

NA 8-2345

C O N T E N T S

ARGUMENT OF

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Louise H. Renne, Esq.,
on behalf of the State of California

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John W. Poulos, Esq.,
on behalf of Respondent

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Louise H. Renne, Esq.,
on behalf of the State of California - Rebuttal

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

-----:
THE PEOPLE OF THE STATE OF CALIFORNIA, :
Petitioners, :
vs. : No. 75
JONATHAN TODD BYERS, :
Respondent. :
-----:

Washington, D. C.,

Tuesday, December 8, 1970.

The above-entitled matter came on for argument at
11:23 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

MRS. LOUISE H. RENNE, ESQ.,
Deputy Attorney General of California
Counsel for Petitioner

JOHN W. POULOS, ESQ.,
School of Law,
University of California
Counsel for Respondent.

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1 It is our position that the Fifth Amendment does not
2 apply to a requirement that a driver must stop and identify
3 himself as the owner of damaged property or to a person injured
4 on the road and that it is not necessary to bar identification
5 evidence or the fruits of that compliance in any kind of crim-
6 inal proceeding.

7 The way in which this case arose procedurally was a
8 two-count criminal complaint was filed in the Mendocino County
9 Justice Court for the Ukiah Judicial District in California,
10 charging the respondent Jonathan Todd Byers with two misde-
11 meanor violations of the California Vehicle Code.

12 Count one of the complaint charged that the respond-
13 ent Byers failed to pass to the left safely, as he was over-
14 taking and passing a vehicle proceeding in the same direction.
15 Count two of the complaint charged that he violated the
16 California property damage hit-and-run statute. Under that
17 statute, a driver is required to stop at the scene of the ac-
18 cident when he is involved in any accident resulting in
19 property damage and give his name and address to the owner or
20 the driver of the vehicle damaged. This requirement is
21 similar to uniform vehicle code requirement and in fact the
22 laws of all jurisdictions in our country impose similar re-
23 quirements and the driver must stop and identify himself.

24 The purpose of the statute is to protect against
25 financial loss or, where similar requirements are imposed in

1 personal injury hit-and-run statutes, to insure that people
2 will not be left lying hurt and injured on the roads.

3 There is another section, part of the statute, sec-
4 tion 202, and that deals where in the case where you have un-
5 attended property where the driver or owner of the damaged
6 property cannot be immediately located. In that case, the
7 driver must leave a note on the car giving that same informa-
8 tion, a statement of the circumstances, and notify the local
9 police. The purpose of that provision is to make sure that
10 when the owner of the damaged property comes to his property,
11 he will know who to contact in the case when he sees the note
12 or if the note has been lost or destroyed, find out who the
13 owner was from the police.

14 This particular part of the statute has never been
15 raised and questioned in the proceedings below. Instead, at
16 the outset of the case, when the demur was first filed to the
17 complaint, the basis of the respondent's argument was that the
18 minimal duty to stop and give your name and address to either
19 the driver or owner of the property damaged violates the
20 privilege against self-incrimination.

21 The Justice Court dismissed the demurser. However, when
22 a writ of prohibition was then taken to the Superior Court,
23 the Superior Court held that this Fifth Amendment privilege
24 against self-incrimination applied to this minimal duty and
25 that the respondent Byers could not be prosecuted for failing

1 to stop at the scene of the accident.

2 The people filed a notice of appeal to the Court of
3 Appeals. The Court of Appeals reversed the decision of the
4 Superior Court. The Court of Appeals held that the -- it held
5 that the Fifth Amendment privilege against self-incrimination
6 did apply to this identification requirement, but that the
7 constitutionality of the statute could be sustained if no use
8 were made of the identification evidence or any fruits of the
9 compliance with the statute.

10 Both parties then filed petitions for hearing with
11 the State Supreme Court. The State Supreme Court reversed the
12 Court of Appeals. It agreed with the Court of Appeals to the
13 extent that it held that all drivers must stop and comply with
14 the statute. It also agreed with the Court of Appeals that
15 the Fifth Amendment applied to the privilege against self-
16 incrimination. But it further held that the constitutionality
17 of the statute could be sustained if no use were made of that
18 information in any kind of criminal proceeding that might arise.

19 The court recognized that this was a new doctrine of
20 jurisprudence because until the decision below, this kind of
21 requirement had been uniformly upheld in California and else-
22 where. So that the court held that fairness required that the
23 respondent Byers should be excused for his failure to stop at
24 the scene of the accident because the respondent could not have
25 anticipated that the court would impose this kind of use

1 restriction.

2 We respectfully submit that the decision of the State
3 Supreme Court should be reversed, and we have three primary
4 reasons.

5 Q Do you understand the use-restriction to in-
6 clude any reliance by the state on the fact that this was the
7 man who -- this is the name of the man who caused the damage?

8 A Yes, Your Honor, this is our understanding of
9 the decision. Now, we might say that the decision doesn't
10 really say whether we are stopped at the moment, the Fifth
11 Amendment applies from the moment, from the mere observation
12 that the man stopped; what the State Supreme Court held was
13 that the privilege applied at the moment the driver is required
14 to stop and give his name and address at the scene of the ac-
15 cident and reasonably believe that compliance will result in
16 self-incrimination.

17 If I might jump ahead of myself just to give a prac-
18 tical illustration of where I think the court's decision leads
19 us, and that case is illustrated by a case now pending in the
20 Court of Appeals in California. The particular facts of the
21 case are that the petitioner, who was in fact an unlicensed
22 driver, hit a parked car in Stockton, California. He stopped
23 and apparently the owner of the parked car was in a restaurant
24 or the nearby area and the owner came out and the petitioner
25 gave his name and address to the owner of the vehicle.

1 Some minutes later the petitioner was standing there
2 talking with the owner of the damaged vehicle, the police ar-
3 rived on the scene. It may have been in response to a call.
4 But for some reason the police arrived on the scene. The
5 petitioner immediately said to the police, "My car hit this
6 parked car and I have been drinking."

7 The police noticed that the petitioner did appear to
8 be a bit unsteady on his feet and he did smell of intoxicants,
9 and advised the petitioner of the implied consent statute
10 under which petitioner, the driver, is deemed to have given
11 his consent to a breatholizer test. And as a result of that
12 test and the facts, a misdemeanor drunk driving complaint was
13 filed in California Municipal Court.

14 The petitioner argued, one, that the state could not
15 introduce evidence of his name and address, which he had
16 given to the other driver, because that was barred by this
17 decision below; two, but for the statute he would not have
18 stopped and then the police wouldn't have found out, wouldn't
19 have arrived on the scene presumably, and he wouldn't have
20 told the police that he was drinking and the results of the
21 breatholizer test would not have become known.

22 The Municipal Court refused to dismiss the complaint.
23 The Superior Court held that under the decision below the in-
24 formation as to the name and address was privileged, the state-
25 ments to the police were privileged, and the results of the

1 breatholizer test were privileged, even though in other cases
2 in this court that information would not be privileged.

3 Q So it is your submission, as I understand it,
4 that the decision of the Supreme Court of California in the
5 case means that if a driver damages property, stops, obeys the
6 law and leaves his name, he first of all of course is not
7 guilty of violation of the hit-and-run statute; and, secondly,
8 he immunizes himself from any prosecution for any other of-
9 fense. Is that --

10 A That is exactly our position, Your Honor.

11 Q And I suppose a likely extension of that might
12 be the argument that he also immunizes himself from any sub-
13 sequent court liability if it can be shown that it resulted
14 from -- his identification, from his stopping and leaving his
15 name.

16 A Well, that is our position.

17 Q That does apply in this case?

18 A Yes, that is correct, Your Honor, and I think
19 how far you can carry this, you can just perhaps go on forever,
20 not only apply -- first of all, the lower California courts
21 have extended the decision to the personal injury hit-and-run
22 statute, so that now any time a driver is involved in an acci-
23 dent he is assured virtual immunity from criminal prosecution.

24 Q The safe thing to do always is to stop and
25 leave your name and address, isn't it?

1 A That is correct.

2 Q And you get immunity back.

3 A That is correct, Your Honor. And the purpose of
4 the hit-and-run statute is not to catch criminals. The pur-
5 pose of the statute is very legitimate reasons, either protect
6 against financial loss or to make sure that people are not
7 left suffering on their own on the road. And if in the course
8 of complying with this statute, a criminal violation is re-
9 vealed, we are precluded from doing anything about it, and
10 consequently it is our view that any deterrent effect of the
11 criminal laws is completely lost. Where as is frequently the
12 case, the right to have a license is predicated -- the revoca-
13 tion of a license is predicated on conviction. We have been
14 led into very serious problems in making sure that only care-
15 ful and competent people are driving on the highways.

