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Constitutional Law - Requirement That the Driver of an Automobile Involved in a Property Damage Accident Stop and Identify Himself Held Not to Be Within the Scope of the Fifth Amendment's Self-Incrimination Clause

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CONSTITUTIONAL LAW—Requirement That the Driver of an Automobile Involved in a Property Damage Accident Stop and Identify Himself Held Not to be Within the Scope of the Fifth Amendment's Self-Incrimination Clause.

On August 22, 1966, Jonathan Todd Byers was charged in a two-count indictment with two misdemeanor violations of the California Vehicle Code. Count one charged that on August 20, 1966, Byers violated §21750 of the California Vehicle Code[1] by the improper and unsafe passing of another vehicle. Count two charged that Byers violated §20002(a)(1)[2] by leaving the scene of an automobile accident resulting in property damage without identifying himself to the owner or person in charge of the damaged property. It was stipulated that both charges arose out of the same occurrence.

Byers demurred to count two on the ground that the requirements of §20002(a), were unconstitutional as applied since they violated his privilege against self-incrimination.[3] His demurrer was sustained by the Supreme Court of California.[4] The court held that the privilege against self-incrimination protected a driver who reasonably believed that compliance with the "hit-and-run" statute would result in self-

1. CAL. VEHICLE CODE § 21750 (West 1960).
The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance without interfering with the safe operation of the overtaken vehicle, subject to the limitations and exceptions hereinafter stated.

2. CAL. VEHICLE CODE § 20002(a) (West 1960). At the time of the accident involved in the instant case, § 20002(a) provided:
The driver of any vehicle involved in an accident resulting in damage to any property including vehicles shall immediately stop the vehicle at the scene of the accident and shall then and there either: (1) Locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved, or; (2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol. Any person failing to stop or to comply with said requirements under such circumstances is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for not to exceed six months or by a fine of not to exceed five hundred dollars ($500) or by both.
Subsequent amendments have no effect on the decision.

3. UNITED STATES CONSTITUTION Amend. V.

4. Byers v. Justice Court, 71 Cal. 2d 1039, 458 P.2d 465, 80 Cal. Rptr. 553 (1969).

incrimination. The court found Byers' belief that compliance with the statute would result in substantial hazards of self-incrimination was reasonable, since the identity of a driver involved in a property damage accident may be critical to a later criminal prosecution. However, the court upheld the statute by creating a use restriction on the information the statute required, precluding the state prosecuting authorities from using either the information disclosed by compliance with the statute or the fruits of such information. But the court decided that it would be unfair to punish Byers for not complying with the statute since he could not have reasonably anticipated the use restriction and, therefore, sustained his demurrer to the charge of leaving the scene of the accident without identifying himself.

The United States Supreme Court granted certiorari[5] to decide the validity of the California Supreme Court's imposition of a use restriction to accomodate both the fifth amendment and the purpose of the statute. The Supreme Court held that, without the use restriction, the statute would not violate the privilege against self-incrimination and concluded that there was no conflict between the statute and the privilege.[6]

The California Supreme Court's decision entitled Byers to immunity from prosecution based upon the required disclosures or the fruits of such disclosures, even though he was deprived of his right to remain silent. The decision resolved to some extent the conflict between the government's need for information and the individual's right to remain silent rather than incriminate himself. Instead of taking advantage of an opportunity to reduce the conflict between the individual and his government, the Supreme Court distinguished *Byers* from the traditional situations in which the individual could claim the privilege, thus defining the conflict out of existence rather than deciding the case by balancing the public need against the individual's claim to constitutional protection.

The plurality opinion[7] held that compliance with the essentially regulatory, non-criminal statute, where self-reporting is necessary to achieve the purpose of the statute, does not violate the privilege against self-incrimination. The reasoning was that since the burden is on the public at large and not on a highly selective group inherently suspect of criminal activities, and the possibility of self-incrimination is not

5. *Cert. granted*, 397 U.S. 1035 (1970).
6. California v. Byers, 402 U.S. 424 (1971).
7. Mr. Chief Justice Burger joined by Justices Stewart, White and Blackmun.

substantial, the statute did not infringe the privilege against self-incrimination. The plurality stated that even if the essentially neutral act of disclosing name and address were incriminating, it would be an extravagent extension of the privilege to hold that it was testimonial.

