THE CORPORATE PRIVILEGE AGAINST SELF-INCRIMINATION

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ABSTRACT

Individuals can claim a Fifth Amendment privilege against self-incrimination, but corporations cannot. While this has made it easier to prosecute corporations, the discrepancy is difficult to defend given the developments in corporate and criminal procedural law over the last century. This Note concludes that the privilege should attach to corporations as a matter of consistent constitutional interpretation and in light of the history and purposes of the Fifth Amendment. The Note then proposes a version of the privilege that a corporation would exercise, modeled on the attorney-client privilege.

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"[N]or shall any person . . . be compelled in any criminal case to be a witness against himself . . . ."[1]

"Corporations have neither bodies to be punished, nor souls to be condemned."

—Edward Thurlow, Lord Chancellor of Great Britain, 1778–1792[2]

INTRODUCTION

It is long-settled law that the Fifth Amendment's privilege against self-incrimination does not attach to corporations. "But long-settled is not necessarily forever-settled,"[3] and in the context of corporate rights, there is reason to suggest that a change is warranted.[4] The Supreme Court might soon revisit the century-old rule proscribing a corporate privilege against self-incrimination because—in addition to changes in the nature of corporations since the rule was decided—courts have eroded the basis for the rule by extending a variety of criminal procedural rights to corporations[5] and by strengthening other corporate rights.[6]

If the Supreme Court found that the privilege does attach to corporations, the consequences could be significant. With the new privilege, corporations might conduct less probing internal investigations or may refuse to comply with investigatory orders. In response, investigators would be more likely to rely on search warrants than subpoenas or other court orders. Anticipating the added cost and difficulty of government-led investigations, corporations may be incentivized to commit fewer resources to compliance. Bad corporate actors may even be emboldened to commit crimes, gambling that a corporate privilege will shield them from consequences. The consequences of a change of law in this area would be

1. U.S. CONST. amend. V.

2. OXFORD ESSENTIAL QUOTATIONS (Susan Ratcliffe ed., 2018).

3. Mark Rochon et al., *Is It Time to Revisit the Corporate Privilege Against Compelled Self-Incrimination?*, THE CHAMPION, Sept./Oct. 2019, at 50, 50.

4. *See id.* (discussing changes in corporate constitutional rights other than self-incrimination).

5. *Id.*

6. *See infra* Section II.C.

tempered by existing exceptions to the privilege and limits on who may invoke a corporate privilege.

This Note asks if corporations should have a Fifth Amendment privilege against self-incrimination. For the reasons discussed below, the Note concludes that corporations should have the privilege. Part I discusses the current law, namely that corporations cannot assert a Fifth Amendment privilege. Part II analyzes the line of cases constituting the current law, the Fifth Amendment's history and purpose, and the principles of corporate jurisprudence before concluding that the current law should change. Part III provides a proposal for a corporate privilege against self-incrimination modeled on the corporate attorney-client privilege.

I.
THE CURRENT STATE OF CORPORATE FIFTH AMENDMENT RIGHTS

This Part discusses both the existing law that the Fifth Amendment privilege against self-incrimination does not attach to corporations and key principles of corporate criminal liability.

The privilege generally protects against the compelled production of testimonial information that tends to incriminate the producer.[7] Corporations have had no Fifth Amendment privilege since the Supreme Court's 1906 decision in *Hale v. Henkel*.[8] *Hale* limited the Court's prior Fifth Amendment jurisprudence, which had permitted business interests to assert the privilege.[9] In addition to the *Hale* rule, custodians of corporate documents may not resist an order compelling the production of those documents on the basis that the documents might personally incriminate them,[10] though

7. *See infra* notes 133–37 and accompanying text.

8. *See* Hale v. Henkel, 201 U.S. 43, 69–70, 74–75 (1906); Hammond Packing Co. v. Arkansas, 212 U.S. 322, 348–49 (1909); Wilson v. United States, 221 U.S. 361 (1911); Baltimore & Ohio R.R. Co. v. Interstate Com. Comm'n, 221 U.S. 612, 622–23 (1911); United States v. White, 322 U.S. 694, 699–701 (1944); Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 65 (1974); Bellis v. United States, 417 U.S. 85, 100 (1974); Braswell v. United States, 487 U.S. 99, 102 (1988).

9. *See* Boyd v. United States, 116 U.S. 616, 634–35 (1886) (permitting a business partnership to assert a Fifth Amendment privilege); *Hale*, 201 U.S. at 71–75 (finding that *Boyd*, when read with subsequent cases, did not extend Fifth Amendment protections to corporations (first citing *Boyd*, 116 U.S. at 622, 634; then citing Interstate Com. Comm'n v. Brimson, 154 U.S. 447 (1894); then citing Adams v. New York, 192 U.S. 585 (1904); and then citing Interstate Com. Comm'n v. Baird, 194 U.S. 25 (1904))).

10. *White*, 322 U.S. at 699; *Wilson*, 221 U.S. at 384–85; *Braswell*, 487 U.S. at 117–18.

the government may not use the act of production as evidence in a prosecution directly against the corporate custodian.[11]

The *Hale* rule, being an interpretation of the Federal Constitution by the United States Supreme Court, does not vary by state. While each corporation is governed by the laws of the state in which it incorporates, this has no effect on the federal constitutional criminal procedural rights that attach to each corporation.[12] Instead, the *Hale* rule applies uniformly to every corporation, regardless of its state of incorporation, its charter or bylaws,[13] whether it is closely- or widely-held, or whether it is public or private.[14]

The significance of the lack of a corporate privilege is circumscribed by rules of corporate liability. Criminal liability is imputed to a corporation when its agent's criminal act is done for the benefit of the corporation, even if the agent's acts are against company policy.[15] The knowledge and intent necessary to satisfy the elements

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11. *Braswell*, 487 U.S. at 118.

12. *See, e.g.*, Joseph Blocher, *Disuniformity of Federal Constitutional Rights*, 2020 U. ILL. L. REV. 1479, 1482–83 (noting that "federal constitutional rights are, by and large, identically applied across the country" and that courts apply the same doctrines throughout the country). *But see id.* (arguing that federal constitutional rights are not uniformly applied when considering interactions with state laws). State laws make a difference when applying the Self-Incrimination Clause because, e.g., different testimonial acts may be protected depending on applicable state criminal law. *See, e.g.*, Baltimore City Dep't of Social Services v. Bouknight, 493 U.S. 549, 555–56, 561–62 (1990) (noting that the Fifth Amendment may be invoked where the act of production might aid in a state prosecution but ultimately concluding that the required record exception nevertheless permitted compelled production).

13. States are generally free to establish protections greater than those provided by the Federal Constitution, *see, e.g.*, LaKeith Faulkner & Christopher R. Green, *State-Constitutional Departures from the Supreme Court: The Fourth Amendment*, 89 MISS. L.J. 197 (2020); Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 231 (2008) (noting the predominant position that federal constitutional law is a "floor" over which states may enact more protective rules but arguing that states may also find ways to "bypass" federal law), but research reveals no examples of a state protecting corporations from compelled self-incrimination.

14. *See, e.g.*, Bellis v. United States, 417 U.S. 85, 90 (1974) ("[N]o artificial organization may utilize the personal privilege against compulsory self-incrimination . . . ."); *In re* Grand Jury Empaneled on May 9, 2014, 786 F.3d 255, 256–59 (3d Cir. 2015).

15. *See* N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 493–94 (1909) (noting that a principal may be held liable in tort for the actions of its employees, even if those actions were against the express orders of the principal, so long as the actions were done for the benefit of the principal, and proceeding to hold the petitioner corporation criminally liable for its employees' actions); *see also* Carol A. Poindexter & Norton Rose Fulbright, *Criminal and Civil Liability for Corporations, Officers, and Directors*, REUTERS PRACTICAL LAW (2016), https://

of crimes may be met by the knowledge and intent of the agent.[16] The Department of Justice has been criticized for prosecuting corporations, but not individual officers, directors, or employees.[17] Corporate directors are rarely charged.[18] This is a case in which the United States is an outlier. In many other countries, corporations cannot be criminally charged at all; instead, prosecutors may charge only individual directors and officers.[19]

II.
THE CONSTITUTIONAL ISSUES UNDERLYING CORPORATE FIFTH AMENDMENT RIGHTS

This Part asks whether the current state of the law described in Part I should change, and thus whether the Fifth Amendment's privilege against self-incrimination should attach to corporations. Section A revisits the reasoning of the line of cases creating and affirming the rule, starting with *Hale v. Henkel*, in light of changes in corporate law and criminal procedure since the Court decided *Hale*. Section B analyzes the issue by asking whether the purpose and history of the Self-Incrimination Clause would be well served by attachment to corporations. Section C asks if principles of corporate jurisprudence, illustrated by several key cases, militate for or against attachment by assessing which interpretation of the Fifth Amendment privilege against self-incrimination is most consistent

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www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/20160801—criminal-and-civil-liability-for-corporations-officers-and-directors.pdf [https://perma.cc/5GFN-RQY9].

16. *N.Y. Cent. & Hudson River R.R.*, 212 U.S. at 495.

17. *See, e.g.*, Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1790 (2015).

18. *See, e.g.*, Bernard S. Black et al., *Outside Director Liability*, 58 STAN. L. REV. 1055, 1131 (2006) (stating that no criminal prosecution has ever been brought against an outside director for oversight failures but noting that criminal sanctions are possible for self-dealing opportunities).

19. In those jurisdictions, it is typical for government actors to use an administrative or civil process to recover fines from the corporation for the acts of its employees. *Cf., e.g.*, Swedish Prosecution Authority, *Prosecution for Complicity in Grave War Crimes in Sudan*, ÅKLAGARMYNDIGHETEN (Nov. 11, 2021, 9:39 AM), https://www.aklagare.se/en/media/press-releases/2021/november/prosecution-for-complicity-in-grave-war-crimes-in-sudan/ [https://perma.cc/38XH-EFDJ] (indicting representatives of an energy company rather than the company itself, yet still seeking forfeiture of allegedly ill-gotten gains from the company); Harrison A. Meyer, *Swedish Prosecution of Corporate Complicity in Sudanese War Crimes*, N.Y.U. J. INT'L L. & POL.: JILP BLOG (Apr. 7, 2022), https://www.nyujilp.org/swedish-prosecution-of-corporate-complicity-in-sudanese-war-crimes/ [https://perma.cc/VS3N-DK6K].

with how other constitutional rights have been applied to corporations.

A. Revisiting the Hale *Line of Cases*

Hale v. Henkel[20] should be revisited because its reasoning subordinates the Constitution to expedient prosecution and does so on the basis of an obsolete image of corporations.

The Court rested its Fifth Amendment holding in *Hale* on two primary justifications: first, the Fifth Amendment privilege "is purely a personal privilege of the witness," and therefore "if [a Fifth Amendment claimant] cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation";[21] and second, that "the corporation is a creature of the state," and thus, a state—"having chartered a corporation to make use of certain franchises"—may "inquire how these franchises [have] been employed, and whether they [have] been abused, and demand the production of the corporate books and papers for that purpose."[22] In other words, one cannot assert the privilege on behalf of another person, but—even if one could—corporations have no privilege to assert. With one exception,[23] subsequent cases affirming and applying the *Hale* rule have not adopted new justifications for the rule.

