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Self-Incrimination and the Use of Income Tax Returns in Non- Tax Criminal Prosecutions

SELF-INCRIMINATION AND THE USE OF INCOME TAX RETURNS IN NON-TAX CRIMINAL PROSECUTIONS

The disclosure of income derived from illegal activities as required in income tax returns may lead to an individual's conviction in a non-tax criminal prosecution. This situation may occur in spite of the constitutional guarantee against self-incrimination which is designed to protect the individual from being compelled by the Government to divulge information that would assist in his own prosecution.[1] Until recently most courts, under various rationales, have refused to find this fifth amendment protection in income disclosure cases. Some courts have failed to reach the question of protection by saying that the disclosures are not in fact sufficiently incriminating.[2] Others facing the issue have nevertheless held that governmental needs were more important than those of the individual[3] or that the taxpayer waived his privilege against self-incrimination by complying with the income tax filing requirements.[4]

The decision of the Ninth Circuit Court of Appeals in *Garner v. United States*[5] suggests that a taxpayer can be afforded sufficient protection against self-incrimination even though he is required to disclose incriminating information. Garner was convicted of conspiring to violate federal gambling statutes.[6] To prove that he was a gambler, an essential element of the conspiracy as charged, the Government introduced into evidence the defendant's income tax returns in which he reported gambling as the major source of his income. The defendant objected to the admission of these returns on the ground that certain answers to questions in the returns would tend to incriminate him. The district court overruled the objection.[7]

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[1]U.S. CONST. amend. V provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." The fifth amendment not only protects against compulsory production of all testimonial or communicative evidence, but also extends to written material, books and records. Gilbert v. California, 388 U.S. 263, 266 (1967); Boyd v. United States, 116 U.S. 616, 633 (1886).

[2]*E.g.*, Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965); United States v. Sullivan, 274 U.S. 259 (1927).

[3]*E.g.*, California v. Byers, 402 U.S. 424 (1971); Shapiro v. United States, 335 U.S. 1 (1948); Falsone v. United States, 205 F.2d 734 (5th Cir.), *cert. denied*, 346 U.S. 864 (1953).

[4]Grimes v. United States, 379 F.2d 791 (5th Cir.), *cert. denied*, 389 U.S. 846 (1967); Stillman v. United States, 177 F.2d 607 (9th Cir. 1949); Shushan v. United States, 117 F.2d 110 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941).

[5]No. 71-1219 (9th Cir., June 5, 1972).

[6]The defendant was charged with conspiracy to violate: 18 U.S.C. § 1084 (1970), which prohibits interstate transmission of bets or wagers by a gambler, 18 U.S.C. § 1952 (1970), which prohibits use of an interstate facility to distribute proceeds of unlawful activity, and 18 U.S.C. § 224 (1970), which makes it a crime to bribe professional athletes.

[7]No. 71-1219 at 1.

In reversing Garner's conviction, the court of appeals found that admission of the returns was error because the defendant was not given adequate protection from compulsory self-incrimination. The court felt that submitting to the statutory compulsion to disclose information in an income tax return did not constitute a voluntary waiver of fifth amendment protections. Consequently, the court held that the Government must prove its case without using the defendant's income tax returns as evidence.[8] The Government was not prohibited, however, from using the returns in further tax-related prosecutions; therefore, these returns would still remain a valuable tool in the enforcement of the internal revenue laws. In light of the requirements and alternatives facing the taxpayer, insulating the disclosure from general prosecutory use, as was done in *Garner*, may both preserve the essence of the privilege and allow the Government to acquire needed information.

Everyone subject to pay income tax must file a return[9] regardless of the source of income.[10] A refusal to file is thus not a practical alternative for a person wishing to conceal the source of income derived from illegal gambling activities. However, once a gambler is required to file, the protection from self-incrimination may be lost entirely.