The plurality conceded that in all situations where the government requires an individual to supply information, there is a possibility of prosecution for criminal offenses from the information disclosed by the individual since the disclosed information could supply "a link in a chain" of evidence leading to prosecution and conviction. However, the plurality held that the mere possibility of incrimination is not sufficient to defeat the state interests in favor of the disclosures required by the statute in question.

The situation in *Byers* was analogized to the filing of tax returns for income. "There is no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of legal involvement."[8] The plurality relied upon *United States v. Sullivan,*[9] stating that to apply the privilege in *Byers* would be "an extreme if not extravagent application of the fifth amendment."[10] For the privilege to be available, the compelled disclosures themselves must confront the individual asserting the privilege with "substantial hazards of self-incrimination."[11]

The plurality distinguished *Byers* from prior self-reporting cases where the privilege had been held applicable.[12] Three distinguishing factors were listed. First, those cases had concerned a "highly selective group inherently suspect of criminal activities."[13] Second, criminal statutes permeated the area to which the reporting scheme applied.[14] Finally, disclosing the required information presented the individual with "substantial hazards of self-incrimination."[15]

8. 402 U.S. 424, 434 (1971).
9. 274 U.S. 259 (1927).
10. *Id.*, at 263-64.
11. 402 U.S. 424, 429 (1971).
12. The following cases were used by the Court to distinguish *Byers*:
Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965). Order requiring registration by individual members of the Communist Party violated the privilege against self-incrimination.
Marchetti v. United States, 390 U.S. 39 (1968). The privilege held a complete defense to prosecutions for noncompliance with Federal gambling tax and registration requirements.
Grosso v. United States, 390 U.S. 62 (1968). The privilege held a defense to prosecution for failure to pay excise and occupational taxes on wagering and conspiracy to defraud the government by tax evasion.
Haynes v. United States, 390 U.S. 85 (1968). The privilege held a defense to prosecution for failure to register a firearm.
13. California v. Byers, 402 U.S. 424, 430 (1971).
14. *Id.*
15. *Id.*, at 429.

According to the plurality, the statute in question was directed at automobile drivers, a group neither highly selective nor inherently suspect of criminal activities. The statute was regulatory and non-criminal since its purpose was to facilitate the satisfaction of civil liabilities arising out of automobile accidents. The required disclosures did not involve the substantial risks of self-incrimination presented in the prior self-reporting cases, since the risks of criminal prosecution from automobile accidents are not as substantial as the risks of criminal prosecution from disclosure of illegal activity. Upon this analysis, the plurality, finding the required disclosures not incriminating, held that Byers could not claim the privilege of the fifth amendment.

Even if the disclosure requirement were self-incriminating, the plurality concluded the disclosures were not testimonial. The plurality reasoned that the stopping and giving of name and address was essentially a neutral act. This neutral act is similar to a physical characteristic which was held in *Schmerber v. California*,[16] *United States v. Wade*,[17] and *Holt v. United States*[18] not to be testimonial. Since the required disclosures were not testimonial or communicative in nature, the privilege would only be available if specific inquiries were made. The plurality dismissed Byers' contention that the required disclosures would imply that he was the driver of a vehicle involved in an accident on the premise that, even though the disclosures could lead to inquiry which could in turn lead to arrest and charge, these later developments would depend upon different factors and independent evidence.[19]

The concurring opinion of Mr. Justice Harlan focused upon the degree of the disclosures involved. Justice Harlan believed that the disclosures were both self-incriminating and testimonial. However, he reasoned that as technology increases, so does the government's need to know. Justice Harlan believed that if the privilege were extended in *Byers*, it would be available every time the government requires self-reporting.[20] Consequently, because of the limited nature and effect of the disclosures, a use restriction on the enforcement of the statute was not warranted.

