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United States v. Doe: The Supreme Court and the Fifth Amendment

Dan K. Webb* and James R. Ferguson**

I. INTRODUCTION

Last Term, in United States v. Doe,¹ the Supreme Court held that the business records of a sole proprietor are not protected by the self-incrimination clause of the fifth amendment.² With this holding, the Court took a major step toward embracing a uniform principle governing the application of the fifth amendment to subpoenaed records.³ Under that principle, the contents of such


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The views expressed in this Article are those of the authors and do not necessarily represent those of the Department of Justice or any other agency of the United States government.

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² In relevant part, the fifth amendment provides that “[n]o person shall be ... compelled in any criminal case to be a witness against himself...” U.S. CONST. amend. V.


The Supreme Court has not yet decided a case involving the fifth amendment and private papers. Indeed, in Doe the Court pointedly noted that all of the subpoenaed documents “pertained to respondent’s business.” 104 S. Ct. at 1241 n.7. Recently, however, the Fourth Circuit held that the fifth amendment prevents the government from subpoenaing an individual’s incriminating personal papers that are in his possession and held by him in an individual capacity. United States v. John Doe No. 462, 745 F.2d 834 (4th Cir. 1984). The Supreme Court granted certiorari in the case but later vacated the judgment and remanded the case to the Fourth Circuit with instructions to dismiss the cause as moot. United States v. John Doe, 105 S. Ct. 1861 (1985).

See also In re Grand Jury Proceedings, 632 F.2d 1033, 1042 (3d Cir. 1980) (fifth amendment protects an accused from government-compelled disclosure of self-incriminating private papers, such as diaries and personal letters). But see Fagan v. United
records are not protected by the privilege against compelled self-incrimination if the "party asserting the privilege has voluntarily compiled the documents."  

The emergence of this doctrine raises an important question in fifth amendment law: what, if anything, does the principle reveal about the Court's view of the policy and values underlying the privilege against self-incrimination? It is the major purpose of this article to suggest that the Doe holding is fully consistent with a view of the privilege as a means of promoting the integrity of the truth-seeking enterprise in the criminal justice system.

To this end, Part II of the article reviews the Supreme Court's earlier decisions dealing with documentary subpoenas and the self-incrimination clause of the fifth amendment. In Part III, the article examines the Doe opinion and traces its roots to the rationale of the Court's earlier decisions. Part IV discusses the three theories commonly used to explain the purpose and values of the privilege against self-incrimination. In Part V, the Article analyzes the Doe opinion from the standpoint of each of the three theories, concluding that the "truth-seeking" rationale is most consistent with the logic and holding of the Court's decision.

II. DOCUMENTARY SUBPOENAS AND THE FIFTH AMENDMENT: THE HISTORICAL CONTEXT

The Supreme Court's decision in United States v. Doe can be fully analyzed only by first reviewing the Court's earlier efforts to determine what limits the fifth amendment imposes on the government's ability to obtain documents through legal compulsion. This question first arose in Boyd v. United States, an 1886 case that still stands as a landmark decision in fifth amendment law.

In Boyd, the federal government brought a forfeiture action to recover thirty-five cases of plate glass after a partnership allegedly imported the glass without paying customs dues. At trial, the government obtained a court order requiring the partners to pro-
duce an invoice supplied by the shipper. After the partners disclosed the invoice, the jury returned a verdict for the government, and the court entered a judgment of forfeiture against the property. On appeal, the Supreme Court reversed the judgment, holding that the court-ordered production of the invoice was unconstitutional under both the fourth and fifth amendments. In reaching this result, the Court broadly declared that the self-incrimination clause of the fifth amendment prohibits "any forcible and compulsory production of a man's own testimony or private papers to be used as evidence to convict him of a crime."

While *Boyd* quickly assumed its place as a major precedent in fifth amendment law, the Supreme Court began almost immediately to limit the application of *Boyd* 's fifth amendment rationale. This development was first evident in a series of cases in which the Court held that an individual could not rely on the fifth amendment to avoid producing the records of a collective entity. Thus, in *Wilson v. United States*, the Court held that a custodian of corporate records could not claim the privilege against self-incrimination to justify a refusal to produce corporate books and records subpoenaed by a grand jury. Similarly, in *United States v. White*, the Court declared that an officer of a labor union could not rely on the self-incrimination clause to bar the production of incriminating union records. Finally, in *Bellis v. United States*, the Court held that a former partner of a dissolved law firm could not claim the privilege to avoid producing the partnership's books and records.

In all of these cases, the Court based its decision on the recognition that the privilege against self-incrimination should be limited to its "historic function" of protecting only the "natural individ-

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7. *Id.* at 617, 619-20.
8. *Id.*
9. *Id.* at 634-38.
10. *Id.* at 630.
11. 221 U.S. 361, 362 (1911).
12. In *Wilson*, the subpoena *duces tecum* was directed to the corporation. In the companion case of *Dreier v. United States*, 221 U.S. 394 (1911), the Court reached the same result when the subpoena was directed to the individual corporate officer and required him to produce the corporate books. *See also* *Wheeler v. United States*, 226 U.S. 478 (1913) (fifth amendment unavailable with respect to corporate records even though the corporation had previously been dissolved).
15. *Given that* *Boyd* also involved a partnership, it seems clear that under *Bellis* the "precise claim sustained in *Boyd* would now be rejected for reasons not there considered." *Fisher v. United States*, 425 U.S. 391, 408 (1976).
ual” from compelled self-incrimination.16 In Couch v. United States,17 the Court carried the same logic a step further by holding that the self-incrimination right is a “personal privilege: it adheres basically to the person, not to information that may incriminate him.”18 In Couch, the Court upheld a documentary summons directing an accountant to produce the personal financial records of the defendant.19 While acknowledging that the records contained “potentially incriminating evidence,” the Court stressed that the summons was directed to the accountant, not to the defendant.20 In these circumstances, the Court reasoned, the defendant could not rely on the self-incrimination privilege since the “ingredient of personal compulsion against an accused is lacking.”21

The Court employed the same basic analysis in Andresen v. Maryland22 and Fisher v. United States.23 In Andresen, the Court held that records seized in a valid search of the defendant’s office were not privileged, even though the records contained incriminating statements made by the defendant.24 In reaching this result, the Court emphasized two facts. First, the government agents had not required the defendant “to say or to do anything.”25 Second, the records seized by the agents “contained statements that [the defendant] had voluntarily committed to writing.”26 In light of these facts, the Court found that the defendant had not been subject to governmental compulsion and therefore could not rely on the fifth amendment.27

By the same token, in Fisher v. United States, the Court held that the fifth amendment would not prevent the enforcement of a documentary summons requiring a taxpayer’s attorney (or indeed the taxpayer himself) to produce records prepared by a third-party accountant.28 The Court again stressed that the contested records

18. Id. at 328.
19. Id. at 336.
20. Id. at 329.
21. Id.
23. 425 U.S. 391 (1976). For a useful discussion of Fisher and Andresen as part of a larger shift in American jurisprudence to a more “pragmatic” and “relativist” vision of the law, see Harvard Note, supra note 5.
25. Id. at 473.
26. Id.
27. Id.
28. In Fisher, several taxpayers who were under investigation for criminal tax viola-
did not contain the compelled testimony of the accused and therefore did not qualify for the privilege against compelled self-incrimination.\textsuperscript{29}

