COMMENT

A Comparative Law Approach to Corporations and the Privilege Against Self-Incrimination

INTRODUCTION

The privilege against self-incrimination[1] ("privilege") is one of the most cherished legal legacies.[2] Simply stated, the privilege prevents compelled testimony when that testimony might expose the witness to the risk of criminal prosecution.[3] The privilege's availability today is so widespread[4] that it may be as close to a

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[1] In the United States, the privilege against self-incrimination is more accurately referred to as a "right" because it is rooted in the Constitution. U.S. CONST. amend. V. However, the English and Australian privileges are part of the common law and are not fundamental guarantees analogous to a constitutional right. *See, e.g.*, Sorby v. Commonwealth (1983) 152 C.L.R. 281, 290 (Austl.) (noting that privilege originates in common law). For purposes of consistency and clarity, this Comment will use the term "privilege" throughout.

[2] *See, e.g.*, Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (stating that privilege against self-incrimination reflects many of our most fundamental values and most noble aspirations); Ullmann v. United States, 350 U.S. 422, 426 (1956) (characterizing privilege against self-incrimination as important advance in development of liberty); Pyneboard Pty. v. Trade Practices Comm'n (1983) 152 C.L.R. 328, 346 (Austl.) (describing privilege as part of common law of human rights, based on desire to protect personal freedom and human dignity).

[3] SIDNEY L. PHIPSON, PHIPSON ON EVIDENCE § 15-36 (13th ed. 1982).

[4] *See, e.g.*, G.L. Peiris, *An Accused Person's Privilege Against Self-Incrimination: A Comparative Analysis of the English, New Zealand and South Asian Legal Systems*, 2 LAWASIA N.S. 50 (1982) (comparing legal systems of England, New Zealand, and South Asia); *see also* Jeffrey K. Walker, *A Comparative Discussion of the Privilege Against Self-Incrimination*, 14 N.Y.L. SCH. J. INT'L & COMP. L. 1, 1 (1993) (comparing common law, civil law, religious and traditional

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universal legal principle as currently exists.[5] Legal systems that recognize some form of the privilege include common law,[6] civil law,[7] and international law,[8] as well as some religious[9] and traditional[10] jurisdictions.

Inheriting the common law tradition of England, the United States and Australia each adopted the privilege as part of their legal systems.[11] The Framers of the Bill of Rights considered the privilege so critical that they codified it in the United States Constitution.[12] By contrast, although Australia adopted a written constitution upon gaining independence from England, its framers did not include the privilege against self-incrimination.[13] Instead, the privilege remained part of Australia's common law of evidence.[14]

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jurisdictions' recognition and application of privilege against self-incrimination).

[5] *See, e.g.*, Peiris, *supra* note 4, at 51-52 (noting existence of privilege in Malaysia, Sri Lanka, and Singapore); Walker, *supra* note 4, at 1 (stating that each major western European jurisdiction and its colonial progeny recognize some form of protection against compelled self-incrimination); Scott A. Trainor, Note, *A Comparative Analysis of a Corporation's Right Against Self-Incrimination*, 18 FORDHAM INT'L L.J. 2139, 2139 (1995) (noting that over fifty countries recognize right).

[6] *See* Environment Protection Auth. v. Caltex Ref. Co. (1993) 178 C.L.R. 477, 496-97 (Austl.) (noting New Zealand's recognition of privilege against self-incrimination); Walker, *supra* note 4, at 12-19 (noting that common law jurisdictions which recognize privilege against self-incrimination include England, United States, Canada, and Scotland (hybrid of common and civil law)). Common-law influenced jurisdictions which recognize the privilege include India and Israel. *Id.*

[7] *See* Walker, *supra* note 4, at 19-27 (discussing recognition of privilege against self-incrimination in France, Germany, The Netherlands, Norway, and Japan).

[8] International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 14(3)(g), S. EXEC. DOC. 95-E, at 2 (1978), 999 U.N.T.S. 171, 177 (stating that governments must guarantee citizens protection against compelled self-incrimination). One hundred twenty-five states ratified the treaty as of early 1995, including England (United Kingdom), the United States, and Australia. INTERNATIONAL LAW: SELECTED DOCUMENTS 387 (Barry E. Carter & Phillip R. Trimble eds., 1995) [hereinafter INTERNATIONAL LAW].

[9] *See* INTERNATIONAL LAW, *supra* note 8, at 28-29 (discussing Saudi Arabia's version of privilege against self-incrimination, which originates in Shari'a, Islamic sacred law); *see also id.* at 19 (noting that Israel's privilege dates back to fourth century B.C. under Judaic law).

[10] *See id.* at 30 (discussing Ethiopia's application of privilege against self-incrimination under traditional law, based on Coptic Christian traditions).

[11] *See* U.S. CONST. amend. V (codifying United States' version of privilege); *Caltex*, 178 C.L.R. at 497-98 (noting that common law privilege against self-incrimination is well established); Blunt v. Park Lane Hotel, 2 K.B. 253, 257 (Eng. C.A. 1942) (stating modern version of British rule).

[12] U.S. CONST. amend. V.

[13] *See* AUSTL. CONST. (failing to provide privilege against self-incrimination).

[14] *See* Sorby v. Commonwealth (1983) 152 C.L.R. 281, 289-90 (noting that privilege

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Although both the United States and Australia adopted English common law upon independence, each nation subsequently developed its own rules regarding the privilege's scope.[15] Concurrently, England continued to refine and change the privilege's scope through its common law system.[16] As a result, the privilege's application sometimes differs markedly in each jurisdiction.[17]

The scope of the privilege illustrates how the laws of these common law nations have diverged over the past two centuries.[18] Nations differ on whether the privilege is fundamentally a *human* right, only granted to natural persons, or whether it applies to artificial entities, such as corporations.[19] In England, the courts allow corporations to claim the privilege.[20] By contrast, the United States limits the privilege to natural persons.[21] Australia recently changed positions, switching from the English rule to the American rule.[22] The split among common law jurisdictions[23] on the availability of the privilege for corporations

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originates from common law and that legislature may abrogate privilege by statute); Concrete Constrs. Pty. v. Plumbers & Gasfitters Employees' Union (1987) 71 A.L.R. 501, 517 (Fed. Ct. Austl.) (stating that self-incrimination privilege is part of common law of evidence).

[15] *See generally* Shaun Ansell, *Self-Incrimination Privilege in Australia: The United States Influence*, 24 QUEENSL. SOC'Y L.J. 545 (1994) (discussing effect of American jurisprudence on development of Australian law).

[16] *See, e.g.*, A.T.&T. Istel Ltd. v. Tully [1993] App. Cas. 45, 53 (1992) (appeal taken from Eng.) (limiting privilege against self-incrimination in civil cases); Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp. [1978] App. Cas. 547, 549 (1977) (appeal taken from Eng.) (refusing to permit foreign discovery on ground that discovering requested materials might violate privilege); Triplex Safety Glass Co. v. Lancegaye Safety Glass Ltd. [1939] 2 K.B. 395, 408-09 (Eng. C.A. 1938) (extending privilege to corporations); The Queen v. Boyes, 121 Eng. Rep. 730, 735 (Q.B. 1861) (discussing circumstances that create permissible privilege claim).

[17] *See infra* notes 77-81 and accompanying text (discussing differences in document discovery rules in each jurisdiction).

[18] *See infra* notes 97-150 and accompanying text (discussing treatment of privilege against self-incrimination for corporations in each country).

[19] *Id.*

[20] *Triplex*, 2 K.B. at 408-09.

[21] Hale v. Henkel, 201 U.S. 43, 70 (1906).

[22] Environment Protection Auth. v. Caltex Ref. Co. (1993) 178 C.L.R. 477, 504 (Austl.).

[23] *See* Sorby v. Commonwealth (1983) 152 C.L.R. 281, 311 (Austl.) (comparing Canada Evidence Act, which abolishes privilege but provides other protections, with Australian State Act, which does not abrogate privilege).

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will have increasing significance as international business expands.[24] Whether the privilege is available to the corporation involved may determine the outcome of many contract, tort, and criminal cases involving corporations.

This Comment examines the rationales for these differing rules and advocates the American and Australian rule. Part I provides a historical context for the origins of the privilege, comparing the traditional ideas about its development with recent research suggesting an alternative history.[25] Part II analyzes the current state of the law regarding the privilege for corporations in England, the United States, and Australia.[26] Finally, Part III argues that the history of the privilege and compelling public policy reasons dictate that states should limit the privilege to natural persons.[27]

I. THE HISTORY OF THE PRIVILEGE

The true origin of the privilege against self-incrimination is controversial. Varying theories exist, each suggesting a different origin for the privilege.[28] This Comment subsequently refers to them as the traditional theory,[29] the canon law theory,[30] and the adversarial theory.[31]

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[24] *See, e.g.*, Donna Fenn, *The Globalists*, INC., Dec. 1995, at 59 (noting that international trade is growing at more than six percent per year, twice rate of increase of world's gross national product).

[25] *See* Trainor, *supra* note 5, at 2139 (arguing that suggested revisions to privilege's history support extension of privilege to corporations). *But see infra* notes 152-65 and accompanying text (rebutting this assertion).

[26] *See infra* notes 67-150 and accompanying text (discussing privilege's scope and current state of law).

[27] *See infra* notes 151-218 and accompanying text (arguing that states should limit privilege to natural persons).

[28] *See infra* notes 29-60 and accompanying text (discussing major theories for origin of privilege against self-incrimination and conflicts between them).

