

Summer 1984

Fifth Amendment Privilege and Documents-Cutting Fisher's Tangled Line, The

Robert Heidt

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Robert Heidt, *Fifth Amendment Privilege and Documents-Cutting Fisher's Tangled Line, The*, 49 Mo. L. REV. (1984)

Available at: <https://scholarship.law.missouri.edu/mlr/vol49/iss3/1>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

MISSOURI LAW REVIEW

VOLUME 49

SUMMER 1984

NUMBER 3

THE FIFTH AMENDMENT PRIVILEGE AND DOCUMENTS—CUTTING *Fisher's* TANGLED LINE

ROBERT HEIDT*

I. INTRODUCTION	440
II. PROTECTING DOCUMENTS THEMSELVES	444
A. <i>The Property Rights Rationale</i>	444
B. <i>From Property Rights to Privacy—The Search for a Rationale</i>	450
C. <i>The Privacy Rationale—Its Misuse in a Noble Cause</i> ...	459
D. <i>Other Policies Behind the Privilege and the Protection of Documents</i>	468
E. <i>Fisher v. United States—the End of Protecting Documents Under the Privilege</i>	470
III. PROTECTING THE IMPLIED ADMISSIONS FROM SUBMITTING DOCUMENTS	473
A. <i>The Implied Admissions Theory: Fisher's Tangled Line</i>	473
B. <i>The Uneven Application of the Implied Admission Theory</i>	473
C. <i>The Requirement that Implied Admissions be Sufficiently Testimonial and Incriminating</i>	476
D. <i>Administering Fisher's Tangled Line</i>	481
IV. A NEW APPROACH	483
A. <i>The "Sufficiently Testimonial" Rubric</i>	483
B. <i>The Exception for "Rocking Chair" Subpoenas</i>	489
V. CONCLUSION	491

* Associate Professor of Law, Indiana University (Bloomington). The research for this Article was funded in part by a grant from the Lane Foundation.

I. INTRODUCTION

For at least a century, people have invoked the fifth amendment privilege against self-incrimination to resist subpoenas and other discovery requests for documents they possess.¹ The privilege is most commonly invoked to suppress subpoenaed documents in civil and criminal proceedings involving the government.² Although corporations,³ partnerships,⁴ and unincorporated associations⁵

1. This Article does not address the issues arising when the claimant, i.e. the person claiming the privilege in order to suppress the subpoenaed documents, did not possess the documents at the time they were subpoenaed. A claimant generally cannot suppress documents not in his possession at the time of the subpoena. *Fisher v. United States*, 425 U.S. 391, 396-402 (1976); *Couch v. United States*, 409 U.S. 322, 329-35 (1973). One exception arises, however, when the claimant's loss of possession is trivial and temporary. Another exception arises when a recognized privilege, such as the attorney-client privilege, exists between the claimant and the person in possession. Of course, the claimant must still show that his documents would have been privileged had they remained in his possession. *Fisher*, 425 U.S. at 405; *Couch*, 409 U.S. at 333. These two exceptions, incidentally, are examples of rare situations in which the claimant may raise the privilege even though the subpoena was not addressed to him; for the most part, the privilege may only be raised by the person to whom the subpoena is addressed.

Moreover, this Article deals only with the issues arising when the claimant possesses the documents in a personal as opposed to a representative capacity. When any officer, director, employee or other agent of a business entity possesses subpoenaed documents in a representative capacity, the person cannot suppress the documents by claiming the privilege, unless the business entity (such as a sole proprietor) can claim the privilege against self incrimination. Instead, the person must submit the documents to the document custodian of the business entity; if the subpoena addresses the person, rather than the entity, the person must submit the documents to the party issuing the subpoena. *Bellis v. United States*, 417 U.S. 85, 88 (1974) (*Bellis* was overruled in *United States v. Doe*, 104 S. Ct. 1237 (1984)). Unfortunately, lower courts continue to confuse the issue of whether documents are possessed in a personal or representative capacity (a "possession, custody or control" dispute) with the issue of whether documents possessed in a personal capacity are protected by the privilege (a "fifth amendment privilege" dispute). See, e.g., *United States v. Mackey*, 647 F.2d 898, 900 (9th Cir. 1981) (wrongly suggesting that all documents held in a personal capacity are for that reason protected by the privilege). This is a source of much confusion. See *infra* note 5.

2. While few courts have explicitly held that a litigant in a private civil case may suppress documents by claiming the privilege, fifth amendment jurisprudence has long emphasized that the ability to use the privilege to suppress documents does not turn on whether the government is a party, or on whether the case is civil or criminal. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (privilege "applies alike to criminal and civil proceedings"); *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (same); see also *Boyd v. United States*, 116 U.S. 616, 634 (1886) (privilege protects documents in a civil forfeiture action); *Minnesota Bar Ass'n v. Divorce Assistance Ass'n*, 311 Minn. 276, 278, 248 N.W.2d 733, 737 (1976) (privilege protects documents in a civil case for injunctive relief); *Rice v. State Bd. of Medical Examiners*, 208 Okla. 440, 442, 257 P.2d 292, 294 (1953) (same); *Stafford & Jackson, The Privilege Against Self-Incrimination in Federal Tax Investigations*, 34 LA. L. REV. 703, 713-14 (1974) (privilege equally available in civil and criminal cases); Note, *The Constitutional Limits of Discovery*, 35 IND. L.J. 337, 341 (1960) (fifth amendment privilege to suppress documents

do not have a fifth amendment privilege, a sole proprietor, however large, may still use the privilege to suppress the business and personal documents in her company's possession.⁶

Because an individual or a business operating as a sole proprietorship both may suppress documents ranging from grocery lists to automobile repair bills, they enjoy a substantial advantage in litigation over entities denied the

in tax cases applies in civil audits). *Compare* Grant v. United States, 291 F.2d 227, 229 (2d Cir. 1961) (privilege protects documents in civil tax proceedings) with United States v. Roundtree, 420 F.2d 845, 852 (5th Cir. 1969) (privilege does not protect documents in civil tax proceedings).

3. Wilson v. United States, 221 U.S. 361, 382 (1911); Hale v. Henkel, 201 U.S. 43, 69-70 (1906).

4. Bellis v. United States, 417 U.S. 85, 93-97 (1974); *In re* Mal Bros. Contracting Co., 444 F.2d 615, 619 (3d Cir.), *cert. denied*, 404 U.S. 857 (1971).

5. McPhaul v. United States, 364 U.S. 372, 380 (1960) (unincorporated political organization); White v. United States, 322 U.S. 694, 701 (1944) (labor union).

This Article does not deal with the issue of whether particular documents, such as desk calendars, are owned and possessed by an organizational entity which lacks the privilege and therefore must be submitted when the subpoena is addressed to the entity. To avoid submitting subpoenaed documents, an entity may claim that the documents are "personal"—that is, that the documents are owned by some individual and are so unrelated to the entity's business and so free of connection with the entity that they should not be considered in the entity's ownership, possession, custody or control. *See In re Grand Jury Subpoena Duces Tecum Dated April 28, 1981*, 657 F.2d 5, 8 (2d Cir. 1981) (listing factors affecting possession, custody or control issue). This is, at bottom, the same issue as whether an individual employee of an entity acts in a personal or representative capacity. *See supra* note 1. When an entity calls documents "personal" in a dispute over the entity's obligation to produce the documents, it means something altogether different from the term "personal" as it is used in a fifth amendment dispute. Mixing the two meanings of "personal" documents creates confusion. *See, e.g., Comment, On Claiming the Fifth Amendment for Mixed Purpose Documents: The Problem of Categorizing Documents as Personal or Corporate in a Business Setting*, 17 U.S.F.L. Rev. 333, 346-47 (1983) (confusing the two meanings of personal documents). Labeling the documents "personal" may still influence the ownership, possession, custody, or control issue, and thus bear on the entity's obligation to submit the documents. But, as discussed *infra*, after *Fisher v. United States*, 425 U.S. 391 (1976), the ability of a subpoenaed person who possesses the documents in his personal capacity to suppress them by claiming the privilege is no longer affected by whether the documents are considered personal or business. Rather, the test is whether the implied admissions from submitting the documents are sufficiently testimonial and incriminating. *But see In re Grand Jury Subpoena Duces Tecum Dated April 28, 1981*, 657 F.2d 5, 7 (2d Cir. 1981) (suggesting that documents that are personal rather than business in nature are more likely to be suppressed and confusing the two meanings of personal documents).

6. As recently as *Bellis v. United States*, 417 U.S. 85, 87-88 (1974), the Court said that a sole proprietor could suppress all his documents: "The privilege applies to the business records of the sole proprietor as well as to personal documents containing more intimate information about the individual's private life." While the later opinion in *Fisher* logically contradicts this statement from *Bellis* and severely restricts the ability of a sole proprietor to suppress documents, many courts continue to allow sole proprietors to suppress all business documents. *See infra* notes 14, 170 & 173.

privilege. This advantage is exploited most often to impede grand jury and tax investigations.⁷ For example, a grand jury investigating price-fixing will routinely subpoena documents from several suspected competitors. All but the sole proprietorship must comply. This ability to suppress documents, which often supply crucial evidence in a price-fixing prosecution, may in practice virtually eliminate the sole proprietorship's antitrust exposure. In general, the ability to suppress documents allows individuals and sole proprietorships to resist attacks on their white collar crimes and civil offenses.

During the nineteenth century, the reasons for protecting documents under the privilege sprang from the notion that an owner's indefeasible natural law property rights put his property absolutely beyond the reach of the government or other litigants, at least while it remained in his possession.⁸ All property to which the government or other litigants could not claim paramount property rights remained beyond the reach of even the most carefully drawn subpoena. The minor interference in possessory interests resulting from using a person's property as evidence was not tolerated. Using a person's property against him in a criminal case was equated with compelling him to utter an incriminating statement.⁹

The property rights rationale for suppressing documents waned after 1945, and a somewhat related privacy rationale arose. Under this rationale, the privilege must protect certain documents in order to safeguard a person's "legitimate expectations of privacy" and his "private enclave where he may lead a private life."¹⁰ In 1976, the Supreme Court in *Fisher v. United States*¹¹ rejected the privacy rationale and adopted the implied admissions rationale long espoused by Wigmore.¹² Under this rationale, the privilege does not protect any voluntarily prepared documents as such; it only prohibits compelling a person to utter self-incriminating testimony. The only reason a person may refuse to submit subpoenaed documents, therefore, is that the act of submitting the documents carries with it implied, self-incriminating admissions. Specifically, submitting documents in compliance with a subpoena impliedly admits that the documents exist and were in the claimant's possession at the time the subpoena was served. These unspoken admissions may incriminate by, for

7. *E.g.*, *United States v. Doe*, 104 S. Ct. 1237, 1239 (1984) (grand jury investigation of corruption in awarding municipal contracts).

8. *Boyd v. United States*, 116 U.S. 616, 627-28 (1886); *see also* *Gould v. United States*, 255 U.S. 298, 309 (1921).

9. *Boyd*, 116 U.S. at 634-35.

10. *Bellis v. United States*, 417 U.S. 85, 91 (1974); *Couch v. United States*, 409 U.S. 322, 336 (1973) ("legitimate expectation of privacy"); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) ("private enclave where he may lead a private life") (quoting *United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting)).

11. 425 U.S. 391 (1976).

12. *Id.* at 410-14; *see* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2264, at 380 (J. McNaughton rev. 1961); *see also* *United States v. Doe*, 104 S. Ct. 1237, 1242 (1984) (reaffirmed commitment to implied admission theory).

example, authenticating the genuineness of the documents. When these admissions sufficiently incriminate, the privilege's ban against compelling the admissions requires the suppression of the documents.¹³ Unfortunately, the Supreme Court's standard for suppression is so dubious and difficult to apply that *Fisher's* practical effect has largely been nullified.¹⁴ As a result, individuals and sole proprietorships generally remain able to suppress documents in their possession.

This Article reviews the protection that the privilege has given documents and the mischief that has resulted. It contends that *Fisher* forces upon the lower courts a standard pettifogging in principle and unworkable in practice. It argues for a standard which would enforce subpoenas for documents over a claim of privilege in almost every instance.¹⁵ It then explains how that exceptional instance when the claim of privilege should be upheld, and the documents suppressed, can be identified.

13. *Fisher*, 425 U.S. at 412 n.12.

14. *Fisher* has produced utter confusion in the lower courts. See note 170 *infra*. Nevertheless, most persons have remained able to suppress their documents. See, e.g., *United States v. Helena*, 549 F.2d 713, 716 (9th Cir. 1977) (subpoena quashed and all documents suppressed); *In re Grand Jury Subpoena Ducus Tecum Served Upon John Doe*, 466 F. Supp. 325, 327 (S.D.N.Y. 1979) (same); see also *In re Berstein*, 425 F. Supp. 37, 39 (S.D. Fla. 1977) (tape of telephone conversation suppressed). *Fisher's* shortcomings are compounded by uncertainty over the procedures for responding to subpoenas. See note 173 *infra*.

15. While I argue that the privilege should not allow the suppression of documents in any criminal or civil proceedings, admittedly arguments exist for various intermediate positions. One intermediate position would allow use of the privilege to suppress documents only in civil cases involving the government and in criminal proceedings. This position compensates for the greater hardship imposed on a private litigant who cannot obtain the key documents as compared to the government litigant which can always obtain the documents (albeit at a high price) by granting the claimant use immunity. This position also avoids the danger that the government, in a civil case, could circumvent the the carefully drawn limits on criminal discovery. Unfortunately, this position collides with the long standing rule that the availability of the privilege should not turn on whether the case is civil or criminal or upon whether the government is a party.

A second intermediate position would deny use of the privilege to suppress the business documents of a sole proprietorship. This position gains support from the rule denying the privilege to partnerships and other unincorporated associations, and from the Court's insistence in *Bellis* that the availability of the privilege should not turn on insubstantial differences in the form of a business enterprise. See *Bellis v. United States*, 417 U.S. 85, 101 (1974). This position, however, forces a lower court to scrutinize each document to determine whether it concerns the claimant's proprietorship or his personal life. That the document relates to a financial matter does not reduce the court's burden, for the financial matter may be unrelated to the proprietorship. In cases involving large numbers of documents, this burden may be prohibitive. Moreover, in other contexts the Court has refused to allow individuals to suppress all documents concerning their personal life. Cf. *United States v. Miller*, 425 U.S. 435, 441 (1976) (personal checks and documents not immune from search and seizure).

II. PROTECTING DOCUMENTS THEMSELVES

Understanding the current law on this subject requires exploring the past. Until *Fisher*,¹⁶ a person's documents, as such, were said to be protected by the fifth amendment privilege. In other words, a person who, by subpoena, was requested to submit documents in his possession could refuse to do so, not because the act of submitting the documents amounted to testimony, but because the documents themselves, although prepared voluntarily, were considered privileged materials. As mentioned earlier, the courts advanced two rationales for this rule: the first based on the right of property; and the second, which evolved from the first, based on the right of privacy.

Although the Supreme Court never acknowledged that these rationales differed, or that one replaced the other,¹⁷ the two rationales reflected different views about the purpose of the self-incrimination privilege and about the proper relation between the government and the individual. Of more practical importance, the rationales, whatever their defects, spawned cases that still influence courts. In theory, the two rationales also produced different tests for deciding which documents would be suppressed. While, under the property rights rationale, a recipient of a subpoena could suppress almost all the documents he owned, under the privacy rationale he could suppress only those documents in which he maintained an expectation of privacy, either because he authored the documents and had kept them secret, or because the documents concerned his intimate personal matters and had been circulated to only a few. In reality, the two rationales led to the same result.

A. *The Property Rights Rationale*

The notion that owning property necessarily entails the right to suppress the property from all investigators would impede law enforcement, at least against the wealthy, to an extent considered intolerable today. Applied broadly, this notion would, for example, bar investigators from examining the property of a corporation suspected of a crime. To see that this notion gave birth to the rule protecting documents, and to see that the cases celebrating this notion are still cited with approval, is to appreciate the extent to which this corner of the law is governed by the dead hand of the past.

The rule that the privilege protects documents stems from *Boyd v. United States*.¹⁸ *Boyd* involved a forfeiture action *in rem* to seize thirty-five cases of glass on the grounds that they had been imported without paying the prescribed duty. The government subpoenaed from the partners, who had imported the glass, an invoice showing their previous purchase of twenty-nine other cases.

16. 425 U.S. 391 (1976).

17. See *Bellis v. United States*, 417 U.S. 85, 87-93 (1974) (equating the rationales).

18. 116 U.S. 616 (1886).

The Supreme Court, emphasizing the partners' property right to the invoice, held that compelling the partners to submit it amounted to a trespass on their property; such a trespass, like any interference with property rights, violated the fifth amendment. Justice Bradley, quoting Lord Camden's famous opinion in *Entick v. Carrington*,¹⁹ set forth the policy for the property right rationale in epic terms:

The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass.²⁰

That the government obtained the invoice through a subpoena and not through a seizure did not reduce the trespass:

It is not . . . the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of . . . private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. . . . Breaking into a house and opening boxes in drawers are circumstances of aggravation; but any forceable and compulsory extortion of a man's . . . private papers to be used as evidence of a crime or to forfeit his goods is within the condemnation of that judgment.²¹

19. *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (1765).