The \textit{Fisher} Court also indicated that the taxpayer could not rely on the fifth amendment even if he had actually authored the document in question.\textsuperscript{30} In a footnote to its opinion, the Court declared that “unless the government has compelled the subpoenaed individual to write the document, the fact that it was written by him is not controlling with respect to the Fifth Amendment issue.”\textsuperscript{31} The Court then noted that in the case of a 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 or document not authored by the producer is demanded.”\textsuperscript{32}

The \textit{Fisher} Court did acknowledge, however, that the very act of producing records can have communicative aspects of its own.\textsuperscript{33} In particular, the Court found that the compelled act of production can constitute an implicit admission of the existence or authenticity of the subpoenaed records.\textsuperscript{34} On the facts of \textit{Fisher}, however, the Court found that the act of production was not sufficiently testimonial to warrant the protection of the fifth amendment.\textsuperscript{35}

Against the backdrop of \textit{Fisher}, \textit{Andresen} and \textit{Couch}, the case of \textit{United States v. Doe} began working its way through the federal courts. The case arose when a sole proprietor resisted compliance with several grand jury subpoenas requiring him to produce proprietorship records in his possession. The case thus provided the Supreme Court with an opportunity to apply the rationale of

\textsuperscript{29} Id. at 409-10.
\textsuperscript{30} Id. at 410.
\textsuperscript{31} Id. at 410 n.11.
\textsuperscript{32} Id.
\textsuperscript{33} Id. at 410. In this respect, the \textit{Fisher} Court adopted Wigmore’s theory of “implicit authentication.” 8 J. \textsc{Wigmore}, \textsc{Evidence} § 2264, at 380 (McNaughton rev. ed. 1961). \textit{Accord} 8 J. \textsc{Wigmore}, \textsc{Evidence} § 2264, at 363-64 (3d ed. 1940).
\textsuperscript{34} \textit{Fisher}, 425 U.S. at 410.
\textsuperscript{35} Id. at 410-11.
Fisher, Andresen and Couch to the broad question of whether the fifth amendment bars the enforcement of a grand jury subpoena compelling an individual to produce his own records in his possession.

III. United States v. Doe

In the fall of 1980, a federal grand jury in Hudson County, New Jersey began a lengthy investigation into allegations of corruption in the awarding of municipal contracts in the Newark area.\(^3^6\) As part of its investigation, the grand jury issued five subpoenas to “John Doe,” the sole proprietor of several companies that did business with various units of local government.\(^3^7\) In those subpoenas, the grand jury commanded Doe to produce a wide range of business and financial records pertaining to the operation of his several firms.\(^3^8\)

Doe resisted compliance. In a motion filed with the District Court for the District of New Jersey, he sought to quash the sub-


\(^{37}\) Id. at 2. The district court's opinion identified “Doe” as Milton Reid.

\(^{38}\) Id. The first two subpoenas were issued on November 19, 1980, and required production of (1) the telephone toll records of several companies of which Doe was a principal and (2) all records, including bank statements and cancelled checks, for the period January 1, 1977, to present for four accounts held by Doe or his companies. Id.

On November 25, 1980, the grand jury issued a third subpoena calling for production of “any and all records as per the Attached Schedule A for the Eastern Equipment Supply Company for the period January 1, 1976 to present.” Id. at 2. The categories of records sought by this subpoena were as follows:

(1) general ledgers; (2) general journals; (3) cash disbursement journals; (4) petty cash books and vouchers; (5) purchase journals; (6) vouchers; (7) paid bills; (8) invoices; (9) cash receipts journal; (10) billing; (11) bank statements; (12) cancelled checks and check stubs; (13) payroll records; (14) contracts and copies of contracts, including all retainer agreements; (15) financial statements; (16) bank deposit tickets; (17) retained copies of partnership income tax returns; (18) retained copies of payroll tax returns; (19) accounts payable ledger; (20) accounts receivable ledger; (21) telephone company statement of calls and telegrams, and all telephone toll slips; (22) records of all escrow, trust, or fiduciary accounts maintained on behalf of clients; (23) safe deposit box records; (24) records of all purchases and sales of all stocks and bonds; (25) names and home addresses of all partners, associates, and employees; (26) W-2 forms of each partner, associate, and employee; (27) workpapers; and (28) copies of tax returns.


A fourth subpoena was issued on December 19, 1980, seeking access to a list of documents pertaining to High Point Equipment and Supply Company. 541 F. Supp. at 2. Finally, on December 29, 1980, Doe was directed to produce bank statements and cancelled checks for the period January 1, 1976, to present for various company accounts maintained at an off-shore bank. Id.
poenas by invoking the self-incrimination clause of the fifth amendment.\(^{39}\) He argued in particular that the forced production of the business records of a sole proprietor would violate the privilege against compelled self-incrimination.\(^{40}\)

The district court agreed. While noting that the fifth amendment does not protect the records of most business entities,\(^ {41}\) the court found that the compelled act of production would require Doe to "admit that the records exist, that they are in his possession, and that they are authentic."\(^ {42}\) The court therefore concluded that the subpoenas could not be enforced except as to records required by law to be kept or to be disclosed to a public agency.\(^ {43}\)

The Court of Appeals for the Third Circuit affirmed the district court's ruling.\(^ {44}\) In reaching its decision, the Third Circuit relied in part on the "act of production" rationale of the district judge. The court thus agreed that the compelled act of production, by forcing Doe to admit implicitly the existence and authenticity of the records, would have certain "communicative aspects" that warranted protection.\(^ {45}\)

As a separate ground for affirming the judge's order, the Third Circuit also held that the contents of the records were themselves protected by the fifth amendment.\(^ {46}\) To reach this conclusion, the court employed a two-step analysis. First, relying on *Boyd v. United States*, the court held that the private records of an individual are protected from compulsory disclosure by the privilege against self-incrimination.\(^ {47}\) Second, the court reasoned that the business records of an individual owner are essentially "no different" from the private papers of that owner.\(^ {48}\) The court therefore concluded that an "individual's business papers, as well as his per-

\(^{39}\) 541 F. Supp. at 2.

\(^{40}\) Id.

\(^{41}\) Citing *Bellis*, the district court specifically stated that "[a]lthough the Fifth Amendment does not protect the records of corporations, unincorporated associations or partnerships, a sole proprietor can invoke the privilege to his benefit." 541 F. Supp. at 2.

\(^{42}\) 541 F. Supp. at 3.

\(^{43}\) Id. The district court identified tax returns and W-2 statements as examples of documents falling within this category. Id.

\(^{44}\) *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327 (3d Cir. 1982).

\(^{45}\) Id. at 334-36.

\(^{46}\) Id. at 333-34.

\(^{47}\) Id. at 333.

\(^{48}\) The quoted phrase is borrowed from the Supreme Court's discussion of the Third Circuit's decision. *Doe*, 104 S. Ct. at 1240.
sonal records, cannot be subpoenaed by a grand jury." In this posture—with the district court and the Third Circuit both declining to enforce the subpoenas—the case came to the Supreme Court.

In an opinion written by Justice Powell, the Supreme Court reversed the Third Circuit's holding that the contents of the subpoenaed records were constitutionally protected. The Court began with a clear statement of its major premise. "As we noted in Fisher," the Court wrote, "the Fifth Amendment only protects the person asserting the privilege from compelled self-incrimination." The Court then turned to the facts of the case at hand. It first


The Third Circuit also rejected the government's claim that the court should enforce the subpoenas because of the government's representation that it would not use the act of production against Doe in any way. The court of appeals noted that the government had not made a formal request for statutory use immunity under 18 U.S.C. §§ 6002 and 6003. 680 F.2d at 337. Section 6002 provides:

Whenever a witness refuses on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Section 6003 provides:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest, and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

The Supreme Court upheld the constitutionality of the use immunity statute in Kastigar v. United States, 406 U.S. 441 (1972).