[29] *See infra* notes 32-44 and accompanying text (discussing traditional theory).

[30] *See infra* notes 45-48 and accompanying text (discussing canon law theory).

[31] *See infra* notes 49-60 and accompanying text (discussing adversarial theory).

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The traditional theory[32] posits that English ecclesiastical courts[33] adopted the oath *ex officio* from the European continent.[34] The oath *ex officio* was a sworn statement to provide truthful answers to the questions asked, despite possible self-incrimination.[35] The privilege then arose out of popular opposition to the use of the oath.[36] This opposition increased when two inquisitorial bodies, the Star Chamber[37] and the ecclesiastical High Commission, used the oath to pursue their political mandates.[38]

Public opposition reached a crescendo during the case of John Lilburn in 1637.[39] Lilburn was an activist in religion, politics, and social reform who spent most of his adult life in jail for attacking the government.[40] The government arrested Lilburn and brought him before the Star Chamber on a charge

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[32] For accounts discussing the traditional theory, see RUPERT CROSS, EVIDENCE 227 (3d. ed. 1967); LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT *passim* (1968); CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 114(a), at 161-62 (John W. Strong et. al. eds., 4th student ed. 1992); 8 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2250, at 270-92 (McNaughton Rev. 1961); Joseph L. Rauh, Jr., *The Privilege Against Self-Incrimination from John Lilburne to Ollie North*, 5 CONST. COMMENTARY 405 (1988).

[33] *See generally* LEVY, *supra* note 32, at 44 (noting that English ecclesiastical courts had jurisdiction over marriage and family matters, and extensive criminal jurisdiction). The ecclesiastical courts' criminal jurisdiction included cases concerning offenses against religion (*e.g.*, heresy, blasphemy, witchcraft), sins of the flesh (*e.g.*, fornication, adultery, incest), and miscellaneous moral offenses (*e.g.*, usury, defamation). *Id.*

[34] *See id.* at 46 (stating that Cardinal Otho, legate of Pope Gregory IX, brought oath *ex officio* to England).

[35] *Id.* at 46-47 (noting that oath was sworn statement promised to provide truthful answers to government's questions). The procedure required that the accused take the oath before he knew what the charges were or who had made the accusation. *Id.* at 47. Anyone who refused to take the oath suffered excommunication. *Id.* at 48.

[36] *See* 8 WIGMORE, *supra* note 32, § 2250, at 269-84 (describing history of opposition to use of oath in ecclesiastical proceedings).

[37] The Star Chamber was the judicial arm of the Privy Council, the most powerful political body in England. *See* LEVY, supra note 32, at 35, 49. The Star Chamber's jurisdiction was almost completely discretionary. *Id.* at 49. It took criminal cases based upon the accusations of private parties and informants. *Id.* at 50. The Council could compel parties and witnesses to attend, and require them to take an oath to tell the truth, despite possible self incrimination. *Id.*

[38] MCCORMICK, *supra* note 32, § 114(a), at 161.

[39] *See generally* LEVY, *supra* note 32, at 266-313 (detailing life and travails of Lilburne). Following his arrest in 1637, John Lilburne spent most of his adult life in prison while fighting for the right against self-incrimination. *Id.* at 271-72.

[40] *Id.* at 272.

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of printing seditious books.[41] After denying these charges, Lilburn refused to answer other questions, and the Star Chamber ordered him whipped and pilloried.[42] In response, on Lilburn's application, Parliament vacated the sentence and eventually abolished the Star Chamber and use of the oath *ex officio*.[43] The traditional theory's proponents suggest that common law courts adopted the privilege shortly thereafter as a result of Parliament's decision.[44]

The second, or canon law theory, questions the traditional theory's historical assertions. Specifically, canon law theory proponents contend that the traditional view mischaracterizes the continental legal system as strictly inquisitorial.[45] The traditionalists claim the oath *ex officio* and other inquisitorial procedures were invented in continental Europe.[46] The canonists assert that the privilege, which protects against inquisitorial procedure, arose out of Roman and canon law.[47] Early canon law writings and ecclesiastical court records support the canon law theory.[48]

The third view, the adversarial theory, asserts that the privilege emerged from the rise of adversarial criminal procedure,

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[41] MCCORMICK, *supra* note 32, § 114(a), at 162.

[42] *Id.*

[43] LEVY, *supra* note 32, at 281. Parliament abolished the Star Chamber and oath *ex officio* in 1641. *Id.*

[44] *See* 8 WIGMORE, *supra* note 32, § 2250, at 292 (noting that privilege assumed more importance in America than in England).

[45] *See* R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962, 964 (1990) (stating that commentators caricatured European continental system as engine of legal tyranny); *see also* M.R.T. MacNair, *The Early Development of the Privilege Against Self-Incrimination*, 10 OXFORD J. LEGAL STUD. 66, 67 (1990) (asserting that privilege originated in common family of European laws and particularly canon law).

[46] Helmholz, *supra* note 45, at 964; MacNair, *supra* note 45, at 67.

[47] *See* Helmholz, *supra* note 45, at 964 n.12 (noting that, absent local custom, continental jurisdictions applied body of Roman and canon law called *ius commune*, which literally means common law).

[48] *See* DAVID BYRNE & J.D. HEYDON, CROSS ON EVIDENCE § 25070 n.1 (4th Austl. ed. 1991) (noting that although scholars use expression *neno tenetur seispsum prodere* ("no one is bound to bear witness against himself") to root privilege in common law, it is canon law principle, supporting theory of continental origins); Helmholz, *supra* note 45, at 989-90 (noting important role that continental privilege played in English privilege's development).

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rather than from political pressure.[49] Before the adversarial system, the accused had no defense counsel.[50] Until the eighteenth century, the accused's best defense was to reply to the state's charges.[51]

The emergence of defense attorneys during the eighteenth century radically changed many aspects of criminal procedure,[52] including the criminal trial's purpose.[53] Previously, the criminal trial was an opportunity for the accused to defend herself.[54] With defense counsel present, the trial became an opportunity to test the prosecution's case.[55]

The adversarial theory's proponents argue that the modern privilege could not emerge without defense attorneys.[56] Without someone to conduct a defense, the accused had little choice but to speak for herself.[57] Although the privilege may have existed in theory by the middle of the seventeenth century, without defense counsel, it was little more than the right to slit one's own throat.[58] Nothing prevented the jury from inferring the defendant's guilt from her silence.[59] That few defendants chose to avail themselves of such a "privilege" is not surprising.[60]

The controversy over the privilege's origin will undoubtedly continue.[61] Nonetheless, by the early eighteenth century, the

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[49] John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1047 (1994).

[50] *Id.* The common law prohibiting defense counsel changed slowly from 1696 to 1836. *Id.* First, the state granted counsel to persons accused of treason. *Id.* at 1047-48. The state later granted counsel to those charged with felonies. *Id.* Defense counsel became a significant part of criminal procedure in the 1780s. *Id.* at 1048.

[51] *Id.* at 1047. In addition to lacking counsel, the accused experienced other procedural disadvantages. *Id.* at 1056. For example, the defendant had no right to subpoena witnesses. *Id.* at 1055.

[52] *Id.* at 1047.

[53] *Id.* at 1048.

[54] *Id.* at 1047.

[55] *Id.* at 1048.

[56] *Id.* at 1054.

[57] *Id.*

[58] *Id.*

[59] *See id.* at 1057 (noting that common presumption was that innocent defendant should be able to demonstrate her innocence by responding to accusations).

[60] *Id.* at 1054.

[61] *See* New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (stating in reference to privilege, that "a page of history is worth a volume of logic").

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English courts began to recognize an early form of the privilege,[62] and this recognition soon spread to the United States[63] and Australia.[64] However, the law defining the scope of the privilege developed independently in each country.[65] One area in which the three jurisdictions diverged was the privilege's availability to artificial entities, such as corporations.[66]

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[62] *See, e.g.*, MCCORMICK, *supra* note 32, § 114(a), at 162 (noting that 18th century privilege was available only at trial, and not during investigatory procedures); WIGMORE, *supra* note 32, § 2250, at 291 (noting that 18th century version of privilege was primitive compared to later formulations).

[63] *See* LEVY, *supra* note 32, at 336-37 (noting that charters England granted to American colonies required adherence to English common law). During the colonial period, courts followed the common law form of the privilege. *Id.* at 336. The rationale behind the Framers' decision to include the privilege in the Bill of Rights is unclear. *See* U.S. CONST. amend. V (codifying privilege against self-incrimination). One probable influence is that seven states had already included the privilege in their constitutional frameworks. *See* R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 764-65 (1935) (noting following dates of state codifications of privilege: Virginia, Pennsylvania, Maryland, and North Carolina 1776; Vermont, 1777; Massachusetts, 1780; New Hampshire, 1784).

Another possible rationale is that although America never had a Star Chamber, its early history contains many cases of religious persecution, witch trials, and officials suppressing political expression. *See, e.g.*, LEVY, *supra* note 32, at 338-39 (discussing various instances of religious and political persecution that mirrored English occurrences prior to recognizing privilege); Pittman, *supra*, at 767 (noting that system of justice in colonial Massachusetts was highly inquisitorial); Frederick D.G. Ribble, *Origin and Development, in* SELF-INCRIMINATION: A COMPILATION OF THE ORIGINAL DICTA 1, 4-7 (Lloyd A.B. Mitchell ed., 1954) (discussing trial of Anne Hutchinson and Massachusetts witch trials).