There are several problems with the Court's reasoning in *Hale*. First is its inconsistent approach to the effect of a corporate agent on the rights of the corporation. A corporation is powerless without agents to represent it,[24] but corporate agents are given inconsistent authority with respect to different corporate rights. What rationale explains why agents of a corporation can assert a corporate attorney-client privilege[25] but not a Fifth Amendment privilege? There

20. 201 U.S. 43 (1906).

21. *Id.* at 69–70. Of course, if the Court had found a usable corporate privilege against self-incrimination, it would have necessarily had to find that the corporation could assert the privilege through its agent. Thus, it is not clear how truly independent *Hale*'s two pillars are.

22. *Id.* at 74–75.

23. *See* United States v. White, 322 U.S. 694, 700 (1944) (supporting its extension of the *Hale* rule to unincorporated associations by citing the "scope and nature of the economic activities" of corporations and adding that the Framers did not intend to protect "economic or other interests of such organizations so as to nullify appropriate governmental regulations").

24. CFTC v. Weintraub, 471 U.S. 343, 348 (1985) ("As an inanimate entity, a corporation must act through agents.").

25. Upjohn Co. v. United States, 449 U.S. 383, 397 (1981); *see Weintraub*, 471 U.S. at 348 & n.4 (noting that the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its

appears to be no principled method to distinguish the ability to assert one privilege but not the other. If a corporation had a privilege, then it could only assert it through an agent. Of course, *Upjohn Co. v. United States*, which held that the attorney-client privilege attaches to corporations,[26] was decided seventy-five years after *Hale*, so this doctrinal inconsistency is not an indictment of the Court's reasoning in 1906; instead, it suggests that subsequent developments in the law support revisiting the *Hale* rule.

Second, the Supreme Court buttressed its holding in *Hale* that witnesses could not assert a privilege on behalf of a corporation by noting that to hold otherwise would make it difficult to establish violations of the Sherman Antitrust Act.[27] The Court applied similar reasoning—that extending the privilege to corporations would interfere with government regulation and make impossible "effective enforcement of many federal and state laws"—when extending the *Hale* rule to unincorporated associations in *United States v. White*.[28] This justification should be revisited in light of the Court's consistent preference for subordinating ease of law enforcement to constitutional rights: the Court has repeatedly interpreted constitutional and common law rights in ways that frustrate criminal investigators.[29] The Court has similarly interpreted constitutional rights in ways that make particular laws difficult to enforce.[30] It is a long-

officers and directors and citing state law provisions vesting management authority in a corporation's board of directors).

26. *Upjohn*, 449 U.S. at 397.

27. *Hale*, 201 U.S. at 70.

28. *White*, 322 U.S. at 700.

29. *See, e.g.*, *Upjohn*, 449 U.S. at 397 (holding that attorney-client privilege protected communications with employees beyond a corporation's "control group"); Katz v. United States, 389 U.S. 347, 360–62 (1967) (Harlan, J., concurring) (preventing investigators from electronically monitoring a public phone booth without a warrant because such action was a Fourth Amendment search where petitioner had a reasonable expectation of privacy); United States v. Jones, 565 U.S. 400, 404 (2012) (preventing investigators from attaching GPS tracking devices to cars without complying with Fourth Amendment search requirements); Brewer v. Williams, 430 U.S. 387 (1977) (holding that a defendant was being interrogated for the purpose of the Sixth Amendment even when the officer speaking in earshot of defendant told defendant not to reply); *see also* Maryland v. Craig, 497 U.S. 836, 870 (1990) (Scalia, J., dissenting) (writing of the Sixth Amendment right to confrontation that the Court is "not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees").

30. *Cf.* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 305 (2009) (holding that submission of a public record and certification violated a defendant's Sixth Amendment right to confrontation); Letter from Eric H. Holder Jr., Att'y Gen., to Nancy Pelosi, Speaker of the U.S. House of Representatives ¶¶ 6–7 (Aug. 26, 2009), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/08-26-

settled rule that the Supreme Court may invalidate laws that conflict with the Constitution;[31] it must therefore be the case that the Court may invalidate investigatory techniques that conflict with the Constitution. Thus, the *Hale* rule cannot be defended on the basis that it makes the Sherman Antitrust Act—or any other law—difficult to enforce.

The Court's reasoning in *Hale* that "the corporation is a creature of the state" and "is presumed to be incorporated for the benefit of the public,"[32] perhaps sound when written in 1906, makes little sense given the development of corporate law over the last century. The Court's decision is based on a now-unrecognizable vision of corporations. As Mark Rochon and other writers have noted, "in *Hale*, the Supreme Court relied on a notion of corporations that sounds nothing like how they are viewed, or treated, today," adding that "[t]he current economic and legal view of corporations is not that they are subjects of the state, subject to demand for whatever the state wishes, but rather that they are independent legal entities that work for the benefit of their shareholders."[33] Though corporations must still specify a purpose in their charter,[34] most corporations simply state that they will carry out any lawful purpose or business activity.[35] Thus, corporate purpose has become "undefined and effectively meaningless."[36]

Supporters of the *Hale* rule may argue that to be a "creature of the state" one need not be its "subject." This argument contends that state laws create the corporate form but cannot create individuals. The power to establish the corporate form, the argument continues, implies a power to create a limited corporate form,

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2009.pdf [https://perma.cc/4GHW-RB52] (noting that the Department of Justice would concede that certificates of the non-existence of records are inadmissible at criminal trials and anticipating that such concession will not have a significant practical effect in most illegal reentry cases only because most defendants plead guilty).

31. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

32. *Hale*, 201 U.S. at 74.

33. Mark Rochon et al., *supra* note 3, at 52–54. The closest corporate form today to that described by the Supreme Court in *Hale* is a federally chartered corporation, of which there are relatively few. *See* Paul E. Lund, *Federally Chartered Corporations and Federal Jurisdiction*, 36 FLA. ST. U. L. REV. 317, 320–26 & n.46 (2009) (noting that while Congress could extend federal chartering power to all corporations engaging in interstate commerce, it has thus far only extended it to national banks, railroads, savings associations, and credit unions).

34. *See, e.g.*, DEL. CODE ANN. tit. 8, § 102(a)(3) (2022).

35. Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1316 (2021).

36. *Id.* at 1315.

including one to which certain rights do not attach.[37] This argument does not get very far. If it is assumed that state regulations could deprive corporations of constitutional rights which would otherwise attach, states must be clear when crafting a regulation that has the effect of vitiating an otherwise valid constitutional right. Furthermore, it is not clear that states do have such a power: the Supreme Court has held that many constitutional rights apply to corporations regardless of their state of incorporation,[38] which suggests state legislatures would be unable to amend their corporate codes to eliminate those rights. The same logic would apply if the Fifth Amendment privilege attached to corporations.

Corporations have changed in ways other than the degree to which they exist for public benefit. Anyone with a few hundred dollars and an internet connection can establish a U.S. corporation chartered in Delaware.[39] The process can be completed nearly instantaneously in Delaware, as the act of incorporation officially occurs before the Secretary of State even reviews the sufficiency of the filings.[40] Corporate forms may even be pre-created and sold for retrofitting to those unable to prepare their own filing.[41] This cheapening of incorporation weakens the claim that the corporation is a creature of the state, since corporate identity can be achieved quickly and inexpensively without any individualized analysis as to whether a new corporation's purpose benefits the state.[42]

Corporations (and their directors and officers) must generally act in the best interest of their shareholders.[43] Some states have passed laws expressly authorizing corporate directors to consider

37. *Cf.* Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser,"* 55 VAND. L. REV. 693, 728–29 (2002) (describing the unconstitutional conditions doctrine); *id.* at 703–08 (describing the argument that the power to ban an activity implies a plenary power to regulate the activity in the context of the First Amendment).

38. *See infra* Section II.C.

39. *See, e.g.*, *Form Your Delaware C Corp in as Little as 10 Minutes*, SWYFT FILINGS, https://www.swyftfilings.com/sem-inc/de/delaware-c-corporation [https://perma.cc/MXH9-JWU6] (offering to incorporate businesses in Delaware for $49).

40. DEL. CODE ANN. tit. 8, § 106 (2022).

41. *Cf. 4 Things You Should Know About Purchasing an Aged Shelf Corporation*, WYO. CORP. SERVS. INC., https://wyomingcompany.com/4-things-every-attorney-should-know-about-purchasing-an-aged-shelf-corporation/ [https://perma.cc/6NEX-KDJP].

42. The flexibility of corporate governance is further reflected in the many "default" provisions of corporate law statutes. *See* DEL. CODE ANN. tit. 8, § 102(b) (2022). These statutes permit corporations to amend their charters to expressly opt-in or opt-out of certain statutory provisions.

43. *See, e.g.*, Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

"all groups affected" in the short- and long-term by corporate actions.[44] Delaware notably has not passed such a "constituency statute," so corporate decisions for Delaware corporations must still be justified with respect to shareholder interests.[45] But whether corporations owe a duty to shareholders alone or a duty to various, nebulous constituencies, corporate decision making need not rigorously justify any particular action with reference to the commonwealth. Constituency statutes, where they apply, do not constrain directors to act only in the best interest of all affected groups, but instead expand the scope of permissible corporate actions by permitting directors to weigh different groups' interests differently. Therefore, at least at the level of individual corporate actions, corporations are not organized for the benefit of public.[46]

Even if corporations existed solely for the general welfare of the public, it is not obvious that such a state of affairs would bar the Fifth Amendment privilege against self-incrimination from attaching to corporations. The public interest is served where constitutional rights to criminal process are duly exercised, as the public has an interest in the just enforcement of the law.

The shift since 1906 in what it means to assert the Fifth Amendment provides another reason to revisit *Hale*. The Court characterized the defense it struck down in *Hale* as an assertion "[t]hat an officer of a corporation which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books."[47] But it is now impermissible to draw an inference of guilt from a criminal defendant's assertion of the Fifth Amendment.[48] Because asserting the Fifth Amendment in a criminal context does not imply criminality, *Hale* cannot be defended on the basis that asserting the privilege would permit corporations to plead criminality.

Justice Brewer, joined by Chief Justice Fuller, dissented from the majority decision in *Hale*. Justice Brewer did not directly attack the majority's reasoning but provided affirmative reasons to rule differently. Starting from the premise that the Fifth Amendment "is

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44. *See, e.g.*, 15 PA. CONS. STAT. § 1715(a) (2022).

45. Nathan E. Standley, Note, *Lessons Learned from the Capitulation of the Constituency Statute*, 4 ELON L. REV. 209, 219 (2012).

46. It might be argued that the requirements of modern corporate law—even if they do not demand every decision benefit the public—ensure that the net effect of all corporate actions benefits the public. Even if this is true, it is still the case that corporations would be less a creature of the state today than in 1906, which would lend toward revisiting *Hale*.