50. Doe, 104 S. Ct. at 1241.
noted that the challenged subpoenas did not require Doe to provide any form of oral testimony, but demanded only the production of existing records—records that had been freely and routinely generated in the ordinary course of Doe's business.\textsuperscript{51} The Court reasoned that in these circumstances the “preparation of the papers was wholly voluntary, and they cannot be said to contain compelled testimonial evidence,” either of Doe or anyone else.\textsuperscript{52} Accordingly, finding no element of governmental compulsion, the Court held that the contents of the subpoenaed records did not qualify for the fifth amendment privilege.\textsuperscript{53}

The Court did agree, however, that the grand jury subpoenas would force Doe to produce records, and that this act could itself have both “testimonial aspects and an incriminating effect.”\textsuperscript{54} Indeed, the Court found a “real” and “substantial” risk that the forced act of production would incriminate Doe through “implicit” admissions concerning the existence and authenticity of the subpoenaed papers.\textsuperscript{55} To illustrate the point, the Court noted that if Doe were forced to produce the documents he would thereby “relieve the government of the need for authentication” in any subsequent criminal proceeding.\textsuperscript{56}

\textsuperscript{51} Id. at 1241-42.
\textsuperscript{52} The Court found that the quoted language from Fisher v. United States, 425 U.S. 391, 409-10 (1976), applied “with equal force” to the Doe facts. Doe, 104 S. Ct. at 1242.
\textsuperscript{53} Doe, 104 S. Ct. at 1242. In an opinion joined by Justice Brennan, Justice Marshall dissented from the Court's holding that the contents of the subpoenaed records were not privileged. Doe, 104 S. Ct. at 1245 (Marshall, J., concurring in part and dissenting in part). According to Justice Marshall, the Third Circuit's judgment “did not rest upon the disposition of this issue” and the Court therefore erred by “reaching out to decide it.” Id.

In like manner, Justice Stevens asserted that the basis for the Third Circuit's decision “turned, not on any suggestion that the contents of the documents were privileged, but rather on the significance of the act of producing them.” 104 S. Ct. at 1246 (Stevens, J., concurring in part and dissenting in part). Justice Stevens therefore insisted that the Court had engaged in “poor appellate practice” by deciding a question that was not necessary to dispose of the court of appeals' judgment. Id. at 1246.

In a footnote, the majority replied to Justice Stevens by reiterating that it read the Third Circuit's opinion as “holding that the contents of the subpoenaed records were privileged.” 104 S. Ct. at 1245, n.18. In this light, the majority reasoned, a reversal is necessary to prevent Doe from arguing on remand that the contents of the records are privileged under the Third Circuit's decision. Id.

\textsuperscript{54} Doe, 104 S. Ct. at 1242.
\textsuperscript{55} Id. at 1243 n.13. The Court based this conclusion on the district court's factual findings, as affirmed by the Third Circuit. Id. at 1243. The Court noted that traditionally it has been reluctant to “disturb findings of fact in which two courts below have concurred.” Id.

\textsuperscript{56} Doe, 104 S. Ct. at 1243 n.13. The Court added that the government is not foreclosed from rebutting the claim of privilege by producing evidence that possession, existence and authentication are a “foregone conclusion.” Id. (quoting Fisher v. United States v. Doe [104 S. Ct. 1245], at 1243.)
For this reason, the Court held that the act of producing the records could not be compelled "without a statutory grant of use immunity pursuant to §§ 6002 and 6003." Under this approach, the government could not obtain the "contents" of the records without immunizing the "testimonial aspects" of the compelled act of production. By virtue of such a grant of limited immunity, the government would be prevented in any subsequent prosecution from relying on the holder's act of production to authenticate the documents or otherwise establish their relevance.

Thus, while adopting the "act of production" rationale of the lower courts, the Supreme Court reversed the Third Circuit's holding that the contents of the subpoenaed records are protected by the fifth amendment. In so doing, the Court reaffirmed the validity of the major principle of the Fisher and Andresen decisions. Under that principle, "[i]f the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the documents are not privileged." The key to the principle lies in its requirement of a causal link between the act of compulsion and the creation of the testimonial evidence. If the evidence is not created through an act of official compulsion, it is not privileged no matter how "incriminating" or

57. Doe, 104 S. Ct. at 1243 n.13.

Like the Third Circuit, the Supreme Court declined to adopt the government's suggestion to uphold a doctrine of "constructive use immunity." Id. at 1244. Under that doctrine, the "courts would impose a requirement on the [g]overnment not to use the incriminatory aspects of the act of production against the person claiming the privilege even though the statutory procedures [of 18 U.S.C. §§ 6002 and 6003] have not been followed." Id. The Court noted, however, that Congress had given certain officials in the Department of Justice the exclusive authority to grant use immunity. Id. Accordingly, the Court declined to "extend the jurisdiction of courts to include prospective grants of use immunity in the absence of the formal request that the statute requires." Id.

58. See, e.g., Kastigar v. United States, 406 U.S. 441 (1972). It bears noting that the authentication requirement of Fed. R. Evid. 901(a) can usually be satisfied in a wide variety of ways, most of which are fairly routine. In the case of business records, for example, the documents can be authenticated by any employee who made the entries or saw the entries being made, or by any individual who is merely familiar with the company's record-keeping procedures. See, e.g., United States v. Smith, 609 F.2d 1294, 1301-02 (9th Cir. 1979). If the records were prepared solely by the holder of the documents, they can still be authenticated by expert or nonexpert handwriting analysis, Fed. R. Evid. 901(b)(3), or even by their "appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances." Fed. R. Evid. 901(a)(4).

59. Doe, 104 S. Ct. at 1242 n.10.
"testimonial" its contents.\textsuperscript{60}

With this principle, the Court has fashioned a coherent and unifying approach to the problem of documentary subpoenas and the fifth amendment. To be sure, the Court has not yet expressly decided whether the privilege applies to the contents of an individual's private, non-commercial papers. Yet such papers seem equally subject to the \textit{Doe-Fisher} rationale: they are, after all, no less "voluntarily-created" than the business records of a sole proprietor. Not surprisingly, therefore, in a concurring opinion in the \textit{Doe} decision, Justice O'Connor wrote to "make explicit what is implicit in the analysis of [the majority] opinion; that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind."\textsuperscript{61}

If this view is correct—and it is plainly supported by language in \textit{Fisher}\textsuperscript{62}—then what does it reveal about the Court's perception of the values and policies of the fifth amendment? To answer the question, we must first examine the different theories used to explain the purpose of the privilege against self-incrimination.

\section*{IV. The Values Underlying the Fifth Amendment}

Widely viewed as a "great landmark in man's struggle to make himself civilized,"\textsuperscript{63} the privilege against self-incrimination is a cornerstone in the modern system of American criminal justice—a right so "cherished" and "fundamental" as to "go to the nature of a free man and to his relationship to the state."\textsuperscript{64} Suprisingly, however, while the privilege is clearly a "fundamental part of our constitutional fabric,"\textsuperscript{65} its meaning and rationale have been the

\begin{footnotes}
\textsuperscript{60} Under this formulation, then, the evidence must meet three criteria to be privileged: it must be testimonial; it must be incriminating; and it must be a product of governmental compulsion. Fisher v. United States, 425 U.S. 391, 408 (1976).