A doctrine espoused by the Supreme Court's decision in *Shapiro v. United States*[11] exemplifies the extent to which the privilege may be abrogated. The "required records" doctrine[12] of *Shapiro* provides that a person may not claim the protection of the privilege against self-incrimination as to records which he is required by law to preserve.[13] He

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[8]The requirement that the Government must prove its case without the help of the accused is a fundamental belief of our criminal justice system. Address by Paul P. Lipton at the Judicial Conference for the Sixth Circuit, May 24, 1968, in 45 F.R.D. 293, 323 (1968).

[9]Section 6011 of the Internal Revenue Code of 1954 requires the making of a return, and section 7203 makes it a crime to fail to file any return. The Supreme Court has sustained this filing requirement even where the reporting of illegal gains tends to incriminate the taxpayer. United States v. Sullivan, 274 U.S. 259 (1927).

[10]This requirement has been upheld in a variety of illegal gain situations. *See, e.g.*, United States v. Sullivan, 274 U.S. 259 (1927) (illicit traffic in liquor); Chadick v. United States, 77 F.2d 961 (5th Cir.), *cert. denied*, 296 U.S. 609 (1935) (graft); Humphreys v. Commissioner, 42 B.T.A. 857 (1940), *aff'd*, 125 F.2d 340 (7th Cir. 1942) (ransom money received by a kidnapper); Droge v. Commissioner, 35 B.T.A. 829 (1937) (lotteries); Rickard v. Commissioner, 15 B.T.A. 316 (1929) (illegal prize fighting picture); Werner v. Commissioner, 10 B.T.A. 905 (1928) (card playing); M'Kenna v. Commissioner, 1 B.T.A. 326 (1925) (racetrack bookmaking).

[11]335 U.S. 1 (1948) (5-4 decision).

[12]The courts and commentators have labeled the language contained in *Shapiro* as the "required records" doctrine. *See, e.g.*, Grosso v. United States, 390 U.S. 39, 55 (1968). *See generally* Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687 (1951); Redlich, *Searches, Seizures, and Self-Incrimination in Tax Cases*, 10 TAX L. REV. 191 (1954); Note, *Required Information and the Privilege Against Self-Incrimination*, 65 COLUM. L. REV. 681 (1965).

[13]335 U.S. at 33. The *Shapiro* majority based its holding on Wilson v. United States,

may neither claim the privilege in refusing to keep the required records nor may he claim the privilege to prevent the admission of the records in a later trial.[14] The doctrine was originally formulated in order that needed information about the operation of maximum price legislation could be obtained,[15] but on occasion it has been extended to income tax records required to be kept by taxpayers.[16] In addition to records that are retained, the doctrine may apply to reports that must be filed, *e.g.*, income tax returns.[17] Indeed, from the time of the doctrine's inception, it has been felt that the Government could completely destroy the privilege against self-incrimination by simply designating reports as being required.[18] Yet, in spite of severe criticism, the doctrine has not been overruled.[19]

In *Marchetti v. United States*,[20] however, the Supreme Court declined to apply the doctrine to a tax-related registration provision, the form[21] for which the Court felt was analogous to an income tax return.[22] Marchetti was convicted for conspiring to evade payment of an occupational

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221 U.S. 361 (1911), which held that corporate records were not protected by the fifth amendment. There was also language in *Wilson* to the effect that the immunity provision of the Compulsory Testimony Act of 1893 did not apply to "records which are required by law to be kept . . . ." *Id.* at 380. From this dicta, the majority in *Shapiro* reasoned that the required keeping of a record was sufficient to make it non-privileged. Justice Frankfurter felt the majority opinion in *Shaprio* rested on dubious authority. 335 U.S. at 62 (Frankfurter, J., dissenting).

[14]335 U.S. at 33 n.42.

[15]Emergency Price Control Act of 1942, 50 U.S.C. § 901 *et seq.* (1970).

[16]INT. REV. CODE OF 1954, § 6001 requires a taxpayer to keep records to show whether he is liable for tax. The taxpayer does not have to file these records with his returns but must keep them to substantiate his returns in case of an audit. In United States v. Clancy, 276 F.2d 617 (7th Cir. 1960), *rev'd on other grounds*, 365 U.S. 312 (1961) and Falsone v. United States, 205 F.2d 734 (5th Cir.), *cert. denied*, 346 U.S. 864 (1953), the "required records" doctrine was held applicable to this situation.