47. Hale v. Henkel, 201 U.S. 43, 75 (1906).

48. *See* Griffin v. California, 380 U.S. 609, 613–14 (1965).

personal to the individual, and does not extend to an agent of an individual, or justify such agent in refusing to give testimony incriminating his principal,"[49] Justice Brewer reasoned that a corporation was "an association of individuals" and so was entitled to the rights of those individuals.[50] Justice Brewer separately argued that merely being subject to the regulations and jurisdiction of a state should not permit the state to selectively "dispense with" the immunities and protections provided under its laws.[51] Both of these points remain compelling reasons to revisit *Hale*, but particularly the latter: if corporations could otherwise assert a constitutional privilege, government regulations could not vitiate it.

B. Reasoning from a Clean Slate: The Fifth Amendment Should Apply to Corporations

The Supreme Court has ascribed various purposes to the Self-Incrimination Clause,[52] and the history and purpose of the privilege suggest that it should attach to corporations. Several cases in which the Court engaged in deeper historical and purposive analysis make it possible to attribute a narrower purpose to the Clause, and not merely one designed to benefit the "clever criminal."[53] As this Section discusses, the purpose and history of the privilege—specifically its purposes of preventing law enforcement abuse, promoting fair play, and avoiding the cruel trilemma of self-accusation, perjury, and contempt—generally suggest that it should attach to corporations.[54] This Section draws from the Supreme Court's understanding of the Clause's purpose developed after *Hale* was decided in 1906, which casts doubt on the *Hale* rule merely because of how the law has developed since the original decision. After developing three arguments grounded in the privilege's history and pur-

49. *Hale*, 201 U.S. at 83 (Brewer, J., dissenting).

50. *Id.* at 85. Justice Brewer's argument would be repeated by several Justices in *Citizens United v. FEC*, 558 U.S. 310, 380 (2010) (Roberts, C.J., with Alito, J., concurring); *id.* at 390 (Scalia, J., with Alito, J., and with Thomas, J. in part, concurring); *see infra* note 120.

51. *Hale*, 201 U.S. at 87–88 (Brewer, J., dissenting).

52. *See* Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 243–44 (2004).

53. *See* Minnick v. Mississippi, 498 U.S. 146, 166–67 (1990) (Scalia, J., with Rehnquist, C.J., dissenting).

54. This Note does not analyze the Self-Incrimination Clause through legislative history chiefly because the Supreme Court has written that "there is no helpful legislative history" when it comes to analyzing the Fifth Amendment. United States v. Balsys, 524 U.S. 666, 674 & n.5 (1998) (citing United States v. Gecas, 120 F.3d 1419, 1435 (11th Cir. 1997)).

pose, two counterarguments are considered: first, that corporations should not be considered "people" for the purposes of the privilege, and second, that extending the privilege to corporations would further only economic interests.

In 1964, the Supreme Court listed a "catalog" of seven "values and . . . aspirations" reflected by the Fifth Amendment.[55] The *Murphy* catalog has been cited with skepticism by scholars[56] and by the Court itself in later opinions.[57] The *Murphy* factors, therefore, will receive limited attention. Instead, this Section will focus on an earlier understanding of the Clause's spirit offered in 1956 by Justice Frankfurter in *Ullmann v. United States*.[58] Justice Frankfurter wrote that—though the privilege might occasionally save the guilty from punishment—it was "aimed at a more far-reaching evil," by which he meant "a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality."[59] Justice Frankfurter continued that "[p]revention of the greater evil was deemed of more importance than occurrence of the lesser evil. Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law-enforcing agencies."[60]

There can be little doubt that Justice Frankfurter was referring to physical torture by invoking the Star Chamber and the Inquisition.[61] The Star Chamber acquired a reputation for persecution in part due to its role in prosecuting heretics and enemies of the monarchy (which became one and the same after the monarch became the head of the English church) during the reigns of Queen Elizabeth and subsequent English monarchs.[62] Justice Frankfurter's ref-

55. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964) (claiming that the privilege prevents or avoids the trilemma, abusive treatment, and reliance on self-deprecatory statements, while it simultaneously encourages or protects the innocent, an accusatorial system of criminal justice, fair play, and privacy), *abrogated by Balsys*, 524 U.S. 666.

56. *See, e.g.*, Allen & Mace, *supra* note 52, at 244–45.

57. *See, e.g.*, *Balsys*, 524 U.S. at 691–93.

58. 350 U.S. 422, 426–29 (1956).

59. *Id.* at 428.

60. *Id.*

61. *See* Frank Riebli, *The Spectre of Star Chamber*, 29 HASTINGS CONST. L.Q. 807, 809 (2002) (noting the use of the Star Chamber in Supreme Court jurisprudence to develop themes such as brutality, abuse of power, oppression, and persecution). That the privilege is meant to guard against torture or other inhuman treatment corresponds to the third purpose of the *Murphy* catalog. *Murphy*, 378 U.S. at 55.

62. *See* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 88–92 (1968); *see also Star Chamber*, L. LIBR. - AM. L. AND LEGAL INFO., https://law.jrank.org/pages/10462/Star-Chamber.html [https://perma.cc/7HYS-QKY7] (describing the in-

erence to the Inquisition likewise invokes torture, including the torture conducted by the ecclesiastical courts of England prior to the Anglican schism.[63] The invocation of torture is tempered by an important qualifier: a recurrence of the Star Chamber and the Inquisition "even if not in their stark brutality."[64] By this, Justice Frankfurter suggested the Clause was aimed at something broader, and less brutal, than torture, including the prevention of abuses by law-enforcement agencies. It is clear that the Fifth Amendment's scope now extends beyond torture.[65]

Corporations cannot be tortured; there is no proverbial rack upon which to place the corporate body. But corporations are still subject to criminal penalties and investigation by law enforcement. To the extent the privilege's anti-torture purpose includes the general prevention of abuse by law enforcement, it should apply to corporations. Though a corporation cannot be detained (and so cannot be pressured to incriminate itself via prolonged or unnecessary detainment), it can be compelled by criminal contempt to comply with an order to produce records that might tend to self-incriminate.[66] Thus, the anti-torture or anti-abuse purpose tends to weigh in favor of attachment.

The next purpose of the privilege also weighs in favor of attachment. Justice Frankfurter wrote in *Ullmann* that it is "better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with

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creased importance of the Star Chamber in the early seventeenth century as a tool of "royal oppression" to persecute groups of Puritan leaders).

63. *The Horrors of the Church and Its Holy Inquisition*, CHURCH AND STATE, https://churchandstate.org.uk/2016/04/the-horrors-of-the-church-and-its-holy-inquisition/ [https://perma.cc/X68S-33X8].

64. *Ullmann*, 350 U.S. at 428.

65. *See, e.g.*, Garrity v. New Jersey, 385 U.S. 493, 497–98 (1967) (holding state law enforcement officers could claim the privilege due to threat of being fired); Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 392 U.S. 280, 284 (1968) (holding city employees could claim the privilege when threatened with job loss); Lefkowitz v. Turley, 414 U.S. 70, 85 (1973) (holding state contractors could claim the privilege due to threat of losing the ability to contract with New York State); Lefkowitz v. Cunningham, 431 U.S. 801, 807–08 (1977) (holding political party officer could claim the privilege due to threat of losing his party position); Spevack v. Klein, 385 U.S. 511, 516 (1967) (holding attorney could claim the privilege due to threat of losing his bar membership in an integrated state bar association).

66. *See, e.g.*, United States v. R. Enters., Inc., 498 U.S. 292, 295 (1991) (discussing imposition of $500 per day fines imposed after respondent companies refused to comply with subpoenas).

the assistance of enforced disclosures by the accused."[67] This purpose corresponds to the fourth *Murphy* purpose, "fair play," which requires the government to shoulder the entire load in its contest with the individual.[68]

The law treats corporations the same as natural persons with respect to other criminal procedural rights.[69] It would, therefore, be surprising if corporations were excluded from the "fair play" requirement that natural persons enjoy when accused of a crime. One might argue that the large size and importance of corporations today suggests that the "fair" thing to do would be for privileges to not attach, as government actors can more easily investigate and regulate corporations if corporations cannot assert the privilege. To be sure, large corporations account for much economic activity and often influence political discussions.[70] To the extent corporations rival government actors for control of economic and political decision making, it might seem unfair to give corporations another tool, the Self-Incrimination Clause, in that contest. Most corporations today, however, do not rival the government in influence.[71] That is, today's handful of trillion-dollar corporations share the same corporate form as millions of small and medium-sized

67. *Ullmann*, 350 U.S. at 427 (quoting Maffie v. United States, 209 F.2d 225, 227 (1st Cir. 1954)).

68. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964); *see also* Brown v. Walker, 161 U.S. 591, 596–97 (1896) (describing that the Self-Incrimination Clause was included in the Fifth Amendment as part of a long, popular struggle against despotism, facilitated by the traumatic imprinting in the citizenry's mind of political and religious trials).

69. For example, every other clause of the Fifth Amendment attaches to corporations. *See* United States v. Yellow Freight Sys., Inc., 637 F.2d 1248, 1254 (9th Cir. 1980), *cert. denied*, 454 U.S. 815 (1981) (Grand Jury Clause); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (Double Jeopardy Clause); Hale v. Henkel, 201 U.S. 43, 76 (1906) (Due Process Clause); Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931) (Takings Clause).

70. *See, e.g.*, Tony Romm, *Corporate America Launches Massive Lobbying Blitz to Kill Key Parts of Democrats' $3.5 Trillion Economic Plan*, WASH. POST (Aug. 31, 2021), https://www.washingtonpost.com/us-policy/2021/08/31/business-lobbying-democrats-reconciliation/ [https://perma.cc/86TR-M8QS] (discussing how corporate lobbying efforts would "add[ ] to the challenges facing Biden and his congressional allies").

71. *See, e.g.*, Roy Bahat, *The Corporation Is Dead, Long Live the Corporation!*, MEDIUM (Nov. 5, 2015), https://wtfeconomy.com/the-corporation-is-dead-long-live-the-corporation-13b787e33b29 [https://perma.cc/T254-H3VD] (noting that the average firm has just 22 people and noting the trend of big companies becoming bigger while small companies have stayed small).

businesses.[72] It would be anomalous to deny the privilege to millions in the corporate class on the basis that several dozen of its most influential members would also benefit. Thus, the privilege's purpose of promoting "fair play" weighs in favor of attachment.

Likewise, the "cruel trilemma"[73] justification militates in favor of attachment. The cruel trilemma refers to a situation in which a party is forced to pick between self-accusation, perjury, or contempt. Plainly put, a corporation may be put in just the same situation as a natural person with respect to the cruel trilemma. Because corporations are subject to criminal punishment when they break the law, a corporation may convey information that tends to incriminate itself, or it may convey false information and be subject to the penalty of perjury or false statement,[74] or it may refuse to answer a

72. *See, e.g.*, *Tracking $1 Trillion*, TIPALTI APPROVE, https://www.approve.com/tracking-trillion-dollar-valuations/ [https://perma.cc/9GER-JES4] (tracking five companies worth over $1 trillion and another forty-five companies likely to achieve such a valuation in the next several decades); *see also* Scott A. Hodge, *The U.S. Has More Individually Owned Businesses Than Corporations*, TAX FOUND. (Jan. 13, 2014), https://taxfoundation.org/us-has-more-individually-owned-businesses-corporations/ [https://perma.cc/6SVC-KKSM] (noting that there are 1.7 million traditional C corporations in the United States); *Facts & Data on Small Business and Entrepreneurship*, SBE COUNCIL, https://sbecouncil.org/about-us/facts-and-data/ [https://perma.cc/3C75-KZU3] (noting that 98.9% of C corporations have fewer than 500 workers and 72.5% have fewer than 10 employees).