During the process of ratifying the United States Constitution in 1787, several states wanted to include a self-incrimination clause. Pittman, *supra*, at 788. However, the required nine states ratified the Constitution before the four remaining states proposed including the privilege. *Id.* James Madison took note when drafting the Bill of Rights and included the privilege against self-incrimination in the Fifth Amendment to the United States Constitution as follows: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . . " U.S. CONST. amend. V.

[64] *See* Sorby v. Commonwealth (1983), 152 C.L.R. 281, 290 (Austl.) (noting common law origin of privilege); P.H. LANE, AN INTRODUCTION TO THE AUSTRALIAN CONSTITUTION 237 (6th ed. 1994) (noting that Australia was English colony until 1901).

[65] *See infra* notes 67-93 and accompanying text (discussing scope of privilege in each jurisdiction).

[66] *See infra* notes 97-150 and accompanying text (discussing development of law regarding the privilege for corporations in each country).

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II. STATE OF THE LAW REGARDING THE PRIVILEGE AGAINST SELF-INCRIMINATION FOR CORPORATIONS

A. The Scope of the Privilege in England, the United States, and Australia

The English Court of Appeal stated the modern English formulation of the privilege in *Blunt v. Park Lane Hotel Ltd.*:[67] "[N]o one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose [the declarant] to any criminal charge, penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for."[68] Australia adopted a similar formulation.[69] The Fifth Amendment of the U.S. Constitution contains the American rule that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[70]

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[67] 2 K.B. 253 (Eng. C.A. 1942).

[68] *Id.* at 257. The true beginning of the modern English rule was the Criminal Evidence Act. *See* Criminal Evidence Act, 1898, 61 & 62 Vict., ch. 36, § 1(a) (Eng.) (prohibiting state from forcing defendant to testify but allowing him to testify in his own defense).

The *Blunt* court denied the privilege to a married woman who did not wish to answer questions tending to prove she committed adultery. 2 K.B. at 257. At one time such answers might have incriminated the witness by subjecting her to ecclesiastical censure. *See id.* (discussing 19th century cases when such risk existed). However, by the time of the *Blunt* decision, the court regarded this risk as obsolete. *Id.* Nevertheless, in a divorce proceeding, the court would not force a witness to admit she committed adultery. *Id.* at 260 (following Redfern v. Redfern, 1891 P. 139).

[69] *See Sorby*, 152 C.L.R. at 290 (noting common law roots of privilege). Australia gained independence from England in 1901 and, unlike England, adopted a written constitution. LANE, *supra* note 64, at 2. Like the United States, Australia has a federal system of government. *See generally id.* at 1 (explaining Australia's federal structure). In addition to the federal statutes, courts, and regulatory bodies, the states and territories each have their own statutes and court systems. *See id.* at 1-2 (discussing Australia's legal system). However, the Australian Constitution did not include the privilege against self-incrimination. *See* AUSTL. CONST. (lacking any provision for privilege against self-incrimination). The privilege is a matter of statutory and common law, in marked contrast to the privilege in the United States. *See generally* SUZANNE MCNICOL, LAW OF PRIVILEGE 227-73 (1992) (providing an extensive review of statutory abrogation of privilege).

[70] U.S. CONST. amend. V; *see also* Malloy v. Hogan, 378 U.S. 1, 3 (1964) (holding that privilege applies to states as well as federal government by operation of Fourteenth Amendment's equal protection clause). States may employ a broader privilege, but the federal interpretation provides a floor below which the states cannot restrict the privilege. *See id.* at 7-8 (discussing states' compliance with federal standards).

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Just as the formulations of the privilege are similar, so are the basic rules regarding who may claim the privilege. In all three countries, any witness that risks self-incrimination may claim the privilege, not just a criminal defendant.[71] However, witnesses other than criminal defendants may not refuse to testify based on the privilege.[72] Instead, they must testify and claim the privilege to specific questions.[73] All three jurisdictions also permit witnesses to claim the privilege in civil cases if truthful answers would subject the witness to subsequent criminal prosecution.[74]

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[71] BYRNE & HEYDON, *supra* note 48, § 25075 (noting that privilege applies to any witness in England and Australia); MCCORMICK, *supra* note 32, § 116, at 165 (noting that privilege applies to any witness in United States). The privilege is personal, and a witness cannot claim the privilege to avoid incriminating codefendants or others. Pyneboard Pty. v. Trade Practices Comm'n (1983) 152 C.L.R. 328, 346-47 (Austl.); Kelly v. Colhoun [1899] 2 Ir. R. 199, 205 (Q.B.); 1 CHESTER J. ANTIEAU, MODERN CONSTITUTIONAL LAW § 2:25 (1969).

In addition to having an absolute right to refuse to testify in court, criminal defendants can also claim the privilege during the investigatory stage. In England and Australia, the suspect can exercise the privilege in the police station after arrest, although most waive the privilege. *See* Bruce v. The Queen (1987) 74 A.L.R. 219-20 (Austl.) (noting that pretrial silence does not give rise to inference of guilt); Rice v. Connolly, 2 Q.B. 414, 419 (1966) (noting that suspect has right to refuse to answer incriminating questions when detained by police); *see also* JENNY MCEWAN, EVIDENCE AND THE ADVERSARIAL PROCESS: THE MODERN LAW 143-44 (1992) (citing various British studies showing that only ten percent of those suspects police interviewed actually exercised their right to silence). In the United States, the Supreme Court has held that officials must provide warnings to the suspect about her right to silence. *See* Miranda v. Arizona, 384 U.S. 436, 467-73 (1966) (holding that police must inform anyone in custody of their rights, including right to silence and to have attorney present during questioning). All three countries limit the privilege to testimonial activities; therefore, the privilege does not apply to physical evidence from the accused, such as blood or handwriting samples. *See* Schmerber v. California, 384 U.S. 757, 760-65 (1966) (holding that samples are not testimonial in nature); Sorby v. Commonwealth (1983) 152 C.L.R. 281, 292 (Austl.) (holding that privilege's protection does not include nontestimonial disclosures); *see generally* SUSAN M. EASTON, THE RIGHT TO SILENCE 135-50 (1991) (comparing American and English jurisprudence regarding bodily samples).

[72] Spokes v. Grosvenor Hotel Co., 2 Q.B. 124, 133 (Eng. C.A. 1897); 1 ANTIEAU, *supra* note 71, § 2:28.

[73] *See* 1 ANTIEAU, *supra* note 71, § 2:28 (noting that nondefendant witnesses must testify in United States); MCNICOL, *supra* note 69, at 274 (noting that England and Australia require nondefendant witnesses to testify and claim privilege to individual incriminating questions).

[74] Civil Evidence Act, 1968, ch. 64, § 14(1)(a) (Eng.). However, the English Parliament abolished civil liability as a ground for claiming the privilege in civil litigation. *See* Civil Evidence Act, 1968, ch. 64, § 16(1)(a) (Eng.). The privilege is available in civil contexts in the United States. McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (permitting claim of privilege in bankruptcy proceeding). *See generally* Jerry L. Marks & Jason B. Komorsky, *Taking the Fifth in Civil Cases*, LOS ANGELES LAW., Nov. 1993, at 31 (discussing tactical considerations for civil litigants claiming privilege). Witnesses in American courts can claim

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Another common thread is that the trial judge ultimately determines the privilege's availability to the witness.[75] Generally, the courts seem to favor granting witnesses fairly wide latitude and erring on their side.[76]

The jurisdictions diverge somewhat on the issue of document discovery. The English and Australian privileges allow a civil litigant or criminal defendant to refuse to turn over documents[77] or answer interrogatories[78] that may tend to incriminate him.[79] By contrast, the United States adopted the controversial "required records" doctrine.[80] Under this doctrine, the government can compel individuals and businesses to provide information that might incriminate them.[81]

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the privilege before grand juries. Blau v. United States, 340 U.S. 159, 161 (1950). The privilege is also available to witnesses testifying before legislative committees. Empsak v. United States, 349 U.S. 190, 199 (1955). Australian witnesses can claim the privilege in a wide variety of proceedings, including administrative, investigative, and executive proceedings. MCNICOL, *supra* note 69, at 140. The privilege is also available in a coroner's court in Australia. *Ex Parte* Alexander (1981) 1982 V.R. 731, 735 (Austl.).

[75] *See* Rogers v. United States, 340 U.S. 367, 374 (1951) (noting that judge must decide whether reasonable probability of incrimination exists); Jackson v. Gamble (1982) 1983 V.R. 552, 556 (Austl.) (noting that trial judge must be satisfied that risk of incrimination exists); The Queen v. Cox & Railton, 14 Q.B.D. 153, 175-76 (1884) (stating that witness must provide facts demonstrating that his answer might provide link in chain of incriminating evidence). The English rule is that the judge must believe from the totality of the circumstances and the nature of the evidence that reasonable grounds exist for the witness to believe he will incriminate himself. The Queen v. Boyes, 121 Eng. Rep. 730, 730 (Q.B. 1861). In the United States, the judge determines from the setting and the implications of the question itself whether the risk of self-incrimination exists. Hoffman v. United States, 341 U.S. 479, 486-87 (1951).

[76] *See Alexander*, 1982 V.R. at 736 (noting that court should permit witness's privilege claim if testimony might form link in chain that might incriminate witness).

[77] The King v. Associated N. Collieries (1910) 11 C.L.R. 738, 747 (Austl.); Rank Film Distrib. v. Video Info. Centre [1981] 1982 App. Cas. 380, 440-48 (appeal taken from Eng.).