[17]For example, although not specifically an income tax case, the Court in Marchetti v. United States, 390 U.S. 39, 56 n.14 (1968), could detect no meaningful difference between a requirement that records be kept and one which required that records, such as income tax returns, be filed.

[18]Mr. Justice Jackson in his dissent in *Shapiro* felt that Congress might have the tendency to extend the requirements even more, thereby narrowing the privilege against self-incrimination considerably. If the doctrine is extended to its fullest reach, it is capable of entirely destroying the privilege. 335 U.S. at 70 (Jackson, J., dissenting).

[19]Mr. Justice Fortas, however, indicated a desire to re-examine the doctrine in Spevack v. Klein, 385 U.S. 511, 519 (1967) (concurring opinion). Two district court decisions have declined to follow *Shapiro* in matters involving income tax records required to be kept. *See* United States v. Remolif, 227 F. Supp. 420 (D. Nev. 1964); *In re* Daniels, 140 F. Supp. 322 (S.D.N.Y. 1956).

[20]390 U.S. 39 (1968).

[21]Internal Revenue Service Form 11-C requires that registrants provide their residence and business addresses, indicate whether they are engaged in the business of accepting wagers, and list the names and addresses of their agents and employees.

[22]*Id.* at 43.

tax imposed upon gamblers[23] and for failing to comply with an internal revenue provision[24] which requires those liable for the occupational tax to supply detailed information. The issue of the relevance of the "required records" doctrine arose because the gambler was required to supply information concerning his activities. The Court felt that *Shapiro* was limited to areas of inquiry which were either non-criminal or regulatory and that the provisions questioned in *Marchetti* were neither.[25] The Court also emphasized that the principal interest of the Government in requiring the registration is the collection of revenue, perhaps indicating that the Court would not apply the doctrine to an area of inquiry, such as gambling, unrelated to the Government's main interest.[26]

The fact situation of *Garner* was very similar to that of *Marchetti*. Information was to be supplied in *Marchetti* by a registration form analogous to the tax return filed in *Garner*. Since both cases involve matters of taxation, an area generally characterized as non-regulatory,[27] the Government's interest in both cases was collection of revenue and not prosecution of gamblers. Following the rationale of *Marchetti*, the *Shapiro* decision would not seem applicable to *Garner*.

Moreover, the doctrine's application in the context of income tax returns which reveal non-tax criminal behavior seems inapposite. The doctrine permits acquisition of information in order that laws may function properly.[28] In the collection of revenue, information is needed solely to determine the correct tax liability of taxpayers; therefore, further information pointing to criminality and not essential to the determination of tax liability may be withheld from non-tax criminal prosecutions without hindering the revenue collection process. Consequently, the reason for the utilization of the doctrine was absent in *Garner*, and it seems that the court was correct in not applying the doctrine.[29]

Although the "required records" doctrine and its abrogation of the privilege against self-incrimination seem inapplicable to income disclosure situations, the protection against self-incrimination may nevertheless be inadequate. A leading case illustrating this inadequacy is *United States v. Sullivan*[30] which dealt with the relationship between the fifth amend-

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[23]INT. REV. CODE OF 1954, § 4411.

[24]INT. REV. CODE OF 1954, § 4412.

[25]390 U.S. at 57. As an area of inquiry, taxation in general might be described as non-regulatory. *See* Address by Paul P. Lipton at the Judicial Conference for the Sixth Circuit, May 24, 1968, in 45 F.R.D. 293, 323, 324 n.9 (1968).

[26]390 U.S. at 57.

[27]Note 25 and accompanying text *supra*.

[28]Text accompanying notes 13-15 *supra*.

[29]From the purpose of the doctrine and the fact situation in *Garner*, it seems obvious that the doctrine should not apply. However, the court was silent on this point, not mentioning "required records" or *Shapiro*.

