

Parallel Administrative and Criminal Proceedings in California

Very often when an administrative hearing is held to determine the fitness of a person to continue in a profession, to maintain a license, or to determine whether the conduct of an individual should result in his expulsion from a state institution or the loss of a state job, the factual situation upon which the reviewing board must base its conclusions is one which also gives rise to responsibility under the criminal law. It is therefore not uncommon for an administrative hearing to convene while a criminal proceeding is pending on the same or similar charges. When this situation arises the defendant in the pending criminal case may attempt to postpone the administrative hearing until after the disposal of the criminal charges. By doing this, an individual may hope that he will be allowed to keep his license, if a license is involved, until it is definitely revoked by the hearing board.¹ He may also want the administrative hearing postponed because he fears that testimony he might give in an attempt to prevent an adverse judgment at the hearing will be used against him at the pending criminal trial.² Finally, a legal determination made at a trial such as the fact that a particular piece of evidence was illegally seized might be of advantage at the hearing because the administrative hearing would be bound by that determination.³ If an adverse decision has been rendered by an administrative hearing while a criminal charge on the same matter is pending, an individual may also attempt to have the ad-

¹Funke v. Department of Motor Vehicles, 1 Cal. App. 3d 449, 81 Cal. Rptr. 662 (1969); Savoy Club v. Board of Supervisors, 12 Cal. App. 3d 1034, 91 Cal. Rptr. 198 (1970).

²Goldberg v. Regents of the University of California, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463(1967).

³Savoy Club v. Board of Supervisors, 12 Cal. App. 3d 1034, 91 Cal. Rptr. 198 (1970).

ministrative decision overruled because the hearing was held before the criminal proceeding.

This article will discuss the response of the California State courts to attempts by litigants to have administrative hearing determinations overruled because the administrative hearing was held while a criminal proceeding arising from the same factual situation was pending.⁴

Cases in which testimony is forced from an individual during an administrative hearing as a result of a threat that the person either testify or have the question involved automatically determined against him, and in which that testimony is later used at a criminal proceeding will not be discussed in this article.⁵ Nor will cases be discussed which involve a person being disciplined or sanctioned by an administrative hearing because he invoked his privilege against self-incrimination⁶ or because

⁴The question of the effect of having an administrative hearing while a criminal case is pending on the same or similar facts has come before Federal Courts in California once. in *Furatani v. Ewigleben*, 297 F. Supp. 1163 (N.D. Calif. 1969) college students sought to enjoin college officials from conducting expulsion hearings until after criminal charges resulting from the same activities were completed and to have the college reinstate them until completion of those criminal proceedings. The students did not contend that the hearings available were inadequate to satisfy due process requirements. They did contend that if they were given prompt hearings they might have to testify to avoid expulsion and therefore would be denied their Fifth Amendment rights because their testimony could then be used against them in their criminal trial. The court held that if the students were forced to incriminate themselves to avoid expulsion and if that testimony was offered against them in subsequent criminal proceedings, they could assert their Fifth Amendment rights at the trial to keep the incriminating statements from being admitted.

⁵Cases dealing with this fact pattern have not yet occurred in California. However, this situation has been discussed by the United States Supreme Court in *Garrity v. New Jersey* 385 U.S. 493 (1967). In *Garrity* the Supreme Court of the United States held that the threat of removal from office to induce the petitioner to forgo the privilege against self-incrimination rendered the resulting statements involuntary and inadmissible in criminal proceedings.

⁶*Slochower v. Board of Higher Education of New York City*, 350 U.S. 551 (1955) where summary dismissal when an employee invoked the privilege against self-incrimination to avoid answering a legislative committee question relating to his official conduct violated the Due Process Clause of the Fourteenth Amendment; *Beilan v. Board of Public Education*, 357 U.S. 399 (1957) were dismissal for "incompetency" when a teacher refused to answer questions relating to communist affiliations and activities did not violate the Due Process Clause of the Fourteenth Amendment; *Lerner v. Casey*, 357 U.S. 468 (1957) where a dismissal after an employee refused to answer whether he was a member of the Communist Party on the grounds that it might incriminate him was not found to violate his rights under the Federal Constitution when based upon his refusal it was found that reasonable grounds existed for belief that because of his doubtful trust and

he denied the hearing board information it needed in the proceeding.⁷ Questions involving procedural requirements and burdens of proof in an administrative hearing are likewise omitted.⁸

The arguments relied on, in the cases which will be developed below, are that due process is denied a person simply when he is forced to submit to an administrative hearing when a parallel criminal proceeding is pending and that a person is denied his privilege against self incrimination if he is forced to testify to protect himself at an administrative hearing in such a situation. It is asserted that an individual is prejudiced at a pending criminal trial when he is forced to submit to an administrative hearing and therefore is denied due process. For simplicity this situation will be referred to as fair trial due process. A major point of this article is that litigants in arguing that fair trial due process has been denied have mistakenly tried to remedy the alleged denial by having the administrative hearing overruled and not the criminal trial where the unfairness would result. A second major point of this article is that due process may be denied at the administrative hearing as well as at the pending criminal trial. A person may be denied due process and not be given a fair administrative hearing because in anticipation of the fact that what he does at the hearing may be used to his detriment by prosecutors in the pending criminal proceeding, he does not pursue his defenses at the hearing. This situation will be referred to as fair hearing due process. The third major point of this article is that even though the compulsion placed upon a person at an administrative hearing may not be a denial of the privilege against self-incrimination, it still may result in unfairness which should be corrected.

reliability his continued employment would endanger national security; *Gardner v. Broderick*, 392 U.S. 273 (1967) where dismissal of a police officer solely for his refusal to waive the immunity to which he is entitled if he required to testify despite his constitutional privilege was not allowed to stand.

⁷*Baird v. State Bar of Arizona*, 401, U.S. (1971) where a denial to process an application or recommend admission to the bar because petitioner refused to answer whether she had ever been a member of the Communist Party was reversed; *In re Stolar* 401 U.S. 23 (1971) where a denial of petitioner's application to take the Ohio bar examination because he refused to answer certain questions which he claimed infringed upon his rights under the First and Fifth Amendments was reversed.

⁸For a discussion of procedural requirements in administrative hearings see Article, "California and Federal Administrative Due Process: Development, Interrelation, and Direction", 5 U.C.D. L. REV. 1 (1972).

