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## Fifth Amendment Privilege and Compelled Production of Corporate Papers After Fisher and Doe

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# FIFTH AMENDMENT PRIVILEGE AND COMPELLED PRODUCTION OF CORPORATE PAPERS AFTER *FISHER AND DOE*

## INTRODUCTION

White collar crime<sup>1</sup> may be "the most serious and all-pervasive crime problem in America today."<sup>2</sup> The Department of Justice has made white collar crime, including corporate wrongdoing, its highest priority.<sup>3</sup> Regulation of corporate misconduct poses unique problems.<sup>4</sup> Corporations frequently conceal their illegal activity in complex transactions that commingle legitimate business with illegal pursuits.<sup>5</sup> Because corporate wrongdoing often leaves only a "paper trail,"<sup>6</sup> effective law enforcement requires access to corporate records.<sup>7</sup> Recent interpretations of the fifth

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1. Congress defines white collar crime as "an illegal act or series of illegal acts committed by non-physical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage." Justice System Improvement Act, § 901(a)(18), 42 U.S.C. § 3791(a)(18) (1982); see Conyers, *Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 Am. Crim. L. Rev. 287, 287 n.1 (1980). White collar crime includes bribery, kickbacks, payoffs, computer crime, consumer fraud, business fraud, securities fraud, illegal competition, embezzlement, pilferage, receiving stolen property, securities thefts, product safety violations, environmental violations, antitrust violations and fraud against the government. See *id.* at 288 & n.4.

2. Conyers, *supra* note 1, at 288; see also Simon & Swart, *The Justice Department Focuses on White-Collar Crime: Promises and Pitfalls*, 30 Crime & Delinq. 107, 108 (1984) ("a veritable corporate crime wave in the last few years"). See generally D. Simon & D. Eitzen, *Elite Deviance* vii-viii (1982) (sociological study exploring serious and representative forms of wrongdoing by wealthy and powerful individuals in corporate and governmental organizations). Official estimates of the annual cost of white collar crime range from \$40 billion to \$200 billion. See Conyers, *supra* note 1, at 297. In comparison, the annual loss attributable to crimes against property is estimated at \$4 billion. See *id.* at 288.

3. See Heymann, *White-Collar Crime Symposium*, 17 Am. Crim. L. Rev. 271, 271 (1980); Simon & Swart, *supra* note 2, at 108; Webster, *An Examination of FBI Theory and Methodology Regarding White-Collar Crime Investigation and Prevention*, 17 Am. Crim. L. Rev. 275, 279 (1980). Corporate crime can be viewed as a subset of white collar crime involving "managerial direction, participation, or acquiescence in illegal business acts." Conyers, *supra* note 1, at 287 n.1 (quoting *Corporate Criminal Liability: Hearings on H.R. 4973 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 242 (1980) (statement of Ralph Nader & Mark Green)).

4. See Applegate, *The Business Papers Rule: Personal Privacy and White Collar Crime*, 16 Akron L. Rev. 189, 190 (1982).

5. See H. Edelhertz, *The Nature, Impact and Prosecution of White Collar Crime* 27 (1970); Applegate, *supra* note 4, at 192-93; Vaira, *Use of the Grand Jury to Obtain Business Records*, 59 Chi. B. Rec. 32, 32 (1977).

6. Applegate, *supra* note 4, at 197; see *United States v. White*, 322 U.S. 694, 700 (1944) ("The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization.").

7. See *Bellis v. United States*, 417 U.S. 85, 91 (1974) ("Were the cloak of the privilege to be thrown around [organizational] records and documents, effective enforcement of many federal and state laws would be impossible.") (quoting *United States v. White*, 322 U.S. 694, 700 (1944)); *Wilson v. United States*, 221 U.S. 361, 384-85 (1911) ("The

amendment,<sup>8</sup> however, may jeopardize this vital access<sup>9</sup> by allowing custodians of corporate papers to resist compulsory production of the papers by invoking their personal privilege against self-incrimination.<sup>10</sup>

Traditionally, the custodian of an organization's records could not resist a subpoena for their production on fifth amendment grounds, even though producing them might tend to incriminate him.<sup>11</sup> Two rationales

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[state's] reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation."); *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906) ("If . . . an officer or employé of a corporation . . . could refuse to produce the books and documents . . . it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers."); 8 J. Wigmore, *Evidence* § 2259b, at 360-61 (J. McNaughton rev. ed. 1961) ("economic crimes [by corporations] are usually not even discoverable without access to business records") (emphasis in original); Applegate, *supra* note 4, at 193 (investigation of white collar crime "first requires access to large amounts of documentary evidence, and then requires careful evaluation of complex contents of the documents"); Vaira, *supra* note 5, at 32 (enforcement requires "extensive examination of financial records in order to follow the often complicated and sophisticated methods devised to hide illegal transactions").

8. The fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The fifth amendment applies to the states through the fourteenth amendment. *Malloy v. Hogan*, 378 U.S. 1, 3, 6 (1964).

9. See *supra* notes 6-7 and accompanying text and *infra* notes 51-52, 148-51 and accompanying text.

10. See, e.g., *In re Grand Jury Subpoenas*, 775 F.2d 43, 46 (2d Cir. 1985), *cert. denied*, 54 U.S.L.W. 3630 (U.S. Mar. 25, 1986); *In re Grand Jury*, 773 F.2d 45, 47 (3d Cir. 1985) (per curiam); *In re Grand Jury Matter* (Brown), 768 F.2d 525, 525-26, 529 (3d Cir. 1985) (en banc); *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985); *In re Katz*, 623 F.2d 122, 125-26 (2d Cir. 1980); *In re Grand Jury 83-8* (MIA) Subpoena Duces Tecum, 611 F. Supp. 16, 24 (S.D. Fla. 1985); Note, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 Harv. L. Rev. 640, 640-41, 654 (1986) [hereinafter cited as *Organizational Papers*].

Although the Harvard note interprets *In re Grand Jury Subpoena Duces Tecum*, 722 F.2d 981 (2d Cir. 1983), to hold that a custodian of organizational papers can claim a privilege, see *Organizational Papers*, *supra*, at 640 n.4, the privilege was allowed only because the documents were held in a personal capacity, not in a representative capacity. See *In re Grand Jury Subpoena Duces Tecum*, 722 F.2d 981, 986-87 (2d Cir. 1983); *In re Grand Jury Subpoena*, No. 85-2171, slip. op. at 7 (8th Cir. Feb. 21, 1986).

Other circuits continue to deny the privilege to custodians of organizational records. See *id.* at 6-7; *In re Grand Jury Proceedings* (Morganstern), 771 F.2d 143, 148 (6th Cir.), *cert. denied*, 106 S. Ct. 594 (1985); *In re Grand Jury Subpoena* (Lincoln), 767 F.2d 1130, 1131 (5th Cir. 1985); *United States v. G & G Advertising*, 762 F.2d 632, 634 (8th Cir. 1985); *United States v. Malis*, 737 F.2d 1511, 1512 (9th Cir. 1984) (per curiam); *In re Grand Jury Proceedings*, 727 F.2d 941, 946 (10th Cir.), *cert. denied*, 105 S. Ct. 90 (1984); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1189 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); *In re Grand Jury Proceedings United States*, 626 F.2d 1051, 1053 (1st Cir. 1980).

11. See *Bellis v. United States*, 417 U.S. 85, 88-89 (1974); *United States v. White*, 322 U.S. 694, 700-01 (1944); *Grant v. United States*, 227 U.S. 74, 77, 80 (1913); *Wheeler v. United States*, 226 U.S. 478, 490 (1913); *Wilson v. United States*, 221 U.S. 361, 384-85 (1911); *Dreier v. United States*, 221 U.S. 394, 400 (1911); *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906). See generally C. McCormick, *McCormick On Evidence* §§ 128-129 (3d ed. 1984) (discussing the privilege with respect to corporations, associations and their agents); 8 J. Wigmore, *supra* note 7, at §§ 2259a-2259b (same); *White Collar Crime*—

justified denying the privilege to the custodian.<sup>12</sup> First, a collective entity enjoys no privilege because it is not a "person" within the scope of the fifth amendment.<sup>13</sup> Since a collective entity can act only through its agents, to permit each agent to assert his personal fifth amendment privileges would grant the entity a de facto privilege,<sup>14</sup> thereby extending the fifth amendment beyond its scope.<sup>15</sup> Accordingly, the organization's agents acting in a representative capacity assume its duty to produce its documents and thereby implicitly waive their privilege.<sup>16</sup> The second rationale was rooted in privacy concerns.<sup>17</sup> Compulsory production of an individual's private papers violated the fifth amendment protection of his legitimate expectation of privacy in his personal papers.<sup>18</sup> Because the privilege applied only to an individual's private papers,<sup>19</sup> the lack of any privacy interest in an organization's papers<sup>20</sup> prevented their custodian

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*Third Annual Survey of Law*, 22 Am. Crim. L. Rev. 279, 560, 564-65 (1984) (same) [hereinafter cited as *Survey*]. See *infra* notes 32, 43-73 and accompanying text.

12. See *Bellis v. United States*, 417 U.S. 85, 89-91 (1974).

13. See *id.* at 89-90; *United States v. White*, 322 U.S. 694, 698-99, 701 (1944); C. McCormick, *supra* note 11, § 128, at 311.

14. See *Bellis v. United States*, 417 U.S. 85, 90 (1974); *United States v. White*, 322 U.S. 694, 699-701 (1944); *Wilson v. United States*, 221 U.S. 361, 377, 384, 386 (1911); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 148 (6th Cir.) (en banc), *cert. denied*, 106 S. Ct. 594 (1985); *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 530 (3d Cir. 1985) (en banc) (Becker, J., concurring); *id.* at 536 (Garth, J., dissenting); *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 56 (2d Cir. 1985).

15. See *Bellis v. United States*, 417 U.S. 85, 89-91 (1974); *Couch v. United States*, 409 U.S. 322, 327-28 (1973); *United States v. White*, 322 U.S. 694, 700-01 (1944); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 148 (6th Cir.), *cert. denied*, 106 S. Ct. 594 (1985); *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 530 (3d Cir. 1985) (en banc) (Becker, J., concurring); *id.* at 536 (Garth, J., dissenting); *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 56 (2d Cir. 1985).

16. See *Bellis v. United States*, 417 U.S. 85, 90 (1974); *Curcio v. United States*, 354 U.S. 118, 123-25 (1957); *United States v. White*, 322 U.S. 694, 699 (1944); *Wilson v. United States*, 221 U.S. 361, 380-82 (1911); C. McCormick, *supra* note 11, § 129, at 312. See *infra* notes 42, 57-58, 101, 122-23 and accompanying text.