[78] *See Associated N. Collieries*, 11 C.L.R. at 747 (applying privilege to interrogatories); Blunt v. Park Lane Hotel, 2 K.B. 253, 257 (Eng. C.A. 1942) (requiring defendant to answer interrogatories because no risk of incrimination existed); Triplex Safety Glass Co. v. Lancegaye Safety Glass, 2 K.B. 395, 407 (Eng. C.A. 1939) (upholding defendant's refusal to answer interrogatories based on privilege).

[79] *See* BYRNE & HEYDON, *supra* note 48, § 25160 (noting an exception if legislature abrogates privilege by statute).

[80] *See* MCCORMICK, *supra* note 32, § 142, at 216-17 (reviewing origin and scope of required records doctrine); *see also* Bernard D. Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 713-15 (1951) (criticizing doctrine).

[81] Shapiro v. United States, 335 U.S. 1, 33 (1948). These records include reports that the government requires businesses or individuals to provide or to keep for a certain

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The privilege does not apply in a variety of circumstances. In all three jurisdictions, if the witness neglects to claim the privilege in a timely manner, even self-incriminating testimony is admissible.[82] If a criminal defendant decides to testify, she waives the privilege and must truthfully answer questions on cross-examination.[83] Besides waiver and failure to claim the privilege, the privilege is not available if the witness no longer risks prosecution because of a grant of immunity,[84] an expired statute of limitations,[85] or a previous conviction or acquittal for the same crime.[86] Additionally, in some instances, statutes abrogate the privilege in England and Australia.[87] However, many of

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period of time. *See* MCCORMICK, *supra* note 32, § 142, 216-17 (discussing required records doctrine). To limit the doctrine, the Supreme Court requires narrow tailoring between the activity the government seeks to regulate and the requirement of keeping the records or providing them to the government. *Shapiro*, 335 U.S. at 33. The required records doctrine has attracted considerable criticism as a confusing and unjustified abrogation of the privilege. *See, e.g.*, Meltzer, *supra* note 80, at 713-15 (criticizing required records doctrine). The commentary is similar to the complaints about British and Australian statutory abrogation. *See, e.g.*, John Forbes, *Australia: Vulnerable Tenet of Privilege Being Assailed from All Sides — The Law Survey*, AUSTL. FIN. REV., May 6, 1992, at 37 (criticizing judicial and statutory limitations on privilege); Charles Glass, *A Modern Enactment of the Star Chamber*, THE INDEPENDENT (London), Nov. 9, 1994, at 18 (criticizing limits on privilege).

[82] The Queen v. Clyne (1985) 2 N.S.W.L.R. 740, 747 (N.S.W. Sup. Ct.); The Queen v. Coote, 4 L.R.-P.C. 599, 607-08 (1873); Regina v. Sloggett, 169 Eng. Rep. 885, 889 (Q.B. 1856).

[83] Evidence Ordinance, 1971, § 70(1) (Austl. Cap. Terr.); Evidence Act, 1977, § 15(1) (Queensl.); Evidence Act, 1910, § 85(1)(d) (Tas.); Crimes Act, 1958, § 399(d) (Vict.); Evidence Act, 1906, § 8(1)(d) (W. Austl.); Brown v. United States, 356 U.S. 148, 155-56 (1958).

[84] Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964); Sorby v. Commonwealth (1983) 152 C.L.R. 281, 290 (Austl.); The Queen v. Boyes, 121 Eng. Rep. 730, 737 (Q.B. 1861). The overlapping jurisdiction of the state and federal governments complicates the issue of immunity in the United States. For example, it was unclear whether a state's grant of immunity permits the federal government to use the witness's testimony against her in a federal prosecution. *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Murphy*, 378 U.S. at 52, helped to answer this question. In *Malloy*, the Court held that the Fifth Amendment applied to the states under the Fourteenth Amendment. 378 U.S. at 3. The *Murphy* Court's holding that immunity must be coextensive with the risk of prosecution naturally followed, because under *Malloy*, the states must grant witnesses full Fifth Amendment protection. *Id.* Therefore, if the federal government grants a witness immunity, a state cannot use the testimony against the witness in a subsequent prosecution. *Murphy*, 378 U.S. at 79. This restriction also applies to the federal government in relation to state court grants of immunity. *Id.*

[85] Hale v. Henkel, 201 U.S. 43, 67 (1906); Brebner v. Perry (1961) 1961 S.A. St. R. 177, 180-81 (Austl.); PHIPSON, *supra* note 3, § 15-42.

[86] *Hale*, 201 U.S. at 67; *Sorby*, 152 C.L.R. at 290.

[87] *See, e.g.*, Bankruptcy Act, 1914, 4 & 5 Geo. 5, ch. 59, § 15(8) (Eng.); Proceeds of

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these statutes provide some level of protection for the witness, thus limiting the compelled testimony's use in subsequent proceedings.[88]

Modern societal concerns about both white collar and street crime have led England and Australia to create exceptions to the privilege in recent years.[89] English juries may now draw inferences from the defendant's refusal to answer police questions during interrogation,[90] and the House of Lords recently limited the privilege's application in civil cases.[91] Because the privilege in the United States derives from the Constitution, American legislatures do not have the same flexibility as their English counterparts.[92] Instead, the Supreme Court must decide the constitutionality of any limits on the privilege.[93]

Crime Act, Austl. C. Acts No. 87, § 48(5) (1987). For example, provisions of England's Bankruptcy Act allow proof of the petitioning creditor's debt by using the debtor's own records. Bankruptcy Act, § 15(8). *See* Forbes, *supra* note 81, at 37s (criticizing statutory abrogation of privilege).

[88] *See, e.g.*, Customs Act, Austl. C. Acts No. 6, § 254(2) (1901) (abrogating privilege in customs proceedings, except where offense involves imprisonment); Bankruptcy Act, § 166 (providing that state cannot use compelled admissions witness makes during bankruptcy proceedings in subsequent criminal proceedings).

[89] *See* Paul Phippen, *Silent Right — Recent Court Decisions on the Right to Remain Silent*, L. SOC'Y GAZETTE (U.K.), September 29, 1993, at 17 (reviewing recent case law); David Wolchover, *Guilt and the Silent Suspect*, 139 NEW L.J. 396, 396-99 (1989) (discussing state's restriction of investigative stage right of silence in Northern Ireland); A.A.S. Zuckerman, *The Inevitable Demise of the Right to Silence*, 144 NEW L.J. 1104, 1104-05 (1994) (discussing proposed changes to right of silence).

[90] Glass, *supra* note 81, at 19 (noting that police inform anyone accused of a crime that prosecution can use his silence against him).

[91] A.T.&T. Istel Ltd. v. Tully, 1993 App. Cas. 45, 53 (1992) (appeal taken from Eng.). The privilege only applied to the extent that the government could use discovered material against the defendant in subsequent criminal proceedings. *Id.* at 55. The debate over these restrictions is certain to continue. *See, e.g.*, Glass, *supra* note 81, at 18 (arguing that restricting right to silence was contrary to England's tradition of civil rights); *see generally* Clare Dyer, *A Loud Cry for Silence*, THE GUARDIAN (London), Sept. 20, 1994, at 20 (discussing conflicts between England's restriction of privilege and European community law).

[92] *See* U.S. CONST. amend. V (codifying common law privilege into United States constitutional law).

[93] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that Supreme Court may invalidate statutes that are incompatible with U.S. Constitution). The Court does not allow the finder of fact to infer guilt from exercising the privilege in a criminal case. Carter v. Kentucky, 450 U.S. 288, 300 (1981).

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B. The Privilege for Corporations

Although these common law jurisdictions apply the privilege similarly, their treatment of the privilege diverges in some respects. One such divergence is the privilege's application to corporations. England permits corporations to claim the privilege.[94] By contrast, the United States does not grant the privilege to corporations.[95] Australia recently changed positions, repudiating the English view and adopting the American rule.[96]

1. England

In England, corporations have claimed the privilege successfully since the 1938 case *Triplex Safety Glass Co. v. Lancegaye Safety Glass Ltd.*[97] The *Triplex* case arose when the chairman of the board of directors of Lancegaye Safety Glass Co., Liverman, allegedly slandered Triplex, a competitor.[98] Triplex filed suit against Liverman and Lancegaye for libel and slander.[99] Triplex served interrogatories on both defendants, but both refused to respond because the answers would tend to incriminate them.[100] The trial court directed defendants to answer the interrogatories, but gave them leave to appeal before further proceedings.[101]

Defendants appealed, and the Court of Appeal ruled in their favor.[102] The main issue was whether the risk of incrimination was bona fide.[103] The court allowed defendants to claim the privilege because prosecution was possible, however remote.[104]

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[94] Triplex Safety Glass Co. v. Lancegaye Safety Glass Ltd. [1939] 2 K.B. 395, 408 (Eng. C.A. 1938).

[95] Hale v. Henkel, 201 U.S. 43, 70 (1906).

[96] Environment Protection Auth. v. Caltex Ref. Co. (1993) 178 C.L.R. 477, 504 (Austl.).

[97] [1939] 2 K.B. 395 (Eng. C.A. 1938).

[98] *Id.* at 395. Liverman sent a letter to the editor of a business newspaper, stating that employees of Triplex inspected the factory of a third glass company. *Id.* at 395-96. The letter alleged that the employees intended to steal a manufacturing procedure and apply for a patent for the stolen method. *Id.* at 396-98. Liverman repeated his allegations at a shareholders' meeting and in several speeches. *Id.* at 398.

