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Constitutional Law—A Driver Involved in an Accident Resulting in Property Damage Can Be Required by Statute to Stop and Identify Himself to the Other Driver

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It is submitted that the spirit of pragmatism and functionalism which pervade the federal system should similarly be introduced by the Court of Appeals into the New York law of collateral estoppel. The court should abandon its archaic and impractical standards and should recognize, in dealing with privity, as it has in dealing with mutuality, that due process of law and reality are not incompatible.

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CONSTITUTIONAL LAW—A DRIVER INVOLVED IN AN ACCIDENT RESULTING IN PROPERTY DAMAGE CAN BE REQUIRED BY STATUTE TO STOP AND IDENTIFY HIMSELF TO THE OTHER DRIVER

On August 20, 1960, defendant Byers was involved in an automobile accident which resulted in damage to another car. Two days later he was charged in a two-count indictment with two misdemeanor violations of the California Vehicle Code. The first count charged him with passing another vehicle without maintaining the "safe distance" required by law[1] and the second count with a violation of California's "hit and run" statute. This statute requires the driver of any vehicle involved in an accident resulting in damage to any property, including vehicles, to stop at the scene of the accident and give his name and address to the other driver.[2] Byers demurred to the second count on the ground that it violated his privilege against compulsory self-incrimination. His demurrer was sustained by the California Supreme Court, which held that compliance confronted him with "substantial hazards of self-incrimination," but upheld the statute by inserting a use restriction on the information disclosed. The California court found Byers not liable because he could not have anticipated the imposition of a use restriction.[3] The United States Supreme Court granted certiorari.[4] *Held,* the constitutional privilege against self-incrimination is not infringed by a state statute which requires a motorist involved in an accident to stop at the scene and give his name and address. *California v. Byers,* 402 U.S. 424 (1971).

1. CAL. VEHICLE CODE § 21750 (West Supp. 1971).
2. *Id.* § 20002 (a) (1).
3. Byers v. Justice Court for Ukiah Judicial Dist., 71 Cal. 2d 1039, 1057, 458 P.2d 465, 478, 80 Cal. Rptr. 553, 566 (1969).
4. 397 U.S. 1035 (1970).

Although *California v. Byers* is the first Supreme Court decision involving the federal constitutionality of a so-called "hit and run" statute, state courts have been grappling with the issue for more than half a century. In 1912, the Missouri Supreme Court held that disclosure of a driver's name after an accident did not violate the petitioner's state privilege against self-incrimination.[5] The court said that the statute was a reasonable exercise of the state's police power, and the fact that the driver disclosed his identity was not evidence of guilt, but of innocence.[6] State courts have upheld similar statutes on the theory that as a condition of operating an automobile, the driver waives his constitutional privilege and must identify himself when he is involved in an accident.[7] This argument has been disputed because automobile travel has become a more vital part of our existence since the date of these early decisions and to expect a driver to waive his privilege against self-incrimination merely for the right to drive a car seems unreasonable.[8] It is also argued that there can be no loss of the privilege without an express, knowing and intelligent waiver.

Statutes have been upheld where a person operating an automobile and causing injury to any person is required to stop and give his name, address and license number to the other party, and in cases where there is serious injury or death, to report it to the authorities.[9] In a more recent case, the Massachusetts Supreme Court upheld a "hit and run" statute, but avoided using the "waiver theory." The court argued that if a defendant could not be required to comply with the statute, he could also refuse to testify in a civil suit arising from the collision to facts showing that he was the operator of the automobile involved.[10]

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5. *Ex parte* Kneedler, 243 Mo. 632, 147 S.W. 983 (1912).

6. The reasoning behind this statement is that in a classic sense flight is indicative of consciousness of guilt and therefore, is circumstantially admissible to prove the driver's actual guilt.

7. *E.g.*, People v. Thompson, 259 Mich. 109, 242 N.W. 857 (1932); State v. Sterrin, 78 N.H. 220, 98 A. 482 (1916); People v. Rosenheimer, 209 N.Y. 115, 102 N.E. 530 (1913).

8. Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 143-44.

9. State v. Razey, 129 Kan. 328, 282 P. 755 (1929). *See also* Commissioner v. Zeitler, 79 Pa. Super. 81 (1922), where the court upheld a statute requiring a driver involved in an accident to stop and help the injured party and to give his name and address upon the request of that party. These statutes were held to be valid regulations under the police powers of the state and in the interest of the general welfare.

10. Commonwealth v. Joyce, 326 Mass. 751, 97 N.E.2d 192 (1951).

One instance in which a "hit and run" regulation was declared unconstitutional was a municipal ordinance which required the driver of a vehicle involved in an accident to make a full report to the police. The Ohio Court of Appeals interpreted the ordinance as compelling the driver to answer all questions concerning the details of the accident. However, the decision suggested that the city council could construct an ordinance that would not violate any constitutional right and still promote the public safety on the streets and highways.[11]

Because these decisions affecting compulsory reporting were made before the Supreme Court applied the federal privilege to the states through the fourteenth amendment in *Malloy v. Hogan*,[12] these state tests of what constitutes self-incrimination in a regulatory area must now yield to the federal standard. However, the problem does not end here, because, as Dean McKay points out, despite all the discussions concerning values enshrined in the right against self-incrimination, it is still difficult to define the scope or state the central policy underlying the privilege.[13] Although the fifth amendment states that no person shall "be compelled in any criminal case to be a witness against himself," the privilege has been applied to civil, as well as criminal, proceedings,[14] and has been held to extend to testimony given before administrative agencies[15] and congressional committees.[16] In the words of Justice Blatchford, writing in 1892 in *Counselman v. Hitchcock*, "[t]he privilege is . . . as broad as the mischief against which it seeks to guard."[17] The most comprehensive statement in recent

11. Rembrandt v. City of Cleveland, 28 Ohio App. 4, 161 N.E. 364 (1927).

12. 378 U.S. 1 (1964). Justice Brennan, writing for the majority of the Court, stated:

> It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.

Id. at 11.

13. McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 194.

14. McCarthy v. Arndstein, 262 U.S. 355 (1923).

15. ICC v. Brimson, 154 U.S. 447 (1894).

16. Quinn v. United States, 349 U.S. 155 (1955).

17. 142 U.S. 547, 562 (1892). This case involved a grand jury investigation of alleged violations of "An act to regulate commerce." Counselman, who was engaged in the grain and commission business in Chicago, refused to answer certain questions on the grounds that they might tend to incriminate him. He was then adjudged in contempt of court, fined and held in custody until he disclose the information demanded of him. The Supreme Court found that Counselman was entitled to refuse to answer and directed the lower court to discharge him from custody.

years of the different values underlying the privilege is contained in Justice Goldberg's opinion in *Murphy v. Waterfront Commission*:[18]

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitional system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' *United States* v. *Grunewald*, 233 F.2d 556, 581-582 (Frank, J., dissenting), rev'd 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' *Quinn* v. *United States*, 349 U.S. 155, 162.[19]

While critics like Jeremy Bentham thought that the privilege should be abolished,[20] others like Wigmore felt that it should be restricted. The latter sought to differentiate between the "abstract privilege—which is indeed a bulwark of justice—and the individual entitled to it—who may be a monster of crime . . . . [T]he privilege therefore should be kept within limits the strictest possible."[21] In *United States v. Sullivan*[22] a bootlegger refused to file an income

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18. 378 U.S. 52 (1963). The California Supreme Court in *Byers* relied upon *Murphy v. Waterfront Commission* to provide a precedent for judicial imposition of a use restriction on required disclosures. The Court held in *Murphy* that (1) "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him" and (2) "in order to implement this constitutional rule . . . the Federal Government must be prohibited from making any such use of compelled testimony and its fruits." *Id.* at 79. *See, e.g.*, N.Y. CRIM. PRO. LAW § 190.40 (McKinney 1971).