17. See *Bellis v. United States*, 417 U.S. 85, 91 (1974); *Couch v. United States*, 409 U.S. 322, 327 (1973); *Wilson v. United States*, 221 U.S. 361, 377-78, 380 (1911); *Boyd v. United States*, 116 U.S. 616, 630 (1886).

18. See *Bellis v. United States*, 417 U.S. 85, 91-92 (1974); *Couch v. United States*, 409 U.S. 322, 335 (1973). See *infra* note 44 and accompanying text.

19. See *Bellis v. United States*, 417 U.S. 85, 90 (1974); *United States v. White*, 322 U.S. 694, 699 (1944); *Wilson v. United States*, 221 U.S. 361, 380 (1911).

20. The *Bellis* Court defined an organization as an entity with an existence independent of its individual members. See *Bellis v. United States*, 417 U.S. 85, 92-93 (1974). Distinguishing between individual and organizational records can be problematic. See Note, *On Claiming the Fifth Amendment for Mixed Purpose Documents: The Problem of Categorizing Documents as Personal or Corporate in a Business Setting*, 17 U.S.F.L. Rev. 333, 333-34 (1983). To qualify as an organizational document for fifth amendment purposes, a document must belong to an organization that maintains a distinct set of organizational records and recognizes in its members a right of control and access to them. *Bellis v. United States*, 417 U.S. 85, 93 (1976). "In other words, it must be fair to say that the records demanded are the records of the organization rather than those of the individual. . . ." *Id.* The size of the organization is not dispositive. See *id.* at 100-01. The issue of whether the documents are possessed in a personal or representative capacity is often confused with the issue of whether documents possessed in a personal capacity are pro-

from asserting his personal privilege.<sup>21</sup>

In *Fisher v. United States*,<sup>22</sup> however, the Supreme Court propounded a literal interpretation of the fifth amendment<sup>23</sup> and repudiated the notion that the fifth amendment directly addresses privacy interests.<sup>24</sup> The Court stated that the fifth amendment protects individuals only from compelled self-incrimination, not from disclosure of private information.<sup>25</sup> Thus, when the government subpoenas an individual's documents, the fifth amendment inquiry focuses on the testimony implicit in the act of producing the documents, not the private character of the documents.<sup>26</sup> After *Fisher*, the sole criterion in analyzing any claim of privilege with respect to documents held in a personal capacity<sup>27</sup> is whether the act of production constitutes compelled testimony that might incriminate the producer.<sup>28</sup>

Based on the demise of the privacy rationale, some authorities construe *Fisher* to create a privilege for custodians of organizational records when their act of producing the records is testimonial and self-incriminating.<sup>29</sup> This interpretation misreads the shift in fifth amendment juris-

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ted by the privilege. See Heidt, *The Fifth Amendment Privilege and Documents — Cutting Fisher's Tangled Line*, 49 Mo. L. Rev. 439, 440 n.1, 441 n.5 (1984). Some authorities contend that the distinction between an individual's and a corporation's documents is irrelevant after *Fisher v. United States*, 425 U.S. 391 (1976). See *infra* notes 87-90 and accompanying text. Nevertheless, this Note argues that *Fisher* supports the traditional distinction between organizational and private papers. See *infra* notes 86, 91-113 and accompanying text.

21. See *Bellis v. United States*, 417 U.S. 85, 91-92 (1974); *United States v. White*, 322 U.S. 694, 699-700 (1944).

22. 425 U.S. 391 (1976).

23. See *Fisher v. United States*, 425 U.S. 391, 401 (1976) ("We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy. . . .").

24. See *id.* at 399-401.

25. See *id.* at 401.

26. See *United States v. Doe*, 465 U.S. 605, 610-14 (1984). The *Fisher* Court noted that special problems of privacy might exist when personal diaries are subpoenaed. See *Fisher v. United States*, 425 U.S. 391, 401 (1976). Whether these privacy problems implicated the fourth or fifth amendments was left ambiguous. See *id.* at 415 n.1 (Brennan, J., concurring).

27. See *supra* note 20 and accompanying text.

28. See *United States v. Doe*, 465 U.S. 605, 612-14 (1984); *Organizational Papers*, *supra* note 10, at 641-42, 644. After *Fisher*, the Court applied the act of production rationale to quash a subpoena for a sole proprietor's business papers. See *United States v. Doe*, 465 U.S. 605, 612-14 (1984).

29. See *supra* note 10 and accompanying text. The Third Circuit has held that, after *Fisher* and *Doe*, a custodian of corporate records can resist a subpoena for corporate records when production would incriminate him. See *In re Grand Jury*, 773 F.2d 45, 47 (3d Cir. 1985); *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 529 (3d Cir. 1985) (en banc); see also *Organizational Papers*, *supra* note 10, at 641-42 (arguing that the demise of privacy invalidates the collective entity rule). The Second Circuit has stated, in dictum, that a limited exception to the collective entity rule exists when the custodian's act of production would be self-incriminating. See *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985) (dictum). This "exception," however, would be coextensive with the scope of the privilege with respect to private documents after *Fisher*. See *supra* notes 23-28 and accompanying text. Thus, the Second Circuit's interpretation,

prudence embodied in *Fisher*.<sup>30</sup> Moreover, reading *Fisher* as authority for permitting corporate agents to claim the privilege disregards nearly eighty years of precedent unequivocally denying the existence of such a privilege.<sup>31</sup>

This Note argues that a custodian has no fifth amendment privilege to resist the compulsory production of organizational documents he holds in a representative capacity. In accepting the duties of a custodian, the agent impliedly waives any personal privilege with respect to organizational documents. Part I analyzes the evolution of the collective entity rule and concludes that *Fisher* entrenched rather than qualified the rule. Part II then examines the implied waiver rationale underlying the collective entity rule and concludes that it conforms with the fifth amendment and promotes the public interest by allowing the government to police corporate misconduct.

## I. THE EVOLUTION OF THE COLLECTIVE ENTITY RULE

For nearly eighty years, the Supreme Court has held that "an individual cannot rely upon [his personal fifth amendment] privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally."<sup>32</sup> Prior to *Fisher v. United States*,<sup>33</sup> the Supreme Court predicated the collective entity rule<sup>34</sup> on both the absence of any privacy

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which creates a privilege for corporate custodians, would be the rule rather than the exception.

30. See *infra* notes 91-113 and accompanying text.

31. See *Fisher v. United States*, 425 U.S. 391, 411 (1976) ("This Court has also time and again allowed subpoenas against the custodian of corporate documents or those belonging to other collective entities."); *Bellis v. United States*, 417 U.S. 85, 88 (1974) ("A long line of cases has established that an individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity."); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 147 (6th Cir.) (en banc) (nothing in *Fisher* or *Doe* "supports an inference that the collective entity rule, developed by the Supreme Court over a period of nearly 80 years, was overruled *sub silentio*"), *cert. denied*, 106 S. Ct. 594 (1985); *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 532 (3d Cir. 1985) (en banc) (Garth, J., dissenting) (Granting the privilege to a corporate custodian is contrary to "nearly eighty years of unvarying and continuous Supreme Court precedent to the contrary."); *In re Two Grand Jury Subpoena Duces Tecum*, 769 F.2d 52, 58 (2d Cir. 1985) ("Since 1906 the Supreme Court has regarded the distinction between an individual and a corporation as vitally important in determining the reach of the fifth amendment."). See *supra* note 11 and accompanying text.

32. *Bellis v. United States*, 417 U.S. 85, 88 (1974). See *supra* note 11, 31 and accompanying text.

33. 425 U.S. 391 (1976).

34. One commentator has referred to this principle as the "representative capacity doctrine." See Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 UCLA L. Rev. 343, 365 (1979). Others refer to the rule as the "collective entity" rule. See *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 145 (6th Cir.) (en banc), *cert. denied*, 106 S. Ct. 594 (1985); *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 534 (3d Cir. 1985) (en banc) (Garth, J., dissenting).

interest in the organization's documents<sup>35</sup> and the custodian's assumption of the organization's obligation to produce its documents for government inspection.<sup>36</sup> In *Fisher*, the Supreme Court disclaimed privacy as a criterion that determines the scope of the privilege.<sup>37</sup>

Some authorities interpret the demise of privacy as the deathknell of the collective entity rule.<sup>38</sup> If this interpretation is correct, the *Fisher* Court overruled sub silentio eighty years of unbroken precedent.<sup>39</sup> These authorities contend that *Fisher* implicitly extended the privilege to an organization's agent holding documents in a representative capacity.<sup>40</sup> In disavowing the privacy rationale, however, the Court contracted the scope of the privilege and did not retreat from the collective entity rule.<sup>41</sup> Instead, *Fisher* underscored the implied waiver theory underlying the collective entity rule.<sup>42</sup>

### A. From *Boyd* to *Bellis*: The Dual Bases of the Collective Entity Rule

In *Boyd v. United States*,<sup>43</sup> the Supreme Court held that, because protecting individual privacy was a primary purpose of the privilege against

35. See *supra* notes 17-21 and accompanying text and *infra* note 68 and accompanying text.

36. See *supra* note 16 and accompanying text and *infra* notes 57-58, 101 and accompanying text.

37. See *United States v. Doe*, 465 U.S. 605, 610-11 & n.8 (1984); *Fisher v. United States*, 425 U.S. 391, 399 (1976); *Organizational Papers*, *supra* note 10, at 644. See *supra* notes 23-28 and accompanying text and *infra* notes 75-85 and accompanying text.

38. See *supra* notes 10, 29 and accompanying text and *infra* notes 40, 87-91 and accompanying text.

39. See *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 147 (6th Cir.) (en banc), cert. denied, 106 S. Ct. 594 (1985); *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 532 (3d Cir. 1985) (en banc) (Garth, J., dissenting). See *supra* notes 11, 31 and accompanying text.

40. See, e.g., *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 528 (3d Cir. 1985) (en banc) ("[*Fisher* and *Doe*] make the significant factor, for the privilege against self-incrimination, neither the nature of the entity which owns documents, nor the contents of documents, but rather the communicative or noncommunicative nature of the arguably incriminating disclosures sought to be compelled."); *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985) ("In certain limited circumstances, however, an individual may have a fifth amendment privilege against being personally compelled to produce corporate documents."); *Organizational Papers*, *supra* note 10, at 642 ("[*Fisher*'s] compelled testimony standard permits no principled distinction between personal and organizational documents."). See *infra* notes 87-91 and accompanying text.

