus goes beyond its decree that LAF-
CO's can no longer disregard CEQA. The opinion has greater signifi-
cance for the breadth it gives to CEQA's operative provisions. By
holding a LAFCO's annexation approval to be a project with a potential
environmental impact, *Bozung* surpasses even *Friends of Mammoth* and
No Oil in the force given to CEQA's ambiguous terms. *Bozung* thus
represents an extension of the supreme court's willingness to rely upon
the intent of the legislature and the underlying policies of CEQA to
afford "the fullest possible protection to the environment."¹¹⁶ *Bozung's*
expansive interpretation also provides a precedent for even broader
judicial extensions of CEQA in the future. These extensions should
continue until the marginal burdens of CEQA clearly become equal to
its marginal benefits.

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VIII EVIDENCE

NEW LIMITATIONS ON THE PRIVILEGE AGAINST SELF-INCRIMINATION

People v. Superior Court (Kaufman, real party in interest).¹ This
case introduces two important limitations on the fifth amendment privi-
lege against self-incrimination.² The first limitation is the enlargement of
the class of suits by the government against individuals that are classi-
fied as "civil" and that are therefore not subject to any of the procedural
safeguards established for criminal prosecutions.³ The second is the
decision to authorize California trial courts, on the basis of discovery
statutes, to grant use immunity to a civil defendant who refuses to be
deposed concerning material covered by the privilege against self-in-
crimination. Although the matter discovered because such a grant has
been made may not be admitted at a criminal trial against the deposed
party, it may be the basis of a "quasi-criminal"⁴ civil sanction against
that defendant.

116. See note 3 *supra*.

1. 12 Cal. 3d 421, 525 P.2d 716, 115 Cal. Rptr. 812 (1974) (unanimous deci-
sion) (Wright, C.J.).

2. U.S. CONST. amend. V.

3. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

4. For a discussion of the term "quasi-criminal," see note 51 *infra*.

I. Facts and Issues

The case arose when Kaufman and his associates were accused of deceptive advertising, prohibited under Civil Code section 3369⁵ and Business and Professions Code section 17500.⁶ A number of alternative legal remedies for these violations were available, including actions for injunctive relief,⁷ restitution,⁸ and criminal sanctions.⁹ In this case, the government elected to apply Business and Professions Code section 17536¹⁰ and Civil Code section 3370.1,¹¹ each authorizing a civil penalty of \$2500.

Prior to trial, an attempt was made to depose Kaufman for discovery purposes. Kaufman responded by refusing to answer on the basis of his privilege against self-incrimination. The prosecution, in turn, requested that the judge issue a protective order under Code of Civil Procedure section 2019(b)(1)¹² to prohibit any use of Kaufman's deposed testimony against him in any criminal proceeding. The trial court refused to issue such an order,¹³ viewing itself as lacking jurisdiction because Code of Civil Procedure section 2019(b)(1) contains no specific legislative authorization for judicial grants of use immunity.

The prosecution appealed, claiming that section 2019(b)(1) could and did give the trial court power to grant immunity. Kaufman himself elected to make no presentation to the supreme court; however,

5. CAL. CIV. CODE § 3369 (West Supp. 1975).

6. CAL. BUS. & PROF. CODE § 17500 (West 1964).

7. CAL. BUS. & PROF. CODE § 17535 (West Supp. 1975); CAL. CIV. CODE § 3369 (West Supp. 1975).

8. CAL. BUS. & PROF. CODE § 17535 (West Supp. 1975). Restitution has not been specifically provided by the legislature for violations of California Civil Code section 3369. However, the supreme court has held that trial courts have inherent power to order restitution to defrauded consumers. *See People v. Superior Court (Jayhill)*, 9 Cal. 3d 283, 286, 507 P.2d 1400, 1402, 107 Cal. Rptr. 192, 194 (1973).

9. CAL. BUS. & PROF. CODE § 17534 (West 1964).

10. This section provides in part:

Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney in any court of competent jurisdiction.

CAL. BUS. & PROF. CODE § 17536 (West 1964).

11. This section provides in part:

Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California

CAL. CIV. CODE § 3370.1 (West Supp. 1975).

12. This section provides in part:

[T]he court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

CAL. CODE CIV. PROC. § 2019(b)(1) (West Supp. 1975).

13. 12 Cal. 3d at 425, 525 P.2d at 718, 115 Cal. Rptr. at 814.

amici curiae did argue the case.¹⁴ In addition to arguing the issue of judicial authority, amici claimed that the civil penalties provided for under Business and Professions Code section 17536 were actually criminal sanctions, and that the protective order proposed was therefore insufficient to replace the privilege against self-incrimination. On both issues the supreme court held for the prosecution.

II. Section 2019 and Use Immunity

a. The Court's Position

The trial court and amici adopted the traditional view that immunity may not be granted in the absence of express statutory authorization.¹⁵ The supreme court, however, distinguished the California precedent cited in support of this view,¹⁶ stating that the cases had not "dealt with an attempt to fashion a protective order restricting the use of testimony sought to be compelled under some statutory scheme."¹⁷ Instead, the court chose to rely on the more recently developed theory that authority to grant immunity may be implied from statutes dealing with other subjects. This theory was accepted in California in 1974 in the case of *Byers v. Justice Court*.¹⁸ That case arose under a statute requiring any person involved in an auto accident to stop and identify himself.¹⁹ The court held that when such a statute is applied to a person who has committed a crime in relation to the accident, and who might possibly be prosecuted for that crime, the requirement that he stop and identify himself violates his fifth amendment privilege against self-incrimination.²⁰ Rather than declare the statute unconstitutional, the court decided that the statute implicitly granted those subject to it use immunity, and that, therefore, no one was privileged to ignore the "stop and identify" rule.²¹

14. *Id.* at 426 n.3, 525 P.2d at 719 n.3, 115 Cal. Rptr. at 815 n.3. Amici curiae were counsel for Kaufman's co-defendant, who had interests identical to those of Kaufman.