I. THE DUE PROCESS QUESTIONS

California litigation involving the effects of having an administrative hearing while a parallel criminal proceeding is pending is fairly recent. The first case involving the question did not arise until 1967.⁹ However twelve years before this, the United States Court of Appeals for the District of Columbia addressed itself to the question in *Silver v. McCamey*.¹⁰ Even though the *Silver* case is not precedent in California, a discussion of it is merited since California litigants have based their contention that due process is not observed when parallel administrative and criminal proceedings are held on the holding and reasoning in *Silver*. In that case a licensed taxicab operator was arrested and charged with two rapes. Revolver ammunition and a bayonet were found in his taxicab. While the trial for one of the rape charges was pending, an administrative board directed Mr. McCamey to answer charges that he was not of proper character to operate a public vehicle because he sexually assaulted and robbed a citizen at gunpoint and because ammunition and a bayonet were found in his taxicab. After a hearing on these charges, the board revoked Mr. McCamey's license to operate a taxicab.¹¹

Mr. McCamey sued in the United States District Court to have his license restored. The district court granted the injunction and the administrative board appealed.

The hearing board relied upon a statute that authorized the commissioners of the District of Columbia, "to revoke any license...when in their judgment, such deemed desirable..."¹² However, the Appeals Court held:

...due process is not observed if an accused person is subjected, without his consent to an administrative hearing on a serious criminal charge that is pending against him. His necessary defense in the administrative hearing may disclose his evidence long in advance of his criminal trial and prejudice his defense in that trial.¹³

⁹Goldberg v. Regents of the University of California, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

¹⁰*Silver v. McCamey*, 221 F.2d 873 (D.C. Cir. 1955).

¹¹*Id.* at 874.

¹²*Id.*

¹³*Id.* at 874-875.

The court answered the contention of the hearing board that the ruling left the public without protection against an accused hacker pending his criminal trial by suggesting that the board may hold a hearing on other charges or take action on the question of whether the pending charges themselves justify a temporary suspension. In the court's opinion a temporary suspension would be like a denial of bail. It would provide public protection but would not involve a finding of guilt or result in permanent loss of employment nor necessitate the disclosure of defenses to the criminal charge. Finally the court held that the board was without prejudice as to future proceedings to revoke McCamey's license, since an acquittal at the criminal proceeding might only mean that the material facts were not proven beyond a reasonable doubt. It would still be possible to prove these facts sufficiently for a civil or administrative proceeding.¹⁴

Judge Danaher strongly dissented the majority's holding in *Silver v. McCamey*. The dissent characterized the inquiry of the Board as only involving McCamey's fitness to drive a taxicab. Examination of the whole record disclosed a fair and complete hearing. The Board had a proper and rational basis for revoking the license. Even though McCamey had not yet been tried on the robbery and rape charges, the Board was entitled to take the testimony of the rape and robbery complainant and weigh it as an element in the fitness hearing.¹⁵ Judge Danaher further stated:

If a person is a taxicab driver, he takes his license on the full understanding that he is subject to supervision as required by law, and fitness to continue as a privileged licensee is always a possible issue. In my opinion, he acquires through the Fifth Amendment no status of insulation from requirements reasonably designed for the public protection.¹⁶

The *Silver* case is not completely clear in its holding and ramifications. As pointed out in the introduction it is possible that due process is denied if a person is subjected to an administrative hearing and a pending serious criminal charge for two reasons. One is that the pending criminal trial inhibits the defendant so that he is not able to defend himself completely at

¹⁴*Id.* at 875.

¹⁵*Id.* at 877.

¹⁶*Id.*

the administrative hearing; this has been called fair hearing due process. Secondly, a complete defense by a person at an administrative hearing will prejudice him in his forthcoming criminal trial, which has been labeled fair trial due process. The majority somewhat indicates which form of due process it is considering by adding the rationale that, "His necessary defense in the administrative hearing may disclose his evidence long in advance of his criminal trial and prejudice his defense in that trial."¹⁷

Necessary defense would include whatever was required to rebut the charge. Thus anything a person did to defend himself before an administrative hearing in this situation would result in disclosure of evidence in advance of his criminal trial.

The wording of the court does not expressly indicate whether the evil is simply disclosure of evidence in advance of the criminal trial or only disclosure of evidence which prejudices his defense at the trial. All evidence that is disclosed may not be prejudicial. The fact that the court does not discuss how the evidence disclosed at McCamey's administrative hearing prejudiced his defense in the pending trial indicates that the court felt that disclosure in itself was a denial of due process without showing the specific resulting prejudice. Also the comment of the dissent that, "... he acquires through the Fifth Amendment no status of insulation from requirements reasonably designed for the public protection,"¹⁸ indicates that the court was looking to unfairness which would result at the trial or, in other words, to fair trial due process. However, even though the court seemed to talk in terms of fair trial due process, its relief was to vacate the holding of the administrative hearing. The court did not take steps to interfere with the pending criminal trial where theoretically the prejudicial effect would take place. In order to do this they would have had to conclude that in some way the hearing itself was not fair. Here one can see the confusion of the court. They speak of fair trial due process but do not rule in any way which would affect the pending trial. They do not speak about fair hearing due process but do overrule the holding of the administrative hearing because due process requirements had somehow not been met.

¹⁷*Id.* at 875.

¹⁸*Id.* at 877.

The confusion in the *Silver* case in dealing with fair trial due process and fair hearing due process is also present in the California cases dealing with concurrent administrative and criminal proceedings. The California courts directed itself to this question in *Funke v. Department of Motor Vehicles*.¹⁹ In *Funke* the petitioner, after being arrested for drunk driving, refused to take one of three blood alcohol content tests required by California law.²⁰ At a hearing that revoked Funke's driver license for refusing to submit to a blood alcohol content test, petitioner argued that it was a violation of basic constitutional rights to proceed with the administrative hearing prior to the criminal trial for drunk driving.²¹ When a writ of mandate to compel the Department of Motor Vehicles to vacate its order was denied by the Sacramento Superior Court, petitioner appealed.

