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***55 THE UNAVAILABILITY TO CORPORATIONS OF THE PRIVILEGE AGAINST SELF-
INCRIMINATION: A COMPARATIVE EXAMINATION**

Based on EPA v. Caltex, High Court of Australia [FNa1]

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I. INTRODUCTION

The High Court of Australia's decision [FN1] denying the availability of the *56 privilege against self-incrimination to corporations (and other "collective entities") [FN2] follows the lead of American judicial pronouncements [FN3] by declaring the privilege to be limited to humans, but denies the human agents of collective entities the benefit of the privilege. In so doing, the Australian Court breaks with the United States Supreme Court in that the Australians recognize that a human may invoke the privilege to refuse to produce incriminating documents that may incriminate the agent personally, [FN4] but the Australians agree with the Americans that neither a corporation (through its agent) nor the agent of a corporation may refuse to produce incriminating documents. [FN5] In upholding the right of a human to assert the privilege against compelled production of documents, the Australian majority gives deference to the principle that the onus of proof is upon the prosecution and stays there until satisfied, [FN6] a doctrine best expressed by the term "presumption of innocence." However, the *57 Australians refuse to extend the presumption of innocence to collective entities or their agents. [FN7]

It is the purpose of this article to demonstrate that because

1. the "scope of the privilege against self-incrimination in its application to corporations is, because of the very nature of a corporation, somewhat limited"; [FN8]
2. in some instances a collective entity's, or its agents, response to a demand for information (the act of production) serves to incriminate the entity or the agent; and
3. the preservation of the presumption of innocence is a right of greater value than the slight gain in effective law enforcement,

the choice by the Australian High Court, as well as the previous choice by the American Supreme Court, is misguided.

The Australian majority bases its decision on a close examination of the "purpose of the privilege ... with a view to ascertaining whether it is available to corporations...." [FN9] In so doing, the Court rejects the common law rules of England, [FN10] Canada, [FN11] and New Zealand, [FN12] which recognize a corporate privilege against self-incrimination, adopting instead the trend of the legislative pronouncements of British Parliament, [FN13] the effect of the Canadian Charter of Rights and Freedoms, [FN14] the broad *58 comments of the British judiciary, [FN15] and, of course, the position of the United States Supreme Court, [FN16] all of which have denied or limited the application of the privilege to corporations.

At the root of the justification for the denial of the privilege against self-incrimination to corporate and other collective entities and their agents are two companion assumptions: (1) a corporation, being non-human, necessarily cannot act other than through a human agency; and (2) when a corporate agent engages in such a necessary act on behalf of a corporation, such an act is the corporation's act, not the individual agent's. Thus, a corporation cannot assert the privilege because it is not a human being compelled to be a witness, and the agent, who is not the corporation, is not the accused.

The High Court of Australia majority accepts this popular position and supports it with a policy pronouncement that the privilege against self-incrimination is truly based only on the desire to prevent torture and other inhumane treatment of human beings. [FN17] Since corporations are not human beings, there is no need for the privilege to apply to them. In reaching this conclusion, the Court permits the compulsion of corporate agents, as individuals, to give evidence against their alter-egos, if not themselves, and although the Court assumes *arguendo* that the presumption of innocence may be invoked by humans to prevent compelled document production, [FN18] the Court in fact rejects the ideal of the presumption of ***59** innocence's burden of proof requirement in application to corporations. [FN19] Of course, the ultimate policy justification for this narrow definition of the privilege against self-incrimination and presumption of innocence is that to grant such rights to collective entities and their agents "would have a detrimental impact on the Government's efforts to prosecute 'white-collar crime,' one of the most serious problems confronting law enforcement authorities." [FN20]