15. See Annot., 13 A.L.R.2d 1439 (1950).

16. *Ex Parte Critchlow*, 11 Cal. 2d 751, 81 P.2d 966 (1938); *In re Tahbel*, 46 Cal. App. 755, 189 P. 804 (2d Dist. 1920). *Critchlow*, in the eyes of the court, dealt with only the proper construction of statutes specifically authorizing grants of immunity. *Tahbel* concerned the placing of a minor in a juvenile home for refusing to answer incriminating questions. In *Tahbel*, it was specifically stated that grants of immunity may not be made without legislative authorization, *id.* at 759, 189 P. at 806, but the court correctly treated this as dicta. 12 Cal. 3d at 426-27 n.4, 525 P.2d at 719-20 n.4, 115 Cal. Rptr. at 815-16 n.4.

17. 12 Cal. 3d at 427 n.4, 525 P.2d at 720 n.4, 115 Cal. Rptr. at 816 n.4.

18. 71 Cal. 2d 1039, 458 P.2d 465, 80 Cal. Rptr. 553 (1969), *rev'd on other grounds sub nom.* California v. Byers, 402 U.S. 424 (1971) (stop and identify statute held not to violate fifth amendment).

19. CAL. VEH. CODE § 20002 (West 1971).

20. 71 Cal. 2d at 1047, 458 P.2d at 471, 80 Cal. Rptr. at 559.

21. *Id.* at 1057, 458 P.2d at 477, 80 Cal. Rptr. at 565.

Three factors entered into the decision of the court in *Byers*, together constituting the "Byers test." The first factor was that the statute involved was designed to secure specific information to aid accident victims in obtaining civil recovery.²² In the absence of a grant of immunity, this specific purpose would often be thwarted through the use of the fifth amendment. The second factor, closely related to the first, was that in the circumstances of *Byers*, a grant of use immunity would not hinder law enforcement and thus would not interfere with the wishes of the legislature in this regard.²³ The third, and final, factor concerned the nature of the court's ruling: as the decision was a matter of statutory interpretation, the legislature was free to correct any error.²⁴

In *Kaufman*, the court applied the *Byers* test to the California statute authorizing trial judges to issue protective orders limiting the scope and use of discovery.²⁵ Discovery in general is designed to "expedite . . . trial of civil matters by allowing litigants adequate" access to information prior to trial,²⁶ and is to be denied only where "clearly improper."²⁷ In order to control the propriety of discovery in a flexible manner, the discretionary power to issue protective orders has been broadly interpreted in cases such as *In re Lifschutz*.²⁸

Lifschutz dealt with an attempt to obtain discovery of materials normally covered by the psychotherapist-patient privilege.²⁹ In *Lifschutz*, the defendant's psychotherapist attempted to claim the privilege after the defendant had initiated use of the privileged materials in the litigation. This action by the defendant brought the patient-litigant exception into effect, eliminating the privilege as to materials relevant to the case.³⁰ In order to limit disclosure of irrelevant information harmful to the interests of the patients, the supreme court in *Lifschutz* held that while the psychotherapist was subject to deposition, the trial judge had wide discretion to issue protective orders strictly controlling what the psychotherapist might be asked and the use to which his answers could be put.³¹

The *Kaufman* court chose to interpret *Lifschutz* very broadly. That case was viewed as recognizing that "[D]iscretion rests in the trial court to control the scope and use of a deposition where a claim of privilege

22. *Id.* at 1054, 458 P.2d at 475, 80 Cal. Rptr. at 563.

23. *Id.*

24. *Id.* at 1055, 458 P.2d at 476, 80 Cal. Rptr. at 564.

25. CAL. CODE CIV. PROC. § 2019(b)(1) (West Supp. 1975).

26. *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 371, 364 P.2d 266, 272, 15 Cal. Rptr. 90, 96 (1961).

27. *Id.* at 377, 364 P.2d at 276, 15 Cal. Rptr. at 100.

28. 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

29. CAL. EVID. CODE § 1014 (West Supp. 1975).

30. CAL. EVID. CODE § 1016 (West 1968).

31. 2 Cal. 3d at 437, 467 P.2d at 572, 85 Cal. Rptr. at 844.

has been tendered and the limits of an exception to the privilege are at issue."³² Combining the discretion of the trial judge with the implied authority doctrine of *Byers*, the court held that the statute authorizing the issuance of protective orders permits the granting of use immunity as well. Applying the *Byers* test, the supreme court found that permitting grants of immunity as part of the broad scope of the discovery statute under examination would (1) "further the legislative purpose of suppressing deceptive advertising," (2) affect law enforcement only minimally, and (3) be subject to reversal by the legislature.³³ Thus, California discovery procedures became a source of use immunity.

b. A Critique of the Court's Analysis

The supreme court's analysis of Code of Civil Procedure section 2019(b)(1) contains several serious errors. The first of these is the court's characterization of the legislative purpose of section 2019(b)(1) as that of "suppressing deceptive advertising."³⁴ That purpose may properly be attributed to the statutes prohibiting deceptive advertising on which the state's prosecution in *Kaufman* was based. Section 2019(b)(1), however, deals exclusively with discovery. To properly apply the *Byers* test to this statute, it would have been necessary to show the purposes of discovery to have been advanced by grants of use immunity. The court made no attempt to do this. Moreover, the decision that grants of immunity under section 2019(b)(1) will not hamper law enforcement is correct only so long as it is the government that is seeking discovery. In the normal case in which the parties are all private citizens, prosecutorial authorities will be unable to control who may be granted immunity; and interference with law enforcement by private litigants seems inevitable.³⁵ Due to these two errors, the supreme court's use of a *Byers* type analysis of section 2019(b)(1) is only weak support, because the court in reality dealt with the wrong statute.

If the court had correctly applied the *Byers* test to section 2019(b)(1), it could not properly have found that statute to be a source of authorization for judicial grants of immunity. Code of Civil Procedure section 2016 is the general provision governing pretrial deposition for discovery purposes; it specifically bars discovery of privileged matter.³⁶ It states:

[U]nless otherwise ordered . . . [under] Section 2019 . . . the deponent may be examined regarding any matter, not privileged

32. 12 Cal. 3d at 426, 525 P.2d at 719, 115 Cal. Rptr. at 815.

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

34. *Id.*

35. As it may be impossible for a prosecutor to prove that he has not made use of information revealed under a grant of use immunity, such a grant may have the result of blocking prosecution.