[30]274 U.S. 259 (1927).

ment and the income tax reporting statute. Sullivan made his living selling moonshine whiskey and, rather than risk prosecution, did not file an income tax return. The Court held that a person could not refuse to file a return on the ground that certain disclosures in the return would tend to incriminate him. If answers to specific questions in the return might incriminate the taxpayer, he could claim the privilege against self-incrimination and refuse to answer those questions.[31] The Court, however, failed to enumerate the particular questions which might tend to be incriminating.

Before the taxpayer may refuse to answer questions in the return, the standard for the invocation of the fifth amendment privilege must be met. This standard has varied from requiring that an answer have the "tendency to incriminate"[32] to allowing the claim of the privilege only if "real and substantial hazards of self-incrimination" exist.[33] Recent cases have followed the later approach,[34] although some courts seem to prefer a more moderate guideline which requires that an answer be a "significant link in the chain leading to prosecution."[35]

There can be no doubt that when Garner reported the source of his income as being derived from illegal gambling, he was furnishing a "link in the chain" leading to his prosecution and conviction.[36] He would therefore be able to claim the privilege and refuse to answer the incriminating questions. Whether this would be the most viable choice among the possible alternatives is a matter of conjecture. Since a taxpayer must file an income tax return,[37] he has only three practical choices with regard to incriminating questions in the return: decline to answer, answer, or invoke the privilege against self-incrimination and decline to answer. If the practical effect of all the alternatives is the implication of the

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[31]*Id.* at 263-64.

[32]*See, 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").

[33]*See, e.g.*, California v. Byers, 402 U.S. 424, 429 (1971); United States v. Freed, 401 U.S. 601, 606 (1971); Leary v. United States, 395 U.S. 6, 18 (1969); Haynes v. United States, 390 U.S. 85, 97 (1968); Grosso v. United States, 390 U.S. 62, 67 (1968); Marchetti v. United States, 390 U.S. 39, 53-54 (1968).

[34]*Id.*

[35]Malloy v. Hogan, 378 U.S. 1, 11 (1964). The "link in the chain" criterion originated in Hoffman v. United States, 341 U.S. 479, 486 (1951).

[36]Since gambling is a highly regulated area which abounds with criminal statutes, Marchetti v. United States, 390 U.S. 39, 44-46 (1968), the meeting of these tests should be a simple matter because of the very nature of such an occupation.

[37]Note 9 *supra.* Failure to file is suspicious as well as illegal. For instance, if all persons earning above a certain amount are required to file a return, then one could infer that either a person made below the requisite amount or that he is not filing in an attempt to conceal some illegal gain.

taxpayer in the commission of a crime, the requirement that he must file a return may be constitutionally suspect.

A gambler who files an income tax return and fails to disclose the source of his income without claiming the privilege faces possible self-incrimination in a number of respects. Because of the nature of Garner's occupation, the taxation of his income fell under special provisions of the internal revenue laws.[38] The ordinary taxpayer must, of course, supply the Government with the necessary information showing whether he qualifies for the deductions, expenses and losses he claims. The gambler must also supply this information, although a different set of rules applies for his computation of these three items.[39] A person who computes his income tax using these special gambling provisions must reveal his source of income in order for the Internal Revenue Service to ascertain whether the tax was computed correctly. Clearly, a person who files a return, using these provisions to compute his taxable income without disclosing its source, would hardly escape the attention of the Internal Revenue Service. An investigation would likely follow, and he could be convicted for failing to supply requested information,[40] as well as for violations of gambling prohibition statutes. With all the harmful consequences attendant upon a refusal to answer, it is likely that the taxpayer will choose one of the other alternatives.

The second alternative, that of filing a return and reporting the source of income as being derived from gambling, eliminates the exploratory step necessitated when the source is withheld and greatly increases the likelihood of prosecution under one of many federal statutes that permeate the area of gambling.[41] Under present Treasury Regulations the returns are surrendered upon request to any United States Attorney,[42] the Justice Department,[43] and any other establishment of the Federal Gov-

[38]INT. REV. CODE OF 1954, § 165(d) provides that a person whose income is derived from gambling may deduct his gamling losses only to the extent of his winnings from gambling. For the state of the law pertaining to gambling and income taxation, see 5 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 28.85 (1969).