19. 378 U.S. at 55.

20. The privilege is used to exclude "the very best possible sort of evidence: the evidence the most completely satisfactory: evidence, in a word, so completely, and even exclusively, satisfactory, that, according to the Roman system, . . . [it] is deemed conclusive . . . ." BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827), VII THE WORKS OF JEREMY BENTHAM 446 (Bowring ed. 1962).

21. J. WIGMORE, EVIDENCE § 2251 n.1(c) (McNaughton rev. ed. 1961).

22. 274 U.S. 259 (1927).

tax return on the ground that it would incriminate him under the National Prohibition Act. Justice Holmes was obviously reasoning along the restrained lines suggested by Wigmore when, writing for the majority of the United States Supreme Court, he stated, "It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime."[23] The Court left open the possibility that the defendant could have refused to answer specific questions in the tax form, but clearly stated that he could not abstain completely from making a return. Although the disclosure of the petitioner's income might create "a necessary and essential link in the chain of testimony"[24] which could connect him with a crime, the Court chose to limit the traditional scope of the privilege as announced in *United States v. Burr*[25] in order to carry out the government's power to tax.

A further restriction on the privilege against self-incrimination in the field of compulsory reporting was established by the Supreme Court in *Shapiro v. United States*,[26] where a witness was compelled by an administrative subpoena to produce sales records which he had kept as required by a regulation of the Price Administrator.[27] Such records were held to have "public aspects" which rendered them at least analogous to public documents. Justice Frankfurter, aware of the serious implications of the majority opinion, wrote a sharp dissent in which he made it clear that he felt that criminals "should be detected, tried, convicted and punished—but not at the cost of needlessly bringing into question constitutional rights and privileges."[28] He also feared

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23. *Id.* at 263-64.
24. United States v. Burr, 25 F. Cas. 38, 40 (No. 14,692c) (C.C.D. Va. 1807).
25. *Id.* at 40-41.
26. 335 U.S. 1 (1948).
27. These records were kept under the Emergency Price Control Act, ch. 26, 56 Stat. 23 (1942), *as amended* 50 U.S.C. App. § 901 *et seq.* (1964).
28. 335 U.S. at 69 (dissenting opinion). Justice Frankfurter also wrote:
> In an almost cursory fashion, the Court needlessly decides that all records which Congress may require individuals to keep in the conduct of their affairs, because they fall within some regulatory power of Government, become 'public records' and thereby, *ipso facto*, fall outside the protection of the Fifth Amendment that no person 'shall be compelled in any criminal case to be a witness against himself.'

Id. at 37.

that the *Shapiro* decision violated the right of privacy, for if records required to be kept by law are instantly transformed into public records, "we are indeed living in glass houses."[29]

In a more politically sensitive area of required reporting, *Albertson v. Subversive Activities Control Board*[30] held that an administrative order requiring petitioners to register as members of the Communist Party violated their fifth amendment privilege against self-incrimination. Pointing to widespread use of the reported data, the Court found the risks of incrimination obvious since the admission of membership in compliance with the federal statute could be used to prosecute registrants under several criminal statutes.[31] Although there was held to be no distinction for constitutional purposes between compelling an admission in oral testimony and requiring one in writing, the majority opinion stated the differences between this case and *Sullivan*:

> 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.* Petitioners' 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 petioners in the admission of a crucial element of a crime.[32]

The standards set by the Court in *Albertson* provided the basis for later decisions in which regulatory statutes were found to infringe a specific group's fifth amendment privilege. *Marchetti v. United States*[33] held that the federal wagering tax statutes violated petitioner's privilege against self-incrimination. The obligation to register and pay the tax involved a "real" and "substantial" hazard of self-incrimination rather than a trifling or imaginary danger.[34] *Marchetti* was distinguished from *Shapiro* on the grounds that: (1) Marchetti wasn't required to keep any

29. *Id.* at 51.