36. CAL. CODE CIV. PROC. § 2016(b) (West Supp. 1975).

. . . . 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 privilege³⁷

On any reasonable reading, this section as a whole indicates a strong legislative intent that the discovery process not affect any privilege in any way.³⁸

Such a reading is supported by *Greyhound Corp. v. Superior Court*,³⁹ the leading California case interpreting the scope of discovery. While it defined the purposes of discovery in very broad terms, and held that relevant statutes were to be given a liberal interpretation in favor of discovery, an exception was made where discovery would be "clearly improper."⁴⁰ A major class of impropriety dealt with in *Greyhound* was discovery of privileged material; the court held that discovery statutes, because of section 2016(b), should not affect, "one way or the other," California decisions and statutes providing for privileges.⁴¹ Thus *Greyhound*, and the cases following it,⁴² agree with an interpretation of section 2016(b) that makes privileged matter completely immune from any discovery technique.

*Lifschutz*⁴³ is also in accord with the view that tampering with privileges during discovery is prohibited. Contrary to the view advanced by the Attorney General's office, and apparently accepted by the *Kaufman* court,⁴⁴ *Lifschutz* does not limit the use of privileged material so that it may be discovered. The protective order granted in *Lifschutz* limited the use of only that material which was specifically excepted from the psychotherapist-patient privilege and was therefore discoverable; discovery of material not within the patient-litigant exception was completely prohibited.⁴⁵ The use restriction was employed to complement the privilege: each was designed to protect the patient from embarrassment due to unnecessary disclosure of confidential material,

37. *Id.*

38. The first and third quoted sentences might conceivably be read so as not to preclude the granting of use immunity. However, to claim that the second sentence may be interpreted to allow such protective orders requires a circular argument: that an order granting immunity and thus allowing discovery may be made because once it is made, material covered by the order will no longer be privileged at trial. Such a bootstrap argument is not valid.

39. 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961).

40. *Id.* at 377, 364 P.2d at 276, 15 Cal. Rptr. at 100.

41. *Id.* at 395, 396, 364 P.2d at 287-88, 15 Cal. Rptr. at 111-12.

42. *See, e.g., Pacific Tel. & Tel. v. Superior Court*, 2 Cal. 3d 161, 465 P.2d 854, 84 Cal. Rptr. 718 (1970).

43. 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

44. 12 Cal. 3d at 426, 525 P.2d at 719, 115 Cal. Rptr. at 815.

45. 2 Cal. 3d at 435, 437, 467 P.2d at 570, 572, 85 Cal. Rptr. at 842, 844.

and the use restriction operated where the privilege could not. In light of this recognized limitation on the scope of discovery where it touches privileged matters, the court's finding that section 2019(b)(1) authorizes grants of immunity seems to be in error.

These limitations upon the scope of discovery are not the sole problem in applying the rationale of *Byers v. Justice Court*⁴⁶ to section 2019(b)(1), for such an application appears to be beyond the original scope of that case in two ways. First, although the court in both *Byers* and *Kaufman* faced a statute designed to provide litigants with information, the statute involved in *Byers* required the reporting of only certain, specific data, while the *Kaufman* court encountered a statute requiring a broad, general disclosure of material. This difference is significant because of the statement by the court in *Byers* that the result there arose from an attempt to ascertain the preference of the legislature between an automatic grant of use immunity and the partial unconstitutionality of the statute.⁴⁷ In *Byers*, the very specific nature of the information required tended to show a correspondingly specific legislative interest, and made the probable desire of the legislature clear. In contrast, the broad, uncertain nature of the information that may be sought in discovery fails to indicate any strong legislative desire that the material be revealed, particularly where such revelation would require that a grant of use immunity be made.

Permitting immunity to be granted under section 2019(b)(1) extends the *Byers* decision in a second way. In *Byers*, the grant of immunity was completely automatic: any use of information obtained under the "stop and identify" statute in a criminal prosecution against the complying party was unconditionally prohibited.⁴⁸ In contrast, under section 2019(b)(1) grants of immunity will be discretionary, controlled only by the trial court's view of what justice requires. This extension is even more significant than the first, since it does not merely limit grants of immunity to particular circumstances, but instead creates a broad new power in the courts.

Because of the court's difficulties—its neglect of the language of section 2016 which bars tampering with privileges, its failure to consider the differences between hit-and-run statutes and those authorizing protective orders in discovery, and its confusion in determining the precise statute to which the *Byers* test was to be applied—it is apparent that the *Kaufman* decision fails as a matter of technical analysis. This failure does not, however, determine whether the decision is acceptable as a matter of policy.

46. 71 Cal. 2d 1039, 458 P.2d 465, 80 Cal. Rptr. 553 (1969), *rev'd on other grounds sub nom.* California v. Byers, 402 U.S. 424 (1971).

47. *Id.* at 1055, 458 P.2d at 478, 80 Cal. Rptr. at 564.

48. *Id.* at 1057, 458 P.2d at 479, 80 Cal. Rptr. at 565.

c. *Policies Relevant to Section 2019 Use Immunity*

Four major factors should be considered in determining the advisability of the decision to allow grants of immunity to be made in the form of protective orders under section 2019. The first involves the relation of immunity grants to the purposes of discovery. Prior to *Kaufman*, the privilege against self-incrimination hampered access to some material which might have assisted in the preparation of civil cases and the conduct of efficient trials. Immunity grants will prevent such interference and allow the real issues in a case to be fully considered. This facilitation of the purposes of discovery represents a strong argument in favor of the court's decision.

A second major consideration is that *Kaufman* provides no guidance to trial judges in the exercise of their newly found discretionary powers. The closest the opinion comes to establishing such guides is the *Byers* test, applied, as it was in *Kaufman*, to the statute on which the suit is founded. The first part of the test provides no guidance, since the purpose of virtually any statute authorizing a civil action will be promoted by allowing discovery. The second part of the test, requiring that grants of immunity made on the basis of implied authorization not interfere with law enforcement, is of some assistance, however. In order to meet this requirement, the trial judge would be forced to consider the nature of the party requesting that immunity be granted, and to deny the protective order where the consent of the prosecutorial authorities had not been obtained. Beyond this, consideration of the underlying suit does not indicate which other factors the trial court should consider in making its decision. May the judge decide on the basis of the prosecutor's motives in seeking or allowing a grant of immunity? May he overrule the decision of the prosecutor to seek civil rather than criminal penalties? What will be necessary to show on appeal that discretion has been abused? Unless such questions receive substantial consideration in the near future, an unfortunate mass of conflicting decisions by trial court judges is likely to develop, resulting in a new burden on the appellate courts. Such a potential burden is hardly a positive aspect of the *Kaufman* decision.