20. 116 U.S. at 627-28 (quoting *Entick*, 19 How. St. Tr. at 1066, Eng. Rep. at 817). Lord Carrington's orientation toward property rights reflected ancient antecedents. See E. COKE, *FOURTH INSTITUTE* 176-77 (1797); 2 J. GABBET, *CRIMINAL LAW* 156-57 (1843); 2 M. HALE, *PLEAS OF THE CROWN* 113-14, 149-51 (1736). Several eighteenth century cases suggested that the common law privilege against self-incrimination extended to protection against submission of documents. See, e.g., *Roe v. Harvey*, 98 Eng. Rep. 302, 305 (K.B. 1769); *King v. Purnell*, 95 Eng. Rep. 595, 597 (K.B. 1748); *King v. Cornelius*, 93 Eng. Rep. 1133, 1134 (K.B. 1744).

21. 116 U.S. at 630. Others have pointed out that Bradley's views exemplify the formalist jurisprudence of the late nineteenth century in its absolute protection of individual rights rooted in natural law. The right to hold private property was perhaps the most significant of these rights. See Note, *Formalism, Legal Realism and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 948-52 (1977). This Note offered an impeccable explanation of *Boyd's* philosophic background; while the cases did not reflect the literal or mechanic method associated with formalism, see, e.g., Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908), it did reflect formalism's substantive values. Note, *supra*, at 948.

The Note states incorrectly, however, that *Boyd* protected documents based on their content. *Id.* at 967-69. In fact, Justice Bradley was indifferent to this. 116 U.S. at 624. The Note equates the property right concern in *Boyd* with concern for protecting a person's reasonable expectation of privacy. Nevertheless, the notion that privilege protects this expectation, while tangentially related to the protection of property rights, came much later than *Boyd* and carried different implications. See text accompanying notes 64-73 *infra*; cf. *Warden v. Hayden*, 387 U.S. 294, 300-09 (1967) (substituted privacy rationale for property rationale to allow seizure of purely evidentiary materials).

Significantly, the government seizures of private property which occurred during executions and forfeitures were only justified because the party seeking the property claimed a property right superior to that of the possessor.²²

Because the privilege, in order to protect the possessor's property rights, condemned such subpoenas, neither the content, purpose, authorship, circulation nor incriminatory nature of the invoice affected the decision to suppress. In fact, this invoice had not been prepared by the partners, but by the sellers, the Union Plate and Glass Company. Moreover, a statute required the partnership to keep the invoice and to present it at the customs office when the glass was imported.²³ In short, the invoice related only to business matters, had not been authored by either of the two partners subpoenaed or by their employees, had previously been revealed to public officials and had been prepared and kept pursuant to a statutory requirement. Under the standards which were to develop ninety years later when the privacy rationale prevailed,²⁴ each of these facts would preclude characterizing the invoice as the private papers of the partners. Although the Court in *Boyd* repeatedly called the invoice the "private" paper of the partners, it only meant that the invoice was the partners' private property.²⁵ As long as a purpose of the subpoena was to obtain a person's property to use against him in a criminal case the fifth amendment was offended.²⁶ A search and seizure for this purpose was inher-

22. 116 U.S. at 628. As in fourth amendment jurisprudence, the category of items to which the government could claim a superior property interest widened quickly to include instrumentalities and contraband, but not mere evidence. *Gould v. United States*, 255 U.S. 298, 309-10 (1921); see also *Marron v. United States*, 275 U.S. 192, 199 (1927) (ledgers and bills considered instrumentalities). *But see United States v. Lefkowitz*, 285 U.S. 452, 465 (1932) (papers are not instrumentalities).

23. *Id.* at 619. The importer was required to produce the original invoice to the collector at the point of arrival. Act of July 31, 1789; General Regulations under the Customs and Navigation Laws, arts. 314-334 (1884); see *Shapiro v. United States*, 335 U.S. 1, 68-69 & n.19 (1948) (Frankfurter, J., dissenting).

24. *Bellis v. United States*, 417 U.S. 85, 92 (1974); *Couch v. United States*, 409 U.S. 322, 335-36 (1973).

25. Nevertheless, cases have cited *Boyd* as a landmark decision protecting "privacy" and have erroneously suggested that Bradley was striving to protect the partner's expectations of privacy. See, e.g., *Bellis v. United States*, 417 U.S. 85, 91-92 (1974); *Couch v. United States*, 409 U.S. 322, 348 (1973) (Marshall, J., dissenting) ("[T]he obvious concern of the [*Boyd*] case [was] the desire of the author of documents to keep them private.").

26. 116 U.S. at 632. In practice, *Boyd* has allowed many more documents to be suppressed than the property rights rationale required. One reason is that, while the subpoena in *Boyd* called for a single invoice which was already before the court, subpoenas in later cases often called for many documents described only by subject matter, making document review of their ownership wholly impractical. Indeed, no clear rule ever emerged to indicate how to apply *Boyd* when a broad subpoena for documents was answered simply with a motion to quash based on the privilege. Was the trial court to obtain the documents in order to determine ownership or would this inspection itself violate the privilege? Not surprisingly, judges rarely attempted to determine ownership; thus, the person subpoenaed could generally suppress all documents in his possession without any realistic danger of the privilege claim being overruled. E.g., *Ballman v.*

ently "unreasonable" and hence violated the fourth amendment as well.²⁷

Perhaps because of Justice Bradley's grandiloquent appeal to resist any encroachments on individual rights, *Boyd* exerted tremendous influence.²⁸ His assumption that the chief aim of human society is the preservation of property rights neither raised the skepticism nor diminished the enthusiasm of modern courts.

Boyd was soon clarified to require possession as well as ownership. In *Perlman v. United States*,²⁹ the Court upheld the use of a person's documents against him when he had voluntarily submitted them to the government and only later had invoked the privilege to block their use. Because the owner retained a superior property right to the documents, the property orientation suggested by *Boyd*³⁰ would have required the government to return the documents as soon as the owner requested them. The Court, perhaps realizing that property rights should be modified in the interest of proving crimes, read *Boyd* merely to protect a person from having to submit his property: "the criterion of immunity [is] not the ownership of property but the "physical or moral compulsion exerted."³¹ Because the claimant had voluntarily submitted the documents, no compulsion had been exerted. Although *Perlman* undermined much of *Boyd's* rationale,³² *Boyd* could be reconciled because the partnership

Fagen, 200 U.S. 186, 195-96 (1906).

Occasionally, however, the wording of a subpoena indicated that it called for documents which were not owned by the subpoenaed party. Then the claimants motion to quash could not be granted outright; some inquiry into ownership was necessary. This most often occurred when a person was subpoenaed to produce corporate documents. See *Dreir v. United States*, 221 U.S. 394, 400 (1911); *Sanford v. United States*, 358 F.2d 685, 685 (5th Cir. 1966); *Bouschor v. United States*, 316 F.2d 451, 458 (8th Cir. 1963); *United States v. Guterma*, 174 F. Supp. 581, 582-83 (E.D.N.Y. 1959).

Similarly, when the "required records" exception to *Boyd* was established, some subpoenas indicated that only "required records" were being sought. Then the motion to quash would not be granted without some inquiry into whether the claimant's records fell into the required records exception. See *United States v. Turner*, 480 F.2d 272, 278 (7th Cir. 1973) (required records of tax preparers produced); *United States v. Silverman*, 449 F.2d 1341, 1345 (2d Cir. 1971) (records required to be filed by attorneys with the state judiciary produced), *cert. denied*, 405 U.S. 918 (1972); *United States v. Kaufman*, 429 F.2d 240, 247 (2d Cir. 1970) (required records of broker-dealer produced), *cert. denied*, 400 U.S. 925 (1970). See generally *Shapiro v. United States*, 335 U.S. 1 (1948) (establishing "required records" exception); text accompanying notes 45-49 *infra*.

27. *Boyd*, 116 U.S. at 630.

28. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) ("a case that will be remembered as long as civil liberty lives in the United States"); *Schmerber v. California*, 384 U.S. 757, 776 (1966) (Black, J., dissenting) ("among the greatest constitutional decisions of this Court").

29. 247 U.S. 7 (1918).

30. *Boyd*, 116 U.S. at 638.

31. *Perlman*, 247 U.S. at 15.

32. *Perlman* implicitly overruled the language in *Boyd* that equated obtaining and using a person's documents against him with compelling him to testify against himself. See *Boyd*, 116 U.S. at 633. In *Perlman*, the documents were obtained and

had possessed the invoice and had been compelled to submit it. Ownership and possession had coalesced.³³ In *Perlman*, as in *Boyd*, the Court found no reason to consider the document's contents, subject matter, authorship, extent of circulation, or incriminatory character. As long as the person subpoenaed possessed the property, and either owned it or held a property interest superior to the party issuing the subpoena, he could suppress it.³⁴

Appreciating the property orientation of *Boyd* helps to explain later document submission decisions that still operate. For instance, a bankrupt may not use the privilege to suppress the documents of his business, because title to the documents passes to the trustee during bankruptcy proceedings.³⁵ Similarly, a corporate president may not suppress documents he authored and possesses if they are owned by the corporation.³⁶ Although ownership is logically irrelevant

used against the claimant, over his objection, when they were introduced into evidence. Had the equation held, this would have violated the privilege, and the claimant would not have needed to show any other compulsion.

33. *Boyd*, 116 U.S. at 630. *Boyd* did not clarify whether the compulsion it condemned resulted from introducing the claimant's property as evidence against him over his objection or in forcing him to transfer possession of the property to those issuing the subpoena. *Perlman* condemned only the forced transfer of possession. Insofar as forcing the transfer of possession interferes more with the claimant's possessory interest in the property, *Perlman* remains consistent with a property rights emphasis.

34. In accordance with the property right rationale, the remedy for the illegal subpoena or seizure of papers included their prompt return to the owner. *Weeks v. United States*, 232 U.S. 383, 398 (1914).

35. *Johnson v. United States*, 228 U.S. 457, 458 (1913). Professor Mayers has pointed out the formalistic result that this rationale produces:

While the bankrupt under examination may, on the plea that they contain criminatory entries, withhold his books from the court, he may not withhold them from the trustee in bankruptcy. . . . The reason why the bankrupt may not withhold his criminatory records from the trustee is that the books and papers of his business are part of the property which the law requires him to surrender to the trustee. "To permit him to retain possession because surrender might involve disclosure of a crime, would," the Supreme Court has explained, "destroy a property right." If, as the Court seemed to feel in . . . [*Boyd*], the right to withhold incriminating documents from the courts is one of the sacred rights for which patriots fought and bled, is it not something like pettifogging to destroy that right by invoking the technical property right of the trustee . . . ?

L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 145 (1959) (citation omitted).

36. *Wilson v. United States*, 221 U.S. 361, 378 (1911) (when corporation is subpoenaed, corporation president must submit corporate documents in his possession to the document custodian for the corporation). Because ownership was critical the *Wilson* Court discussed which documents were Wilson's and which were the corporation's:

The copies of letters written by the president of the corporation in the course of its transactions were as much a part of its documentary property, . . . as its ledgers and minute books. It was said in the appellant's statement before the Grand Jury that the books contained copies of his 'personal and other correspondence as well as copies of the correspondence relating to the busi-

under the currently prevailing implied admissions rationale, lower court opinions emphasizing that a person must own documents in order to suppress them are too frequent and recent to be assumed invalid.³⁷

On one major issue, however, *Boyd's* property orientation carried implications which the Court could not accept. Logically, *Boyd* would suppress property owned by corporations as well as by natural persons. So applied, it would jeopardize the efforts of the government to pursue corporate crimes and civil offenses to an extent that may have been considered politically unacceptable. To limit *Boyd*, the Court needed to find a basis for treating property owned by corporations differently from property owned by individuals. In *Hale v. Henkel*,³⁸ the Court, after citing natural law, the social contract, and the rights-privilege distinction, ultimately relied on the "visitatorial powers" of the state to inspect the property and records of state corporations.³⁹

ness and affairs' of the corporation. But his personal letters were not demanded. These the subpoena did not seek to reach; and as to these no question of violation of privilege is presented. Plainly he could not make these books his private or personal books by keeping copies of personal letters in them.

221 U.S. 361, 377-78 (1911).

A major effect of *Wilson* was to ensure that subpoenas addressed to organizational entities would not be frustrated by claims that the employees were keeping the organization's documents from the custodian in charge of complying with the subpoena. *Wilson* clarified that when the organization was subpoenaed, all employees must allow the custodian to examine the organization's files and produce responsive documents. One should not assume from *Wilson*, however, that an individual who is subpoenaed would be unable to suppress documents he did not own. While in theory ownership was a necessary condition for suppression, in practice the impracticality of a review of ownership by the court meant that an individual would generally be able to suppress all documents he possessed unless the subpoena expressly asked for documents he did not own. See note 26 *supra*.

37. *E.g.*, *United States v. Falley*, 489 F.2d 33, 41 (2d Cir. 1973) (ownership essential for suppression); *United States v. Egenberg*, 443 F.2d 512, 517-18 (3d Cir. 1971) (same). *But see* *United States v. Cohen*, 388 F.2d 464, 468 (9th Cir. 1967) (holding that possession was sufficient). An occasional case suggesting that a person can suppress all documents he possesses but does not own illustrates the confusion engendered by the emphasis on ownership. *E.g.*, *United States v. Kleckner*, 273 F. Supp. 251, 252 (S.D. Ohio 1967).

Through the rubric that the documents are held in a "representative capacity," partial, undivided ownership is insufficient. See *United States v. Fleischman*, 339 U.S. 349, 357-58 (1950) (documents of the Joint Anti-Fascist Refugee Committee compelled from a member); *Rogers v. United States*, 340 U.S. 367, 371-72 (1951) (same result for the Denver Communist Party).

38. 201 U.S. 43 (1906).

39.

[An individual] owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the State, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State. . . .

Use of the visitatorial powers concept in *Hale* allowed *Boyd's* absolute protection of property rights to remain intact. In contrast, an approach suggesting the corporation's property rights should be balanced against, and on occasion yield to, law enforcement interests would have implicitly challenged an absolute rule. Not until 1944, in *White v. United States*,⁴⁰ did the Court acknowledge that the reason production of documents of organizations could be compelled was not so much title or visitation rights, but the fear that otherwise the privilege would be too potent an instrument for covering up business crimes.⁴¹

B. *From Property Rights to Privacy—The Search for a Rationale*

In retrospect, the property rights rationale, which reflected the absolute protection of rights associated with legal formalism, was not likely to survive the era of legal realism. During its slow demise over eighty years, the property rights rationale was confined with increasingly unprincipled distinctions. The distinctions then evolved into a rationale more compatible with legal realism, the privacy rationale. If only because the cases decided along the way still exert influence, the evolution toward the privacy rationale warrants attention.

Discontent with the property rights rationale surfaced early. In 1910, in *Holt v. United States*,⁴² Justice Holmes noted that while the language of the privilege forbade compelling a person to testify against himself, it did not forbid compelling and using his property against him.⁴³ Because, at common law, a person held a property interest in his own body, the logic of *Boyd* would forbid compelling a person to appear in court and to allow the use of his body as evidence against him. In upholding an order compelling a criminal defen-

Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. . . . There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its power.

201 U.S. at 74-75.

40. 322 U.S. 694 (1944).

41.

The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible.

322 U.S. at 700.

42. 218 U.S. 245 (1910).

43. *Id.* at 251-52; see U.S. CONST. amend. V (“[N]or shall [any person] be compelled in any criminal case to be a witness against himself.”). In contrast, some state constitutions contain language that forbids compelling a person to give “evidence” against himself, language that might protect more than just testimony. *Schmerber v. California*, 384 U.S. 757, 761-62 n.6 (1966).

nant to wear a blouse in court, Justice Holmes avoided the logic of *Boyd* and stated the view that would prevail only much later: "The prohibition of compelling a man in a criminal case to be a witness against himself is the prohibition of the use of physical or moral compulsion to extort communications from him. . . ."44 Under this view, neither documents nor any other property which a person had voluntarily prepared or kept could be suppressed. Nevertheless, cases in the 1920's, such as *Gouled v. United States*,45 simply reasserted the property rights approach for documents and other property, an approach that prevailed for at least thirty years.

The evolution from property rights to privacy in fourth amendment law is a familiar story and suggests the direction of a similar evolution of the fifth amendment. One implication of *Boyd* was that a person's property was also protected under the fourth amendment from any search and seizure. Following *Boyd*, property in a person's possession to which he did not enjoy superior title, such as stolen property, received no fourth amendment protection.46 The exception for stolen property was gradually expanded to allow seizure of any property which the private citizen was not permitted to possess, including contraband and instrumentalities of crime.47

In *Warden v. Hayden*48 in 1967, the Supreme Court severed the fourth amendment from the property rights heritage of *Boyd*. *Hayden* presented the issue of whether the defendant's clothing, mere evidence of a crime and not an instrumentality or contraband, could constitutionally be seized. The Court recognized that because the government was not able to assert a superior property right in the clothing, *Boyd* and its progeny would condemn the seizure.49 It then correctly traced the property right approach to *Entick v. Carrington* and the view that protecting property rights was the chief aim of human society.50 It deemed the notion that property rights controlled the fourth amend-

44. *Holt*, 218 U.S. at 252-53.

45. 255 U.S. 298 (1921). *Gouled* involved a prosecution against clothing and equipment suppliers for conspiring to defraud the government. One defendant moved to suppress under the privilege documents taken from him surreptitiously, but without force. The Court noted that the papers enjoyed no special sanctity as distinguished from other forms of property. Under the Court's view, the government needed to show a superior property right to the papers. The fact that the papers were needed for evidence would not warrant seizing them or compelling their production: "In either case [claimant] is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case." *Id.* at 306.

46. *Gouled*, 255 U.S. at 304; see note 20 *supra*.