In his Opening Appellate Brief, petitioner argued that he was denied his constitutional rights at the hearing because, 1) he was required to reveal his defenses prior to the criminal trial,²² 2) his attorney was forced to cross-examine prosecution witnesses in advance of the criminal trial²³ and 3) he was deprived of his privilege against self-incrimination.²⁴ Petitioner relied

¹⁹*Funke v. Department of Motor Vehicles*, 1 Cal. App. 3d 449, 81 Cal. Rptr. 662 (1969).

²⁰CAL. VEH. CODE § 13353 (West 1971). The pertinent part reads as follows:

(a) Any person who drives a motor vehicle upon a highway shall be deemed to have given his consent to a chemical test of his blood, breath or urine for the purpose of determining the alcoholic content of his blood if lawfully arrested for any offense allegedly committed while the person was driving a motor vehicle under the influence of intoxicating liquor. The test shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe such person was driving a motor vehicle upon a highway while under the influence of intoxicating liquor. Such person shall be told that his failure to submit to such a chemical test will result in the suspension of his driving privilege to operate a motor vehicle for a period of six months.

The person arrested shall have the choice of whether the test shall be of his blood, breath or urine.

²¹*Funke v. Department of Motor Vehicles*, 1 Cal. App. 3d 454, 81 Cal. Rptr. 662, 664 (1969).

²²Appellant's Opening Brief at 7, *Funke v. Department of Motor Vehicles*, 1 Cal. App. 3d 449, 81 Cal. Rptr. 662 (1969).

²³*Id.*

²⁴*Id.* at 9-10.

upon *Silver v. McCamey* as authority for his first two contentions.²⁵

The court in *Funke* denied that prejudice resulted in the criminal trial from the disclosure of his defenses at the administrative hearing and from the fact that his attorney cross-examined the prosecution's witness in advance. It reasoned that if there were any legal ground of complaint it would pertain only to the criminal trial. Because the criminal trial is for the purpose of developing truth, the court would not accept the view that there was any unconstitutional prejudice if evidence was disclosed in advance of trial; especially since the petitioner did not show in what way he was prejudiced or that the information disclosed as to his defenses fell outside the scope of permissible prosecution discovery.²⁶

The court distinguished *Silver v. McCamey*. After incorrectly characterizing *Silver* as a case dealing with the effect of an acquittal in a criminal case upon a prior revocation of a taxi cab license, the court stated that it was clear that the Department of Motor Vehicles did not conduct a hearing to determine if Funke was driving while intoxicated. The administrative board's focus was on whether Funke was arrested with probable cause; whether he received proper explanation of the requirements to submit to a blood alcohol content test; whether he was advised of the consequences of his refusal to do so; and whether he refused. Other than the need to show probable cause for arrest, the court felt that these questions and the question of the criminal trial were quite different.²⁷

The petitioner in *Funke* did not raise the question as to possible fair hearing due process violations nor did the court direct itself to this aspect of the problem. Even though Funke sought to have the administrative hearing determination overruled his argument was that he was injured at the trial. He never pointed out how the hearing itself was unfair. If the hearing was fair as to the matter before it, but the result was to prejudice a pending criminal trial, it would make no sense to remedy

²⁵ Funke's third contention (that he was deprived of his privilege against self-incrimination) will be discussed below in the section dealing with self-incrimination.

²⁶ *Funke v. Department of Motor Vehicles*, 1 Cal. App. 3d 449, 454, 81 Cal. Rptr. 662, 665 (1969).

²⁷ *Id.* at 455, 82 Cal. Rptr. at 665.

the prejudice at the trial by vacating the past fair hearing. Steps would have to be taken to keep the prejudice out of trial. The trial determination should have been appealed in this situation. Prejudice at the trial would not be eliminated by simply overturning the holding of the hearing.

In *Funke*, the petitioner presented a defense at the hearing even though he objected that to do so would prejudice him at the pending criminal trial. If he had refused to defend himself because to do so would prejudice his pending trial, a legitimate fair hearing due process question would have been raised. That question would be whether the issues sought to be determined at the hearing were so interrelated to the question to be determined by the criminal court of whether petitioner was driving while intoxicated that the pending criminal trial inhibited Funke from defending himself. His inability to tell his complete story at the hearing without fear that he would prejudice his defense at the criminal proceeding would make any determination by the administrative agency grossly unfair.

This fair hearing due process approach argument may easily be confused with a self-incrimination argument which will be discussed below. However, it is meant to be a separate approach from the argument that a person should not be forced to choose between defending his interest before an administrative hearing and the possibility that the testimony he gives at the hearing will be used against him in the pending criminal trial. The fair hearing due process argument asserts that it is unfair to rule against an individual at an administrative hearing when a person has refused to testify and actively present his defenses because he is inhibited by the fact that whatever he does at the hearing may be used against him in the pending criminal proceeding. Even if no self-incrimination is involved in the compulsion to testify before an administrative hearing, it is unfair and therefore a denial of due process to rule against a person when he has not testified at the hearing because of the possible impact it may have at his pending criminal trial.

The next California case in this area, *Savoy Club v. Board of Supervisors*,²⁸ provided the factual circumstances under which a

²⁸*Savoy Club v. Board of Supervisors*, 12 Cal. App. 3d 1034, 91 Cal. Rptr. 198 (1970).

person who is being subjected to parallel administrative and criminal proceedings could have raised the fair hearing due process arguments discussed above. In *Savoy Club* the petitioners, the corporation and a stockholder, sought a writ of mandamus directing the Los Angeles County Board of Supervisors to set aside its decision to revoke the corporation's license to conduct a card club. A hearing had been conducted after the County Sheriff's Department alleged that the corporation had engaged in violations of certain gambling ordinances. The administrative hearing which revoked the Club's license was held after several continuances had been granted, some of them at the request of the defendant. One day before the administrative hearing, the attorney for Savoy Club requested a further continuance. When neither the defendant nor his attorney appeared at the hearing, the request for the continuance was denied and the hearing resulted in the revocation of the Savoy Club license. On appeal the Savoy Club argued that the board abused its discretion by not granting a further continuance. It asserted that an administrative hearing to impose sanctions, such as the loss of a license, cannot be held when a criminal action based upon identical charges is pending. It also argued that a licensee should not be forced to decide between defending himself against the loss of a license and the fear that his testimony could be used against him at the pending criminal proceeding.²⁹ As authorities for these contentions, *Silver v. McCamey* was cited.³⁰

The petitioners in *Savoy Club* made the same mistake as the petitioners in *Funke* in citing *Silver v. McCamey* as authority for overruling the hearing board's determination. By citing *Silver*, they argued that they were injured at the criminal trial and want that injury remedied by overruling the results of the hearing. However it is clear that the Savoy Club was not injured

²⁹*Id.* at 1038, 91 Cal. Rptr. at 200.