A third major factor is related to the separation of powers. If the legislature had remained silent on the issue of privilege from discovery, it is arguable that, as in *Byers*, the court would have been within its bounds in deciding that grants of use immunity are an appropriate tool for promoting the purpose of the statute. However, where the legislature has clearly indicated that privileges are not to be altered, the separation of powers dictates agreement, not contravention, on the part of the court. In such matters of policy, the legislature should be the primary authority.

The last major factor to be considered is perhaps the most important, for it concerns the spirit of the fifth amendment. Grants of use immunity are within the letter of the privilege against self-incrimination,⁴⁹ and in certain situations—such as that in *Byers*—are proper tools for obtaining information needed by the state. Where there are multiple potential defendants to a criminal action, as in *Kaufman*, however, grants of use immunity are a means of avoiding the restrictions of the fifth amendment. In such circumstances, each defendant can be convicted on the basis of the other's testimony. To be sure, no one has been forced to testify against himself, but, in total, such a scheme seems to violate the spirit of fairness in our criminal justice system that the fifth amendment was designed to protect.⁵⁰

The sum of the factors discussed is against the *Kaufman* decision, for the improvement in discovery is outweighed by the problems the opinion creates, by the lack of regard for the legislature's intent, and by the way it circumvents the spirit of the Constitution. Thus, the rule that immunity may be granted through the use of discovery statutes is not only incorrect as a matter of California statutory interpretation, but is also undesirable as a matter of policy.

III. *The Applicability of Use Immunity in Actions for Quasi-criminal Sanctions*

The second major issue raised in *Kaufman* was whether or not the new discovery weapon, a judicial grant of use immunity, could be employed to compel testimony from the defendant during discovery in an action to enforce a "quasi-criminal"⁵¹ sanction. Amici⁵² argued that the "civil penalties"⁵³ with which *Kaufman* was threatened were actually criminal in nature, and that the proposed protective order therefore would not fully preserve his privilege against self-incrimination. This argument relied primarily upon *Boyd v. United States*,⁵⁴ which recognized that certain sanctions, although not explicitly criminal, may be treated as such for the purposes of the fifth amendment privilege. The court in *Kaufman* rejected the amici's position, holding that the penalty

49. *Kastigar v. United States*, 406 U.S. 441 (1972).

50. See note 63 and accompanying text *infra*.

51. The term "quasi-criminal" was applied to a forfeiture sanction in *Boyd v. United States*, 116 U.S. 616, 634 (1886). *Boyd* indicated that the term encompassed penalties and forfeitures directed at "offenses against the laws." *Id.* at 634. The term is applied to sanctions which have both criminal and civil elements, including such "marginal disabilities" as loss of citizenship and loss of occupational license. See Comment, *The Privilege Against Self-Incrimination and Quasi-criminal Sanctions*, 35 TUL. L. REV. 400 (1961).

52. See note 14 and accompanying text *supra*.

53. See notes 10-11 and accompanying text *supra*.

54. 116 U.S. 616 (1886).

asserted against Kaufman was a civil sanction and that Kaufman had no claim to fifth amendment protection. The court in essence deferred to the "civil" label attached to the sanction by the legislature,⁵⁵ although it noted several other factors consistent with the label.⁵⁶ The following discussion analyzes the court's treatment of the defendant's interests in not testifying against himself and then examines whether the civil penalty imposed in *Kaufman* should have led to application of the privilege against self-incrimination. Finally, some implications of the court's treatment are considered.

a. The Uncertain Scope of the Privilege Against Self-incrimination

In declaring that the action pending against Kaufman was civil in nature, the court summarily disposed of important and complex questions concerning the extent of a defendant's privilege against self-incrimination. The privilege is applicable only in a "criminal case,"⁵⁷ but its scope has been expanded through judicial interpretation to embrace civil actions to enforce penalties and forfeitures deemed criminal in nature.⁵⁸ The effort to characterize quasi-criminal sanctions as penal or civil in nature, in order to determine whether the privilege applies, has produced a long and cloudy history of line-drawing and testing,⁵⁹ a history which is not enlightened by the court's opinion in *Kaufman*.

Behind the efforts of the courts to determine when the defendant's privilege applies lies a dispute over the importance of the privilege itself.⁶⁰ One commentator has noted that the elaboration of due process

55. See note 76 *infra*.

CAL. BUS. & PROF. CODE § 17536 (West Supp. 1975) provides in pertinent part: Any person who violates any provision of this chapter [deceptive advertising] . . . shall be liable for a *civil* penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a *civil* action brought in the name of the people

(emphasis added.)

CAL. CIV. CODE § 3370.1 (West Supp. 1975) provides in pertinent part:

Any person who violates any provision of this chapter [unfair competition] shall be liable for a *civil* penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a *civil* action brought in the name of the people

(emphasis added.)

56. See text accompanying note 78 *infra*.

57. U.S. CONST. amend. V provides: "[N]or shall any person . . . be compelled in any criminal case to be a witness against himself"

58. See *Boyd v. United States*, 116 U.S. 616, 634 (1886).

59. For an historical overview of judicial efforts to characterize sanctions as civil or penal, see Comment, *The Federal Witness Immunity Acts in Theory and Practice*, 72 YALE L.J. 1568, 1583-87 (1963).