16 It is our position that the decision is wrong, it is
17 wrong because the statute does not create a substantial hazard
18 of self-incrimination. Its requirements of merely giving
19 your name and address as akin to identification requirements,
20 it is akin to requirements that have been imposed in any kind
21 of regulatory field.

22 Q There is more to it than merely identifying
23 yourself. The fact is that you have to leave your name and
24 address at a place where an accident has happened, which is
25 more than that. My name is so and so and I was here, I was

1 driving the car. Isn't that true?

2 A Yes, that is true, Your Honor.

3 Q Now, would you say that is non-testimony?

4 A We would urge that it is non-testimony. First
5 of all, we would urge that --

6 Q A requirement that says I so and so have just
7 been involved in an accident.

8 A Well, although it is verbal, Your Honor, we
9 would say that it is non-testimonial to this extent: The
10 respondent has conceded, number one, that the requirement to
11 stop does not violate the Fifth Amendment. And he hasn't taken
12 issue with our contention that a driver could be required to
13 stop and leave his fingerprints or presumably be photographed.
14 And it is our contention that giving the name and address is
15 akin to this kind of identification, in fact less cumbersome.

16 Q Let's assume that the statute didn't require
17 someone to give his name and address when he has an accident,
18 just requires him to leave his fingerprints at the scene, that
19 whoever finger print this is was involved in an accident. I
20 would think that would be the same objection. Just because it
21 involves saying I whose fingerprints are left here, I was
22 here --

23 A Well, respondent has not taken issue with our
24 contention. Of course, it is our position that the Fifth
25 Amendment has never been carried this far. Even if it would

1 be considered testimonial, certainly the requirement to stop
2 and give your name and address, identify yourself, doesn't
3 create a substantial hazard of self-incrimination. It is not
4 a crime, number one, to drive, or two, to be in an accident.

5 Q Don't you think that is a better argument than
6 non-testimonial nature, that it really doesn't pose any sub-
7 stantial incrimination?

8 A Well, certainly a very clear argument, I remind
9 Your Honor, that does not create a substantial hazard of self-
10 incrimination. We stand very firmly on that. And the require-
11 ment -- let me backtrack just to make clear -- of course, being
12 in an accident doesn't meant that you have committed a crime,
13 it can happen to anybody. It is a very chance event, and
14 since the purpose of the statute is for other reasons and the
15 information required is neutral, that this does not create a
16 substantial hazard of self-incrimination.

17 Q Let's assume for the moment that it does have
18 overtones of the possibility, do you argue that when you take
19 an automobile license you take it upon certain conditions and
20 if you don't comply with those conditions you don't get a
21 license.

22 A That is our position, Your Honor, that even if
23 there should be any overtones of self-incrimination, that the
24 requirement to stop and give your name and address and for the
25 state to be able to use that information later is a valid

1 condition that the state may impose upon drivers.

2 As a matter of fact, we think that this case can
3 meet the constitutional test of an implied waiver, that when a
4 person puts a very dangerous instrumentality in their control,
5 under their control, an instrumentality which statistics show
6 us results in death and destruction comparable to war, and
7 when it is also considered that this kind of duty has been
8 imposed upon drivers since automobiles were first invented,
9 and it has been assumed that when you are in an accident you
10 should stop, that there could even be an implied waiver.

11 And for the State Supreme Court to hold, as they
12 have held, that we cannot enforce the criminal laws to make
13 sure that only careful and competent drivers are on the high-
14 way, seems to us is an unwarranted extension of the Fifth
15 Amendment and its unresponsive need and recognition of the
16 need despite any assertion of the privilege.

17 We think that the reading of the State Supreme Court
18 opinion makes clear that the court reached the decision that
19 it did based on this Court's opinion in the Albertson,
20 Marchetti, Grosso and Haynes cases, and the Leary cases, in
21 which the Court held unconstitutional registration require-
22 ments in the areas of Communist registration, gambling, fire-
23 arms, and marijuana transport statutes. But those case --

24 Q Yes, but I gather the State Supreme Court
25 didn't go so far as to say they did not have to leave their

1 name and address. They said only to that extent the state is
2 interested in having the names and addresses, can be satisfied
3 and is accommodated with the privilege as simply denying the
4 use of the information of the name and address in any state
5 prosecution. Wasn't that it?

6 A Yes, but --

7 Q They didn't go quite so far as we went in
8 Marchetti and Grosso.

9 A Well, we think that the very fact that it didn't
10 go quite that far, Your Honor, indicates that the State Supreme
11 Court recognized that these statutes must be upheld insofar as
12 the --

13 Q They recognize the state interest which could
14 be accommodated with the privilege of simply denying the use
15 in criminal prosecution and yet requiring the person involved
16 in such an accident to leave his name and address.

17 A Yes, and it is our position, Your Honor, that in
18 coming to the conclusion that this balance could be reached,
19 that the state was quite unrealistic in coming to that con-
20 clusion. We think that it reached that conclusion because it
21 thought it was compelled to hold that the Fifth Amendment
22 privilege was applicable to this requirement because of this
23 Court's decisions in the Albertson, Marchetti and Grosso,
24 and Haynes cases.

25 If the Court did not find that the requirement fell

1 within the Fifth Amendment, it then would have gone on to come
2 to attempt to resolve the problem by imposing use restrictions.
3 And in relying, we think in any way, upon Marchetti-Gross and
4 Haynes for the conclusion it reached as to the applicability
5 of the Fifth Amendment, the Court was mistaken, because we
6 think that this Court did make it quite clear that those cases
7 were dealing with very narrow areas, gamblers, people who had
8 to register firearms and the very fact of registering a fire-
9 arm would incriminate them.

10 We don't have that kind of case at all in the driver
11 accident case.

12 Q Well, except -- under your State Supreme Court
13 decision, the state does get the name of the driver, and
14 address, doesn't it?

15 A Well --

16 Q Now, what purpose do you want to use it for in
17 a criminal prosecution?

18 A Excuse me, Your Honor. First of all, whether
19 or not the state will get the name and address may depend on
20 the circumstances. Now, in the case where you have attended
21 property, where the driver is right there, under the hit-and-
22 run statute you only need give your name and address to the
23 driver and then leave, and there is no requirement that the
24 owner of damaged property notify the police of the accident.
25 And the court opinion below doesn't --

1 Q But what does the state want the name and
2 address for?

3 A Well, the state interest in having a private
4 exchange of information is to protect against financial loss.

5 Q Well, there is nothing in the Supreme Court
6 holding that affects that, is there?

7 A No, that --

8 Q It said that the name and address has to be
9 given. Well, for what other purpose does the state have for
10 the name and address?

11 A Well, the other purpose the state would have --
12 first of all, the state has an interest in any case in knowing
13 who caused accidents or why accidents were caused.

14 Q That is all satisfied under your Supreme Court
15 decision.

16 A But the other interest is in enforcing its
17 criminal laws, that interest is not satisfied.

18 Q And that is where the -- that is the crux of it,
19 isn't it?

20 A That is the crux of it.

21 Q You want it for the purposes of prosecuting and
22 convicting under the state criminal laws, and surely that
23 implicates --

24 Q Well, what about a statute that if you go over
25 80 miles an hour you have to give your name and address? Would

1 that help anybody?

2 A Well, I think -- I don't know what the state --

3 Q Well, my next question is what is the differ-
4 ence?

5 A Well, I think there is quite a lot of differ-
6 ence, Your Honor. Going --

7 Q Insofar as the state is concerned, these are
8 two traffic violations, and all the state is interested in, I
9 assume, is the traffic violations. They are not interested in
10 damage to the car, that is civil. Am I right?

11 A That is correct, Your Honor.

12 Q Well, what is the difference?

13 A Well, I think the difference is that if the
14 statute read that only people driving 80 miles per hour need
15 stop and give their name and address, then 80 miles an hour
16 were per se a crime, that perhaps it could be said in that
17 case that the only state interest was to catch criminals, if
18 I understand your question correctly. But here the purpose of
19 the statute --

20 Q You can drive 80 miles an hour and strike a car,
21 just takes off a little piece of paint, you have to leave your
22 name and address.

23 A That is correct, Your Honor.

24 Q Well, what is the magic of having an accident?

25 A Well, the magic of having the accident is that

1 that triggers the hit-and-run statute and it --

2 Q It requires him to admit that he committed a
3 crime?

4 A Well, we don't know whether or not -- we never
5 know why an accident was caused.

6 Q Well, why do you -- why are you interested?

7 A Well, the state has a number of interests.

8 Q I can see the interest of the state in seeing
9 to it that the citizen of the state who caused damage shall be
10 able to litigate and know who did it, but I don't see the in-
11 terest of the state in having that name and address for any
12 prosecutorial purpose of any kind.