The Court's reasoning in denying the availability of the privilege against self-incrimination has a compelling logical appeal: a collective entity, being non-human, cannot be a witness. Therefore a corporation (or other collective entity) cannot assert a privilege against compelled testimony. An agent of a collective entity, when acting as such, is the entity and therefore cannot assert a privilege either for the same reasons. And, if seeking to assert the privilege as a human on behalf of the corporation, the agent is in the position of seeking to assert someone else's privilege, which is not possible. Moreover, the reach of any rule limiting compelled production of testimony requires that some testimony be involved—thus, to the extent that the production of pre-existing documents is in question, requiring production does not involve testimony whether production is sought from a human or a collective entity. [FN21] Even assuming for the sake of argument that a human can refuse to produce pre-existing documents, this is not a necessary element of the privilege and thus is not an "essential element in the accusatorial system." [FN22] Thus, making the privilege unavailable to corporations to refuse production of compelled incriminating documents would not compromise the accusatorial system. There are two problems with this reasoning:

***60** 1. It implies that the American Supreme Court is correct in denying even a human the privilege against self-incrimination to prevent compelled disclosure of a pre-existing document, while assuming *arguendo* this is not the rule in Australia; and

2. It pays only lip service to what I call the principle of presumption of innocence because, by so implying that there is no privilege to refuse compelled production by a human, the Court thereby justifies not extending the privilege to collective entities.

Thus, like the United States Supreme Court, [FN23] and by a bare majority of the Justices on both Courts, [FN24] in the name of law enforcement, and without balancing the incremental gain from promoting such law enforcement interests against the cost of erosion of individual rights, the High Court of Australia proclaims that "if it ever was the common law in Australia that corporations could claim the privilege against self-incrimination in relation to the production of documents, it is no longer the common law." [FN25] It is beyond the scope of this paper to engage in the analysis of balancing the interests of the state against those of the individual; however, it is the purpose of this paper to question the Court making such a choice without such analysis.

II. GENERAL THEORIES OF PRIVILEGE AND RELATION TO THE ISSUE OF AVAILABILITY TO CORPORATIONS

The opinion of Chief Justice Mason and Justice Toohey of the High Court of Australia surveys the history and development of the privilege, relying in large part upon the analysis contained in Professor McNaughton's revision of Wigmore's original analysis and identifying the modern rationale for the privilege as "protection of the individual from being confronted by the 'cruel trilemma' of punishment for refusal to testify, punishment for truthful testimony

or perjury (and the consequential possibility of punishment)." [FN26] This rationale, the Court noted, is predicated upon a more refined philosophy: "[T]he privilege is now seen *61 to be one of many internationally recognized human rights." [FN27] Clearly this rationale for the privilege against self-incrimination forecloses the availability of the privilege to a non-human entity, including a corporation. This conclusion had already been reached by the courts of the United States and Canada and had been acknowledged by the courts in England [FN28] as the Caltex Court notes in its own opinion. [FN29]

There are numerous justifications, or reasons, for the privilege both historically and theoretically. Wigmore (through McNaughton) [FN30] identifies twelve, as the Caltex Court observes. Moreover, as that same Court also notes, Mr. Justice Goldberg, in *Murphy v. Waterfront Commission*, [FN31] referring to the Wigmorean justifications, eloquently articulated a list of his own:

It [the privilege] reflects many of our fundamental values and most noble aspirations:

1. our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt;
2. our preference for an accusatorial rather than an inquisitorial system of criminal justice;
3. our fear that self-incriminating statements will be elicited by inhumane treatment and abuses;
4. 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," [citing Wigmore];
5. 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," [citing Grunewald];
6. our distrust of self-deprecatory statements;
- *62 7. and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." [citing Quinn]. [FN32]

Chief Justice Mason and Justice Toohey, in *Caltex*, after reviewing this legal literature, conclude that, of the twelve reasons put forth in Wigmore on Evidence:

[W]e need only refer to the last two, namely: ... "[t]he privilege prevents torture and other inhumane treatment of a human being ... [; and 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." [FN33]

Moreover, the Court asserts that the first of these reasons, the prevention of inhumane treatment of human beings "in essence ... corresponds to the only present-day justification for the privilege according to Lord Templeman" [FN34] in *A.T. & T. Istel Ltd v. Tully*, [FN35] the most recent British decision of the House of Lords on the subject of the rationale for the privilege. According to the Caltex majority, that valid justification is the "discouragement of ill-treatment of suspects and the extraction of dubious confessions." [FN36]

