CONSTITUTIONAL LAW—INCOME TAX—SELF-REPORTING CONFRONTS SELF-INCRIMINATION: THE FIFTH AMENDMENT IN RETREAT!—*United States v. Milder*, 329 F. Supp. 759 (D. Neb. 1971).

Defendant, while working as an accountant for the Milder Oil Company from 1964 through 1966, was supplementing his regular income by embezzling funds. Although he filed income tax returns for those years, he failed to disclose the income derived from this supplemental source and therefore was convicted of income tax evasion under section 7201 of the Internal Revenue Code.[1] On motion for a new trial, he contended that the conviction was improper since, by virtue of his fifth amendment privilege against self-incrimination, he was not required to report embezzled funds as income.[2]

Although the district court in *United States v. Milder*[3] agreed that by reporting this income defendant would be forced to incriminate himself, it denied defendant's motion for a new trial on the ground that the fifth amendment privilege was not an available defense in a prosecution for tax evasion.[4] It found that this right was in direct conflict with the congressional power to tax income under the sixteenth amendment, and, since the sixteenth amendment was " 'the last expression of the will of the lawmaker,' " it prevailed over the fifth amendment.[5]

The leading Supreme Court case dealing with the relationship between the fifth amendment and the income tax reporting statute is *United States v. Sullivan*,[6] decided in 1927. There, defendant, a bootlegger in illegal liquor, was convicted of willfully refusing to file an income tax return.[7] As a defense he pleaded the fifth amendment, contending that by filing a return he would be forced to disclose his illegal occupation, thereby incriminating himself.[8] The Supreme Court, however, rejected this claim and held that the fifth amendment did not entitle a person to flatly refuse to answer *all* of the questions on the return. It was noted that if the defendant did not choose to answer

1 INT. REV. CODE OF 1954, § 7201:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

2 United States v. Milder, 329 F. Supp. 759, 760 (D. Neb. 1971).

3 329 F. Supp. 759 (D. Neb. 1971).

4 *Id.* at 763-64.

5 *Id.* (quoting from Schick v. United States, 195 U.S. 65, 68-69 (1904)).

6 274 U.S. 259 (1927).

7 *Id.* at 262.

8 Sullivan v. United States, 15 F.2d 809, 810 (4th Cir. 1926), *rev'd*, 274 U.S. 259 (1927).

specific incriminatory questions he should have filed an incomplete return and then raised his fifth amendment privilege.[9] Reserved for another time was the question of "what, if anything, [defendant] might have withheld."[10]

The scope of the fifth amendment privilege as it relates to self-reporting statutes was further restricted by the Supreme Court in 1953 and 1955, when it decided *United States v. Kahriger*[11] and *Lewis v. United States*.[12] These cases upheld the constitutionality of the federal wagering statutes as against the allegation that they were violative of the fifth amendment. It was these cases which, prior to 1968, discouraged attacks on the federal self-reporting statutes.[13] However, in that year the Supreme Court decided the triad of cases consisting of *Marchetti v. United States*,[14] *Grosso v. United States*,[15] and *Haynes v. United States*[16] which overruled *Kahriger* and *Lewis*, and invited a frontal attack on all similar self-reporting statutes. In *Milder*, the defendant initiated such an attack, and, though *Marchetti*, *Grosso*, and *Haynes* could have been easily distinguished on their facts, the district court declined to do so, but, instead, found that Milder had been "prosecuted for refusing to relinquish his Fifth Amendment right not to be compelled to be a witness against himself."[17]

Marchetti and *Grosso* involved statutes imposing occupational[18] and excise[19] taxes on wagering. Those who were subject to the occupational tax were required to register with the Internal Revenue Service[20] and to conspicuously post stamps, which were distributed upon paying the tax, in their places of business.[21] Those subject to the excise tax on wagering were required to submit monthly, to the Internal Revenue Service, a disclosure form expressly designed for the sole use of those engaged in the wagering business.[22] The defendants in *Marchetti* and *Grosso* were convicted of failing to pay these taxes and also of failing

9 274 U.S. at 263.

10 *Id.*

11 345 U.S. 22 (1953).

12 348 U.S. 419 (1955).

13 *See* Mackey v. United States, 401 U.S. 667, 671-72 (1971).

14 390 U.S. 39 (1968).

15 390 U.S. 62 (1968).

16 390 U.S. 85 (1968).