³⁰*Id.* It was also argued that the administrative body will be bound by the prior determination of a judicial body in a criminal proceeding. Thus, for example, the hearing officer would be bound by the finding of a trial court that there was an unlawful search and seizure which was contended in this case. The result of this is that different determinations may be made in administrative hearings depending upon when the hearing is held. If it is held after the trial and bound by the finding of an unlawful search and seizure, the result may be different than if it is held before the trial when the administrative hearing would not be bound by the courts determination. Appellants' Opening Brief at 7-8, *Savoy Club v. Board of Supervisors*, 12 Cal. App. 3d 1034, 19 Cal. Rptr. 198 (1970).

at the criminal trial because of what transpired at the hearing as they never participated in the administrative hearing. Savoy Club should have argued that fair hearing due process had been violated, because their inability to defend themselves makes a determination by the board unfair.

Savoy Club's contention that a licensee should not be forced to decide between defending against the loss of his license by testifying and the fear that his testimony could be used against him in a pending criminal action was characterized by the Appeal Court as a self-incrimination argument. The court's treatment of this argument will be dealt with below. The statement, however, can be looked at as a fair hearing due process argument discussed above. Even assuming no self-incrimination problems it is basically unfair to rule against a person at an administrative hearing when a person is inhibited in defending himself at that hearing because he fears that what he does to defend himself may be used by the prosecution in the pending criminal proceeding. Petitioner did not frame his argument along this fair hearing due process line, nor did the court respond to it in that way. The question still remains unanswered even though it is a valid contention.

The basic problem in all of these cases which discussed due process is a confusion between arguments and remedies. To argue that due process will be denied at a criminal trial, and seek to remedy this by overturning a prior administrative determination is inconsistent. The relief must pertain to the actual trial. This was the mistake of the court in *Silver*. In *Funke* and *Savoy* the California courts seem to recognize this mistake and denied relief when the petitioner made the same inconsistent argument. The question unanswered is the result of a case whose fair hearing rather than fair trial due process is argued.

II. SELF-INCRIMINATION QUESTIONS

As stated above, the court in *Savoy Club* treated the petitioner's contentions as self-incrimination arguments. Before discussing the court's view of this argument, the two previous California cases dealing with asserted self-incrimination violations in situations involving parallel administrative and crim-

inal proceedings should be discussed. These cases are *Goldberg v. Regents of the University of California*³¹ and *Funke v. Department of Motor Vehicles*.³²

In *Goldberg* a mandamus proceeding was instituted to compel the Regents of the University of California to reinstate several students who were either suspended or dismissed from the Berkeley campus for violating student conduct rules. The petitioners alleged that they were denied a fair hearing that was required under the due process clause of the Fourteenth Amendment³³ in that they might have had to incriminate themselves if they explained their conduct to the hearing committee. In their Opening Brief they argued that three of the petitioners were arrested and charged with violating California Penal Code sections. The conduct which resulted in the arrests was also the subject of the administrative hearings. By proceeding with the administrative hearings over petitioner's objections, while the criminal charges were still pending, the petitioners argued they could explain their conduct to the hearing board only at the expense of possibly incriminating themselves before the criminal courts.³⁴

The court in *Goldberg* never directly responded to the petitioners challenge that in explaining their actions to the hearing committee they would be incriminating themselves before the criminal court even though the petitioners clearly framed the question in these terms in their brief.³⁵ Instead, the court reasoned that the disciplinary measures imposed may have very serious effects upon the careers of the plaintiffs but they amount to a denial of a benefit and could not be characterized as criminal proceedings.³⁶ Furthermore the court could not accept the contention that when conduct violated rules of the University and of the State that the discipline imposed by the University must await the completion of some other proceedings. The Uni-

³¹*Goldberg v. Regents of the University of California*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

³²*Funke v. Department of Motor Vehicles*, 1 Cal. App. 3d 449, 81 Cal. Rptr. 662 (1969).

³³Appellant's Opening Brief at 18, *Goldberg v. Regents of the University of California*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

³⁴*Id.* at 19.

³⁵*Id.*

³⁶*Goldberg v. Regents of the University of California*, 248 Cal. App. 2d 867, 885, 57 Cal. Rptr. 463, 476 (1967).

versity can formulate its own standards and punishments to achieve its educational objectives. Except for applicable constitutional limitations the relationship between University rules and laws of the outside community is coincidental. The recognition of the interest of the academic community in resolving disciplinary matters swiftly does not involve any area occupied by state criminal law. Any other approach would be very impractical and inconsistent with the functions of an educational institution.³⁷

The reasoning of the *Goldberg* court in no way related to the self-incrimination issue raised by petitioners. In fact, the court never even mentioned the words "self-incrimination." This apparent failure to come to grips with this issue is important to remember, as later cases have cited *Goldberg* as standing for the proposition that this type of fact pattern does not raise a self-incrimination issue.

The next California case discussing the question of self-incrimination in parallel administrative and criminal cases was *Funke v. Department of Motor Vehicles*.³⁸ As stated above, where the facts of *Funke* are also explained,³⁹ petitioner argued as his third contention that he was deprived of his privilege against self-incrimination because he was forced to submit to an administrative hearing while a criminal proceeding arising out of the same factual circumstances was pending. In his Opening Appellate Brief, Funke argued that he was compelled to an unconstitutional election of courses.⁴⁰ He was confronted with an administrative hearing to decide if he had refused to take a blood test to determine if he was intoxicated and with a criminal trial to determine if he was driving a motor vehicle while intoxicated. The hearing was before the trial. In order to preserve his driving privilege, Funke argued, he was forced to testify at the administrative hearing. The prejudicial effect of this was illustrated by the fact that a transcript was prepared of his testi-

³⁷*Id.* at 885-886, 57 Cal. Rptr. at 476.

³⁸*Funke v. Department of Motor Vehicles*, 1 Cal. App. 3d 449, 81 Cal. Rptr. 662 (1969).

³⁹See text accompanying footnotes 19 to 25.