13 A Well, Your Honor, I think that the interest of
14 the state in having the name and address -- now, I just make
15 perfectly clear that in this case you're only required to give
16 it to a third party, but of course there are other reporting
17 statutes. We are not involved in that case. But interest,
18 the state has a great deal of interest in knowing, number one,
19 who is involved in accidents, are they careful and competent
20 drivers.

21 We may -- if a person is involved in an accident --
22 numbers of accidents, he may not be a careful and competent
23 driver, so it may be necessary to revoke his license, which
24 is an interest totally unrelated to prosecutorial interests.
25 We may want to know why your accidents are caused.

1 Q I am interested in the prosecutorial use of it.

2 A Well --

3 Q Which is the Fifth Amendment.

4 A The Fifth Amendment, that's correct.

5 Q Well, that is my interest, and the fact that
6 you want statistics, that doesn't bother me at all.

7 A Well --

8 Q The fact that you want to prosecute this man
9 does worry me.

10 A Well, it seems to me, Your Honor, that if in
11 any regulatory area there are going to be criminal statutes,
12 it is presumably the legislature's view or Congress' view, in
13 the federal regulatory area, the criminal statutes have some
14 deterrent value on the behavior of the regulated person.

15 Now, if the state or the Congress, for example,
16 can't enforce the income tax laws, if the criminal statutes
17 cannot be enforced as a criminal matter or as a practical
18 matter, then there is no deterrent effect.

19 Q Well, the criminal statute here is failure to
20 leave your name and address.

21 A That's correct.

22 Q That is the statute.

23 A That is the statute.

24 Q So if you leave your name and address, is that
25 for the benefit of the state, because I thought you said that

1 if you give it to the driver of the car, the state will never
2 know about it?

3 A That is correct, Your Honor, the state may not.

4 Q Well, what good is that to the state? It isn't
5 any good.

6 A Well, the problem is that --

7 Q Right?

8 A No, not when it -- yes, when it is just given
9 to the one driver, then we may not find out about it. Of
10 course, that --

11 Q And the only reason you want to find out about
12 it is to prosecute him.

13 A Well, the real problem, Your Honor, is that if
14 we find out about it, if the police happen by, which is what
15 happened in the case in Stockton, then -- and they discover
16 the man was drunk or he was an unlicensed driver, then because
17 the State Supreme Court has said that the privilege applied
18 at the very moment a person is required to stop and identify
19 himself, if the privilege applies at that very moment, then if
20 we happen to find out about it, that a criminal violation is
21 revealed at that moment, there is nothing we can do about it.

22 Q In the Stockton case, what do you need his name
23 and address for? You said the police picked him up.

24 A But that --

25 Q And he was drunk. So what do you need this

1 little piece of paper for?

2 A Well, the reason --

3 Q Why do you need to prosecute him?

4 A The reason the driver stopped, Your Honor, was
5 because he hit a car.

6 Q Well, if he had been polite, without the
7 statute, he would have stopped.

8 A Well, he alleged that he stopped because of the
9 statute.

10 Q That is definitely not this case?

11 A No, it is not this case, Your Honor, but -- be-
12 cause this man never stopped, of course. But in any case, if
13 the privilege applies at the very point a man is required to
14 stop, then the state really cannot do anything about it if a
15 criminal prosecution should be revealed.

16 Q That is the way I understood the Supreme Court
17 of California said, you just can't use this piece of paper or
18 that information.

19 A Well --

20 Q That is all it says. Isn't that what it says?

21 A It said you can't use that information or the
22 fruits of the compliance. Now, the compliance means the minute
23 you stop, too, so that we can't use a driver's name and address
24 -- well, we submit a name and address is not incriminating.
25 There is nothing incriminating about driving, there is nothing

1 about -- nothing incriminating about being a driver. If a
2 criminal prosecution is warranted, it is up to the state to
3 show that an accident was caused by criminal conduct.

4 Q When a person gets a license to drive on the
5 roads of your state, is there -- are there any explicit con-
6 ditions imposed in any application he signs?

7 A Well --

8 Q Insofar as obeying the laws of the state, any-
9 thing along those lines?

10 A Well, I would have to qualify my opinion on
11 this, Your Honor. Certainly there is not any kind of agree-
12 ment that he would stop, no. There is not an express waiver
13 of any kind. But it would be our position that there is kind
14 of a duty, as has been upheld --

15 Q As an implicit waiver?

16 A I'm sorry, as an implicit waiver, yes. I
17 think it should be perfectly clear --

18 Q Hess vs. Pawloski has maybe some slight rele-
19 vance.

20 A I think Hess vs. Pawloski has a very great deal
21 of relevance, Your Honor. I think there are other decisions
22 of this Court. As I recall, Illinois vs. Allen last year, the
23 Court held that a defendant by his conduct can waive his right
24 to be present before a jury or court hearing. The driving is
25 like any other area of regulation. There are certain minimal

1 requirements that must be met, certain information that must
2 either be given to a private individual, because of a regula-
3 tory interest, or to the government. And where the informa-
4 tion is neutral and has legitimate regulatory purposes, the
5 Fifth Amendment doesn't apply.

6 Q Mrs. Renne, I am lost a little bit as to what
7 happened under count one and the offense under 21750. Can you
8 tell me?

9 A As a practical matter, the case was never prose-
10 cuted, Your Honor, because -- well, we have always been on
11 appeal, so meanwhile the prosecution on count one has been
12 held in abeyance. There has been nothing that has happened.

13 Q This would in effect be customary by the effect
14 of this decision, I would think.

15 A I would certainly think so, Your Honor. We are
16 in a very difficult position.

17 Q About the only source of your information is
18 what?

19 A Well, of course, in this particular case --

20 Q If there had been compliance, it would be
21 frustrated?

22 A Yes, we believe it would be frustrated under
23 the decision below.

24 Q And here there was no compliance.

25 A That's correct. There may well be areas where

1 a theory of use restrictions serves a very valid purpose and
2 can accommodate a government's need for information and the
3 privilege. But the problem in this case is where an accident
4 occurs, it is a chance thing, it occurs -- the duty must be
5 performed on the spot and if the privilege applies the minute
6 there is an accident, the minute there is a duty to stop and
7 give your name and address, we think it would place a virtually
8 impossible situation as far as undertaking any kind of criminal
9 law enforcement.

10 Q Now, your opposition tries, I think, to draw a
11 distinction between the death or injury statute and the
12 property damage statute. Do you feel there is any validity to
13 that distinction that he attempts to draw?

14 A Well, I think, Your Honor, that a holding of
15 one court in particular, Bailey vs. Superior Court, which is
16 cited in the respondent's brief and in our reply brief, may be
17 the answer to your question, or at least one distinction the
18 California courts have tried to draw.

19 Q I want to know what you think.

20 A Well, I think it is very difficult to draw any
21 kind of a distinction. Certainly, you cannot draw a distinc-
22 tion insofar as giving your name and address is concerned.
23 You cannot draw a distinction between the personal injury or
24 the property damage hit-and-run statute and the California
25 courts have so held.

1 Now, in the Bailey case, that court attempted to
2 draw a distinction when it said that the duty to stop and
3 render aid and assistance was non-testimonial and that you
4 could draw distinction along those lines; whether or not that
5 distinction would hold water should that case or similar case
6 come before the State Supreme Court is open to question. I
7 think it is very difficult kind of distinction --

8 Q Certainly other state hit-and-run statutes often
9 do not separate the death and injury portion from the other
10 portion, and --

11 A If I might add, Your Honor, every time from the
12 -- years ago, when the hit-and-run statutes were attacked on
13 the use grounds, they have been uniformly upheld. Only one
14 reported case ever held a hit-and-run statute unconstitutional,
15 and it did so on that ground -- on the ground that the driver
16 was required to stop and give a full report of the accident.
17 That was Rembrandt vs. Cleveland. But in that case the court
18 was very careful to draw a distinction that anything less than
19 that was not violative of the privilege against self-
20 incrimination.

21 Recently, the State Court of Illinois held their
22 statute constitutional under the Fifth Amendment also.

23 Q As I read your California Supreme Court opinion,
24 I thought that it was quite clear that apart from Marchetti
25 and Grosso and Haynes that have upheld this statute, and what

1 I think you might direct yourself to after lunch, if I may sug-
2 gest to you, is how you distinguish these cases from those.

3 Q May I ask you one question?

4 A Yes, Your Honor.

5 Q Suppose California had a law that required
6 burglars to leave calling cards at the homes they burglarized,
7 saying they had been there, what would you say about that?