41. See *infra* notes 95-99, 100 and accompanying text.

42. See *infra* notes 93-95, 106-09 and accompanying text.

43. 116 U.S. 616 (1886). In *Boyd*, the Supreme Court first extended the privilege against self-incrimination to compulsory production of private papers. *Boyd*'s holding would be reiterated without question for the next 90 years. See *Fisher v. United States*, 425 U.S. 391, 419 (1976) (Brennan, J., concurring); see also C. McCormick, *supra* note 11, § 126, at 306 (discussing the privilege as related to compulsory production of documents); 8 J. Wigmore, *supra* note 7, § 2264, at 379-80 & n.1 (same); *Survey*, *supra* note 11, at 564 (same). In this context, "private" is used to distinguish documents owned by an individual from those owned by an organization. See *supra* note 20 and accompanying text.

self-incrimination, the fifth amendment proscribed the compulsory production of private papers.<sup>44</sup> In subsequent decisions, the Court proved reluctant to extend the privilege to all categories of private property.<sup>45</sup> Logically, *Boyd*'s rationale would allow any owner of private property, including corporations, to invoke the fifth amendment when the government legitimately seeks access to that property.<sup>46</sup>

A corporation, however, is a fictional entity created by the state and enjoys only those rights and privileges the state sees fit to confer.<sup>47</sup> A corporation holds its documents subject to the state's reserved right of visitation, which permits the government to inspect them for any legitimate purpose.<sup>48</sup> Thus, in *Hale v. Henkel*,<sup>49</sup> the Supreme Court upheld a contempt order issued against a corporate official who refused to produce corporate records on the ground that the corporation would be incriminated.<sup>50</sup> The Court stated that illegal corporate activities were generally

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44. See *id.* at 630, 634-35. Two years before *Fisher*, the Supreme Court stated that "[p]rotection of individual privacy was the major theme running through the Court's decision in *Boyd*." *Bellis v. United States*, 417 U.S. 85, 91 (1974). One commentator, however, discerns two stages in the development of the privacy rationale. See Heidt, *supra* note 20, at 442, 444. In the early stage, property rights were paramount. *Id.* As long as the person subpoenaed possessed the property and either owned it or held a property interest superior to the party issuing the subpoena, he could suppress the property. See *Bellis v. United States*, 417 U.S. 85, 90 (1974); Heidt, *supra* note 20, at 448. Later interpretations of *Boyd*, however, emphasized the protection of individual privacy. See *Bellis v. United States*, 417 U.S. 85, 91 (1974); Heidt, *supra* note 20, at 457-58. Under this rationale, the privilege protects certain documents in order to safeguard a person's "legitimate expectation of privacy," *Couch v. United States*, 409 U.S. 322, 336 (1973), and his "private enclave where he may lead a private life," *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (quoting *United States v. Grunewald*, 233 F.2d 556, 581-82 (1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)).

45. See Heidt, *supra* note 20, at 449. See *infra* notes 50-73 and accompanying text.

46. See Heidt, *supra* note 20, at 444, 449.

47. See *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906); C. McCormick, *supra* note 11, § 128, at 311.

48. See *Bellis v. United States*, 417 U.S. 85, 89 (1974); *United States v. White*, 322 U.S. 694, 700 (1944); *Wilson v. United States*, 221 U.S. 361, 382-85 (1911); C. McCormick, *supra* note 11, § 128, at 311. In *Wilson*, the Court explained the relationship between the fifth amendment and the state's visitatorial powers:

[T]he corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist production upon the ground of self-crimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitatorial power of the State, and in the authority of the National Government where the corporate activities are in the domain subject to the powers of Congress.

*Wilson v. United States*, 221 U.S. 361, 382 (1911).

49. 201 U.S. 43 (1906).

50. See *id.* at 74-75.



discoverable only by examining corporate papers.<sup>51</sup> Accordingly, allowing a privilege with respect to corporate records would impermissibly frustrate the government's visitatorial powers and impede legitimate efforts to regulate corporate conduct.<sup>52</sup>

Over the next eighty years, the Court delineated the fifth amendment rights of representatives of corporations, partnerships and other collective entities. Not once did the Court allow a custodian holding an entity's records in a representative capacity to assert his personal fifth amendment privilege.<sup>53</sup> In *Wilson v. United States*,<sup>54</sup> the Court held that a corporate representative could not prevent a corporation from complying with a documentary subpoena on the basis of his own privilege against self-incrimination.<sup>55</sup> Although the Court recognized that compelling the custodian to produce corporate documents could be as incriminating as compelling him to produce his private papers,<sup>56</sup> it held that the custodian had waived his privilege.<sup>57</sup> On becoming custodian, he voluntarily accepted a duty to produce corporate documents that overrode his personal privilege.<sup>58</sup> In *United States v. White*,<sup>59</sup> the Court extended the collective entity rule to the custodian of union documents.<sup>60</sup> The *White* Court emphasized that the power to compel production was a necessary concomitant of the government's duty to police powerful artificial entities.<sup>61</sup>

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51. *See id.* at 74. *See supra* note 6 and accompanying text.

52. *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906); *see Bellis v. United States*, 417 U.S. 85, 89 (1974); *United States v. White*, 322 U.S. 694, 700 (1944); *Wilson v. United States*, 221 U.S. 361, 382, 384-85 (1911). *See supra* notes 9-10 and accompanying text and *infra* notes 66-67 and accompanying text.

53. *See supra* notes 11, 31-32, 39 and accompanying text.

54. 221 U.S. 361 (1911).

55. *Id.* at 384-85. In a companion case, the Court held that a corporate custodian personally subpoenaed to produce corporate documents could not avoid production. *See Dreier v. United States*, 221 U.S. 394, 400 (1911). Even after the dissolution of a corporation and the transfer of its books, the transferee cannot invoke the privilege as to corporate documents. *See Wheeler v. United States*, 226 U.S. 478, 490 (1913). The rule applies even if the individual is the sole shareholder of a professional corporation. *See Grant v. United States*, 227 U.S. 74, 77, 80 (1913).

56. *See Wilson*, 221 U.S. at 378-79.

57. *Id.* at 380-82; *see Meltzer, Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. Chi. L. Rev. 687, 703 (1951). *See supra* notes 16, 42 and accompanying text and *infra* notes 101, 122-23 and accompanying text.

58. *See Wilson v. United States*, 221 U.S. 361, 380 (1911) (corporate documents "are of a character which subjects them to the scrutiny demanded and . . . the custodian has voluntarily assumed a duty which overrides his claim of privilege"). The Court noted that English common law accorded corporate agents a right against self-incrimination with respect to production of corporate papers. *See id.* at 385-86. The Court recognized, however, that "these [English cases] cannot be deemed controlling. The corporate duty, and the relation of the appellant as the officer of the corporation to its discharge, are to be determined by our laws." *Id.* at 386.

59. 322 U.S. 694 (1944).

60. *See id.* at 701.

61. *See id.* at 700 ("The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be corre-

In 1974, the Court in *Bellis v. United States*<sup>62</sup> held that the collective entity rule precluded a partner from asserting his privilege to resist the compelled production of partnership records.<sup>63</sup> Justice Marshall summarized the two rationales that still required the collective entity rule.<sup>64</sup> First, because the fifth amendment protects only the natural individual from compelled self-incrimination, neither an artificial entity, nor its agents acting in their representative capacities, can invoke the privilege.<sup>65</sup> Again the Court reasoned that the economic power of modern collective entities, readily susceptible to abuse, demands effective government regulation.<sup>66</sup> Recognition of the agent's privilege, however, would extend the privilege to the entity, thus denying the government access to crucial evidence of organizational misconduct—the organization's official documents.<sup>67</sup> Second, the *Bellis* Court noted that the partner's lack of privacy interest in partnership records also justified applying the collective entity rule.<sup>68</sup> In the sole dissent, Justice Douglas objected only to the majority's characterization of a three-man partnership as a collective entity.<sup>69</sup> Thus, as of 1974, the Supreme Court unanimously agreed that the collective entity rule barred agents of collective entities from asserting their personal privileges with respect to the entities' documents.<sup>70</sup>

From *Hale* to *Bellis*, the Supreme Court drew a "bright line" between

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spondingly effective."). In addition, the *White* Court explained the need to treat all collective entities in the same manner for fifth amendment purposes:

[T]he absence of [visitatorial powers over] a particular type of organization does not lessen the public necessity for making reasonable regulations of its activities effective, nor does it confer upon such an organization the purely personal privilege against self-incrimination. Basically, the power to compel the production of the records of any organization, whether it be incorporated or not, arises out of the inherent and necessary power of the federal and state governments to enforce their laws. . . .

*Id.* at 700-01. See *supra* notes 51-52 and accompanying text and *infra* note 66 and accompanying text.

62. 417 U.S. 85 (1974).

63. *Id.* at 101.

64. See *id.* at 89-92.

65. See *id.* at 90.

66. See *id.* at 90-91 (quoting *United States v. White*, 322 U.S. 694, 700 (1944)).

67. See *Bellis*, 417 U.S. at 90-91. The Court explained this problem as follows:

In view of the inescapable fact that an artificial entity can only act to produce its records through its individual officers or agents, recognition of the individual's claim of privilege with respect to the financial records of the organization would substantially undermine the unchallenged rule that the organization itself is not entitled to claim any Fifth Amendment privilege, and largely frustrate legitimate governmental regulation of such organizations.

*Id.* at 90.

68. See *id.* at 91-92.

69. See *id.* at 101-05 (Douglas, J., dissenting).

70. The custodian may, however, refuse to give oral testimony concerning corporate matters that would be personally incriminating. *Curcio v. United States*, 354 U.S. 118, 124-25 (1957). If the custodian has already produced the documents, then he can be compelled to authenticate them orally. *United States v. Austin-Bagley*, 31 F.2d 229, 234 (2d Cir.), *cert. denied*, 279 U.S. 863 (1929).

documents belonging to an organization and documents belonging to an individual.<sup>71</sup> When a subpoena duces tecum sought the former, the possessor could not claim his own privilege.<sup>72</sup> When an individual's documents were sought, however, he could invoke his privilege on the basis of a privacy interest in his own written thoughts.<sup>73</sup>

## B. Fisher and Doe

### 1. The Demise of Privacy

Two years after *Bellis*, the Supreme Court in *Fisher v. United States*<sup>74</sup> rejected the proposition that protection of privacy was a function of the fifth amendment.<sup>75</sup> Rather, the fifth amendment only protected the individual from compelled, self-incriminating testimonial disclosures.<sup>76</sup> Because the papers in question were voluntarily prepared, their content did not constitute compelled testimony.<sup>77</sup> The act of producing the documents, however, may have testimonial and incriminating aspects independent of the contents.<sup>78</sup> Production of documents tacitly concedes the existence of the papers demanded, their possession or control by the one producing them, and implicitly authenticates the documents as those described in the subpoena.<sup>79</sup> If this testimony incriminates the producer, he can invoke the fifth amendment to avoid production.<sup>80</sup>

Consequently, the fifth amendment basis for resisting production of private papers shifted from the individual's privacy interest in their contents to his right not to disclose self-incriminating testimony inherent in the act of production.<sup>81</sup> In *Fisher*, however, the fifth amendment did not shield an individual taxpayer's records because his act of producing them

71. See *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 58-59 (2d Cir. 1985).

72. See *supra* notes 11, 49-70 and accompanying text.

73. See *supra* note 43 and accompanying text.

74. 425 U.S. 391 (1976).