16. 384 U.S. 757 (1966). The Court held that the withdrawal of blood samples against the petitioner's protests was not compelling the petitioner to furnish evidence against himself.
17. 388 U.S. 218 (1967). The petitioner had argued that words he had been compelled to speak in a lineup were of a testimonial nature. The Court rejected this argument.
18. 218 U.S. 245 (1910).
19. California v. Byers, 402 U.S. 424, 434 (1971).
20. *Id.*, at 451-52 (Harlan concurring).

Mr. Justice Black wrote a strong dissent[21] in which he chastised ". . . the shrinking process to which the Court today subjects a vital safeguard of our Bill of Rights."[22] Justice Black stated, "The plurality opinion, if agreed to by a majority of the Court, would practically wipe out the Fifth Amendment's protections against compelled self-incrimination."[23] In his opinion, nothing could be more testimonial or self-incriminating than an individual's own statement that he is a person who has just been involved in an automobile accident resulting in property damage. Justice Black believed that the unarticulated premise of the plurality opinion is that since there is so much crime in America today, the Bill of Rights must not be completely enforced so as not to hamper the government's criminal prosecution.[24]

Mr. Justice Brennan wrote a separate dissent,[25] arguing that the record clearly showed a substantial hazard of self-incrimination. Justice Brennan also criticized the plurality's characterization of the disclosures as non-testimonial, stating:

> Apparently the plurality believes that a statute which required all robbers to stop and leave their names and addresses with their victims would not involve the compulsion of "communicative or testimonial" evidence.[26]

He concluded that the opinion would limit individual privacy and the instances in which the privilege would be available. He also believed that the use immunity should not be limited to the compelled disclosures, but should be extended to complete immunity from prosecution arising out of the conduct involved in the accident.

Byers is an example of the conflict which arises when the government's need for information clashes with the individual's right to remain silent rather than incriminate himself. The California Supreme Court partially resolved the conflict by a judicially-created use restriction: the purpose of the regulatory statute was achieved and Byers was granted immunity from prosecution even though he was deprived of his right to remain silent. This comment shall attempt to analyze the impact of the Court's approach in resolving the conflict.

There has never been any clear agreement on the policy behind, or the scope of, the fifth amendment privilege against self-incrimination. A

21. Justices Douglas and Brennan joined in the dissent.
22. 402 U.S. 424, 459 (1971) (Black dissenting).
23. *Id.*
24. California v. Byers, 402 U.S. 424, 463 (1971) (Black dissenting).
25. Justices Douglas and Marshall joined in the dissent.
26. 402 U.S. 424, 473 (1971) (Brennan dissenting).

number of factors have been suggested as the basis for the policy behind the privilege, as well as outlining its scope. Commentators have suggested a reluctance to make the individual choose between self-incrimination and contempt,[27] and the fear that an incriminating statement will be coerced.[28] Courts, on the other hand, have relied on the privilege to protect the innocent,[29] to preserve the dignity of the judicial system, to promote respect for the right of individual privacy,[30] and to maintain a fair state-individual balance.[31]

The purpose of the privilege against self-incrimination is to safeguard substantive rights that bear directly upon the judicial system, and the standards of civilized society, and to protect individual freedom from oppression and injustice.[32] The focus is on the element of free choice.[33]

However, since the right to exercise the privilege has never been absolute, the point at which the interests of the individual must yield to the interests of the government is determined by balancing the conflicting needs. In cases involving the privilege against self-incrimination, the scales are initially weighted in favor of the individual. Disclosures can be compelled only when the interests of the individual are outweighed by a strong and legitimate governmental interest.

Since the statute in question forced Byers to make a statement against his will, or punished him for not doing so, the situation in *Byers* falls within the purpose and policy of the privilege. If the compelled statement is also self-incriminating and testimonial, and therefore within the scope of the privilege, only a strong and legitimate governmental interest could compel the disclosure.