47. *United States v. Guido*, 251 F.2d 1, 34 (7th Cir. 1958) (instrumentalities—shoes); *Morton v. United States*, 147 F.2d 28, 30 (D.C. Cir. 1945) (instrumentalities—blood-stained clothes and liquor bottle). See generally *Warden v. Hayden*, 387 U.S. 294, 301-04 (1957).

48. 387 U.S. 294 (1957).

49. *Id.* at 301-03.

50.

The common law of search and seizure after *Entick v. Carrington* . . . re-

ment to be "discredited."⁵¹ A different goal for the fourth amendment was embraced: "We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts."⁵² In light of the government's interest in obtaining the clothing and the protections given the defendant by the warrant procedure, the relatively modest harm to the defendant's privacy interests from seizing the clothing did not require suppression.

After *Hayden*, one might have expected an equally clean break from the property rights rationale in fifth amendment jurisprudence. As the technology for copying documents improved, the interference with a person's property rights that resulted from compelling him to part with subpoenaed documents, even for the duration of a lengthy investigation, became de minimus. Such interference rarely justified the harm to the law enforcement interests in obtaining evidence caused by the suppression of the documents. Nevertheless, the rejection of the property rights approach in fifth amendment jurisprudence took a more serpentine path.

The first inroad came in the so-called "required records" rule. One implication of the property rights approach was that a person could be required to produce documents or property in his possession that were owned by the public. For instance, a person could be compelled to produce state-owned records that he was required to prepare and keep in the course of his duties.⁵³ In *Shapiro v. United States*,⁵⁴ the Court, over substantial dissent, challenged the property rights framework. The Court allowed compelled production of records which were "required by statute to be kept," even though such records might be owned by the claimant.⁵⁵

flected Lord Camden's view, derived no doubt from the political thought of his time, that the "great end, for which men entered into society, was to secure their property." . . . Warrants were "allowed only when the primary right to such a search and seizure is in the interest which the public or complainant may have in the property seized." . . . No separate governmental interest in seizing evidence to apprehend and convict criminals was recognized; it was required that some property interest be asserted.

Id. at 303 (citations omitted).

51. *Id.* at 304.

52. *Id.* Shifting the emphasis from property rights to privacy did not represent a restriction of fourth amendment protection. For example, under the privacy rationale, a person no longer needed to own property to claim that its seizure was illegal. *See, e.g., United States ex rel. DeForte v. Mancusi*, 379 F.2d 897, 901-02 (2d Cir. 1967), *aff'd sub nom.*, *Mancusi v. DeForte*, 392 U.S. 364 (1968).

53. *Davis v. United States*, 328 U.S. 582, 591-94, (1946); *Wilson v. United States*, 221 U.S. 361, 380 (1911).

54. 335 U.S. 1 (1948).

55. *Shapiro* involved a prosecution for violation of the Emergency Price Control Act. The government subpoenaed from one suspected of tie-in sales "all duplicate sales invoices, sales books, ledgers, inventory records, contracts and records relating to the sale of all commodities from September 1, 1944 to September 29, 1944." *Id.* at 4. The

In *Shapiro*, the government had subpoenaed records that the suspect had been required to keep under price control legislation. Justice Vinson's opinion for the court glossed over the key issue of ownership. He relied upon dicta from *Wilson v. United States* suggesting that documents "required by law to be kept" were unprivileged.⁵⁶ The government interest in the documents, manifested by the statute, showed that such records carried sufficient "public aspects" to justify compelling their submission.

Justice Frankfurter's lengthy dissent in *Shapiro* clarified the move away from the property rights approach. He emphasized that previous cases had found required records unprivileged only when the records were publicly owned.⁵⁷ Requiring records to be kept does not transfer ownership to the public. Accordingly, the majority was ignoring *Boyd's* property approach, a move "far reaching in its implications involving . . . a drastic change in the relations between the individual and the Government as hitherto conceived."⁵⁸

If property rights no longer controlled the application of the privilege to documents, what did control? The references in *Shapiro* to the public aspects of required records suggested a new concern with the document's subject matter and the reason for the document's preparation, as well as with the government's interest in obtaining such documents. The government always possesses a strong law enforcement interest in obtaining documents with an incrimina-

Price Control Act required the claimant to keep these records.

56. Justice Vinson stated:

The principle [that a custodian has no privilege as to the documents in his custody] applies not only to public documents in public offices but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.

335 U.S. at 17 (quoting *Wilson v. United States*, 221 U.S. 361, 380 (1911)).

57. Justice Frankfurter acknowledged that the dicta in *Wilson*, on which the majority relied, appeared to oppose a strict property rights limitation. As he explained, however, the *Wilson* court was only saying that a document custodian of a corporation can be compelled to submit the corporation's records. 335 U.S. at 58-65 (Frankfurter, J., dissenting). The *Wilson* Court never suggested that an individual can be compelled to submit his own records whenever a statute requires those records to be kept.

58. *Id.* Frankfurter went on to state that:

The underlying assumption of the Court's opinion is that all records which Congress in the exercise of its constitutional powers may require individuals to keep in the conduct of their affairs, because those affairs also have aspects of public interest, become "public" records in the sense that they fall outside the constitutional protection of the Fifth Amendment. . . .

If the records in controversy here are in fact *public*, in the sense of publicly owned, or governmental, records, their non-privileged status follows. . . . No one has a private right to keep for his own use the contents of such records. But the notion that whenever Congress requires an individual to keep in a particular form his own books dealing with his own affairs his records cease to be his when he is accused of a crime, is indeed startling.

Id. at 53-54 (Frankfurter, J., dissenting) (citing *Davis v. United States*, 328 U.S. 582, 594, 602 (1946) (Frankfurter, J., dissenting)).

tory subject matter. Yet the majority did not say that it would allow compulsion of all incriminating documents; its holding was limited to documents required to be maintained by statute. What subject matter and what government interests might give other documents a "public aspect" preventing suppression remained unclear.

The eighteen years after *Shapiro* brought a flood of fifth amendment litigation concerning testimony but little new concerning the fifth amendment and documents. Nevertheless, the new cases undermined the property rights rationale, if only because they led the Court to identify policies favoring the privilege other than the protection of property rights. In *Murphy v. Waterfront Commission*,⁵⁹ Justice Goldberg summarized seven policies identified by the history of the privilege and recent cases.⁶⁰ Commentators reorganized Goldberg's policies into three categories: the "foxhunter" policies of discouraging torture and browbeating and maintaining a fair state-individual balance of advantages in criminal proceedings, the "old woman's" policy of avoiding the cruel "trilemma" of self-accusation, perjury, or contempt, and the "hermit's" policy of preserving a private enclave where one may lead a private life.⁶¹ These policies remained the acknowledged justifications for the privilege until at least 1976.⁶²

59. 378 U.S. 52 (1964).

60. Justice Goldberg stated:

[The privilege] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States v. Grunewald*, 233 F.2d 556, 581-82 (Frank, J., dissenting), *rev'd*, 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often a "protection to the innocent." *Quinn v. United States*, 349 U.S. 155, 162.

378 U.S. at 55.

61. E.g., Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 686 (1968); O'Brien, *The Fifth Amendment: Fox Hunters, Old Women, Hermits and the Burger Court*, 54 NOTRE DAME LAW. 26, 27 (1978); see also McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 213-14 ("[F]rom all the welter of the reasons given . . . [for] the privilege . . . only two have . . . force . . . : (1) preservation of official morality, and (2) preservation of individual privacy.").

62. One exception is the Court's abandonment of the claim that the privilege helped protect the innocent. See *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 415 (1966).

In 1976, in *Fisher v. United States*, 425 U.S. 391, 399-401 (1976), the Court

Murphy said nothing about the need to protect property rights or about the invasion of property rights caused by compelling a person to submit his property in response to a subpoena. Nor did the policies mentioned in *Murphy*, save perhaps privacy, overlap with Bradley's concerns in *Boyd*. Bradley's failure to mention the foxhunter or old woman's policies in *Boyd*, although Bentham had described them as early as 1820,⁶³ suggests the fundamental difference between the new view of the privilege and Bradley's property rights rationale. While Bradley saw the privilege as a substantive rule to assure the absolute protection of property rights required by natural law, the new view, borrowing from Bentham, saw the privilege as a procedural rule to combat the conduct of police and prosecutors.

Two years later, the Court in *Schmerber v. California*,⁶⁴ relying on the policies listed in *Murphy*, drew a distinction which was fundamentally incompatible with the property right approach, and which logically should have ended the protection of documents. *Schmerber* concerned whether the privilege allowed a suspect to refuse a blood test. The suspect argued that compelling him to submit a sample of his blood to be used against him offended the property rights approach of *Boyd*. Because the Court had long held that a person's property interest in his body was not the kind of property interest deserving protection,⁶⁵ lower courts had upheld compelling a person to submit to "fingerprinting, photographing or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture."⁶⁶ Thus, the conclusion that the blood test could be compelled did not require a major conceptual shift.⁶⁷ Nevertheless, Justice Brennan announced a critical distinction between testimonial evidence and non-testimonial evidence. Real or physical evidence, like the blood sample, was non-testimonial and could be compelled.⁶⁸ Under this test, ownership of the evidence,

stopped claiming the privilege protected privacy, except as a by-product of its protection against compelling incriminating testimony.

63. See J. BENTHAM, *Rationale of Judicial Evidence*, in 7 THE WORKS OF JEREMY BENTHAM 446-47 (J. Bowring ed. 1843).

64. 384 U.S. 757 (1966).

65. *Holt v. United States*, 218 U.S. 245, 252-53 (1910).

66. *Schmerber*, 384 U.S. at 764.

67. Compelling an accused to submit to a blood test to produce evidence against him does contradict the policy of maintaining a purely adversary system, in which the accused need not contribute to his own conviction. *Schmerber* illustrates, therefore, that the policies of *Murphy* will not be pushed to their logical limits and that much fifth amendment jurisprudence will turn on the degree to which the policies are offended. As Justice Brennan conceded, the scope of the privilege does not coincide "with the complex of values its helps to protect." *Id.* at 762.

68. The Court stated:

Not even a shadow of testimonial compulsion or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone.

so critical to the property rights rationale, was immaterial. The privilege now applied only when the government was compelling self-incriminatory testimony. It aimed at preventing government agents from compelling a person to speak against himself. Obtaining evidence against a subject through "the cruel simple expedient of compelling it from his own mouth"⁶⁹ exemplified the procedures the privilege now discouraged. The Court's testimonial/nontestimonial distinction made the ownership of the evidence, so critical to the property rights rationale, immaterial.

Logically, the testimonial/non-testimonial distinction of *Schmerber* should have swept away the notion that the privilege protects any documents prepared voluntarily before the subpoena was issued. Such documents are like any other real or physical evidence a person might own. Compelling a person to submit these documents, in response to a subpoena, requires nothing more than compelling him to submit any other property in his possession.⁷⁰ Documents prepared in the past, unlike documents a suspect is compelled by the government to write at the police station, are not the product of coercive questioning. Any communications they might contain would not be compelled communications. Yet Justice Brennan in a perplexing passage, insisted that documents, unlike other real or physical evidence, should remain protected. Citing *Boyd*, he concluded that "the protection of the privilege reaches an accused communication, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers."⁷¹

The reliance on *Boyd* seems seriously misplaced. *Boyd* did not emphasize a distinction between documents and other property. Beyond that, the passage contains two glaring flaws. First, Justice Brennan erroneously assumes that all of one's papers contain a person's communications. Yet many papers a person owns will only contain communications by others. The invoice in *Boyd*, for example, had been prepared by the shipping company and did not contain any communications of the claimant. His reasoning also overlooks the lack of government compulsion in the preparation of the documents. Compelling the submission of documents is not equivalent to compelling whatever communications may be on those documents.

Were it not for the reference to *Boyd*, *Schmerber* would have allowed the generalization that the privilege only applies when testimony, implied or explicit, is being compelled. *Boyd*, as reborn in *Schmerber*, qualified this gener-

Id. at 765.

69. *Id.* at 763 (citing *Miranda v. Arizona*, 384 U.S. 436, 460 (1966)) It is significant that *Miranda* and *Schmerber* were decided the same term, for in both the Court found that controlling the browbeating of suspects was a key purpose of the privilege.

70. The Court finally recognized this in *Fisher v. United States*, 425 U.S. 391, 410 n.11 (1976): "In the case of documentary subpoena the only thing compelled is the act of producing the document and the compelled act is the same as the one performed when a chattel . . . is demanded."

71. *Schmerber*, 384 U.S. at 763-64.

alization by excepting documents—one type of real or physical evidence, and one type of property. Documents could still be suppressed, regardless of their author, apparently on the ground that they contain communications. Logically, other physical evidence containing communications, such as t-shirts, encribed trophies, bumper stickers, photographs, phonograph records and old newspapers, could also be suppressed. Without the property rights approach, however, the reason for suppressing property which contained communications (albeit not compelled communications) was yet to be stated.

That reason, of course, turned out to be privacy. Shortly after *Schmerber*, the Court, in *Warden v. Hayden*,⁷² found that privacy, not property rights, underly the fourth amendment.⁷³ The Court was also beginning to find that privacy was the rationale for the fifth amendment as well.⁷⁴ The most explicit adoption of privacy as the rationale for suppressing documents came in *Couch v. United States*.⁷⁵ In that case, the claimant's documents were subpoenaed from his accountant while the accountant possessed them. Consequently, the claimant was not compelled to produce anything, a factor fatal under the long-standing rule of *Perlman*.⁷⁶ But Justice Powell's introduction went further and endorsed the privacy goal of the privilege, namely that the privilege "respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation."⁷⁷ In *Couch*, the claimant had forfeited his "reasonable expectations of privacy"⁷⁸ in the documents when he handed

72. 387 U.S. 294 (1967).

73. *Id.* at 304. Justice Brennan acknowledged the possibility of special treatment for some property:

The items of clothing involved in this case are not "testimonial" or "communicative" in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. . . . This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.

Id. at 302-03 (citing *Schmerber*, 384 U.S. at 757).

74. Support for the privacy policy as a key to the privilege was gaining even before *Schmerber*. See *United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir. 1956); Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. CHI. L. REV. 472, 488-89 (1957). After *Schmerber*, the support increased. See *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966); Griswold, *The Right to be Let Alone*, 55 Nw. U.L. REV. 216 (1960).

Justice Murphy's opinion in *United States v. White*, 322 U.S. 694, 699-700 (1944) also emphasized privacy more than property rights:

Such records and papers are not the private records of the individual members or officers of the organization. Usually, if not always, they are open to inspection by the members and this right may be enforced on appropriate occasions by available legal procedures. . . . They therefore embody no element of personal privacy and carry with them no claim of personal privilege.

Id. cited in *Bellis v. United States*, 417 U.S. 85, 92 (1974).

75. 409 U.S. 322 (1973).

76. *Id.* at 332-333 (citing *Perlman v. United States* 247 U.S. 7, 15 (1918)).

77. *Id.* at 327.

78. *Id.* at 335. The parallel between Powell's emphasis on legitimate expecta-

them to his accountant, knowing that mandatory disclosure of much of the information in the documents was required by the tax laws. Incredibly, Justice Powell cited *Boyd* in support of this "expectation of privacy" standard even though the invoice in question there had been disclosed to others, was authored by others, was required by statute, and contained a subject matter wholly business in nature.⁷⁹

The triumph of the privacy rationale as the basis for suppressing documents was reinforced the next year in *Bellis v. United States*,⁸⁰ in which a member of a partnership attempted to suppress all partnership documents. As if to dispute that property rights had ever governed the fifth amendment approach to documents, Justice Marshall claimed that privacy concerns had governed the earlier document cases as well. For example, he explained the *Hale v. Henkels*⁸¹ rule that an organization could not suppress documents on the ground that an organization could not maintain a legitimate expectation of privacy in its documents.⁸²

Under the privacy rationale as elaborated by Marshall, the claimant's ability to restrict access to documents became a key factor. The corporate documents in *Wilson* did not contain the requisite element of privacy or confidentiality because "by virtue of [corporations'] character and the rules of law applicable to them, the books and papers are held subject to examination by the [state]."⁸³ Applying this approach to the partnership documents at issue in

tions of privacy in fifth amendment law and a similar emphasis in fourth amendment law was obvious. See *Katz v. United States*, 389 U.S. 347, 351-53 (1967) (warrant required to intrude on legitimate expectation of privacy).

79. *Couch*, 409 U.S. at 335. The belief that *Boyd* turned on the content of the invoice, rather than its ownership, has even been shared by commentators aware of Bradley's property orientation. See, e.g., Note, *supra* note 21, at 946. The Court in *Boyd*, never discussed the contents of the invoice, however; the invoice was suppressed merely because it was the property of the partnership. 116 U.S. at 619-38. The tortured transformation of *Boyd* from a case protecting property rights to one protecting privacy may account for its durability as a fifth amendment landmark.

80. 417 U.S. 85 (1974).

81. See *supra* notes 38-39 and accompanying text.

82. As noted in *Bellis*:

Control of such records is generally strictly regulated by statute or by the rules and regulations of the organization, and access to the records is generally guaranteed to others in the organization. In such circumstances the custodian of the organization's records lacks the control over their content and location and the right to keep them from the view of others which would be characteristic of a claim of privacy and confidentiality.

417 U.S. at 92.

Justice Marshall's reading of *Boyd* completely ignored its property rights orientation. "Protection of individual privacy was the major theme running through the Court's decision in *Boyd*, . . . and it was on this basis that the Court in *Wilson* distinguished the corporate records involved in that case from the private papers at issue in *Boyd*." 417 U.S. at 91-92 (citations omitted).

83. 417 U.S. at 92 (quoting *Wilson v. United States*, 221 U.S. 361, 382 (1911)).