8 A Well, I would think that that would be an uncon-
9 stitutional statute to the extent that it requires only burglars
10 to stop. If the purpose is to have only burglars stop --

11 Q How about anybody that enters a home, to leave
12 a calling card?

13 A In a home, it would seem to me that that statute
14 probably would be unconstitutional because the only purpose of
15 that statute would be to catch burglars, burglary is per se a
16 crime, it occurs in a home. These are all very distinguishing
17 features from the case we have presented here. Driving is not
18 a crime.

19 Q Well, if they can tell they were there, they can
20 use evidence against them. I was simply asking you to point
21 out the real difficulties of your case. I am not saying which
22 way I am.

23 A Yes.

24 Q But if you apply it to other crimes, you could
25 raise certain questions in each one.

1 A Well, I think that it might raise questions. You
2 would have to ask what is the purpose of the statute, why do
3 you want it. Of course, a simple answer is that driving is not
4 a crime.

5 Q But it would be used against him by the state in
6 each instance. The same rule would apply, wouldn't it?

7 A If the only purpose was to --

8 Q One distinction between what Justice Black was
9 asking about is robbing banks is inherently illegal and driving
10 automobiles is not. One is licensed by the state and the other
11 is not.

12 A That's correct, Your Honor.

13 Q But is it illegal -- I had an idea that it was
14 illegal to because the laws says so.

15 A Oh, it --

16 Q It is quite a thing per se, a per se area, in
17 common law.

18 A Correct, Your Honor.

19 Q We are governed by common law on it mainly.

20 MR. CHIEF JUSTICE BURGER: Miss Renne, I think we
21 won't ask your friend to take two or three minutes. We will
22 let you begin fresh after lunch.

23 (Whereupon, at 12:00 o'clock noon, the Court was in
24 recess, to reconvene at 1:00 o'clock p.m., the same day.)
25

MR. CHIEF JUSTICE BURGER: Mr. Poulos, would you proceed.

ARGUMENT OF JOHN W. POULOS, ESQ.,

ON BEHALF OF RESPONDENT

MR. POULOS: Mr. Chief Justice and may it please the Court. Initially, I would like to point out that there are three areas that I am going to discuss, but I am not going to take them up in the order in which I now present them.

The first is that there has been an incomplete statement of the facts. Secondly, there has been an erroneous, completely erroneous characterization of California law after the Byers decision. And, thirdly, the point of implied waiver we have heard discussed here today was raised for the first time in the reply brief.

Now, this has been argued before and was before both the California Supreme Court and the California Court of Appeal, but I did not have the opportunity to present my position on the doctrine of implied waiver before this Court because it came before this court the first time in the reply brief. But I will comment, I hope somewhat extensively, on that theory in a moment.

The underlying facts involved in this case are really quite simple. They start off with this: Byers was driving a vehicle down one of the roads, the public highways in the State

1 of California. He was following a vehicle in front of him, and
2 while attempting to pass the vehicle in front, he made what is
3 known as an unlawful pass or unsafe pass to the left, a viola-
4 tion of California vehicle code, Section -- the section in
5 question.

6 As a result of that failure to make the safe pass to
7 the left, there was a collision. The collision caused property
8 damage and the property damage which was caused as a result of
9 that accident is the property damage that triggered the hit-run
10 statute here in question, California vehicle code section 2002A.

11 Now, at the trial, at the prohibition proceedings,
12 there was indeed a stipulation to that effect. There were also
13 a finding in the court's findings of fact and conclusions of
14 law in connection with prohibition proceeding indicating that
15 that indeed was the fact.

16 And so what we have here is the issue as to whether or
17 not the State of California can by the use of the hit-run
18 statute force a man to make a statement which would incriminate
19 himself, for indeed it was criminal action on the part of
20 Byers which triggered the reporting requirement of the hit-run
21 statute.

22 Every California case --

23 Q He didn't have to do it, did he? He could object.

24 A That is precisely what he did to, he did not
25 comply with the statute, raising the Fifth Amendment privilege.

1 The action was then filed two days later in the Justice
2 Court, two days after the accident there was a complaint filed
3 in the Justice Court alledging a violation of the safe pass
4 statute and also a violation, which is incidentally vehicle code
5 section 21750, and count two the violation of the hit-run pro-
6 vision. A demurrer was interposed and --

7 Q Does it appear how, since he did not obey the hit-
8 and-run statute -- does it appear how the state knew who he
9 was?

10 A Well, I would have to speculate off the record --
11 on the record itself it does not appear that -- you know, there
12 are many ways of finding out who is driving an automobile other
13 than compelling it out of his own mouth.

14 Q Like the license plates?

15 A Like the license plates.

16 Q Do you think that would be barred, too?

17 A No, I do not.

18 Q You can be forced to --

19 A We are forced to drive automobiles with license
20 plates.

21 Q Even though you may be in an accident and would
22 incriminate yourself --

23 A That's correct.

24 Q -- identifying yourself?

25 A That's correct. And I am going to get back to

1 that point in a minute as to the reason that I feel that is
2 true.

3 Every California court, from the Superior Court to the
4 Court of Appeals to the Supreme Court of California, has held
5 that there has been a violation of the Fifth Amendment privilege
6 against self-incrimination. Under the fact of his case, the
7 only argument is that the Superior Court said, reading in
8 *Albertson vs. Subversive Activities Control Board*, where you
9 recognize that Marchetti, Grosso, Haynes and Leary had not been
10 decided at the time of the prohibition proceedings in the
11 California Superior Court.

12 At that point the court said that the Fifth Amendment
13 privilege was complete defense. There was an appeal; the
14 appeal went to the Court of Appeals of California, and the only
15 difference really between the decision of the Superior Court and
16 the decision of the California Court of Appeals was that the
17 California Court of Appeals seized upon the concept of use re-
18 strictions.

19 Now, the concept of use restrictions was not even
20 argued before the California Court of Appeals in any kind of
21 meaningful sense. It wasn't raised in the briefs and it was
22 only collaterally touched upon.

23 The decision came down using rather vague terms. The
24 reference to the Court of Appeals citation is found in the
25 petition for writ of certiorari. The exact citation skips my

1 mind at the moment. But if the court is to look at that cita-
2 tion, you see that the use restriction concept really did at
3 that point give someone a fear of the so-called immunity bath.
4 For that reason, both counsel for the petitioner and counsel
5 for the respondent petitioned the Supreme Court.

6 There was a dual reason behind the respondent. There
7 was sought to be urged a concept of fairness, that if this was
8 indeed a new concept in the jurisprudence of the State of
9 California, namely the use of use restrictions, then he should
10 not be criminally punished for having agreed with all of the
11 members of the California courts that the Fifth Amendment was
12 applicable.

13 The court granted the petition for hearing. In fact,
14 it granted both petitions for hearing. There is quoted in the
15 reply brief what appears to be a concession on my part. I want
16 to place that concession in proper context, for I do not concede
17 now that it is a concession.

18 If the Court compares the language of the Court of
19 Appeals decision, you will see why I made the statements in the
20 petition for a hearing before the California Supreme Court as
21 broadly as I did. But the issue of use restrictions, of course,
22 is one of the main issues before the California Supreme Court
23 and it was fully argued.

24 The California Supreme Court's decision in the case
25 is substantially different than the use restriction concept used

1 by the Court of Appeals below.

2 At this point, the California Supreme Court created a
3 limited concept of use restriction. The court clearly states in
4 that case that it is only the information which is procured as a
5 result of the compliance with the hit-run statute which cannot
6 be used. There is no concept of an immunity bath used by the
7 California Supreme Court. The language in three or four differ-
8 ent places in the opinion clearly indicated that the only thing
9 that is within the use restriction is this concept of the in-
10 formation actually compelled.

11 Now, there are two California Court of Appeals cases
12 subsequent to Byers which clearly shows that Byers has not pro-
13 duced that immunity bath that the Attorney General would have
14 you believe. It simply is not so.

15 The first citation is found in both -- was first found
16 in my brief, the respondent's brief, and later appears in the
17 reply brief, is Bailey vs. Superior Court of Ventura, and it is
18 4 Cal. App. 3d 522.

19 Q What is that?

20 A 4 Cal. App. 3d 522, 84 Cal. Rptr. 436. Now, with-
21 out belaboring that case, that is a case that came up after the
22 decision in Byers. It was a case dealing with section 2001
23 rather than 2002 of the California Vehicle Code. The differ-
24 ence being 2001 is the personal injury hit-run statute; 2002 is
25 the property damage hit-run statute.