[99] *Id.* at 395.

[100] *Id.*

[101] *Id.* at 398-99.

[102] *Id.* at 409.

[103] *See id.* at 404 (discussing the "reasonable ground to apprehend danger" standard which court established in *Regina v. Boyes*, 121 Eng. Rep. 730 (Q.B. 1861)).

[104] *Id.* at 405. The court distinguished between the risk of prosecution being unlikely

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Addressing whether to grant the privilege to corporations, the court found that although a corporation cannot suffer the physical pains of a natural person, it can suffer conviction and punishment.[105] As a result, the company's reputation might suffer serious damage.[106] Therefore, the court saw no reason why corporations could not claim the privilege. [107]Since *Triplex*, the privilege has been available to corporations without serious reconsideration by the English courts.[108]

2. United States

In marked contrast to the English position, the United States Supreme Court has held for nearly a century that the privilege does not apply to corporations.[109] The Court later extended this ruling to other organizations in what became known as the "collective entity doctrine."[110] The Supreme Court introduced this doctrine in the landmark case *Hale v. Henkel*.[111]

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and nonexistent. *Id.* The judge must ultimately decide whether the witness's privilege claim is bona fide. *Id.*

[105] *Id.* at 409.

[106] *Id.*

[107] *Id.*

[108] *See, e.g.*, British Steel Corp. v. Granada Television Ltd., 1981 App. Cas. 1096, 1097 (H.L. 1980) (appeal taken from Eng.) (deciding case on other grounds); Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1978 App. Cas. 547, 549, 563-66 (H.L. 1977) (appeal taken from Eng.) (presuming existence of privilege). However, a change that affected both individuals and corporations occurred in A.T.&T. Istel Ltd. v. Tully, 1993 App. Cas. 45 (H.L. 1992) (appeal taken from Eng.). In *Tully*, the court restricted the use of the privilege in civil cases to the extent that only disclosures that would provide information for use in a subsequent criminal trial were privileged. *Id.* at 55. Moreover, one judge suggested that the only acceptable justification for the privilege was discouraging the police from treating suspects poorly and producing dubious confessions. *Id.* at 53. Because neither of these factors apply to corporations, if future panels agree with this dicta, England might change its rule and deny the privilege to corporations. *See infra* notes 151-218 and accompanying text (arguing that this outcome is desirable).

[109] Hale v. Henkel, 201 U.S. 43, 70 (1906).

[110] *See infra* notes 128-30 and accompanying text (discussing other entities that doctrine governs).

[111] 201 U.S. 43 (1906). Twenty years prior, the Court first addressed the question of whether the Fifth Amendment applied to document production in *Boyd v. United States*, 116 U.S. 616 (1886). The Court reversed a lower court order requiring a contractor to produce an invoice. *Id.* at 634, 638. Because the contractor's papers were private, the compelled production violated the Fifth Amendment. *Id.* at 638. However, in *Boyd*, the Court did not address whether business associations could claim the privilege. *See id.* at 616 (deciding case on basis of personal privilege).

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In *Hale*, the defendant challenged a subpoena duces tecum that ordered him to testify before and produce documents for a grand jury conducting an antitrust investigation.[112] Although the prosecutor granted Hale immunity,[113] Hale refused to produce the documents because production would incriminate the corporation of which he was an officer.[114] The circuit court directed him to appear and produce the documents, and when he failed to do so, the court found him in contempt.[115] Hale appealed to the Supreme Court, claiming that compelled production of the documents violated the Fifth Amendment.[116]

The Court rejected Hale's Fifth Amendment privilege claim for three primary reasons.[117] First, the Court construed the privilege as purely personal, noting a clear difference between an individual and a corporation.[118] While an individual's rights flow from the Constitution, a corporation's rights flow from the state that granted its charter.[119] Second, the state grants corporate charters for the benefit of the public.[120] Therefore, the

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[112] *Hale*, 201 U.S. at 70.

[113] *See* Brown v. Walker, 161 U.S. 591, 594 (1896) (holding that grant of absolute immunity from prosecution is sufficient to deny witness of Fifth Amendment privilege not to answer). Later, the Court would clarify that total immunity from prosecution for the offense, or "transactional" immunity, exceeds the Fifth Amendment's requirements. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964) (holding that government may not use compelled testimony or its fruits against witness). To compel testimony, the state merely had to grant "use and derivative use" immunity. *Id.* This type of immunity prohibited the state from using either the compelled testimony itself, or information investigators uncover as a result of the required testimony. *Id.*

[114] *Hale*, 201 U.S. at 74.

[115] *Id.* at 46.

[116] *Id.*

[117] *Id.* at 58-77. The Court was more sympathetic to Hale's Fourth Amendment claim. *Id.* at 76. The Court stated that the discovery order was overly broad, and that compulsory production of papers could violate the Fourth Amendment in the same manner as a search warrant. *Id.* Further, the Court determined that the Constitution entitles corporations to the protection of the Fourth Amendment. *Id.* Justice Harlan proposed a strong argument for denying Fourth Amendment protection to corporations, stating that a corporation was not part of the "people" within the meaning of the Amendment. *Id.* at 78 (Harlan, J., concurring). The majority's opinion seems to withstand the test of time in light of the modern rationale for the Fourth Amendment exclusionary rule. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 656 (1961) (discussing deterrence of police misconduct as rationale for excluding illegally seized evidence).

[118] *Hale*, 201 U.S. at 70.

[119] *Id.* at 74.

[120] *Id.*

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state reserves a right to investigate the corporation's affairs and determine whether it is abiding by its charter.[121] Finally, the Court noted the near impossibility of prosecuting antitrust cases without corporate documents.[122] As a result, the Court declined to extend the Fifth Amendment privilege to corporations.[123]

The Court has not wavered from this position in ninety years.[124] To the contrary, in *Wilson v. United States*,[125] the Court expanded the holding of *Hale* to include corporate documents that might personally incriminate the officer who had custody of the papers.[126] While the privilege protects an officer's private papers, she is merely a custodian of the corporate records and must relinquish them upon a court order.[127]

The Court subsequently extended the holdings of *Hale* and *Wilson* to unincorporated associations,[128] partnerships,[129] and closely held corporations.[130] This line of cases, beginning with *Hale*, developed the collective entity doctrine.[131] For purposes

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[121] *Id.* at 75.

[122] *Id.* at 73; *see generally* Michael M. Baylson, *The Fifth Amendment in Civil Antitrust Litigation: Overview of Substantive Law*, 50 ANTITRUST L.J. 837 (1982) (discussing Fifth Amendment claims in context of civil antitrust cases).

[123] *Hale*, 201 U.S. at 76-77. The Court never reached the issue of Hale's personal incrimination, as the state granted him immunity from prosecution. *Id.* at 73.

[124] *See, e.g.*, Braswell v. United States 487 U.S. 99, 105 (1988) (stating that *Hale* determined issue of privilege for corporations).

[125] 221 U.S. 361 (1911).

[126] *Id.* at 384-85 (holding that allowing officers to refuse inspection of corporate records would unreasonably limit state's power of visitation). *See generally* MCCORMICK, *supra* note 32, § 130 (discussing agent's inability to claim personal privilege).

[127] *Wilson*, 221 U.S. at 385. Additionally, an officer cannot refuse to produce personally incriminating corporate records because they belong to the corporation. Bellis v. United States, 417 U.S. 85-86, 94-96 (1974). Nor can an officer invoke her personal privilege to protect the corporation. 8 WIGMORE, *supra* note 32, § 2259(b), at 354-55. The corporation itself has no privilege. *Hale*, 201 U.S. at 69-70. An officer cannot attempt to claim the privilege for the corporation, because a witness cannot claim the privilege on behalf of a third person. *Id.* However, the state cannot require an officer to provide oral testimony regarding the records that might personally incriminate her. Curcio v. United States, 354 U.S. 118, 123-24 (1957).

[128] *See* United States v. White, 322 U.S. 694, 701 (1944) (extending collective entity doctrine to trade unions and reiterating that privilege was purely personal).

[129] *See Bellis*, 417 U.S. at 95-96 (holding that partnership records were not personal and that their custodian could not claim privilege to protect them from disclosure).

[130] *See* Braswell v. United States, 487 U.S. 99, 104, 118-19 (1988) (noting that closely held corporations were nonetheless corporations and that privilege did not protect their institutional records).

[131] *See id.* at 104 (discussing lengthy history of collective entity doctrine).

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of the Fifth Amendment, the doctrine treats individuals differently than collective entities, granting the privilege to individuals while denying it to collective entities.[132]

3. Australia

Until recently, Australia followed the English rule and permitted corporations to claim the privilege.[133] However, the Australian High Court never explicitly adopted the rule and merely assumed the privilege's applicability to corporations.[134] In 1993, the High Court confronted the issue in *Environment Protection Authority v. Caltex Refining Co.*[135] and abolished the privilege for corporations.[136]

In *Caltex*, the defendant refining company held a conditional license that permitted it to discharge certain quantities and types of waste into the ocean.[137] In April 1991, the government subpoenaed documents from Caltex to determine if it was discharging pollutants in breach of its license.[138] Caltex challenged the

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[132] *Id.* The Court has continually characterized representatives of collective entities as agents who hold records in a custodial, rather than a personal, capacity. Fisher v. United States, 425 U.S. 391, 411 (1976). However, for a sole proprietor, document production may be self-incriminatory and therefore privileged. United States v. Doe, 465 U.S. 605, 606, 613 (1984). *See generally* Amy Schlesinger Rich, Note, *Pleading the Fifth: Record Custodians and the Act-of-Production Doctrine*, 8 CARDOZO L. REV. 633, 634-43 (1987) (discussing history of act of production doctrine). Custodians of corporate records cannot claim that the act of producing nonprivileged documents is testimonial and therefore within the ambit of the Fifth Amendment. *Braswell*, 487 U.S. at 99.