60. A contribution to the debate over the values served by the privilege lies beyond the scope of this Note. See generally GRISWOLD, *THE FIFTH AMENDMENT TODAY* (1955); MAYERS, *SHALL WE AMEND THE FIFTH AMENDMENT?* (1959); SCHAEFER, *THE SUSPECT AND SOCIETY* c.3 (1967); 8 WIGMORE, *EVIDENCE* § 2251 (3d ed. 1940); McKay, *Self-incrimination and the New Privacy*, 1967 SUP. CT. REV. 193 (1967).

rights, development of protections against coerced confessions, and changed notions of "fundamental fairness" have provided additional protections against government oppression, thus reducing the usefulness of the fifth amendment privilege.⁶¹ As a result, the protective sphere of the defendant's privilege has been contracted in recent years.⁶² The privilege nevertheless remains a revered aspect of our constitutional protections of individual rights, particularly as a cornerstone of our accusatorial system of criminal justice and as an important protector of individual integrity and privacy.⁶³ The importance attributed to these values is reflected in judicial efforts, discussed below, to determine whether the privilege is applicable in quasi-criminal actions.

b. Civil-Criminal Characterization of Quasi-criminal Sanctions

*Boyd v. United States*⁶⁴ is the seminal case in judicial efforts to characterize sanctions as criminal or civil for purposes of protection against self-incrimination. *Boyd* involved an action to enforce a federal revenue statute⁶⁵ which provided for both traditional criminal penalties and forfeiture of illegally imported goods. The prosecutor, needing certain invoices in the defendant's possession that were protected in a criminal action by his fifth amendment privilege, chose to pursue only the forfeiture of the goods under the rubric of a civil suit, and then compelled production of the invoices. The United States Supreme Court held the admission of the invoices in evidence and the underlying statute unconstitutional; the sanction was declared a penalty or forfeiture imposed for "offenses against the law"⁶⁶ and thus called for the protection of the privilege against self-incrimination. The Court's rule was drawn in terms of offenses against the law rather than criminal offenses, to provide additional protection against the possibility of the legislature, either intentionally or unintentionally, placing criminal sanctions into technically civil laws.⁶⁷

The *Boyd* approach to determining the nature of a sanction involved consideration of the procedure in question, the sanction imposed,

61. Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CALIF. L. REV. 89, 94 (1965).

62. The scope of the privilege has been narrowed by judicial acceptance of the doctrine of use immunity, *Kastigar v. United States*, 406 U.S. 441 (1972), by the development of a "required records exception" to the privilege, see C. McCORMICK, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* 300-03 § 142 (2d ed. 1972), and by the allowance of criminal discovery of evidence intended to be introduced by defendants, *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

63. See McKay, *Self-incrimination and the New Privacy*, 1967 SUP. CT. REV. 193.

64. 116 U.S. 616 (1886).

65. Act of June 22, 1874, ch. 391, § 12, 18 Stat. 186.

66. *Id.* at 634.

67. This interpretation is consistent with *Lees v. United States*, 150 U.S. 476

and the presence of alternative criminal remedies in the same statute.⁶⁸ However, in 1938 the Supreme Court stated in *Helvering v. Mitchell*⁶⁹ that the test of whether civil or criminal procedures apply in an action depends upon whether the sanction can be characterized as "remedial" or "penal."⁷⁰ In applying the new test to a 50 percent deficiency penalty for tax evasion, the Court concluded that the penalty was a civil (remedial) sanction because it reimbursed the government for the expense of investigation and loss from fraud, because the deficiency penalty was placed in a different section of the code than was the criminal penalty for the same act, and because recovery of the penalty "by distraint," a civil procedure, was provided for in the section authorizing the penalty.⁷¹

The remedial versus penal test advanced in *Helvering v. Mitchell* was an important step in limiting *Boyd*. *Helvering* recognized that the growth of regulatory law had created a new set of sanctions that required consideration of factors beyond those considered in *Boyd* in determining whether constitutional protections applied.⁷² *Helvering* also removed *Boyd's* possible requirement that fifth amendment protections be applied whenever the act being civilly prosecuted is also subject to criminal sanctions, even if the civil sanction is primarily remedial. The Court's new test instead examined whether the particular sanction before the Court tended to punish the act or to reimburse those injured or potentially injured.⁷³

(1893). See note 68 *infra*.

68. 116 U.S. at 634.

Subsequent courts accepted the *Boyd* view that the fifth amendment privilege against self-incrimination embraces civil proceedings to enforce penalties and forfeitures as well as criminal prosecutions. See *Lees v. United States*, 150 U.S. 476 (1893) (privilege against self-incrimination applicable to civil proceeding to recover a \$1000 penalty for violation of the Act of Feb. 26, 1885, ch. 164, § 3, 23 Stat. 332); *Thurston v. Clark*, 107 Cal. 285, 40 P. 435 (1895) (privilege applicable to civil proceeding under statute authorizing removal from office as a penalty for corrupt practices). In *Thurston*, the court held that the fifth amendment privilege applied "to all cases in which the action prosecuted is not to establish, recover, or redress private and civil rights, but to try and punish persons charged with the commission of public offenses." *Id.* at 289, 40 P. at 437. See also *United States v. United States Coin & Currency*, 401 U.S. 715 (1971), holding the privilege applicable to an action for forfeiture of money owned by a gambler who failed to register and pay a gambling tax.

Boyd may have been limited by *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), which held that the fifth amendment applies only to actions for civil penalties that are aimed at persons "significantly involved in a criminal enterprise." *Id.* at 688.

69. 303 U.S. 391 (1938).

70. *Id.* at 400 n.3.

71. *Id.* at 401-05.

72. The Court in *Helvering* couched its discussion in terms of legislative intent, unlike *Boyd*, but did not overrule *Boyd*, suggesting that the factors considered in the former case were still relevant.

73. 303 U.S. at 398-401. Although *Helvering's* penal-remedial test limits *Boyd v.*

Some cases subsequent to *Helvering*, including *Kaufman*, have unfortunately given undue weight to legislative characterization in determining the nature of a sanction.⁷⁴ Additionally, the courts have often failed to elaborate on the factors to be considered, merely replacing one set of labels (civil, criminal) with another (remedial, penal). The remedial-penal test has proven to be arbitrary and variable in application. Courts have tended to pronounce their conclusions as to the nature of sanctions without adequate explanation and possibly without adequate consideration of competing factors.⁷⁵

Kaufman reflects both the tendency to use labels that obscure the analysis of the underlying issues involved in making the civil-criminal distinction, and the excessive deference of the courts to the labels attached by legislatures to sanctions.⁷⁶ Although *Kaufman* rejects the

United States, 116 U.S. 616 (1886), in this way, it may also require that the privilege against self-incrimination apply where a penalty is sought to be imposed upon an activity not also subject to criminal sanction. This would at least be consistent with and could possibly extend beyond the scope of *Boyd*. See note 68 *supra*.

74. One writer noted that "courts have demonstrated a propensity to base their classifications entirely on [legislative] intent, and to disregard other criteria. This has led, in many cases, to a circular mode of judicial reasoning . . ." Comment, *The Federal Witness Immunity Acts in Theory and Practice*, 72 *YALE L.J.* 1568, 1587 n.90 (1963).