Bellis focused attention on the accessibility of partnership documents under state law. Pennsylvania law treated partnership documents much like corporate documents in that they remained accessible to every partner, and no partner could use the documents without the consent of the other partners.⁸⁴ Apparently, these factors helped Marshall conclude that no reasonable expectation of privacy concerning the partnership documents remained.⁸⁵

The privacy and property right rationales were not unrelated. Although Justice Marshall, like Justice Powell, ignored *Boyd's* property rights approach, ownership became relevant under Marshall's privacy test because it might allow a person to keep his documents confidential and use them without another's consent. Moreover, the privacy and property rights rationales reflected the notion that a person's personality is somehow embodied in his property—or at least in his documents.⁸⁶ A person's documents were supposedly an extension of his personality. Hence, the argument went, using them against him resembles compelling him to testify against himself. The embodiment notion is perhaps easiest to grasp if one assumes—as the privacy proponents appear to do⁸⁷—that the documents at issue resemble Anne Frank's diary, a journal authored by the claimant which deals with a noncommercial subject matter and expresses the claimant's own views and personality. The notion is harder to grasp when applied to the car repair bills and medical insurance receipts of an individual or the price lists of a sole proprietorship.

C. *The Privacy Rationale—Its Misuse in a Noble Cause*

While the privacy rationale echoed popular values of individualism—who wants to compel Anne Frank to submit her diary?—it presented serious

84. *Id.* at 96-98. The partners could use the documents for *partnership* purposes without permission. *See id.* at 98.

85. *See id.* at 101.

86. This "personality" theory of property reached back at least to Hegel. *See G. HEGEL, THE PHILOSOPHY OF RIGHT* § 44-53 (T. Knox ed. 1952); *see also J. LOCKE, TWO TREATISES OF GOVERNMENT* 305-06 (P. Laslett ed. 1960); Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause* (pt. 2), 29 MICH. L. REV. 191, 205-06 (1930). *But see* H. REYBURN, *THE ETHICAL THEORY OF HEGEL* 129-31 (1970) (criticizes the "personality theory").

The notion that a person's documents or other property are an extension of his personality remains a viable principle in in the German Federal Republic. There, it is associated with a constitutional principle protecting the free development of one's personality. Decision of 21 Feb. 1964, 19 Entscheidungen des Bundesgerichtshofs für Strafrecht 325 (commonly known as the "Diary Case"). Whether a person's documents or property may be used as evidence against him turns on a calculus weighing the importance of the crime against his privacy interest in the particular documents or property. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1042-43 (1983).

87. References to the need to protect diaries appear, for example in *Couch v. United States*, 409 U.S. 322, 350 (1973) (Marshall, J., dissenting) and in *Fisher v. United States*, 425 U.S. 391, 401 n.7 (1976). Indeed, the fear of allowing a government to subpoena a diary has supplied much of the persuasive power of the privacy rationale.

problems. It called for an application of the fifth amendment privilege to documents which contradicted the application of the privilege to testimony. In practice, its tests for suppressing documents proved even less susceptible to sensible administration than had the earlier test. As a result, a person and a sole proprietorship continued to be able to suppress almost all their documents.

1. The Premise of the Privacy Policy

As set forth in *Couch* and *Bellis*, the privacy rationale allowed a person to resist a subpoena for incriminating documents on the ground that the claimant maintained a reasonable expectation as to their privacy. Although "privacy" is a catch phrase signifying different interests in different contexts,⁸⁸ privacy in this context seemed to refer to at least two discrete interests. One is a person's interest in being allowed to keep his thoughts and feelings—his daydreams, for example—secret. This privacy interest is most compelling when the thoughts have not been disclosed to any other person. An apparent goal of the privacy rationale, therefore, was to allow a person to write his thoughts and feelings without fear of the writing returning to haunt him. In Powell's words, the writings, like the person's private thoughts, would lie within "a private inner sanctum" protected from the government. The more the ability to write down thoughts and feelings is seen as an aid to full personal growth, the stronger the argument for some constitutional protection.

A second interest to which "privacy" seemed to refer is a person's interest in reducing distribution of information about intimate matters, even though the information is already known to a few others. Information about a person's sexual activities would be an example. This interest increases as the information sought concerns increasingly intimate matters. Consequently, the privacy rationale would also allow suppression of documents such as love letters which, while not authored by the claimant, pertained to an intimate subject matter and had been circulated to only a few. Taken together, these two interests, which the values of liberalism seem to support, may require allowing a person to suppress documents which contain his own writings about his thoughts or which pertain to intimate subjects, provided the documents have been kept confidential or at least tightly restricted in circulation.⁸⁹

The privilege against self-incrimination, however, is not the appropriate vehicle for these goals.⁹⁰ Consider the application of the privilege to testimony. There the application of the privilege turns solely on whether the testimony is incriminating. If the information sought is incriminating, the privilege affords

88. See generally Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173 (canvassing the various meanings of "privacy").

89. *Couch v. United States*, 409 U.S. 322, 349-50 (1973) (Marshall, J. dissenting).

90. The assumption that the privilege protects privacy and therefore ought to allow suppression of documents has been criticized. See, e.g., Friendly, *supra* note 61, at 686; see also *In re Horowitz*, 482 F.2d 72, 82-87 (2d Cir. 1973) (Friendly, J.).

complete protection; if not, it offers no protection.⁹¹ Thus, the privilege allows inquiry into a person's thoughts and daydreams as long as describing those thoughts and daydreams does not tend to incriminate. It does not allow inquiry into past events the claimant has witnessed, however public, if describing those events would incriminate. It allows inquiry into a person's past sexual activities if describing them does not incriminate; it forbids inquiry into a public official's past public acts if describing those acts would incriminate. It is irrelevant whether the claimant has maintained a reasonable expectation of privacy as to the information sought.

Nor does the language of the privilege, which only refers to self-incriminatory testimony, suggest a goal of protecting privacy. One side effect of not compelling self-incriminating testimony has often been suppression of some private information; but this does not mean protecting privacy is a goal.⁹² In *Kastigar v. United States*,⁹³ the Court implicitly rejected the idea that the privilege protects against disclosure of private information. In that case, the Court upheld the constitutionality of immunity statutes which remove the invoker's privilege once he was provided use immunity from prosecution, *i.e.*, once he was assured his incriminatory response would not be used to prosecute him. The Court felt that, by providing the invoker use immunity, the government had removed all policy reasons for invoking the privilege.⁹⁴ This conclusion could not have been reached if protection of privacy was an additional goal, for the invoker's privacy interests are frustrated when he is compelled to provide private information, immunity order or no.⁹⁵

When the government is seeking documents, the fourth amendment, which expressly refers to "papers," seems better suited to evaluating and protecting privacy interests than the fifth.⁹⁶ Under the fourth amendment, the

91. *Ulman v. United States*, 350 U.S. 422, 430-31 (1956) (privilege is available only when the answer would tend to incriminate); *see also* *United States v. Calandra*, 414 U.S. 338, 353 (1974) (testimony about intimate matters can be compelled unless it incriminates); *Blair v. United States*, 250 U.S. 273, 281-82 (1919) (same); *Brown v. Walker*, 161 U.S. 591, 598 (1896) (same).

92. It is unclear whether those who added the privilege to the fifth amendment sought more than this ancillary protection of privacy. In any event, the consensus of authority seems to be that "the history of the privilege does not settle the policy of the privilege." 8 J. WIGMORE, *supra* note 12, § 2251, at 295.

93. 406 U.S. 441 (1972).

94. *Id.* at 448-59.

95. Indeed, if the privilege sought to allow suppression of private information, no immunity statute, even one granting transactional immunity, would be coextensive with the scope of the privilege. Thus, *Ullman v. United States*, 350 U.S. 422 (1956), and *Brown v. Walker*, 161 U.S. 591 (1896), would have been wrongly decided.

96. After *Schmerber*, protection under the privilege turned on the "testimonial" character of the evidence, an approach that does not necessarily focus on privacy interests. *See United States v. Bennet*, 409 F.2d 888, 896 (2d Cir. 1969) (Friendly, J.) ("[A]n approach geared to the objective of the Fourth Amendment to secure privacy would seem more promising than one based on the testimonial character of what is seized.").

courts directly evaluate a person's privacy interests in suppressing documents and must balance those interests against the harm to the government's interest in law enforcement caused by suppression.⁹⁷ This balancing test has not resulted in anything like the absolute protection for certain documents which comes from applying the privilege. After the demise of the "mere evidence" rule, documents for which an expectation of privacy exists can be seized if probable cause is established and a warrant is obtained.⁹⁸ Yet seizing a person's documents offends privacy interests just as much as does compelling the person to submit the documents. The intrusion involved in the government's seizure of documents adds an indignity and assault on privacy not present where submission is compelled by a subpoena. The subpoena procedure at least leaves the assembly of the documents in the control of the person himself.⁹⁹

On the other hand, a broadly drafted subpoena will often sweep up more documents than will a narrowly drawn search warrant. Requiring probable cause and a description of the particular documents desired will reduce the number of documents seized. In contrast, case law allows subpoenas to be broad in scope and to request a large number of documents.¹⁰⁰ For example, grand jury subpoenas may force persons to unearth many documents of which the government investigators were unaware and for which the investigators could not have established the probable cause a warrant requires.

97. See *Berger v. New York*, 388 U.S. 41, 58 (1967) (balancing interests in privacy and law enforcement). The Court in the past two decades has indicated that increasingly severe standards of probable cause are necessary to justify increasingly intrusive searches. See generally *Camara v. Municipal Court*, 387 U.S. 523 (1967); *Terry v. Ohio*, 392 U.S. 1 (1968); *Stanford v. Texas*, 379 U.S. 476 (1965). Commentators have explored how the fourth amendment ought to apply to documents in the context of protecting privacy. See, e.g., Bradley, *Constitutional Protection for Private Papers*, 16 HARV. C.R.-C.L. L. REV. 461, 479-84 (1981) (standard more demanding than probable cause should govern seizure of personally authored and confidentially maintained documents).

98. *Andresen v. Maryland*, 427 U.S. 463, 476-77 (1976) (search for business records in suspect's office upheld); Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 69-70 (1974); see also *United States v. Miller*, 425 U.S. 435, 441-43 (1976) (person's checks and accounts are not immune from seizure); cf. *Katz v. United States*, 389 U.S. 347 (1967) (claimant's conversations can be recorded pursuant to a warrant, even though made with a reasonable expectation of privacy).

99. The passage of the Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (current version at 42 U.S.C. § 2000Daa (1982)), demonstrated a congressional preference for obtaining documents by subpoenas, a method less intrusive than search and seizure. The law was a reaction to *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (upheld seizure of photographs from student newspaper), and sought to limit, but not prevent, searches and seizures of documents from newspapers and other engaged in first amendment activities. See also *Guidelines on Methods of Obtaining Documentary Materials Held by Third Parties*, 28 C.F.R. § 59 (1984).

100. Subpoenas are subject only to requirements of relevance and minimal specificity, standards less rigorous than the warrant requirements of probable cause and particularity. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946).

Despite the large number of documents that a subpoena may request, the harm to privacy interests from being compelled to submit the documents can be mitigated. The claimant's primary means of protection is to restrict the circulation of sensitive documents. When the documents are requested by a federal grand jury, the requirements of grand jury secrecy will impose some limits on the document's circulation.¹⁰¹ If and when the investigation turns into a criminal case, the subpoenaed person can probably reduce the circulation of the documents by obtaining a protective order.¹⁰² A protective order can also restrict the circulation of documents submitted in a civil case.¹⁰³ These orders can be designed to keep the documents from everyone except the opposing party's counsel, who may be ordered not to reveal their contents. The courts are accustomed to limiting discovery, through protective orders and other methods, in order to protect privacy interests.¹⁰⁴ The various methods devised for maintaining the privacy of a litigant's trade secrets offer

101. See FED. R. CRIM. P. 6(e); *Douglas Oil Co. v. Petrol Stops N.W.*, 441 U.S. 211, 222 (1979) (transcripts of grand jury testimony should be disclosed only to litigants in related cases under similar circumstances); *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958) (same).

102. Rule 16(d)(1) of the Federal Rules of Criminal Procedure allows even a non-party to obtain a protective order for cause. FED. R. CRIM. P. 16(d)(1).

103. FED. R. CIV. P. 26(c). The privacy interests that support suppressing a person's documents when they are subpoenaed by the government apply with less force when the documents are sought by a private plaintiff. The danger of the documents being used to prosecute the claimant decreases, especially when a protective order limits access to the documents. Nevertheless, the government may learn of the documents if they are used at trial or subpoenaed from the adverse party.

More importantly, the interest which the proponents of a privacy approach sought to protect seems to center on a person's interest in keeping personal writings from the eyes of the government. Hence, the privilege operates as a limit on government power. Disclosing documents to private plaintiffs, while just as embarrassing as disclosing them to the government, enhances the government's power much less.

104. "Privacy interests" refer here only to the two interests described *supra* at notes 90-91 and accompanying text. The current law gives absolute protection to much private information under other privileges. See, e.g., *United States v. Goldfarb*, 328 F.2d 280, 281 (6th Cir.) (attorney-client), *cert. denied*, 377 U.S. 976 (1964); Note, *The Physician-Patient Privilege*, 58 W. VA. L. REV. 76 (1955); *United States v. Lustig*, 555 F.2d 737, 747 (9th Cir. 1977) (marital communications).

The law also protects privacy interests by recognizing a tort action when private information is disclosed to a person's detriment. See *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931) (action for publicizing facts about the plaintiff's personal life) (superceded by statute; see *Roberts v. Gulf Oil Corp.* 147 Cal. App. 3d 770, 195 Cal. Rptr. 383 (1983)); *Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 367 P.2d 284 (1961) (bank's disclosure of plaintiff's finances supports action for breach of confidential relation). See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* ch. 20 (4th ed. 1971).

Related interests are protected by familiar constitutional limits on the government's power to regulate intimate, see, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraceptives), or private activities, see, e.g., *Stanley v. Georgia*, 394 U.S. 557 (1969) (home display of pornography).

examples.¹⁰⁵

Assuming, however, that Anne Frank should remain able to resist a subpoena for her diary, she should not need to rely on the privilege. The right to a "private enclave where one can lead a private life" need not be abandoned merely because the fifth amendment is an inappropriate vehicle for securing it. One alternative is to recognize a right under the first amendment to suppress a person's writings which have been kept confidential and which deal with her private thoughts and feelings or intimate personal matters.

There are many advantages in not basing such a right in the fifth amendment. Traditional fifth amendment rules derived to deal with testimony, but often inappropriate for documents, may be jettisoned. One such rule provides that the claimant need not turn over allegedly privileged information in camera so the court can determine whether the privilege applies.¹⁰⁶ Another fifth amendment rule gives the claimant the benefit of any doubt about whether the information is privileged.¹⁰⁷ As discussed below, when applied to documents, the combined effect of these rules is to prevent courts from determining whether a reasonable expectation of privacy has been maintained as to the documents in question. Under a new privilege the courts need not be hampered by these rules and thus will be better able to apply whatever test is developed to protect privacy interests. For example, the claimant can be required not only to submit the documents in camera, but to show he has authored them and has sufficiently restricted their circulation. He can also be required to show the extent to which their subject matter is personal rather than business. In short, he can be required to meet whatever standards for a first amendment privilege are developed by the courts.

Such a first amendment "privilege" draws support from several cases suggesting a similar privilege for certain testimony.¹⁰⁸ In *Gibson v. Florida Legislative Investigation Committee*,¹⁰⁹ the Court recognized a first amendment privilege in upholding a witness's refusal to answer questions about his politi-

105. See 4 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 26,750, at 26-540; see, e.g., *Xerox Corp. v. IBM Corp.*, 64 F.R.D. 367, 383 (S.D.N.Y. 1974) (production ordered to "counsel only"); *Hunter v. International Sys. & Control Corp.*, 51 F.R.D. 251, 262 (W.D. Mo. 1970) (production conditioned on preventing disclosure to others).

106. See note 109 *infra*.

107. Cf. *Hoffman v. United States*, 341 U.S. 479, 488 (1951) (disclosure of allegedly privileged information cannot be compelled unless it is perfectly clear that the information is not privileged).

108. See *Baird v. State Bar of Ariz.*, 401 U.S. 1, 8 (1970); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958); *Watkins v. New York*, 354 U.S. 178, 200 (1957); *Black Panther Party v. Smith*, 661 F.2d 1243, 1272 (D.C. Cir. 1981), *vacated sub. nom. Moore v. Black Panther Party*, 458 U.S. 1118 (1982); Note, *Discovery*, 27 VILL. L. REV. 198, 208 (1982). *But see Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (refusing to recognize a first amendment privilege for newsmen); *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 161 (1970) (refusing to recognize a first amendment privilege protecting political actions).

109. 372 U.S. 539, 543-46 (1963).

cal beliefs and associations. Before answers to such questions could be compelled, the state must "convincingly show a substantial relation between the information sought and a subject of overriding and compelling State interest."¹¹⁰ A similar showing could be required before invading a person's private enclave by compelling submission of qualifying personal documents.

Development of the first amendment privilege suggested in *Gibson* should prevent wide-ranging legislative inquiries into the beliefs and associations of political dissidents. Before *Gibson*, dissidents lacked any method for blocking such inquiries other than the privilege against self-incrimination. The privilege was an awkward tool for this purpose because dissidents could only invoke it to block those inquiries to which their replies would incriminate. Moreover, by invoking the privilege they appeared, at least in the public's eye, to be admitting wrongdoing.