17 329 F. Supp. at 763.

18 INT. REV. CODE OF 1954, § 4411.

19 *Id.* § 4401.

20 *Id.* § 4412.

21 *Id.* ch. 69, § 6806(c), 68A Stat. 831, *as amended*, Revenue Act of 1968, 26 U.S.C. § 6806 (1970).

22 *Grosso*, 390 U.S. at 65.

to register as required by the statutes. Granting their petitions for review, the United States Supreme Court reversed defendants' convictions, reasoning that since the statutes required defendants to give information which would make them liable to prosecution under state and federal gambling statutes, the fifth amendment was a complete defense to such federal prosecutions.[23]

Likewise, in *Haynes*, decided the same day, the Court reversed a conviction for possession of an unregistered firearm.[24] It found that, under the provisions of the National Firearms Act,[25] the possession of an unregistered firearm and the failure to register such a firearm were, in essence, the same offense, and therefore defendant would be compelled to incriminate himself if he were forced to register the firearm.[26]

The Court in deciding *Marchetti, Grosso* and *Haynes* adopted the rationale of its decision in *Albertson v. Subversive Activities Control Board.*[27] Throughout the opinions in these three cases the majority emphasized that:

> The questions propounded . . . like those at issue in *Albertson* . . . are "directed at a highly selective group inherently suspect of criminal activities"; they concern, not "an essentially non-criminal and regulatory area of inquiry," but "an area permeated with criminal statutes."[28]

It was this singling out of a specific group "inherently suspect of criminal activities" and the fact that these returns could be used by federal and state personnel in investigatory and prosecutory endeavors which served as the determinative factors in the decisions.

The Court in *Marchetti* and *Grosso* stressed that the statutes were aimed almost exclusively at illegal gambling and that legal wagering was essentially excluded from the ambit of the Act.[29] The result of compelling petitioners to file a return would be to subject them to possible state or federal prosecution for their disclosed wagering activities. Likewise, in *Haynes*, the Court analyzed the National Firearms Act and, after noting those persons and types of firearms exempt from the

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23 *Id.* at 64-69; *Marchetti*, 390 U.S. at 60-61.

24 390 U.S. at 101.

25 INT. REV. CODE OF 1954, ch. 53, §§ 5801-5862, 68A Stat. 721-29, *as amended*, Revenue Act of 1968, 26 U.S.C. §§ 5801-5872 (1970).

26 390 U.S. at 95-100.

27 382 U.S. 70 (1965).

28 *Haynes*, 390 U.S. at 98-99 (quoting from Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965)); *Marchetti*, 390 U.S. at 47, 57; *Grosso*, 390 U.S. at 64-69.

29 *Marchetti*, 390 U.S. at 42; *Grosso*, 390 U.S. at 65, 68.

statute's provisions, concluded that the Act was "apparently intended to guarantee that only weapons used principally by persons engaged in unlawful activities would be subjected to taxation."[30]

In this regard *Milder* is distinguishable from these cases since the income tax statutes do not deal with areas "permeated with criminal statutes" and with groups "inherently suspect of criminal activities." Thus, what was said in *Marchetti* to distinguish that case from *Sullivan* could have been adopted in *Milder* to distinguish it from the *Marchetti* triad:

> Unlike the income tax return in question in *United States v. Sullivan*, . . . every portion of these requirements had the direct and unmistakable consequence of incriminating petitioner . . . .[31]

These distinguishing characteristics were utilized in the recent Supreme Court case of *California v. Byers*,[32] wherein the Court upheld the constitutionality of a California statute requiring a motorist to stop after he is involved in an accident and disclose his name and address to the other driver. The statute was upheld on the basis that since the statute was not aimed at a " 'highly selective group inherently suspect of criminal activities' "[33] it did

> not entail the kind of substantial risk of self-incrimination involved in *Marchetti, Grosso,* and *Haynes.* Furthermore, the statutory purpose is noncriminal and self-reporting is indispensable to its fulfillment.[34]

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30 390 U.S. at 87 (footnote omitted). In 1969, relying on *Marchetti, Grosso,* and *Haynes,* the Court in Leary v. United States, 395 U.S. 6 (1969) held that the transfer tax provisions of the Marihuana Tax Act violated the privilege against self-incrimination, since compliance with them "would have required petitioner unmistakably to identify himself as a member of this 'selective' and 'suspect group . . . ." *Id.* at 18.