Of course, by focusing on the human scope of the origin and history of the privilege, [FN37] the Caltex majority is impelled to conclude that the *63 "historical reasons for the creation and recognition of the privilege do not support its extension to corporations." [FN38] "Likewise" the majority concludes that "the modern and international treatment of the privilege as a human right which protects personal freedom, privacy and human dignity is a less than convincing argument for holding that corporations should enjoy the privilege." [FN39]

Next, the Caltex majority turns to the judgment of the lower court, the Court of Criminal Appeal, [FN40] written by sitting Chief Justice Gleeson of the New South Wales Supreme Court, where, in granting the availability of the privilege to corporations, Chief Justice Gleeson stated the "principal bases" are that the privilege "assists in maintaining the fair state-individual balance and that it 'is a significant element in maintaining the integrity of our accusatorial system of criminal justice,' which requires the Crown to prove its case before the accused is called upon to answer." [FN41] Only if the High Court were to accept one or the other of these justifications for the privilege in the corporate setting could the privilege be made available to a corporation. And, of course, the Court rejects these grounds of analysis.

As for the fair state-individual balance rationale, the majority says they "reject without hesitation the suggestion that the availability of the privilege to corporations achieves or would achieve a correct balance between state and corporation." [FN42] Based upon the recognition that corporations are in a stronger position than an individual in relation to the state [FN43] and that their status as entities has made corporate and complex fraud crime difficult for the state to regulate, the majority concludes that *64 "in maintaining a 'fair' or 'correct' balance between state and corporation, the operation of the privilege should be confined to natural persons." [FN44]

The majority then goes on to analyze the next prong of Chief Justice Gleeson's justification for applying the privilege to corporations, the maintenance of the accusatorial system of justice. The accusatorial system is predicated on the principle that the onus is on the prosecution to prove the guilt of the accused, and that guilt must be proven beyond a reasonable doubt. [FN45] If the onus is on the prosecution, then that principle must be "complemented by the elementary principle that no accused person can be compelled by process of law to admit the offence with which he or she is charged[.]" [FN46] The majority then asserts that "[t]hat principle, which was primarily directed against a requirement to testify or admit guilt, was extended, by means of the privilege against self-incrimination, so as to protect an accused from compliance with an obligation arising by process of law to produce incriminating documents." [FN47] Presumably, the italicized principle in the last quoted sentence is the principle requiring the prosecution to bear the onus of proof. The Caltex majority thus links the privilege against self-incrimination as applied to the production of documents to the burden or onus of proof requirement in criminal cases.

Moreover, the majority then assumes, at least arguendo, that the privilege is available to a natural person to refuse the production of documents. [FN48] The Caltex majority points out that under English law, "settled as early as the eighteenth century, the courts would not make an order requiring an accused person to produce documents which would or might tend to incriminate him or her of the offence charged." [FN49] Thus, the privilege "protects an accused person who is required by process of law to produce documents which tend to implicate that person in the commission of an offence charged." [FN50] Moreover, "[i]n its application to the production of documents, the operation of the privilege is more far reaching in the protection which it gives than in its application to oral evidence" [FN51]-that is "because the privilege protects a person from *65 discovering or revealing information which may lead to the discovery of admissible evidence of guilt not in his or her possession or power." [FN52]

Of course, this assumption that the privilege may be exercised by a natural person to avoid producing documents that contain incriminating matter has been declared unjustified by the United States Supreme Court, so long as the production order does not compel any "testimony." [FN53] In *Fisher v. United States*, [FN54] Mr. Justice White, speaking for the Court, states that "the 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," [FN55] and thus laid to rest the rule that "private papers" are not producible at the government's demand because they are shielded by the privilege against self-incrimination.