[133] *See, e.g.*, Pyneboard Pty. v. Trade Practices Comm'n (1983) 152 C.L.R. 328, 335 (Austl.) (noting split of authority and assuming privilege applied to corporations); Controlled Consultants v. Commissioner for Corp. Affairs (1985) 156 C.L.R. 385, 394 (Austl.) (deciding case on basis of statutory abrogation of privilege); Concrete Constrs. Pty. v. Plumbers & Gasfitters Employees' Union (1987) 71 A.L.R. 501, 518 (Fed. Ct. Austl.) (noting lack of High Court authority and assuming existence of privilege). Judge Murphy of the High Court had advocated abolishing the privilege for corporations since 1982. *See, e.g.*, Rochfort v. Trade Practices Comm'n (1982) 153 C.L.R. 134, 150 (Austl.) (suggesting that Australia should not allow corporations to claim privilege).

[134] *See, e.g., Pyneboard*, 152 C.L.R. at 335, 344-45 (deciding case on alternate grounds).

[135] (1993) 178 C.L.R. 477 (Austl.); *see generally* Ansell, *supra* note 15, at 547 (suggesting that United States' jurisprudence influenced Australian High Court); Suzanne B. McNicol, *The High Court Rules: Corporations and the Privilege Against Self-Incrimination*, 68 LAW INST. J. 1058 (1994) (analyzing *Caltex* decision).

[136] *See* McNicol, *supra* note 135, at 1058 (noting that vote was close; of seven High Court judges, four voted in favor of abolishing privilege for corporations and three against).

[137] *Caltex*, 178 C.L.R. at 488.

[138] *Id.* at 489.

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subpoena, claiming the privilege against self-incrimination.[139] The lower court upheld the subpoena.[140] However, the intermediate appellate court invalidated it, and the Environment Protection Authority appealed to the High Court.[141]

The High Court extensively reviewed the common law authorities in the United States, England, Canada, and New Zealand.[142] Noting the split of authority[143] and differing approaches, the court then reviewed the privilege's historical and modern rationales.[144] The court concluded that the privilege's historical rationale was to prevent the state from compelling incriminating testimony from natural persons.[145]

In contrast to the historical privilege, the court stated that the privilege's modern justification is maintaining a fair balance between the state and the individual.[146] The High Court decided that this rationale did not justify extending the privilege to corporations. Because corporations generally have more resources than individuals, it is easier for them to mount a defense in relation to the state.[147] Furthermore, it stated that corporate crime is difficult to detect and punish even without extending the privilege to corporate entities.[148] The High Court predicted that allowing corporations to claim the privilege would create an imbalance and keep relevant documents out of court during

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[139] *Id.* The statute authorizing the document demand did not expressly abrogate the privilege. *See* Clean Waters Act, 1970, § 29(2)(a) (N.S.W.) (requiring businesses that discharge pollutants to produce documents relating to discharge).

[140] *Caltex*, 178 C.L.R. at 489.

[141] *Id.*

[142] *Id.* at 490-96.

[143] *Id.* The United States does not grant corporations the privilege. *See supra* notes 109-32 and accompanying text (discussing United States law regarding privilege for corporations). England permits corporations to claim the privilege. *See supra* notes 97-108 and accompanying text (discussing English law regarding privilege for corporations). New Zealand grants the privilege against self-incrimination to corporations. New Zealand Apple & Pear Mktg. Bd. v. Master & Sons Ltd. [1986] 1 N.Z.L.R. 191, 196 (C.A.). Canada grants corporations the privilege at common law. Webster v. Solloway, Mills & Co. [1931] 1 D.L.R. 831, 833 (Alta.).

[144] *Caltex*, 178 C.L.R. at 497-506.

[145] *Id.* at 497-98. The court also noted that international authorities supported this approach. *Id.* at 499.

[146] *Id.* at 500.

[147] *Id.*

[148] *See id.* (noting concern over corporate crime and difficulty of detection).

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prosecutions of corporate crime.[149] The Commonwealth Parliament subsequently approved the decision by quickly codifying it.[150]

III. ANALYSIS

The American and Australian rule denying corporations the privilege is preferable to the English rule granting corporations the privilege. The privilege should not be available to corporations for two reasons. First, the historical underpinnings of the privilege support limiting it to individuals. Second, strong social policy reasons support denying entities the privilege.

A. Historical Considerations

The true origin of the privilege against self-incrimination is controversial.[151] Some recent scholarship questioning the privilege's common law origins suggests that the privilege originated in Roman canon law.[152] These origins support the American and Australian position denying the privilege to corporations.[153]

The ecclesiastical documents that give rise to the canon law theory emphasize the individual's right to protect himself against the state's intrusive powers.[154] The documents' language suggests only a personal privilege.[155] Additionally, religion is the

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[149] *Id.* at 504. Commentators criticized the *Caltex* decision, stating that pragmatic concerns about successfully prosecuting corporations rather than legal principle guided the court. *See, e.g.*, Tom Middleton, Note, *Criminal Cases in the High Court of Australia*, 18 CRIM. L.J. 284, 287 (1994) (criticizing *Caltex* court's reasoning).

[150] Evidence Act, Austl. C. Acts No. 2, § 187 (1995).

[151] *See supra* notes 32-60 and accompanying text (discussing various theories for origin of privilege).

[152] *See generally* Helmholz, *supra* note 45 (providing extensive evidence from Roman canon law writings and records of ecclesiastical courts that privilege originated in continental Europe); Langbein, *supra* note 49 (discussing adversarial theory for origin of privilege); *see also* Macnair, *supra* note 45, at 70-71 (discussing canon law oaths that predate English adoption of rule).

[153] *But see* Trainor, *supra* note 5, at 2158-63, 2176-77 (suggesting that revisionist history of privilege justifies granting privilege to corporations).

[154] *See* Helmholz, *supra* note 45, at 983-84 (characterizing *ius commune* conception of privilege as protection against intrusive officials that pry into lives of ordinary people).

[155] *See id.* at 967 nn.26-27 (translating canon law language). The canon law language illustrates the personal nature of the privilege: "But conversely it seems he may not be

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foundation of canon law.[156] The canon law reflected the notion that people should confess to God, but that the law should not require confession to any person.[157] Another canon law justification was that compelling confessions would encourage perjury, a mortal sin.[158] These religious justifications for the privilege support limiting the privilege to individuals, as collective entities have no conscience or soul to redeem.[159]

Although courts frequently discuss the history of the privilege, it is not a decisive factor in their holdings. The seminal United States decision, *Hale v. Henkel*,[160] relied on the Court's interpretation of the Constitution.[161] Australian and English courts considered both policy and general principles of self-incrimination when granting or denying the privilege to corporations.[162] In recent cases, such as the Australian *Environment Protection Authority v. Caltex Refining Co.*[163] case, policy considerations appear to be an important factor in the court's decision.[164] Modernly, these considerations provide strong support for limiting the privilege to individuals.[165]

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forced to respond since no one is bound to betray himself . . . ."; "no one is told to betray himself in public . . . ."; "he was not forced to answer an interrogation . . . because he does not have to betray himself." *Id.*

[156] *See* BLACK'S LAW DICTIONARY 206-07 (6th ed. 1990) (defining canon law as body of Roman ecclesiastical jurisprudence compiled in 12th, 13th and 14th centuries). Canon law includes the opinions of the ancient Latin fathers, the decrees of General Councils, and the decretal epistles and bulls of the Pope. *Id.*

[157] *See* Helmholz, *supra* note 45, at 981-82 (noting that canon law commentators used language from biblical commentary to justify privilege).

[158] MacNair, *supra* note 45, at 71.

[159] *See* Hale v. Henkel, 201 U.S. 43, 74 (1906) (noting that corporation is creature of state).

[160] 201 U.S. 43 (1906).

[161] *Id.* at 69-70.

[162] *See, e.g.*, Triplex Safety Glass Co. v. Lancegaye Safety Glass Ltd., 2 K.B. 395, 408-09 (Eng. C.A. 1939) (discussing circumstances in which privilege applies).

[163] (1993) 178 C.L.R. 477 (Austl).

[164] *See id.* at 500-03 (discussing practical considerations surrounding prosecution of corporate crime).

[165] *See infra* notes 166-218 and accompanying text (discussing policy reasons for limiting privilege).

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B. Policy Considerations

1. Historical Role of the Corporation

One policy consideration that supports limiting the privilege to individuals is the role of the corporation in society. As the American cases repeatedly note, corporations exist at the pleasure of the state.[166] The state grants benefits to corporations on the assumption that corporations benefit society by providing employment, goods, and services.[167] Because corporations exist for the public's benefit, the public should be able to demand accountability and compliance from corporations.[168]

A claim of the privilege against self-incrimination means that based on the available information, a well-founded risk of criminal prosecution exists.[169] If the government prosecutes a corporation, then presumably at least some cause exists to believe the corporation has done something illegal and therefore against the public trust.[170] An entity that exists by the grace of the public should not be allowed to conceal violations of the public trust for its own benefit.[171]

2. The Fair Balance Between the State and the Corporation

In *Caltex*,[172] the Australian High Court considered whether granting the privilege to corporations was appropriate under the

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[166] *See, e.g.*, United States v. White, 322 U.S. 694, 700 (1944) (asserting that states charter corporations, justifying state investigation of corporate records); Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 138 (1939) (explaining that state charters give companies their legal existence); Hale v. Henkel, 201 U.S. 43, 74 (1906) (noting that states grant corporate charters, and corporation's existence is at pleasure of state); Covington Drawbridge Co. v. Shepherd, 61 U.S. (1 How.) 227, 233 (1857) (maintaining that corporation has no legal existence outside of state which creates it).