31 390 U.S. at 48-49. This same rationale had already been used to distinguish *Sullivan* in Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965):

> 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 noncriminal 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.

Id. at 79. *See* Note, 13 VILL. L. REV. 650, 657 (1968).

32 402 U.S. 424 (1971); *see* Mackey v. United States, 401 U.S. 667, 709-10 (1971) (Brennan, J., concurring); United States v. Fricano, 416 F.2d 434, 435 (2d Cir. 1969).

33 402 U.S. at 430.

34 *Id.* at 431. Judge McCree, dissenting in part in United States v. Whitehead, 424 F.2d 446, 453 (6th Cir. 1970), criticized the use of these characteristics to distinguish *Marchetti, Grosso,* and *Haynes,* as follows:

> [T]he character of the group subject to a disclosure requirement certainly is not by itself determinative of the substantiality of the risk of self-incrimination atten-

Notwithstanding the fact that *Milder* could have been distinguished on these grounds, the district court was correct in not doing so. The reason that *Marchetti, Grosso,* and *Haynes* emphasized areas "permeated with criminal statutes" and groups "inherently suspect of criminal activities" was not because they constituted a standard to be met in determining the applicability of the fifth amendment. As Justice Brennan aptly pointed out in his dissenting opinion in *Byers,* the emphasis was placed on these factors to show that petitioners were confronted with substantial hazards of self-incrimination.[35] Therefore, these conditions were not imposed criteria or limitations but were facts which were being used in the application of the established fifth amendment standard. It was in the context of applying this standard that the Court, in the *Marchetti* triad, examined the types of areas and persons at which the statutes were aimed and thereafter concluded that petitioners' fifth amendment rights were being infringed upon since a real and substantial danger of self-incrimination did exist.[36] As the Court stated:

> The central standard for the privilege's application has been whether the claimant is confronted by substantial and "real," and not merely trifling or imaginary, hazards of incrimination.[37]

Referring to this standard and the position of the petitioners, the Court stated:

> In these circumstances, it would be impossible to say that the hazards of incrimination which stem from the obligation to pay the excise tax and to file [the required] form . . . are "imaginary and unsubstantial." . . . The criminal penalties for wagering with which petitioner is threatened are scarcely "remote possibilities out of the ordinary course of law," . . . yet he is obliged, on pain of criminal prosecution, to provide information which would readily incriminate him, and which he may reasonably expect

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dant on compliance with such a requirement. Even if the requirement is not directed at an inherently suspect group, the risk encountered as a consequence of compliance may still be "real and appreciable."

35 402 U.S. at 469-70 (Brennan, J., dissenting).

36 Justice Harlan, writing for the majority in United States v. United States Coin & Currency, 401 U.S. 715 (1971) interpreted *Marchetti* and *Grosso* as follows:

> Because the risk of self-incrimination was substantial, we held that a Fifth Amendment privilege could be raised as a defense to a criminal prosecution charging failure to file the required forms.

Id. at 717. *See* United States v. Whitehead, 424 F.2d 446, 452 (6th Cir. 1970) (McCree, C.J., dissenting in part); Marshall v. United States, 422 F.2d 185, 194 (5th Cir. 1970). *But see* United States v. Whitehead, *supra* at 450; United States v. Hunt, 419 F.2d 1, 3 (3d Cir. 1969), *cert. denied,* 397 U.S. 1016 (1970); United States v. Walden, 411 F.2d 1109, 1114 (4th Cir. 1969).

37 *Marchetti,* 390 U.S. at 53.

> would be provided to prosecuting authorities. These hazards of incrimination can only be characterized as "real and appreciable."[38]

Therefore, the *Milder* court properly determined that:

> [T]he mere fact that the income tax laws are directed primarily at the public at large and thus lawful activity, rather than a particularized group engaged in illegal activity, does not resolve the problem posed by the Fifth Amendment.[39]

Besides rejecting the apparent limitations of the *Marchetti* triad, the district court in *Milder* also presumably disregarded the previous application of the "real and substantial" danger criterion in situations involving self-reporting statutes, and adopted the rule that the fifth amendment protects a person from "even so much as a *tendency* to incriminate."[40] It further stated that, in the circumstances present,

> [t]here can be little doubt . . . that had defendant reported his embezzlement income, such information would have had more than a tendency to incriminate him, and supplied the government with a link in a chain of evidence which could be used to prosecute him for embezzlement.[41]

The standard under the fifth amendment has been variously described as a "tendency to incriminate"[42] and a "reasonable cause to apprehend danger"[43] of incrimination. However, in cases involving the registration and reporting requirements of various regulatory statutes, the Supreme Court has consistently applied the "real and substantial hazards of self-incrimination" criterion.[44] Under the facts in *Milder*,

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38 *Grosso*, 390 U.S. at 66-67 (citations omitted).