[39]*Id.*

[40]INT. REV. CODE OF 1954, § 7203 makes it a crime to willfully fail to file any return, pay any tax, or supply any requested information. In what appears to be a questionable decision, Sanders v. Commissioner, 225 F.2d 629 (10th Cir. 1955), the taxpayer was found guilty of failing to file a return, although he filed "skeleton" returns containing his name and address and amount of tax due, but "no detailed information as to income or deductions." It seems that the more logical prosecution would have been under § 7203 (failing to supply any information).

[41]The provisions applicable to the prosecution of a gambler are as follows: 15 U.S.C. §§ 1171-78 (1970); 18 U.S.C. § 224 (1970); 18 U.S.C. §§ 1081-84 (1970); 18 U.S.C. §§ 1301-06 (1970); 18 U.S.C. § 1511 (1970); 18 U.S.C. §§ 1952-53, 1955 (1970); 18 U.S.C. § 1962 (1970).

[42]Treas. Reg. § 301.6103(a)-1(g) (1961).

[43]*Id.*

ernment.[44] As a result of the information found in the return, the Government may wish to commence an investigation of the individual, initiate prosecution, or use the information against the individual at trial.[45]

Another consequence that may result from answering the questions is waiver of the constitutonal protection.[46] *Sullivan* held that a person may claim the privilege against self-incriminating questions in an income tax return.[47] Several circuit court cases have interpreted the *Sullivan* language[48] additionally to mean that if a person answered the incriminating questions in the tax return, he voluntarily waived the privilege.[49] The majority in *Garner*, however, argued that this reasoning was erroneous because the waiver in this situation was involuntary.[50] A "cruel trilema"[51]

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[44]*Id.* at § 301.6103(a)-1(f) (1961).

[45]The role which Garner's income tax returns played in the investigation of his case or in the decision as to how to prosecute is uncertain.

[46]If an individual testifies against himself when not compelled to do so, he has waived his constitutional protection. United States v. Monia, 317 U.S. 424, 427 (1943); *see* United States *ex rel.* Vajtauer v. Commissioner, 273 U.S. 103, 113 (1927). However, the Court has indulged in every reasonable presumption against such an occurrence. Carnley v. Cochran, 369 U.S. 506, 516 (1962); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[47]Text accompanying note 31 *supra.*

[48]The language referred to is:

> If the form of the return called for answers that the defendant was privileged from making he could have raised the objection in the return . . . . But if the defendant desired to test that or any other point he should have tested it in the return so that it could have been passed upon.

274 U.S. at 263-64.

[49]Grimes v. United States, 379 F.2d 791, 796 (5th Cir.), *cert. denied*, 389 U.S. 846 (1967); Stillman v. United States, 177 F.2d 607, 618 (9th Cir. 1949); Shushan v. United States, 117 F.2d 110, 117-18 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941). The *Stillman* court's reasoning on this point was as follows:

> The income tax returns were voluntarily executed by appellants under oath. They were not made in compliance with a subpoena or court order, nor were they made under the threat of prosecution or induced by any form of compulsion *save that reflected in the duty of every person to report all forms of taxable income in the manner prescribed by our Internal Revenue Laws.*
>
> If appellants believed that certain declarations in their tax returns might incriminate them they could have refrained from making the voluntary tax declarations here in evidence. *However, they chose to report the illicit income rather than risk possible prosecution for making false or incomplete returns covering such income.* The disclosures upon the tax returns must therefore be deemed to have been voluntarily entered upon a public record.

177 F.2d at 618 (emphasis added).

[50]The fallacy of saying a person has waived his privilege because he complied with a statutory scheme by answering incriminating questions is discussed by the *Garner* court:

> It is one thing to say that government can compel a person to make disclosures which are deemed necessary for government to adequately administer a program such as the revenue collection system. It is entirely

was forced upon the defendant, thereby rendering his choice to answer the questions involuntary. If he filed the return and answered the questions truthfully, he would be incriminating himself by declaring the source of his income as being derived from illegal gains; if he answered the questions untruthfully, he would have been subjecting himself to a perjury charge; and if he failed to file a return, he would have been violating a statute. *Garner* may be evincing a new trend since heretofore the waiver theory has gone unchallenged by the courts. At present, however, there is a conflict between the circuits[52] on this particular issue, and until a decision by the Supreme Court, a taxpayer may still be convicted in a non-tax prosecution with the help of his own involuntary disclosures.