⁴⁰Appellant's Opening Brief at 9, *Funke v. Department of Motor Vehicles*, 1 Cal. App. 3d 449, 81 Cal. Rptr. 662 (1969).

mony and used by the District Attorney in the prosecution of Funke at the criminal trial.⁴¹ Funke further asserted that to require him to testify at the price of losing his license is no different than if an accused were required to testify in a criminal proceeding since the prejudicial effect of his testimony and the violation of the privilege against self-incrimination is the same either way.⁴²

The court's answer to Funke's arguments was confusing and unclear.⁴³ It first stated that any compulsion was personal and not a legal compulsion. Next in response to the appellant's assertion that illegal compulsion was present because it was necessary for him to testify at the department proceedings to protect his license, the court stated that the taking of a blood test does not involve the privilege against self-incrimination.⁴⁴ The court has confused Funke's argument. Nowhere in his brief did Funke contend that the taking of a blood test violated his privilege against self-incrimination. The court then stated that it found no distinction between the situation where a criminal defendant has a choice to testify or abstain from testifying and

⁴¹*Id.* at 10.

⁴²*Id.*

⁴³The court's exact response to Funke's arguments was:

...Any compulsion was a personal, not a legal compulsion. Appellant asserts illegal compulsion in that it was necessary for him to testify at the department proceeding to protect his driver's license. The taking of a blood test does not involve the privilege against self-incrimination. We find no distinction between the situation where a criminal defendant has a choice to testify or not to testify and chooses to do so in order to protect his liberty, and petitioners choice to testify in a civil proceeding to protect a driving privilege. Assuming self-incrimination, however, the compulsion of circumstances is not a compulsion which the constitution prohibits (Cf. *Goldberg v. Regents of the University of California...*) The proceeding under the Vehicle Code § 13353 are civil and not criminal in nature, although they may result in the denial of a valuable privilege. (citation omitted) The intention of the Legislature was to reduce the carnage on our highways caused by operation of motor vehicles by intoxicated persons. (citation omitted) It would frustrate the legislative intention to postpone suspension or revocation of the driving privilege until the conclusion of frequently delayed judicial proceedings.

Funke v. Department of Motor Vehicles, 1 Cal. App. 3d 449, 454, 81 Cal. Rptr. 662, 664 (1969).

⁴⁴*Funke v. Department of Motor Vehicles*, 1 Cal. App. 3d 449, 454, 81 Cal. Rptr. 662, 664 (1969).

chooses to do so to protect his liberty, and Funke's choice to testify in a civil proceeding to protect his driving privilege.⁴⁵ However, there is a distinction. In most criminal trials there is no pending parallel proceeding arising out of the same factual situation. If a defendant chooses to testify or not to testify the results of that choice only affect the proceeding in which he exercises that option. In the situations involving parallel administrative and criminal proceedings, two agents of the government are proceeding against the defendant at the same time. If the defendant chooses not to testify at the administrative hearing to protect himself at the criminal proceeding he will in most instances receive an adverse judgement at the hearing. Thus he is being penalized for exercising his privilege. If he chooses to testify at the hearing there is no way he can completely rely upon his privilege against self-incrimination at the future criminal proceeding. Even if he refuses to take the stand, the prosecutor will have his admissions and testimony which he gave at the administrative hearing to possibly offer against him.

The court went on to state that even assuming self-incrimination, the compulsion of circumstances is not a compulsion which the constitution prohibits. To explain this statement the court cites that part of *Goldberg v. Regents of the University of California* (previously discussed) which held that no due process violation was present when students were disciplined by a college administrative board while parallel criminal charges were pending.⁴⁶ As was pointed out above the *Goldberg* court did not directly discuss the self-incrimination issue raised by the petitioners. The court in *Funke* stated that the proceedings involved were civil and not criminal in nature although they may result in the denial of a valuable privilege. This however, does not preclude the fact that the denial of self-incrimination may be involved. Finally the court stated that the intention of the legislature was to reduce carnage on the highways caused by intoxicated drivers, and it would frustrate this legislative intention to postpone suspension or revocation of the driving privilege until the conclusion of frequently delayed judicial proceedings. For these

⁴⁵*Id.*

⁴⁶See text accompanying footnotes 33 to 37.

reasons the court held the constitutional rights of Funke were not impaired because the hearing was conducted prior to trial on criminal charges.⁴⁷

With *Goldberg* and *Funke* decided, the basis for the decision in *Savoy Club* was established. The court in *Savoy Club*, whose facts are related above,⁴⁸ looked upon petitions objections to the holding of the hearing before the criminal trial as a self-incrimination question. *Savoy Club* had argued that a continuance at the hearing should have been granted because an administrative hearing imposing sanctions cannot be held when criminal action based upon identical charges is pending; and that a licensee should not be forced to decide between defending against the loss of a license and the possibility that his testimony could be used against him at the pending criminal proceeding.⁴⁹

The court stated that the later contention was devoid of merit.⁵⁰ It went on to argue as to the second contention that there is no valid reason why the hearing should have been continued because the petitioners might have had to invoke the privilege against self-incrimination since that privilege cannot be asserted in advance of questions actually asked in an examination. Without conditions which establish the necessity of its assertions, the mere possibility of self-incrimination could not be urged as a bar to the hearing.⁵¹

This statement indicates that the court did not see the broader issue of self-incrimination involved in the situation. The court in *Savoy Club* was looking only to possibly incriminating statements asked at the administrative hearing. However self-incrimination may be present when the defendant is forced to aid the prosecution in the formation of his case.⁵² The petitioner

⁴⁷*Funke v. Department of Motor Vehicles*, 1 Cal. App. 3d 449, 454, 81 Cal. Rptr. 662, 664 (1969).

⁴⁸See text accompanying footnotes 26 to 30.

⁴⁹*Savoy Club v. Board of Supervisors*, 12 Cal. App. 3d 1034, 1038, 91 Cal. Rptr. 198, 200 (1970).

⁵⁰*Id.* The exact words of the court are, "They now argue that 'a licensee should not be forced to decide between defending against the loss of his license (by testifying) and the fear that his testimony could be used against him in a pending criminal action.' This contention of devoid of merit."