30. 382 U.S. 70 (1965).

31. For example, an admission of membership in the Communist Party could have been used to prosecute petitioners under the membership clause of the Smith Act, 18 U.S.C. § 2385 (1964), or under the Subversive Activities Control Act, 50 U.S.C. § 783 (a) (1964).

32. 382 U.S. at 79 (emphasis added).

33. 390 U.S. 39 (1968).

34. *See* Rogers v. United States, 340 U.S. 367 (1951); Brown v. Walker, 161 U.S. 591 (1896).

records, but instead to provide information about his wagering activities; (2) there were no public aspects to the information required from Marchetti; and (3) the requirement in *Shapiro* was in an essentially non-criminal and regulatory area of inquiry, while the wagering statute was aimed at "a highly selective group inherently suspect of criminal activities." Although the Court accepted the allegation that the government's principal interest in enacting the statute was to collect revenue and not to punish gamblers, the characteristics of the activities about which the information was sought and the composition of the group to which the inquiries were made brought the case within the *Albertson* rule.

Similarly, *Grosso v. United States*[35] held that since payment of an excise tax on wagering would have provided information incriminating to the petitioner, he was justified in asserting the constitutional privilege against self-incrimination. In *Haynes v. United States*,[36] a section of the National Firearms Act[37] was held to violate the privilege because the registration requirement contained in the statute was directed principally at those persons who had obtained possession of a firearm without having complied with the Act's other requirements. Therefore, those registering under the Act were immediately threatened with criminal prosecution. The Court pointed out that registration is not invariably indicative of a violation of the Act's requirements; there are uncommon situations where a possessor who has not violated the Act's other provisions is obliged to register. "Nonetheless, the correlation between obligations to register and violations can only be regarded as exceedingly high, and a prospective registrant realistically can expect that registration will substantially increase the likelihood of his prosecution."[38] The Court held in *Leary v. United States*[39] that compliance with the transfer tax provisions of the Marijuana Tax Act[40] would have required petitioner, not by virtue of registration requirements but rather by virtue of the requirement to obtain an order form, to unmistakably identify himself as a member of a "selective group inherently suspect of criminal activities." By requiring Leary, in the course of obtaining

35. 390 U.S. 62 (1968).
36. 390 U.S. 85 (1968).
37. 26 U.S.C. §§ 5841, 5851 (1964).
38. 390 U.S. at 97 (1968).
39. 395 U.S. 6 (1969).
40. 26 U.S.C. § 4741 *et seq.* (1964).

the order form, to identify himself not only as a transferee of marijuana, but also as a transferee who had not registered and paid the occupational tax, the law compelled him to expose himself to a "real and appreciable" risk of self-incrimination and violated his constitutional privilege under the fifth amendment.

In deciding the instant case, a plurality of the Court considered first, whether compliance with the statute involved a substantial risk of self-incrimination and second, whether the disclosures were testimonial in the fifth amendment sense. Chief Justice Burger, writing for four members of the Court, began his discussion by stating that the tension between the state's demands for disclosures and protection of the right against self-incrimination must be resolved in terms of balancing the public need and the individual claim to constitutional protections.[41] He cited the burdens of living in an organized society, filing tax returns for example, and pointed out that in each of these situations there was a possibility of prosecution and conviction.

