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Criminal Procedure -- Regulatory Statutes and the Privilege against Self-Incrimination

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Criminal Procedure—Regulatory Statutes and the Privilege Against Self-Incrimination

Governmental use of self-disclosure to obtain information creates serious conflicts between the necessity of the government to have such information in order to carry out its legitimate regulatory functions and the privilege against self-incrimination contained in the fifth amendment to the United States Constitution.[1] The character and purpose of the required information are in large part non-criminal and regulatory, but since it is possible that the information may be used in a subsequent criminal proceeding, it is difficult to determine exactly when the privilege should apply. In addition, because the standards for applying the fifth amendment privilege have been developed primarily in the criminal, testimonial setting, rather than in the regulatory, reporting setting, it is necessary to determine if the same standards should be applied in both contexts.[2]

In *California v. Byers*,[3] the Supreme Court was faced with determining whether the standards developed in the criminal setting should apply in the regulatory field. The defendant has been indicted for violation of a California statute[4] which in essence provided that the driver of a vehicle involved in an accident would immediately stop, locate the owner of any damaged property, and give the owner his name and address.[5] The defendant demurred to the indictment, claiming that compulsory compliance with the statute violated his privilege against self-incrimination.[6] The lower court overruled the demurrer, but a writ of prohibition was granted by the Superior Court, Mendocino County,

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[1]"No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V. The fifth amendment was held applicable to the states in Malloy v. Hogan, 378 U.S. 1 (1964).

[2]*See generally* Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, in THE SUPREME COURT REVIEW 103 (P. Kurland ed. 1966).

[3]402 U.S. 424 (1971).

[4]CAL. VEHICLE CODE § 20002(A)(1) (West 1971):

> 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 . . . 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 . . . .

[5]The defendant was also charged with violation of CAL. VEHICLE CODE § 21750 (West 1971), which provides sanctions for the failure to pass another vehicle in a safe manner.

[6]Byers v. Justice Court for the Ukiah Judicial District, 71 Cal. 2d 1039, 1042, 458 P.2d 465, 467, 80 Cal. Rptr. 553, 555 (1969).

restraining further proceedings on the ground that the statute was a violation of Byers' asserted privilege.[7] The superior court's ruling was affirmed by the California Supreme Court, which determined that the defendant faced substantial hazards of self-incrimination.[8] The United States Supreme Court granted certiorari and reversed on the grounds that the privilege did not apply under the facts of the case.[9]

This note will discuss the effect of *Byers* upon the application of the standards developed in the criminal setting, as opposed to those promulgated in regulatory cases, and the factors which should be considered by the Court in determining which standards are to be applied. An understanding of the ramifications of the Court's decision requires knowledge of the scope and application of the fifth amendment privilege as developed by previous Court decisions.

Even though the language of the fifth amendment is specifically limited to criminal cases,[10] the Supreme Court has held that the privilege must "have a broad construction in favor of the right which it is intended to secure."[11] The ability to invoke the privilege is not dependent upon the nature of the proceedings in which testimony is sought[12] but has been extended "wherever the answer might tend to subject to criminal responsibility him who gives it."[13] The central standards which have been developed to determine when the privilege against self-incrimination is applicable are the requirements that there be a "substantial probability of incrimination"[14] and that the risks of incrimination be "real and appreciable."[15] However, it is important to emphasize the distinction between the application of these standards in the criminal, testimonial setting and their application in the regulatory area.

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[7]*Id.* at 1042, 458 P.2d at 468, 80 Cal. Rptr. at 556.

[8]*Id.* at 1047, 458 P.2d at 471, 80 Cal. Rptr. at 559. The California Supreme Court determined that § 20002 was a violation of the privilege against self-incrimination, but instead of nullifying the statute, it placed a use-restriction on evidence obtained in compliance with the statute. *Id.* at 1050, 458 P.2d at 743, 80 Cal. Rptr. at 561. The effect of the use-restriction is to prohibit the introduction of evidence obtained directly or indirectly as a result of compliance with the statute and consequently to correct the constitutional infirmity of the statute. However, since Byers could not anticipate that the statute would be made valid by the use-restriction, the California Supreme Court chose not to punish Byers for his failure to comply with section 20002. *Id.* at 1057, 458 P.2d at 477, 80 Cal. Rptr. at 565.

[9]402 U.S. at 431.

[10]U.S. CONST. amend. V. *See* note 1 *supra*.

[11]Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

[12]McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).

[13]*Id.*

[14]Marchetti v. United States, 390 U.S. 39, 61 (1968).

[15]*Id.* at 48.