75. See *id.* at 399-401.

76. *Id.*

77. See *United States v. Doe*, 465 U.S. 605, 610-12 (1984); *Fisher v. United States*, 425 U.S. 391, 409-10 (1976).

78. See *Fisher*, 425 U.S. at 410; see also *Organizational Papers*, *supra* note 10, at 645-47 (explaining how the act of production can be testimonial). Whether the act of production involves compelled testimonial communication depends on whether it supplies a necessary link in the evidentiary chain. See *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 146 (6th Cir.) (en banc), cert. denied, 106 S. Ct. 594 (1985). Does it confirm that which was previously unknown to the government, for example, the existence or location of the papers? *Id.* Does it supply assurance of authenticity not available to the government from sources other than the person summoned? *Id.* The implied admission that a taxpayer possessed fraudulent tax records, for instance, would help to establish the essential element of scienter. See *Heidt*, *supra* note 20, at 478.

79. *Fisher*, 425 U.S. at 410. A document is admissible in evidence only after being authenticated. See Fed. R. Evid. 901(a).

80. See *Fisher*, 425 U.S. at 410-13.

81. See *United States v. Doe*, 465 U.S. 605, 610-14 (1984); *Fisher*, 425 U.S. at 431 (Marshall, J., concurring).

was not self-incriminating testimony.<sup>82</sup> In *United States v. Doe*,<sup>83</sup> the Court again applied the act of production rationale<sup>84</sup> but held that a sole proprietor could assert his privilege in response to a subpoena seeking his business records because compliance might authenticate them.<sup>85</sup>

## 2. The Collective Entity Rule After *Fisher* and *Doe*

Neither *Fisher* nor *Doe* indicated in any way that the Court had suddenly cast aside the collective entity rule.<sup>86</sup> Nevertheless, some courts and commentators read *Fisher* and *Doe* to create an exception to the collective entity rule when a corporate custodian's act of production constitutes self-incriminating testimony.<sup>87</sup> They reason that because the Court held privacy interests irrelevant to the fifth amendment, it thereby eliminated the foundations for the collective entity rule.<sup>88</sup> Accordingly, they argue that the different treatment of documents based on their private or organizational character is no longer valid.<sup>89</sup> Rather, it is the nature of the testimony implicit in the act of producing the documents that is significant, regardless of their ownership.<sup>90</sup> This interpretation, however, misreads the mandate of both *Fisher* and *Doe* and ignores statements in

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82. See *Fisher*, 425 U.S. at 410-14. In *Fisher*, individual taxpayers had turned over their accountants' workpapers to their attorneys. See *id.* at 394. Their attorneys, who were summoned to produce the workpapers, see *id.*, could resist the summons by virtue of the attorney client privilege only if the workpapers would have been privileged from production in their clients' hands. See *id.* at 404-05. Thus, the Court had to decide whether "the documents could have been obtained by summons addressed to the taxpayer while the documents were in his possession." *Id.* at 405. In this case, the taxpayers' act of production would not have been testimonial because the existence and location of the papers were a "foregone conclusion," *id.* at 411, and because the taxpayers' production would not have authenticated the accountants' papers, see *id.* at 412-13; *id.* at 430 n.9 (Brennan, J., concurring) ("[The taxpayers] stipulated, however, that the documents involved here exist and are those described in the subpoenas, thereby obviating any problem as to self-incrimination in these cases resulting from the act of production itself.").

83. 465 U.S. 605 (1984).

84. See *id.* at 612.

85. *Id.* at 606, 613-14 & nn.11-12.

86. See *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 145, 147 (6th Cir.) (en banc), cert. denied, 106 S. Ct. 594 (1985).

87. See *supra* notes 10, 29 and accompanying text. They reason that because the custodian's implied admissions are just as likely to be testimonial and incriminating as that of any individual, no reason exists for compelling the implied admissions of the custodian but not those of other individuals. See *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 528 (3d Cir. 1985) (en banc); *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985); *In re Grand Jury 83-8 (MIA) Subpoena Duces Tecum*, 611 F. Supp. 16, 24 (S.D. Fla. 1985); *Organizational Papers*, *supra* note 10, at 647-48; see also Heidt, *supra* note 20, at 475-76 (noting that, though the implied admissions of custodians are no different than those of other individuals, the Court nonetheless requires a custodian of organizational papers to produce them when subpoenaed).

88. See *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 525-28 (3d Cir. 1985) (en banc); *Organizational Papers*, *supra* note 10, at 641-42. See *supra* note 10 and accompanying text.

89. See *supra* note 88.

90. See *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 528 (3d Cir. 1985) (en banc); *Organizational Papers*, *supra* note 10, at 642, 647-48.

those opinions that directly contradict their conclusion.<sup>91</sup>

In both *Fisher* and *Doe*, the Court took great care to explain that the act of production rationale had no effect on the collective entity rule.<sup>92</sup> In each case, the Court cited *Bellis* and its predecessors for the proposition that the custodian of organizational papers cannot claim his privilege to refuse to produce them under subpoena.<sup>93</sup> Moreover, the *Fisher* Court stated that, despite any incrimination implicit in his act of production, the agent of collective entity must produce the entity's records on demand.<sup>94</sup> Thus, the Court apparently accepted the collective entity rule without hesitation.

The concurring opinions in *Fisher* demonstrate that the entire Court assumed the continued validity of the collective entity rule. The concurring opinions criticized the majority not for extending the privilege to organizational representatives but for its reduction of an existing individual privilege.<sup>95</sup> Justice Marshall, who only two years earlier authored the

91. See *infra* notes 92-113 and accompanying text.

92. See *In re Grand Jury Proceedings* (Morganstern), 771 F.2d 143, 145-46, 147 (6th Cir.), cert. denied, 106 S. Ct. 594 (1985); *In re Grand Jury Matter* (Brown), 768 F.2d 525, 530 (3d Cir. 1985) (en banc) (Becker, J., concurring); *id.* at 532, 538 & n.6 (Garth, J., dissenting); *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 58 (2d Cir. 1985). See *infra* notes 93-101 and accompanying text.

93. See *United States v. Doe*, 465 U.S. 605, 608 (1984); *Fisher v. United States*, 425 U.S. 391, 411-13 (1976).

94. *Fisher v. United States*, 425 U.S. 391, 413 & n.14 (1976). Curiously, the Harvard note argues that *Fisher* overruled the collective entity rule but never mentions passages in the *Fisher* opinion indicating that the Court saw no conflict between the act of production rationale and the collective entity rule. See *Organizational Papers*, *supra* note 10, at 643-48. In two instances, the *Fisher* Court carefully distinguished situations involving personal papers from those involving organizational papers. See *Fisher*, 425 U.S. at 411-12, 413 & n.14. In the first instance, the Court stated:

This Court has also time and again allowed subpoenas against the custodian of corporate documents or those belonging to other collective entities such as unions and partnerships and those of bankrupt businesses over claims that the documents will incriminate the custodian despite the fact that producing the documents tacitly admits their existence and their location in the hands of their possessor. *E.g.*, *Wilson v. United States*; *Dreier v. United States*; *United States v. White*; *Bellis v. United States*; *In re Harris*.

*Fisher*, 425 U.S. at 411-12 (citations omitted) (emphasis in original). In the second instance, the Court emphasized that organizational papers must be produced despite any self-incriminating testimony inherent in the act of production:

Moreover, in *Wilson v. United States*, *supra*; *Dreier v. United States*, *supra*; *United States v. White*, *supra*; *Bellis v. United States*, *supra*; and *In re Harris*, *supra*, the custodian of corporate, union, or partnership books or those of a bankrupt business was ordered to respond to a subpoena for the business' books even though doing so involved a 'representation that the documents produced are those demanded by the subpoena'.

*Id.* at 413 (quoting *Curcio v. United States*, 354 U.S. 118, 125 (1957)). The Court stated that "[i]n these cases compliance with the subpoena is required even though the books have been kept by the person subpoenaed and his producing them would itself be sufficient authentication to permit their introduction against him." *Id.* at 413 n.14.

95. See *Fisher*, 425 U.S. at 414 (Brennan, J., concurring); *id.* at 431-32 (Marshall, J., concurring).

Court's opinion in *Bellis*,<sup>96</sup> disagreed with the majority's rejection of the privacy rationale,<sup>97</sup> but opined that the act of production analysis nevertheless preserved the distinction between corporate documents held in a representative capacity and private papers held in a personal capacity.<sup>98</sup> Similarly, Justice Brennan did not join the majority opinion because he perceived the "denigration of privacy principles" as a "serious crippling of the protection secured by the privilege against compelled production of one's private books and papers."<sup>99</sup> Justice Brennan also pointed out that the cases articulating the collective entity rule did not hold that the act of producing the records of business entities was insufficiently testimonial for purposes of the privilege.<sup>100</sup> Those cases were decided on the ground that the custodian of organizational documents assumed the corporation's duty to produce its records, thereby waiving his privilege.<sup>101</sup>

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96. See *Bellis v. United States*, 417 U.S. 85, 85 (1974).

97. See *Fisher*, 425 U.S. at 431-32 (Marshall, J., concurring).

98. See *id.* at 432 (Marshall, J., concurring) ("[T]he Court's rationale provides a persuasive basis for distinguishing between the corporate-document cases and those involving the papers of private citizens."). See *infra* note 101 and accompanying text.

99. *Fisher*, 425 U.S. at 414 (Brennan, J., concurring).

100. See *id.* at 429 (Brennan, J., concurring) ("Nothing in the language of [the representative capacity cases], either expressly or impliedly, indicates that the act of production with respect to the records of business entities is insufficiently testimonial for purposes of the Fifth Amendment.").

As previously noted, the Court in *Wilson v. United States*, 221 U.S. 361 (1911), established the collective entity rule despite acknowledging that the corporate officer was being compelled to be a "witness against himself." *Id.* at 378-79. In *United States v. White*, 322 U.S. 694 (1944), the Court denied the privilege to the custodian of union records even though the privilege was "designed to prevent the use of legal process to force . . . [an individual] to produce and authenticate any personal documents or effects that might incriminate him." *Id.* at 698. The Court explicitly recognized in *Curcio v. United States*, 354 U.S. 118 (1957), that the "custodian's act of producing books or records in response to a subpoena *duces tecum* is itself a representation that the documents produced are those demanded by the subpoena." *Id.* at 125. Nonetheless, the custodian of corporate records could claim no privilege. *Id.* at 122. By accepting custody of corporate records, the custodian had waived his privilege as to any testimony inherent in his act of producing them. *Id.* at 124-25.