73. *See Murphy*, 378 U.S. at 55. The trilemma theory was popularized in part by Leonard W. Levy, who describes the U.S. privilege as grounded in English, Catholic ecclesiastical courts with their oaths *ex officio*, which later turned to self-incriminatory oaths used in the prosecution of Catholics by the English monarch's Star Chamber. *See generally* LEVY, *supra* note 62, at 281–82, 306–12. The Court has doubted this justification of the privilege but has not suggested that the presence of the cruel trilemma militates against an assertion, only that the factor deserves less weight. Brogan v. United States, 522 U.S 398, 404 (1998) ("This 'trilemma' is wholly of the guilty suspect's own making, of course. An innocent person will not find himself in a similar quandary[,]as one commentator has put it, the innocent person lacks even a 'lemma.'" (quoting Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COLO. L. REV. 989, 1016 (1996))).

74. Sworn corporate submissions are within the ambit of the federal perjury statutes. 18 U.S.C. §§ 1621–1623 (creating criminal liability for "[w]hoever" satisfies their elements); 1 U.S.C. § 1 (defining "whoever" to include corporations). While convictions under §§ 1621, 1622, and 1623 are rare, corporations have been convicted for making false statements, 18 U.S.C. § 1001 (criminalizing the provision of materially false statements in any matter within the jurisdiction of the executive, legislative, or judicial branch of the federal government). CONG. RSCH. SERV., 98-808, FALSE STATEMENTS AND PERJURY: AN OVERVIEW OF FEDERAL CRIMINAL LAW 3 & n.14, 7 & n.45, 13 & n.83 (May 11, 2018), https://crsreports.congress.gov/product/pdf/RL/98-808 [https://perma.cc/78MW-FHVH].

lawful order and be subject to contempt.[75] Thus, a corporation is subject to the trilemma of self-incrimination, perjury, or contempt, which suggests that it should be able to assert the privilege. To be sure, the difference in consequences between the corporate trilemma and that of a natural person—i.e., that a corporation cannot be imprisoned—suggests that less weight be given to the cruel trilemma when considering attachment. Any difference in weight does not, however, alter the conclusion that because corporations are subject to the cruel trilemma, they should be able to assert the privilege.

One might argue that the intent of the Fifth Amendment privilege is only to achieve all of the aforementioned purposes for natural persons and that the privilege should not attach to corporations because corporations are not, and should not be treated as, people.[76] This argument implies that, where the law must, it treats cor-

75. 18 U.S.C. § 402 ("Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court . . . shall be prosecuted for such contempt . . . .").

76. *Cf.* RONALD DWORKIN, LAW'S EMPIRE 169–71 (1986) (suggesting the personification of corporations as people could take several forms for the purpose of civil liability, from merely helping to describe a conclusion of fault to "taking the corporation seriously as a moral agent"); Ciara Torres-Spelliscy, *Does "We the People" Include Corporations?*, 43 HUM. RTS. 16, 20 (2018), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/we-the-people/we-the-people-corporations/ [https://perma.cc/6LLU-Q6VG] (discussing recent expansions of corporate personhood and concluding that "[i]f corporations are going to be treated as legal persons, they should have personal accountability too"); Kent Greenfield, *If Corporations Are People, They Should Act Like It*, THE ATLANTIC (Feb. 1, 2015), https://www.theatlantic.com/politics/archive/2015/02/if-corporations-are-people-they-should-act-like-it/385034/ [https://perma.cc/3K7R-7CVQ] (arguing that "[c]ompanies deserve many of the same rights as citizens," except asserting that some rights are better suited to natural persons only, such as the right against self-incrimination). Dictionaries appear split on whether to include corporations within the meaning of the word person, though even those that do include such a meaning rank it low among all of person's possible meanings. *Compare Person*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/person [https://perma.cc/YLL8-3XDD] (including as one of the meanings of person "one (such as a human being, a partnership, or a corporation) that is recognized by law as the subject of rights and duties"), *and Person*, DICTIONARY.COM, https://www.dictionary.com/browse/person [https://perma.cc/45VC-6GUU] (including as one of the meanings of person "a corporation, a partnership, an estate, or other legal entity (artificial person, or juristic person) recognized by law as having rights and duties"), *with Person*, OXFORD LEARNER'S DICTIONARIES, https://www.oxfordlearnersdictionaries.com/us/definition/english/person [https://perma.cc/J3T8-QXGX] (providing no meanings related to corporations or artificial entities), *and Person*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/person [https://perma.cc/8B2M-PPXX] (same).

porations as people, but those instances are exceptions to the general rule. It further asserts that nowhere is it less necessary to treat corporations as people than in the context of criminal procedure. A corporation cannot be imprisoned for its crimes,[77] it cannot be tortured for its false confession,[78] and neither, one might argue, should it be entitled to wield criminal procedure to protect its privacy or promote its freedom of expression.[79] However, there is no general or default rule that instructs that the word "person" should normally exclude corporations. Congress has expressed its own view on the matter by passing the Dictionary Act, which defines "person" to include corporations in any congressional act.[80] While this is not binding on any interpretation of the Constitution, it illustrates a common reading of "person," and elevates it to apply by default to all legislation. Moreover, as discussed below, corporations are afforded the same rights as individuals with respect to other criminal procedural rules and constitutional rights. Thus, treating corporations as people is the rule rather than the exception.

A related argument might be that the privilege should not "be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations" because it was designed to protect individual civil liberties.[81] That the privilege was not designed to benefit economic interests is difficult to dispute. In light of this, the next question is whether corporations have only economic interests. The Supreme Court recently alluded to this question, implying that corporations need not be limited to

77. The corporation itself cannot be imprisoned. *See* United States v. Yellow Freight Sys., Inc., 637 F.2d 1248, 1253 (9th Cir. 1980), *cert. denied*, 454 U.S. 815 (1981).

78. The Supreme Court and commentators have suggested that the privilege's purpose is to protect against torture and other coercive interrogation techniques: proponents of this view rely on the logic that if statements extracted by torture are inadmissible as evidence to prove the guilt of the speaker, then the government will not seek to torture in order to build its case against the speaker. *See, e.g.*, Louis Michael Seidman, *Rubashov's Question: Self-Incrimination and the Problem of Coerced Preferences*, 2 YALE J.L. & HUMAN. 149, 151–60 (1990); Ullmann v. United States, 350 U.S. 422, 427–28 (1956); *Murphy*, 378 U.S. at 55.

79. Privacy is one of the justifications for the privilege, becoming especially popular in post-Red Scare literature on the subject. *See* ALAN DERSHOWITZ, IS THERE A RIGHT TO REMAIN SILENT? 74, 99–100 (2008) (noting the privilege's use to protect freedom of association and expression during McCarthyism).

80. *See* 1 U.S.C. § 1; *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707 (2014) (finding no reason to depart from the Dictionary Act for the purposes of analyzing the Religious Freedom Restoration Act).

81. United States v. White, 322 U.S. 694, 700 (1944).

economic interests.[82] Because corporations need not be incorporated or managed in a manner calculated to maximize profits, it is not the case that permitting corporations to assert a Fifth Amendment privilege only serves to protect economic interests. As discussed below, numerous constitutional rights have been afforded to corporations, including the First Amendment right to the free exercise of religion.[83] That corporations can assert other rights not designed to benefit economic interests suggests that the issue has already been decided and that attachment of the privilege to corporations would further not just economic interests, but also civil liberties.

C. Principles of Corporate Jurisprudence Suggest That the Privilege Should Attach

This Section shows that the reasoning used in corporate jurisprudence cases suggests that the privilege against self-incrimination should attach to corporations. Each of the below "principles" discusses other rights that attach to corporations and how those rights bear on whether the Fifth Amendment privilege should also attach.

1. In General, Treat Corporations Like Natural Persons

Free Exercise Clause. In *Burwell v. Hobby Lobby*, the Supreme Court held that a corporation was a "person" for the purposes of the Religious Freedom Restoration Act.[84] The Court then held that corporations are protected by the Free Exercise Clause because no persuasive explanation had been provided as to why for-profit corporations were not protected.[85] The Court first noted that all parties conceded that nonprofit corporations, such as church-owned corporations, were protected,[86] and then that the same principle animating the nonprofit authority—that extending the protection

82. *Hobby Lobby*, 573 U.S. at 713 ("In any event, the objectives that may properly be pursued by the companies in these cases are governed by the laws of the States in which they were incorporated—Pennsylvania and Oklahoma—and the laws of those States permit for-profit corporations to pursue any lawful purpose or act . . . ." (internal quotation marks omitted)); *see also* Fisch & Solomon, *supra* note 35, at 1327 ("*Hobby Lobby* appears to stand for the proposition that a corporation can have an alternative purpose from profit maximization.").

83. *See Hobby Lobby*, 573 U.S. at 719.

84. *Id.* at 707–09 (first citing 42 U.S.C. § 2000bb-1; then citing 1 U.S.C. § 1; and then citing FCC v. AT&T, Inc., 562 U.S. 397, 403–06 (2011)).

85. *Id.* at 709.

86. *Id.*

furthers individual religious freedom—required the protection be extended to for-profit corporations.[87]

Next, the Court reasoned that the profit-making objective of for-profit corporations did not provide sufficient reason to deny protection because sole-proprietorships could assert a free-exercise claim.[88] The Court continued that because corporations could be formed for any lawful purpose or business, and because many corporations did further unprofitable ventures, such as charitable efforts and environmentalism, "there is no apparent reason why they may not further religious objectives as well."[89]

Applying the Court's reasoning in *Hobby Lobby* to a corporate Fifth Amendment privilege appears challenging. If the essential syllogism of *Hobby Lobby* is that once nonprofits and sole-proprietorships can do something, for-profit corporations can do the same, then the reasoning does not suggest a change to the *Hale* rule—no artificial entity, whether organized for profit or not, may assert a Fifth Amendment privilege. If the syllogism is instead that exercising religious beliefs is a lawful purpose, and that corporations may be organized for any lawful purpose, then that, too, is unlikely to bear on the *Hale* rule—because invocation of the Fifth Amendment privilege carries an association of criminality, the first argument against its invocation by a corporation is that such invocation suggests the corporation is in violation of its charter to only act for lawful purposes. To this, a corporation might reply that its invocation is not the sign of a clever criminal, but merely the assertion of a procedural right designed to make the government meet its own burden; that is, because assertion does not imply or require criminality, assertion does not necessarily suggest the corporation's charter has been violated.[90]

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87. *Id.*

88. *Id.* at 709–10 (citing Braunfeld v. Brown, 366 U.S. 599 (1961)).