\textsuperscript{61} \textit{Doe}, 104 S. Ct. at 1245 (O'Connor, J., concurring). In disputing this contention, Justice Marshall noted that \textit{Doe} "presented nothing remotely close to the question that Justice O'Connor eagerly poses and answers." 104 S. Ct. at 1245 (Marshall, J., concurring in part and dissenting in part). In Justice Marshall's view, the question of whether the fifth amendment protects the contents of documents was "obviated by the Court of Appeals' rulings relating to the act of production and statutory use immunity." 104 S. Ct. at 1245-46. Justice Marshall also noted his continuing belief that under the fifth amendment "there are certain documents no person ought to be compelled to produce at the Government's request." \textit{Id.} at 1246 (quoting Fisher v. United States, 425 U.S. 391, 431-32 (Marshall, J., concurring)).


\textsuperscript{63} E. Griswold, The \textit{Fifth Amendment Today} 7 (1955).


\textsuperscript{65} Murphy v. Waterfront Comm'n, 378 U.S. 52, 56 n.5 (1964).
\end{footnotes}
subject of considerable debate and uncertainty. Indeed, as the Supreme Court has freely acknowledged, "the law and the lawyers have never made up their minds just what [the privilege] is supposed to do or just whom it is intended to protect."66

Furthermore, a surprising number of distinguished jurists and scholars have been highly critical of the privilege in its modern form. According to these critics—including such notable authorities as Wigmore, Pound, McCormick and Friendly—the right against self-incrimination has been interpreted so broadly that it reaches far beyond its original purpose and rationale. This development, the critics argue, is especially striking in view of the limits placed on other forms of testimonial privilege, such as the attorney-client privilege or the marital communications privilege. While these privileges promote relationships of unquestioned social

66. Wigmore identifies no less than twelve different justifications for the privilege, three of which are especially notable: (1) the privilege "prevents torture and other inhumane treatment of a human being"; (2) it encourages the government to do a "complete and competent independent investigation," and (3) it contributes to 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." J. WIGMORE, EVIDENCE § 2251, at 297-318 (McNaughton rev. ed. 1961). For other discussions of the different values said to underlie the fifth amendment, see Gerstein, supra note 3; McKay, Self-Incrimination and the New Privacy, 1967 SUP. CT. REV. 193 (1967); O'Brien, The Fifth Amendment: Fox Hunters, Old Women, Hermits and the Burger Court, 54 NOTRE DAME LAW. 26 (1979); Ritchie, supra note 3; Harvard Note, supra note 5.

67. Murphy v. Waterfront Comm'n., 378 U.S. 52, 56 n.5 (quoting Kalven, Invoking the Fifth Amendment—Some Legal and Impractical Considerations, 9 BULL. ATOMIC SCI. 181, 182 (1953)). Judge Friendly has argued that this “lack of conviction and consensus” provides a “curious basis for making a greatly expanded notion of the privilege the veritable linchpin of a Bill of Rights.” Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. CINN. L. REV. 671, 684 (1968).


Perhaps the earliest notable criticism of the privilege was provided more than 150 years ago by Jeremy Bentham. Bentham, A Rationale of Judicial Evidence, in 7 THE WORKS OF JEREMY BENTHAM 446 (Bowring ed. 1843). Even then, Bentham found that a major obstacle to a criticism of the privilege was:

By assuming [the propriety of the rule, as a proposition too plainly true to admit of dispute] as true, you . . . represent all men . . . whose opinions are worth regarding, as joining in the opinion; and by this means . . . you present . . . the fear of incurring the indignation or contempt of all reasonable men, by presuming to disbelieve or doubt what all such reasonable men are assured of.

Id. at 451 (quoted in Friendly, supra note 67, at 679).

69. See supra note 68.

70. Friendly, supra note 67, at 680.
value, the fifth amendment "extends, by hypothesis, only to persons who have been breakers of the criminal law or believe they may be charged as such."\footnote{71}

But in what sense has the privilege been unduly expanded? On this point, the critics' argument has two parts. They first note that the historic purpose of the right against self-incrimination is to guard against "roving inquisitions" and other abuses in the investigation of criminal activity.\footnote{72} They then argue that this purpose is not furthered by forbidding all inquiry of the accused in an orderly trial before a neutral magistrate.\footnote{73} Indeed, according to the critics, there is no reason why an individual who has been charged by a valid indictment based on "reasonable" and "independent" evidence should not be obliged to answer questions in a proper judicial setting. The critics thus claim that "[j]ustice . . . would not perish if the accused were subject to a duty to respond to orderly inquiry" in the course of a judicial proceeding.\footnote{74}

Dean Wigmore set forth the substance of this argument in an early plea for a "general freedom of questioning":

\footnote{71}{\textit{Id.}}

\footnote{72}{McCormick thus writes that the privilege arose in response to the "evils of the fishing expedition, the inquisition of the suspect about all of his past life without any previous charge being laid against him, and the barbarous evil of torture." McCormick, supra note 68, at 221.}

\footnote{73}{The critics argue that the privilege in its early form drew a sharp distinction between the pre-indictment interrogation of suspects and the questioning at trial of a properly-charged defendant. See, e.g., McCormick, supra note 68, at 221. According to Wigmore, when the privilege first arose in the early seventeenth century, "it was not doubted that a suspect could be made to respond to questions once he was properly accused; it was just that a person could not be compelled to provide the first evidence against himself." 8 J. Wigmore, Evidence, § 2251, at 317 n.11. See also Friendly, supra note 67, at 677-78; McCormick, supra note 68, at 221. "Not until after the triumph of the Parliament over the King and his special courts did the notion grow up of a special prohibition in the ordinary courts against any judicial interrogation which would require a man to confess a crime." McCormick, supra note 68, at 221-222.}

\footnote{74}{See Palko v. Connecticut, 302 U.S. 319, 325-26 (1937). In this vein, Dean Pound proposed that "there should be express provision for a legal examination of suspected or accused persons before a magistrate; that those to be examined should be allowed to have counsel present to safeguard their rights; that provision should be made for taking down the evidence so as to guarantee accuracy." Pound, supra note 68 at 1017.}

\footnote{71}{M. Frankel, a former district court judge for the Southern District of New York, has modified this proposal by adding two provisions: (1) the suspect should have the right to refuse to be questioned before the magistrate; and (2) the prosecution should be permitted to comment at trial on any such refusal. M. Frankel, Partisan Justice 98-99 (1978). See also W. Schaefer, The Suspect and Society 76-81 (1967) (author proposes interrogation before a judicial officer, contending that such interrogation is central to the drive for broader discovery in criminal proceedings).}

In 1972 the English Law Revision Committee "proposed that the accused be formally called to the stand, but only after the prosecution had already made out a case which would justify conviction." Gerstein, supra note 3, at 350 n.35.
I imagine that to-day the average lawyer, as well as the average layman, if asked for his candid opinion, would admit that in the nature of things there is no reason why, if an accused person is innocent, he should be unwilling to say so, and to explain the facts of his conduct and vindicate himself,—always assuming, of course, that a charge has been made with proper solemnities, and that he is not called upon, in inquisitorial style, to answer hasty accusations without weight.\(^7\)

Echoing the same theme, Professor McCormick wrote that the modern right against self-incrimination goes far beyond the evils from which the privilege sprang. It goes far beyond the demands of ordinary morality, which sees nothing wrong in asking a man, for adequate reason, about particular misdeeds of which he has been suspected and charged. Safeguards for official interrogation are needed, of course . . . But to say he shall be free of questioning altogether about his crimes goes too far.\(^6\)

Whatever merit these views might have, they have not influenced the decisions of the Supreme Court. In the course of the past century, the Court has adopted a generally expansive view of the fifth amendment, applying the privilege to a wide variety of settings, including, of course, the trial itself.\(^7\) In so doing, the Court has relied, at one time or another, on at least three different theories of the purpose and rationale of the right against self-incrimination.