The Court found the requirement that a driver involved in an accident stop and give his name and address to be similar to the income tax reporting scheme in *Sullivan* since both types of statutes are regulatory and directed at the public at large.[42] Thus, the Court sought to establish a similarity between the position of the bootlegger in *Sullivan* and the petitioner in the instant case. Following this train of thought, section 20002 (a) (1) of the California Vehicle Code was held to be essentially non-criminal and regulatory.[43] Drivers who were forced to comply with the statute were part of the general public rather than "a highly selective group inherently suspect of criminal activities."[44] Therefore, the plurality reasoned, the statutory disclosures required by section 20002 (a) (1) did not entail the substantial risk of self-incrimination which was found in *Marchetti, Grosso* and *Haynes.*

Not content to conclude the decision at this point, the Court went on to state that even if the required disclosures could be viewed as incriminating, they were not testimonial in the fifth amendment sense. Although the Court conceded that stopping might provide authorities with "a link in the chain of evidence

41. California v. Byers, 402 U.S. 424, 427 (1971) [hereinafter cited as instant case].
42. *Id.* at 430.
43. *Id.*
44. *Id.* at 431.

needed to prosecute,"[45] the act of stopping was viewed as no more testimonial 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."[46] Disclosure of the driver's name and address was held to be an essentially neutral act, which merely identified the driver and did not by itself implicate anyone in criminal conduct. The Court concluded that just as there is no constitutional right to refuse to file an income tax return, neither is there a constitutional right to leave the scene of an accident to avoid possible legal involvement. The question of imposing a use restriction, as the California Supreme Court did, never entered into the plurality opinion since there was found to be no violation of petitioner's right against self-incrimination.

In a concurring opinion, Justice Harlan took issue with the contention of the plurality that the disclosure of a driver's name was not testimonial and that, in the instant case, there was no real risk of self-incrimination. However, he felt the presence of "real" as opposed to "imaginary" risks of self-incrimination was not a sufficient ground for extending the privilege to regulatory schemes of this kind.[47] The application of existing standards in this area can only defeat the state's primary and nonprosecutorial goal of assuring personal financial responsibility for automobile accidents given the necessity for self-reporting as a means of securing information. Harlan believed, along with the plurality, that there is a need for balancing the right against self-incrimination with the need of a modern society to ensure financial responsibility to civil litigants in automobile accident cases. Despite his disagreement with the plurality on several basic issues, he came to the same conclusion, that in the event of an accident causing

45. *Id.* at 432; *see* Hoffman v. United States, 341 U.S. 479 (1951); United States v. Burr, 25 F. Cas. 38 (No. 14,692e) (C.C.D. Va. 1807).

46. Instant case at 431-32; Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967); Schmerber v. California, 384 U.S. 757 (1966); Holt v. United States, 218 U.S. 245 (1910). The problem arising from the distinction between testimonial and non-testimonial forms of evidence may be stated as follows:

I read a scene from *Little Caesar*
Modeled some of Dillinger's old clothes
Stood for hours in a lineup
Wrote some larcenous verse and prose.
I gave them the prints from my fingers
and the blood from my veins
But if I rob the local bank
must I leave them my name?

47. Instant case at 439 (Harlan, J., concurring).

property damage the driver should be required to stop and give his name, and that the purposes of the fifth amendment do not warrant imposition of a use restriction.[48]

In a sharp dissent, Justice Black wrote that the privilege against self-incrimination is severely endangered by the plurality opinion. If Byers had stopped and identified himself at the scene of the accident, this disclosure could have been used by the state to establish his guilt for unlawful passing. The California statute is aimed at all drivers in the state who are involved in accidents causing property damage. "If this group is not 'suspect' of illegal activities," he stated, "it is difficult to find such a group."[49] Justice Black also sought to distinguish the instant case from *Sullivan* on the ground that the only information the state required of Byers was of a type which greatly enhanced the probability of his conviction for a crime. Thus, the driver's failure to stop was analogous to a taxpayer's refusal to answer a particular incriminating question on a tax return, which the Court in *Sullivan* intimated was constitutionally acceptable. Justice Black also rejected the plurality's conclusion that the required disclosures were not testimonial, for "[w]hat evidence can possibly be more 'testimonial' than a man's own statement that he is a person who has been involved in an automobile accident inflicting property damage?"[50] Rather than declare the law unconstitutional, however, Justice Black agreed with the California Supreme Court's decision to impose a use restriction on the required information.