39 329 F. Supp. at 763.

40 *Id.*

41 *Id.*

42 *E.g.*, Emspak v. United States, 349 U.S. 190, 201 (1955) ("may tend to be incriminatory"); McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) ("might tend to subject to criminal responsibility"); Counselman v. Hitchcock, 142 U.S. 547, 563 (1892) ("will tend to criminate him").

43 *E.g.*, Hoffman v. United States, 341 U.S. 479, 486 (1951) ("reasonable cause to apprehend danger"); Mason v. United States, 244 U.S. 362, 367 (1917) ("reasonable cause to apprehend danger"); United States v. Doto, 205 F.2d 416, 417 (2d Cir. 1953) ("reasonable cause to apprehend danger"). *See also* Brown v. Walker, 161 U.S. 591, 600 (1896) (more than a "remote and naked possibility" of danger); People v. Schultz, 380 Ill. 539, 544, 44 N.E.2d 601, 603 (1942) ("reasonable ground to apprehend danger"); Bradley v. O'Hare, 2 App. Div. 2d 436, 440, 156 N.Y.S.2d 533, 538 (1954) ("can reasonably be apprehended will lead to incrimination").

44 California v. Byers, 402 U.S. 424, 429 (1971); United States v. Freed, 401 U.S. 601, 606 (1971); Minor v. United States, 396 U.S. 87, 97-98 (1969); Leary v. United States, 395 U.S. 6, 18 (1969); Marchetti v. United States, 390 U.S. 39, 53-54 (1968); Grosso v. United States, 390 U.S. 62, 67 (1968); Haynes v. United States, 390 U.S. 85, 97 (1968).

the conclusion of compulsory self-incrimination would be the same regardless of which standard was applied.

In view of the inspection and disclosure provisions of the Treasury Regulations,[45] defendant Milder would be faced with a real and substantantial danger of incrimination if he were to report his embezzled income. These regulations provide for the inspection of any return by a United States attorney, by an attorney of the Department of Justice,[46] by the Department of the Treasury,[47] and by "any other establishment of the Federal Government."[48] These returns can be utilized in the course of, or in the preparation for, United States grand jury proceedings or any litigation in which the United States is interested in the result.[49]

A good illustration of the danger of incrimination which can arise from filing an income tax return is the case of *United States v. Tucker*,[50] decided in 1970. While conducting a "routine audit" of Tucker's income tax return, the Internal Revenue Service discovered that there existed the possibility of a violation of 18 U.S.C. § 215 (1970), which prohibits any employee of a bank insured by the Federal Deposit Insurance Corporation from accepting anything of value in return for procuring a loan for a third party. Upon discovering this, the Internal Revenue Service sent a letter containing the pertinent information to the United States Attorney General's office. Thereafter the FBI conducted an investigation which led to the criminal prosection of Tucker for the alleged violation of the statute.[51] After Tucker unsuccessfully moved to suppress the information[52] turned over by the Internal Revenue Service, he pleaded nolo contendere and received a suspended sentence plus a fine.[53] In this case the income tax return was not only a link in the chain of evidence

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45 Treas. Reg. §§ 301.6103(a)-1 to 301.6108-1 (1961).

46 *Id.* § 301.6103(a)-1(g) (1961).

47 *Id.* § 301.6103(a)-1(e) (1961).

48 *Id.* § 301.6103(a)-1(f) (1961).

49 *Id.* § 301.6103(a)-1(h) (1961). In Stillman v. United States, 177 F.2d 607 (9th Cir. 1949), the court of appeals commented:

> [I]n many cases income tax returns have been used as evidence in prosecution of crimes other than those arising out of income tax violations, without any discussion by the courts regarding the constitutional privilege.

Id. at 617. *See* Smith v. United States, 305 F.2d 197, 201 (9th Cir. 1962) (Dep't of Agriculture prosecuted defendant on the basis of information derived from examination of defendant's income tax return); Gibson v. United States, 31 F.2d 19, 22 (9th Cir. 1929) (prosecution for violation of National Prohibition Act utilized defendant's income tax return).