In *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972), the Court concluded from the placement of a forfeiture sanction and a criminal sanction in separate statutory sections that the legislature had intended the forfeiture to be a civil sanction; it largely relied on the legislative intent in holding the action to be civil in nature. *Id.* at 236-37. See also *Madonna v. State*, 151 Cal. App. 2d 836, 840, 312 P.2d 257, 260 (3d Dist. 1957), holding that the legislative description and treatment of a cause of action as civil was determinative.

In contrast, the Court in several prior cases had rejected the idea that a legislative label should be accepted without examining the underlying purpose of a sanction. *Trop v. Dulles*, 356 U.S. 86, 94 (1958); *In re Winship*, 397 U.S. 358, 365-66 (1970). In determining the penal or civil nature of a statute providing for loss of nationality for desertion, the Court in *Trop* noted that it was not bound by the non-penal classification given the statute by the Cabinet Committee that prepared it. The Court stated that "even a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute." 356 U.S. at 95.

One Lot Emerald Cut Stones might be reconciled with these cases because in *One Lot* the Court did determine that the forfeiture sanction was not necessarily directed at a criminal offense. 409 U.S. at 234, 236 n.6. The Court also considered the nature of the sanction. *Id.* at 237.

75. One commentator concluded that most courts first decide whether the privilege should apply, and then apply the civil or criminal label to express the result. Note, *The Privilege Against Self-incrimination and Quasi-criminal Sanctions*, 35 *TUL. L. REV.* 400, 424 (1961). That author argued that courts are uncertain about what factors to weigh and what weight to give them, and are uncomfortable in making a utilitarian analysis of a constitutional right, especially where the policies underlying the privilege are questioned. Thus, he concluded that courts resort to rigid categories to depersonalize decisions, and obscure the analytical process.

76. The court stated:

Although a 'criminal' or 'civil' label is not in itself determinative of the nature of the action, we deem the Legislature to have directed that criminal sanctions

extreme view expressed in *Madonna v. State*⁷⁷ that the legislative description and treatment of a cause of action as civil in nature is determinative of the issue, the court's treatment of the issue has the same effect. The factors the court considered in confirming the legislative characterization were too limited to permit effective review. The court pointed out that the civil penalty sanction was not intended by the legislature to impose criminal stigma or the loss of personal freedom, that other civil procedures had previously been applied to such actions, and that the underlying conduct was not made subject to criminal sanction in the same statutory section.⁷⁸ The court also analogized the civil penalty sanction to exemplary damages.⁷⁹ The following section of this Note discusses a number of important factors not considered in the court's analysis and examines the persuasiveness of the arguments that the court did raise.

c. *Applicability of the Privilege to the Civil Penalty in Kaufman*

If the court had subjected the civil penalty action to closer scrutiny, it would have found that a number of other factors are relevant to the determination of whether the defendant's privilege against self-incrimination should apply.⁸⁰ These concern both the nature of the sanction and the purpose of the statute involved.

. . . are beyond the scope of proceedings based upon violations of prohibitions against deceptive advertising.

12 Cal. 3d at 432, 525 P.2d at 723, 115 Cal. Rptr. at 819.

This reliance on legislative intent may be particularly misguided in this situation, because the legislature's attachment of a civil label to the sanction occurred prior to the supreme court's expansive interpretation of "violation" in CAL. BUS. & PROF. CODE § 17500 (West 1964) in *People v. Superior Ct. (Jayhill)*, 9 Cal. 3d 283, 288-89, 507 P.2d 1400, 1403-04, 107 Cal. Rptr. 192, 195-96 (1973). See note 81 *infra*. Had the legislature anticipated this interpretation, it might have been more hesitant to apply a civil characterization to the sanction.

77. 151 Cal. App. 2d 836, 312 P.2d 257 (3d Dist. 1957).

78. 12 Cal. 3d at 430-33, 525 P.2d at 722-24, 115 Cal. Rptr. at 818-20.

79. *Id.* at 433, 525 P.2d at 724, 115 Cal. Rptr. at 820.

80. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1962), indicates many relevant considerations:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry [A]bsent conclusive evidence of congressional intent as to the penal nature of a statute

Id. at 168-69. The Court in *Kennedy* did not find it necessary to examine all of these factors because the sanction was clearly intended to be penal, and therefore criminal procedures were held to be applicable. The Court very likely did not mean to rule out consideration of these factors if the sanction was intended to be nonpenal in nature. See note 74 *supra*.

Regarding the nature of the sanction, the most prominent feature of the civil penalty to be imposed on Kaufman is the potential exposure of the defendant. The penalty calculation, as construed previously by the court,⁸¹ can result in almost unlimited liability.⁸² The monetary penalties provided in the false advertising and unfair competition statutes potentially dwarf the actual harm caused by the deception; indeed, actual harm to the public is not required for a misrepresentation to constitute a violation of these laws.⁸³ This lack of relationship between damage caused and penalty demanded distinguishes the action from a remedial civil action and suggests a close resemblance to traditional penal actions.

The court itself notes in *Kaufman* that the monetary sanction is intended to be a punitive and deterrent exaction,⁸⁴ but it argues that the sanction is analogous to exemplary damages which may be recovered in a civil action.⁸⁵ However, the analogy is inapposite; exemplary damages are awarded only on a showing of actual harm,⁸⁶ the damages must bear a reasonable relation to the actual harm,⁸⁷ and such damages are allowed only when directed at certain types of willful behavior.⁸⁸ Under the statute in *Kaufman*, actual injury need not be demonstrated⁸⁹ and the behavior may be negligent or accidental.⁹⁰

The civil penalty sanction in *Kaufman* is not designed to redress the private rights of injured consumers, because the money recovered

81. *People v. Superior Court (Jayhill)*, 9 Cal. 3d 283, 288-89, 507 P.2d 1400, 1403-04, 107 Cal. Rptr. 192, 195-96 (1973). The court in *Jayhill* interpreted a violation of CAL. BUS. & PROF. CODE § 17500 (West 1964) as each individual perceiving the false advertisement, a formulation that produces potentially enormous liability.