Justice Brennan's dissenting opinion pointed out that the plurality misinterpreted the Court's earlier decisions; they seem to believe that membership in a highly suspect group is an indispensable basis for a fifth amendment claim. In the earlier decisions the crime-directed character of the registration requirement was only found to be important insofar as it showed the substantial risk of self-incrimination faced by a specific petitioner in a particular case. However, since Justice Brennan felt that a use restriction would not adequately protect a driver from prosecution, he advocated total immunity for those drivers reporting their involvement in an accident.

48. Justice Harlan felt that imposing a use restriction would significantly impair the state's capacity to prosecute drivers whose illegal behavior caused accidents. *Id.* at 458.

49. *Id.* at 461.

50. *Id.* at 462-63.

The plurality opinion is open to criticism on many grounds. In order to distinguish the case from *Albertson* and the decisions following it, the Court interpreted section 20002 (a) (1) as being directed at all persons who drive automobiles in California. However, the compelled disclosures were not required of *all* drivers, but only those persons who drive automobiles and were involved in an automobile accident causing property damage. As Justice Black stated in his dissent, "[i]f this group is not 'suspect' of illegal activities, it is difficult to find such a group."[51] The California Supreme Court took judicial notice of the fact that although not all drivers involved in accidents are lawbreakers, a *substantial correlation* exists between being a driver involved in an accident and being a driver who has simultaneously violated one or more vehicle laws. Certainly, a cursory glance at the two volumes of the California Vehicle Code makes it clear that this is an area permeated with criminal sanctions.

A driver's identification of himself as the operator of a motor vehicle which caused property damage may be crucial in subsequent criminal prosecution. Other information held by the authorities may be sufficient to determine that whoever was driving a given vehicle was guilty of a crime; the only remaining question may be to determine whether a defendant was the operator of that vehicle.[52] According to the standard set by the Supreme Court in the highly significant decision of *Hoffman v. United States,*[53] a person is protected by the privilege against self-incrimination if it is "evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."[54] It is hard to see how the Court can seriously contend that it still applies the *Hoffman* "test" and yet disallow Byers from claiming the privilege under that rule.

The fact that the statutory purpose is ostensibly noncriminal is not sufficient to defeat the petitioner's right to refuse to incriminate himself. The statutes involved in *Marchetti, Grosso* and *Haynes* were also purportedly noncriminal, but as Justice Har-

51. *Id.* at 461.
52. Mansfield, *supra* note 8, at 122.
53. 341 U.S. 479 (1951).
54. *Id.* at 486-87.

lan pointed out, in agreement with the California Supreme Court on this issue, the use of the privilege is not limited to situations where the purpose of the inquiry is to get an incriminating answer; it is the *effect* of the answer that is determinative.[55] Once the group of drivers being regulated by the statute is limited to those involved in automobile accidents causing property damage—a group under "a substantial shadow of suspicion"[56]—and where circumstances make it clear that a driver complying with the statute faces a substantial risk of self-incrimination, the rules pronounced by the Court in *Albertson, Marchetti, Grosso* and *Haynes* should be applicable. In each of these cases the crime-directed character of the registration requirement was important only insofar as it supported the petitioners' claim that they faced substantial hazards of self-incrimination and were, therefore, entitled to claim their fifth amendment right. It should be noted that in *Marchetti* the Court did not declare the wagering statute invalid under all circumstances, but held that in cases where a party could not show substantial hazards of self-incrimination, he could not claim the privilege. In the instant case, Byers was guilty of unlawful passing which resulted in an automobile accident. Had he stopped at the scene of the accident to identify himself, he would have faced as substantial a risk of incriminating himself for his traffic offense as would a gambler by complying with the wagering tax statute.

The finding of the plurality that a driver's disclosure of his name and address at the scene of an accident in which he was involved is not testimonial rests more on fantasy than on any judicial precedents. From a defendant-driver's statement of identification an inference can be drawn that the driver believed that he was the operator of a vehicle involved in a particular accident.[57] From this inference the trier of fact can then infer the ultimate fact that the defendant actually was the operator involved in the accident. When evidence of this self-identification is introduced at trial, it is not only "testimonial," but in many cases also highly incriminating.