In contrast, one who refuses to respond because the government inquiry intrudes upon constitutionally protected beliefs and associations throws attention on whether the government is entitled to ask the question, not on the incriminatory nature of his response. The claimant's refusal to answer is seen to spring from the impropriety of the inquiry, not from the illegality of his conduct.¹¹¹

In summary, the privacy policy as an independent goal of the privilege collided with the privilege's approach to testimony and, to some extent, with the fourth amendment's approach to privacy. Moreover, privacy interests could be protected to some extent by protective orders and by other methods for restricting the circulation of documents. Finally, privacy interests overlapped with first and ninth amendment values and could be protected with more precision and candor, and less administrative difficulty, by evolving a privilege based on those amendments. The awkward attempt to protect documents under the self-incrimination privilege may have delayed that evolution.

2. The Practical Effect of the Privacy Rationale

In practice, the privacy approach allowed a great many more documents to be suppressed than the image of Anne Frank's diary or the wish to protect legitimate expectations of privacy would warrant. Typically, a person or proprietorship subpoenaed to produce its documents would reply with a motion to quash the entire subpoena based on the privilege. As long as the claimant was not an organization ineligible to invoke the privilege, the motion to quash generally succeeded and all documents in the claimant's possession were suppressed.¹¹² The claimant did not need to show anything about the documents'

110. *Id.* at 546.

111. Others have argued that first amendment values will be better protected by developing the *Gibson* first amendment privilege than by continuing to rely on the privilege against self-incrimination. See Friendly, *supra* note 61, at 696.

112. *Cf. In re Lukich*, 335 F. Supp. 557, 558 (N.D. Ohio 1971) (documents not suppressed; documents owned by single shareholder corporation).

subject matter, authorship, or previous distribution.¹¹³ It was not even clear that the claimant needed to claim that his documents would incriminate him.¹¹⁴ Advertising flyers prepared by the claimant's employees and seen by millions, price lists, and automobile repair bills were as likely to be suppressed as the claimant's secret diaries of her thoughts and feelings. While the claimant's reasonable expectations of privacy were said to justify the general rule allowing her to suppress documents in her possession, courts did not insist upon a document by document inquiry into whether the claimant had preserved a reasonable expectation of privacy as to each document.¹¹⁵

Some of those committed to using the privilege to protect privacy, most notably Justices Brennan, Marshall, and Powell, had implied that the privilege should only extend to documents in which the invoker maintained a "legitimate expectation of privacy."¹¹⁶ Where a claimant had disclosed his records to others or where others acquired access to the records, a reasonable expectation

113. Cf. *United States v. Calandra*, 414 U.S. 338, 346 (1974) (expectation of privacy test applied to voice identification).

114. *Boyd* and the property rights approach in general did not emphasize whether the documents were incriminatory, nor did the logic of the privacy approach. The interest in maintaining the privacy of one's documents would be sacrificed when the documents were required to be produced, regardless of their incriminatory character.

The lower courts differed, with some flatly requiring the claimant to show that the documents were incriminatory, and others relying on the general rule that a person may not be compelled to produce any of his documents, save for those falling within the required records exception. Compare *United States v. Ponder*, 475 F.2d 37, 39 (5th Cir. 1973) (claimant must show that each document is incriminatory) and *In re Turner*, 309 F.2d 69, 71 (2d Cir. 1962) (same) with *Stuart v. United States*, 416 F.2d 459, 462 n.3 (5th Cir. 1969) (documents suppressed without inquiring into whether they were incriminatory); and *United States v. Judson*, 322 F.2d 460, 467 (9th Cir. 1963) (same).

In some cases, the Supreme Court has assumed, without explanation, that the claimant must at least allege that the documents are incriminatory. *Fisher v. United States*, 425 U.S. 391, 417 (1976) (Brennan, J., concurring); *Bellis v. United States*, 417 U.S. 85, 90 (1974); *United States v. Calandra*, 414 U.S. 338, 346 (1974); *United States v. White*, 322 U.S. 694, 701 (1944). However, the Court has never indicated the method for determining whether a document is incriminatory.

115. See, e.g., *Hill v. Philpott*, 445 F.2d 144, 148 (7th Cir.) (suppression is allowed if the evidence sought "relates to some communicative act or writing"), cert. denied, 404 U.S. 991 (1971); *In re Grand Jury Proceedings*, 1972 TRADE CASES (CCH) ¶ 73,857 at 91,594 (W.D. Ky. 1972) (all non-corporate documents suppressed without inquiry into whether expectation of privacy maintained as to each).

116. Justice Marshall has advocated a factor test that weighs the nature of the documents (compare a diary with an advertisement), and the steps that the claimant has taken to secure privacy (compare use of a safety deposit box with general internal distribution). *Couch*, 409 U.S. at 351 (Marshall, J., dissenting). Similarly, Justice Brennan has emphasized whether the documents are "wholly business rather than personal in nature," the prior access to the documents allowed others, and the claimant's attempts to maintain secrecy. *Fisher*, 425 U.S. at 414, 425 (Brennan, J., concurring); see also *Couch*, 409 U.S. at 335-36 (Powell, J.) (test is whether expectation of privacy is reasonable).

of privacy no longer existed. The subject matter of the documents also affected their protected status—the more the subject matter is wholly business rather than personal, the less the claimant's privacy interests.¹¹⁷ In theory, therefore, the privacy policy would allow suppression of relatively few documents.

Unfortunately, any test based on the document's subject matter, extent of circulation, availability to third parties, or incriminatory character presented major administrative problems. Such a test called for document by document judgments which the trial court could not render sensibly. One reason, already noted, was that other fifth amendment cases suggest the claimant cannot constitutionally be required to show her documents to the court.¹¹⁸ Yet the test suggested by the privacy proponents would require the trial judge to evaluate the subject matter and circulation of the allegedly privileged documents without seeing them. The test would therefore pressure the trial judge toward accepting the claimant's representations about the documents' subject matter and circulation uncritically.

Even if the documents were available to the trial judge, the privacy test would impose a prohibitive burden. A large sole proprietorship may submit a thousand documents in response to a subpoena in an antitrust case. To tell if each one is wholly business rather than personal in nature, especially without guidance from opposing counsel, would have required the court to learn a great deal about the invoker's personal life, background, and business. How was the court to know, for example, whether the name placed on the claimant's desk calendar for 2:00 p.m. on March 15 was that of an intimate personal friend or of a business competitor with whom the claimant was fixing prices?

Determining whether each document had been seen only by the claimant

117. *Fisher*, 425 U.S. at 426-27 (Brennan, J., concurring). Nevertheless, even these Justices continued to protect all the business records of a sole proprietor on the ground that such records are an extension of "an aspect of a person's activities, though concededly not the more intimate aspects of one's life." *Id.*; see *Bellis v. United States*, 417 U.S. 85, 87 (1974) (Marshall, J.).

118. The rule that a witness claiming the privilege need not reveal his response to the court, even *in camera*, suggests by analogy that the claimant opposing the document subpoena need not submit documents. *United States v. Weisman*, 111 F.2d 260, 262 (2d Cir. 1940) (L. Hand, J.) (witness who invokes privilege need not respond); see also *Malloy v. Hogan*, 378 U.S. 1, 11-14 (1964); *Empak v. United States*, 349 U.S. 190, 198 n.18 (1955); *Hoffman v. United States*, 341 U.S. 479, 487-89 (1951). See generally *United States v. Reynolds*, 345 U.S. 1, 8-9 (1953); Weston, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 581 n.36 (1978) (*in camera* proceedings are feasible for assessing claims of most privileges, but not for determining claims of the privilege against self-incrimination). But see *Brown v. United States*, 276 U.S. 134, 144 (1928) (documents must be revealed so the court may determine whether they are privileged).

Some courts have suggested an intermediate position that would require the party invoking the privilege to describe the documents but not submit them. *United States v. Jones*, 538 F.2d 225, 226 (8th Cir. 1976) *cert. denied*, 429 U.S. 1040 (1977); *United States v. Johnson*, 465 F.2d 793, 796 (5th Cir. 1972).

would have been equally difficult. Often the face of a document does not indicate its past circulation. Unless the claimant's word about the document's circulation was accepted uncritically, the court would have needed to subpoena others who might have seen the documents. Determining the right of access to a document and determining the document's incriminatory character when it was subpoenaed would have also presented difficulties.¹¹⁹

While the "legitimate expectation of privacy" test may be appropriate for deciding whether a warrant is needed to seize specified items or communications under the fourth amendment; it could not be sensibly applied to decide fifth amendment claims when a broad subpoena asks for many documents which are only described by general categories. The failure of lower courts to take the test seriously was inevitable.

D. *Other Policies Behind the Privilege and the Protection of Documents*

Because the assumption that the privilege protects some documents in themselves has been so durable, a thorough search for support for this assumption is unwarranted. Without the privacy policy, the question becomes whether any generally recognized policy behind the privilege calls for protecting documents in themselves.¹²⁰ The other policies expressed in *Murphy* fall into two categories—the foxhunter policy and the old woman's policy. The foxhunter policies reflect, in turn, two general goals—an attempt to influence the methods by which law enforcement officers investigate and prosecute crimes, and a determination to maintain the proper balance of burdens and advantage between the government and the criminal suspect. The first goal is furthered by using the privilege to discourage browbeating and torture, and to encourage the search for evidence other than confessions. The second goal reflects the historic dissatisfaction with inquisitorial systems where the suspect was forced to assist in his own undoing. The goal is to ensure an adversary system in which a state wishing to subject a suspect to fines or imprisonment is not entitled to help from the suspect and must shoulder the entire burden of proving guilt itself. This goal reflects beliefs about the proper distance and allocation of power between the state and the individual which are central to the views of

119. A document will be incriminatory as long as it might provide a clue leading to evidence of criminal conduct. A document which appears innocuous on its face may be incriminatory when considered in combination with other circumstances. *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Coffey v. United States*, 198 F.2d 438, 440 (3d Cir. 1952); Falknor, *Self-incrimination Privilege: Links in the Chain*, 5 VAND. L. REV. 479, 483 (1952). Determination of whether a document is incriminatory requires substantial background knowledge about the activities of the claimant, the crimes that he may have committed, and investigatory paths that the government might pursue. A court is hardly in a position to obtain this knowledge when the documents are subpoenaed early in a government investigation or civil case.

120. This question must be separated from the question of whether any policies behind the privilege call for protecting the implied admissions that may accompany document submissions. See text accompanying notes 162-66 *infra*.

Hobbes and Locke and to individualism generally.¹²¹

Allowing a person to suppress documents does not discourage browbeating and torture. When a suspect is in police custody, the temptation to use coercive measures to obtain a confession is pronounced; the value of the privilege in discouraging browbeating or torture in that context is apparent. The temptation to browbeat a witness at a deposition or a trial in order to obtain a confession calls for some prophylactic measure like the privilege in that context as well. But subpoenaing a person to appear before a court or a grand jury and turn over his documents does not create an occasion for such abuses. When a person's instinct for self-preservation leads him to evade questions asking for a verbal statement, the police responses invited at the station-house are anger, trickery, and coercion. When a person fails to submit documents, the only government response invited is a further subpoena.¹²²

Nor must documents be suppressed in order to encourage the search for evidence other than confessions. Any incriminatory statements arising from the documents were uttered before the litigation or investigation began. As long as the statements were not written under any compulsion, the fear of compulsion that justifies the natural distrust of confessions does not apply to them. Excluding them automatically underestimates the fact finder's capacity to determine their reliability. Excluding them also opposes long-standing evidence principles which recognize the reliability of past writings of a party and allow such writings to be admitted against the party, despite the lack of cross-examination at the time the statements were written.¹²³

Denying protection to documents would not threaten the goal of maintaining the proper balance of advantage between the state and the individual as that goal has been previously understood.¹²⁴ Granted, compelling the submission of documents will increase the extent to which the suspect may be forced to assist in gathering evidence against himself. For example, in anti-

121. See T. HOBBS, *LEVIATHAN* 108 (H. Schneider ed. 1958); *Locke, Second Treatise . . . of Civil Government*, in *ENGLISH PHILOSOPHERS FROM BACON TO MILL* (E. Burt ed. 1939).

122. The greater the danger that an unsatisfactory response will lead to coercion being applied until the desired response is obtained, the more the need for the privilege. C. MCCORMICK, *supra* note 17, ch. 13.

123. See *FED. R. EVID.* 801(d)(1). When the statements on the documents are not written by the person subpoenaed, there is plainly nothing "confessional" about them, and this policy does not come into play.

124. In *Watts v. Indiana*, 338 U.S. 49 (1949), the Court identified some specific requirements reflecting the commitment to an adversarial system:

The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands.

Id. at 54.

trust cases submitting one's documents may require much effort, and the documents themselves may incriminate. Neither the involvement of the suspect in submitting evidence nor the incriminating character of the evidence controls, however. Suspects may provide important evidence against themselves when they are forced to appear in line-ups and to provide fingerprints, blood tests, and handwriting and voice samples. In compelling these measures, the Court has clearly stated that this policy is not offended unless the government proves its case or obtains its leads by forcing a person to testify against himself.¹²⁵ Documents voluntarily prepared in the past do not contain testimony compelled by the government, and therefore allowing the government to use this evidence does not give it an inappropriate advantage.

Nor does the old woman policy call for protecting documents in themselves. This policy reflects the desire to avoid subjecting persons to the "cruel trilemma" of telling the truth and admitting guilt, refusing to answer and being found in contempt, or lying and committing perjury. It reflects not only humanitarian concerns for avoiding cruelty but due process concerns for maintaining the appearance of humane legal processes.¹²⁶ Documents prepared voluntarily before a subpoena is issued are not prepared in the face of the cruel trilemma. The contents of the documents—unlike the contents of a verbal statement by a person called to testify—are not compelled in such a way that the author in composing them is put to a choice of incrimination, perjury, or contempt.

This summary indicates that none of the policies which are now said to inform the privilege call for using the privilege to protect documents in themselves. Those who would immunize some documents, such as diaries, from subpoena must base this rule on some other privilege or policy.

E. *Fisher v. United States—The End of Protecting Documents Under the Privilege*

The watershed opinion *Fisher v. United States*¹²⁷ put to rest the claim—whether based on property rights, privacy, or other grounds—that the privilege protects documents in themselves. In *Fisher*, a taxpayer was invoking the privilege in order to suppress tax-related summaries which his accountant had prepared. The summaries were in the possession of the taxpayer's attorney to whom the IRS summons was directed. Although transferring the summaries

125. *Gilbert v. California*, 388 U.S. 263, 265-67 (1967) (handwriting samples); *United States v. Wade*, 388 U.S. 218, 222-23 (1967) (appearing in line-ups); *Schmerber v. California*, 384 U.S. 757, 761 (1966) (blood tests).

Admittedly, compelling a person to submit documents or any property does extort some implied admissions, such as the admission that the person possessed the property at the time of the subpoena. Whether extorting these implied admissions seriously offends this policy is discussed at text accompanying notes 168-72 *infra*.

126. 8 J. WIGMORE, *supra* note 12, § 2251.

127. 425 U.S. 391 (1976).

to another would normally have destroyed the taxpayer's fifth amendment privilege,¹²⁸ the Court found the attorney-client privilege still applied to the summaries in the hands of the attorney.¹²⁹ Thus, the Court reached the major issue whether the summaries would have been privileged had they remained in the hands of the taxpayer.¹³⁰

Justice White approached this issue by reviewing *Boyd* and the later inroads on the protection of documents. He pointed out the connection between *Boyd* and the mere evidence rule, both of which rested on a single-minded commitment to property rights.¹³¹ With the demise of the mere evidence rule, the foundations of *Boyd* were "washed away."

White further refuted the claim that under *Schmerber*, documents prepared voluntarily in the past constituted testimony or communications that, unlike other physical evidence, were immune from subpoena. Rather, "the privilege protects the person only against being incriminated by his compelled testimonial communications."¹³² Justice White emphasized that documents prepared voluntarily do not contain any compelled testimonial evidence. Justice Brennan's language in *Schmerber* suggesting the opposite—that voluntarily produced documents do contain testimonial evidence—was ignored.

Justice White addressed the privacy policy directly. He insisted that while privacy might be guarded incidentally through protecting against compelled self-incrimination,¹³³ protecting privacy was not a goal of the privilege:

We cannot cut the Fifth Amendment completely loose from the moorings of its language and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment. We adhere to the view that the Fifth Amendment protects against "compelled self-incrimination, not the disclosure of private information."¹³⁴

Fisher thus resolved that documents were to be treated like any other physical

128. *Id.* at 396.

129. *Id.* at 402-05.

130. *Id.* at 405.

131. "[T]he prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him." *Id.* at 409 (citing *Gouled v. United States*, 255 U.S. 298 (1921)).

132. "As far as this record demonstrates, the preparation of all of the papers sought in this case was wholly voluntary, and they cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else. The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else." 425 U.S. at 410 (citing *Schmerber v. California*, 384 U.S. 757, 761) (footnote omitted).

133. "It is true that the court has often stated that one of the several purposes served by the constitutional privilege against compelled testimonial self-incrimination is that of protecting personal privacy. But the court has never suggested that every invasion of privacy violates the privilege." 425 U.S. at 399 (citations omitted).

134. *Id.* at 400-01.

property in the subpoenaed person's possession.¹³⁵ The protection of the privilege was finally limited to compelled testimony, although it would naturally extend to compelled writings as well.¹³⁶

135. As long as the subpoenaed documents were prepared voluntarily, "the only thing compelled is the act of producing the documents, and the compelled act is the same as the one performed when a chattel . . . is demanded." *Id.* at 410 n.11.