In the criminal setting, the privilege applies to any answer which might provide "a link in the chain of evidence."[16] The privilege is a personal one,[17] and the determination of whether the privilege applies to a particular question is largely the responsibility of the individual respondent. The privilege is confined to "instances where the individual has reasonable cause to apprehend danger from a direct answer."[18] However, since the factors which motivate a party to invoke the privilege are usually known only to that party, the participation of the trial court in determining what is "reasonable" is very limited, and the privilege can be invoked any time its application is remotely plausible.[19] As a prerequisite to requiring an individual to answer a question which the trial court does not consider incriminating, it is necessary that it be "perfectly clear from a careful consideration of all the circumstances in the case . . . that the answers cannot possibly have . . . a tendency to incriminate."[20]

These liberal standards are necessary since if the defendant were required to prove the risk of incrimination before his refusal to answer would be permitted, *proof of that risk* might be sufficient to incriminate him. The difficulty is that the level of proof necessary to establish clearly the application of the privilege also might be sufficient to establish guilt. Therefore, the defendant must be able to invoke the privilege without completely establishing its application,[21] and the judiciary must intervene only where the application of the privilege would be patently frivolous.[22]

In contrast to the well developed standards in the criminal, testimonial setting,[23] the standards which have been applied to self-disclosed information in the regulatory area are of recent development. In *Albertson v. Subversive Activities Control Board*,[24] the petitioners had been ordered by the Subversive Activities Control Board to register as

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[16]Blau v. United States, 340 U.S. 159, 161 (1950).

[17]Rogers v. United States, 340 U.S. 367, 371 (1951), *citing* Hale v. Henkel, 201 U.S. 43, 69-70 (1906).

[18]Hoffman v. United States, 341 U.S. 479, 486 (1951), *citing* Mason v. United States, 244 U.S. 362, 365 (1917).

[19]*See* L. MAYER, SHALL WE AMEND THE FIFTH AMENDMENT? 233-41 (1959).

[20]Counselman v. Hitchcock, 142 U.S. 547, 580 (1892), *citing* Temple v. Commonwealth, 75 Va. 892, 898 (1881).

[21]United States v. Kahriger, 345 U.S. 22, 34 (1953) (Jackson, J., concurring).

[22]L. MAYER, *supra* note 19.

[23]Brown v. Walker, 161 U.S. 591 (1896); Counselman v. Hitchcock, 142 U.S. 547 (1892).

[24]382 U.S. 70 (1965).

members of the Communist Party. They had refused to do so, invoking the privilege against self-incrimination. The Supreme Court affirmed the right of the petitioners to invoke the privilege, declaring that the required registration was potentially incriminating since it could be used as evidence in a criminal prosecution.[25]

Albertson developed three general criteria to determine whether a "substantial risk of incrimination" existed: (1) whether the statute was directed at a highly select group, (2) whether the group against whom the statute was directed were inherently suspect of criminal activity, and (3) whether the area towards which the statute was directed was permeated with criminal statutes.[26] These criteria were applied in *Marchetti v. United States*[27] and *Grosso v. United States*,[28] both of which dealt with regulations relating to gambling, and in *Haynes v. United States*,[29] which concerned the registration of firearms.[30] Although the latter cases dealt with different regulatory schemes, by applying the *Albertson* criteria the Court was able to decide with relative certainty that "real risks" of incrimination existed not only for the particular petitioners involved in the case but also for the entire class of persons of whom they were typical. These decisions seem correct, since in each case the close relationship between the information required and the criminal activity involved would result in substantial risks of incrimination for any individual who supplied the required information.

It is important to emphasize that while the Court developed and applied the new standards for the regulatory area, it used them only as a measure of the individual standards.[31] The Court did not decide if the individual standards discussed previously should be abandoned in the regulatory area, primarily because such a decision was not necessary. When the Court found that the class of persons that the statute was directed against was faced with substantial hazards of incrimination, it naturally followed that the Court would find that the petitioners, as individual members of that class, would face similar hazards. The deter-

[25] *Id.* at 80. "Such an admission of membership may be used to prosecute the registrant under the membership clause of the Smith Act . . . ." *Id.* at 77.

[26] *Id.* at 79.

[27] 390 U.S. 39 (1968).

[28] 390 U.S. 62 (1968).

[29] 390 U.S. 85 (1968).

[30] *See also* Leary v. United States, 395 U.S. 6 (1969) (narcotics). *But cf.* Minor v. United States, 396 U.S. 87 (1969) (narcotics).