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55. Instant case at 436-37.

56. Byers v. Justice Court for Ukiah Judicial Dist., 71 Cal. 2d 1039, 1046, 458 P.2d 465, 470, 80 Cal. Rptr. 553, 558 (1969).

57. Mansfield, *supra* note 8, at 123.

The plurality's attempt to justify its conclusion that the disclosures are not "communicative" or "testimonial" by using the Court's earlier decisions also meets with failure, at least from a logical standpoint. In *Holt v. United States*,[58] the Court held that defendant could be required to try on a blouse as a means of identification because the fifth amendment prohibits "the use of physical or moral compulsion to extort communications from him [defendant], not an exclusion of his body as evidence when it may be material."[59] *Schmerber v. California*[60] held that a suspect's blood could be taken from him against his will and used as evidence against him. The Court in *United States v. Wade*[61] required a suspect to recite certain words purportedly uttered by a bank robber. Similarly, handwriting samples have also been considered outside the scope of the privilege. In deciding this issue, the Court stated in *Gilbert v. California*:[62]

> One's voice and handwriting are, of course, means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication within the cover of the privilege. A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection.[63]

It is this basic distinction that the plurality misses in the instant case. When a driver is required to stop and give his name, it is not the quality of his voice that the statute aims at, but the communication that he believes he is the driver involved in a particular accident. Another important difference between the circumstances in the instant case and those in the cited cases is that in the latter, the person required to give his blood or fingerprints was already a suspect. Since under present conditions traffic police face a virtually insurmountable task in locating "hit and run" drivers,[64] and the chances of apprehension for a particular traffic violation are very low, a driver's communication that he was in-

58. 218 U.S. 245 (1910).
59. *Id.* at 252-53.
60. 384 U.S. 757 (1966).
61. 388 U.S. 218 (1967).
62. 388 U.S. 263 (1967).
63. *Id.* at 266-67.
64. Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 421, 434 (1969).

volved in an accident may be the only source of information connecting him with a crime. Once the driver stops, he allows eyewitnesses to better identify him, the police to photograph him, take fingerprints and conduct tests on his vehicle.[65]

From a utilitarian point of view it is difficult to see how the Supreme Court's decision in the instant case helps to expedite the prime aim of the statute, which is to facilitate the settlement of tort claims arising from automobile accidents. For example, if a driver hits a parked car and leaves his name and address, the state can collect evidence and build up a criminal case against him. However, if he leaves the scene of the accident, he has a good chance of escaping all criminal, as well as civil, liability. If the Court had placed a use restriction on the information disclosed, as did the California Supreme Court, the driver, by stopping, would only face civil liability and a possible raise in his insurance rates, which is not a great deterrent. Therefore, the Supreme Court decision may operate as an incentive for drivers involved in accidents who face a substantial risk of criminal prosecution for driving violations to just keep going. If a guilty driver complies with the statute and the state is not allowed to use this information or any leads therefrom as evidence against him, the state is in no worse a position than it was before. The state has lost nothing but certain information it would not have possessed without the driver's voluntarily stopping and leaving his name and address. Therefore, placing a use restriction on the required disclosures fulfills the legislative intent of facilitating the settlement of tort claims arising from automobile accidents without unnecessarily infringing upon any constitutional rights.

Justice Harlan's argument that a use restriction places an undue burden on the state is weakened by the fact that the California state legislature *did place* such a use restriction on information disclosed by drivers who are involved in accidents resulting in personal injury or death,[66] which are obviously more serious than damage to property. However, there is no need for full transactional immunity, as Justice Brennan suggests in his dissenting opinion, as long as the prosecution has the burden of proving that its evidence did not arise in any way from the driver's disclosures and the courts rigidly enforce this requirement.