50 316 F. Supp. 822 (D. Conn. 1970).

51 *Id.* at 823.

52 *Id.* at 827.

53 Telephone conversation with Mr. F. MacBuckley, Assistant United States Attorney for the District of Connecticut, March 13, 1972.

but it was the catalyst which initiated the investigation and subsequent prosecution.

By recognizing that the effect of filing a completed income tax return would be to expose defendant to the danger of self-incrimination and by taking cognizance of the government's need to obtain tax revenues to support itself, the *Milder* court placed itself in the thicket between these two paramount and competing interests. It resolved this dilemma by sacrificing the interest of the individual in favor of the government. First, the court noted *Marchetti, Grosso* and *Haynes* involved taxing statutes authorized under article I, section 8 of the Constitution and that in the present case the statutes were enacted under the sixteenth amendment.[54] Then it found that

> there is a direct conflict between the Fifth and Sixteenth Amendments, for if Congress is to effectively collect taxes on income it must be able to require disclosure of the income and its sources, and if the source happens to be illegal its disclosure will undoubtedly have an incriminating effect upon the taxpayer.[55]

Utilizing the principle that when a constitutional amendment is inconsistent with a provision of the Constitution or with an earlier amendment the one later in time will prevail, the conflict was resolved in favor of the sixteenth amendment.[56]

The repeal or amendment, by implication, of a constitutional provision is not favored by the courts and is infrequently utilized.[57] The rule usually applied is the one mentioned in *Milder*: " 'When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent.' "[58] Self-reporting of income is a necessity if the government is

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54 329 F. Supp. at 763-64. U.S. CONST. art. I, § 8 provides in part:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States . . . .

U.S. CONST. amend. XVI provides:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

55 329 F. Supp. at 764.

56 *Id.* The applicable rule is stated in Sutherland as follows:

> The presumption against implied repeals is overcome . . . by a showing that the two acts are irreconcilable, clearly repugnant as to vital matters to which they relate, and so inconsistent that the two cannot have concurrent operation.

1 J. SUTHERLAND, STATUTORY CONSTRUCTION § 2014, at 470 (3d ed. 1943, Supp. 1972).

57 United States v. Welden, 377 U.S. 95, 102-03 n.12 (1964); *see* J. SUTHERLAND, *supra* at §§ 2014, 2016, 2020.

58 329 F. Supp. 764 (quoting from United States v. Burr, 25 F. Cas. 38, 39-40 (No.

to conduct an efficient income tax system.[59] At the same time, the privilege against self-incrimination has been repeatedly declared to be among the foremost freedoms of our constitutional system.[60] Therefore, the crux of the controversy in this case, as in other contemporary cases attacking various self-reporting statutes necessary to effectuate a valid governmental purpose, is whether the interests of the government and the individual *can* both be accommodated.

The determination that reconciliation between the fifth and sixteenth amendments is impossible requires an inquiry into the available alternatives and the difficulties coupled with each. The *Milder* court noted that "it [was] influenced by the practical difficulties which might ensue from a contrary holding," including the possibility that the "federal income tax system would ultimately fall in a shambles, with catastrophic effects upon the whole nation."[61] The facts underlying this acknowledgment will serve as the evaluative criteria in judging the feasibility of any proposed solution. These facts are that the nation cannot maintain itself without an income tax system and that this system cannot be adequately sustained without self-reporting. Therefore, the alternatives are either to hold that the fifth amendment is inapplicable, as was done in *Milder*, or to find a method by which both the efficient gathering of revenue and the protection against compulsory self-incrimination can be maintained. This clash between the fifth amendment and the self-reporting statutes was crystalized in the *Byers* decision which was decided immediately prior to *Milder* and has significant impact on this issue.

Although the factual pattern and reporting statute involved in *Byers* differs from that in *Milder*, *Byers* is of special interest and importance since it sets forth, in the various opinions of the Justices, the different approaches to the self-incrimination/self-reporting dilemma. Therefore, a discussion of the opinions in *Byers* will be undertaken in order to elucidate the general approaches to the problem and examine their applicability to the income tax statutes.