89. *Id.* at 712.

90. *See* Griffin v. California, 380 U.S. 609, 613–14 & n.5 (1965) (citing Adamson v. California, 332 U.S. 46 (1947)). A negative inference may be drawn where the privilege is asserted outside of the criminal context. *See, e.g.*, Baxter v. Palmigiano, 425 U.S. 308, 320 (1976) (permitting a negative inference during prison disciplinary proceedings); *cf.* SEC v. Monterosso, 746 F. Supp. 2d 1253, 1263–64 (S.D. Fla. 2010) (permitting an adverse inference to be drawn against defendant corporation in SEC action after Lynch, the corporation's former COO and CFO, invoked his Fifth Amendment privilege at a deposition because Lynch's testimony could be imputed to the corporation in the areas of his employment, which were relevant to the SEC's claims, and because Lynch's interests were similar to defendant corporation's interests where both wanted to "minimiz[e] their role in the alleged conduct with respect to the other actors").

Even if a crime had been committed, it is not clear that the commission of any single crime necessarily violates a charter provision that the corporation be organized to conduct or promote any lawful business or purpose. A one-time jaywalker does not a criminal make; nor does the commission of a single crime make a corporation a criminal enterprise. Similarly, crimes may be committed accidentally,[91] and crimes of negligence should logically have no bearing on the purpose of incorporation.

Grand Jury Clause. The Ninth Circuit has recognized that the Fifth Amendment provides corporations the right to be indicted by a grand jury for infamous crimes.[92] There appears to be no principled basis to justify granting corporations protection under the Fifth Amendment's Grand Jury Clause but denying corporations protection under its Self-Incrimination Clause.

In *United States v. Yellow Freight System, Inc.*, the defendant corporation was accused of giving and receiving rate concessions on interstate shipments of goods, a violation of the Elkins Act,[93] which could result in a penalty of between $1,000 and $20,000 and up to two years' imprisonment.[94] The court was faced with a question of whether the corporation, which could not serve a two-year term of imprisonment, was nonetheless entitled to a grand jury based on a theory that the fine was infamous.[95] The court acknowledged that "potential confinement in a penitentiary of some violators of a criminal statute does not render all violations of that statute 'infamous'"[96] and held that tests other than imprisonment may demonstrate infamy. These tests included whether the crime was infamous by its nature, whether there was a congressional declaration of infamy, and whether the crime was punishable at common law by civil disabilities.[97]

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91. *See, e.g.*, Keith Schneider, *Jury Finds Exxon Acted Recklessly in Valdez Oil Spill*, N.Y. TIMES, June 14, 1994, at A1 (noting that a jury determined Exxon's captain was negligent and reckless).

92. United States v. Yellow Freight Sys., Inc., 637 F.2d 1248, 1254 (9th Cir. 1980), *cert. denied*, 454 U.S. 815 (1981).

93. 49 U.S.C. §§ 41(1), (3) (1976) (current version at 49 U.S.C. § 14904).

94. *Yellow Freight Sys., Inc.*, 637 F.2d at 1250.

95. *Id.* at 1253.

96. *Id.*

97. *Id.* at 1254 (first citing *Ex parte* Wilson, 114 U.S. 417, 423–24 (1885); then citing United States v. Waddell, 112 U.S. 76 (1884); then citing Ullmann v. United States, 350 U.S. 422, 451 n.5 (1956) (Douglas, J., dissenting); then citing Elkin v. Commonwealth, 106 S.W.2d 83, 84, 269 Ky. 6, 8 (1937); and then citing Hunter v. United States, 272 F. 235, 238 (4th Cir.), *cert. denied*, 257 U.S. 633 (1921)).

Applying those tests to the charges brought against the defendant, the court found the violations were not infamous because the crime was not infamous by its nature due to its status as a regulatory crime, the lack of evidence that Congress intended to brand this as an infamous crime, and the fact that the corporation was only subject to a fine.[98] As to the last point, the court cited *United States v. Armored Transport, Inc.* for its claim that "[a] fine, regardless of its amount, cannot be infamous punishment."[99]

Thus, the Ninth Circuit relied on the nature of the criminal penalty, as well as the nature of the criminalizing statute, to determine whether the corporation had a right to indictment by a grand jury under the Fifth Amendment. The rule established by the Ninth Circuit, then, is one which requires statute-by-statute interpretation as to the question of infamy, with statutes less likely to be infamous as applied to corporations, because corporations cannot be imprisoned, one of several factors in determining infamy. What the rule does not do, however, is treat corporations differently on the basis of their relationship with the state or their ability to only act through agents. Instead, *Yellow Freight System* stands for the proposition that constitutional rights apply equally to corporations, in that corporations, like natural persons, are entitled to an indictment by grand jury for infamous crimes. The way in which infamy is determined, too, is the same for corporations and natural persons. The difference in outcomes may be ascribed to an identifiable characteristic of the corporate form: it cannot be imprisoned.

Double Jeopardy Clause. The Supreme Court has held that double jeopardy barred appeal following a corporation's acquittal verdict in a criminal contempt trial.[100] In *United States v. Martin Linen Supply Co.*, two commonly owned linen supply companies and their president were charged with violating a consent decree entered to resolve an antitrust suit.[101] The jury returned a not guilty verdict for the president but was "hopelessly deadlocked" as to the corporations.[102] The district court granted defendants' motion for

98. *Id.* at 1254–55.

99. *Id.* at 1254 (citing United States v. Armored Transp., Inc., 629 F.2d 1313, 1319 (9th Cir. 1980)). The Ninth Circuit's reasoning in *Armored Transport* supports the claim that infamy analysis is identical for corporations and natural persons. *See Armored Transport*, 629 F.2d at 1319 ("[T]he gravity of [a one million dollar fine] to a corporation seems no greater than the potential gravity of a large fine upon an individual. Clearly, an individual charged with an offense for which the maximum penalty is a fine is not constitutionally entitled to indictment by grand jury.").

100. United States v. Martin Linen Supply Co., 430 U.S. 564, 575 (1977).

101. *Id.* at 565 n.1.

102. *Id.*

judgment of acquittal, under Rule 29(c) of the Federal Rules of Criminal Procedure.[103] The Supreme Court did not address the significance of the fact that respondent was a corporation; instead, the Court focused on Rule 29(c), and whether it weighed in favor of appealability under the Double Jeopardy Clause.[104] Thus, *Martin Linen* suggests that the extension of the Fifth Amendment's double jeopardy protection to corporations was so uncontroversial that the Supreme Court felt it was unnecessary to explain. At a minimum, the case stands for the proposition that the Double Jeopardy Clause applies to corporations.

Unlike many other corporate rights discussed in this section, *Martin Linen* and the Double Jeopardy Clause's application to corporations is consonant with the logic of *Hale v. Henkel*. First, the application of the Double Jeopardy Clause does not interfere with a corporation's role as a "creature of the state." Once the corporation has been put in jeopardy once, an assertion of double jeopardy to protect against subsequent prosecution is not an assertion that the corporation's criminality offers any protection.[105] Instead, it is the jeopardy undergone in the first trial that offers the protection, a jeopardy which exists independently of the guilt or innocence of the defendant. It is the finality of the first judgment, rather than a privilege of the defendant, that motivates the outcome.

An assertion of double jeopardy to avoid corporate prosecution differs from an assertion of the Fifth Amendment privilege against self-incrimination in another respect. Invoking double jeopardy on behalf of the corporation does not protect the asserting individual, while invoking the right against self-incrimination on behalf of the corporation may save the asserting individual from personal criminal liability if the corporation possesses incriminating documents as to the asserter. It is unclear whether such a distinction should affect the corporation's constitutional rights.

Due Process Clauses of the Fifth and Fourteenth Amendments. The *Hale* decision also noted that a corporation "can only be proceeded against by due process of law."[106] This claim is provided just before the majority opinion held that the Fourth Amendment attaches to corporations. The majority's opinion and Justice Brewer's dissent-

103. *Id.* at 566.

104. *Id.* at 571–75.

105. *Cf.* Hale v. Henkel, 201 U.S. 43, 75 (1906) (rejecting the argument that a corporation's criminality should provide a basis to refuse to produce a corporation's books).

106. *Id.* at 76.

ing opinion in *Hale* noted that the Fourteenth Amendment's Due Process Clause also applies to corporations.[107]

Though the Court provided no reasoning for the attachment of the Due Process Clause to corporations, it could be explained by treating corporations as natural persons for the purpose of the Clause. It is anomalous to hold that the Fifth Amendment's Due Process Clause applies to corporations but that the Self-Incrimination Clause does not; pivotally, both clauses rely on a single iteration of the word "person" to convey their meaning.[108]

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107. *Id.* at 76, 83–84.

108. "[N]or shall any person . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The word "person" appears only twice across the five clauses of the Fifth Amendment, with its second instance implied across the Double Jeopardy, Self-Incrimination, and Due Process Clauses. While most are set off by semicolons, the Self-Incrimination and Due Process Clauses have only a comma between them. *See* Michael Nardella, *Knowing When to Stop: Is the Punctuation of the Constitution Based on Sound or Sense*, 59 FLA. L. REV. 667, 667–74 & nn.28–29 (2007) (noting the strange punctuation and the differences in punctuation both between drafts of the Fifth Amendment and compared to similar state constitutions). It is possible that the Due Process Clause acts as a qualification on the Self-Incrimination Clause, i.e., that one shall not be compelled in any criminal case to be a witness against himself without due process of law. Though this interpretation would have some grounding in the history of the Fifth Amendment, this is not the interpretation adopted by courts, nor is it defended by academics. *See id.* at 685–91 (considering several possibilities for the strange punctuation, and concluding that a comma was used for purely rhetorical and stylistic reasons, rather than to alter the meaning of either clause); *cf.* Johnson v. Sayre, 158 U.S. 109, 114 (1895) (holding that although such a construction was "grammatically possible," the Grand Jury Clause did not exempt from the requirement those in the land or naval forces only "when in actual service in time of war or public danger"; instead holding that the danger qualification only applied to those in the militia, because that construction better served the purpose of the Amendment (quoting U.S. CONST. amend V)).

It might equally be argued, given the lack of deference granted to the punctuation of the Amendment, that further interaction between the Clauses is appropriate. Though the Self-Incrimination Clause applies in "any criminal case," a somewhat tortured construction could define "criminal case" according to the crimes and offenses mentioned elsewhere in the Amendment. For example, self-incrimination could be permitted as to crimes which are neither capital nor infamous, and in cases which do not put "life or limb" at stake. *Cf.* LEVY, *supra* note 62, at 100, 105 (noting that in the opinion of at least two judges of the Star Chamber in 1569, the accused could only avoid swearing a self-incriminating oath in cases of life or limb, but that the accused must swear an oath before the Star Chamber, since it was unable to sentence the accused to death). The Supreme Court has rejected such tortured interpretations, creating a rule grounded in statutory interpretation of the criminalizing statute rather than textual interpretation of the Amendment itself. *See* United States v. Ward, 448 U.S. 242, 248–49 (1980) (holding that a criminalizing statute is criminal if either (1) Congress indicated ex-

Takings Clause. The Supreme Court has recognized that the Fifth Amendment's Takings Clause applies to corporations.[109] In *Russian Volunteer Fleet v. United States*, the petitioner, a Russian corporation, had hired a New York shipbuilding company to construct two ships.[110] The U.S. government, by presidential executive order, took the contracts, and the ships built under the contracts, for the use of the United States.[111] The Court held that because the petitioner was an "alien friend," it was "entitled to the protection of the Fifth Amendment of the Federal Constitution."[112] The Court then concluded that the corporation was entitled to compensation from the U.S. government equivalent to the full value of the property at the time of the taking.[113] With no explanation to the contrary, this is best resolved by the principle that a right which attaches to natural persons also attaches to corporations.