The final alternative available to the taxpayer is that of refusing to answer and claiming the privilege as suggested by *Sullivan*.[53] But even claiming the privilege does not provide adequate protection from self-incrimination. The act of claiming the privilege is inherently suspicious. If Garner had filed a return and stated that he received a large amount of income from an unnamed source and that he was withholding disclosure of the source because it would tend to incriminate, the authorities would likely infer that he was engaged in an illegal enterprise.[54] An official investigation would likely ensue and perhaps uncover other facts which would lead to the initiation of a criminal prosecution.[55] The claiming of the privilege thus becomes the "first link in the chain" leading to prosecution.

Apparently, a taxpayer like Garner has no protection from self-incrimination when he is required to file income tax returns. Unless the taxpayer can be afforded this protection, the filing requirement upheld by *Sullivan* seems unconstitutional. Only the abolition of the general requirement to report income would entirely eliminate the danger of incrimination, but this would ignore the realities of the revenue collection system. Information must be gathered in order that the Government can operate this system efficiently and equitably. Thus, a clash between the

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> another matter, however, to then disregard the fact that the disclosure was forced and to say that, since the original purpose of compelling disclosure was not inherently hazardous to an individual's rights, any subsequent use of that compelled information is the use of "volunteered" information and therefore constitutionally inoffensive.

No. 71-1219 at 6-7.

[51]The term "cruel trilema" comes from Justice Goldberg's opinion in Murphy v. Waterfront Comm'n., 378 U.S. 52, 55 (1964).

[52]Grimes v. United States, 379 F.2d 791, 796 (5th Cir.), *cert. denied*, 389 U.S. 846 (1967), at present is the only other circuit court which has decided this issue and its conclusion is opposite that of *Garner*.

[53]Text accompanying note 31 *supra*.

[54]E. GRISWALD, THE FIFTH AMENDMENT TODAY 56 (1955).

[55]*Id.* at 55.

privilege against self-incrimination and the Government's need for information inevitably occurs.[56] In spite of this clash and the difficulties it presents, there are ways to protect the taxpayer and secure needed information.

Prohibiting the Internal Revenue Service from disclosing the returns and information contained therein would be one technique by which both values could be accommodated.[57] The taxpayer would have no fear of incrimination while the Government would receive the data it needs in the revenue collection process.[58]

Another way in which the Government may acquire the information it needs without infringing upon an individual's privilege against self-incrimination is a statutory grant of immunity from prosecution.[59] Freedom from prosecution for a crime related to the testimony given is exchanged for information needed by the Government.[60] Even though the information may be incriminating, the individual who receives the grant may not refuse to give the requested information.[61] For a grant of immunity to be effective, however, all danger of self-incrimination must be removed. Consequently, the Court has held that in order for the immunity to be valid, it must be coextensive with the privilege it displaces.[62]

Since an immunity must totally preclude prosecution for any offense related to the compelled disclosure in order to be constitutionally sufficient,[63] it is a broader solution than that needed in income tax situations. Granting immunity from prosecution in exchange for compelled answers to questions in an income tax return would be tantamount to allowing to criminal to exculpate himself. For example, the disclosure of income derived from gambling would result in a total immunity from gambling offense prosecutions.

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[56]California v. Byers, 402 U.S. 424, 427 (1971).

[57]At the very least, this solution would entail repeal of the Treasury Regulations discussed in the text accompanying notes 42-44 *supra*.