Fisher had as much of an impact on the privilege against self-incrimination in the human setting as in the collective entity setting. In *Fisher*, the IRS served summonses upon taxpayers' attorneys. The taxpayers had transmitted tax records prepared by their accountants to the taxpayers' attorneys. The attorneys asserted, among other things, that they could not be compelled to produce the documents because to do so would violate their clients' privilege against self-incrimination. [FN56] Holding that the privilege did not apply, the Court jettisoned the "private papers" principle and asserted that the "proposition that the Fifth Amendment prevents compelled production of documents over objection that such production might incriminate stems from *Boyd v. United States*...." [FN57] After reviewing the facts of *Boyd*, [FN58] the *Fisher* Court went on to point out *66 that "[a]mong its several pronouncements, *Boyd* was understood to declare that the seizure, under warrant or otherwise, of any purely evidentiary materials violated the Fourth Amendment and that the Fifth Amendment rendered these seized materials inadmissible." [FN59] Moreover, "[s]everal of *Boyd's* express or implicit declarations have not stood the test of time. The application of the Fourth Amendment to subpoenas was limited by [inter alia] *Hale v. Henkel*," [FN60] the "mere evidence" rule was rejected when *Warden v. Hayden* [FN61] held that "[p]urely evidentiary (but 'nontestimonial') materials, as well as contraband and fruits and instrumentalities of crime" [FN62] may be the subject of search and seizure, and "any notion that 'testimonial' evidence may never be seized and used in evidence" [FN63] died with the decision in *Katz v. United States*, [FN64] which held that conversations are subject to seizure. [FN65]

The Fisher Court found that the taxpayers had no privilege to protect against producing documents prepared by their tax accountants in the taxpayers' or their attorneys' possession, since the documents contained no compelled testimony. [FN66] The Court did concede that the act of producing such documents might be incriminating under certain *67 circumstances: "[c]ompliance with the subpoena tacitly" admits the papers' existence, their "possession or control by the taxpayer," and the "taxpayer's belief that the papers are those described in the subpoena." [FN67] In the cases before the Court in Fisher itself, [FN68] the Court concluded that there were no compelled incriminating aspects in the "act of producing" by either taxpayer and that in any event such questions regarding the incriminating nature of the act of production "do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof." [FN69] Some years later, in *Braswell v. United States*, [FN70] the Court effectively foreclosed the use of the act of production as a basis for the shield of the privilege against self-incrimination in the corporate setting, as will be discussed further hereinafter. [FN71]

Nonetheless, the Caltex majority assumes that the privilege against self-incrimination does shield a person from the requirement of producing documents or other evidence which would be incriminating or lead to incriminating evidence. [FN72] However, the majority concludes that because this manifestation of the privilege "extends well beyond the objects originally sought to be achieved by way of protecting natural persons from the abuses which necessitated the introduction of the privilege," [FN73] and even though the production of documents may have some testimonial aspects, "the case for protecting a person from compulsion to make an admission of guilt is much stronger than the case for protecting a person from compulsion to produce books or documents which are in the nature of real evidence of guilt and are not testimonial in character." [FN74]

Even accepting *arguendo* that "the privilege does protect the individual from being compelled to produce incriminating books and documents," the Caltex majority continues, "it does not follow that the protection is an essential element in the accusatorial system of justice or that its unavailability in this respect, at least in relation to corporations, *68 would compromise that system." [FN75] The Justices then proclaim that: "[T]he fundamental principle that the onus of proof beyond a reasonable doubt rests on the Crown would remain unimpaired, as would the companion rule that an accused person cannot be required to testify to the commission of the offence charged." [FN76] Thus, the Justices opine that all considerations support the "conclusion that the privilege against self-incrimination in its entirety is not available to corporations." [FN77]

Chief Justice Mason and Justice Toohey then conclude their analysis of the privilege's unavailability to corporations and their agents by invoking the policy of law enforcement necessity and efficiency previously discussed. Thus, we are back to the beginning: the rationale of the decision is the law and order view that to allow the privilege to corporations would inhibit law enforcement [FN78] and the incursion into individual rights is not worth exploring because the right (privilege) really does not exist at all; it has only been assumed *arguendo* to exist. Without weighing the cost to society of the relinquishment of the right not to be compelled to aid the prosecution, it is inappropriate to assume that society's interest in effective law enforcement is worth more.