101. *Fisher*, 425 U.S. at 429-30 (Brennan, J., dissenting) ("At most, those issues, though considered, were disposed of on the ground, not that production was insufficiently testimonial, but that one in control of the records of an artificial organization undertakes an obligation with respect to those records foreclosing any exercise of his privilege."). According to Justice Brennan, the majority rationalized the collective entity rule based on the insufficient testimonial effect of the custodian's act of production. See *id.* at 428-30 (Brennan, J., dissenting). Thus, he criticized their putative rationale by pointing out that implied waiver, not insufficient testimonial character, explained the inapplicability of the fifth amendment to custodians of organizational documents. *Id.* at 429-30 (Brennan, J., dissenting). Justice Marshall, however, opined that the insufficient testimonial value of producing organizational documents distinguished them from personal documents. *Id.* at 432 (Marshall, J., concurring). Nevertheless, it appears that the majority merely indicated that the custodian's act of production was not testimonial when the existence and the location of the documents were a foregone conclusion. *Id.* at 411-12. Later in the opinion, the Court noted that the custodian must produce subpoenaed documents despite the authentication of the documents inherent in this act of production. See *id.* at 413 & n.14. In any case, since each opinion invoked the collective entity rule to demonstrate the

*Fisher* and *Doe* did not affect the implied waiver rationale underlying the collective entity rule.<sup>102</sup> Neither *Fisher* nor *Doe* involved a custodian of organizational documents involving his personal privilege.<sup>103</sup> Thus, the Court did not address the implied waiver theory. Only two years before *Fisher* was decided, the *Bellis* Court did address the implied waiver theory and held that the custodian could claim no privilege because the organization would thereby gain a de facto privilege.<sup>104</sup> After *Fisher* and *Doe*, *Bellis*' reasoning remains valid and necessary to ensure government access to organizational papers.<sup>105</sup>

Rather than expand the scope of the privilege, *Fisher* and *Doe* reduced its scope with respect to an individual's private papers.<sup>106</sup> Before *Fisher*, the fifth amendment applied to the contents of an individual's private papers.<sup>107</sup> After *Fisher*, the fifth amendment applies to personal docu-

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consistency of its conclusions with existing fifth amendment principles, each Justice apparently assumed the continuing validity of the collective entity rule.

102. See *In re Grand Jury Proceedings* (Morganstern), 771 F.2d 143, 145-46, 147 (6th Cir.) (en banc), cert. denied, 106 S. Ct. 594 (1985); *In re Grand Jury Matter* (Brown), 768 F.2d 525, 530 (3d Cir. 1985) (en banc) (Becker, J., concurring); *id.* at 536-39 (Garth, J., dissenting).

103. See *Doe*, 465 U.S. at 606; *Fisher*, 425 U.S. at 405; *In re Grand Jury Proceedings* (Morganstern), 771 F.2d 143, 147 (6th Cir.) (en banc), cert. denied, 106 S. Ct. 594 (1985).

In *Doe*, the Court limited its holding in the very first sentence of the opinion: "This case presents the issue whether, and to what extent, the Fifth Amendment privilege against compelled self-incrimination applies to the *business records of a sole proprietorship.*" *Doe*, 465 U.S. at 606 (emphasis added). Similarly, *Fisher* involved the documents of an individual taxpayer, not those of a collective entity. See *Fisher*, 425 U.S. at 393-94, 405. Even the Harvard note, which advocates granting the privilege to custodians of organizational documents, admits in a footnote that "[t]echnically, *Fisher* dealt with business records of a sole proprietor and rejected the privacy standard only in that context." *Organizational Papers*, *supra* note 10, at 641 n.9. To justify extending *Fisher* beyond its immediate context, the Harvard note relies on authorities that applied the *Fisher* holding to other situations. See *id.* at 641 n.9. None of these cases, however, involved organizational documents. See, e.g., *Doe*, 465 U.S. at 618 (O'Connor, J., concurring) (*Fisher* interpreted to deny fifth amendment protection of private papers of any kind); *Fisher*, 425 U.S. at 414-15 (Brennan, J., concurring) (*Fisher* majority criticized for reducing the fifth amendment protection offered to private papers); *State v. Superior Court*, 128 Ariz. 253, 256, 625 P.2d 316, 319 (1981) (*Fisher*'s act of production rationale applied to preclude the production of private letters); Bradley, *Constitutional Protection for Private Papers*, 16 Harv. C.R.-C.L. L. Rev. 461, 475 (1981) (*Fisher* interpreted to deny fifth amendment protection of private papers of any kind); *Formalism*, *supra* note 108, at 978 (*Fisher* leaves little protection for private expressions).

104. See *Bellis v. United States*, 417 U.S. 85, 94 (1974).

105. See *infra* notes 117-75 and accompanying text.

106. See Heidt, *supra* note 20, at 470-72; Comment, *Business Records and the Fifth Amendment Right Against Self Incrimination*, 38 Ohio St. L.J. 351, 360-61 (1977); Note, *Abolition of Fifth Amendment Protection for the Content of Preexisting Documents: United States v. Doe*, 38 Sw. L.J. 1023, 1032 (1984) [hereinafter cited as *Abolition*]. See *supra* note 99 and accompanying text. Some judges and commentators have noted that the trend of the Court's recent decisions has been to narrow the scope of the privilege. See, e.g., *Fisher*, 425 U.S. at 414 (Brennan, J., concurring); Note, *Constitutional Law: Search and Seizure of Private Business Records No Longer Supplies Compulsion Necessary to Invoke the Fifth Amendment*, 29 U. Fla. L. Rev. 376, 386 (1977).

107. See *Doe*, 465 U.S. at 605, 609 n.6, 610-12; *Fisher*, 425 U.S. at 418-20 (Brennan, J., concurring); *id.* at 430-31 (Marshall, J., concurring); *Bellis v. United States*, 417 U.S. 85,

ments only if and to the extent that the act of producing them constitutes self-incriminating testimony.<sup>108</sup> Thus, it is unlikely that by reducing the scope of the privilege with respect to an individual's private papers,<sup>109</sup> the Court intended to permit custodians of organizational documents to claim a privilege for the first time. Instead of disturbing the rule, the disavowal of privacy confirmed that the ultimate basis of the collective entity rule is the agent's implied waiver of his privilege on voluntarily assuming custody of organizational documents.<sup>110</sup>

As a group, *Bellis*, *Fisher* and *Doe* require a two step inquiry to determine the applicability of the fifth amendment privilege to documentary evidence. First, the court must determine whether an individual has a privilege with respect to the subpoenaed records.<sup>111</sup> If the papers are organizational records held in a representative capacity, the inquiry ends because an agent of a collective entity cannot claim his personal privilege in these circumstances.<sup>112</sup> If an individual holds records in a personal capacity, then the court must determine whether the act of production would be self-incriminating testimony.<sup>113</sup> Consequently, *Fisher* and *Doe* restricted the scope of the privilege with regard to an individual's records but did not at the same time extend the privilege to custodians of documents belonging to a collective entity. The demise of privacy in no way

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87-88 (1974); *In re Grand Jury Matter* (Brown), 768 F.2d 525, 527 (3d Cir. 1985) (en banc); C. McCormick, *supra* note 11, § 126, at 306; Applegate, *supra* note 4, at 217-18; Cramer, *Back From the Brink: Boyd's Private Papers Protection and the Sole Proprietor's Business Records*, 21 Am. Bus. L.J. 367, 367 (1984); Heidt, *supra* note 20, at 442, 444; Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States*, 95 Harv. L. Rev. 683, 683-84 (1982); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 Harv. L. Rev. 945, 945-46 (1977) [hereinafter cited as *Formalism*]; *Abolition*, *supra* note 107, at 1031; *Survey*, *supra* note 11, at 564.

108. See *Doe*, 465 U.S. at 612-14; *Fisher*, 425 U.S. at 430-31 (Marshall, J., concurring); *In re Grand Jury Matter* (Brown), 768 F.2d 525, 527 (3d Cir. 1985) (en banc); C. McCormick, *supra* note 11, § 126, at 306-07; Cramer, *supra* note 108, at 368-89 & n.115; Heidt, *supra* note 20, at 442, 470-73; *Abolition*, *supra* note 107, at 1031; *Organizational Papers*, *supra* note 10, at 644-45.

109. See *supra* notes 96-100, 107 and accompanying text.

110. See *Fisher*, 425 U.S. at 429-30 (Brennan, J., concurring); *In re Grand Jury Matter* (Brown), 768 F.2d 525, 530 (3d Cir. 1985) (en banc) (Becker, J., concurring) ("[T]he custodian is deemed to have waived his privilege with respect to any testimonial incrimination inherent in the act of production by acceptance of his corporate position.").

111. In *Doe*, the Court noted that the Court of Appeals first addressed "whether the Fifth Amendment ever applies to the records [in question]." *Doe*, 465 U.S. at 608. After determining that the privilege could apply to the records of a sole proprietor, "[t]he Court of Appeals next considered whether the documents at issue in this case are privileged." *Id.* The Court did not take issue with this approach.

112. See *Doe*, 465 U.S. at 608-09. See *supra* notes 11-16, 32, 63-66, 71-73 and accompanying text.

113. See *Doe*, 465 U.S. at 612-14; *Fisher*, 425 U.S. at 410-11; *In re Grand Jury Proceedings* (Morganstern), 771 F.2d 143, 145, 147 (6th Cir.) (en banc), *cert. denied*, 106 S. Ct. 594 (1985); *In re Grand Jury Matter* (Brown), 768 F.2d 525, 527-28 (3d Cir. 1985) (en banc). See *supra* note 110 and accompanying text.



disturbed the corporate custodian's implied waiver of his personal privilege with respect to corporate documents.

## II. IMPLIED WAIVER AND THE DE FACTO CORPORATE PRIVILEGE

Although the collective entity rule survives *Fisher* and *Doe*, some authorities question its empirical assumptions<sup>114</sup> and its constitutionality.<sup>115</sup> In contending that regulatory needs may not or should not override the privilege, these authorities give short shrift to the corporate custodian's implied waiver.<sup>116</sup> Because the increasing sophistication of modern corporate crime stymies effective government investigation,<sup>117</sup> the regulatory predicate for inferring waiver is even more compelling today than it was eighty years ago.