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\(^7\) Wigmore, *supra* note 68, at 86. Wigmore later modified his position to accept the privilege against self-incrimination, but urged that it "be kept within limits the strictest possible." 4 J. WIGMORE, EVIDENCE § 2251, at 3102 (1st ed. 1905); see also Friendly, *supra* note 67, at 673.

\(^6\) MCCORMICK, *supra* note 68, at 222.

\(^7\) See, e.g., Pillsbury Co. v. Conboy, 459 U.S. 248 (1983) (deponent's civil deposition testimony, closely tracking his prior immunized testimony, is not, without duly authorized assurance of immunity at the time, immunized testimony within the meaning of 18 U.S.C. § 6002, and therefore may not be compelled over a valid assertion of the fifth amendment privilege); Lefkowitz v. Cunningham, 431 U.S. 801 (1977) (state statute, which provided for termination if an officer of a political party subpoenaed by a grand jury concerning the conduct of his office refused to testify or to waive immunity against subsequent criminal prosecution); Lefkowitz v. Turley, 414 U.S. 70 (1973) (New York statutory provisions which required public contracts to provide that if a contractor refuses to waive immunity or to testify concerning his state contracts, his existing contracts may be cancelled and he shall be disqualified from further transactions with the state for five years, and further required disqualification from contracting upon a person's failure to waive immunity or to answer questions regarding his state transactions, violate contractor's constitutional privilege against compelled self-incrimination); Mathis v. United States, 391 U.S. 1 (1968) (state prisoner questioned by an Internal Revenue Service investigator about certain tax returns in a "routine tax investigation" entitled to warnings of right to silence and right to counsel); Griffin v. California, 380 U.S. 609 (1965) (prosecutor's and trial court's comments on the defendant's failure to testify violated the self-incrimination clause of the fifth amendment).
These theories can be broadly described as: (1) the truth-seeking rationale; (2) the individual dignity rationale; and (3) the privacy rationale. To each of these theories we may now turn.

A. Promoting The Integrity Of the Truth-Seeking Enterprise

As John Hart Ely has noted, the "privilege against self-incrimination . . . has a lot to do with wanting to find the truth: coerced confessions are less likely to be reliable." This well-known idea underlies the single most important and pragmatic rationale for the right against self-incrimination: the privilege serves to promote the integrity of the truth-seeking enterprise in the administration of criminal justice. According to this theory, the right against self-incrimination enhances the fairness and reliability of the truth-seeking process in several important ways.

First, the privilege serves to eliminate many of the abuses associated with an "inquisitorial" approach to the investigation of crime. According to accepted views, the police use of the inquisitorial method breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to an expected answer—that is, to a confession of guilt. Thus, the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad

78. While these theories incorporate the major values influencing the Court's view of the Fifth Amendment, the list is by no means exhaustive. In Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), the Court provided a more comprehensive account, stating that 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," . . . our distrust of self-deprecating statements; and our realization that the privilege, while sometimes a "shelter to the guilty," is often "a protection to the innocent."

Id. at 55. (citations omitted).


80. See J. ELY, supra note 79, at 95; Gerstein, supra note 2, at 350.
Accordingly, by barring all forms of coercive official interrogation, the right against self-incrimination discourages the use of torture and other kinds of physical abuse in the investigation of a crime. The privilege therefore insures that the investigative process comports with the basic standards of decency and fairness demanded by a civilized society.

Second, the privilege works to improve the accuracy of factual determinations in criminal trials. It achieves this goal in two basic ways. First, it excludes from evidence the "inherently unreliable" confessions of tortured or coerced defendants—a benefit that the

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82. See, e.g., Michigan v. Tucker, 417 U.S. 433, 446-47 (1974). In a sense, this function of the self-incrimination privilege is equivalent to the "voluntariness" inquiry of the Due Process Clause. Under that inquiry, a suspect's statements will not be admitted if they were obtained by techniques and methods offensive to due process, or under circumstances in which the suspect did not have an opportunity to exercise a free and unconstrained will. Haynes v. Washington, 373 U.S. 503, 514-15 (1963).
83. It might be argued that the deterrence of inhumane methods of police interrogation is more properly viewed as a separate rationale for the self-incrimination privilege, rather than a component part of the truth-seeking theory. This argument is bolstered by the fact that the prohibition of tortured confessions is not always consistent with the "search for truth" in criminal litigation. In some cases, after all, the use of torture could lead to a truthful confession whose exclusion from evidence would only impede the full discovery of facts in a criminal trial.

As a general matter, however, there is good reason to hold that "coerced confessions are less likely to be reliable," J. Ely, supra note 79, at 95, since the use of force in police interrogations may well "cause a defendant to accuse himself falsely." Michigan v. Tucker, 417 U.S. 433, 448 n.23, 449 (1974). It is in this sense that the exclusion of tortured confessions can fairly be viewed as generally serving the same goal as that ascribed to the truth-seeking rationale—namely, the accurate determination of guilt or innocence in criminal litigation.

It is also in this sense that the prohibition of inhumane methods of police interrogation stands in sharp contrast to other "fair process norms" that operate to vindicate individual values by excluding evidence of unquestioned truth from the adjudicative process. See infra note 91-108 and accompanying text. See also Arenella, Foreword: Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies, 72 GEO. L.J. 185, 200-05 (1983).

84. J. Ely, supra note 79, at 95. It is sometimes said that the privilege also protects the innocent defendant who fears prejudicial impeachment or an otherwise ineffective performance on the stand. E. Cleary, McCormick on Evidence 286-87 (1976). It is not likely, however, that an innocent defendant, properly advised, will exercise the privilege in order to avoid prejudice from his unprepossessing appearance, from his nervousness, his halting speech or from his inability to cope with a clever or unscrupulous cross-examiner. The dangers of such prejudice are generally more remote, however, than the almost certain risk of an adverse inference from the defendant's silence.

Supreme Court has long recognized:

Cases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion, since the Clause provides only that a person shall not be compelled to give evidence against himself. And cases involving statements often depict severe pressures which may override a particular suspect's insistence on innocence. Fact situations ranging from classical third-degree torture, to prolonged isolation from family or friends in a hostile setting, or to a simple desire on the part of a physically or mentally exhausted suspect to have a seemingly endless interrogation end, all might be sufficient to cause a defendant to accuse himself falsely.\(^8\)

Thus, the exclusionary rule of the fifth amendment operates to reduce the risk that the fact-finding process will be distorted by an untrustworthy form of evidence.