136. Despite the Court's clear statement that the privilege protects only the incriminatory implied admission coming from the submission of documents, the Fifth Circuit, among others, continues to assume that the privilege applies to some documents in themselves. *E.g.*, *United States v. Davis*, 636 F.2d 1028, 1042 (5th Cir. 1981); *see also In re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033, 1042 (3d Cir. 1980) (some documents still protected in themselves); *ICC v. Gould*, 629 F.2d 847, 858-59 (3d Cir. 1980) (same), *cert. denied*, 449 U.S. 1077 (1981). The confusion may stem from the penultimate paragraph in *Fisher* :

Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his "private papers," . . . We do hold that compliance with a summons directing the taxpayer to produce the accountant's documents involved in these cases would involve no incriminating testimony within the protection of the Fifth Amendment.

425 U.S. at 414 (citing *Boyd v. United States*, 116 U.S. 616, 634-35 (1886)). The Court meant to reserve this question only because compelling submission of records *that the taxpayer had written* might compel implied admissions that would clearly authenticate the records. Such implied admissions might be sufficiently testimonial and incriminatory to be privileged. *See infra* text accompanying notes 131-34.

Justice White did not intend to renege on his previous discussion. He did not intend to suggest that papers owned by the taxpayer would be protected regardless of whether their submission entailed sufficiently incriminatory and testimonial implied admissions. The Fifth Circuit has seized upon this paragraph, however, to claim that documents are absolutely protected "from production by summons or subpoena as long as they are in the hands of the owner." *United States v. Davis*, 636 F.2d 1028, 1042 (5th Cir. 1981). The Fifth Circuit's position that ownership and possession suffice was rejected by the Supreme Court at least as early as 1948. *See Shapiro v. United States*, 335 U.S. 1 (1948) (compelling submission of required records owned and possessed by claimant). At the most, Justice White was saying that ownership and possession might be necessary conditions for suppression, not sufficient ones.

The paragraph in question has also been misconstrued to mean that papers of a more private or personal nature than the accountant's summaries may be privileged in themselves. Wilson & Matz, *Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods*, 14 AM. CRIM. L. REV. 651, 664 (1977). Fortunately, the citation to *Boyd* (where the document in question was a business invoice as to which no reasonable expectation of privacy existed), clarifies that "private papers" here means personally owned papers, not papers for which a reasonable expectation of privacy exists. Justice White did not mean to say that some personally owned documents may yet be protected in themselves; only that compelling submission of documents owned and authored by the claimant might compel implied admissions sufficiently testimonial and incriminatory to warrant protection.

Admittedly, the Court in *Andresen v. Maryland*, 427 U.S. 463, 465, 477 (1976), if only by its repeated reference to the business nature of the records in issue, seemed to reserve the question whether some documents might be of such a personal nature as to be immune from seizure or subpoena. Moreover, in *Fisher* Justice White also distinguished a personal diary from the accountant's summaries. 425 U.S. at 401 n.7. Read

III. PROTECTING THE IMPLIED ADMISSIONS FROM SUBMITTING DOCUMENTS

A. *The Implied Admissions Theory: Fisher's Tangled Line*

Although *Fisher* clarified that the privilege does not protect documents, it did not dispose of the document submission issue. For, according to Justice White, the privilege may yet protect a person from being compelled to submit documents. The Court's rationale, derived primarily from Wigmore,¹³⁷ reasons that forcing the persons subpoenaed to submit the requested documents (or logically, any physical objects in his control) impliedly forces him to admit that these documents exist, were in his possession or control, and were the documents requested.¹³⁸ Though never spoken, these implied admissions, unlike the documents themselves, are testimonial in nature and are compelled when the submission of documents is compelled.¹³⁹

When these implied admissions are sufficiently testimonial and incriminating, the privilege may be invoked and the documents suppressed. This is true even when the documents themselves would serve as more important evidence than the implied admissions. After *Fisher*, attention focuses not on the ownership, private nature, or incriminating character of the documents themselves, but on whether the claimant will incriminate himself by admitting each document exists, is in his possession or control, and is responsive to the subpoena. Conceivably, innocuous documents may now be suppressed and highly incriminating documents compelled; the key is whether the judge considers the admissions implied from submitting the documents sufficiently testimonial and incriminating. That the government only wants the documents and is not interested in using the implied admissions is immaterial.

This section examines the implied admissions theory as described and applied in *Fisher*. The more closely the theory is examined, and the more it is compared with standards governing related matters, the more the theory reveals itself to be attenuated in principle and unworkable in application.

B. *The Uneven Application of the Implied Admissions Theory*

The notion that submitting subpoenaed property constitutes testimony has

in context, however, White was merely suggesting that the privacy concerns presented by a subpoena for a personal diary might warrant protecting the diary on some grounds other than the fifth amendment, such as the first amendment. *Id.* at 401. Fortunately, the Court has reaffirmed since *Fisher* that documents are not protected in themselves. *United States v. Doe*, 104 S. Ct. 1237, 1241-42 (1984).

137. 8 J. WIGMORE, *supra* note 12, §§ 2263-64, at 379-80.

138. *Fisher*, 425 U.S. at 410. Justice White suggested that the implied admissions theory underlay *Couch* and *Schmerber*. 425 U.S. at 412 n.12.

139. Probably the most common method for introducing the implied admissions into evidence would be through the testimony of the investigator who issued the subpoena for the documents and witnessed their submission by the person subpoenaed. The government also could conceivably introduce any cover letter that the person subpoenaed might have included with the documents verifying that they are the documents requested.

not been applied evenhandedly. The Court has allowed other acts to be compelled even though the acts equally constituted testimony. As Justice White acknowledged, forcing an accused to provide a handwriting sample also compels implied admissions: "When an accused is required to submit a handwriting exemplar he admits his ability to write and impliedly asserts that the exemplar is his writing."¹⁴⁰ These admissions are compelled nonetheless.

Perhaps the most incriminating implied admissions compelled by the Court came in *California v. Byers*.¹⁴¹ A plurality upheld a traffic statute compelling a person in an accident involving property damage to stop at the scene and give his name and address. This compelled conduct impliedly admitted that the person had been involved in the accident, that he believed that property damage had resulted, and that the name and address given were correct.¹⁴² More significantly, the compelled conduct forced the accused to focus attention on himself as a suspect or witness, a result not shared by compelling implied admissions that accompany submitting documents.

In upholding the statute in *Byers*, Chief Justice Burger compared the admissions to the implied admission compelled when a person is put in a line-up and forced to utter voice samples. In the latter case, the admission implied is that the compelled statements are uttered in the person's "normal, undisguised voice." Yet in *United States v. Wade*,¹⁴³ when the line-up procedures were attacked, the Court attached no significance to this implied admission on the ground that it was not "testimonial" under the privilege.¹⁴⁴ Chief Justice Burger also noted that in earlier cases the Court had compelled the admissions inherent in filing tax returns.¹⁴⁵

140. *Fisher*, 425 U.S. at 411; see *People v. Collier*, 44 Cal. Rptr. 465, 469 (1965); Weintraub, *Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination*, 10 VAND. L. REV. 485, 496-97, 505 (1957).

141. 402 U.S. 424 (1971) (plurality opinion).

142. *Id.* at 456 (Harlan, J., concurring).

143. 388 U.S. 218 (1967).

144. *Id.* at 222-23.

145. 402 U.S. at 428-29, 433-34; see also *United States v. Sullivan*, 274 U.S. 259 (1927) (tax returns); cf. *Gilbert v. California*, 388 U.S. 263 (1967) (handwriting samples, non-tax case). In *Sullivan*, the Court allowed the government to compel the taxpayers to file a return and pay the tax due. The privilege could not be invoked by refusing to file, but only by invoking the privilege on the return itself. Compelling the filing forced the taxpayer to admit that the name and address on the return were true, and that the filer received enough income to require reporting. Nevertheless, Justice Holmes believed the claim of privilege was "an extreme if not extravagant application of the Fifth Amendment." 274 U.S. at 263-64. Although the Court did not emphasize the point, recognizing the implied admissions theory in *Sullivan* would have given taxpayers who fail to file a safe defense.

Some lower courts have ignored the implied admissions that accompany compelled acts on the ground that the admissions are merely incidental to a non-testimonial act. See *Welch v. District Court of Vt.*, 461 F. Supp. 592, 596 (D. Vt. 1978) (statements uttered accompanying refusal to take a breathalyzer admitted as incident to refusal); cf. *United States v. Austin-Bagley Corp.*, 31 F.2d 229, 234 (2d Cir. 1929) (L. Hand,

Even advocates of the implied admission theory can hardly contend that *no* acts may be compelled that impliedly admit incriminating matters. For example, acceptance of a subpoena or summons impliedly admits that the person accepting is the person to whom the subpoena or summons is addressed. Similarly, taking the stand when one's name is called at a civil trial impliedly adopts the name called and surely situations exist in which these admissions of one's identification incriminate.

The claim that incriminatory implied admissions should not be compelled also conflicts with statutes requiring explicit disclosures which may incriminate. Examples are statutes requiring doctors to report deaths and their causes, druggists to report sales of poisons, and persons in charge of factories to report accidents and injuries.¹⁴⁶ Any analysis of whether these statutes violate the privilege must begin with the recognition that the statutes compel admissions which may expressly or impliedly incriminate.

Implied admissions were also compelled in previous cases involving the submission of documents. For instance, the required records rule of *Shapiro v. United States*¹⁴⁷ allows the government to compel a person to submit records he was statutorily required to keep. Yet compelling submission of these documents also compels the usual implied admissions. Indeed, the admissions implied from submitting required records include the admission that these documents are the ones the statute has required, admissions which may be particularly significant and incriminating.

The Court also compels implied admissions when it requires a custodian of an organization's records to submit them when subpoenaed, even though doing so would incriminate her. Justice White acknowledged this in *Fisher*.

Moreover, . . . the custodian of corporate, union, or partnership books or those of a bankrupt business was ordered to respond to a subpoena for the business' books even though doing so involved a "representation that the documents produced are those demanded by the subpoena." . . .

In these cases compliance with the subpoena is required even though the books have been kept by the person subpoenaed and his producing them would itself be sufficient authentication to permit their introduction against him.¹⁴⁸

The custodian's implied admissions are just as likely to be testimonial and incriminating as the sole proprietor's.¹⁴⁹ Now that the Court in *Fisher* has

J.) ("[T]estimony auxiliary to the production [of documents] is as unprivileged as are the documents themselves.").

146. *E.g.*, *People v. Rosenheimer*, 209 N.Y. 115, 120, 102 N.E. 530, 532 (1913).

147. 335 U.S. 1 (1948).

148. *Fisher*, 425 U.S. at 413 & n.14 (citations omitted; quoting *Curcio v. United States*, 354 U.S. 118, 125 (1957)).

149. Sole owners of corporations have consistently been compelled to submit the corporate documents, even though they are incriminating themselves by implied admissions in doing so. *See Grant v. United States*, 227 U.S. 74, 79-80 (1913); *United States v. Shlom*, 420 F.2d 263, 265-66 (2d Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970);

ruled that documents of a sole proprietor are in themselves as unprivileged as documents of an organization, no reason exists for compelling the implied admissions of a custodian, but not a sole proprietor.

C. *The Requirement That Implied Admissions Be Sufficiently Testimonial and Incriminating*

Justice White was willing to compel implied admissions that were testimonial and incriminatory under certain circumstances. For instance, submission of the work papers of the accountant in *Fisher* could be compelled because the work paper's existence, possession by the claimant, and responsiveness to the summons were a "foregone conclusion" that did not need to be proven through the implied admissions.¹⁵⁰ Therefore, because the implied admissions were so unimportant to the government's case, Justice White believed they were not "sufficiently testimonial."¹⁵¹

If the implied admissions in *Fisher* had been sufficiently testimonial, they could be compelled on the alternative ground that they were not sufficiently incriminating.¹⁵² According to Justice White, the implied admissions would incriminate sufficiently only if they would authenticate the documents.

White's approach in deciding whether the implied admissions would be incriminatory was out-of-step with the approach generally used in deciding the incriminatory potential of information. For example, previous cases, most no-

Fineberg v. United States, 393 F.2d 417, 420 (9th Cir. 1968); *Hair Indus. Ltd. v. United States*, 340 F.2d 510, 511 (2d Cir. 1965); *see also* *United States v. Richardson*, 469 F.2d 349, 351-52 (10th Cir. 1972) (corporate officer who owned substantially all the stock); *cf.* *George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 288-89 (1968) (director/president/shareholder in closely held, family owned corporation).

150. The Court noted in *Fisher*: "The existence and location of the papers are foregone conclusions and the taxpayer adds little or nothing to the sum total of the government's information by conceding that he in fact has the papers." 425 U.S. at 411.

151. *Id.* at 411. In his concurring opinion, Justice Brennan attacked White's suggestion that implied admissions lose their testimonial character when they are unimportant as evidence. He stated that "I know of no Fifth Amendment principle which makes the testimonial nature of evidence and, therefore, one's protection against incriminating himself, turn on the strength of the Government's case against him." 425 U.S. at 429 (Brennan, J., concurring). While Justice Brennan's point seems indisputable, Justice White's meaning may have been more far-reaching. He may have meant that in deciding whether the implied admissions are *sufficiently* testimonial, a court should weigh policies instead of categorizing the admissions as testimonial or non-testimonial. Here, White may have concluded that compelling the implied admissions would not seriously offend the policies behind the privilege, and on that basis have labeled the admissions insufficiently testimonial.

152. *Id.* at 412-13. The notion that testimony can be insufficiently incriminating as a matter of degree to invoke the privilege conflicts with past decisions. *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 476 (1966) ("The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination.").

tably *Hoffman v. United States*¹⁵³ and *United States v. Coffey*,¹⁵⁴ established that admissions innocuous on their face will be considered incriminatory as long as they may provide either circumstantial evidence of criminal conduct or investigatory clues leading to evidence of criminal conduct.¹⁵⁵ The party seeking to overcome a claim of privilege bore a severe burden. In the Supreme Court's words, the claim of privilege could not be overruled unless it is "perfectly clear, from a careful consideration of all the circumstances in the case that the witness is mistaken, and the answer cannot possibly have such tendency" to incriminate."¹⁵⁶

Yet White appeared to put the burden of proof on the claimant and to require that the admissions be incriminatory on their face.¹⁵⁷ Under previous cases the claimant need only sketch a scenario of how his response could combine with other circumstantial evidence to show criminal conduct, or how it could lead investigators step-by-step to uncover evidence of criminal conduct.¹⁵⁸ Nevertheless, White felt sufficiently confident about the possible uses of these implied admissions to rule out all scenarios through which they could tend to incriminate except for the possibility that they would authenticate the papers.¹⁵⁹ The conflict with *Hoffman* was not just a matter of language. White

153. 341 U.S. 479 (1951).

154. 198 F.2d 438 (3d Cir. 1952), *approved in* *Emspak v. United States*, 349 U.S. 190, 198 n.18 (1955).

155. 341 U.S. at 486-87; 198 F.2d at 440.

156. *Hoffman v. United States*, 341 U.S. at 488 (quoting *Temple v. Commonwealth*, 75 Va. 892, 898 (1881)). *See generally* Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 YALE L.J. 1082, 1090 (1982).

157. The *Fisher* Court stated that:

[S]urely it is not illegal to seek accounting help in connection with one's tax returns or for the accountant to prepare workpapers and deliver them to the taxpayer. At this juncture, we are quite unprepared to hold that either the fact of existence of the papers or of their possession by the taxpayer poses any realistic threat of incrimination to the taxpayer.

425 U.S. at 412.

158. *See supra* notes 113-14. Implied admissions may be incriminatory even though they appear innocuous. The court must determine whether the implied admissions considered in combination with other information might constitute circumstantial evidence or clues leading to evidence of criminal conduct. *E.g.*, *In re Atterbury*, 316 F.2d 106, 109-11 (6th Cir. 1963) (trial court erred in refusing to allow witnesses to show circumstances that made demanded testimony self-incriminatory); *In re Portell*, 245 F.2d 183, 185 (7th Cir. 1957) (trial court erred in excluding newspaper clippings showing how testimony would be self-incriminatory); *Ballantyne v. United States*, 237 F.2d 657, 664-65 (5th Cir. 1956) (prior statements of witnesses to IRS agents and grand jury showed that answering grand jury question would incriminate witness); *see also* *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951) (response can be shown to be incriminating without introducing evidence).

159. *See* 425 U.S. at 412-13. Conspicuously absent from White's discussion is any reference to *Hoffman*, perhaps suggesting that *Hoffman's* expansive view of incriminatory information is ripe for restriction. Another explanation for the failure to cite *Hoffman* is suggested by *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968). In these cases, the claimants attacked

recognized that the taxpayer in *Fisher*, by being compelled to submit the accountant's summaries, was forced to admit impliedly that the documents exist, were in his possession, and were responsive to the summons.¹⁶⁰ Under *Hoffman*, investigatory or evidentiary scenarios under which these admissions would tend to incriminate were not as inconceivable as Justice White suggested. Surely these admissions might have incriminated in ways other than by authenticating the documents. For instance, the taxpayer's implied admission that he possessed the summaries is some evidence that the summaries were sent to him, and that he read them or was otherwise aware of their contents. Thus, if the summaries contained the accountant's opinions about the legality of possible tax strategies, the implied admission that the taxpayer possessed them would help to establish the *scienter* element in a later prosecution for tax fraud.