1 Q What is the difference?

2 A Well, I think there is a difference, and the
3 reason I pointed out that in the brief was not that there is a
4 difference in the reporting requirement for both statutes require
5 you to stop and to characterize yourself, if you will, as being
6 the driver of the adverse vehicle, and in that sense they are
7 both self-incriminating. So under the facts of this case, for
8 example, if Byers had indeed stopped and had characterized him-
9 self as the driver of the vehicle who had sideswiped the other
10 automobile, he would have been supplying the prosecution with
11 one of the elements of the offense, plainly and simply.

12 Q Anything more than that?

13 A Pardon me?

14 Q Anything more than identity?

15 A Well, it is identity. That is the problem that
16 we have been running through in this case. This is not an
17 identity case. I think the question posed by Mr. Justice White
18 clearly shows that it is not. But let me read you from another
19 California case for just a moment to --

20 Q Before you do that, though, would you clear up
21 why this is more than identity, and we would perhaps understand
22 your case better?

23 A Yes, Your Honor, and that is why I want to cite
24 from this case for you. A mere identity case is a case in
25 which a citizen -- for example, a citizen walking down a street

1 is stopped by the authorities and asked, "What is your name?"
2 There are no circumstances requiring him to characterize him-
3 self. He doesn't say, "I am the driver of a vehicle which has
4 just violated the vehicle code," or "I am not a burglar or a
5 murderer or a speeder." Nothing like that is required. But
6 the vehicle code section here in question does require you to
7 do that.

8 Q Well, if it required you to do no more than
9 identify yourself, it would be all right?

10 A Well, of course, this doesn't reach that point.

11 Q But that is the center of this complaint.

12 A I think if you were simply walking down the
13 street and there was --

14 Q We are only dealing with drivers now and auto-
15 mobiles, not with pedestrians.

16 A But the --

17 Q When you leave your name at the scene of an acci-
18 dent, you are saying "I was here and I was involved in the acci-
19 dent."

20 A Well, I agree with that. I don't think -- you
21 couldn't require constitutionally, I submit, under the facts of
22 this case, a mere identity, under the facts of this case, be-
23 cause it isn't the fellow walking down -- he is in suspicious
24 circumstances. The California Supreme Court found that. They
25 said there is a substantial correlation between being a driver

1 involved in an accident and having contemporaneously violated
2 one or more sections of the California Vehicle Code.

3 Q Well, are you saying that being involved in an
4 accident equates with some kind of criminal act?

5 A I cannot say that it is equated, but nor has this
6 Court ever required an equation. What we are talking about
7 here is a substantial correlation, and the California Supreme
8 Court found that substantial correlation in almost words -- I am
9 not purporting to quote but --

10 Q You don't have to strike down the statute on its
11 face, do you?

12 A No, no.

13 Q All you have to do is say there was complete cor-
14 relation in this case.

15 A There is complete correlation in this case.

16 Q You say that what he did was a criminal act and
17 he refused to leave a statement behind saying that he did it.

18 A I agree with that. That position really is argued
19 in our brief, but I think this case even goes beyond that point.

20 Q What is the criminal act here?

21 A Violation of Vehicle Code Section 21750, which is
22 failure to pass to the left at a safe distance.

23 Q Well, aren't you prejudging him when you say
24 this?

25 Q All he had to say was "I was involved in an

1 accident."

2 A No, Your Honor, that is --

3 Q 2002, the driver of any vehicle involved in an
4 accident --

5 A Your Honor, may I read to you how the California
6 courts have construed that section. The California courts,
7 getting back to this case --

8 Q Are you appealing from this opinion, the judgment
9 of the California courts?

10 A No, Your Honor, but I am trying to dispel any
11 idea that this is just simply an identification case. It is
12 not.

13 Q Well, suppose there is an accident and the police
14 come up and say, "Give me your driver's license." You don't
15 have to give it?

16 A No, I don't think you do.

17 Q Oh, you don't? You want that statute to go, too?

18 A If you are in the statute where the statute re-
19 quires you to -- if you are the driver of the vehicle --

20 Q Doesn't California have a statute which requires
21 you to show your driver's license?

22 A I can't answer that, Your Honor.

23 Q You wouldn't want to make a wager, would you?

24 [Laughter.]

25 A If you put it that way, no.

1 But I would again like to refer to this case. It says
2 thus under the facts peculiar to this case, we find no error in
3 the court's instructions that to comply with section 2001 --
4 now, this is the personal injury, but the wording, the relevant
5 wording is exactly the same -- defendant was under a duty not
6 only to identify himself as he did but also to identify himself
7 as the driver of a vehicle involved in the accident.

8 So there is now simply an identify case, that is a
9 case where you require the defendant to characterize himself
10 vis-a-vis a burglar, vis-a-vis a person who has been the driver
11 of an offending vehicle.

12 Q Well, isn't it merely to characterize himself as
13 the driver of the vehicle involved in an accident?

14 A Yes.

15 Q So is that criminal?

16 A I would venture a guess that it is in most cases.
17 In most cases, there is no doubt a high correlation between
18 being a driver in the accident, being a driver involved in an
19 accident and a violation of one or more sections of the
20 California Vehicle Code. The California Supreme Court so found
21 and certainly it is in an admirable position to be able to do
22 that.

23 Q Can you come up with supposititious case where
24 you would not have the same results as you can on this factual
25 results, this set of facts under the California case statute?

1 How could you ever have a situation where on your theory it is
2 not incriminatory?

3 A Of course, you don't need one because the opera-
4 tion of this --

5 Q How about the driver of the other car?

6 A Well, there is a certain genius about this de-
7 cision, and the genius is this, that it preserves exactly the
8 state's interests in securing information. Yet there has not
9 been the contemporaneous dilation of another code section,
10 there is compliance, there is no need to impose use restrictions
11 because they are not needed. There hasn't been any self-
12 incrimination.

13 But if in fact there has been, and the court says there
14 is this high correlation, reaching -- enabling the court to
15 reach the conclusion that there is a real and substantial risk
16 of self-incrimination involved, regardless of the facts, regard-
17 less of whether or not Byers in fact did the particular act,
18 there is this substantial risk of self-incrimination.

19 Q Where did the Supreme Court of California get
20 this correlation? Who said so?

21 A Well, the Supreme Court of California said so,
22 and it --

23 Q Well, did they just pull it out of the air or is
24 the correlation between hit-and-run drivers and criminal
25 activity?

1 A I think that the California Supreme Court could
2 take judicial notice of the fact that there is indeed a high
3 correlation in the State of California between being involved
4 in an accident, which is what they said, being involved in an
5 accident and being a substantial correlation between that and
6 having violated one or more contemporaneously.

7 Q Mr. Justice White just asked you, does that apply
8 to both drivers?

9 A Yes, it would apply to both drivers.

10 Q And the correlation is the same as to both?

11 A Well, no. All you're telling me is that in a
12 two-party case one may or may not. Now, we don't know. You
13 can't infer that there is a 50 percent probability. We are all
14 familiar with instances in which both vehicles indeed have been
15 at fault. That is not uncommon. In fact, that may be more
16 common than the situation in which there is only one at fault.
17 And I suspect and I submit to the Court that the California
18 Supreme Court is in a much better position to assess the work-
19 ing of those rules in California than is this Court.

20 Q Well, I don't see that they have any basis for
21 judicial notice of any correlation whatsoever unless there was
22 evidence in the case suggesting that a study had been made, a
23 survey had been made and that this is the result.

24 A I don't --

25 Q It is pure speculation.

1 A Well, we call things pure speculation sometimes
2 when we don't understand exactly why the court did what it did.
3 We have things called policy facts. Every rule of law is based
4 upon that particular outlook on the universe. And when we are
5 litigating that particular fact, we have a tendency to say,
6 well, we do say that the facts support that and that conclusion
7 has to be in the record. But that isn't the kind of a fact
8 that is normally litigated. It is normally what we would refer
9 to as a policy fact, a fact that the court is in a position to
10 know. I submit that that is a proper assumption of the judicial
11 process.

12 Q Let's assume that a driver of a car drives off
13 the road and parks in one of the rest areas along a large
14 highway, legally parked there, and just as he is getting out of
15 the car some speeder or racer loses control of his car and
16 crashes into him. Now, he is under the obligation to report
17 that accident to the fellow who parked, isn't he?

18 A Well, depending, in California, on a number of
19 things. If the accident caused damage of more than \$200 --

20 Q Well, he causes plenty of damage.

21 A Yes, he has an obligation to --

22 Q Now, do you think that he could claim the privil-
23 ege?

24 A Yes, because --

25 Q Well, why? He had absolutely no anticipation

1 that he --

2 A If he is going 80 miles an hour --

3 Q -- the fellow who is parked --

4 A Oh, no. I'm sorry, I misunderstood your question

5 Q The fellow who is parked.

6 A The fellow who is parked has an obligation to

7 report --

8 Q Well, what if he doesn't?

9 A Well, it is technically, I believe, a --

10 Q Well, is he privileged not to report under your
11 theory in this?

12 A No.

13 Q Because why?

14 A Because --

15 Q Because he has no hesitation that he might be
16 involved in criminal charges?

17 A Exactly.

18 Q And you say the difference in your case is that
19 your man had reasonable grounds to believe that he might be
20 charged with a crime?