The privilege is designed to protect the individual from being compelled by government coercion to divulge the thoughts or conduct he would not otherwise admit.[34] The test for claiming the privilege is whether the information will incriminate the individual directly, or provide a link in the chain of evidence leading to his convicton.[35] "It need only be evident . . . that a responsive answer to the question or

27. *See generally*, Mansfield, *The Albertson Case: Conflict Between Self-Incrimination and The Government's Need for Information*, 1966 SUP. CT. REV. 103.
28. 8 J. WIGMORE, EVIDENCE § 2252 (McNaughton Rev. ed. 1961).
29. *See*, Twinning v. New Jersey, 211 U.S. 78, 91 (1908).
30. *See*, Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966).
31. *See*, Miranda v. Arizona, 384 U.S. 436 (1966).
32. M. BASSIOUNI, CRIMINAL LAW AND ITS PROCESSES 413 (1969).
33. Lisenda v. California, 314 U.S. 219, 241 (1941), where the Court speaks of: "Free choice to admit, to deny, or to refuse to answer."
34. *See generally*, 65 COLUM. L. REV. 681 (1965).
35. United States v. Burr, 25 F. Cas. 38, 40 (No. 14, 624e) (C.C. Va. 1807).

an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."[36] The danger of self-incrimination in the eyes of the individual must be real and not imaginary.[37] In other words, if the individual reasonably believes that the information would tend to incriminate him, and so long as it is not ". . . *perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken and that the answer[s] *cannot possibly* have such a tendency. . . .",[38] he may claim the privilege.

In prior cases involving self-reporting, the Court had examined the nature of the activity disclosed and the resulting probability of criminal prosecution. In *Sullivan*,[39] a bootlegger was prosecuted for failure to file an income tax return. The Court rejected his argument that the required disclosure revealing the illegal source of his income would incriminate him. The Court held that because not all the required disclosures were incriminating, the fifth amendment privilege did not excuse the failure to file any return. The fact that some of the required information might be privileged did not allow the petitioner in *Sullivan* to ". . . draw a conspirer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law."[40]

However, the Court, in *Marchetti v. United States*,[41] and its companion cases *Grosso v. United States*[42] and *Haynes v. United States*,[43] found the required disclosures violative of the fifth amendment since they were directed at a uniquely suspect group: the petitioners had engaged in illegal activity before registration and therefore, upon registration, were immediately threatened with criminal prosecution. In *Marchetti* and *Grosso*, the petitioners were prosecuted for failure to register and pay the occupational or excise taxes as gamblers. The petitioner in *Haynes* was prosecuted for failure to register as a possessor of a firearm obtained in violation of the registration requirement. In these cases, the Court held that where the conduct which is the reason for the registration requirement is itself illegal, the petitioners were presented with real and substantial risks of self-incrimination. Un-

36. Hoffman v. United States, 341 U.S. 479, 486-87 (1950).
37. Mason v. United States, 244 U.S. 362 (1917); Heike v. United States, 227 U.S. 131 (1913).
38. Hoffman v. United States, 341 U.S. 479, 488 (1950).
39. United States v. Sullivan, 274 U.S. 259 (1927).
40. *Id.*, at 264.
41. 390 U.S. 39 (1968).
42. 390 U.S. 62 (1968).
43. 390 U.S. 85 (1968).

like *Sullivan*, "every portion of these requirements had the direct and unmistakable consequence of incriminating petitioner."[44] Since *Marchetti, Grosso* and *Haynes* all involved the disclosure of illegal activity, the information required was, therefore, invariably tantamount to a confession of guilt, and necessitated the protection of the fifth amendment.

As the plurality noted, Byers could not claim the same substantial risks of self-incrimination as were presented in *Marchetti, Grosso* and *Haynes* since "[d]riving an automobile . . . is a lawful activity."[45] Indeed, being involved in a property damage accident is not in itself illegal, and, therefore, disclosure of this involvement would not be directly incriminating.

However, the petitioner in *Albertson v. Subversive Activities Control Board*[46] was allowed to claim the privilege even though disclosure of inherently illegal conduct was not required. Albertson was prosecuted for failure to register as a member of the Communist Party as required by the Subversive Activities Control Act. The Court found the privilege available by distinguishing *Sullivan* on the grounds that,

> In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioner's claims are not asserted in an essentially non-criminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime.[47]

Thus, *Albertson* involved not the admission of inherently illegal activity, but the admission of a crucial element of a crime. The Court reasoned that since the inquiry was directed at a highly suspect group in an area permeated with criminal statutes, the probability of prosecution was great enough to give rise to the privilege.