Right to a Jury in All Criminal Prosecutions. Corporations have a right to a jury trial when faced with a substantial criminal fine.[114] The test for whether a corporation has a right to a jury trial appears to exactly follow the test for whether an individual has a right to a trial, i.e., a defendant has a right to a jury trial for substantial crimi-

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pressly or impliedly a preference for a criminal label or (2) if the statutory scheme was so punitive in purpose or effect to negate a congressional intention to create a civil penalty); *cf.* DERSHOWITZ, *supra* note 79, at 25–39 (noting several difficulties in applying textual analysis to the Constitution in general and the Fifth Amendment in particular). *But see* District of Columbia v. Heller, 554 U.S. 570, 576–93 (2008) (engaging in nearly twenty pages of textual analysis in order to determine the appropriate construction of the Second Amendment).

109. Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931).

110. *Id.* at 487.

111. *Id.*

112. *Id.* at 489 (citing Wong Wing v. United States, 163 U.S. 228, 238 (1896)).

113. *Id.*

114. The Congressional Research Service discussed three illustrative cases:

> Muniz v. Hoffman, 422 U.S. 454, 477 (1975) (a $10,000 fine imposed upon a large union did not trigger the jury trial right); United Mine Workers v. Bagwell, 512 U.S. 821, 824, 838 (1994) ($64 million in fines does trigger a jury trial right); Southern Union Co. v. United States, [567 U.S. 343, 352] (2012) ("The RCRA subjects Southern Union to a maximum fine of $50,000 for each day of violation. 42 U.S.C. 6928(d). The Government does not deny that, in light of the seriousness of that punishment, the company was properly accorded a jury trial. And the Government now concedes the District Court made factual findings that increased both the 'potential and actual' fine the court imposed. This is exactly what *Apprendi* guards against: judicial factfinding that enlarges the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow[.]").

CONG. RSCH. SERV., R43293, CORPORATE CRIMINAL LIABILITY: AN OVERVIEW OF FEDERAL LAW 19 n.122 (Oct. 30, 2013), https://sgp.fas.org/crs/misc/R43293.pdf [https://perma.cc/ELJ7-47NG].

nal offenses. Just as with the Grand Jury Clause, any systematic trend is likely due to the fact that corporations cannot be imprisoned.

2. Ask if the Claimed Right Is One Which Individuals Should Lose When They Choose to Form a Collective Entity

Freedom of Speech. The Supreme Court has held that the First Amendment protects direct corporate contributions to political candidates.[115] In *Citizens United v. FEC*, the Court held that the government could regulate, but not suppress, corporate speech.[116] The Court considered and rejected a rule which would have only extended First Amendment protections to "nonprofit corporate political speech funded overwhelmingly by individuals" because such a rule was incompatible with the text of the relevant federal statute, which created no *de minimis* exception to the individually-funded requirement.[117] The Court relied in part on the purpose of the First Amendment in reaching its conclusion that the Amendment protected corporate speech and donations.[118] It also relied on the changing dynamic of speech, and rapid changes in technology.[119] Several Justices seemed to credit the proposition that individuals should not lose a right merely because they chose to form a collective entity, echoing the argument raised by Justice Brewer in his dissenting opinion in *Hale*.[120]

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115. Citizens United v. FEC, 558 U.S. 310, 372 (2010).

116. *Id.* at 319.

117. *Id.* at 327–29.

118. *Id.* at 343.

119. *Id.* at 364.

120. *Id.* at 380 (Roberts, C.J., with Alito, J., concurring) (noting with approval the Court's prior rejection of the idea that "speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation" (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978))); *id.* at 390 (Scalia, J., with Alito, J., and with Thomas, J. in part, concurring) ("[Activities of individual editors and printers] were not stripped of First Amendment protection simply because they were carried out under the banner of an artificial legal entity. . . . [The notion] that modern newspapers, since they are incorporated, have free-speech rights only at the sufferance of Congress, boggles the mind."). *But see id.* at 430 (Stevens, J., with Ginsburg, Breyer, and Sotomayor, JJ., concurring in part and dissenting in part) ("Although Justice Scalia makes a perfectly sensible argument that an individual's right to speak entails a right to speak with others for a common cause, he does not explain why those two rights must be precisely identical . . . ." (citation omitted)). The *Citizens United* Court employed the same argument that was used in deciding the Fourth Amendment issue in *Hale*. The *Hale* Court held that corporations could assert a Fourth Amendment right against "unreasonable searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a dis-

Of course, it is difficult to separate the opinions in *Citizens United* from the First Amendment issue decided by the Court; that is, the same arguments that persuaded the Court to expand First Amendment rights to corporations may be unpersuasive for advocates seeking to expand Fifth Amendment rights to corporations. Or put still another way, the Court may be much more likely to expand freedom of speech than it is to expand what some Justices have characterized as a protection for "clever criminals."[121]

3. Rights Trump Ease of Enforcement

Attorney-Client Privilege. The Supreme Court settled the issue of whether corporations have an attorney-client privilege, and the scope of such privilege, in *Upjohn Co. v. United States*.[122] Corporations do have the privilege, and it may protect communications both among nonlegal employees without company counsel and between company counsel and corporate employees.[123] Work product doctrine applies to corporations, too.[124] That corporations enjoy one evidentiary privilege already makes it hard to justify the absence of another on the basis that it would make corporations difficult to investigate and prosecute. If ease of prosecution were the aim of corporate criminal procedure, surely there would be no corporate attorney-client privilege.

Fourth Amendment. In *Hale v. Henkel*, even while holding that corporations do not have and cannot assert a Fifth Amendment right against self-incrimination, the Supreme Court held that corporations had a Fourth Amendment right against unreasonable searches and seizures, and that the right was such that it could be asserted through corporate agents.[125] As with corporate attorney-client privilege, the presence of a Fourth Amendment right to be free from unreasonable searches and seizures weakens any claim

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tinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body." Hale v. Henkel, 201 U.S. 43, 76 (1906).

121. *Cf.* Minnick v. Mississippi, 498 U.S. 146, 166–67 (1990) (Scalia, J., with Rehnquist, C.J., dissenting).

122. 449 U.S. 383 (1981).

123. *Id.* at 394.

124. *Cf., e.g.*, Wultz v. Bank of China Ltd., 304 F.R.D. 384, 393–97 (S.D.N.Y. 2015) (denying work product doctrine only because the materials in question would have been generated absent litigation, not because claimant was a corporation).

125. *Hale*, 201 U.S. at 76–77. This holding was of no use to the petitioner, whose contempt charge remained a good basis for his confinement even where the order underlying the contempt charge was unreasonable for the purpose of the Fourth Amendment. *Id.* at 77.

that the government must be unhindered in prosecuting corporations. If corporate criminal procedure were chiefly concerned with permitting prosecution of corporations, then the Fourth Amendment would not attach to corporations.

The Double Jeopardy and Grand Jury Clauses of the Fifth Amendment are also examples of rights trumping enforcement. It would be far easier to prosecute corporations if there were no bar on retrying them. It would also be easier to prosecute corporations if they never had the right to indictment by grand jury. Notably however, research has revealed no court that has credited, or even addressed, such arguments.

III.
PROPOSAL FOR A CORPORATE PRIVILEGE

Part II suggested that the Fifth Amendment privilege against self-incrimination should attach to corporations; this Part proposes *how* the privilege should apply to corporations, and the implications of the proposal on public policy. Section A proposes a method by which corporations could exercise a Fifth Amendment privilege. Section B discusses the likely effects of the proposal on public policy.

This Note takes as given the principle that corporations should not commit illegal acts.[126] This same principle holds that no agent of a corporation should commit illegal acts. The following policy proposal is evaluated against the present doctrine on the basis of its ability to incentivize corporations and their agents to commit fewer crimes, employees to report those crimes, and government actors to investigate and prosecute those crimes as accurately, quickly, and cheaply as possible. The analysis also makes a simplifying assumption, one which is clearly not always applicable, that corporations will break the law in the pursuit of gains and will only be checked by a rational fear of criminal punishment.[127]

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126. As a matter of Delaware law, the normal insulation corporate directors enjoy from personal liability evaporates where they knowingly take an illegal action. *See* Miller v. AT&T Co., 507 F.2d 759, 763 (3d Cir. 1974); Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs., Inc., 854 A.2d 121, 131 (Del. Ch. 2004) ("Under Delaware law, a fiduciary may not choose to manage an entity in an illegal fashion, even if the fiduciary believes that the illegal activity will result in profits for the entity."); Cynthia Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1326 (1998) (justifying the normative value of corporate compliance by noting regulations are passed by political entities entrusted to study and regulate complex activities).

127. Not every corporation will act in the same way. Presumably, corporations established for non-profit purposes will face very different incentives in deciding

Two additional issues should be noted. First, any change in the Fifth Amendment privilege must interact with existing privileges and doctrines. Attorney-client privilege and work product doctrine already provide a shield to corporations looking to avoid complete compliance with orders for production and testimony. Additionally, the "required records" doctrine may intervene to require production where a corporation would otherwise have a valid privilege claim.[128] Just as important as the existing corporate criminal procedural rights is the government's ability to execute search warrants against a corporation claiming privilege as to its documents. If the government can meet the relatively low probable cause standard[129]—though still a higher standard than that needed to obtain a grand jury subpoena.[130]—then the government can itself execute the warrant and vitiate much of the power of the privilege. This option is available because the privilege only protects against *self*-incrimination and execution of a warrant by the government is not *self*-incriminating with respect to the warrant's target. Other means of obtaining information, including from third parties, are also relevant to determining the significance of a corporate privilege.[131]

In the current state of corporate investigations, prosecutors and regulators rely heavily on corporations to do the job of investi-

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how rigorously they will enforce internal compliance programs. Even for-profit corporations will differ based on a number of factors, including their owned assets, risk profile, shareholder composition, board composition, and other factors that affect corporate decision making.

128. A Fifth Amendment privilege claim will fail under the required record exception if the sought information is regularly kept, generally public information, and the request is related to a valid civil regulatory effort. *See* Allard Chu, *Protecting the Common Good with the Required Records Doctrine*, 51 URB. LAW. 393, 408, 411–12 (2022).

129. *See* Illinois v. Gates, 462 U.S. 213, 238, 241 (1983) (holding that probable cause must be determined according to the totality of the circumstances).