[167] *Hale*, 201 U.S. at 74-75.

[168] *See id.* at 75 (noting that legislature has reserved right to determine whether corporation is violating its charter).

[169] *See, e.g.*, The Queen v. Boyes, 121 Eng. Rep. 730, 730 (Q.B. 1861) (discussing common law requirements to support witness's claim of privilege).

[170] *See Hale*, 201 U.S. at 74 (stating that corporations are incorporated for benefit of public).

[171] *See id.* at 74-75 (stating that corporations may not conceal information when charged with abuse of state-granted benefits).

[172] Environment Protection Auth. v. Caltex Ref. Co. (1993) 178 C.L.R. 477 (Austl).

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privilege's modern rationale.[173] This rationale suggests that the privilege helps to maintain a fair balance between the state and the individual.[174] For several reasons, this rationale does not support granting the privilege to corporations.

First, corporate structure — particularly in large companies — makes gathering information difficult and acts as a shield against investigation.[175] Because many corporations are decentralized and departmentalized, many people work on small parts of a larger whole.[176] Therefore, even an employee who wants to report illegal activities to the authorities might not have access to enough information to do so.[177] By contrast, individuals do not have the bureaucratic structure inherent in a corporate entity. In sum, corporate bureaucracy provides an inherent protective shield against investigation.[178]

Furthermore, unlike street criminals, corporations conduct much of their business in writing, and extending the privilege to cover corporate documents would immunize many corporations against prosecution.[179] Writings record financial transactions, mergers, loans, and other data.[180] If corporations can lock the only "witnesses" to their misbehavior in file cabinets, they can withhold critical evidence from the same legal system that provides for the corporation's existence.[181] If this paper trail is un-

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[173] *Id.* at 498-506.

[174] *Id.*

[175] *See* Ben Jacobsen, *Corporate Crime: New Investigative Horizons, in* CRIMINAL AND CIVIL INVESTIGATION HANDBOOK 6-6 (Joseph J. Grau ed., 1981) (noting that multiple divisions in corporate structure create obstacles to data gathering).

[176] *See* MARSHALL B. CLINARD ET AL., ILLEGAL CORPORATE BEHAVIOR 7 (1979) (noting that corporations tend to decentralize both operations and decision making).

[177] *See id.* (noting that decentralization creates environment where crime may flourish at all levels).

[178] *See id.* at 8 (noting that corporations have unique social structure which may actually encourage crime and unethical behavior). Group dynamics exist which pressure individuals to conform and play certain roles within the organization. *Id.*

[179] *See Developments in the Law — Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1276-77 (1979) [hereinafter *Corporate Crime*] (describing documentary evidence as key to prosecuting corporate crime).

[180] *See* Jacobsen, *supra* note 175, at 6-9 (discussing various records that investigators should analyze while investigating corporations, including computer data).

[181] *See* Hale v. Henkel, 201 U.S. 43, 74 (1906) (referring to corporations as creatures of state). Compare corporate wrongdoing with street crimes, which often leave behind physical evidence, such as fingerprints or bloodstains. *See* Vernon J. Geberth, *Homicide Investigation, in* CRIMINAL AND CIVIL INVESTIGATION HANDBOOK 3-57 to -59 (Joseph J. Grau ed.,

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available, it renders the investigation and prosecution of corporate crime difficult or impossible in many instances.[182] Rather than creating a fair balance, allowing corporations to use the privilege would grant many of them immunity from prosecution.[183]

The corporation's capacity to defend itself is a third consideration in determining whether the privilege is necessary to maintain a fair balance. While wealth should not be the controlling criterion, a corporation's financial resources ordinarily place it in a better position to defend itself than an individual defendant.[184] Furthermore, authorities employ different investigatory procedures when the suspect is a corporate entity, relying more on documentary evidence and less on interrogation.[185] This reduces the risk that the police might coerce an unsophisticated defendant.[186] Additionally, easier access to legal advice places the corporate defendant in a considerably better position than most individuals.[187] Although all criminal defendants have the right to an attorney, in a typical street crime case this is likely to be a busy public defender, rather than the in-house counsel many corporations retain.[188]

1981) (describing procedure for collecting such physical evidence at murder scene). This type of physical evidence is not available in cases of corporate crime. *See Corporate Crime*, *supra* note 179, at 1276 (noting that corporate crime often leaves no physical trace).

[182] *See* United States v. White, 322 U.S. 694, 700-01 (1944) (noting that, without records and documents, enforcing federal and state laws against corporations would be impossible); Environment Protection Auth. v. Caltex Ref. Co. (1993) 178 C.L.R. 477, 500 (Austl.) (noting that complexity of corporate fraud creates enforcement difficulties); 8 WIGMORE, *supra* note 32, § 2259(a), at 353 (describing prosecution of corporate crime as "largely futile" if corporations could claim privilege for their documents).

[183] *See Caltex*, 178 C.L.R. at 504 (describing results of granting privilege to corporations as disproportionate and adverse); 8 WIGMORE, *supra* note 32, § 2259(a), at 353 (noting that acts of collective groups are often evidenced in writings only).

[184] *See Caltex*, 178 C.L.R. at 500 (noting that companies tend to have greater resources than individuals).

[185] *See* Jacobsen, *supra* note 175, at 6-9 (suggesting investigatory procedures for corporate crime that do not include police-style interrogation).

[186] *See* Miranda v. Arizona, 384 U.S. 436, 467-73 (1966) (discussing police coercion as rationale for requiring that officials warn suspects of constitutional rights).

[187] *See* FRANCIS T. CULLEN ET AL., CORPORATE CRIME UNDER ATTACK 189 (1987) (noting that during Ford Pinto case, Ford retained two high profile law firms to help quash indictment against it).

[188] *See Miranda*, 384 U.S at 474 (holding that Constitution entitles suspects to legal counsel).

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A fourth and final key to the balance between state and individual is that the Fourth Amendment protects corporations from unreasonable searches and seizures.[189] This protection provides sufficient balance to keep the corporation in a fair position in relation to the government.[190] The Fourth Amendment's warrant requirement guarantees that a neutral magistrate will review the government's assertion of probable cause to conduct a search, preventing harassment and "fishing expeditions" by law enforcement officials.[191]

3. Maintaining an Accusatorial Rather than Inquisitorial System of Justice

Along with maintaining a fair state individual balance, the privilege is necessary to guarantee an accusatorial, rather than inquisitorial, system of justice.[192] The Star Chamber practiced an inquisitorial system that required witnesses to answer questions that might incriminate them.[193] In effect, the government forced witnesses to testify against themselves.[194] By contrast, the root of the accusatorial system is that the government must prove its case against the defendant without a compelled confession.[195] The privilege against self-incrimination is essential to this principle and has included incriminating documents within its scope[196] since the 18th century.[197]

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[189] Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 208-09 (1946).

[190] *See id.* at 213 (balancing state law enforcement function against unreasonable intrusion into corporate affairs).

[191] *See* Hale v. Henkel, 201 U.S. 43, 71-72 (1906) (noting that Fourth and Fifth Amendments serve different functions).

[192] *See* Caltex Ref. Co. v. State Pollution Control Comm'n (1991) 25 N.S.W.L.R. 118, 127 (Austl.) (citing three modern justifications for privilege among which are maintaining fair balance between individual and state and maintaining integrity of accusatorial system of justice), *rev'd sub nom*, Environment Protection Auth. v. Caltex Ref. Co. (1993) 178 C.L.R. 477 (Austl.).

[193] *See* LEVY, *supra* note 32, at 49-50 (discussing Star Chamber's inquisitorial procedures).

[194] *Id.* at 51.

[195] Environment Protection Auth. v. Caltex Ref. Co. (1993) 178 C.L.R. 477, 501 (Austl.); *see generally* LEVY, *supra* note 32, at 39-40 (noting features of accusatorial system — trial by jury, definite accuser, public proceedings, confrontation rights, and requiring that prosecution prove its case).

[196] LEVY, *supra* note 32, at 39-40, 51.

[197] *See* Rex v. Cornelius, 93 Eng. Rep. 1133, 1133-34 (K.B. 1744) (holding that prosecu-

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However, both American and Australian courts have accepted the notion that denying corporations the privilege is compatible with an accusatorial system of justice.[198] The U.S. Supreme Court held that merely compelling information from a litigant does not implicate the Fifth Amendment privilege.[199] While a court may require the production of documents, fulfilling the compulsion requirement, the requested information is not testimonial. While document production has communicative aspects, it is not analogous to compelled testimony.[200] Unlike a witness called to testify, the document producer need only supply the documents requested, not state that their contents are true.[201] However, a witness called to testify must swear to tell the truth.

The U.S. Supreme Court has distinguished testifying under oath from other acts that merely provide information.[202] When a corporation produces a document, the government must still find the necessary facts and draw the needed inferences without the help of the accused.[203] Further, document production does not place the corporation in the situation of choosing either to lie or to incriminate itself.[204] Therefore, requiring corporations to produce documents does not weaken the accusatorial system.[205]

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tor could not inspect documents that could incriminate defendant).