But what were the statutes that "permeated" the area in *Albertson*? The Court noted two:[48] the membership clause of the Smith Act,[49]

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44. Marchetti v. United States, 390 U.S. 39, 49 (1968).
45. 402 U.S. 424, 431 (1971).
46. 382 U.S. 70 (1965).
47. *Id.*, at 79.
48. *Id.*, at 77.
49. 18 U.S.C. § 2385 (1964 ed.). The membership clause of the Smith Act, while not prohibiting membership in the Communist Party, does prohibit the knowing membership in any organization which advocates the overthrow or destruction of "the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence . . . ."

and §4(a) of the Subversive Activities Control Act.[50] These statutes prohibit membership in any group advocating the overthrow or destruction of the government if the member knows of this advocacy. Interpretation of these statutes had required not only this knowing membership, but also active participation in the organization's illegal aspects before the member was threatened with criminal prosecution.[51]

Therefore, while the Court in *Byers* treated *Albertson* as similar to *Marchetti, Albertson* did not involve inherently illegal conduct or activity which would be virtually certain to imply illegal conduct. Thus the risks involved in *Albertson*, like *Byers*, were not the same as the risks involved in *Marchetti, Grosso* and *Haynes*. Distinguishing *Byers* from *Marchetti, Grosso* and *Haynes* is not conclusive in finding the privilege is not available. Since *Byers* obviously does not meet the standard of *Marchetti*, the question should be whether *Byers* meets the standard set by *Albertson*.

The risks involved in *Byers* were certainly as substantial as the risks discussed in *Albertson*. Both cases involved the disclosure of name and address. Similarly, both cases involved conduct that was not inherently illegal or virtually certain to imply illegal activity. The risk that admission of Communist Party membership "might be used"[52] in a criminal prosecution was no more substantial than the risk Byers' incurred by his admission: the likelihood that registration as a Communist may provide a significant investigatory lead in a prosecution for membership in an organization advocating overthrow of the government is not greater than the probability that the identification of the driver of an automobile involved in a property damage accident will provide a significant investigatory lead to prosecution for violation of one of the many criminal statutes that "permeate" the area of the operation of automobiles.

Byers was not inherently suspect, but he was at least as suspect as

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Whoever organizes or helps or attempts to organize any society, group or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purpose thereof—.

50. 50 U.S.C. § 783(a) (1964 ed.).
It shall be unlawful for any person knowingly to combine, conspire or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship . . . the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual.

51. Scales v. United States, 367 U.S. 203 (1960).

52. Albertson v. Subversive Activities Control Board, 382 U.S. 70, 77-78 (1965).

the petitioner in *Albertson.* Therefore, although Byers could not meet the standard met by *Marchetti,* it would not have been an "extravagant extension" to conclude he met the standard set out in *Albertson.*

After holding the privilege unavailable since Byers was not presented with a substantial risk of self-incrimination, the Court further concluded that even if Byers were faced with a substantial risk of self-incrimination, the compelled disclosure was not testimonial.[53]

The essence of the privilege is the individual's right not to incriminate himself by compelled testimonial communication.[54] In applying the privilege, courts have traditionally distinguished between testimonial and physical evidence. The result has been that the compelled disclosure of real or physical evidence is not protected.[55]

Thus, in *Holt v. United States,*[56] where the petitioner at trial was required to put on a blouse to corroborate the prosecution's testimony that the blouse fit him, it was held that,

> [T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence where it may be material.[57]

Later in *Schmerber v. California,*[58] the Court held that the compelled extraction of blood for analysis as evidence in a charge of drunken driving did not violate the privilege. The Court agreed that the extracted blood sample was incriminating, but refused to apply the protection of the fifth amendment on the grounds that ". . . compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."[59]

Similarly, in *United States v. Wade,*[60] where a suspect was required to speak certain words at a lineup in order to allow a witness to identify his voice, the voice of the suspect was held to be an identifying physical characteristic and not within the scope of the fifth amendment privilege.