130. *See* Paul Ohm, *Probably Probable Cause: The Diminishing Importance of Justification Standards*, 94 MINN. L. REV. 1514, 1519 (2010) (describing the relevance requirement for a grand jury subpoena as a "less-than-probable-cause standard[ ]"); *see also* Carpenter v. United States, 138 S. Ct. 2206, 2221 (2018) (describing the relevance requirement to obtain an order under the Stored Communications Act as "fall[ing] well short of the probable cause required for a warrant").

131. Aside from warrants and grand jury subpoenas, the government may use a variety of tools to conduct electronic surveillance, *see, e.g.*, 18 U.S.C. §§ 2510–2522 (authorizing interception of wire and electronic communications); 18 U.S.C. §§ 3121–3127 (pen register and trap and trace devices); 18 U.S.C. §§ 2701–2713 (disclosure of stored wire and electronic communications), and may rely on cooperators and other witnesses, *see, e.g.*, Wade v. United States, 504 U.S. 181, 183 (1992); Ricketts v. Adamson, 483 U.S. 1, 3–4 (1987).

gating corporate wrongdoing. This saves investigators money because they do not need to send agents to execute search warrants, nor do they need to interview and untangle a web of employee interviews. Additionally, it avoids the issue that some corporate records may be encrypted or otherwise difficult to access, e.g., they may be stored overseas.[132] A corporate privilege would not prevent corporations from conducting investigations on behalf of the government; the corporation may still choose to waive its privilege. Instead, it is only fair to say that the strategic calculus corporations must consider will become more complicated, as they might seek to negotiate terms for waiving the privilege or consider refusing to cooperate altogether. Of course, even if corporations stopped conducting investigations for the government, that would not end the public policy evaluation. It could be that replacing internal investigations with government investigations would uncover more wrongdoing and lead to more effective prosecutions, which would lead to better deterrence.

Even if the privilege attaches to a corporation, a corporate Fifth Amendment claimant must still meet the four elements of a claim for the privilege:[133] (1) compulsion;[134] (2) incrimination;[135] (3) testimony;[136] and (4) assertion.[137]

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132. There are processes for obtaining overseas data, but they are cumbersome and time consuming. *See* Alan McQuinn & Daniel Castro, *How Law Enforcement Should Access Data Across Borders*, INFO. TECH. & INNOVATION FOUND., July 2017, at 1, 6–9 (explaining several of the mechanisms used to obtain overseas data).

133. *See, e.g.*, R. ALLEN ET AL., CRIMINAL PROCEDURE: INVESTIGATION AND RIGHT TO COUNSEL 847–70 (2020).

134. The Fifth Amendment does not protect against volunteered statements; there must be some compulsion, which must be from a state actor. *See generally* Lawrence Rosenthal, *Compulsion*, 19 U. P?. J. CONST. L. 889, 893–924 (2017).

135. The limit imposed by the incrimination requirement is whether a truthful answer poses a danger of incriminating the answerer, i.e., whether it increases the likelihood of their prosecution or conviction for criminal penalties. *See, e.g.*, Hoffman v. United States, 341 U.S. 479, 486 (1951); Hiibel v. Sixth Jud. Dist. Court of Nev., 542 U.S. 177, 190–91 (2004); *see also* CONG. RSCH. SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 103-6, at 1305–06 & nn.171–73 (Johnny H. Killian & George A. Costello eds., 1992).

136. The Fifth Amendment "applies only when the accused is compelled to make a Testimonial Communication that is incriminating." Fisher v. United States, 425 U.S. 391, 408 (1976); *see also* CONG. RSCH. SERV., *supra* note 135, at 1306–07 & nn.180–81.

137. With some exceptions, witnesses must expressly claim a Fifth Amendment privilege at the time they rely on it. Salinas v. Texas, 570 U.S. 178, 183 (2013) (plurality opinion) (citing Minnesota v. Murphy, 465 U.S. 420, 427 (1984)).

A. Create a Limited Privilege That Management Can Invoke

This Section suggests that a corporate privilege against self-incrimination should be modeled on corporate attorney-client privilege, with limits on which corporate agents may assert it and when they may assert it. Under *CFTC v. Weintraub*, an employee cannot assert the organization's attorney-client privilege if the organization waives it; neither can the employee waive the privilege if the organization asserts it.[138]

The privilege should be limited by restricting who may assert it. Just because a corporation has a Fifth Amendment privilege does not mean every current and former employee can assert a corporate privilege. Instead, the power to assert and waive the self-incrimination privilege should fall to the corporation's managers, directors, and designated officers just as the power to assert and waive the attorney-client privilege falls to the corporation's presently-in-control managers.[139]

It would be a sensible judicial limitation to prevent a corporation's officers or board of directors from delegating the power to invoke corporate privilege to all corporate employees. And, because corporations cannot speak, the primary application of a corporate privilege would be to object to orders to produce documents, books, and records. Courts should inquire as to any act of production testimony such orders seek, and whether the act is sufficiently compelled and incriminating to permit a valid Fifth Amendment privilege claim. A contrary rule, permitting any employee to claim the privilege, would be unworkable simply because there is no way to guarantee that multiple employees will take the same position as

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138. 471 U.S. 343, 348–49 (1985) ("The parties in this case agree that, for solvent corporations, the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors." (citing Dodge v. Ford Motor Co., 170 N.W. 668, 684 (1919))); *see also In re* Bevill, Bresler & Schulman Inc., 805 F.2d 120, 124–25 (3d Cir. 1986) ("A corporate official . . . may not prevent a corporation from waiving its privilege arising from discussions with corporate counsel about corporate matters." (first citing *In re* Grand Jury Investigation, 599 F.2d 1224, 1236 (3d Cir. 1979); and then citing *In re* Grand Jury Subpoena Duces Tecum, 391 F. Supp. 1029, 1034 (S.D.N.Y. 1975))).

139. *Weintraub*, 471 U.S. at 349 (describing the rule that outgoing managers may not assert a corporation's attorney-client privilege over the wishes of current managers and that new managers may waive attorney-client privilege with respect to the communications of former officers and directors (first citing Citibank, N.A. v. Andros, 666 F.2d 1192, 1195 (8th Cir. 1981); then citing *In re* Grand Jury Investigation, 599 F.2d 1224, 1236 (3d Cir. 1979); and then citing Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 n.5 (8th Cir. 1978) (en banc))).

to whether the privilege should be asserted or waived. A contrary rule would also permit any employee to assert a corporate privilege for the benefit of the employee, even where others at the corporation elected to waive the privilege: it would make more sense that, if the board of directors or a designated officer waived the privilege, that employees could no longer assert a corporate privilege if ordered to testify or produce corporate records.

Testimony is a more difficult issue than document production. When producing documents, corporations act through their custodians. The custodian's role is limited solely to producing documents at the direction of the corporation. The documents are not in the mind of the custodian but are owned by the corporation. The ambiguities of where the corporate form begins and ends, therefore, are generally not at issue when considering an assertion of privilege as to document production. However, when it comes to employee testimony, it is difficult to say where the corporate "self" ends. While it may be that some information sought from an employee is "corporate information," it is still the employee, rather than the corporation, who takes the stand. Information learned by employees, unlike documents and records, is no longer solely the possession of the corporation. It is, at best, shared information. Information offered to authorities from a third party is not *self*-incrimination, so it should not be protected by the privilege. Therefore, a corporation should not, in general, be able to prevent its employees from testifying.

There is one instance, however, where it would be appropriate to assert a corporate privilege as to testimony. A corporate representative, selected to respond to inquiries into the corporation,[140] should be able to assert a corporate Fifth Amendment privilege in order to refuse to testify as to certain facts. This Note suggests that if (1) the corporation's management has previously authorized (or required) a corporate representative to assert the privilege, and (2) a question posed to the representative seeks testimonial information under compulsion which could incriminate the corporation, then the representative should be able to invoke the privilege to refuse to testify. This should be the case even if the representative is immunized as to his personal criminal liability. Assertion of the privilege would not permit the representative to remain silent or refuse to take the witness stand; instead, the representative would have to assert the privilege as to each question for which an answer

140. *Cf.* FED. R. CIV. P. 30(b)(6), 45(g) (providing for depositions by subpoena of organizational representative in federal civil cases and penalizing noncompliance with contempt); FED. R. CRIM. P. 42 (criminal contempt).

might furnish a link in the chain of corporate liability. The justification for this rule is that the corporate representative should have the ability to assert a privilege against corporate self-incrimination when acting as the corporation's representative, rather than in an individual capacity.

To prevent gaming of a corporate privilege, courts should craft a rule that requires examination of the provenance of documents and information as to which a corporate privilege is claimed. Because there will be a temptation for those fearful of prosecution to frustrate investigators by transferring incriminating records to a corporation, a court examining a corporate privilege claim should deny the claim where the basis for corporate ownership was to prejudice the government with an artificial privilege claim. Furthermore, courts should deny a corporate representative's privilege claim as to testimony if the corporation selected the agent specifically to insulate the agent by providing them with a corporate privilege, or if the corporation itself was formed to provide the privilege to the representative.[141] These exceptions could be seen as a crime-fraud exception to the privilege.

To be clear, a corporate privilege should not authorize a corporation to prevent its employees from cooperating. Instead, should employees cooperate and share information that the corporation could not itself be compelled to disclose, the corporation could still assert the privilege for itself; that is, an employee's decision to cooperate should not destroy the corporation's privilege.[142] Put another way, the corporation should retain the ability to refuse to incriminate itself, even if its employees disclose incriminating facts to the government.

B. Effect of a Corporate Privilege on Public Policy

This Section analyzes whether a corporate privilege against self-incrimination, implemented as suggested in Section II.A, would have a positive effect on public policy. To do so, this Section applies the privilege to a historical case study, the demise of Enron and Arthur Andersen.

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141. *Cf.* United States v. Kordel, 397 U.S. 1, 8 (1970) (suggesting that a corporation could not satisfy its discovery obligations by appointing an agent who would assert an individual privilege (citing United States v. 3693 Bottles, More or Less, Enerjol Double Strength, 265 F.2d 332, 336 (7th Cir. 1959))).

142. *Cf.* State v. Gutierrez, 482 P.3d 700, 713 (N.M. 2019) (holding that the defendant did not waive his spousal communication privilege by disclosing to third parties the subject matter of the confidential communications he shared with his ex-wife and second wife).

It should be admitted by any proponent of a corporate Fifth Amendment privilege that, all else being equal, the privilege will make it more difficult to prosecute corporate crime and thus likely lead to the commission of more corporate crime. But the analysis cannot end there. First, as discussed above, the effectiveness of investigative tools does not justify infringement of constitutional rights.[143] Moreover, all else might not remain equal; a change in corporate Fifth Amendment law might prompt simultaneous changes in investigative techniques, Sentencing Guidelines, or substantive criminal law.[144]

Because the privilege would be controlled by a firm's management, and management may change by "takeover, merger, loss of confidence by shareholders, or simply normal succession,"[145] incumbent managers would gain an additional incentive not to lose control in certain circumstances. If incumbent managers face any criminal liability for information that they presently refuse to disclose, then they will worry that new managers would choose to waive the privilege, exposing old managers to criminal liability.[146] Though attenuated, this chain of incentives connecting managerial control to a lower threat of criminal liability should generally cause

143. *See supra* notes 29–31 and accompanying text.