21 A Precisely. Now --

22 Q Is there any review of his appraisal of that situ-
23 ation?

24 A Is there any review? Well, you have got it in
25 this case, namely there is a criminal charge filed against him,

1 and there is a determination traditionally as to whether or not
2 the privilege applied.

3 Q Let's change the situation just a little bit,
4 since we are getting into hypotheticals. Suppose there is a
5 collision of two moving cars on the road, and the one in the
6 position or posture of your client, who believes that he has
7 fair anticipation of some criminal charge, decides to stop, but
8 in the meantime one of the passengers or the driver of the car
9 has already taken note of his license number. Nevertheless they
10 both stopped and pulled off the road, he complied with the
11 statute. Under this decision of the Supreme Court of California,
12 may they use the evidence against him?

13 A Which evidence?

14 Q The evidence that he stopped and that he --

15 A The evidence from a license plate?

16 Q No, can they use any evidence of this accident
17 against him?

18 A Yes, they may use all evidence --

19 Q And why --

20 A -- other than the evidence that was compelled
21 from him by virtue of the hit-run statute.

22 Q How do they find that, by a fact-finding in each
23 case?

24 A No, the statute tells you very clearly what is
25 compelled and what is not, and the court looks and that is

1 really the holding of the Bailey case and this other case that
2 I -- there are two other cases, one other case that I think the
3 Court really ought to look at.

4 Q Well, what is compelled from him that is not
5 already known by the driver of the other car, namely that he
6 was in the automobile and was driving it and had an accident?

7 A The touchstone of the Fifth Amendment isn't what
8 -- you can only incriminate yourself but no one else knows --
9 the touchstone of the Fifth Amendment is that it can't come
10 from my mouth. If I were to rob someone with a gun --

11 Q Don't you think that if you represent him you
12 would undertake to make a claim that that is the only way to
13 find out about him, is the reporting of the fact that he stopped?

14 A Well, one could make that claim, but the court
15 will see from these subsequent California cases, the claim will
16 not be heeded because they are in a situation where you can
17 constitutionally require the car to stop at the scene of the
18 accident. The Bailey case says you can compel him to stop at
19 the scene of the accident, you can compel him to render
20 assistance to the injured party, but you may not compel him to
21 speak his own guilt, which in essence is what the statute re-
22 quires.

23 Q And speaking his own guilt, the fact that he dis-
24 closes his name and that he was the driver of the car.

25 A Yes, which the California Supreme Court says that

1 he -- of course, under the facts of our case there is no ques-
2 tion. He knew that if he characterized himself as the driver
3 of that vehicle, he would be admitting one of the elements of
4 the crime, no question about that, under the facts of our case.
5 He was prosecuted for it.

6 But there is no question that he did violate 21750,
7 and if he did stop and did get the information he would be in-
8 criminating himself.

9 Now, it is the hypothetical person, the person who was
10 just going down the road who would also come within the purview
11 of this statute, I assume, under a theory that there is such a
12 substantial correlation that the statute is aimed at a select
13 group of people and are currently suspect of crime, because of
14 this substantial correlation. But that is really not our case.

15 Q Are you saying then that you are not in the cate-
16 gory of Marchetti and Gross cases?

17 A No, I think we are distinctly in that category of
18 cases. The distinction being here that the court found that
19 there was substantial correlation. Finding the substantial
20 correlation, it is difficult to distinguish this case from
21 Marchetti, Grosso, Haynes, and Leary. One could -- the
22 Attorney General argues that there has been some kind of a new
23 standard applied. These aren't magic words. We don't decide
24 cases upon whether or not the Supreme Court enant the right
25 formula.

1 The purpose of that formula is in order to determine
2 that there is a real and substantial risk of self-incrimination,
3 and that there was in this case.

4 Well, I have only a short period of time left, and I
5 wanted to talk for a moment about this doctrine of implied
6 waiver. I don't think that doctrine of implied waiver raises a
7 federal question before this Court. The reason I say that is
8 that this Court -- I am assuming you recognize that the doctrine
9 of implied waiver is a legal doctrine, it has nothing to do with
10 the facts. It isn't a factual thing at all. It is a legal
11 fiction, and the effect that the legal fiction is to create a
12 substantive rule of law.

13 When you say someone is entitled to waive something,
14 that is really in effect a substantive rule of law. The sub-
15 stantive rule of law in California is for the California courts
16 or the California Legislature to decide. It only would become
17 a federal question if and only if the courts first decided that
18 there was in fact such an implied waiver, then the constitution-
19 al issue would attach as to whether or not in fact this was
20 constitutionally permissible. But under this case, all of the
21 courts, the Court of Appeals expressly, refused to find implied
22 waiver here. There is no basis for it, either in a California
23 statute or a California case law.

24 Secondly, the California Supreme Court said the same
25 thing. They called it "untenable" and again the Court of

1 Appeals in the Bailey case has held the same thing. So I don't
2 think that the idea of implied waiver presents this Court with
3 any federal question in this case. It is really a red herring.
4 Again --

5 Q Would you say that the state could use any in-
6 formation it obtained from compliance with this statute in a
7 license revocation proceeding?

8 A In a license revocation proceeding?

9 Q Yes. The court here cannot use restrictions
10 permitting the use of the other in a criminal case. Now, let's
11 assume that a gentleman complies with the statute and gives his
12 name and address and the state uses that information not in a
13 criminal proceeding but in a proceeding to revoke his license.

14 A That's a difficult question. I suppose the
15 answer to that logically would be yes.

16 Q The point I was making --

17 A Well, this Court has said, for example, in
18 Garrity and Broderick, and it has even been applied in cases of
19 the private forfeiture of property.

20 Q Well, we are really arguing then about, on your
21 view also, about whether the state may revoke licenses.

22 A I really don't see that as the issue in the case.

23 Q I know, but you say that the principle is a
24 public one.

25 A Well, I am not sure that it does. I am expressing

1 doubt about that case. That isn't our case. I can see compet-
2 ing interests where one classically might say that the
3 privilege against self-incrimination doesn't apply in that kind
4 of situation, but the reason would be quite different. The
5 reason would be this, that that goes to the license which per-
6 mitted you to drive in the first place, and it is quite differ-
7 ent really to say that the state couldn't use it in the license
8 revocation proceeding than it is --

9 Q Or that you haven't waived your -- what rights
10 you have.

11 A Yes, but that is a little different, and I sus-
12 pect the California court might, Your Honor, reach that result
13 of implied waiver in that kind of a revocation hearing. But,
14 you know, I could see the court legitimately doing that.

15 Q May I ask you one question. Let's suppose this
16 thing had occurred, an accident had occurred on the 1st day of
17 October 1969. A week later the chief of police wrote him and
18 said, "There was an accident down at a certain place at a cer-
19 tain time and a man was killed, and we want you to write us now
20 whether or not you were the man driving the car that killed
21 him." Could he be compelled to answer that?

22 A No. But that doesn't meet Marchetti, Gross,
23 Haynes, and Leary. That's the basic philosophy behind the
24 Fifth Amendment, the power --

25 Q Suppose they didn't ask him to tell all the

1 details, but they asked him to give them enough, although the
2 man was not known at that time?

3 A Well, Hoffman --

4 Q It was just enough to put them on the trail and
5 get him.

6 A Well, Hoffman vs. United States followed in
7 Melloy vs. Hogan, there is a complete line of cases, you see
8 the link in the chain of evidence test and, yes, indeed, they
9 supplied him or the sheriff come to the hypothetical, required
10 him to supply evidence which would provide the prosecution
11 with the link in the chain of evidence, it is --

12 Q What is the difference in making him give an
13 answer a week later as far as the Fifth Amendment is concerned
14 and making him give it at the time the accident actually oc-
15 curred?

16 A I see none, and that is why I think there is a
17 whole section in our brief saying we don't need the Marchetti,
18 Grosso, Haynes and Leary cases, that this is a patent viola-
19 tion of the Fifth Amendment privilege under prior case law.

20 Q What about the license tag on your car?

21 A The license tags?

22 Q Yes.

23 A I think that the state can require a vehicle to
24 have license tags.

25 Q And that they can use all of the information

1 that is on the registration card?