In *Byers*, the plurality essentially took the position that the hit-and-run self-reporting statute was not aimed at a group "inherently suspect

14,692e) (C.C.D. Va. 1807); *see, e.g.*, Golconda Lead Mines v. Neill, 82 Idaho 96, 350 P.2d 221 (1960); *cf.* Brown v. Walker, 161 U.S. 591, 596 (1896).

59 *See, e.g.*, 8A J. MERTENS, JR., FEDERAL INCOME TAXATION § 47.01 (rev. 1971).

60 *In re* Gault, 387 U.S. 1, 50 (1967) (a "great office in mankind's battle for freedom"); Miranda v. Arizona, 384 U.S. 436, 460 (1966) (" 'the hallmark of our democracy' "); Malloy v. Hogan, 378 U.S. 1, 7 (1964) (an "essential mainstay" of American system of criminal prosecution).

61 329 F. Supp. at 764.

of criminal activities" and therefore did not present a substantial risk of self-incrimination.[62] As was demonstrated by the above discussion, and by the concurring and dissenting opinions, this is fallacious reasoning.[63] The plurality based its conclusion that no significant danger of incrimination was present on the fact that "most accidents occur without creating criminal liability."[64] However, as Justice Harlan pointed out in his concurring opinion:

> [I]f the privilege is truly a personal one, and the central standard is the presence of "real" as opposed to "imaginary" risks of self-incrimination, such general empirical differences can only function as evidentiary indicia in assessing the particular individual's claim, in all the circumstances of his particular case, that if he were to comply with the reporting requirement he would run a genuine risk of incrimination.[65]

Although Justice Harlan conceded that a "real" danger of incrimination was present, he solved the problem by adopting a solution similar to that adopted in *Milder*; he determined that such a risk did not warrant the extension of the fifth amendment's privilege to essentially regulatory schemes.[66] Therefore, he concurred in the plurality decision that the statute should be upheld as constitutional without the imposition of any restriction on the use of the compelled information.[67]

In contrast to the plurality and concurring positions, the two dissenting opinions took the view that the statute could not escape the fifth amendment's proscription without providing the individual with adequate protection after he has made the compulsory disclosures. The major difference between the dissenting opinions of Justice Black and Justice Brennan was that the former adhered to the position of the California Supreme Court which imposed a restriction on the use of the compelled information;[68] whereas, Justice Brennan felt that the only thing which could supplant the fifth amendment privilege was

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62 402 U.S. at 431. The plurality opinion was written by Chief Justice Burger who was joined by Justices Stewart, White and Blackmun.

63 *Id.* at 438-39 (Harlan, J., concurring); *id.* at 460-61 (Black, J., dissenting); *id.* at 469-70 (Brennan, J., dissenting).

64 *Id.* at 431.

65 *Id.* at 442; Rogers v. United States, 340 U.S. 367 (1951), wherein the Court stated:

> [T]he decisions of this Court are explicit in holding that the privilege against self-incrimination "is solely for the benefit of the witness," and "is purely a personal privilege of the witness."

Id. at 371 (footnotes omitted).

66 402 U.S. at 438-39.

67 *Id.* at 458.

68 *Id.* at 463-64.

transactional immunity.[69] Specifically, Justice Brennan maintained that a person cannot be compelled to report his involvement in an auto accident unless he is "immune from prosecution under state law for traffic offenses arising out of the conduct involved in the accident."[70]

The positions adopted in the *Byers* case clearly illustrate the difficulty involved in seeking a solution to the self-incrimination/self-reporting conflict. In order to evaluate the various alternatives as they relate to the income tax statutes, it is essential to recognize the problem as a three-dimensional one: first, the individual's interest in being free from compulsory self-incrimination; second, the state and federal governments' interest in being able to adequately enforce their criminal laws; and third, the government's interest in being able to operate an efficient, profitable, and equitable revenue-gathering system. Since all of these are of considerable importance, the goal in resolving the conflict among them should be to give each the optimum possible recognition, while ensuring the adequate functioning of the others. As can readily be seen, each one of the positions espoused in *Byers* has inherent weaknesses which, when applied to the income tax reporting requirement, become even more pronounced. If the rationale of the plurality opinion, that the California statute did not pose a "real and substantial" danger of incrimination, were applied to the income tax statutes, its effect would be the same as in *Byers*, namely, to deny reality and to abrogate the personal status of the fifth amendment privilege. To apply transactional immunity to income tax returns, as proposed by Justice Brennan, would have the effect of tolerating crime. Although a state might be able to endure the abdication of its criminal sanctions relating to violators of traffic laws who are involved in accidents, the government could never endure such a waiver when it applies to a major portion of all criminals.