⁵¹*Id.*

⁵²*Prudhomme v. Superior Court*, 2 Cal. App. 3d 320, 326, 85 Cal. Rptr. 129, 133 (1970).

in *Savoy Club* was arguing that any information he revealed, however innocent it may seem, could possibly be used by the prosecution to his detriment at the trial. Since the only alternative to not testifying at the hearing will most likely also result in an adverse determination at the hearing, he would pay for invoking his privilege against self-incrimination with that adverse hearing determination. This view of the self-incrimination question was not answered by the court.

In answering petitioner's argument that the administrative hearing should have been postponed pending the outcome of the criminal proceedings because of possible self-incrimination problems, the court noted that *Silver v. McCamey* was cited by *Savoy Club*.⁵³ The court stated that California law was more in accord with the dissent in that case and quoted the passage from the dissent reproduced above in the discussion on *Silver v. McCamey*.⁵⁴ This passage expressed the opinion that a person acquires through the Fifth Amendment no status of insulation from requirements reasonably designed for public protection. The court then pointed out that administrative proceedings are not criminal in nature and that licensing procedures are set up to protect the public; when a license is revoked it is to protect society and not to punish the licensee. The rules of burden of proof and principals of evidence at criminal cases do not apply to administrative proceedings.⁵⁵ A restatement of the thrust of this argument might be that the State has a right to place a person in a position where he may have to incidentally incriminate himself when involved in administrative proceedings which serve a legitimate State interest.

The court in *Savoy Club* found one further deviation in the *Silver* decision from the California view in this situation. The rationale in *Silver* for the holding that due process was not observed when a person was subjected to parallel administra-

⁵³*Savoy Club v. Board of Supervisors*, 12 Cal. App. 3d 1034, 1039, 91 Cal. Rptr. 198, 200 (1970).

⁵⁴See text accompanying footnote 16.

⁵⁵*Savoy Club v. Board of Supervisors*, 12 Cal. App. 3d 1034, 1039, 91 Cal. Rptr. 198, 201 (1970).

tive and criminal proceedings was the possibility of premature and coerced pretrial discovery. Since *Jones v. Superior Court*,⁵⁶ however, limited discovery has been allowed in California. The court in *Savoy Club* went on to cite *Funke v. Department of Motor Vehicles* for the proposition that any grounds for complaint in this situation must pertain only to the trial. Since the trial is for the purpose of developing truth, there is no unconstitutional prejudice if the defendant discloses his evidence in advance of trial. The petitioner did not show how he was prejudiced nor did he allege that his defenses fell outside the scope of discovery allowed the prosecution in criminal cases.⁵⁷ The court next stated that the above rules and principals, "effectively refute petitioners' claim that the criminal proceeding should have been abated."⁵⁸ It must be pointed out that this was an appeal from the administrative hearing revoking the Savoy Club license not an appeal from the criminal trial. One may overlook the court's statement that the discussion referred to effectively refutes the claim that the criminal proceeding should have been abated, as simply as a mistake on the part of the court. However, it may be more reasonable to look at it as an indication of the confusion with which the court looked at the question.

The court concluded its reasoning on this question of self-incrimination with the statement that as in *Funke*, the petitioner had a choice to testify or not to testify to protect their license, not only did they refuse to testify but refused to appear at the hearing.⁵⁹

In their Petition for Rehearing before the Second Appellate District which was incorporated into the Savoy Club's Petition

⁵⁶*Jones v. Superior Court*, 58 Cal. 2d 56, 22 Cal. Rptr. 879 (1962). In *Jones* the defendant attempted to restrain the enforcement of a discovery order granted in a rape case. The California Supreme Court held that the prosecution was entitled to discover the names of the witnesses the defendant was going to call in the case and any reports and x-rays the defendant was going to introduce in evidence to support his affirmative defense of impotency. The prosecution was not entitled to names and addresses of all physicians who had treated the defendant prior to trial or all medical reports and x-rays taken following defendant's injuries.

⁵⁷*Savoy Club v. Board of Supervisors*, 12 Cal. App. 3d 1034, 1040, 91 Cal. Rptr. 198, 201 (1970).

⁵⁸*Id.*

⁵⁹*Id.*

for Hearing before the California Supreme Court, appellants argued that the reliance of the appellate court upon *Funke v. Department of Motor Vehicles* and *Jones v. Superior Court* should be reexamined in the light of the recent California Supreme Court case of *Prudhomme v. Superior Court*⁶⁰ which petitioner believed sharply limited *Jones*.⁶¹ Prudhomme, who was being prosecuted for murder, had a discovery order entered against her compelling her attorney to disclose to the prosecution the names, addresses and expected testimony of witnesses he intended to call. The Supreme Court held that the order was in excess of the court's jurisdiction because it did not clearly appear from the face of the order or from the record that the information demanded could not possibly have a tendency to incriminate her.⁶²

On the basis of *Prudhomme v. Superior Court*, the Savoy Club argued that the Supreme Court had expressly disapproved of the language in *Jones* which the Appellate Court had relied on.⁶³ Petitioners contended that *Prudhomme* has restated the *Jones* rule and quoted the following passage:

...it is apparent that the principal element in determining whether a particular demand for discovery should be allowed is not simply whether the information sought pertains to an affirmative defense...but whether disclosure thereof *conceivably might lighten* the prosecutions' burden of proving

⁶⁰*Prudhomme v. Superior Court*, 2 Cal. App. 3d 320; 85 Cal. Rptr. 129 (1970).

⁶¹Petition for Hearing before the California Supreme Court at page 2 of Petition for Rehearing, *Savoy Club v. Board of Supervisors*, 12 Cal. App. 3d 1034, 91 Cal. Rptr. 198 (1970).

⁶²*Prudhomme v. Superior Court*, 2 Cal. App. 3d 320, 322, 85 Cal. Rptr. 129, 130 (1970).