> We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial

53. 402 U.S. 424, 431 (1971).
54. *See,* Schmerber v. California, 384 U.S. 757 (1966).
55. "The distinction which has emerged . . . is that the privilege is a bar against compelling 'communication' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Id.,* at 764.
56. 218 U.S. 245 (1910).
57. *Id.,* at 252-53.
58. 384 U.S. 757 (1966).
59. *Id.,* at 764.
60. 388 U.S. 218 (1967).

> involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have.[61]

That the disclosures in *Byers* do not fit neatly into either testimonial or physical evidence is obvious from the fact that five of the nine Justices ruling in *Byers* believed the disclosures to be testimonial.[62] The cases relied upon by the plurality as authority presented situations in which the individual was required only to use his bodily traits to identify himself. Because Byers was required to orally communicate his identity, cases focusing solely on the physical traits of the accused are not squarely on point with the situation presented in the instant case.

It would seem that a statute which requires the driver of an automobile involved in a property damage accident to stop and to identify himself would compel him "to disclose any knowledge he might have",[63] or to "speak his guilt."[64] Therefore, the communication would appear to be testimonial. However, the plurality did not agree.

> The act of stopping is no more testimonial—indeed less so in some respects—than requiring a person in custody to stand or walk in a police lineup, to speak prescribed words, to give samples of handwriting, fingerprints or blood. Disclosure of name and address is an essentially neutral act.[65]

This approach raises two issues which the plurality did not deal with directly. First, the plurality takes a narrow view of what the statute required. The act of stopping, like the acts of standing and walking, may in some situations not be testimonial in nature. However, the act of stopping required by this statute, unlike the speaking compelled from the petitioner in *Wade*, did not merely provide a physical characteristic from which the driver might be identified, but rather compelled the driver to identify himself as one involved in a property damage accident. In effect, it required the driver to say "I was involved in a property damage accident," which is certainly a testimonial communication.

Second, the plurality refers to the disclosure of name and address as a "neutral act." The plurality offered no cases directly in support of its decision that the oral disclosure of name and address is not a

61. *Id.*, at 222.
62. Justices Harlan, Black, Douglas, Brennan and Marshall.
63. United States v. Wade, 388 U.S. 218, 222 (1967).
64. *Id.*, at 223.
65. 402 U.S. 424, 431-32 (1971).

testimonial communication. Apparently *Sullivan* was relied upon as authority for this reasoning, since the plurality concluded that linking a name with a motor vehicle is no more incriminating than linking income with a tax return.[66] However, *Sullivan* decided only that the disclosure of name and address was neutral in the circumstances presented, and not that disclosure of name and address was always neutral. Indeed, the situation may be presented in which the disclosure of name and address would be tantamount to a confession. Thus, the plurality attempts to define a response to government inquiry as neutral with reference to neither the circumstances under which it occurs nor the question which it answers.

The plurality's use of the concept of a "neutral act" is unclear in another respect, since they seem to use the test for self-incrimination to determine whether the disclosure was testimonial. In order for the fifth amendment privilege to be available, the disclosure must be both testimonial and self-incriminating. These are two separate and independent concepts, requiring independent determination. A disclosure may be testimonial, yet, because it is neutral and not self-incriminating, not be within the protection of the fifth amendment.

Even if a name linked with a motor vehicle is no more incriminating than a name linked with a tax return, the conclusion that the disclosure of name and address is a "neutral act" says nothing of the testimonial character of the communication. This linking of "testimonial" with "self-incrimination" may have been a valid method of determining whether the privilege is available. However, this was not done in *Wade, Holt* and *Schmerber* since the two concepts were treated as separate entities. In addition, *Albertson, Marchetti, Grosso* and *Haynes* all essentially involved the disclosure of name and address, but their decisions reflected no discussion of the disclosures as netural acts.

It would not be an extravagant extension of the fifth amendment to hold that Byers was compelled to make a testimonial communication that was self-incriminating and within the scope of protection provided by that amendment. *Byers*, therefore, reflects a narrowing in the Court's application of the fifth amendment from that indicated in *Albertson*.