2 A Yes.

3 Q What's the difference?

4 A That doesn't -- on its face, the first signifi-
5 cant difference is simply this: There is never there a re-
6 quirement of testimonial compulsion, which has been this
7 Court's -- one of its touchstones of determining whether or
8 not the Fifth Amendment does apply. This is a case, the case
9 at bar is one of testimonial compulsion. The case that you
10 proposed is not.

11 Q Well, why can't I say I am not going to give you
12 my address because at some time in the future, knowing how I
13 drive, I am going to have an accident.

14 A Because I don't think that represents a real
15 and substantial risk of self --

16 Q I am not giving you my address so you can come
17 and pick me up when I have that accident.

18 A If you have the accident I think --

19 Q Well, I told you what kind of driver I am.

20 (Laughter.)

21 A Well, maybe by the fact that you give me your
22 address you will be a better driver.

23 Q I guess what I am worried about, frankly, is
24 if you can get this information by means of your tags, your
25 driver's license or any other information, what's wrong with --

1 information which you have given from your own mouth, to quote
2 you --

3 A Because --

4 Q -- from your own mouth, or your own handwriting
5 on the application?

6 A There is still a crucial difference. In neither
7 instances of your hypothetical require anyone to characterize
8 himself. You aren't saying to the police authorities "I was
9 the driver." That is a case of identity, when you're talking
10 about the license plate numbers, and that is why I thought it
11 was crucial for us to explore that from the first. There is
12 that crucial distinction between an identification require-
13 ment and one which requires you really to characterize your-
14 self within criminal context.

15 Q Then would it be safe to take it from your con-
16 clusion, even though it isn't this case, that you would agree
17 that all you have to do is stop and leave your name, nothing
18 else, just your name, or your license number, that that would
19 not be a Fifth Amendment problem?

20 A No, I think that presents a Fifth Amendment
21 problem.

22 Q Then why do you say that -- you make a distinc-
23 tion between something which involves only identification?

24 A Well --

25 Q Does it have to be more than identification?

1 A If someone who is -- if it required everyone
2 who was involved in the accident, the drivers, the riders,
3 everyone who were involved in the broad sense, whether it was
4 a driver or a rider or a witness, to give his name and address,
5 I think that is a substantially different problem than we have
6 before us.

7 Q Then what you're saying, I take it, if I have
8 it correctly, that if it required every passenger in the car,
9 including the driver, to leave his name and addresss, it would
10 present no Fifth Amendment problem?

11 A Limiting it only to automobile accidents?

12 Q Any conflict between two moving vehicles or one
13 moving vehicle and a stationary vehicle or person.

14 A No, I think there is a Fifth Amendment problem
15 there. I don't think it is of the magnitude that the problem
16 is we have in this case. It is quite distinguishable.

17 Q How does a person who is a passenger in the car
18 incriminate himself?

19 A He does not.

20 Q Then if the statute requires the passengers to --

21 A Really, it is the scope of the inquiry, if you
22 could get enough people in so that it is so-called neutral on
23 its face, which was one of the problems in the Sullivan case,
24 if it applies to so many people outside of the criminal con-
25 text, then you see you begin to run into the question of

1 whether there is real and substantial risk of self-incrimination.

2 Q Isn't there a state interest in preserving the
3 witnesses to accidents which are not criminal and to criminal
4 conduct?

5 A Yes, but that is precisely why the State of
6 California in this case used the use restriction doctrine. They
7 said that we recognize our interests in having that information,
8 but we recognize as illegitimate the use of that information in
9 a criminal proceeding. And that again is the genius of the
10 use restriction device.

11 The California Court of Appeals and the California
12 Supreme Court both say that with the use restriction device we
13 allow the state to get their legitimate information, but we
14 do not permit the state to use that as punishment.

15 Q You would not see this opinion of the Supreme
16 Court of California as reaching a statute which requires that
17 all the passengers report the accident?

18 A No, I don't. I don't think that would -- that
19 would be an entirely different case. It would have to be
20 litigated. I am not sure at this point that I would say that
21 it was completely divested of any Fifth Amendment problem, but
22 it is a substantially different case.

23 Q We recognize that you can't fight the Supreme
24 Court of California, but we just wanted to get your reaction.

25 Q What do you think, except your position in lieu

1 of the Sullivan case, certainly distinguishing between Marchetti
2 and my recollection is also in Albertson.

3 A I'm sorry, I didn't understand the question.

4 Q I say what do you think accepting of your po-
5 sition in this case would do to the Sullivan case, Justice
6 Holmes' Sullivan case --

7 A Nothing.

8 Q -- which we distinguish in Marchetti and I think
9 also in Albertson?

10 A Nothing, and the reason -- and I think this case
11 is completely consistent with the Sullivan rule.

12 Q Well, why is that?

13 A Because during the course of the Sullivan de-
14 cision, this Court said in essence -- and I am not quoting --
15 but the Court said you cannot refuse to file the income tax
16 return with a blanket concept that to do so would incriminate
17 yourself. But you may make specific objection in that return
18 to a specific question which incriminates you, and that is
19 completely consistent with what we are doing in the Byers case.
20 It is a much easier case than Marchetti, Grosso and Haynes.

21 In this case we come exactly within the purview of
22 what was done in Sullivan, for in this case the only thing
23 that was asked was self-incriminating. That was not true in
24 Sullivan, although the Sullivan court did recognize, speaking
25 through Mr. Justice Holmes, did recognize that if the specific

1 question was put to you and indeed it was self-incriminating.
2 you could claim it in the return.

3 I see that this case does nothing to Sullivan. In
4 fact, I cited Sullivan in the brief in support of my contention.

5 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Poulos.

6 Mrs. Renne?

7 ARGUMENT OF LOUISE H. RENNE, ESQ.,

8 ON BEHALF OF PETITIONER -- REBUTTAL

9 MRS. RENNE: Mr. Chief Justice, and may it please the
10 Court. With respect to the last question answered, we think
11 that the decision below is directly contrary to this Court's
12 holding in U.S. vs. Sullivan, for the reason that U.S. vs.
13 Sullivan held that taxpayers must still file a return even
14 though the source of their income was illegal. So that a
15 taxpayer had to identify himself as a taxpayer.

16 Similarly here, a driver need only identify himself
17 as a driver. It is identification as part of a regulatory
18 group --

19 Q Counsel, doesn't leaving the name and address
20 not only identify yourself as the driver but as the driver of
21 a car that has just been in an accident?

22 A It does identify -- yes, it does identify your-
23 self as a driver of a car that has been involved in an accident.

24 Q A specific accident.

25 A A specific accident. That's correct, Your

1 Honor. But the fact that you have been in an accident certain-
2 ly does not --

3 Q A specific accident. Let's not talk about ac-
4 cidents in general, but about this specific accident that the
5 man was just in.

6 A That would not be incriminating --

7 Q What wouldn't be incriminating?

8 A The fact that you give the name and address or
9 that you have given the name and address as being the driver
10 of this specific accident, has nothing to do with incrimina-
11 tion, as I understand your question, Your Honor.

12 If I might add, if I understand your question, I
13 think that it is interesting to note that the respondent has
14 now conceded that it was criminal conduct that caused the ac-
15 cident, but if a trial had been held this is what the trial
16 would have been all about. And I don't know whether or not
17 until the confession, nobody could say that it was caused by
18 criminal conduct. That was the charge, but the state would
19 have to prove that beyond reasonable doubt in a criminal trial.

20 It could be that there might be a defense that the
21 respondent Byers could show that as he attempted to pass the
22 car the driver of the other car speeded up.

23 Q Well, what about Mr. Justice Black's question
24 to your colleague, where the police show up at your house and
25 say there was an accident here last week, we understand you

1 were there, were you there?

2 A I think that the police could ask that question
3 of --

4 Q Would it make it a crime to refuse to answer?

5 A Well, I think it would have to depend on why
6 they were asking the question.

7 Q Well, they just come and ask you and you say,
8 sorry, it is none of your business. Can you do that?

9 A A week's lag may be sufficient, and particularly
10 if what the police were trying to show was that you were the
11 hit-and-run driver.

12 Q Suppose it was an hour after the accident?

13 A I think the police could ask that question.

14 Q Well, the police can always ask you anything,
15 but do you have to answer?

16 A Well, you would certainly -- if I may answer the
17 question this way -- you would certainly have to answer if you
18 were there right on the spot at the scene of the accident, you
19 would have to answer that.