III. THE PRESUMPTION OF INNOCENCE: THE MISSING LINK OF THE CALTEX ANALYSIS

The Caltex majority articulates two policy principles that justify the imposition of a rule of no privilege for corporations. First, there is the *69 policy that a corporation is a creature of the state and is subject to greater, if not complete, scrutiny by the state as part of the price of its existence-i.e., the visitatorial power of the state. [FN79] Second, there is a desire to expand investigatory and prosecutorial powers-i.e., law enforcement weapons-in the name of law and order to quell the present grave criminal threat to society at large. [FN80]

The first policy-the visitatorial power principle-has been "jettisoned" [FN81] as a justification for the collective entity rule, [FN82] and offers no acceptable explanation for the result of denying the privilege of self-incrimination in the corporate setting. The second policy-effective law enforcement-is presented only as result. The Justices present no analysis in support of the choice of rejecting the individual right in favor of assumed greater good to society. In an analogous setting, the American exclusionary rule has been held by the United States Supreme Court to have exceptions which have been carved out on a cost-benefit analysis. [FN83] This analogy goes only so far, however, since a basic premise for the exclusionary rule exceptions is that the rule is not constitutionally based. [FN84] *70 In

the context of analysis of the privilege against self-incrimination, certainly as a common law principle, the analogy is valid: Even though not constitutionally mandated, the privilege should only yield if there is a countervailing gain to society.

Based only on these policy principles favoring the denial of the privilege to corporations, the Caltex majority concludes the State's coercion of the production of incriminating corporate documents (1) does not violate an essential element of the accusatorial system or compromise that system; (2) leaves unimpaired "the fundamental principle that the onus of proof beyond a reasonable doubt" rests on the prosecution; and (3) leaves unimpaired "the companion rule that an accused person cannot be required to testify to the commission of the offence charged." [FN85]

Chief Justice Mason and Justice Toohey do not further explain why we should accept these conclusions. Thus, one is impelled to ask

1. Why is it that the State's coercion of the production of incriminating corporate documents does not violate an essential element of the accusatorial system or compromise that system?
2. Why does the State's coercion of the production of incriminating corporate documents leave unimpaired the fundamental principle that the onus of proof beyond a reasonable doubt rests on the prosecution?
3. Why does allowing the coerced production of documents leave unimpaired the companion rule that an accused person cannot be required to testify to the commission of the offense charged?

In the opinion of Chief Justice Mason and Justice Toohey leading up to the assertion of these three conclusions, the Justices discussed at least three principles which might provide answers to these questions. These three principles are: a corporation is not human and therefore cannot be subject to inhumane treatment; [FN86] being nonhuman, a corporation cannot be a witness and therefore it cannot be compelled to testify, against itself or anyone; [FN87] and compelled production of a document which contains incriminating material is not compelled testimony and thus does not violate the principles underlying the privilege. [FN88]

Some other principles which might provide answers to those questions that are not stated by the Caltex majority but might be implied are: any relevant statement against interest made by a suspect is usable by the *71 prosecution; such use is not prohibited by the privilege against self-incrimination; the State's coercion of document production is not violative of the privilege against self-incrimination; and only the coercion of testimony is prohibited.