[198] *See* Braswell v. United States, 487 U.S. 99, 104 (1988) (producing documents does not have testimonial effect); *Caltex*, 178 C.L.R. at 503 (finding that unavailability of privilege to corporations does not compromise accusatorial system).

[199] *Braswell*, 487 U.S. at 103 (citing Fisher v. United States, 425 U.S. 391, 410-11 (1976)).

[200] *Id.*

[201] *Fisher*, 425 U.S. at 410 (citing Curcio v. United States, 354 U.S. 118, 125 (1957)).

[202] *See, e.g.*, Schmerber v. California, 384 U.S. 757 (1966) (holding that providing blood sample, while compelled, is not testimonial act implicating privilege).

[203] *See Fisher*, 425 U.S. at 408 (comparing document production to requirement that defendants provide blood or handwriting samples). While compelled, such acts are not testimonial. *Id.*

[204] *See* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) (discussing "cruel trilemma" of self-accusation, perjury, or contempt). Because the document producer does not swear to the truth of the document's contents, the trilemma does not arise.

[205] Environment Protection Auth. v. Caltex Ref. Co., 178 C.L.R. 477, 503 (1993) (Ausdl.).

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4. The Far-Reaching Effects of Corporate Activity

Negligent or illegal corporate activities can yield harsh results that directly affect many people.[206] One need only consider disasters like Love Canal[207] and the plant explosion in Bhopal, India[208] to see the havoc that a negligent corporation can wreak.[209] Illegal labor practices — whether unfair discrimination or safety violations — compromise the health, safety, and well-being of a corporation's employees.[210] Such instances are not rare in the United States,[211] and the issue of corporate wrongdoing has taken on similar urgency in England and Aus-

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[206] *See Corporate Crime, supra* note 179, at 1276 (noting that harm corporations cause is often widely distributed rather than focused on particular victim).

[207] CULLEN ET AL., *supra* note 187, at 76-77 (describing history of Love Canal). A builder developed a residential neighborhood on 15 acres of land with 20,000 tons of chemical waste buried underneath. *Id.* The residents suffered severe health effects as a result. *Id.*

[208] *Id.* at 75 (describing leak of 45 tons of methyl isocyanate from Union Carbide pesticide plant, which killed 2000 people).

[209] *See* Orr Kelly, *Corporate Crime; The Untold Story*, U.S. NEWS & WORLD REP., Sept. 6, 1982, at 25 (noting that few corporate criminals face criminal charges, regardless of damage corporations cause). *But cf.* Jim Doyle, *Jail Terms for Corporate Crime: Prosecutors Going After Executives*, S.F. CHRON., April 22, 1993, at A1 (noting increasing jail terms for corporate executives). In 1990, California became the first state to enact a "Corporate Criminal Liability Act." *See* Scott Sibary, *"Be a Manager, Go to Jail": Coping with a New Type of Law*, SAM ADVANCED MGMT. J., Sept. 22, 1993, at 38 (discussing implications of manager liability laws).

[210] *See* CULLEN ET AL., *supra* note 187, at 62 (citing Department of Labor statistics that, in 1978 alone, occupational injuries cost $23 billion in lost wages, medical expenses, insurance payments, and lost productivity); *id.* at 67 (citing government figures that exposure to toxic agents in workplace may cause as many as 100,000 deaths each year); Joel Swartz, *Silent Killers at Work, in* CORPORATE AND GOVERNMENTAL DEVIANCE 114 (M. David Erdmann & Richard J. Lundman eds., 1978) (discussing deaths and injuries from occupational diseases).

[211] *See* Kelly, *supra* note 209, at 25 (citing 1982 report documenting that, in previous decade, 115 of 500 top American companies received criminal convictions or civil penalties); *see also* ALBERT J. REISS, JR. & ALBERT D. BIDERMAN, DATA SOURCES ON WHITE-COLLAR LAW-BREAKING (1980) (discussing issues of definition and classification, sources of information about white-collar crime, barriers to statistical reporting, and information systems); U.S. DEPARTMENT OF JUSTICE, WHITE-COLLAR CRIME: A REPORT TO THE PUBLIC (1989) (discussing problem and law enforcement efforts to combat white-collar crime).

On corporate and white collar crime, see generally AUGUST BEQUAI, WHITE-COLLAR CRIME: A 20TH CENTURY CRISIS (1978) (discussing types of crime, problems involved in investigation and prosecution); CRIME AT THE TOP: DEVIANCE IN BUSINESS AND THE PROFESSIONS (John M. Johnson & Jack D. Douglas eds., 1978) (featuring essays on white collar crime, unethical behavior by professionals, and proposed solutions); WHITE-COLLAR CRIME: THEORY AND RESEARCH (Gilbert Geis & Ezra Stotland eds., 1980) [hereinafter THEORY AND RESEARCH] (featuring essays discussing institutions and criminal behavior).

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tralia in recent years.[212] Corporate crime also has an economic effect.[213] Whether a corporation cheats on its taxes, falsifies costs on government contracts, or overcharges a social welfare agency, ordinary taxpayers bear the burden through higher taxes and product costs.[214]

Permitting corporations to claim the privilege would make it difficult and, in many cases, impossible to hold corporations accountable.[215] Besides directly impeding criminal investigations, the privilege would hamper civil trials. In some cases, civil plaintiffs would not obtain adequate discovery from corporate defendants.[216]

If a corporate defendant believes the state might subsequently indict it for a crime, the court would not require it to produce the documents necessary for the civil plaintiff to prove her

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[212] *See generally* Charles E. Reasons & Colin H. Goff, *Corporate Crime: A Cross-National Analysis, in* THEORY AND RESEARCH, *supra* note 211, at 126 (discussing impact of corporate crime on society in Australia and England); Adam C. Sutton & Ronald Wild, *Investigating Company Fraud: Case Studies from Australia, in* THEORY AND RESEARCH, *supra* note 211, at 293 (analyzing incidents of corporate fraud).

[213] *See* Kelly, *supra* note 209, at 25 (estimating $200 billion dollars per year in inflated prices, environmental damage, and evaded taxes). Price fixing costs consumers $60 billion per year. *Id.*

[214] *See* CULLEN ET AL., *supra* note 187, at 62-64 (noting examples of all types of corporate misconduct in recent years). The IRS reports $1.2 billion in lost revenue from unreported corporate taxable income. *Id.* at 62. The government fined General Electric over $1 million and General Dynamics over $75 million on false claims for defense contracts. *Id.* at 62-63. In 1977, Revco Drug Stores was convicted of ten counts of falsification for submitting more than $500,000 in fraudulent Medicare claims. *Id.* at 63. The Allied Chemical Co. pleaded no contest to charges of dumping pesticides into Virginia waters, and paid over $13 million in state assessed fines. *Id.*

[215] *See* Hale v. Henkel, 201 U.S. 43, 74 (1906) (stating that, in many cases, examining corporate papers is only way to prove corporate crime); *accord*, Environment Protection Auth. v. Caltex Ref. Co. (1993) 178 C.L.R. 477, 504 (Austl.) (noting importance of documents as evidence of criminal activity); 8 WIGMORE, *supra* note 32, § 2259(a), at 353 (noting that without documentation, prosecutor's task when prosecuting corporate crime would be impossible); Meltzer, *supra* note 80, at 704 (noting that antitrust cases are hard to prove even with documentary evidence from defendant); *Corporate Crime, supra* note 179, at 1276 (noting key role of documentary evidence in investigating corporate behavior).

[216] *See* CULLEN ET AL., *supra* note 187, at 164, 220-24 (noting that several civil cases preceded criminal prosecution of Ford, and in some instances, no civil remedies were available to victims' families). On the Pinto case generally, see LEE PATRICK STROBEL, RECKLESS HOMICIDE? FORD PINTO'S TRIAL (1985).

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case.[217] As a result, the civil plaintiff would have no redress if courts allowed corporations to claim the privilege.[218]

CONCLUSION

The American and Australian courts refuse to permit corporations to claim the privilege against self-incrimination, while the English courts permit this claim. The American and Australian rule is preferable for both historical and policy reasons. First, the history of the privilege supports restricting it to individuals. Second, compelling policy reasons exist for denying the privilege to corporations. The law creates corporations, and provides them with benefits on the assumption that they exist for the public good. States must retain the right to investigate the suspected wrongdoing of an entity that exists by its consent. Finally, granting the privilege to corporations is unnecessary to maintain either a fair state individual balance or an accusatorial system of justice.

Additionally, corporate structure and the nature of corporate crime are factors that could weaken or destroy the state's ability to investigate wrongdoing if it could not demand documents. Corporate crime can potentially be devastating to large numbers of people. It also has a huge economic impact. Investigating corporate crime and bringing criminal companies to justice is inherently difficult. Providing corporations with a privilege that shields incriminatory papers would make bringing corporate criminals to justice unreasonably difficult.

As multinational corporations continue to expand, the need to effectively deter corporate crime will increase proportionately. The United States has followed the wise policy of denying corporations the privilege for nearly a century, and Australia recently adopted this rule. England should reconsider its rule before it becomes a safe harbor for corporations seeking protection for criminal behavior through the privilege.

Lynn Loschin

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[217] *See* McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (allowing claim of privilege in civil case if testimony would expose witness to potential criminal prosecution).

[218] *See* CULLEN ET AL., *supra* note 187, at 164, 220-24 (discussing civil litigation in Ford Pinto case).

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