[58]Such a result was reached in relation to the National Firearms Act, 26 U.S.C. § 5801 *et seq*. (1970). In Haynes v. United States, 390 U.S. 85, 95-100 (1968), the Supreme Court held that the privilege against self-incrimination provides a full defense to a governmental prosecution of a person for failure to register a firearm under the National Firearms Act. Information collected under this Act was made available to prosecuting officials. After the decision, the Act was amended by Congress to prevent the disclosure to law enforcement officials that was heretofore allowed. In a subsequent case, United States v. Freed, 401 U.S. 601 (1971), the constitutonality of the Act as amended was upheld.

[59]More than forty federal statutes grant immunity from prosecution. Federal immunity statutes are listed in Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1571-78 (1963).

[60]Justice White explained the role of immunity statutes in Murphy v. Waterfront Comm'n., 378 U.S. 52, 93 (1964) (concurring opinion).

[61]Ullmann v. United States, 350 U.S. 422, 438 (1956).

[62]Hale v. Henkel, 201 U.S. 43 (1906); Brown v. Walker, 161 U.S. 591 (1896); Counselman v. Hitchcock, 142 U.S. 547 (1892).

[63]Counselman v. Hitchcock, 142 U.S. 547, 586 (1892).

The *Garner* court's restriction on prosecutory use is a more narrow solution than that provided by an immunity and seems to be an excellent way to alleviate the predicament encountered by members of Garner's occupation.[64] Information that may be incriminating would still be compelled but could not be disclosed for other than specified purposes.[65] There is a restriction only on a particular use and not an absolute prohibition against prosecution relating to matters revealed in the disclosure. However, any prosecution subsequent to the compelled disclosure must be based on evidence obtained independently of that disclosure.[66]

A use-restriction is an effective means of accommodating values: it permits information to be gathered in order to fulfill a valid governmental need for such information, while it also protects the individual by removing the possibility of incrimination as a result of his disclosures. A use-restriction may also be viewed as a means of correcting constitutional abuses. If a requirement entails disclosures that are incriminating, a restriction barring use of the disclosures in a way which exploits their incriminatory aspects would remove the fifth amendment objection to the requirement.[67]

Although a use-restriction is an effective judicial tool, there is a limitation to its application. When a criminal prosecution is related to the area about which information is sought, practical considerations constrain the application of the use-restriction.[68] For example, its impracti-

[64]This was the approach taken by the majority in *Garner*. The dissent in *Garner* pointed out that the use-restriction concept was rejected in California v. Byers, 402 U.S. 424 (1971). However, these cases are distinguishable. Text accompanying notes 69-76 *infra*.

[65]*See generally* McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 229-31.

[66]Once the return is filed, prosecution can take place only if the Government can demonstrate that its evidence is not tainted by the incriminatory aspects of the return. Mackey v. United States, 401 U.S. 667, 712 (1971) (Brennan, J., concurring).

[67]The sequence of events that transpired after the Supreme Court's decision in Hanes v. United States, 390 U.S. 85 (1968), is illustrative of the way in which a constitutional defect may be rectified by the imposition of a use-restriction. In *Hanes*, possessors of illegal firearms were required by the National Firearms Act, 26 U.S.C. § 5801 *et seq.* (1970), to register with the Federal Government. Names of those who registered were made available to state, local, and other federal officials. The Court felt that the entire statutory scheme was designed to force persons engaged in illegal activity to incriminate themselves despite the protection afforded by the fifth amendment.

Congress revised the statute to prohibit the use of the information in a criminal prosecution. The amendment stated that no information provided in compliance with the Act can be used directly or indirectly as evidence against the registrant or applicant "in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence." 26 U.S.C. § 5848 (1970); *see* 26 C.F.R. § 179.202 (1970). When this revision was tested in United States v. Freed, 401 U.S. 601 (1971), the Court held that the use-restriction remedied the defect found in *Hanes*.