Some combination of these reasons, articulated or implied by the Justices, provide good technical answers to the questions posed, or at least mechanical answers. Surely, the privilege against self-incrimination, having been born of the excesses of the Star Chamber and Ecclesiastical Courts, was intended to prevent the excesses of inhumanity and extraction of dubious confessions. Since a corporation cannot assert its own privileges, much less testify and be coerced, it could never suffer the harms against which the privilege was aimed. [FN89] A corporate agent, not being the corporation itself, cannot assert the privilege of that other entity. [FN90]

However, none of these justifications addresses the spirit behind, nor concept underlying, the fundamental choice that the privilege against self-incrimination represents. That choice is between the inquisitorial system on the one hand, and the accusatorial system on the other. [FN91] When the Justices in Caltex refer to the "accusatorial system," presumably they are using it synonymously with the "adversary system." Either phrase carries with it the notions associated with individual rights vis-a-vis the state, set forth in the United States Bill of Rights, the Canadian Charter of Rights and Freedoms, or summarized in the range of justifications articulated in support of the privilege by Wigmore and Justice Goldberg. [FN92] The privilege against self-incrimination is a very significant aspect of the differences that inhere in the adversary system. However, the privilege is not all there is. The placing of the onus on the prosecution to bear the burden of production and persuasion in a criminal case is a significant block in the foundation of the accusatorial system. Moreover, the companion principle accompanying the onus and the privilege is the presumption of innocence.

*72 The prosecution must not only bear the onus of production of evidence and persuasion beyond a reasonable doubt, but it must do so without any assistance from the accused. The relationship of the privilege against self-

incrimination and the presumption of innocence in this formula is fundamental and must be seen to operate hand-in-hand with the privilege against self-incrimination, but also independently of it.

Wigmore explains that the presumption of innocence is "merely another form of expression for a part of the accepted rule for the burden of proof in criminal cases, i.e., the rule that it is for the prosecution to adduce evidence, and to produce persuasion beyond a reasonable doubt." [FN93] The presumption "implies" that the accused may remain silent "until the prosecution has taken up its burden and produced evidence and effected persuasion." [FN94] The "right to silence" which stems from the presumption of innocence has thus created, in a criminal matter, a burden upon the state independently to investigate and produce incriminating evidence against those whom it has charged.

In English common law, the principles of the Crown's burden of proving guilt beyond a reasonable doubt and the accused's "right to silence" have held steadfast. Lord Chancellor Viscount Sankey explained the importance of the Crown's evidentiary burden in *Woolmington v. Director of Public Prosecutions*: [FN95] "[n]o matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained." [FN96]

In the United States, the presumption of innocence has been called "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" [FN97] This statement appears in the *Winship* decision, which declared the standard of proof beyond a reasonable doubt in a criminal case a requisite of a fair trial under the due process clause of the Fourteenth Amendment to the constitution of the United States. [FN98] Although the Court in *Winship* did not mention the presumption of innocence again in its opinion, the subscription to the importance of the presumption in this constitutional setting is *73 unquestionable. Some years before *Winship*, Chief Justice Earl Warren had occasion to comment on the relationship of the presumption of innocence to the privilege against self-incrimination, authoring a decision of the Court ordering acquittal of a defendant for refusing to answer questions before the House Un-American Activities Committee in *Quinn v. United States*: [FN99]

Coequally with our other constitutional guarantees, the Self-Incrimination Clause "must be accorded liberal construction in favor of the right it was intended to secure." Such liberal construction is particularly warranted in a prosecution of a witness for a refusal to answer, since the respect normally accorded the privilege is then buttressed by the presumption of innocence accorded a defendant in a criminal trial. To apply the privilege narrowly or begrudgingly-to treat it as an historical relic, at most merely to be tolerated-is to ignore its development and purpose. [FN100]

Given the importance of the placement of the onus of proof upon the prosecution in the Anglo-American adversary process, and the concomitant significance of the presumption of innocence until that burden has been satisfied, it is curious that the American and Australian Courts have been so quick to say that the privilege against self-incrimination should be denied to any entity. At the very least one would expect a more reasoned analysis than that provided in *Caltex*. As noted, the *Caltex* majority believes even a human cannot resist a demand to produce private papers and, therefore, the privilege against self-incrimination should not be available to corporations either. [FN101] Because the position [FN102] is based on the reasoning of *Braswell*, [FN103] the *Braswell* dissent is worth considering as it questions that reasoning.