[31] 402 U.S. at 469 (Brennan, J., dissenting).

mination that by the *Albertson* standards the privilege was applicable to the entire class precluded the necessity of any determination of the availability of the privilege to the particular individuals involved, since "reasonable cause" to believe there was a risk of incrimination would exist wherever the *Albertson* standards were met. However, although it is true that substantial hazards as to a class of persons would result in substantial hazards to the petitioner who is a member of that class, a determination of substantial hazards according to the personal standards ("reasonable cause") does not necessarily indicate substantial hazards for the entire class. For example, in *California v. Byers* the petitioner was faced with substantial hazards according to the individual standards,[32] but the class that the statute was directed against was not faced with similar hazards according to the regulatory standards developed in *Albertson*. The alternatives available to the court were to apply the individual standards and effectively nullify a valid statute[33] (even without proof that other drivers faced hazards similar to the petitioner) or to apply the *Albertson* standards and deny the petitioner's claim of the privilege.[34] Given these alternatives, it was necessary for the Court

[32]*Id.* at 438-39 (Harlan, J., concurring); Mansfield, *supra* note 2, at 121-24.

[33]As an alternative to complete nullification of the hit-and-run statute, the California Supreme Court imposed a use-restriction on information obtained in compliance with the statute. "If the disclosures compelled by sec. 20002 of the Vehicle Code and the fruits of such disclosures may not be used in a criminal prosecution relating to the accident, the requirements of the privilege against self-incrimination are met." Byers v. Justice Court for the Ukiah Judicial District, 71 Cal. 2d 1039, 1050, 458 P.2d 465, 473, 80 Cal. Rtpr. 553, 561 (1969).

However attractive a use-restriction may be in theory, it is the opinion of the writer that the practical effect of the use-restriction would be to preclude many criminal prosecutions for traffic offenses and require the ultimate abandonment of the hit-and-run statute. The only appropriate application of a use-restriction is to instances in which the information to be restricted is not intricately related to a larger statutory system; otherwise the effect of the use-restriction is to inhibit the operation of the entire regulatory scheme. Marchetti v. United States, 390 U.S. 39, 58-59 (1968).

For example, in *Byers* the use-restriction would prohibit the use not only of information obtained directly by compliance with the statute (the name, address, and concommitant identification as a driver involved in an accident) but also any evidence "tainted" by the original compliance. Since as a practical matter it would be impossible to determine if evidence had been obtained by compliance with the statute or by independent police investigation, almost any person who complied with the hit-and-run statute would be immune from criminal prosecution. Considering its effect upon California's entire system of automobile regulation, the imposition of a use-restriction was not a viable alternative to the disposition of the *Byers* case.

[34]The development and application of the individual standards and the *Albertson* standards in previous cases required a decision within the context of these standards, and the Court was not free to create different standards for a *Byers*-type situation. In theory, of course, alternatives to the two established standards were available.

to determine explicitly or implicitly that the individual standards did not apply in this regulatory setting.

In the Supreme Court decision, a plurality of the Court determined that according to the *Albertson* standards, the disclosures in *Byers* (the name and address of the driver) "simply do not entail the kind of substantial risk of self-incrimination involved in *Marchetti, Grosso,* and *Haynes*."[35] The Court stated that since the California statute was directed at the public-at-large and since most accidents did not result in criminal prosecutions, it could not consider drivers involved in accidents either a select group or highly suspect of criminal activity.[36]

Moreover, that the plurality chose to ignore completely the individual standards which had been developed in the criminal setting requires the obvious conclusion that the personal standards were considered inapplicable in a regulatory setting. The failure to consider the individual standards largely explains the difference in opinion between the plurality and the dissents, since the conclusions of each depended primarily upon the frame of reference within which the privilege was applied. The plurality dealt with the broad relationship between the privilege and the hit-and-run statute, while both dissents focused upon the risks of self-incrimination faced by the respondent.[37] The dissenters recognized the existence of the *Albertson* standards but used them only as a means of determining the application of the personal standards.

However, regardless of whether the *Albertson* standards or the individual standards had prevailed, the effect of a decision to accord the privilege would have been the same. Because of the limitations within which the case had to be decided,[38] the plurality and the dissents could only decide whether the statute did or did not violate the privilege against self-incrimination as to the entire class of persons toward whom it was directed. While the dissents purported to be concerned only with deter-

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[35]402 U.S. at 431.

[36]*Id.*

[37]While there were separate dissenting opinions by Justice Black and Justice Brennan, Justice Brennan explicitly recognized his use of the personal standards:

> Contrary to the plurality opinion, I do not believe that we are called upon to determine the broad and abstract question "whether the constitutional privilege against compulsory self-incrimination is infringed by California's so-called 'hit and run' statute . . . ." [Quoting the plurality opinion.] I believe that we are called upon to decide the question presented by this case, which is whether California may punish [the] respondent, over his claim of the privilege against self-incrimination . . . .