[68]In Marchetti v. United States, 390 U.S. 39, 60 (1968), the Court refused to apply a

cality in a related crime situation is demonstrated by the facts of *California v. Byers*.[69] In *Byers*, the petitioner attacked the constitutionality of California's "Hit & Run" statute[70] by arguing that if he complied with the statute, he would be incriminating himself. The statute directs drivers involved in motor vehicle accidents resulting in property damage to stop at the scene and give their name and address to the driver or owner of the other vehicle. If the driver has committed a violation of the motor vehicle laws[71] and does stop and reveal his identity, he supplies the "essential link in the chain needed to prosecute" by focusing attention upon himself as a participant in an auto accident which involves a probable criminal prosecution. The California Supreme Court deemed this revelation sufficiently incriminating and accordingly barred its use in subsequent prosecutions for violations of traffic laws.[72]

The United States Supreme Court disagreed. It emphasized that the government's need for information and the privilege against self-incrimination must be balanced.[73] The State of California needed information to aid in the determination of civil liability resulting from traffic accidents, to evaluate the effectiveness of traffic laws, and to aid in the enforcement of those laws.[74] The ability to secure this needed information was viewed as more important than the individual's privilege against self-incrimination since the possibility of self-incrimination was not great.[75] On the basis of this reasoning, the Court concluded that it was unnecessary to impose a use-restriction on the incriminating disclosures.

The distinguishing characteristic between the use-restriction of *Garner* and that of *Byers* is the class of offenses addressed by each. The use-restriction imposed by the California Supreme Court was directly

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use-restriction in connection with a wagering tax. The names of those who paid the tax were made available to interested prosecuting authorities. Inasmuch as Congress specifically desired such a result, the Court felt that to impose use-restrictions would be to legislate a result contrary to the wish of Congress. *Id.* 58-59. The restriction in *Marchetti* seems distinguishable from that of *Garner* because the criminal statute sought to be enforced in *Marchetti* was directly related to the purpose for which the information was needed.

[69]402 U.S. 424 (1971) (plurality opinion).

[70]CAL. VEHICLE CODE § 20002 (West 1971).

[71]In this case the defendant was charged with improper passing pursuant to § 21750 of the Cal. Vehicle Code (West 1971).

[72]Byers v. Justice Court, 71 Cal. 2d 1039, 1044-45, 458 P.2d 465, 470-71, 80 Cal. Rptr. 553, 558-59 (1969).

[73]California v. Byers, 402 U.S. 424, 427 (1971). But this balancing inevitably results in the dilution of constitutional guarantees. The fifth amendment establishes the amount of protection given and the circumstances in which it applies. To give any less protection is to fail to apply the privilege correctly. It seems, therefore, that any balancing approach is unsatisfactory. *See, e.g.*, Konigsburg v. State Bar, 366 U.S. 36, 56 (1961) (Black, J., dissenting).

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

[75]402 U.S. at 430.

related to the traffic laws, and of course would prevent a number of traffic prosecutions.[76] To exculpate himself a person need only obey the Act; no information he supplied could be used against him in the trial for a traffic violation arising in conjunction with the traffic accident. The *Garner* use-restriction, however, was directed at an area unrelated to the revenue collecting process.

By correctly applying the use-restriction, the *Garner* court has removed the inequities accompanying *Sullivan's* requirement that everyone must file an income tax return. Addition of a use-restriction saves the filing requirement from being declared unconstitutional in its compulsion of self-incrimination. The taxpayer would thus be afforded protection in non-tax criminal prosecutions, an area where heretofore he had none. It is hoped that the use-restriction approach of *Garner* will be followed in future decisions involving income tax return requirements as well as other filing requirements. Notwithstanding its possible later application, *Garner's* present significance is that it represents the antithesis of earlier judicial thinking on the issue of self-incrimination and the income tax laws.

JOHN FRANCIS HANZEL

[76]Justice Harlan felt that a use-restriction imposed in this case would "render doubtful the State's ability to prosecute in a large class of cases where illegal driving has caused accidents." 402 U.S. at 443 (concurring opinion).

TABLE OF CASES

CONTRIBUTORS TO THIS ISSUE

Peter A. Arntson, *Partner, Phillips, Kendrick, Gearheart & Aylor, Arlington, Virginia.*

Denis J. Brion, *Member of the Virginia State Water Control Board.*

Louis B. Sohn, *Bemis Professor of International Law, Harvard Law School, Cambridge, Massachusetts.*