20 Q They may ask you were you driving the car that
21 was in an accident at Sixth and Newark.

22 A That may be a different case, Your Honor. I
23 think that would be a different case.

24 Q Well, wouldn't that be incriminating?

25 A I think -- could the state make that a crime?

1 Q If it isn't incriminating, they can make you
2 answer.

3 A Well, I think that they could. I think that a
4 lot would have to depend upon though what were the circum-
5 stances. Then I think you get into other kinds of cases. When
6 you have the accident scene and you have an immediate event
7 that requires a person to answer, and you have on this probable
8 cause, at that point where you have a person in your home, you
9 might have -- I think your problems may be different, but I
10 don't think we -- in order to sustain the constitutionality of
11 this statute, I don't think we have to go on and consider that
12 other case. I think it is enough that if you are on the scene
13 of the accident, the police can require you to show your
14 license, they can require you to answer.

15 Q You say that the police, the state may make him
16 leave his name and identify himself at the scene of the acci-
17 dent, but a half hour later he cannot be made to answer the
18 question were you driving the car in that accident?

19 A Well, I think that the problems may be entirely
20 different. I think it raises an entirely different kind of
21 issue, entirely different kinds of considerations.

22 Q Well, you don't care to speculate on what the
23 answer should be?

24 A Well, under California law, under various
25 statutes, he could be required to answer. He could be required

1 to answer, yes, but I don't think we have to go that far in
2 this case.

3 Q Mrs. Renne, doesn't the California law require
4 that you have to make a report to the State Motor Vehicles?

5 A Yes, it does, Your Honor, if --

6 Q And that is available for everybody?

7 A The reports are available to persons involved in
8 accidents. They are kept confidential to the extent that you
9 have to have some interest in seeing the report. If I might
10 also add, Your Honor --

11 Q And it identifies the driver of the car?

12 A Oh, certainly, and I think when you posed the
13 question, isn't this the same exact case as when you are fill-
14 ing out a license or a vehicle registration application, I
15 think the answer is yes, this is the same case. Identification
16 is the law.

17 Q Now, the difference is when you fill out your
18 application you don't say that you were the driver of a car
19 that had an accident. There is a difference there.

20 A Well, yes, but if your license is seized and you
21 just -- you find that out when you fill out the application.

22 Q You can then say the car was stolen.

23 A Well --

24 Q But if you give your name and say -- I don't
25 think it is important.

1 A Well, except under the theory of the State
2 Supreme Court, it could be the case that if you're wanted for
3 another crime you are not required to show your license because
4 that might incriminate you for reasons unrelated to the acci-
5 dent.

6 Q Are you familiar with the line of cases begin-
7 ning with Chief Justice Marshall's statement in the
8 case that any evidence of which a man may be required to give,
9 any evidence that might tend to show that he is guilty of a
10 crime he can refuse to answer that question?

11 A Your Honor, are you referring to the link in
12 the chain kind of analysis, that line?

13 Q Yes.

14 A Yes, we are familiar with that line of cases,
15 and it was --

16 Q It has been unbroken line of decisions, hasn't
17 it?

18 A The use of that simile has been considered, but
19 usually when it has been considered it has been considered in
20 the context of a judicial proceeding or legislative committee
21 proceeding where the very fact that the witness was called
22 before the court or the legislature may -- attention has been
23 focused, official attention --

24 Q Does it make any difference whether it is
25 legislative or judicial proceedings? I thought the amendment

1 said that no man shall be compelled to give evidence against
2 himself.

3 Q In any criminal case.

4 A In any criminal case. If I might add, in
5 Marchetti, Grosso and Haynes line of cases --

6 Q Have you read any cases, have we decided any
7 case that it has got to be asked in a pending criminal case --

8 A Well --

9 Q -- following the line of Mr. Chief Justice
10 Marshall, even though there has not been, if might be used as
11 a link in a chain to convict of a crime, that he can decline
12 to answer?

13 A Well, I think there are two cases, two lines of
14 cases that immediately come to mind in answering your ques-
15 tion. The first is the Marchetti, Gross, and Haynes line of
16 cases, in talking about the link of the chain, says that the
17 information required must constitute a substantial link in the
18 chain --

19 Q Wouldn't this be substantial?

20 A Name and address?

21 Q Yes.

22 A No, Your Honor. It is not a --

23 Q Name and address in connection with an accident
24 that has happened, where somebody is hurt or somebody is
25 killed.

1 A It could be caused by any number of reasons.

2 Q And they don't prove your guilt or innocence.

3 That was the question, as I understood it. I may be wrong.

4 The link in the chain that might tend to incriminate him.

5 A Well, if we are going to extend the link in the
6 chain analysis endlessly, then it would mean that U.S. in U.S.
7 vs. Sullivan, the decision should have gone the other way,
8 because the fact that a taxpayer files, is required to file a
9 tax return in which by the fact that he states his source of
10 income or the fact that he doesn't state his source of income--

11 Q Which case?

12 A The Sullivan case.

13 Q That's the general rule, and he did not say that
14 he had to answer every question there. You said they couldn't
15 be excused from making a report of taxes.

16 A And we think we have the exact same situation in
17 this case, Your Honor. We're not asking the driver to state
18 how many drinks did you have, or had you been drinking prior
19 to the accident. The driver is only required to say that he
20 was a driver, and it is the same thing, the same case also
21 as Shapiro vs. United States, which we have referred to in our
22 brief, embodying that it required records doctrine, where you
23 have a regulatory program. The information required is essen-
24 tial for the regulatory program, and in this case it was even
25 more neutral kind in that required in Shapiro vs. United States.

1 The Fifth Amendment does not apply.

2 Q It seems he should have had quite an apprehen-
3 sion. He was tried, wasn't he?

4 A Pardon me?

5 Q Wasn't he tried for a crime?

6 A The respondent in this case?

7 Q Yes.

8 A No. No, Your Honor. This --

9 Q Wasn't a charge made against him?

10 A The only charge made against him --

11 Q What was the charge?

12 A The charge was failure to pass to the left
13 safely.

14 Q Wasn't that an offense under the laws of the
15 State of California?

16 A It is an offense under the laws of California.

17 Q What happened to that charge?

18 A Well, nothing has happened as yet, except that
19 the State Supreme Court has said that the man -- it would be
20 unfair to try the respondent Byers. Now, our position --

21 Q He evidently could have had a reason for appre-
22 hension, if that is exactly what occurred, the state did
23 charge him with a crime.

24 A The state did charge him with -- the record
25 doesn't show how the state found out it was this man.

1 Q But they found out and as it wound up they
2 charged him with a crime.

3 A They did, because -- at the trial the facts of
4 what actually occurred would have come out.

5 Q Mrs. Renne, is it clear on this record -- I
6 thought your friend had said so -- that they did not find out
7 about him because of his stopping and reporting in terms of
8 the statute. Is that right or not?

9 A Yes, the state did not find out --

10 Q So that it was not his stopping and reporting
11 that brought on this kind of procedure at all?

12 A No, no. He --

13 Q That is immaterial to the question that I was
14 asking. I was asking you if it wasn't the rule of law and
15 hasn't been since Marshall's statement, that it is a link in
16 the chain of evidence that might cause a man to be prosecuted,
17 not convicted -- he might be turned loose -- if it is a link
18 in the chain of evidence that might cause him to be prosecuted,
19 he couldn't be compelled to answer.

20 A That is correct. There has been a state law.
21 The problem is how do you apply link in the chain. I am re-
22 minded of "for want of a nail, the shoe was lost," et cetera,
23 et cetera. And every piece of information that a person can
24 be required to give, the manufacturer has to label his goods,
25 the physician has to report nature and causes of accidents --

1 every piece of information a person could be required to give
2 could lead to some conceivable criminal charge.

3 Q Well, it did.

4 A It did in this case. Well, in this case he
5 didn't stop, so it didn't.

6 Q He hasn't been convicted or acquitted, I under-
7 stand.

8 A No, at the trial we were to have found out
9 whether or not he was guilty. He now says he was but we
10 didn't know it at the time for sure.

11 I just would finally like to add in conclusion that
12 insofar as the State Supreme Court held that there is a sub-
13 stantial shadow of suspicion cast upon people in accidents,
14 that that determination was unsubstantiated by the record,
15 there is no evidence, this case arose on the pleadings, and in
16 reaching that conclusion the State Supreme Court did not rest
17 on any particular provisions of California law. It seemed
18 that it was compelled to do so on the basis of Marchetti, Grosso,
19 and Haynes, and we think those cases are distinguishable, be-
20 cause of the very facts involved in those cases and are not
21 here.

22 Thank you.

23 MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Renne.

24 Mr. Poulos, you acted at our request and our appoint-
25 ment, and we thank you for your assistance, not only to your

1 client but your very careful assistance and preparation of this
2 case. The case is submitted.

3 MR. POULOS: Thank you, Your Honor.

4 (Whereupon, at 1:56 o'clock p.m., argument in the
5 above-entitled matter was concluded.)

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