### A. Propriety of Implied Waiver

The implied waiver rationale represents a balance of competing interests.<sup>118</sup> Balancing the government's interest in effective regulation of cor-

114. See Gerstein, *supra* note 34, at 372-73; *Organizational Papers*, *supra* note 10, at 648-52.

115. See Gerstein, *supra* note 34, at 368; *Organizational Papers*, *supra* note 10, at 652-54. These commentators argue that public policy interests such as law enforcement are irrelevant in determining the scope of the fifth amendment. See Gerstein, *supra* note 34, at 368; *Organizational Papers*, *supra* note 10, at 652-53. Gerstein argues that balancing interests, while appropriate to the fourth amendment, is inappropriate to the fifth amendment. See Gerstein, *supra* note 34, at 368. The Supreme Court and numerous scholars, however, have indicated that balancing is an integral part of determining the reach of the fifth amendment. See *California v. Byers*, 402 U.S. 424, 427 (1971); M. Berger, Taking the Fifth 192 (1980); C. McCormick, *supra* note 11, § 142, at 352-53; 8 J. Wigmore, *supra* note 7, § 2259b, at 360; Meltzer, *supra* note 57, at 715; *Formalism*, *supra* note 108, at 967. See *infra* note 118 and accompanying text.

116. Despite general recognition that the collective entity rule is based on implied waiver, see *supra* notes 16, 57-58 and accompanying text, the Harvard note does not discuss the issue. See *Organizational Papers*, *supra* note 10, at 648-54.

117. See Applegate, *supra* note 4, at 192-93, 196-98. See *supra* notes 4-7, 9 and accompanying text.

118. See *California v. Byers*, 402 U.S. 424, 427 (1971), in which the Court explained the balance of interests underlying implied waiver:

Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other.

*Id.*; see also *id.* at 449 (Harlan, J., concurring) ("In federal cases stemming from Fifth Amendment claims, the Court has chiefly derived its standards from consideration of two factors: the history and purposes of the privilege, and the character and urgency of the other public interests involved.") (quoting *Spevack v. Klein*, 385 U.S. 511, 522-23 (1967) (Harlan, J., dissenting)); M. Berger, *supra* note 115, at 192 ("If the [fifth amendment] balance weighs in favor of the state, the individual must comply with the regulatory obligation; if not, his privilege against self-incrimination applies but only as to specific incriminatory disclosures."); C. McCormick, *supra* note 11, § 142, at 352 ("[T]he question becomes whether there is a sufficient public interest to outweigh the strong policy in favor of maintaining the protection of the privilege."); 8 J. Wigmore, *supra* note 7, § 2259b, at 360 ("The reason why the privilege is not available to the custodian is that in this class of cases the arguments supporting efficiency of law enforcement are more per-

porations against the custodian's claim of privilege, the Supreme Court has concluded that, despite any possible self-incrimination in producing corporate documents, a corporate custodian may not assert his personal privilege.<sup>119</sup> If a corporate agent were allowed to claim his privilege, the fifth amendment would extend impermissibly to the corporation,<sup>120</sup> thereby effectively shielding its documents and most of its conduct from governmental scrutiny.<sup>121</sup> Accordingly, on assuming custody of corporate documents, the custodian voluntarily accepts the corporation's duty to produce them.<sup>122</sup> The custodian's duty to produce corporate documents overrides his personal privilege.<sup>123</sup>

Implying a waiver of a constitutional privilege through a balancing of competing interests is neither impermissible nor unusual.<sup>124</sup> Despite its

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suasive, and the sentiments behind the privilege are less appealing, than in the usual case."); Meltzer, *supra* note 57, at 715 ("the governmental need for records to enforce a particular policy, the existence of a purpose other than getting documentary confessions, and the extent of the encroachment on the citizen's privacy may all be weighed"); *Formalism*, *supra* note 107, at 967 ("judiciary must now weigh the claimed benefits of exclusion [of privileged evidence] against the societal cost in lost convictions").

119. See *supra* notes 11-15, 50-73 and accompanying text.

120. See *supra* notes 13-65 and accompanying text. The collective entity rule reflects a fundamental fifth amendment policy: the privilege against self-incrimination protects only the natural individual. See *Bellis v. United States*, 417 U.S. 85, 89-90 (1974); *United States v. White*, 322 U.S. 694, 701 (1944); *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906); C. McCormick, *supra* note 11, § 128, at 311; 8 J. Wigmore, *supra* note 7, § 2259a, at 352-53. The privilege preserves human dignity by shielding the accused individual from the abuses of physical compulsion that are likely to grow out of a free license to interrogate. See *Fisher v. United States*, 425 U.S. 391, 398 (1976); *United States v. White*, 322 U.S. 694, 698-99 (1944); C. McCormick, *supra* note 11, § 118, at 286; 8 J. Wigmore, *supra* note 7, § 2251, at 315-17, 353. Additionally, the privilege tends to protect the individual from being overwhelmed by the potentially oppressive investigatory and prosecutorial apparatus of the state. See *Garner v. United States*, 424 U.S. 648, 655-56 (1976); *United States v. White*, 322 U.S. 694, 698-99 (1944); C. McCormick, *supra* note 11, § 118, at 288; 8 J. Wigmore, *supra* note 7, § 2251, at 318.

Neither rationale requires applying the privilege to a corporation. See 8 J. Wigmore, *supra* note 7, § 2259a, at 353. An artificial entity cannot be physically abused nor can it suffer the indignities that the privilege is intended to prevent. *Id.* Moreover, in our adversarial system of criminal justice, a collective entity is not at the same disadvantage as the individual. *Id.* In fact, the state might suffer an insurmountable disadvantage if collective entities could claim a privilege. *Id.* See *supra* notes 5-8, 47-48, 57-58 and accompanying text. In sophisticated white collar offenses, the privilege may deny the prosecution the only available evidence. See C. McCormick, *supra* note 11, § 118, at 286. See *supra* notes 4-7, 51-52, 66-67 and accompanying text and *infra* notes 147-75 and accompanying text.

Thus, the privilege impedes the state's ability to enforce its laws by depriving it of access to a valuable source of information—the subject of the investigation itself. See C. McCormick, *supra* note 11, § 118, at 286. In the case of a human being, this cost is acceptable in the interest of preserving individual dignity. See *id.* at 287. In the case of a corporation, the absence of this counterbalancing interest renders the cost to society unacceptable. See C. McCormick, *supra* note 11, § 128, at 311; 8 J. Wigmore, *supra* note 7, § 2259a, at 353.

121. See *supra* note 14 and accompanying text.

122. See *supra* notes 16, 57-58, 101 and accompanying text.

123. See *supra* notes 16, 36, 57-58 and accompanying text.

124. See, e.g., *California v. Byers*, 402 U.S. 424, 427-28, 431 (1971) (public policy of

language, the fifth amendment is not absolute.<sup>125</sup> Even the privilege against oral self-incrimination, the paradigm of fifth amendment protection,<sup>126</sup> can be waived impliedly.<sup>127</sup> By disclosing incriminating information on the stand, a witness waives his privilege and must continue to give relevant testimony, even if self-incriminating.<sup>128</sup> Moreover, records required to be kept by law<sup>129</sup> must be produced by their custodian even if production would incriminate him.<sup>130</sup> Furthermore, a driver involved in

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promoting civil liability in car accidents outweighs risk of self-incrimination in requiring driver to stop and report to police); *Rogers v. United States*, 340 U.S. 367, 371 (1951) (state interest in integrity of judicial process outweighs witness' fifth amendment privilege); *United States v. St. Pierre*, 132 F.2d 837, 839 (2d Cir. 1942) (same), *cert. dismissed as moot*, 319 U.S. 41 (1943); see also Meltzer, *supra* note 57, at 705-06 ("It is true, of course, that [the privilege] may be subordinated to the community's interest in efficient regulation"); Note, *Testimonial Waiver of the Privilege Against Self-Incrimination*, 92 Harv. L. Rev. 1752, 1760, 1761 & n.52 (1979) (Supreme Court has balanced the interest in truth-finding against the interests underlying the fifth amendment privilege in cases involving testimonial waiver, required records and stop-and-report statutes).

One scholar suggests that such balancing is essential to the continued viability of the privilege itself. See C. McCormick, *supra* note 11, § 118, at 288 ("If the privilege is to remain viable it must retain such flexibility, and it must reflect an appropriate balance among the wide variety of policy factors as they are affected by the specific context in which it is invoked."). *Fisher* itself exemplifies the Court's balancing of competing interests. See *id.* § 125, at 305. Compelling the defendant to produce his self-incriminating and voluntarily written papers runs afoul of the fifth amendment's policy against compelling an individual to assist in establishing his own guilt. *Id.* Nonetheless, "the limitation of the privilege to compelled *testimonial* activities reflects a policy judgment that the government should not be barred from compelling all defendant assistance or exploiting earlier decisions by a defendant that now render incriminating evidence available to the government." *Id.* (emphasis added).

125. See M. Berger, *supra* note 115, at 190.

126. See *id.* at 161, 163, 178; 8 J. Wigmore, *supra* note 7, § 2263, at 378; *Organizational Papers*, *supra* note 10, at 645.

127. See *Rogers v. United States*, 340 U.S. 367, 370-71 (1951); *United States v. Yurasovich*, 580 F.2d 1212, 1217-20 (3d Cir. 1978). See generally C. McCormick, *supra* note 11, § 140, at 345 (discussing waiver by disclosure of incriminating facts); 8 J. Wigmore, *supra* note 7, § 2276(b)(1), at 456-57 (same).

128. See *Rogers v. United States*, 340 U.S. 367, 373-74 (1951); *id.* at 379 (Black, J., dissenting).

129. In *Shapiro v. United States*, 335 U.S. 1 (1948), the Supreme Court stated that "the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.'" *Id.* at 33 (quoting *Wilson v. United States*, 221 U.S. 361, 380 (1911)). Limitations on the required records exception were subsequently developed in *Albertson v. SACB*, 382 U.S. 70 (1965) and in a trilogy of cases—*Marchetti v. United States*, 390 U.S. 39 (1968), *Grosso v. United States*, 390 U.S. 62 (1968), and *Haynes v. United States*, 390 U.S. 85 (1968). See *California v. Byers*, 402 U.S. 424, 429 (1971). See generally C. McCormick, *supra* note 11, § 142, at 350-53 (discussing limitations on the required records exception); 8 J. Wigmore, *supra* note 7, § 2259c(2), at 362-67 (same). To qualify as a required record, three requirements must be satisfied: first, the statute's purpose must be essentially regulatory; second, the records must be the kind customarily kept by the regulated party; and third, the records must have assumed "public aspects." See *Grosso v. United States*, 390 U.S. 62, 67-68 (1968).