Equally objectionable is the conclusion reached by Justice Harlan that the fifth amendment should not be extended to essentially regulatory areas which require self-reporting; it has the weakness of upholding two interests while completely sacrificing the third. The result which

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[69] Justice Brennan, concurring in Mackey v. United States, 401 U.S. 667, 710 (1971), described the grant of immunity necessary to supplant the fifth amendment privilege. In discussing the government's power to require reports in collecting excise taxes, he stated:

> And if the information has been compelled over a claim of privilege, application of those cases requires that the individual be protected against the use of that information in state prosecutions under the statutes making criminal the taxed activity, and to complete immunity from prosecution under federal statutes of like kind.

Id. at 710.

[70] 402 U.S. at 478.

comes closest to a feasible solution is the use restriction proposed by Justice Black. However, this compromise proposal, as pointed out by Justice Harlan, seriously impairs the enforcement of criminal laws. This result is caused by the "presumption that evidence used in a prosecution after the individual discloses his relationship to the regulated transaction would not have been available" in the absence of the disclosure.[71] Because this presumption necessitates that the government prove that its evidence was independently obtained, Justice Harlan correctly observed that it would "render doubtful the State's ability to prosecute in a large class of cases."[72] This impairment of the government's ability to prosecute would affect an even larger class of cases if applied to income tax statutes.

The weakness in adopting one of the *Byers* positions is that each Justice approached the problem from the traditional concepts developed under the fifth amendment. The fact that, due to governmental needs, the individual cannot be given absolute protection from being forced to disclose incriminating information is no reason to deny any protection that can be afforded. Nor is the fact that absolute protection has been strived for in the past a reason for inflexible adherence to this policy in situations where such protection is impractical. The objective should be to afford each interest as much recognition as possible, consistent with the practical needs of the others.

Following this accommodative approach, it appears that the best solution to the income tax controversy would be to prohibit the Internal Revenue Service from disclosing the returns, or the information contained therein, to any other department of the federal government or to any state agency. If such a prohibition were adopted, and criminal penalties were imposed on persons divulging the information on these returns, it would protect against wholesale disclosure of these compelled statements, while allowing the government to accomplish both its revenue-raising purpose and the unimpaired enforcement of its criminal sanctions. Although this proposal does not provide complete fifth amendment protection, it is better than either totally denying it or impairing the effective and necessary processes of government.[73]

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71 *Id.* at 443.

72 *Id.*

73 In essence, this is the approach the Supreme Court took with regard to the reporting requirements of the National Firearms Act. In *Haynes*, the Court held that the fifth amendment privilege prohibited the government from prosecuting a person for either failing to register a firearm under the Act or possessing an illegal firearm. Thereafter, the

Act was amended by Congress, and the Court, in United States v. Freed, 401 U.S. 601 (1971), held that the amended Act did not violate the fifth amendment privilege since,

(1) its provisions prohibited the direct or indirect use of any of the required information in a criminal prosecution; and

(2) "*no information filed* is as a matter of practice disclosed to any law enforcement authority . . . ." *Id.* at 604.

By taking this course, the Court was able to give appropriate recognition to the individual's right to be protected against compulsory self-incrimination, the government's interest in taxing firearms and the government's interest in the proper enforcement of its criminal sanctions. As the *Freed* Court pointed out, this solution does "not reach the question of 'use immunity' as opposed to 'transactional immunity,'" but creates a scheme in which "the hazards of self-incrimination are not real." *Id.* at 606 n.11.

EDITORIAL NOTE

While this Note was being published, the United States Court of Appeals for the Eighth Circuit affirmed the district court's decision. United States v. Milder, No. 71-1443 (8th Cir., filed May 9, 1972). The court of appeals merely based its decision on United States v. Sullivan, 274 U.S. 259 (1927), stating:

> We reject appellant's argument that the constitutional guarantee of immunity from compulsory self-incrimination bars prosecutions such as the present one. The Fifth Amendment does not release the recipient of illegal income from his duty to file a federal income tax return, *United States v. Sullivan*, 274 U.S. 259 (1927), and it does not authorize him to falsify answers on a return submitted. *United States v. Knox*, 396 U.S. 77 (1969).