65. *See* Mansfield, *supra* note 8, at 121-25.
66. CAL. VEHICLE CODE §§ 20012-13 (West 1971).

Studying the plurality opinion, one is bound to consider whether the Court is deliberately contorting its logic to reach a decision on public policy grounds. The plurality clearly desires to ensure financial security in automobile accident cases and also to apply criminal sanctions to drivers whose violation of a state vehicle law has resulted in an accident. In the same skeptical mood, one may also question the motives of the California legislators in drafting the statute. Was the sole intention of the legislators to stimulate the settlement of civil suits or was this avowed purpose merely a means of achieving their prime objective of aiding the state's prosecution of criminal violators in this area? The members of the California legislature must have been aware of the fact that a statute openly seeking to facilitate criminal prosecutions would have been struck down by the courts as violating the fifth amendment and they skillfully circumvented this objection with a law that achieved the same unconstitutional results. One must admire Justice Harlan's candor in admitting that the driver in the instant case faced a substantial risk of incriminating himself and that this infringement of a constitutional right should be tolerated in the interest of meeting the needs of society resulting from technological progress.

While the end sought by the Court may be socially desirable, one must necessarily question whether the resulting infringment upon constitutional rights is too costly a price to pay. Justice Black is correct in his statement that in regard to statutes of this kind "balancing inevitably results in the dilution of constitutional guarantees."[67] Under the holding of the instant case, a legislature could frame a law requiring a group with a relatively high degree of criminality to incriminate themselves as long as the true nature of the law is hidden beneath the mantle of some vague regulatory purpose, such as facilitating the settlement of tort claims, an area the state rarely seemed concerned with before. If the statute involved in the instant case had regulated an area of greater sensitivity than "hit and run" drivers (for example, a statute obliquely aimed at Black Panthers or prostitutes), civil libertarians would have raised a furor over the threat to our constitutional rights. It is pertinent to recall the words of Justice Bradley in *Boyd v. United States*,[68] when a lower court required petitioners to

67. Instant case at 463 (Black, J., dissenting).
68. 116 U.S. 616 (1886).

produce their books and papers for inspection by a government attorney and to be used in evidence:

> Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but *illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.* This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.[69]

The California Supreme Court and the dissenting Justices on the United States Supreme Court were aware of these dangers and tried to avoid them by the means discussed earlier. To study the plurality decision in the instant case after reading *Burr, Boyd* and other early decisions dealing with the privilege against self-incrimination leaves one with an overwhelming feeling of nostalgia—"a wistful yearning for something past or irrecoverable."[70]

BARRY BASSIS

CONSTITUTIONAL LAW—EVICTION OF STATE'S TENANTS NECESSITATES A LIMITED HEARING ACCORDING TO THE STATE ACTION DOCTRINE OF THE FOURTEENTH AMENDMENT

The appellants, Mr. and Mrs. Melvin Fuller, were low-income tenants in a state assisted and supervised, partially tax-exempted, private, limited-profit housing company organized under the Private Housing Finance Law.[1] Pursuant to section 44-a of that law, the Ebbets Field Housing Company, Inc.,[2] leased 20% of its units to the State Housing Finance Agency[3] which sublet these units at a low rental, made possible by rental subsidies, to

69. *Id.* at 635 (emphasis added).

70. THE NEW MERRIAM-WEBSTER POCKET DICTIONARY 340 (1964).

1. N.Y. PRIV. HOUS. FIN. LAW §§ 10-37 (McKinney 1962).

2. The housing project was constructed by the Ebbets Field Housing Company, organized pursuant to sections 10-37 of the N.Y. Private Housing Finance Law, for middle-income occupancy.

3. N.Y. PRIV. HOUS. FIN. LAW § 43 (McKinney 1962). The New York State Housing Finance Agency [hereinafter referred to as the Agency] is a corporate governmental agency, constituting a public benefit corporation.