130. See *California v. Byers*, 402 U.S. 424, 434 (1971); *Wilson v. United States*, 221 U.S. 361, 380 (1911); see also *Shapiro v. United States*, 335 U.S. 1, 5, 32-33 (1948) (be-

an accident involving property damage can be compelled by statute to stop and give his name and address to a police officer,<sup>131</sup> despite the testimonial admission that he was involved in an accident, that he believes that property damage occurred and that the name and address given are authentic.<sup>132</sup>

In the required records and the "stop and report" cases, the fifth amendment does not apply because regulatory concerns override the individual's privilege.<sup>133</sup> The Supreme Court has held that the tension between the government's need for information and the fifth amendment is resolved by "balancing the public need on the one hand, and the individual claim to constitutional protection on the other."<sup>134</sup> In many situations, the possibility that compliance with a disclosure requirement may incriminate the individual cannot defeat the public need for disclosure.<sup>135</sup>

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cause privilege held not to apply, individual must produce required records). In the case of required records, the government can compel both creation and production of the documents without running afoul of the fifth amendment. *See* C. McCormick, *supra* note 11, § 142, at 350; Heidt, *supra* note 20, at 475.

131. *See* California v. Byers, 402 U.S. 424, 426-27, 433-34 (1971).

132. *See* Heidt, *supra* note 20, at 474-75. The required records exception removes the fifth amendment's protection from any direct or implied testimonial authentication of other disclosures inherent in the act of producing the records. *See In re Grand Jury Proceedings*, 601 F.2d 162, 171 (5th Cir. 1979); C. McCormick, *supra* note 11, § 142, at 353.

133. *See, e.g.,* California v. Byers, 402 U.S. 424, 427, 430 (1971) (public policy to promote civil liability in car accidents outweighs risk of incrimination in requiring drivers to stop and report to police); Shapiro v. United States, 335 U.S. 1, 32-33 (1948) (records required for commodity price regulation in wartime not inconsistent with fifth amendment); *In re Grand Jury Proceedings*, 601 F.2d 162, 166-71 (5th Cir. 1979) (records required by U.S. Customs Service for regulation of customhouse brokerage offices not subject to privilege); *In re Morris Thrift Pharmacy*, 397 So. 2d 1301, 1304-05 (La. 1981) (records of prices charged by pharmacies in Medicaid provider program not within scope of privilege); Andresen v. Bar Ass'n, 269 Md. 313, 328-30, 305 A.2d 845, 854-55 (required records of funds entrusted to lawyers by clients not within scope of privilege), *cert. denied*, 414 U.S. 1065 (1973); State Real Estate Comm'n v. Roberts, 441 Pa. 159, 161, 164-65, 271 A.2d 246, 247-49 (1970) (escrow accounts of real estate brokers are required records not within scope of privilege), *cert. denied*, 402 U.S. 905 (1971).

134. California v. Byers, 402 U.S. 424, 427 (1971).

135. *See id.* at 428. *See supra* note 133 and accompanying text. Noting that organized society imposes many burdens on its constituents, the Byers Court listed examples of situations in which "the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure," as follows:

[Society] commands the filing of tax returns for income; it requires producers and distributors of consumer goods to file informational reports on the manufacturing process and the content of products, on the wages, hours, and working conditions of employees. Those who borrow money in the public market or issue securities for sale to the public must file various informational reports; industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere. Comparable examples are legion.

*Id.* at 427-28.

Thus, registered broker-dealers accused of fraudulent sale of securities and other violations of the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C. §§ 77q(a), 77x (1982), must produce documents whose existence and safekeeping were required by Securities & Exchange Commission regulations. *See* United States v. Kaufman, 429 F.2d 240, 247 (2d Cir. 1970). Similarly, a psychiatrist accused of large-scale distribution of

Disclosure requirements, however, are not without limitation. A statute cannot be aimed at a "highly selective group inherently suspect of criminal activities,"<sup>136</sup> whose mere compliance with the statute would, in almost every conceivable circumstance, be incriminating.<sup>137</sup> On the other hand, statutes that are "neutral on their face and directed at the public at large"<sup>138</sup> for an essentially regulatory purpose do not conflict with the fifth amendment.<sup>139</sup> Thus, although prosecutorial needs alone do not suffice to imply a waiver,<sup>140</sup> the privilege can be impliedly waived to accommodate a broad regulatory purpose. To permit government access to required records for essentially non-criminal purposes, the custodian of required records impliedly waives his privilege on assuming custody of the documents.<sup>141</sup> His privilege cannot be revived merely because the same information later becomes relevant to a criminal investigation.<sup>142</sup>

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controlled substances must produce his W-2 forms, prescription forms and patient files because they are required records to which the privilege does not apply. *In re Doe*, 711 F.2d 1187, 1191-94 (2d Cir. 1983). Despite the producer's compelled, self-incriminating testimony, the fifth amendment does not apply to required records because the public interest "overrides the privilege in instances in which the privilege would otherwise apply." *Id.* at 1192.

136. *California v. Byers*, 402 U.S. 424, 430 (1971) (quoting *Marchetti v. United States*, 390 U.S. 39, 47 (1968)).

137. *See California v. Byers*, 402 U.S. 424, 430 (1971). In *Marchetti v. United States*, 390 U.S. 39 (1968), the Court concluded that compliance with a federal statute requiring payment of an occupational gambling tax would have incriminated the payer in almost every conceivable circumstance. *See id.* at 48-49.

138. *California v. Byers*, 402 U.S. 424, 429 (1971) (quoting *Albertson v. SACB*, 382 U.S. 70, 79 (1965)).

139. *See California v. Byers*, 402 U.S. 424, 430 (quoting *Albertson v. SACB*, 382 U.S. 70, 79 (1965)).

140. *See Organizational Papers*, *supra* note 10, at 652-54. The Harvard note assumes that the collective entity rule serves purely prosecutorial needs and is therefore invalid. *See id.* On the contrary, a broad survey of corporate misconduct done for the Law Enforcement Assistance Administration demonstrates that the overwhelming majority of corporate misconduct and government enforcement efforts involve civil and administrative violations. *See Orland, Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 Am. Crim. L. Rev. 501, 506-08 (1980) (analyzing M. Clinard, P. Yeager, J. Brissetter, D. Petrashek & E. Harries, *Illegal Corporate Behavior* 257-60 (1979)).

141. *See Wilson v. United States*, 221 U.S. 361, 381 (1911). The *Wilson* Court explained the implied waiver theory as follows:

The fundamental ground of decision in this class of cases, is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection.

*Id.*

142. *See California v. Byers*, 402 U.S. 424, 448 (1971) (Harlan, J., concurring). In *Byers*, Justice Harlan commented on the relationship between the privilege and competing public interests:

But it would not follow that the constitutional values protected by the [privilege] . . . are of such overriding significance that they compel substantial sacrifices in the efficient pursuit of other governmental objectives in all situations

Applying the required records standards by analogy to the collective entity rule demonstrates the propriety of implying a waiver to ensure effective regulation of corporate conduct. Neither keeping corporate records nor conducting the business typically recorded in corporate documents is inherently illegal.<sup>143</sup> Merely complying with a governmental request for corporate documents generally does not result in self-incrimination.<sup>144</sup> The duty to produce corporate records primarily serves a regulatory purpose<sup>145</sup> and is not aimed at a "highly selective group inherently suspect of criminal activities."<sup>146</sup> Thus, implying a waiver of the corporate custodian's personal privilege does not violate the standards set for denying the privilege in other areas that involve an overriding public interest in disclosure.

### B. *Need for Implied Waiver*

The need to regulate corporate conduct dictates that a corporate custodian should not be allowed to invoke his own privilege with respect to the production of corporate documents.<sup>147</sup> Allowing the custodian of corporate records to resist production of those records would obstruct the only avenue of access to corporate documents available to the government.<sup>148</sup> For example, without access to the documents, the government may not

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where the pursuit of those objectives requires the disclosure of information which will undoubtedly significantly aid in criminal law enforcement.

*Id.* (Harlan, J., concurring).

For instance, the Occupational Safety and Health Administration (OSHA) announced recently that, in its largest enforcement action ever, it will seek \$1.4 million in fines against the Union Carbide Corporation for its willful disregard for health and safety at its West Virginia plant. Noble, *Union Carbide Faces Fine of \$1.4 Million on Safety Violations*, N.Y. Times, April 2, 1986, at A1, col. 3. "The plant is the only United States manufacturer of methyl isocyanate, the chemical that leaked from Carbide's plant in Bhopal, India in December, 1984, and killed at least 2,000 people." *Id.* at A15, col. 1. Union Carbide noted that most of the alleged violations involved paperwork. *Id.* at A15, col. 3. OSHA cited the corporation for improper recordkeeping and failure to follow regulations for recording injuries and illnesses. *Id.* at A15, col. 4. The results of OSHA's six-month investigation were sent to the Justice Department for possible criminal prosecution because OSHA can only impose civil penalties. *Id.* at A15, col. 1. If the privilege were available to the custodians of Union Carbide's records, they are likely to have claimed their privilege on the ground of self-incrimination. The custodians' claim of privilege would have deprived OSHA of access to documents essential to its regulatory function merely because the compelled testimony might later tend to incriminate these custodians.

143. *Cf.* *California v. Byers*, 402 U.S. 424, 439 (1971) ("Driving and automobile, unlike gambling, is a lawful activity").

144. *See* G. Lilly, *Evidence* § 92, at 340 (1978).

145. *See supra* note 140 and accompanying text.

146. *Cf.* *California v. Byers*, 402 U.S. 424, 430 (1971) ("This group, numbering as it does in the millions, is so large as to render [the statute in question] a statute 'directed at the public at large'") (quoting *Albertson v. SACB*, 382 U.S. 70, 79 (1965)); Orland, *supra* note 140, at 506-08 (indicating that corporate misconduct is predominantly civil and administrative in nature).

147. *See supra* notes 1-7, 47-52, 61, 66 and accompanying text.

148. *See* Heidt, *supra* note 20, at 488. *See supra* notes 4-7, 51-52, 66-67 and accompanying text.

have sufficient information for a search warrant.<sup>149</sup> More significantly, a custodial privilege may immunize a price-fixing conspiracy, for instance, by precluding any access to the only memorandum of the agreement.<sup>150</sup> If officers of two corporations are the only individuals with knowledge of the memorandum sufficient to produce and authenticate it, a custodial privilege would shield the two corporations from antitrust prosecution.<sup>151</sup>

The Second Circuit would allow a corporate representative to invoke his personal privilege on the theory that a corporation can still produce the documents by hiring a new agent who can respond to the subpoena without fear of self-incrimination.<sup>152</sup> Requiring a corporation to hire a new agent, however, would not eliminate the de facto corporate privilege. Because a corporation can only act through its agents, the responsibility for hiring the new agent and for leading him to the requested documents would ultimately fall to a corporate employee.<sup>153</sup> The employee's act of hiring the new agent would, however, testify as to his authority to do so.<sup>154</sup> His act of leading the agent to the requested documents would result in implicit authentication of those documents.<sup>155</sup> Thus, the employee is likely to rely on his privilege against self-incrimination to avoid assisting the corporation in complying with the subpoena. If every agent capable of hiring and assisting the new agent declines to do so for fear of self-incrimination, the new agent cannot produce the documents.<sup>156</sup> Consequently, the Second Circuit's approach does not address the government's need for access to corporate documents.