In other contexts, the implied admissions from submitting documents may seriously incriminate even when they do not authenticate. For example, admitting possession of stolen documents may provide some evidence that the claimant stole the documents, not to mention damning evidence that the claimant received the stolen documents. In price-fixing cases, an executive's awareness of correspondence from competitors inviting him to participate in a price-fixing conspiracy may constitute circumstantial evidence of his own participation. His awareness of correspondence from competitors revealing their future pricing plans may provide circumstantial evidence of price fixing. By admitting possession of certain documents, a sole proprietor will help the government establish that the documents were kept in the regular course of business, a requirement needed for the government to admit the documents under the business record exception to the hearsay rule.¹⁶¹

statutes that required registration and taxation of gamblers. The fifth amendment attacks centered on compelled conduct that either incriminated in itself or implied testimony that incriminated. The Court paid little, if any, attention to *Hoffman* and its liberal standards for determining what is "incriminatory." Rather, the Court emphasized that a claimant must be confronted with hazards of incrimination that are "substantial and 'real'" and not merely trifling or imaginary." *Marchetti*, 390 U.S. at 53; *Grosso*, 390 U.S. at 67. The *Fisher* Court's failure to cite *Hoffman* accords with these cases and suggests that implied admissions will not be deemed incriminating as readily as testimony will be.

160. 425 U.S. at 410. The taxpayer's accountant had produced the summaries; thus, the taxpayer himself had not impliedly admitted anything. Nevertheless, because the issue was whether the summaries would have been privileged had they remained in the taxpayer's hands, the Court was forced to examine the implied admissions that would have been compelled had the taxpayer produced the summaries.

161. The Court noted in *Fisher*:

The taxpayer would be no more competent to authenticate the accountant's workpapers or reports by producing them than he would be to authenticate them if testifying orally. The taxpayer did not prepare the papers and could not vouch for their accuracy. The documents would not be admissible in evidence against the taxpayer without authenticating testimony. Without more, responding to the subpoena in the circumstances before us would not appear to represent a substantial threat of self-incrimination.

Justice White's treatment of the authenticity issue is no less baffling. According to White, whether a taxpayer's submission of documents will authenticate them depends on whether he prepared the documents himself. The taxpayer in *Fisher* did not prepare the accountant's summaries; therefore, his submission of them did not authenticate them, a fact White believed to be fatal to his fifth amendment claim. Only the accountant supposedly would be able to authenticate the summaries.

Under normal evidence principles, however, the accountant's summaries could be authenticated in any number of ways.¹⁶² Probably anyone who could recognize the summaries as genuine, based on their contents, character, the recognition of the accountant's signature, or other distinguishing features could authenticate them.¹⁶³ Indeed, the taxpayer's implied admission that he possessed the summaries is some evidence that he received them. Together with other evidence showing that the accountant had promised to prepare and send the summaries to the taxpayer, the implied admission of possession may indeed authenticate the summaries.¹⁶⁴

Another troubling suggestion in Justice White's opinion is that the taxpayer would not be able to authenticate the accountant's summaries because he would be unable to vouch for their "accuracy."¹⁶⁵ White stated that "production would express nothing more than the taxpayer's belief that the papers are those described in the subpoena. . . ."¹⁶⁶ Showing authenticity, however, involves a preliminary showing of the document's genuineness, not its accuracy.¹⁶⁷ Once authenticated, documents are often admitted into evidence for purposes other than showing the accuracy of any assertions they might contain; in these instances there is no need for a preliminary showing of the document's accuracy.

In *Fisher*, the record does not show the possible purposes for which the government might have introduced the summaries. Their "accuracy" may have been unimportant. If the government wanted to show the accuracy of the

425 U.S. at 412 (footnote omitted).

162. FED. R. EVID. 901 allows authentication or identification by any evidence "sufficient to support a finding that the matter in question is what its proponent claims." See 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 901(a)[02] (1983); Levin, *Authentication and Content of Writings*, 10 RUTGERS L. REV. 632, 635-37 (1956).

163. 5 J. WEINSTEIN & M. BERGER, *supra* note 162, § 901(b)(2)[01], Rule 2 (familiarity with handwriting); *id.* §§ 901(b)(2)[01]-[04] (distinctive characteristics of writing).

164. *E.g.*, *Greenbaum v. United States*, 80 F.2d 113, 124-25 (9th Cir. 1935) (company's mailing of letter shown by evidence of receipt of a letter through the mail bearing company's name and sent from a town in which the company operated); *cf.* *Conner v. Zanuzoski*, 36 Wash. 2d 458, 464-65, 218 P.2d 879, 882-83 (1950) (when combined with some evidence that a letter was written and mailed, evidence that a reply letter was received is sufficient to authenticate the original letter).

165. *Fisher*, 425 U.S. at 413.

166. *Id.* at 412.

167. See FED. R. EVID. 901.

assertions in the summaries, it would not only need to authenticate the summaries but also to bring them within one of the exceptions to the hearsay rule. The inability of the taxpayer to vouch for the summaries' "accuracy" does not negate the possibility that by impliedly admitting possession of the summaries, the taxpayer may have helped to authenticate them or may have otherwise incriminated himself.

In short, the implied admissions from submitting the accountant's summaries may have tended to incriminate the taxpayer under the *Hoffman* standards in several different ways. By asking only whether the implied admissions were on their face evidence of criminal conduct or would alone authenticate the summaries, the Court either underestimated their incriminatory potential or was presaging a major restriction in *Hoffman's* expansive notion of an incriminatory statement.

This section has described the requirements that implied admissions from submitting documents must be sufficiently testimonial, and sufficiently incriminating before the documents can be suppressed. The first requirement means at least that the admissions must not be foregone conclusions in light of the other evidence available to a prosecutor. Because a court must decide whether this requirement is met at the time for submitting the documents, it apparently must make a prediction about the other evidence which is likely to be available. The requirement that implied admissions be sufficiently incriminating carries a new and uncertain meaning. Implied admissions that authenticate the documents submitted appear to meet this test. But the Court's baffling treatment of the authenticity issue gives little guidance to lower courts that now must decide whether the implied admissions in their case will authenticate. Indeed, neither *Fisher* nor *United States v. Doe*,¹⁶⁸ the Court's only elaboration on *Fisher*, provides significant guidance about when implied admissions from submitting documents will satisfy the two requirements.¹⁶⁹ As a result, lower courts have tended to conclude that implied admissions will or will not meet these requirements without discussion and without principled analysis.¹⁷⁰

168. 104 S. Ct. 1237 (1984) (Court refused to review whether lower court correctly decided factual questions of whether implied admissions would authenticate and incriminate).

169. Standards for determining whether implied admissions are sufficiently incriminating are not likely to develop. The lack of standards combined with the unwillingness of higher courts to review decisions about whether implied admissions incriminate sufficiently give trial courts complete discretion on this issue. *But see id.* at 1243 n.13 (documents will not be suppressed if the government shows that their existence, possession, and authentication are "foregone conclusions").

170. *Fisher* has produced varying results in the lower courts. Some courts have suppressed all documents authored by the subpoenaed person, including business records, on the assumption that the implied admissions will incriminate the claimant by authenticating the documents. This principle allows the claimant to prevail without showing that the implied admissions from producing each document would incriminate. *In re Grand Jury Proceedings*, 626 F.2d 1051, 1058 (1st Cir. 1980); *United States v.*

D. Administering Fisher's Tangled Line

The greatest concern about the implied admissions theory, at least as described in *Fisher*, is the difficulty of administering it. When a person refuses to submit documents by claiming the privilege, courts now need to make a determination for each unseen document, determining not only whether admitting the existence, possession, and responsiveness of the document will incriminate sufficiently,¹⁷¹ but also whether the admissions are likely to be sufficiently important in government prosecution.¹⁷² Requiring these document by document

Plenson, 560 F.2d 890, 893 (8th Cir. 1977) (dicta), *cert. denied*, 434 U.S. 996 (1977); *United States v. Beattie*, 541 F.2d 329, 330-31 (2nd Cir. 1976); *In re Special Grand Jury No. 1*, 465 F. Supp. 800, 811 (D. Md. 1978) (emphasizing the uncertainty engendered by *Fisher*).

Other lower courts have refused to suppress documents that the claimant did not prepare. *In re Witness Before the Grand Jury*, 546 F.2d 825, 827 (9th Cir. 1976); *In re Berstein*, 425 F. Supp. 37, 39 (S.D. Fla. 1977); *cf.* *United States v. Osborne*, 561 F.2d 1334, 1339 (9th Cir. 1977) (attorney-client privilege); *In re Fischel*, 557 F.2d 209, 212 (9th Cir. 1977) (same). Occasionally a court attempts to follow *Fisher* carefully. *E.g.*, *In re Grand Jury Empaneled on January 17, 1980*, 505 F. Supp. 1041 (D.N.J. 1981) (submission ordered because existence, possession and location of documents were "foregone conclusions").

Other courts have suppressed the documents as long as they were owned by the subpoenaed party, even though he did not claim to have prepared them. *In re Grand Jury Subpoena Duces Tecum John Doe*, 466 F. Supp. 325, 327 (S.D.N.Y. 1979) (sufficient risk of incrimination if subpoenaed person's compliance will, in effect, admit possession of documents that might exist); *see also* *United States v. Helina*, 549 F.2d 713, 716 (9th Cir. 1977) (reaffirming *Boyd* and suppressing all documents in the claimant's possession, *Fisher* notwithstanding).

In contrast, one panel of the Ninth Circuit refused to suppress documents unless production would "ordinarily compel the taxpayer to restate, repeat or affirm the truth of the contents of the documents sought." *In re Fred R. Witte Center Glass No. 3*, 544 F.2d 1026, 1028 (9th Cir. 1976). If taken literally, this standard would rarely allow suppression. *See also* *United States v. Authement*, 607 F.2d 1129, 1131-32 (5th Cir. 1979) (applied implied admission test when property other than documents subpoenaed); *Fagan v. United States*, 545 F.2d 1005, 1007 (5th Cir. 1977) (construing *Fisher*); *Kenderdine, The Internal Revenue Service Summons to Produce Documents: Powers, Procedures and Taxpayer Defenses*, 64 MINN. L. REV. 73, 98 (1979) (lower courts still protect documents under the privilege).

171. The facts in *Fisher* suggest the Byzantine character of assessing whether implied admissions are incriminatory. One implied admission was that the claimant possessed or controlled the summaries. The claimant in *Fisher*, however, did not possess or control the summaries; his accountant did. The implied admission was false. Thus, under the Court's approach, the outcome turned on whether a false implied admission that was never made would have been incriminatory if it were made and if it were true.

172. Implied admissions will often be unimportant as evidence, especially when compared to the documents themselves. This suggests two tempting rationales for compelling submission of the documents. First, the court could prevent anyone from using the implied admissions as evidence against the claimant. For instance, the prosecutor could be required to authenticate the documents through independent testimony and to keep the source of the documents secret. Similarly, the court could obtain the government's assurance that it will not use the implied admissions against the claimant. In a

judgments, for which no coherent standards yet exist, puts a substantial burden on the court, especially in cases involving a large number of documents.

At the time these judgments must be rendered, a court will not have, and cannot feasibly obtain, the information it needs. In a private civil case, for example, the court must render its judgments when the government is not present. In a criminal case, the court must make its decision when the government probably does not know much about the documents the subpoenaed person is suppressing. Even if the government knew about the documents, the investigation is likely to be at such an early stage that the prosecutors will not know which offenses may be prosecuted or whether eventually they will gather other evidence which will render the implied admissions "forgone conclusions." Attempting to make decisions early in a civil or criminal case will be like grasping at shadows, due to the difficulty in determining whether the implied admissions from submitting any particular documents will incriminate or pose a practical danger or meet any other standard. The claimant will enjoy the benefit of the inevitable doubts about the application of the privilege which arise from the lack of information, and he should invariably prevail.¹⁷³

third variation, the court simply compels submission of the documents and the implied admissions, while relying on the claimant's ability to nullify a prosecution by showing that the implied admissions were used against him. Apparently, the theory is that when all use of the compelled admissions in criminal proceedings against the claimant is prevented, the admissions can be compelled. But this rationale contains a fatal flaw: only a statutory grant of use immunity (as determined by the prosecutor) can give the court authority to compel incriminating implied admissions. Because compelling the admissions may prevent a prosecution, it may only be done when approved by the prosecutor. Moreover, the prosecutor must follow the procedures of the immunity statute. His mere assurance of "no use" is insufficient. *United States v. Doe*, 104 S. Ct. 1237, 1244 (1984); *cf. Pillsbury Co. v. Conboy*, 103 S. Ct. 608, 616-17 (1983) (likelihood that desired testimony could not be used against the claimant does not warrant compelling the testimony absent an immunity order).

A second alternative, available only to the government, is to grant the claimant statutory use immunity for submitting the documents. This immunity, however, would cover only the implied admissions from submitting the documents and not their contents. *Doe*, 104 S. Ct. at 1244 n.17. However, the difficulty of showing "no use" of the implied admission means that this alternative may preclude prosecution of the claimant. The government will need to show that it did not use the implied admissions as evidence or clues *and* that it did not use them indirectly, in, for example, selecting its trial strategy or in selecting or ordering witnesses. *See Strachan, Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791, 810-31 (1978). For example, the government would need to show by clear and convincing evidence that the claimant's admission of possession had no effect on its planning or its decision to proceed. Since submitting documents admits not only their possession, but also their existence and responsiveness, merely authenticating the documents through independent evidence does not show "no use".

173. *Hoffman v. United States*, 341 U.S. 479, 488 (1951) (claim of privilege cannot be overruled unless it is perfectly clear that the response cannot tend to incriminate).

Uncertainties surrounding the procedures for claiming the privilege for documents also tend to give an individual or sole proprietor the ability to suppress any documents

IV. A NEW APPROACH

A. The "Sufficiently Testimonial" Rubric

Justice White's conclusion in *Fisher* that the implied admissions from submitting these documents would not be "sufficiently testimonial" for the privilege to apply points the way toward the more sensible and workable standard advocated here. The "sufficiently testimonial" standard contains enough flexibility to allow for the play of the policies behind the privilege. By its terms, the "sufficiently testimonial" standard acknowledges that in light of policy considerations, certain actions may be compelled, even though doing so inevitably compels some incriminatory implied admissions which are testimonial. By conceding some testimonial aspects to the compelled submission of documents or other property, the "sufficiently testimonial" standard admits that the reasons for denying the privilege are deeper and more complex than the testimonial/non-testimonial distinction suggests.

This standard would allow the Court to hold generally that the implied

in their possession. For instance, lower courts have not required a person who has withheld documents on grounds of privilege to inform the party who submitted the FED. R. CIV. P. 30 Request for Documents or the subpoena that some documents have been withheld. Even if the party requesting the documents asks whether any documents were withheld under a claim of privilege, it is not clear that the claimant will be penalized for failing to answer. U.S. DEP'T OF JUSTICE, ANTITRUST GRAND JURY PRACTICE MANUAL 86 n.20 (1975); Fairman, *The Antitrust Grand Jury: Representing the Corporation*, 13 LAW NOTES 45, 47 (1977). A few courts, however, have held that the claimant must indicate that he is withholding documents on the grounds of privilege and must attempt to identify the documents *in camera*. See *In re Bon Voyage Travel Agency*, 449 F. Supp. 250, 253 (N.D. Ill. 1978); *Sperry Rand Corp. v. IBM Corp.*, 45 F.R.D. 287, 291 (D. Del. 1968); J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 45.05[1] (2d ed. 1976).

This uncertainty gives the claimant substantial advantages. There is no reason why a person who wants to withhold privileged documents should indicate that the documents exist but are being withheld. It is better to let the requesting party assume that the documents submitted are the only ones responsive to the subpoena or Rule 30 request. This uncertainty lays a trap for the requesting party not versed in procedural niceties, and it requires all requesting parties to ask whether any documents were withheld. When the subpoenaed party does not follow up with an assurance that nothing was withheld, the requesting party should be suspicious. At that point, he may be able to persuade a court to force the subpoenaed party to reveal whether documents have been withheld, and if so, to describe them generally. *E.g.*, *United States v. 62.50 Acres of Land*, 23 F.R.D. 287, 289 (N.D. Ohio 1959) (court ordered identification of documents by interrogatories).

Another procedural rule assisting the claimant provides that the claimant cannot be held in contempt for failure to respond to a subpoena for documents as long as *any* of the documents requested are privileged. As a result, a subpoena requesting correspondence or memoranda can initially be resisted *in toto*, even though some of the documents requested are not privileged. See, *e.g.*, *Bowman Dairy Co. v. United States* 341 U.S. 214, 221 (1951); see also *In re Grand Jury Proceedings*, 601 F.2d 162, 172 (5th Cir. 1979) (contempt conviction overturned because subpoena asked for documents that included items protected by work-product privilege).

admissions from submitting documents or other property are insufficiently testimonial to trigger the protection of privilege. The only exception should arise in the rare and easily identifiable case where the language of the subpoena discloses on its face that the implied admissions from submitting the materials requested will necessarily establish the elements of a crime. This rare situation should arise only when the subpoena requests material the mere possession of which is criminal. Only then will compelling the implied admissions from submitting documents, "reduce the accusatorial system to a mere ritual."¹⁷⁴ In other words, in this rare situation, compelling the implied admissions will seriously offend the policy of maintaining the proper balance of advantages between the state and the individual suspect, a major policy behind the privilege. In all other situations, subpoenas for documents and other property should be enforced over a fifth amendment claim, without a laborious inquiry into the particular documents or the particular implied admissions.