82. Sizable penalties have been recovered in a number of actions. Comment, *Enforcing California's False Advertising Law: A Guide to Adjudication*, 25 HASTINGS L.J. 1105, 1109 n.18 (1974). That author concluded that the monetary penalties provided under CAL. BUS. & PROF. CODE § 17536 (West Supp. 1975) may be the harshest false advertising remedies in the country. See *id.* at 1109 n.19. For a tabulation of state false advertising statutes, see Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 757-60 (1972).

83. 29 OP. CAL. ATT'Y GEN. 175, 177-78 (1957).

84. 12 Cal. 3d at 431, 525 P.2d at 723, 115 Cal. Rptr. at 819.

85. *Id.* at 432-33, 525 P.2d at 724, 115 Cal. Rptr. at 820.

86. See *Clark v. McClurg*, 215 Cal. 279, 9 P.2d 505 (1932); *Bezaire v. Fidelity & Deposit Co.*, 12 Cal. App. 3d 888, 91 Cal. Rptr. 142 (2d Dist. 1970); Annot., 17 A.L.R.2d 527 (1951).

87. See note 86 *supra*.

88. See *Lightner Mining Co. v. Lane*, 161 Cal. 689, 120 P. 771 (1911); *Roth v. Shell Oil Co.* 185 Cal. App. 2d 676, 8 Cal. Rptr. 514 (4th Dist. 1960).

89. See note 83 *supra*.

90. Under CAL. BUS. & PROF. CODE § 17500 (West 1964) there is no requirement of proof of intent to deceive. See *Audio Fidelity, Inc. v. High Fidelity Recordings, Inc.*, 283 P.2d 551, 555 (9th Cir. 1960); *People v. Lynham*, 253 Cal. App. 2d 959, 965-66, 61 Cal. Rptr. 800, 805 (2d Dist. 1967); *People v. Wahl*, 39 Cal. App. 2d (Supp.) 771, 773, 100 P.2d 550, 551 (Super. Ct. 1940).

goes to the state.⁹¹ The lack of restitutionary intent is further demonstrated by the existence of a separate restitution remedy in a separate statutory provision.⁹² While it has been held that a sanction which reimburses the prosecuting agency for costs incurred is remedial and does not invoke the fifth amendment privilege,⁹³ the civil penalty in *Kaufman* bears little direct relation to the costs of prosecution. The penalty assessed is recovered partially by the prosecuting agency and partially by the jurisdiction in which the action is brought.⁹⁴ However, the penalty is calculated not on the basis of governmental costs, but rather on the basis of the number of consumers reached by the misrepresentation. Furthermore, the redistribution to local entities is apparently designed to encourage the prosecution of false advertising charges, a purpose that is nonrestitutionary in nature.⁹⁵

An excessive monetary penalty has been held to require that the privilege against self-incrimination be available to a defendant.⁹⁶ While the penalties demanded in *Kaufman* were not great—only a few violations having been alleged—enormous liability is possible under the statute.⁹⁷ Rumorous individual liability, like incarceration, poses a sufficient threat of governmental oppression to require the protection of the privilege against self-incrimination. Similarly, the protection of human dignity inherent in the privilege seems as essential in the face of the threat of a large civil penalty as it is in response to the threat of more traditional criminal liability.

The court's opinion distinguishes the civil penalty from other criminal sanctions by declaring that the legislature had intended that no social stigma be attached to a conviction.⁹⁸ Whether a stigma attaches to a

91. See note 94 and accompanying text *infra*.

92. Section 17535 provides in part:

The court may make such orders or judgments . . . [as] may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter [false advertising] declared to be unlawful.

CAL. BUS. & PROF. CODE § 17535 (West Supp. 1975).

93. *Helvering v. Mitchell*, 303 U.S. 391, 401 (1938).

94. See CAL. BUS. & PROF. CODE § 17536(b) (West Supp. 1975).

95. It could be argued that such encouragement is similar to reimbursement to the prosecuting government, at least to the extent of covering the costs of prosecution, and is thus restitutionary in nature. Encouragement and restitution are basically different processes however, and the method of calculating the penalty also is nonrestitutionary.

96. See *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956); *Lees v. United States*, 150 U.S. 476 (1893); *United States v. LeBeouf Bros. Towing Co.*, 377 F. Supp. 558 (E.D. La. 1974); cf. *United States v. Fishman*, 15 F.R.D. 124 (S.D.N.Y. 1952).

97. See notes 81-82 and accompanying text *supra*.

98. "[W]e deem the Legislature to have directed that criminal sanctions, including . . . the stigma of a criminal conviction, are beyond the scope of proceedings based upon violations of prohibitions against deceptive advertising." 12 Cal. 3d at 432, 525 P.2d at 723, 115 Cal. Rptr. at 819.

civil penalty conviction, however, is not totally subject to legislative or judicial intent or desires. A social stigma clearly may arise if a person is found by a court to have deceived the public through false advertising. Also, many criminal acts are penalized by monetary sanctions alone, yet this fact does not remove the social condemnation connected with a conviction.

Regarding the relationship between the purposes of the statute and the privilege against self-incrimination, the remedial-penal distinction developed in *Helvering v. Mitchell*⁹⁹ sought to distinguish society's efforts to deter and punish prohibited conduct (penal sanctions) from less intrusive schemes to restrict certain activities to desirable channels without regard to *mens rea* or retribution (regulatory sanctions). The dividing line quickly becomes so hazy as to be undetectable, but the distinction reflects a perception that protection against self-incrimination is necessary in the former category where the individual is confronted with the full oppressive force of governmental sanctions, but not in the latter set of more benign controls.

Applying some of the traditional measures of the remedial-penal test produces a checkered picture of the civil penalty statute. In some respects the statutory scheme appears to be regulatory. No *mens rea* is required for violation of the statute;¹⁰⁰ as pointed out above, such strict liability is indicative of a regulatory rather than a penal purpose. In addition, the legislature appears to have designed the penalty to act as a regulatory deterrent for corporations and business associations whose profits from deceptive advertising could be so great as to render the small misdemeanor fine insignificant.¹⁰¹

In other respects the statutory scheme appears to be penal. No administrative body controls the setting of standards or administration of the statute; instead, the statute is enforced through regular law enforcement channels. The goal of the statutory scheme prohibiting false advertising is apparently not supervision of advertising practices, but rather the interposition of a sanction so injurious as to effectively prevent advertising from approaching the prohibited sphere. In this sense, the civil penalty plays a traditional criminal function, rather than a regulatory role.