In *Braswell*, a federal grand jury issued a subpoena to *Braswell* as the president of two corporations, which he operated essentially as his own businesses-he was sole shareholder and, although his wife and mother *74 held corporate offices, neither had any authority. [FN104] *Braswell* claimed that to produce the documents requested would self-incriminate. [FN105] The majority, per Chief Justice Rehnquist, held that under the "mandate" of the collective entity cases, "without regard to whether the subpoena is addressed to the corporation, or as here, to the individual in his capacity as a custodian ..., a corporate custodian ... may not resist a subpoena for corporate records on Fifth Amendment grounds." [FN106] Moreover, "[u]nder those circumstances, the custodian's act of production is not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation-which of course possesses no such privilege." [FN107]

The majority recognized that "certain consequences flow from" [FN108] a custodian acting in a representative

capacity. "Because the custodian acts as a representative, the act is deemed one of the corporation and not the individual. Therefore, the Government ... may make no evidentiary use of the 'individual act' against the individual." [FN109] Thus, in a criminal case, the Government cannot introduce evidence that the corporation's documents were delivered by a particular individual in response to a subpoena. [FN110] Rather, for example, the Government might offer evidence by a subpoena server that the corporation produced the records subpoenaed. In such a scenario, if an accused "held a prominent position within the corporation that produced the records, the jury may, just as it would had someone else produced the documents, reasonably infer that he had possession of the documents or knowledge of their contents." [FN111] In this setting, since the jury is not told about the defendant's production of the records, "any nexus between ... [him] and the documents results solely from the corporation's act of production and other evidence in the case." [FN112] Finally, the Court observed in a footnote:

*75 We leave open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records. [FN113]

Justice Kennedy's dissent in *Braswell* characterized the majority opinion as based on a "metaphysical progression" which "is flawed" [FN114] in arguing for recognition of the privilege in *Braswell*'s act of production. He asserted that "the act demanded of *Braswell* requires a personal disclosure of individual knowledge, a fact which cannot be dismissed by labeling him a mere agent." [FN115] At "[t]he heart of the matter, [actually,] as everyone knows, [is the fact that the prosecution does not see such persons as *Braswell*] as mere agents at all.... What the Government seeks instead is the right to choose any corporate agent as a target of its subpoena and compel that individual to disclose certain information by his own actions." [FN116] This, Justice Kennedy asserts, gives the corporate agency fiction too much weight and undermines the majority's reasoning:

In a peculiar attempt to mitigate the force of its own holding, it impinges upon its own analysis by concluding that, while the Government may compel a named individual to produce records, in any later proceeding against the person it cannot divulge that he performed the act. But if that is so, it is because the Fifth Amendment protects the person without regard to his status as a corporate employee; and once this be admitted, the necessary support for the majority's case has collapsed. [FN117]

Thus, the *Braswell* majority recognizes the validity of the claim of privilege against self-incrimination at the same time it denies its existence. Justice Kennedy's analysis is quite compelling and renders the underpinnings of the *Braswell* principle questionable at the very least.

Finally, it is worth noting that even if the privilege against self-incrimination were deemed applicable to a corporation, the effect thereof *76 would be minimal. The dissenting opinion in *Caltex*, by Justices Deane, Dawson, and Gaudron, asserts that the "scope of the privilege against self-incrimination in its application to corporations is, because of the very nature of a corporation, somewhat limited." [FN118] Essentially the dissenters made five points:

1. "A corporation cannot be a witness." [FN119]
2. "[T]he privilege offers no protection against the use of a corporation's documents." [FN120]
3. "[A] corporation's privilege is no ground for resisting production of the corporation's documents by another person.... An officer or an employee of a corporation cannot resist production of documents in his possession, custody or control because their production might incriminate the corporation." [FN121]
4. "Although a corporation cannot be a witness in proceedings, when an officer or employee is called, even in criminal proceedings against the corporation, the officer or employee may not refuse to answer upon the basis that the answer would tend to incriminate the corporation." [FN122]
5. "Thus, the debate about whether a corporation may claim privilege against self-incrimination centres on the relatively confined area of the production of documents or the answering of interrogatories because these are the things which a corporation itself may be required to do." [FN123]