Id. at 468.

[38]*See* note 34 and accompanying text *supra.*

mining the respondent's personal risk of incrimination and consequently applied the individual standards, their decision would have reached far beyond that determination. The effect of their opinion would have been to nullify the entire statute.[39]

Consequently, the real issue faced by the Court was not whether to focus on the broad class affected by the statute (all drivers involved in accidents) or on the individual respondent, because any decision would have affected the entire class. The real question was which standard would be used to determine if the statute should be held to violate the privilege of nearly all drivers who were involved in accidents: the personal risks faced by the respondent, or the *Albertson* standards. In view of the fact that the result of the Court's decision would have been the application of the privilege to the *entire class* of persons affected by the statute, *regardless of which standard was applied*, the decision of the plurality favoring the class standard was the only satisfactory resolution of the conflict.

The personal standards were developed as a result of the particular difficulties caused by requiring a witness to prove the risk of incrimination that he faced. They should not be applied in settings other than the type that necessitated them,[40] since the necessity of allowing the privilege to be asserted whenever a person has "reasonable cause" to believe that he will be incriminated minimizes the role of the judiciary in the determination of when the privilege applies and results in abuse of the privilege.[41] The personal standards are not necessary in the regulatory setting, since

[39]In *Byers*, the ability of California to punish drivers who failed to comply with the hit-and-run statute would have been severely restricted by the application of the individual standards. Almost all drivers who failed to stop at the scene of an accident could successfully claim that they had reasonable cause to believe a risk of self-incrimination existed, and consequently they could not be punished under the hit-and-run statute. Without enforcement the statute would be worthless.

[40]In the testimonial setting there is no effective way for the trial court to determine the incriminatory nature of an answer other than requiring the respondent to explain the reasons for his refusal. Since the circumstances under which an answer is given and the relationship of that answer to the respondent are unique, the consequence has been to allow the privilege to be invoked whenever "reasonable cause" exists. In situations in which the court can determine the incriminatory nature of a response without explanation from the respondent, the standard of reasonable cause is inappropriate and should not be applied. In that situation, it *is* possible for the court to make an independent assessment of the risk of incrimination.

[41]In the criminal setting, the effect of the individual standards is to deny testimony only to a particular court, and countervailing circumstances require continued toleration of the abuse which results. In the regulatory setting, the effect of applying such standards may be the nullification of an entire statute, and the importance of that statute must be continually recognized. California v. Byers, 402 U.S. 424, 448 (1971) (Harlan, J., concurring).

there is an alternative for determining when the privilege applies which avoids the defects of the personal standards. The risk of incrimination resulting from compliance with a statute will remain relatively constant, since the information to be elicited is limited and specifically defined by statute and a judicial determination of the general incriminatory nature of a statute is possible. Unfortunately, although the information required and the setting in which such information is given will remain constant enough to allow a determination of the risk to the average individual, it is not possible for such a determination to anticipate the *particular characteristics* of an individual which might make compliance with the statute incriminating. It is both theoretically and practically possible that because of his personal characteristics *someone* will be incriminated by *any* required compliance. The decision as to whether the risks faced by those few persons necessitates the nullification of the statute will depend upon such factors as the nature and detail of the information required, the access of prosecuting authorities to the information, and the importance of the regulatory scheme as well as the *Albertson* standards.

Applying the individual standards in a regulatory setting such as *Byers* could also involve the use of the personal risks of the defendant as a measure of the risks faced by the entire class he represents, when in fact there might be little relation between the two. That is, there could be no guarantee that other members of the class faced the same risks of incrimination as did the involved party. The result could be nullification of an important regulatory measure without sufficient justification. Consequently, in a *Byers*-type setting it is necessary to ignore the personal standards and to apply the class standards exclusively.

The *Albertson* standards (the select group, highly suspect of criminal activity, in an area permeated by criminal statutes) provide a reasonable measure of the risks of incrimination that are faced by the entire class of persons against whom a statute is directed. However, it is important that these standards do not become either absolute or the object of semantic exercises. Additional standards, such as the access which prosecuting authorities have to the required information and the detail of the information required, should be added when they will facilitate the ultimate decision of the court. By continually recognizing that the purpose behind such standards is the determination of the risk of incrimination faced by an entire class, it may be possible to sustain the legitimate purpose of regulatory schemes and still protect the essence of the privilege against self-incrimination.

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