⁶³The language referred to was:

At least since *Jones v. Superior*, 58 Cal. 2d 56 [22 Cal. Rptr. 879, 372 P.2d 919, 96 ALR 2d 1213], limited discovery of defense evidence has been allowed in California. '...[a]bsent the privilege against self-incrimination or other privileges provided by law, the defendant in a criminal case has no valid interest in denying the prosecution access to evidence that can throw light on the issues in the case.' (P. 59) Accordingly after observing that the procedure for pretrial discovery tends to promote the orderly ascertainment of truth, the court declared: 'The procedure should not be a one street.' (P. 60) *Savoy Club v. Board of Supervisors*, 12 Cal. App. 1034, 1040, 91 Cal. Rptr. 198, 201 (1970).

its case in chief. Although the prosecution should not be completely barred from pretrial discovery, defendant must be given the same right as an ordinary witness to show that disclosure of particular information *could* incriminate him." (emphasis added) "...in ruling upon a claim of privilege the trial court must find that it clearly appears from a consideration of all the circumstances in the case that an answer to the challenged question *cannot possibly have a tendency* to incriminate the witness." (citations omitted: emphasis added.)⁶⁴

Savoy Club then concluded that in light of *Prudhomme*, *Silver v. McCamey* was resurrected in California. Clearly neither the case law nor public policy, as per *Jones*, held that there was no violation of either due process or self-incrimination if an administrative hearing was not continued until the completion of the trial.⁶⁵ The petition for a hearing by the Supreme Court of California was denied without comment.

Even though the logic and the reasoning of the California courts in dealing with the question of self-incrimination in parallel administrative and criminal proceedings has not been clear, the over-all conclusion that no self-incrimination is involved in forcing one to chose to testify or not to testify is correct when compared with recent United States Supreme Court cases dealing with the privilege against self-incrimination in related areas.⁶⁶

In *United States v. Kordel*⁶⁷ the Supreme Court of the United States granted certiorari to consider the questions raised when the government initiates simultaneous civil and criminal proceedings.⁶⁸ The respondents in *Kordel* were the president and

⁶⁴Petition for hearing before the California Supreme Court at pages 2-3 of Petition for Rehearing, *Savoy Club v. Board of Supervisors*, 12 Cal. App. 3rd 1034, 91 Cal. Rptr. 198 (1970).

⁶⁵*Id.* at 3.

⁶⁶No United States Supreme Court case nor California Supreme Court case has dealt directly with the effect of a parallel administrative hearing and criminal case. The Supreme Court of Colorado directed itself to this question in *People ex rel Heckers v. District Court* 463 P.2d 310 (1969) when a district court suspended a hearing to revoke a liquor license pending a criminal trial. The Supreme Court of Colorado held that the court had no authority to do so. In distinguishing *Silver v. McCamey* the court said, "we find nothing in the administrative procedures, as pointed out above, that requires self-incrimination, and furthermore the burden is upon the proponent for an order of suspension or revocation to prove sufficient grounds therefore and not upon the licensee." *Id.* at 312.

⁶⁷*United States v. Kordel*, 397 U.S. 1 (1970).

⁶⁸*Id.* at 3.

vice-president of Detroit Vital Foods, Inc., who were in the position of being prosecuted criminally for mislabeling drugs while a parallel civil proceeding was taking place to condemn the drugs they were accused of mislabeling. They were convicted along with the corporation in the United States District Court for the Eastern district of Michigan for violating the Federal Food, Drug and Cosmetics Act. The Sixth Circuit Court of Appeals reversed these convictions on the grounds that respondents Fifth Amendment privilege against compulsory self-incrimination was violated when the Government used interrogatories to obtain evidence from respondents for use in the nearly contemporaneous civil condemnation proceedings. The Court of Appeals ruled that the interrogatories left the respondents with the choices of refusing to answer and forfeiting the property of the corporation that was the subject of the civil suit, giving false answers and subjecting themselves to the risk of prosecution for perjury, or disclosing the requested information and supplying the government with evidence and leads which were helpful in securing their indictment and conviction. The coercion in the choices resulted in compulsory self-incrimination.⁶⁹

The United States Supreme Court did not believe that this analysis was accurate because the respondent could have invoked his Fifth Amendment privilege against self-incrimination.⁷⁰ The Supreme Court rejected the notion that the coercion inherent in the choices which compelled incrimination in this situation were of constitutional dimensions.

A second recent United States Supreme Court case which also reflects the present constitutional standards as to what constitutes compulsory self-incrimination is *California v. Byers*.⁷¹ Byers was charged with two violations of the California Vehicle Code. The first count charged that Byers failed to maintain a safe distance while passing another vehicle. The second count charged that he failed to stop and identify himself after having been involved in an accident resulting in property damage as is required by section 20002 of the California Vehicle Code.⁷² Byers demurred to the second count on the ground that it violated his

⁶⁹*Id.* at 7.

⁷⁰*Id.* at 7-8.

⁷¹*California v. Byers*, 402 U.S. 424 (1971).

⁷²CAL. VEH. CODE § 20002 (West 1971).

privilege against compulsory self-incrimination. The Supreme Court of California ultimately sustained the demurrer holding “that the privilege protected a driver who ‘reasonably believes that compliance with the statute will result in self-incrimination.’”⁷³ The California court, however, upheld the validity of the statute by imposing a judicial use restriction on the information it required to be disclosed. The Supreme Court of the United States granted certiorari to, “access the validity of the California Supreme Courts’ premise that without the use restriction...[the statute] would violate the privilege against compulsory self-incrimination...”⁷⁴. Four members of the court in a plurality opinion held that compulsory self-incrimination which was forbidden by the Constitution was not infringed by the California State Statute which required a driver involved in an accident resulting in property damage to stop and give his name and address.⁷⁵ One justice writing a separate opinion concurred in the result.

In the plurality opinion Chief Justice Berger stated:

Whenever the court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the State’s demand for disclosures and the protection of the right against self-incrimination are likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.

An organized society imposes many burdens on its constituents. It commands the filing of tax returns for income; it requires producers and distributors of consumer goods to file informational reports on the manufacturing process and the content of products, on wages, hours, and working conditions of employees. Those who borrow money on the public market or issue securities for sale to the public must file various information reports; industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere. Comparable examples are legion, (footnotes omitted).

In each of these situations there is some possibility of prosecution – often a very real one – for criminal offenses disclosed by

⁷³California v. Byers, 402 U.S. 424, 427 (1971).

⁷⁴*Id.* at 427.