Finally, by barring the use of all evidence obtained through coercive interrogation, the privilege against self-incrimination compels the state to build its case on the basis of a thorough and independent investigation.\(^6\) In so doing, the privilege works to guarantee an accusatorial system in which the state relies not on confessions extracted from unwilling subjects, but on evidence secured through its own independent efforts.\(^7\) And this, in turn, provides yet another "assurance that every person convicted is in fact guilty as charged."\(^8\)

The crux of the truth-seeking rationale thus lies in its view of the fifth amendment as a means of protecting the integrity of the fact-finding process from the evils of coercive interrogations. According to this view, the government's use of "actual coercion" in the interrogation of individuals not only leads to physical abuse, but also results in unreliable evidence that impairs the accurate determination of guilt or innocence. Accordingly, the truth-seeking ra-

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\(^87\) Thus, in Miranda v. Arizona, 384 U.S. 436 (1966), the Court noted that "our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." 384 U.S. at 460. See also Malloy v. Hogan, 378 U.S. 1, 8 (1964). The objectives of the accusatorial system of justice are generally held to be (1) protecting the suspect or defendant from abuse and (2) ensuring the reliability of the fact-finding process. Gerstein, supra note 3, at 381. There is, accordingly, a close interrelationship among the three principal concerns of the truth-seeking rationale.
\(^88\) E. Cleary, supra note 86, at 287; Harvard Note, supra note 5, at 972.
tionale views the fifth amendment as serving an important utilitarian function by barring the use of all testimonial evidence created through governmental coercion.\textsuperscript{89} This perspective is fully consistent with the historic origins of the privilege. The right against self-incrimination arose in the seventeenth century in response to the inquisitorial methods of the English Courts of High Commission and Star Chamber.\textsuperscript{90} In those courts, an "individual could be called before the court and made to respond to a broad inquiry into his affairs without regard to the nature or strength of the accusations against him."\textsuperscript{91} This practice was at time accompanied by torture, and was often subject to political and religious abuse.\textsuperscript{92} For this reason, the practice led ultimately to the adoption of an evidentiary privilege designed to deter the state from relying on torture or other abuses in the investigation of crime.\textsuperscript{93} In its early form, the privilege did not bar the questioning of the defendant at a formal trial in the regular criminal courts.\textsuperscript{94} Rather, it prevented the state from compelling a suspect to answer questions prior to any formal charge of criminal wrongdoing.\textsuperscript{95} (It was only in the absence of such a charge that the individual was "truly being made to accuse himself.")\textsuperscript{96} In this form, the privilege faithfully incorporated the two major concerns that underlie the modern truth-seeking rationale: (1) it discouraged the state from employing brutal or inhumane tactics in the questioning of suspects; and (2) it encouraged the government to base all charges of criminal wrongdoing on reliable evidence obtained through independent investigation.

The truth-seeking rationale is equally compatible with the gen-

\textsuperscript{89} Put differently, the truth-seeking theory conceives of the privilege as a "fair process norm" that merits protection within the criminal process because it contributes instrumentally to good criminal law "results." See Arenella, supra note 83, at 224.


\textsuperscript{91} E. CLEARY, supra note 86, at 279.

\textsuperscript{92} Id. at 280. See also 4 J. WIGMORE, supra note 66, at § 2250.


\textsuperscript{94} I. MAYERS, supra note 68, at 14-15; J. WIGMORE, supra note 66, at 317 n.11; Friendly, supra note 67, at 677-78; MCCORMICK, supra note 68, at 221.

Given that the early privilege did not apply to questioning at a formal trial, the origins of the right are not compatible with the well-known theory which holds that the purpose of the privilege is to protect the "dignity" of the guilty defendant from the "cruel trilemma" of self-incrimination, perjury or contempt. See infra text accompanying notes 99-102.

\textsuperscript{95} See supra note 66.

\textsuperscript{96} Friendly, supra note 67, at 677.
eral design of the Constitution's provisions dealing with the criminal process. These provisions—contained principally in the fifth and sixth amendments—set forth a number of procedural guarantees intended to promote the fairness and reliability of the criminal fact-finding process. In particular, the "guarantees of grand juries, petit juries, information of the charge, the right of confrontation, compulsory process and even the assistance of counsel" are all intended to "ensure a reliable determination" on the key issue of guilt or innocence. And this, of course, is precisely the role ascribed by the truth-seeking rationale to the privilege against self-incrimination.

The truth-seeking theory is therefore consistent with both the origins of the privilege and the overall design of the criminal provisions of the Constitution. In a very real sense, accordingly, it embodies the core values of the fifth amendment.

B. The Protection of the Dignity of the Defendant

A second view of the privilege against self-incrimination holds that its major purpose is to protect the personal dignity and humanity of the individual defendant. According to this perspective, the privilege serves the function of assuring that even guilty individuals are treated in a manner consistent with basic respect for human dignity. Wholly apart from its function in assuring the accuracy of the guilt-determining process, the privilege demands that even those guilty of an offense not be compelled beyond a certain extent to participate in the establishment of their own guilt. This is based upon the feeling that to require participation would be simply too great a violation of the dignity of the individual, whether or not he is guilty of a criminal offense.

At the heart of the theory is the recognition that a guilty defendant, if forced to testify at trial, would be confronted with the "cruel trilemma of self-accusation, perjury or contempt." That is, he could only choose either to (1) perjure himself, (2) acknowledge his

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97. J. ELY, supra note 79, at 95; Seidman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 COLUM. L. REV. 436, 449 (1980).
98. J. ELY, supra note 79, at 95.
100. Id.
101. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). E. CLEARY, supra note 86, at 287. The argument thus runs that "there is simply something immoral—though it has proved tricky pinning down exactly what it is—about the state's asking somebody whether he committed a crime and expecting him to answer." J. ELY, supra note 86, at
guilt; or (3) refuse to testify and be held in contempt. This choice, according to the theory, is far too cruel to be justifiable:

To place an individual in a position in which his natural instincts and personal interests dictate that he should lie and then to punish him for lying, or for refusing to lie or violate his natural instincts, is an intolerable invasion of his personal dignity. 102

This view of the fifth amendment is concerned only with the dignity of the guilty defendant. By its very terms, the theory does not apply to the innocent defendant, for such a defendant is not vulnerable to the "cruel trilemma": that is, he is not motivated either to commit perjury or to make a confession, for he is not guilty of the alleged offense.

The theory thus separates the fifth amendment from all notions of "protecting the innocent" or "discovering the truth," and focuses instead on the dignity of the guilty defendant. It rests, accordingly, on a rationale that conceives of the privilege not as a utilitarian "means to an end," but as a substantive "end in itself"—an important individual right that has as its sole purpose the protection of the individual defendant from "overreaching" state power. 103

Such a view is part of a larger model which holds that the criminal process can properly be used to promote ends that are wholly unrelated to discovering the truth or enforcing the criminal law. 104

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96. As Dean Ely intimates, the immorality of such questioning is not obvious to everyone. Judge Friendly writes:

> No parent would teach such a doctrine to his children; the lesson parents preach is that a . . . misdeed, even a serious one, will generally be forgiven; a failure to make a clean breast of it will not be. Every hour of the day people are asked to explain their conduct to parents, employers and teachers.

Friendly, supra note 67, at 680. See also S. Hook, Common Sense and the Fifth Amendment 73 (1963).

102. E. Cleary, supra note 86, at 287. See also United States v. Grunewald, 233 F.2d 556, 591 (Frank, J., dissenting); E. Griswold, supra note 63, at 7.

As against this theory, Bentham argued that "whatever hardship there is in a man's being punished, that and no more is there in his thus being made to criminate himself." Bentham, supra note 68, at 231 (emphasis added). From this point of view, a guilty individual who is compelled to testify is subject to no greater hardship than that which the community has already deemed to be appropriate—namely, the prescribed penalty for the offense committed by that individual.

103. See, e.g., Arenella, supra note 83, at 200-01; O'Brien, supra note 66, at 43.

104. This theory corresponds to what Professor Herbert L. Packer described in his classic work, The Limits of the Criminal Sanction, as the "Due Process Model" of the criminal process. H. L. Packer, The Limits of the Criminal Sanction, 163-73 (1968). According to Professor Packer, the Due Process Model is rooted in a fear of official power:

Precisely because of its potency in subjecting the individual to the coercive power of the state, the criminal process must, in this model, be subjected to
According to this model, the criminal process is designed in part to vindicate certain individual values by imposing limits on the proper exercise of official power. The model further holds that such limits are properly enforced through rules that exclude relevant and trustworthy evidence, even though such rules impair the capacity of the criminal process to make an accurate assessment of factual guilt. The model thus stands in sharp contrast to another, more traditional view, which holds that the central mission of the criminal process is to determine guilt or innocence, and thereby enforce the substantive commands of the criminal law.