It has been suggested that the collective entity rule is unnecessary be-

149. See Heidt, *supra* note 20, at 488.

150. See *In re Grand Jury Matter* (Brown), 768 F.2d 525, 536 (3d. Cir. 1985) (en banc) (Garth, J., dissenting).

151. See *id.*

152. See *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985) (citing *United States v. Barth*, 745 F.2d 184, 189 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1356 (1985)). The Third Circuit seems to agree with the Second Circuit. See *In re Grand Jury Matter* (Brown), 768 F.2d 525, 529 (3d. Cir. 1985) (en banc).

153. Cf. *Wilson v. United States*, 221 U.S. 361, 376-77 (1911) ("[A court order] served on the corporation . . . [is] equivalent to a command that the persons [representing the corporation] shall do what is required.").

154. Whether the compelled act is a testimonial communication depends on whether it supplies a necessary link in the evidentiary chain. See *In re Grand Jury Proceedings* (Morganstern), 771 F.2d 143, 146 (6th Cir.), *cert. denied*, 106 S. Ct. 594 (1985). If the compelled act confirms something that was previously unknown to the government or supplies an assurance of authenticity not available from other sources, then it would be a testimonial communication. *Id.* Though the Supreme Court has never explicitly defined testimonial acts, see *Organizational Papers*, *supra* note 10, at 645, it is reasonable to infer that a corporate agent's act of hiring someone on behalf of the corporation testifies as to his authority to do so.

155. Cf. *Fisher v. United States*, 425 U.S. 391, 410 (1976) ("The act of producing evidence in response to a subpoena . . . would indicate the [producer's] belief that the papers are those described in the subpoena.").

156. This result would be especially likely in the case of a professional or closely-held corporation.

cause the government can gain access to corporate documents by granting use immunity to the custodian.<sup>157</sup> This reasoning begs the question. Regardless of the need for the rule, use immunity is irrelevant to the custodian of corporate papers because it is required only as a substitute for a legitimate fifth amendment privilege.<sup>158</sup> To grant immunity to an individual who has already waived his privilege would, in effect, grant a new privilege in exchange for documents to which the government is already entitled.<sup>159</sup> In any case, if waiver is unnecessary due to the availability of use immunity, then it is unnecessary in all situations in which the Supreme Court implies a waiver.<sup>160</sup> For example, the custodian of required records would be entitled to use immunity in exchange for production.<sup>161</sup> This result would contradict the Supreme Court's holding in *Shapiro v. United States*<sup>162</sup> because Congress "did not intend to frustrate the use of those records for enforcement action by granting an immunity bonus to individuals compelled to disclose their required records."<sup>163</sup>

Granting use immunity to the corporate custodian would frustrate the government's efforts at effective law enforcement. Theoretically, this arrangement would immunize only the testimony inherent in the act of production and not the contents of the documents.<sup>164</sup> In practice, use

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157. Congress has provided for government grants of use immunity with respect to potentially incriminating evidence. See 18 U.S.C. §§ 6002-6003 (1982); see also *Kastigar v. United States*, 406 U.S. 441, 448, 453 (1972) (declaring statutory use immunity constitutional). To satisfy the requirements of the fifth amendment, a grant of use immunity need be only as broad as the privilege against self-incrimination. See *United States v. Doe*, 465 U.S. 605, 617 n.17 (1984); *Pillsbury v. Conboy*, 459 U.S. 248, 253 & n.8 (1983); *United States v. Calandra*, 414 U.S. 338, 346 (1974); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 107 (1964) (White, J., concurring). Since use immunity removes the threat of self-incrimination, the privilege ceases to apply to the claimant. See C. McCormick, *supra* note 11, § 143, at 354; 8 J. Wigmore, *supra* note 7, § 2282, at 509. The prosecution, however, must affirmatively prove that the evidence it offers is derived from a legitimate source wholly independent of the previously immunized testimony. See *Kastigar v. United States*, 406 U.S. 441, 460 (1972).

158. See *Shapiro v. United States*, 335 U.S. 1, 21-22 (1948); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 147 (6th Cir.) (en banc), *cert. denied*, 106 S. Ct. 594 (1985).

159. See *Shapiro v. United States*, 335 U.S. 1, 15, 16 (1948).

160. The Harvard note interprets the required records exception as support for creating a new privilege for corporate custodians. See *Organizational Papers*, *supra* note 10, at 653. Ironically, its arguments against the representative capacity doctrine—that the privilege applies whenever the act of production constitutes self-incriminating testimony and the availability of use immunity—would invalidate the required records exception as well. Both the collective entity rule and the required records exception have roots in *Wilson v. United States*, 221 U.S. 361, 380 (1911). See *Shapiro v. United States*, 335 U.S. 1, 17 (1948); Meltzer, *supra* note 57, at 703, 709. The custodian's act of production is equally incriminating in either case. See Heidt, *supra* note 20, at 474-78. If the Harvard note is correct, the Supreme Court in *Fisher* and *Doe* implicitly overruled *Wilson*, the required records exception and the collective entity rule though none of them were at issue.

161. See *supra* note 157 and accompanying text.

162. 335 U.S. 1 (1948).

163. *Id.* at 7.

164. See *Organizational Papers*, *supra* note 10, at 651. Since the grant of immunity is coextensive with the fifth amendment, see *Murphy v. Waterfront Comm'n*, 378 U.S. 52,



immunity does not guarantee access to the contents of corporate documents. To the contrary, it may effectively immunize the contents of the documents in addition to any testimonial aspects of the act of production. If the act of production testifies to the existence and possession of the subpoenaed documents,<sup>165</sup> then the grant of immunity would preclude the government from using the content of the document in the custodian's subsequent prosecution.<sup>166</sup> Because the contents could not have been obtained without the act of production testimony, the content constitutes the "direct fruit" of the immunized testimony and is therefore also subject to the immunity.<sup>167</sup> Use immunity would thus deprive both the act of production and the content of the papers of any evidentiary value.

Moreover, use immunity nullifies the possibility of prosecuting the custodian.<sup>168</sup> Once immunity is granted, the government must prove the unprovable in order to prosecute the custodian—that it has made no use, evidentiary or otherwise, of the implicit testimony.<sup>169</sup> For instance, the prosecution would have to prove not only that its evidence was independently obtained,<sup>170</sup> but also that it had not used the act of production testimony to interpret evidence,<sup>171</sup> to plan the cross-examination,<sup>172</sup> to plot trial strategy or even to proceed with the case.<sup>173</sup> Prosecuting the producer of the documents would be very difficult without using the act of production testimony for at least one of these purposes.<sup>174</sup> It is questionable whether corporate crime would be effectively deterred if only the artificial entity were punished and not the individuals responsible for the crimes.<sup>175</sup> Thus, implied waiver, not use immunity, ensures effective gov-

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54 (1964), the privilege need only protect the producer from the self-incrimination inherent in his act of production. See *United States v. Doe*, 465 U.S. 605, 617 n.17 (1984). Normally, the content of the documents is not protected by the privilege. See *id.* at 612.

165. See *supra* notes 78-79 and accompanying text.

166. See *Fisher v. United States*, 425 U.S. 391, 433-34 (1976) (Marshall, J., concurring); Heidt, *supra* note 20, at 482 n.172.

167. See *Fisher v. United States*, 425 U.S. 391, 433-34 (1976) (Marshall, J., concurring); Heidt, *supra* note 20, at 482 n.172.

168. See Heidt, *supra* note 20, at 488.

169. See *id.* at 481 n.172, 488.

170. See *Kastigar v. United States*, 406 U.S. 441, 460 (1972); C. McCormick, *supra* note 11, § 143, at 355-56; Mykkeldtvedt, *To Supplant the Fifth Amendment's Right Against Compulsory Self-Incrimination: The Supreme Court and Federal Grants of Witness Immunity*, 30 Mercer L. Rev. 633, 656-57 (1979).

171. See *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973).

172. See *id.*

173. See *id.*

174. See Mykkeldtvedt, *supra* note 170, at 658-59.

175. Many criminal law scholars believe that prosecution of the organization's members is necessary to effectively deter organizational crime. See, e.g., Geis, *Criminal Penalties for Corporate Crimes*, 8 Crim. L. Bull. 377, 384 (1972); Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. Chi. L. Rev. 423, 437 (1963); Meltzer, *supra* note 57, at 702-03; Comment, *Is Corporate Criminal Liability Really Necessary?*, 29 Sw. L.J. 908, 925 (1975); see also Heymann, *supra* note 3, at 272 ("The most effective single weapon against white-collar crime is successful criminal prosecution of the offender."). Other commentators believe that imposing penalties on the

ernment regulation of corporate misconduct.

#### CONCLUSION

*Fisher* and *Doe* did nothing to affect the collective entity rule. Rather, the Supreme Court shifted the fifth amendment inquiry from the contents of private documents to the testimony inherent in their production. In reducing the scope of the fifth amendment with respect to personal documents, the Supreme Court did not extend it to documents held in a representative capacity.

Instead, *Fisher* and *Doe* confirmed that a corporate custodian impliedly waives his privilege by voluntarily accepting custody of the documents. The custodian waives his privilege to allow effective regulation of the corporation he represents. Moreover, the regulatory rationale underlying the collective entity rule is even stronger today than it was eighty years ago. Due to the complexity of modern transactions and technology, the detection, investigation and prosecution of corporate crime requires even greater access to documentary information. Since the corporate representative enjoys the benefits of the corporate form, it is only fair that he be required to accept its incidental obligations. The regulatory needs of the state often override the individual's privilege without violating the fifth amendment. Thus, construing *Fisher* and *Doe* as extending the fifth amendment to custodians of corporate documents, though ostensibly advancing an individual's liberties, would obstruct the regulation of economically powerful entities capable of causing great harm to society.

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organization is sufficient to deter organizational crime. See, e.g., Breit & Elzinga, *Anti-trust Penalties and Attitudes Toward Risk: An Economic Analysis*, 86 Harv. L. Rev. 693, 704-06 (1973); Coffee, *Making the Punishment Fit the Corporation: The Problems of Finding an Optimal Corporation Criminal Sanction*, 1 N. Ill. U.L. Rev. 3, 12-14 (1980).