144. For example, misprision of felony could be strengthened to deter gaming of the corporate privilege. *See* 18 U.S.C. § 4.

145. CFTC v. Weintraub, 471 U.S. 343, 349 (1985).

146. By creating a constant fear of new management, the proposed rule would make incumbent managers work harder to please constituent shareholders to avoid proxy battles for control. Therefore, the proposal should reduce agency costs. Agency costs are typically categorized in one of three ways: as (1) monitoring costs, which are paid by a principal to watch the agent; (2) bonding costs, which are paid in the first instance by the agent—so long as bonding costs can be anticipated by agents, they will be baked into the price to employ an agent, and so bonding costs are in the end borne by principals even if they are initially paid for by agents—to show their commitment to the principal; or (3) residual costs, which arise where the interests of the principal and agent conflict. Stockholders collectively act as the principal to the corporation, which is run by an agent, the board of directors, which is comprised of directors elected by the shareholders. However, the net change in social surplus and economic productivity may decrease, depending on any corresponding rise in transaction costs. Transaction costs refer to the costs of conducting any given transaction. In the context of proxy contests for control, transaction costs will increase under the proposal because incumbents will likely spend much more of the corporation's money to defend against any proxy challenges. *See generally* Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271 (1986); Frank H. Easterbrook, *Two Agency-Cost Explanations of Dividends*, 74 AM. ECON. REV. 650 (1984).

management to work harder to win reelection, which would promote economic activity.[147]

Though it is ultimately difficult to conclude whether the proposal would be good public policy, the question is inapposite to the larger inquiry addressed by this Note, which is whether the Fifth Amendment's Self-Incrimination Clause should attach to corporations at all; the question of attachment is a question of what the Constitution requires, not of public policy.

This Note examines the case of Enron and Arthur Andersen both because many readers will already be familiar with its facts and because it demonstrates criminality overseen by managers, rather than rogue acts of individual employees.[148] In cases where a corporation can credibly claim criminal conduct was non-systematic, it is incentivized to cooperate with the government, and so would be less likely to assert a Fifth Amendment privilege.

The demise of Enron[149] and Arthur Andersen[150] has captured the imagination of commentators.[151] In brief, Enron's veneer of

147. Consideration of countervailing influences on management productivity—e.g., a reduced willingness of highly capable managers to enter management positions in the first instance due to an increased fear of exposure to personal liability—will be necessary to determine the theoretical effect of a change in law on economic activity.

148. That Arthur Andersen operated as a limited liability partnership rather than a corporation is not important to the below analysis. If a future case arose on similar facts but with a corporation in the shoes of Arthur Andersen, this analysis would be applicable.

149. Michael Peregrine, *Twenty Years Later: The Lasting Lessons of Enron*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 5, 2021), https://corpgov.law.harvard.edu/2021/04/05/twenty-years-later-the-lasting-lessons-of-enron/ [https://perma.cc/WTC3-NQDN] ("[I]t was (at the time) the largest bankruptcy in American history. The alleged business practices of its executives led to numerous individual criminal convictions."); The Associated Press, *A Look at Those Involved in Enron Scandal*, CHI. TRIB. (May 25, 2006, 12:21 PM), https://www.chicagotribune.com/sns-ap-enron-trial-glance-story.html [https://perma.cc/G37Y-7GKH] (noting recent convictions of Enron's founder, Kenneth Lay, and former CEO, Jeffrey Skilling, and ongoing or pending retrials of five additional executives, as well as a slew of other related convictions, guilty pleas, acquittal verdicts, and overturned convictions).

150. Arthur Andersen LLP v. United States, 544 U.S. 696 (2005); *see Arthur Andersen Goes Out of Business*, ABC NEWS (Aug. 31, 2002), https://abcnews.go.com/Business/Decade/arthur-andersen-business/story?id=9279255 [https://perma.cc/Y8LZ-GK4J] (discussing the conviction of Arthur Andersen and its decision to "voluntarily relinquish[ ], or consent[ ] to revocation of, its firm permits in all states" (internal quotation marks omitted)).

151. *Cf.* Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PENN. J. BUS. L. 797, 797 (2013) (using Arthur Andersen as the basis for studying the effects of convictions on companies).

success unraveled in 2001 when its illegal accounting practices came to light.[152] Enron's auditor, Arthur Andersen, "instructed its employees to destroy documents pursuant to its document retention policy."[153] The Supreme Court summarized a few colorful incidents:

> [O]n October 26, John Riley, another partner with petitioner, saw Duncan [the head of Arthur Andersen's "engagement team" for Enron] shredding documents and told him "this wouldn't be the best time in the world for you guys to be shredding a bunch of stuff." On October 31, David Stulb, a forensics investigator for petitioner, met with Duncan. During the meeting, Duncan picked up a document with the words "smoking gun" written on it and began to destroy it, adding "we don't need this." Stulb cautioned Duncan on the need to maintain documents and later informed Temple [an in-house counsel for Arthur Andersen] that Duncan needed advice on the document retention policy.[154]

The SEC served Enron and Arthur Andersen with subpoenas for their records on November 8, 2001.[155] The next day, Duncan, the head of Arthur Andersen's engagement team, instructed Arthur Andersen employees to cease shredding following receipt of the subpoena.[156]

On the basis of this conduct, Arthur Andersen was charged with tampering with and destroying evidence in violation of 18 U.S.C. §§ 1512(b)(2)(A) and (B).[157] Arthur Andersen was found guilty by a jury in the Southern District of Texas, and its conviction was affirmed by the Fifth Circuit.[158]

The above incidents involving John Riley and David Stulb are not the only evidence in the record of the Arthur Andersen prosecution, but they provide excellent illustrations of how the proposed privilege would operate in practice. David Stulb testified at trial as to his observations of Duncan's shredding.[159] Testimony from Riley and Stulb was the only evidence cited by the government in its brief

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152. *Arthur Andersen*, 544 U.S. at 698–702.

153. *Id.* at 698.

154. *Id.* at 701 n.6 (citations omitted).

155. *Id.* at 702.

156. *Id.*

157. *Id.*

158. *Id.* The Supreme Court ultimately reversed and remanded the conviction due to its finding that the jury instructions were flawed. *Id.* at 708.

159. Joint Appendix, *Arthur Andersen*, 544 U.S. 696 (No. 04-368), 2005 WL 474013, at *170–75.

to the Supreme Court that this incident occurred,[160] which makes some sense since the described documents were apparently shredded.

Under the privilege as proposed, Arthur Andersen could not prevent Stulb and Riley from testifying at trial: as mentioned, only the corporate representative can assert a corporate privilege against self-incrimination as to testimony. However, the employees' decision to testify would not vitiate the corporate privilege either. That witnesses could testify to the contents of documents made unavailable by shredding suggests that they could also testify to the contents of documents made unavailable by a valid claim of corporate Fifth Amendment privilege. Therefore, the same testimony could be developed and submitted into evidence, supporting the same conviction, even while privileged documents remained unavailable due to a claim of corporate privilege by Arthur Andersen.

It may be helpful to consider what Arthur Andersen might have tried to do more specifically. Arthur Andersen could have attempted to take advantage of the privilege by encrypting its records and preventing employees from making local copies of files, in an effort to prevent employees from blowing the whistle and sharing what they know with the government, and to prevent them from otherwise providing useful testimony. Employees might only be permitted to stream corporate documents and files. Local copies could be stored on overseas servers.

All of that trouble—for example, the cost measured in labor hours lost while employees wait for files to stream to their screens, or in information technology salaries paid to set up and maintain such systems—would likely not be worth the benefit of potentially avoiding criminal fines. All these precautions would produce no certain benefit. Employees could still testify as to the documents they saw, even if they never obtained copies of the files; this was exactly what happened at Arthur Andersen's trial. It is also difficult to believe that no employee would ever think to take a photo of their screen or to record a conversation with a co-worker discussing Arthur Andersen's wrongdoings. If the board of directors chose to delegate the power to assert or waive the privilege to an executive, how can the board ensure that the executive does not herself waive the right to secure the benefits of cooperation? If the executive's employment contract provided that she could not waive the right

160. Brief for the United States at 9, *Arthur Andersen*, 544 U.S. 696 (No. 04-368), 2005 WL 738080 (citing Joint Appendix, *supra* note 159, at *170–71, *175–77, *198–99) (containing transcripts of testimony from John M. Riley and David Stulb)).

without securing benefits for the corporation, would such a contract be enforceable?

The uncertain benefit of failing to cooperate must be compared to a near-certain benefit from the alternative to pleading the Fifth: compliance, cooperation, and remediation. Under the Organizational Sentencing Guidelines, the base fine of a compliant firm may be reduced by up to 95 percent.[161] Department of Justice Guidelines similarly provide huge incentives to corporations that demonstrate efforts to comply.[162] To be sure, if the criminal liability of a cooperation-sentence exceeds a corporation's assets despite the gravity reduction offered by the Sentencing Guidelines, the corporation may still prefer a high-risk strategy that has the potential to avoid all criminal liability. Whether the Sentencing Guidelines are mandatory or merely advisory for the sentencing of corporations is an unsettled area of law.[163] While a defendant's silence may not be used directly at sentencing, it may "bear[ ] upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided by" the Sentencing Guidelines.[164] More generally, the promise not to use a defendant's invocation of the Fifth Amendment against them at sentencing rings hollow if the government can merely offer cooperation benefits to all those who do not invoke the Fifth Amendment. As the above discussion tends to show, if it had the privilege, Arthur Andersen would have been well-advised not to rely on it.

CONCLUSION

The Fifth Amendment's privilege against self-incrimination should attach to corporations for three reasons. First, most of the changes in corporations and criminal procedural law since the Supreme Court decided *Hale v. Henkel* in 1906 militate in favor of attachment. Second, the history and purpose of the Self-Incrimination Clause together suggest that it should attach to cor-

161. WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 289 (6th ed. 2021) ("[T]he Guidelines will reduce the base fine of a fully compliant firm by up to 95 percent, while they quadruple the base fine of firms with the highest culpability rating." (citing U.S. SENT'G GUIDELINES MANUAL § 8C2.4-2.6 (U.S. SENT'G COMM'N 2018))).

162. *Id.* at 303.

163. *Id.* at 290 n.37 (noting that while the Sentencing Guidelines are no longer mandatory as to individuals under United States v. Booker, 543 U.S. 220 (2005), it is possible that a mandatory application of the Guidelines does not violate a corporation's Sixth Amendment rights).

164. Mitchell v. United States, 526 U.S. 314, 330 (1999).

porations. Finally, principles of corporate jurisprudence suggest that the privilege should attach.

This Note proposes that corporations should be able to exercise a privilege against self-incrimination modeled on the corporate attorney-client privilege, and that several exceptions be built into any judicial pronouncement of the rule to prevent abuses of the privilege and corporate form.

The effect of a corporate privilege on public policy cannot be easily assessed before it is implemented, but the case of Arthur Andersen suggests it would not have a significant impact on the ability of courts to hear evidence on otherwise unavailable documents and communications.