Yet, according to its staunchest proponents, the model offers a view of the criminal process that is most consistent with a civilized and humane society.

controls that prevent it from operating with maximal efficiency . . . [T]he proponents of the Due Process Model would accept with considerable equanimity a substantial diminution in the efficiency with which the criminal process operates in the interest of preventing official oppression of the individual.

Id. at 166.


106. H. L. Packer, supra note 104, at 168. This willingness to exclude relevant evidence sharply distinguishes the Due Process Model from another, competing theory of the criminal process—what Professor Packer described as the “Crime Control Model.” Id. at 158-61, 168. As Packer noted,

[i]n theory, the Crime Control Model can tolerate rules that forbid illegal arrests, unreasonable searches, coercive interrogations, and the like. What it cannot tolerate is the vindication of those rules in the criminal procedure itself through the exclusion of evidence illegally obtained or through the reversal of convictions in cases where the criminal process has breached the rules laid down for its observance.

Id. at 167-68.

It bears noting that the vindication of so-called “fair process norms” within the criminal justice system is not an “inherent function of any procedural system.” Arenella, supra note 83, at 203 n.111 (emphasis added). On the contrary, in theory at least, such norms can fairly be vindicated outside the criminal justice system through remedies such as administrative sanctions or civil damages. This point is clearly evident in the fact that the legal systems of continental Europe have not embraced the American notion that criminal proceedings can justifiably be used for “purposes other than those of establishing the truth and enforcing the substantive criminal law.” Damaska, supra note 105, at 586.

107. See supra note 106. This theory corresponds to what Professor Packer described as the “Crime Control Model” of the criminal process. H. L. Packer, supra note 104, at 158-62. As Professor Packer notes, the Crime Control Model “requires that primary attention be paid to the efficiency with which the criminal process operates to screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime.” Id. at 158.

108. One variation on this theme asserts that the privilege enhances the humanity of the criminal justice system by making the criminal trial more nearly a “contest between equals,” rather than a mismatch between the “lone suspect” and the “huge investigatory and prosecutorial apparatus of the state.” E. Cleary, supra note 84, at 288.
C. The Protection of Personal Privacy

A third view of the self-incrimination clause ascribes to the privilege the broad purpose of protecting the privacy and autonomy of the individual. According to this view, the major goal of the self-incrimination right is to preserve an "inviolable enclave" within which each person can lead a "private life free from unwarranted intrusion and disclosure." The theory further holds that this goal can be fully realized only by protecting a "core of personal communications, papers and effects" from all forms of "non-willed government procurement." The theory therefore asserts that the privilege against self-incrimination operates to bar the compulsory production of an individual's papers and documents, as well as his actual "testimony."

A major premise of the privacy theory is the notion that papers and other types of written communications are mere "physical extensions of an individual's thoughts and knowledge." According to this premise, the papers of an individual often disclose as much as the individual himself could disclose if forced to answer questions directly. Accordingly, under this logic, the privilege against self-incrimination can adequately protect a zone of personal privacy only if it applies to all personal papers and records, including documents pertaining to the individual's business.

The privacy theory found its earliest expression in the 1886 case of Boyd v. United States. In Boyd, the Court rejected the claim that the "seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." The Court therefore held that the compulsory production of an individual's incriminating private papers violates the right against compelled self-incrimination. The Court noted that a contrary holding would "suit the purposes of despotic power," and would not agree with the "pure atmos-

109. Harvard Note, supra note 5, at 971-72. See also Fisher v. United States, 425 U.S. 391, 415 (1976) (Brennan, J., concurring) ("history and [the Supreme Court] have construed the constitutional privilege to safeguard against governmental intrusions of personal privacy to compel either self-incriminating oral statements or the production of self-incriminating evidence recorded in one's private books and papers").
110. Harvard Note, supra note 5, at 985-86.
111. Id. at 988.
114. Id. at 426-7.
115. 116 U.S. 616 (1886).
116. Id. at 633.
117. Id. at 630.
phere of political liberty and personal freedom” enjoyed under the Constitution.\(^\text{118}\)

The Boyd opinion thus adopted the theory that the fifth amendment is designed to protect the right of each individual to enjoy a “private enclave where he may lead a private life.”\(^\text{119}\) In United States v. Doe, the sole proprietor relied on the same theory to support the claim that the contents of his business records were protected from compulsory disclosure.\(^\text{120}\)

V. **DOE AND THE VALUES OF THE FIFTH AMENDMENT**

In deciding United States v. Doe, the Supreme Court did not refer to any underlying rationale for the fifth amendment. Nevertheless, the opinion can be usefully analyzed from the standpoint of each of the three theories presented above.

Turning first to the truth-seeking rationale, this theory is fully consistent with the Doe holding concerning the contents of subpoenaed records. As noted earlier, the crux of that holding lay in the requirement of a causal link between the act of governmental compulsion and the creation of the incriminating records.\(^\text{121}\) This focus on the role of actual compulsion in the creation of the testimonial evidence is eminently well-founded from the standpoint of the truth-seeking theory. For if the records are created voluntarily—if they are not the product of governmental compulsion—their reliability is not open to question, and there is no reason to exclude them from evidence.\(^\text{122}\) On the contrary, their admission at trial would serve a useful purpose by aiding in the accurate determination of guilt or innocence.

Furthermore, the government’s use of the legal process to obtain the records does not pose a risk of physical abuse or implicate any other form of inhumane treatment.\(^\text{123}\) It does not, in other words, bear “any resemblance to the historical practices at which the right against self-incrimination was aimed.”\(^\text{124}\) Nor does it undermine the accusatorial system,\(^\text{125}\) or otherwise alter the state’s obligation

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118. Id. at 632.
119. Harvard Note, supra note 5, at 951-56.
121. See supra notes 59-60 and accompanying text.
122. Andresen v. Maryland, 427 U.S. 463, 477 (1976); Friendly, supra note 67, at 702.
123. Friendly, supra note 67, at 702.
125. In Andresen v. Maryland, the Court described the main features of the accusatorial system as follows:
to gather reliable evidence through independent investigation.

While the truth-seeking theory is thus compatible with the major thrust of the *Doe* holding, the same cannot be said for the individual dignity rationale. It seems clear, after all, that the compelled production of incriminating records is no less an "assault on dignity" than the compulsion of testimony in court: in both cases, the guilty individual is made to act as an "instrument of his own condemnation." Indeed, a subpoena calling for the production of incriminating records confronts the guilty suspect with what amounts to the same "cruel trilemma": he can either (1) produce the records and thereby incriminate himself; (2) destroy the records and run the risk of an "obstruction of justice" prosecution; or (3) refuse to produce the records and be held in contempt.

But whatever cruelty is involved in this choice, it was not enough to persuade the *Doe* Court that the fifth amendment should protect the records of a sole proprietor. On the contrary, in the entire course of the *Doe* opinion, the Court did not mention the "cruel trilemma," but held instead that the contents of the records were not privileged despite their incriminating nature.

The privacy theory is similarly at odds with both the rationale and the holding of the *Doe* opinion. Indeed, in both *Fisher* and 

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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, . . . the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands.