⁷⁵*Id.*

or deriving from the information which the law compels a person to supply. Information revealed by these reports could well be "a link in a chain" of evidence leading to prosecution and conviction. But under our holdings mere possibility of incrimination is insufficient to defeat the strong policies in favor of disclosure called for by statutes like the one challenged here.⁷⁶

The compulsion to incriminate in both *Kordel* and *Byers* were as great, if not much more compelling, than the compulsion involved in administrative hearings. In these cases the Supreme Court of the United States found no violation of the Fifth Amendment privilege against self-incrimination. In both of these cases the Supreme Court also mentioned the need for balancing the public interest sought to be protected, against the rights asserted by a particular individual as to his privilege against self-incrimination. The public interests protected by an administrative hearing are no less important than the public interest in *Kordel* of condemning impure drugs or the interest in *Byers* of insuring financial responsibility of motorists involved in accidents. Therefore in terms of constitutional standards, it seems clear that the compulsion exerted at an administrative hearing to protect one's interest is not a compulsion which results in a denial of the right against self-incrimination if the person chooses to testify to protect that privilege under review.

III. CONCLUSION

All of the California courts which have dealt with cases involving parallel administrative and criminal procedures have held that no constitutional violations result if an administrative hearing is not postponed until after the criminal proceeding. This includes both due process and self-incrimination issues. The court decisions indicate that in the future administrative proceedings may be postponed in such situations if petitioners specifically enumerate what prejudice will result at the criminal trial because of the administrative hearing and if they can demonstrate that evidence will be disclosed which is not of the nature allowed to prosecutors under *Jones*.

The survey of the three California cases discussed above brings out three points. First, litigants who have found them-

⁷⁶*Id.* at 427-428.

selves in the position of having to answer for their conduct before both administrative hearing boards and criminal courts have mistakenly argued that the administrative determination prejudiced their criminal trial and for that reason should be overruled. If one is unable to postpone a hearing and testimony at the hearing leads to prejudice at the trial, the trial should be appealed and not the administrative hearing which was fair as to matters before it. Secondly, litigants who face this situation in the future should attempt to postpone the hearing by arguing that due process will be denied them at the hearing because the administrative hearing is being conducted under such circumstances that the defendant is naturally inhibited in his defense because of the fear that what he does at the administrative hearing will be used to his detriment by the prosecutor in the pending criminal trial. This situation, it should be argued, is unfair to such an extent that it denies fair hearing due process. As previously discussed, this contention has not been answered by the courts. Finally, such litigants should refrain from arguing self-incrimination since it appears that the California courts have, in the light of recent United States Supreme Court cases, correctly held that the compulsion involved in testifying at an administrative hearing, even when a concurrent criminal case is pending, is not such that it violates the right against self-incrimination.

Even though the compulsion of having to choose between losing a license, being expelled from a university or college or losing any other privilege which would be regulated by an administrative hearing and possibly incriminating one's self in a pending criminal proceeding is apparently not of constitutional magnitude, the inherent unfairness in such a situation is obvious. Although the courts have emphasized that administrative hearings are not criminal in nature, the privileges regulated by them are extremely important.⁷⁷ A liquor license, a driver license, a license to run a club, all may be as important to an individual as the land upon which his home is built. No one will deny that to be expelled or dismissed from a college or uni-

⁷⁷*Funke v. Department of Motor Vehicles*, 1 Cal. App. 3d 449, 454, 81 Cal. Rptr. 662, 664 (1969).

versity may have serious effects upon an individual's life as well as the career he plans to enter.⁷⁸ The courts have noted the importance of the protection to the public provided by administrative hearings.⁷⁹ However, the public also benefits by keeping qualified professionals and licensed workers on their job. The public benefits by allowing a safe driver to keep his license and by keeping productive students in school.

To protect the public to the fullest extent, administrative hearings should have all the facts before them before they make a decision. Justice is not served nor the public protected when a person chooses not to fully explain his conduct before an administrative hearing because he fears that whatever he says may be used against him in a pending criminal trial. The interests sought to be protected by an administrative board and a criminal court are different ones.⁸⁰ It is quite possible that an explanation which exonerates a person's conduct before an administrative hearing can be used to convict him in a criminal trial. Public prosecutors have no basis to complain if the advantage that is available because of a prior administrative hearing is denied them; especially if we look at this advantage as a wind-fall since in most criminal cases the record of an administrative hearing on the same or similar facts is not available. This is particularly true when the cost of giving that advantage possibly frustrates the fact-finding ability of the hearing board which results in both the public and the person before the administrative board being injured.

A remedy for this inequitable situation would be to provide that testimony given by a defendant at an administrative hearing could not be used by the prosecution in a pending criminal case arising out of the same factual situation. The major difficulty mentioned by the courts in refusing to postpone administrative hearings until after the criminal proceeding is the fact that criminal proceedings may be extended indefinitely because of delays and maneuvers. During this time the public would be left unprotected against a possibly guilty offender. However by

⁷⁸Goldberg v. Regents of the University of California, 248 Cal. App. 2d 867, 885, 57 Cal. Rptr. 463, 476 (1967).

⁷⁹Savoy Club v. Board of Supervisors, 12 Cal. App. 3d 1034, 1039 91 Cal. Rptr. 198, 201 (1970).

⁸⁰*Id.*

providing that testimony at the hearing by the defendant could not be used by the prosecution, no delay in the administrative hearing would be required. The public would be protected by a speedy determination of the issue and the individual before the board would not find himself in the unfair position of knowing that whatever he said to protect himself at the hearing could also be used to convict him at the pending trial. Under these circumstances there would be no self-incrimination problem because any information given by the defendant at the hearing could not be used by the prosecuting attorney. The fair hearing due process question would also be avoided because the defendant could now completely defend himself at the hearing without reservation.

It may be argued that this would be too difficult a process to administer in that it would call in all the problems involved in fruit of the poisonous tree questions. This would complicate the proceedings and necessitate collateral hearings as to what if any of the prosecutors evidence has been tainted. But to argue that the possibility of additional proceedings is too burdensome to provide such a remedy is unsound. First of all it must be assumed that the prosecution will not deliberately seek out the information disclosed at the administrative hearing. Since this information would be such that it would be almost impossible for the prosecutor to come across it unintentionally, the only way he could obtain it would be to willfully violate the prohibitions against his obtaining it. In that situation it cannot be contended that it is too much of a burden to cope with collateral proceedings to protect the defendant's interests.

Providing that testimony given by a defendant at an administrative hearing cannot be used by the prosecutor in a pending criminal proceeding arising out of the same factual circumstances would allow society the swift protection it needs, ensure that the administrative hearing had all the information upon which to base its decision, and protect the defendant from the unfair results which now characterize this situation.

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