This proposed rule draws support from past cases, from application of policies behind the privilege, and from a realization that all other holdings force standards upon the lower courts that they cannot sensibly administer. Justice Harlan's concurring opinion in *Byers* suggests the analysis supporting the proposed rule.¹⁷⁵ Harlan acknowledged that the implied admissions compelled by forcing a person in an accident to stop and identify himself will be highly incriminatory in some instances. He evaluated whether compelling the implied admissions would offend the policies behind the privilege.¹⁷⁶ For instance, he felt the preference for an adversary system reflected in the policy of maintaining the proper state-individual balance would not be seriously undermined by compelling these disclosures. State prosecutors and investigators would still need to put forth a substantial effort in order to obtain a conviction.¹⁷⁷ If the implied admissions from compelled acts so completely establish guilt that the accusatorial system which the privilege is supposed to secure is

174. *California v. Byers*, 402 U.S. 424, 456 (1971) (Harlan, J., concurring).

175. *See Byers*, 402 U.S. at 434-58 (Harlan, J., concurring).

176. *Id.* at 449. The Chief Justice adopted the same approach:

Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.

Id. at 427. The Chief Justice was not as willing, however, to acknowledge that compelling a person involved in an accident causing property damage to stop and identify himself produced implied admissions that were testimonial, and under *Hoffman*, incriminating. *Id.* at 431-34.

177. The Justice Harlan stated that "the State must still bear the burden of making the main evidentiary case against *Byers*. . . . To characterize this burden as a merely ritualistic confirmation of the "conviction" secured through compliance with the reporting requirement in issue would be a gross distortion of reality. . . . *Id.* at 457-58 (Harlan, J., concurring).

“reduced to a mere ritual,” compelling the acts would seriously offend the policies behind the privilege.¹⁷⁸

Justice Harlan next considered the interest in compelling the acts which carry the implied admissions. In *Byers*, he concluded that the state purposes for compelling this conduct, such as the interest in assisting the victims of accidents and the clear need for self-reporting to secure these purposes, outweighed the harm to the policies behind the privilege.

Applying Harlan’s approach, the first inquiry is whether forcing the implied admissions which accompany document submission would implicate the policies behind the privilege to any significant extent. The answer ought to be clear. At its worst, forcing these implied admissions is equivalent to forcing the subpoenaed person to state in an affidavit that the documents he is turning over exist, were in his possession or control, and were responsive to the subpoena. No further questioning or cross-examination is allowed, thus compelling these implied admissions does not invite browbeating, and there is no need to use the privilege as a prophylactic measure against browbeating. Nor are these implied admissions the kind of self-deprecatory statements which deserve our “natural distrust.” On the contrary, when a person submits a document, the implied admissions of its existence and his possession gain reliability from his ability to submit it. The coercion from having to submit documents plainly does not reduce the reliability of these implied admissions.

The old woman’s policy, which aims at avoiding the cruel trilemma of incrimination, perjury or contempt applies with greatly diminished force when the only testimony compelled is the unspoken set of admissions inherent in submitting a box of documents. Surely, the indignity from having to turn over boxes of documents does not compare with the indignity of having to admit wrongdoing verbally. Nor does the submission of documents recall the cruelty of the rack, the trial of John Lilburn, or any other procedures which historically led to the adoption of the privilege.¹⁷⁹ A policy which springs from revulsion against compelling a confession during legal proceedings applies with barely perceptible force when a person is merely asked to submit pre-existing documents. In the words of one commentator, the implied admissions theory “reeks of the oil lamp.”¹⁸⁰

A final policy concern is whether compelling these implied admissions will so eliminate the need for further effort by the prosecution that the adversary character of criminal proceedings will be lost. This concern does not arise in the normal case where a broad subpoena requests a substantial number of

178. *Id.* at 453 (Harlan, J., concurring).

179. Cromwell’s efforts to obtain the conviction of John Lilburn through self-incrimination probably constitute the most influential incident leading to the privilege. See *The Trial of John Lilburn and John Wharton*, 3 How. St. Tr. 1315 (1637), cited in *Miranda v. Arizona*, 384 U.S. 436, 459 (1966); L. LEVY, *THE ORIGINS OF THE FIFTH AMENDMENT* 390. The cruel trilemma that faced Lilburn hardly resembles that facing one who must turn over incriminating documents.

180. Friendly, *supra* note 105, at 702.

documents, the mere possession of which is not illegal. The implied admissions of possession hardly make the case; the government still faces the burden of making its case based on the documents themselves and on other evidence. This policy is implicated only when a subpoena asks for documents or other property the mere possession of which is a crime. Then the implied admission that one possesses the property may so establish guilt that the adversary character of criminal proceedings is lost. Except for this rare instance, however, compelling the implied admissions from submitting documents does not seriously offend the policies behind the privilege.

The rule proposed here is identical to the rule which now governs whenever the documents of an organization are subpoenaed, and both rules are shaped by the same policy concerns. Under the current rule, the corporate custodian must submit the organization's documents and, by oral testimony, must verify that these are the documents requested. The Supreme Court has refined the rule by holding that no further testimony, such as testimony about the location of documents not submitted, may be compelled.¹⁸¹ As a policy matter, merely compelling these prefatory verifying and identifying statements by the custodian (or under the proposed rule, by the claimant) does not invite a browbeating cross-examination and should mark the end of the individual's participation in the trial or investigation. Compelling further testimony or cross-examination would compromise the policies behind the privilege to a greater extent.

When the Court has refused to compel acts because of the implied or explicit admissions accompanying them, the policies behind the privilege have been threatened much more seriously. In *Albertson v. S.A.C.B.*,¹⁸² the privilege prevented the government from compelling members of a communist organization to register.¹⁸³ In *Marchetti v. United States*¹⁸⁴ and *Grosso v. United States*,¹⁸⁵ the privilege prevented the government from compelling a person to register as a gambler or to pay an excise tax on gambling.¹⁸⁶ In *Haynes v. United States*,¹⁸⁷ the privilege prevented compelling a person to register possession of certain firearms which were used principally by persons engaged in unlawful activities.¹⁸⁸

181. *Curcio v. United States*, 354 U.S. 118, 128 (1957). *But cf.* *McPhaul v. United States*, 364 U.S. 372, 380 (1960) (agent held in contempt for not answering whether documents were in his possession); *United States v. O'Henry's Film Works, Inc.*, 598 F.2d 313, 318 (2d Cir. 1979) (no testimony permitted beyond authentication and identification; however, custodian must give "testimony auxiliary to his nonproduction"); *United States v. Austin-Bagley Corp.*, 31 F.2d 229, 234 (2d Cir. 1929) (same); *Bleakley v. Schlesinger*, 294 N.Y. 312, 317, 62 N.E.2d 85, 87 (1945) (same).

182. 382 U.S. 70 (1965).

183. *Id.* at 78.

184. 390 U.S. 39 (1968).

185. 390 U.S. 62 (1968).

186. 390 U.S. at 60; 390 U.S. at 70.

187. 390 U.S. 85 (1968).

188. *Id.* at 100.

In these cases, the disclosures were compelled from a "highly selective group inherently suspect of criminal activities."¹⁸⁹ Moreover, the evidence produced by the compelled act would be highly incriminatory in almost every instance.¹⁹⁰ By comparison, the group in *Byers* from whom implied admissions were compelled—those involved in traffic accidents—was larger and more closely resembled "the public at large."¹⁹¹ The same is true of the group of taxpayers who, the Court has found, can constitutionally be required to file personal income tax returns even when the implied admissions from filing may incriminate.¹⁹² Such groups are not "inherently suspect," for there is nothing inherently incriminatory in being involved in an accident or in earning income. The fact that the matters admitted are not criminal in themselves does not mean that they are not incriminating under *Hoffman*; it does, however, speak to Justice Harlan's concern that if the compelled disclosures alone establish guilt, the adversary process will be reduced to a ritual.¹⁹³

Similar concerns distinguish compelling the submission of documents from compelling the acts and disclosures in the *Marchetti* line of cases. The group of people who may be compelled to submit documents includes all parties to civil or criminal litigation, non-party witnesses who may be deposed or asked to testify in such cases, and all who may possess documents pertaining to a grand jury inquiry. Plainly, any member of the "public at large" may fall into this group at some time. Whatever implied admissions come from submitting documents would not be compelled from an inherently suspect group. Nor are the admissions compelled inherently incriminatory. It is not a crime to possess documents.

Many cases deciding whether an act may be compelled resolve the matter on a level of generality that avoids case-by-case inquiry into how incriminating the particular implied admissions of this claimant would be under all the circumstances. Instead, in *Wade* and *Byers* where the acts were compelled, and in *Marchetti*, *Grosso*, *Haynes*, and *Albertson* where they were not, attention focused on the extent to which the implied admissions would incriminate most claimants, and on whether compelling the admissions would offend the policies behind the privilege in most instances. For example, in *Byers* the plurality, and especially Justice Harlan in his concurrence, examined the extent to which the implied admissions from compelling a person involved in an accident

189. *Albertson*, 382 U.S. at 79.

190. "The [*Marchetti*] Court noted that in almost every conceivable situation compliance with the statutory gambling requirements would have been incriminating. Largely because of these persuasive criminal prohibitions, gamblers were considered by the Court to be a 'highly selective group inherently suspect of criminal activities.'" *California v. Byers*, 402 U.S. at 430 (quoting *Albertson*, 382 U.S. at 79).

191. See *Sullivan v. United States*, 274 U.S. 259, 263 (1927) (taxpayer may be compelled to file return, but may be privileged from making certain answers).

192. See *Byers*, 402 U.S. at 456 (Harlan, J., concurring).

193. *Fisher*, in contrast, suggested a case-by-case evaluation of how testimonial and how incriminating the implied admissions from producing documents would be. 425 U.S. at 409-13.

to stop, identify himself, and give his address would usually incriminate and the extent to which compelling those implied admissions would generally offend the policies behind the privilege. Concluding that the harm to the policies was outweighed by the public interest favoring compulsion, the plurality and Justice Harlan established a sweeping rule that the state could compel the acts even though the implied admissions from the acts will be so incriminatory as to nearly reduce the adversarial system to a ritual in some particular situations. These cases support the sweeping rule proposed here. For, except when the subpoena asks for documents, the possession of which is illegal, the proposed rule would allow the submission of documents to be compelled without a case-by-case evaluation of how incriminating the particular implied admissions are likely to be and whether compelling them would offend the policies behind the privilege in the claimant's particular situation.¹⁹⁴

If the rule proposed here was applied to the document production issue, the trial court would no longer need to evaluate the incriminatory potential of the implied admissions which come from submitting each document. The court could discard the fiction that it can predict whether the implied admissions will provide practical assistance to the prosecutor. It could avoid rendering judgments for which it lacks adequate information, an endeavor which only decreases respect for the judicial system. When a more discriminating approach cannot be sensibly applied, an approach that provides a clear disposition is needed.

Allowing a party to resist a subpoena for his documents sacrifices important interests. Often other avenues for obtaining documents will not exist. In grand jury investigations of business crimes where broad subpoenas are commonly used, the government will probably not learn enough about the documents to describe them in the detail needed to obtain a search warrant. To be sure, the government will be able to obtain the documents over a claim of privilege by providing the claimant use immunity. As commentators have pointed out, however, providing use immunity all but nullifies the possibility of prosecuting the claimant. Providing use immunity forces the government to prove the unprovable—that it has made no use, evidentiary or otherwise, of the implied admissions compelled.¹⁹⁵ Furthermore, the opposing litigant in a private civil case lacks the power to either offer use immunity or to obtain a search warrant, and thus he cannot overcome a claim of privilege. While the rule allowing documents to be suppressed originated at a time when fishing expeditions for evidence were condemned and discovery was severely limited, the rule incongruously remains to block investigations, such as grand jury investigations, which courts recognize may properly be wide-ranging.¹⁹⁶

194. See note 166 *supra*.

195. The Court has acknowledged the need to allow wide latitude to grand jury investigations. *United States v. Calandra*, 414 U.S. 338, 344-46 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972); *Costello v. United States*, 350 U.S. 359, 361-63 (1956); *Blair v. United States*, 250 U.S. 273, 279-83 (1919).

196. Nevertheless, subpoenas for physical evidence that might incriminate are

B. The Exception for "Rocking-Chair" Subpoenas

As mentioned above, the proposed rule would allow an exception which can be identified without document-by-document inquiry and without serious administrative difficulties. The exception is designed to avoid compelling implied admissions when the admissions will so completely establish the claimant's guilt that they will "reduce the adversarial system to a ritual." For example, a person who submits a document in response to a subpoena asking only for a particular stolen document impliedly admits that the document was in his possession, was stolen, and that he knew it was stolen at least by the time the document was produced. These implied admissions in themselves may establish the offense of receiving stolen property. In general, when the documents amount to contraband, such that their mere possession by the person subpoenaed is illegal, submitting them may leave the government with little to do but ritualistically admit into evidence the harvest of the subpoena. A brief review of a subpoena should enable a trial judge to determine whether admitting possession of the documents requested would in fact establish a complete offense.

The problem suggested by this example is not only presented by subpoenas for documents, but by subpoenas for any substance the mere possession of which is illegal, such as illegal drugs. One who submits material in response to the subpoena impliedly admits his possession; if possession alone is a crime, little remains for the prosecutor to establish through the adversary system. The law enforcement official who issued the subpoena to the suspect and received the material in response, need only testify to what he did and observed, and admit into evidence the subpoena and the response. The government, having enforced the subpoena, may sit back in its rocking chair, its case established. The person subpoenaed will have eliminated the government's burden through his implied admissions.

In practice, law enforcement officers have not generally enforced crimes of possession by sending subpoenas to the suspect which require submission of the contraband.¹⁹⁷ If law enforcement officers attempt to compel submission of controlled items in this fashion, the courts could rely on the due process clause rather than on the privilege to quash the subpoena. If so, a sweeping rule that the privilege against self-incrimination does not allow suppression of any documents or property need not be qualified by even this single exception. Nevertheless, because compelling the implied admissions in these examples offends the policy of maintaining the proper state-individual balance—a key policy behind the privilege¹⁹⁸—the privilege should provide an independent basis for quashing the subpoena.

not unknown. *See, e.g., United States v. Authement*, 607 F.2d 1129, 1131-32 (5th Cir. 1979) (enforcing subpoenas for brass knuckles in police brutality case).

197. *Garner v. United States*, 424 U.S. 648, 655-56 (1976) (adversary system is the policy behind the privilege).

198. *See Byers*, 402 U.S. at 450 (Harlan, J., concurring).

As discussed in evaluating Justice White's opinion in *Fisher*, the implied admissions from submitting documents may incriminate in many ways and in many cases. Only a matter of degree separates any document subpoena from the case where the subpoena asks for documents the mere possession of which is illegal. Nevertheless, a principled basis exists for refusing enforcement of these latter subpoenas, while permitting others to be enforced. Justice Harlan's concurring opinion in *Byers*, which focused on the harm to the policies behind the privilege, suggests the analysis:¹⁹⁹ admit that the implied admissions may be incriminatory, and ask whether they so establish the offense and so remove all burdens from the prosecutor that the adversarial system is reduced to a ritual. Under this analysis, it is apparent that a person will rarely establish all elements of an offense so completely as to eliminate any significant work for the prosecutor simply by admitting that some of the documents requested in the subpoena exist, were in his possession and were responsive to the subpoena. Surely, Harlan's standard is not met whenever the implied admissions authenticate documents that may legally be possessed but which contain incriminatory contents. After all, the issue is whether the admissions of existence, possession and responsiveness eliminate the burden of the prosecutor, not whether the contents of the documents themselves do so. This is why Harlan's standard is probably met only when the subpoena asks for documents the mere possession of which is illegal. That many implied admissions provide an important evidentiary link may make them incriminatory, but, under *Hoffman*, it hardly reduces the adversarial system to a ritual.

The proposed approach should not be difficult to administer. The judge need only look at the face of subpoena. A subpoena asking for types of documents without regard to subject matter, such as cancelled checks, receipts, desk calendars, memoranda, and correspondence between certain persons, should clearly be upheld. Possessing such documents is not alone a crime. Impliedly admitting that one possesses such documents will not eliminate the government's work. This is true even though the implied admissions from submitting certain of these documents turn out to be incriminatory.

Subpoenas asking for documents of a subject matter which is often incriminatory should likewise survive attack. An example would be a subpoena in a price-fixing investigation which requests documents referring to discussions about prices between the subpoenaed sole proprietor and one of his business competitors. Possessing documents referring to such discussions is not alone a crime. Turning over such documents still leaves the government with substantial burdens. Just as in *Byers*, where the implied admission that one had been involved in the accident involving property damage could be compelled because the police still needed to ascertain the details on which any criminal liability turned, so here the implied admission that one possesses documents of a potentially incriminatory subject matter still leaves the government the burden of ascertaining the critical details. Unless the claimant, refer-

199. *Id.* at 450-58.

ring to the subpoena on its face, satisfies the trial judge that the implied admission from submitting the materials requested in the manner requested will reduce the adversarial system to a mere ritual, the subpoena should survive.

V. CONCLUSION

Branches of the law occasionally maintain their structure long after the philosophy from which they sprang has lost vitality. Once practice becomes customary, as did the practice of allowing sole proprietorships to suppress their documents, it may outlast changes in philosophy until the reason for the practice is forgotten or repeated uncritically. Inertia, *stare decisis*, and vested interest oppose fresh scrutiny. A current observer, like the lower courts, searches from property rights to privacy to the implied admissions theory for a convincing rationale for suppressing documents. The first recalls a lifeless and unfashionable formalism, the second collides with other jurisprudence on the privilege, and the third connects tangentially, if at all, with the policies now supporting the privilege. The notion born in *Boyd*—that the privilege against self-incrimination applies when subpoenas request documents—has not aged gracefully. In *Fisher*, the Court recognized that *Boyd* was moribund but mistook the implied admissions theory for a sign of life. The time for a decent burial has come.