427 U.S. 463, 476 (1976) (quoting Watts v. Indiana, 338 U.S. 49, 54 (1949)). In *Andersen*, the Court found that these key attributes of the accusatorial system were not "endangered by the introduction of business records 'independently secured through skillful investigation.'" 427 U.S. at 477.

126. One aspect of the *Doe* holding that is inconsistent with the truth-seeking rationale is the notion that the compelled act of production has a testimonial importance warranting fifth amendment protection. As one commentator has noted, "[t]his is hard to perceive how the issuance of a subpoena for the production of preexisting papers entails a significant risk that compliance will be coerced in a manner likely to affect the reliability of the evidence." Harvard Note, supra note 5, at 973 n.170.


128. On this point, Judge Friendly argues that in the context of documentary subpoenas "[t]he 'cruel trilemma of self-accusation, perjury or contempt' . . . reduces to a dilemma. This occurs, not as before by elimination of contempt, which should apply to a refusal to produce documents, but because there is no real possibility of perjury." Friendly, *supra* note 67, at 702. There is, however, the possibility of an obstruction of justice prosecution. Indeed, just as the guilty defendant is powerfully motivated to provide false testimony, so too is he motivated to obstruct justice by destroying incriminating records before they fall into the hands of the government. In a very real sense, accordingly, the "cruel trilemma" arises with equal force in the case of documentary subpoenas.
Doe, the Court squarely rejected the notion that the fifth amendment protects a generalized privacy right in the contents of records or documents.\(^{129}\) Finding that “[s]everal of Boyd’s express or implicit declarations have not stood the test of time,”\(^{130}\) the Fisher Court stressed that the fourth amendment—and not the fifth—is the provision directly dealing with the “subject of personal privacy.”\(^{131}\) In the fourth amendment, the Court explained, the Framers:

struck a balance so that when the State’s reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant will issue. They did not seek in still another Amendment—the Fifth—to achieve a general protection of privacy but to deal with the more specific issue of compelled incrimination.\(^{132}\)

Accordingly, the Court remained firmly committed to the “view that the Fifth Amendment protects against ‘compelled self-incrimination, not [the disclosure of] private information.’ ”\(^{133}\)

Thus, of the three major theories, the truth-seeking rationale is the only one that fits neatly with the Doe holding concerning the contents of subpoenaed records. This is not to say that the Supreme Court has adopted the theory to the exclusion of all others,\(^{134}\) or even that the Court relied on the theory in deciding Doe. But the truth-seeking rationale is at least compatible with Doe’s focus on the role of actual compulsion in the creation of testimonial evidence.

More broadly, the truth-seeking rationale is also compatible with the heightened interest of the Burger Court in promoting the accuracy of the criminal fact-finding process. This interest is clearly evident in several recent decisions in which the Court has refused to exclude evidence that would plainly contribute to an accurate determination of guilt or innocence.

For example, in four recent decisions dealing with the fifth amendment, the Court has reached the same basic result that it reached in Doe: it has upheld the admissibility of probative and reliable evidence on the ground that such evidence was not the product of “actual” governmental coercion. In South Dakota v.

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131. Id. at 400.
132. Id.
133. Id. at 401 (quoting United States v. Nobles, 422 U.S. 225,233 n.7 (1975)).
Neville, the Court found that a driver's refusal to submit to a blood-alcohol test was not a form of "compelled" testimony and therefore could properly be admitted in a prosecution for drunk driving. Similarly, in Minnesota v. Murphy, the Court held that a defendant's admissions to his probation officer were not made involuntarily and therefore did not qualify for the fifth amendment privilege. Finally, in Quarles v. New York and Oregon v. Elstad, the Court held that the failure to give Miranda warnings was not tantamount to "actual" coercion, and did not justify the exclusion of all evidence obtained as a result of the unwarned admissions.

In yet another area—the law of search and seizure—the Court recently modified the exclusionary rule of the fourth amendment to further the "search for truth" in criminal litigation. In United States v. Leon, the Court upheld the admission of evidence obtained through a "good faith" reliance on a defective search warrant issued by a neutral and detached magistrate. In reaching its conclusion, the Court emphasized the social costs that often result when evidence of unquestioned reliability is excluded from criminal trials. "Particularly when law enforcement officials have acted in objective good faith or their transgressions have been minor," the Court wrote, "the magnitude of the benefit conferred on . . . guilty defendants offends basic concepts of the criminal justice system." Similarly, in Nix v. Williams, the Court refused to apply the exclusionary rule to reliable evidence that "inevitably" would have been discovered through independent investigation, even though it was actually obtained in violation of the sixth amendment right to counsel. In so doing, the Court stressed that the exclusion of such evidence would "do nothing whatever to promote the integrity of the trial process," since the defendant would not suffer any preju-

135. Id.
139. In New York v. Quarles, 104 S. Ct. 2626 (1984) the Court recognized a "public safety" exception to the Miranda requirements, and upheld the admissibility of a gun obtained after an arrested suspect identified its whereabouts. In Oregon v. Elstad, 105 S. Ct. 1285 (1985), the Court held that the fifth amendment does not require the suppression of a confession, made after proper Miranda warnings and a valid waiver of rights, solely because the police had obtained an earlier unwarned but voluntary confession from the suspect.
141. Id. at 3419.
dice that he would have avoided in the absence of police misconduct. In these circumstances, the Court reasoned, the failure to admit the evidence would serve only to "inflict a wholly unacceptable burden on the administration of criminal justice." "We are unwilling," the Court concluded, "to impose added burdens on the already difficult task of proving guilt in criminal cases by enlarging the barrier to placing evidence of unquestioned truth before juries."

VI. CONCLUSION

It is thus clear that the truth-seeking rationale is consistent not only with the Doe-Fisher principle, but also with the recent movement of the Burger Court toward a "guilt or innocence" model of the criminal process. Under this model, the Court has shown a heightened interest in the accurate determination of guilt or innocence, and a pronounced reluctance to "sacrifice the truth in individual cases on the altar of broader social goals." From this point of view, the Court has achieved in the area of documentary subpoenas the same result that it has realized in other areas of criminal procedure: it has embraced a rule that reduces the "enormous societal cost" of excluding evidence of "unquestioned truth"

143. Id. at 2510-11; Leading Cases of the 1983 Term, 98 Harv. L. Rev. 87, 125 (1984).
144. 104 S. Ct. at 2511.
145. Id. at 2509 n.5.
146. As Professor Arenella has noted, the Burger Court has not adopted a "pure" guilt or innocence model, since any system of criminal procedure must, to some extent at least, serve "functions apart from promoting reliable guilt determinations." Arenella, supra note 83, at 187, 228. Nevertheless, the Burger Court's recent decisions clearly reflect
several distinctive themes of crime control ideology: judicial deregulation of state and federal criminal justice officials, hostility to fair process norms that impair the state's capacity to detect and punish the factually guilty, and a pronounced tendency to view individual rights from a utilitarian perspective that defines their content in light of their functional impact on the system's capacity to promote social control.

Arenella, supra note 83, at 247.


147. Seidman, supra note 97, at 446. Writing in 1980, Professor Seidman argued that the Court often employed the rhetoric of the guilt or innocence model, while "suc-cumb[ing] to the familiar temptation to use the system for purposes unrelated to the determination of factual guilt." Seidman, supra note 97, at 449. It is, of course, unclear whether Professor Seidman would apply the same argument to the 1984 Term.
in the administration of criminal justice.\textsuperscript{148} And herein may well lie the importance of the \textit{Doe} holding in the development of the Court's view of the purpose and values of the privilege against self-incrimination.