The penal nature of the action is further indicated by the fact that the underlying conduct is subject to criminal sanction in a related

99. 303 U.S. 391 (1938).

100. See note 90 *supra*.

101. It may be argued that a regulatory scheme which lacks large penalties will be ineffective in deterring violations of false advertising statutes, since substantial profits can be made by violators. Even if correct, however, this argument does not deny that substantial penalties imposed on an individual justify fifth amendment protection. According fifth amendment protection does not totally defeat the purpose of such sanctions,

statutory provision,¹⁰² despite the court's formalistic assertion that "the statutory provision does not in any way purport to proscribe criminal conduct."¹⁰³ The placement of the sanction in a separate code section is only slightly different from the situation in *Boyd v. United States*,¹⁰⁴ where the source of the allegedly civil sanction was a criminal statute, although the *Kaufman* court distinguishes *Boyd* on the basis of the difference in placement.¹⁰⁵ Several courts, however, have rejected this distinction.¹⁰⁶

The court argues in a footnote that the use of other civil procedures in the trial of a civil penalty case indicates that the fifth amendment privilege should be unavailable.¹⁰⁷ However, the United States Supreme Court has recognized that the scope of the fifth amendment privilege is broader than the guarantees of other criminal procedural rights.¹⁰⁸ Therefore, the use of other civil procedures does not logically compel denial of the privilege against self-incrimination.

As this discussion has demonstrated, characterization of the civil penalty in *Kaufman* is not as simple as the court's treatment would suggest. Moreover, even the factors discussed by the court do not compel the result reached. The court unfortunately chose not to evaluate the factors supporting fifth amendment protection and relied instead on the legislature's weighing of the conflicting values. The court thereby avoided its judicial responsibility to review carefully legislative ac-

because the information needed to convict individuals may be otherwise obtained, and because the privilege against self-incrimination is unavailable to corporations, *Hale v. Henkel*, 201 U.S. 43 (1906), and to unincorporated associations, *United States v. White*, 322 U.S. 694 (1944).

102. CAL. BUS. & PROF. CODE § 17534 (West 1964) provides that a violation of § 17500 is a misdemeanor.

103. 12 Cal. 3d at 432, 525 P.2d at 723, 115 Cal. Rptr. at 819.

104. 116 U.S. 616 (1886).

105. 12 Cal. 3d at 430, 525 P.2d at 722, 115 Cal. Rptr. at 818.

106. See *United States v. United States Coin & Currency*, 401 U.S. 715 (1971) (summarized in note 68 *supra*); *United States v. LeBeouf Bros. Towing Co., Inc.*, 377 F. Supp. 558 (E.D. La. 1974); *Thurston v. Clark*, 107 Cal. 285, 40 P. 435 (1895) (summarized in note 68 *supra*); cf. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965); *People v. Reulman*, 62 Cal. 2d 92, 396 P.2d 706, 41 Cal. Rptr. 290 (1964) (both *One 1958 Plymouth Sedan* and *Reulman* involve fourth amendment protection against introduction of illegally seized evidence in an action for a forfeiture). But see *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (summarized in note 74 *supra*). This case may be distinguishable, because the criminal offense involved a different *mens rea* than did the civil offense. 409 U.S. at 234, 236 n.6.

107. 12 Cal. 3d at 431 n.9, 525 P.2d at 723 n.9, 115 Cal. Rptr. at 819 n.9.

108. For example, in *United States v. Regan*, 232 U.S. 37 (1914), cited in *Kaufman* as supporting a civil burden of proof in false advertising actions, 12 Cal. 3d at 431 n.9, 525 P.2d at 723 n.9, 115 Cal. Rptr. at 819 n.9, the Court, distinguishing *Boyd v. United States*, 116 U.S. 616 (1886), explicitly stated that the scope of the fifth amendment privilege against self-incrimination is broader than the guarantees of article III and the sixth amendment governing criminal trials. 232 U.S. at 50; cf. *United States v. Zucker*, 161 U.S. 475, 487 (1896); *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892).

tions for possible infringement of constitutional rights.¹⁰⁹ The factors considered above point out similarities between the civil penalty sought to be imposed on Kaufman and traditional criminal sanctions that are sufficiently significant to demand closer scrutiny than the court provided; the results of such scrutiny seem to require that the defendant be accorded fifth amendment protection from self-incrimination.

d. Implications of the Kaufman Approach to the Civil-Criminal Distinction

The *Kaufman* court's inclusion of use immunity in the arsenal of discovery weapons has disturbing implications, the most disturbing of which is the use of this new weapon in cases like *Kaufman*, where the sanctions to be imposed are quasi-criminal. As exemplified in *Kaufman*, the use of judicial grants of use immunity in conjunction with quasi-criminal sanctions provides a wide margin in which legislatures and prosecutors may circumvent the privilege against self-incrimination. The court's analysis would allow the legislature to provide quasi-criminal sanctions as alternative sanctions for many criminal offenses. The prosecutor could then choose whether to pursue the criminal or quasi-criminal sanction, depending upon whether a grant of use immunity was needed. Judicially created use immunity will be most damaging for defendants and is most likely to be used by the prosecution when the underlying conduct can be sanctioned through such an alternative, non-criminal cause of action. The court's analysis would also enable legislatures to replace many criminal laws with statutes providing for harsh penalties labeled civil. Many of today's criminal prohibitions could thereby be converted into civil violations, prosecuted in trials where the constitutional protections of criminal procedure would be absent. The *Kaufman* treatment of the distinction between civil and criminal sanctions is additionally troublesome because of its potential application to existing quasi-criminal sanctions such as loss of occupational license, loss of citizenship, and other marginal disabilities which are not usually pursued in criminal proceedings. In some cases such sanctions should be considered criminal in nature, but the analysis in *Kaufman* would not be sufficiently sensitive to isolate those situations.

The *Kaufman* court's cavalier treatment of the values protected by the privilege against self-incrimination indicates a continuing movement toward restriction of this fifth amendment right. *Kaufman* represents a

109. The *Boyd* court explained the judicial role in these terms:

[I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd v. United States, 116 U.S. 616, 635 (1886).