However, the reliance by both the plurality and Justice Harlan on *Marchetti* and its companion cases as defining the standard of application of the fifth amendment, indicates that the decision in *Albertson*

66. *Id.*, at 433-34.

involved more than protection of the fifth amendment. While the Court expressly stated that it was considering merely the application of the fifth amendment,[67] it would, perhaps, be unwise to ignore the unique jeopardy in which an individual is placed by an admission of membership in the Communist Party.[68] Freedom of association may not have been the issue upon which *Albertson* was decided; nevertheless, it is an important factor to be considered in an analysis of its holding.

Perhaps the real distinction between *Byers* and the prior self-reporting case, aside from *Albertson*, can be found in an analysis of Justice Harlan's concurring opinion. Rather than attempting to define the information required as non-self-incriminating or non-testimonial, Justice Harlan concedes that the information required may have been both,[69] and focuses instead on the nature of the statute: ". . . the presence of a 'real' and not imaginary risk of self-incrimination is not a sufficient predicate for extending the privilege against self-incrimination to regulatory schemes of the character involved in this case."[70] Thus, regulatory statutes, like Communists, are different.

When applied in the criminal process, the primary context from which the privilege emerges,[71] the only government interest involved is the interest in the enforcement of law through criminal sanctions. But this is the purpose of the fifth amendment: "to compel the State to opt for the less efficient methods of an "accusatorial system."[72] However, the extension of the privilege into the non-criminal regulatory field would affect other governmental interests; interests which need not be sacrificed in the pursuit of the accusatorial system.

Within this non-criminal regulatory area, Justice Harlan would require an evaluation of other incidents of the statutory scheme in determining the application of the fifth amendment. The privilege becomes available only where the accusatorial system is reduced to a ". . . merely ritualistic confirmation of the 'conviction' secured through compliance with the reporting requirement. . . ."[73]

Thus, unless the event which gives rise to the required reporting

67. Albertson v. Subversive Activities Control Board, 382 U.S. 70, 74 n.6 (1965).
68. Indeed, in *Albertson*, the Court, citing Patricia Blau v. United States, 340 U.S. 159 (1950), states "that the mere association with the Communist Party presents sufficient threat of prosecution to support a claim of the privilege." 382 U.S. at 77.
69. California v. Byers, 402 U.S. 424, 435-36 (1971) (Harlan concurring).
70. *Id.*, at 439.
71. *Id.*, at 440.
72. *Id.*, at 448.
73. *Id.*, at 458.

is itself a crime, as in *Marchetti* and its companion cases of *Grosso* and *Haynes,* or the information required is so detailed as to provide all information necessary for a convinction, the required disclosure would not be such a threat to the values protected by the fifth amendment as to be privileged where the purpose of the statute is regulatory.

Since the required disclosures in *Byers* were not virtually certain to imply criminal conduct, and prosecution was relevant only as part of the total statutory scheme, the Court was unwilling to place any burden on the entire scheme by thwarting prosecution.

Had Byers' disclosures been protected, the Court would have been required to consider the question of immunity. This, however, would have required a difficult balancing of interests which the plurality may have been unwilling to undertake. Since the main purpose of the privilege is to prevent the use of compelled testimony in obtaining a conviction,[74] there is no infringement of the privilege if the disclosures are protected by the grant of a use immunity.[75] If a judicial or statutory grant of immunity gives protection as broad as the risk of prosecution,[76] the conflict which gives rise to the privilege is removed, and, therefore, it can not be invoked.[77]

Immunity is thus given when the information sought is more important than the prosecution of the individual.[78] Therefore, use restrictions are not appropriate in all instances.[79] If the immunity would frustrate the achievement of a significant governmental purpose, immunity is not a proper accomodation of the privilege.

Two governmental purposes were presented by the statute involved in *Byers.* The plurality conceded that the main purpose of the statute was to facilitate financial responsibility for automobile accidents. Prosecution was only a secondary purpose. Thus, the main governmental purpose advanced by the statute would not have been frustrated by the granting of a use immunity. However, by defining the terms of the privilege in such a way as to deny the disclosure protection, the

74. Ullman v. United States, 350 U.S. 422, 438-39 (1956).
75. *See,* Counselman v. Hitchcock, 142 U.S. 547 (1892).
76. *Id.*
77. Ullman v. United States, 350 U.S. 422 (1956).
78. 71 Cal. 2d 1039, at 1053-54, 458 P.2d 465, at 474-75, 80 Cal. Rptr. 553, at 562-63. Sometimes the granting of immunity may help the prosecuting authorities; the individual's testimony leads authorities to persons directly responsible for the criminal activity under investigation. Note, *Criminal Immunity in Florida,* 16 U. FLA. L. REV. 475 (1963).
79. In Marchetti v. United States, 390 U.S. 39, 58 (1968), a use restriction was not appropriate since it would thwart the achievement of a significant congressional purpose—the prosecution of gamblers. See note 12, *supra.*

plurality was able to eliminate any conflict between the statute and the fifth amendment, without a determination of the importance of the information in relation to the need for prosecution. As a result, there was no need to hamper the state's prosecution interest at all, even though the prosecution's interest was deemed to be secondary.

Justice Harlan, on the other hand, eliminated any need for use immunity, not by re-defining the terms of the privilege, but rather by distinguishing between criminal and non-criminal disclosure:

> Technological progress creates an ever-expanding need for governmental information about individuals. If the individual's ability in any particular case to perceive a genuine risk of self-incrimination is to be a sufficient condition for imposition of use restrictions on the government in all self-reporting contexts, then the privilege threatens the capacity of the government to respond to societal needs with a realistic mixture of criminal sanctions and other regulatory devices.[80]

CONCLUSION

Because Byers' disclosures were found to be non-incriminating and non-testimonial, the Court was not required to find a strong legitimate governmental interest to outweigh Byers' claim to the fifth amendment privilege. This interest would have been extremely difficult to find, since the Court admitted that the statute was essentially regulatory and prosecution was a secondary interest. Therefore, it would seem that the hampering of state prosecuting authorities would not have been sufficient to outweigh Byers' claim, because the primary purpose of the statute would be left unimpeded. If the privilege had been available, a use immunity would have been appropriate since the significant governmental purpose would not have been thwarted.

In *Byers* the privilege appeared to be submitted to a process of "shrinkage" by a restrictive standard. The standard apparently used in *Byers* is that only the disclosure of inherently illegal activity is inherently risky, and therefore only the disclosure of illegal activity presents the individual with substantial risks of self-incrimination and gives rise to the availability of the privilege. And although *Albertson* was cited as authority for the decision in *Byers, Albertson* could not have met this standard.

However, the plurality's determination that Byers' disclosures were not privileged under the fifth amendment does not clarify the prior

80. California v. Byers, 402 U.S. 424, 452 (1971) (Harlan concurring).

decisions in this area. The determinative factor may be that the regulatory scheme of the statute renders the disclosures non-testimonial.[81] Alternatively, it may also be significant that Justice Stewart has stated:

> [T]he Fifth Amendment guarantee against compulsory self-incrimination was originally intended to do no more than confer a testimonial privilege in a judicial proceeding. But the Court through the years has drifted far from that mooring. . . . Perhaps some day the Court will consider a fundamental re-examination of its decisions in this area, in light of the original constitutional meaning.[82]

An explanation of *Byers* solely on the grounds that the required disclosures were not "self-incriminating" or "testimonial" is not entirely valid and apparently not consistent with the authority used in the Court's decision. The explanation may be deeper and more complex. *Byers* reveals that the Court will be seeking more cogent reasons than have been necessary in the past to invoke the privilege, at least where an important non-criminal objective is involved. The Court's reluctance to affirm the use restriction indicates that, in the future, the Court's desire to facilitate "realistic" government[83] requires a recognition of the necessity of reasonable restrictions of the scope of protection provided an individual when society seeks to promote a valuable social objective through non-criminal means.[84]

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81. 402 U.S. 424, 431 (1971).
82. Leary v. United States, 395 U.S. 6, 54 (1969) (Stewart concurring).
83. 402 U.S. 424, 474 (1971) (Brennan dissenting).
84. *Id.*, at 458 (Harlan concurring).