*77 IV. CONCLUSION

It is unlikely that the judicial and legislative tide against corporate and "act of production" privileges can be turned back. It is equally unlikely that the privilege against self-incrimination would receive any expansive treatment when balanced against the interests of governments in effective criminal investigation, apprehension, and prosecution of

white collar crime. However, the assumption that there is no basis for such privilege, either on behalf of corporations or their agents, without more principled analysis, is unfortunate. The effect of the abrogation of a corporation's privilege to resist the production, on self-incrimination grounds, upon both the adversarial system and the burden of proof in criminal adjudication is by no means unsubstantial and is worth further analysis by the Anglo-American Courts.

FNa1. 178 C.L.R. 477 (1993) (Austl.).

The questions on appeal before the High Court of Australia arose out of a prosecution by the appellant, the Environmental Protection Authority, of the respondent, Caltex Refining Co. Pty. Ltd., for eleven pollution offenses of discharging grease and oil into the ocean and several licensing breaches under the Clean Waters Act 1970 and the State Pollution Control Commission Act 1970. "Following the commencement of the prosecution, the EPA served on Caltex two notices, each requiring Caltex to produce identical documents relating to the pollution offenses. The first notice was a notice pursuant to § 29(2)(a) of the Clean Waters Act 1970 ... and the second was a notice to produce pursuant to the Rules of the Land and Environment Court..." *Id.* at 486. The EPA's sole purpose for executing these notices was to obtain evidence and information to use in the prosecution against Caltex. In response, Caltex challenged the issuance of the notices. The trial court held that Caltex was required to produce the documents requested in the notices, but submitted certain questions of law to the Court of Criminal Appeal for determination. The Court of Criminal Appeal held that Caltex as an incorporated company is entitled to a privilege against self-incrimination and that Caltex did not have to produce documents in response to the notices. The High Court reversed that decision of the Court of Criminal Appeal.

FNa1. Professor of Law, Southwestern University School of Law, Los Angeles. The author is indebted to Vincent Del Buono, for his prodding; Professor David E. Aaronson of Washington College of Law, American University, for his penetrating criticism and suggestions; Ms. Romy Schneider, Southwestern University School of Law, Class of 1996, for her research assistance and other input; Diana Spielberger, for her editorial suggestions; and his wife, Melissa Grossan, for her editorial suggestions.

FN1. *Caltex*, 178 C.L.R. 477. The Justices of the High Court of Australia delivered four separate judgments in *Caltex*. The judgment authored by Chief Justice Mason and Justice Toohey, speaking to the position of the majority, is the judgment most often referred to herein and to which I shall refer as the majority opinion.

FN2. Under the collective entity rubric, or doctrine, any non-human entity is denied the privilege against self-incrimination. As the majority put it in *Caltex*, the privilege is not available "to artificial legal entities such as corporations." 178 C.L.R. at 507-08; see also, e.g., *Braswell v. United States*, 487 U.S. 99, 104-09 (1988).

FN3. The United States Supreme Court has comprehensively denied the privilege against self-incrimination to all artificial entities. In *Hale v. Henkel*, 201 U.S. 43 (1906), the Court held that the right under the Fifth Amendment not to incriminate one's self was strictly a personal privilege and that an individual could not claim the privilege on behalf of a third person even though the individual was the third person's agent. *Id.* at 69. The *Hale* Court also introduced the concept that a corporation is a "creature of the State" and "its powers are limited by law." *Id.* at 74. In *Bellis v. United States*, 417 U.S. 85 (1974), the Court pointed out that an agent cannot rely on his personal privilege to avoid the production of the entity's documents which are in the agent's possession in a representative capacity. *Id.* at 97-98. The privilege is denied even though the documents might incriminate the agent personally. *Id.* Most recently, in *Braswell v. United States*, 487 U.S. 99 (1988), the Court upheld the collective entity rule by precluding a corporation from claiming the privilege. *Id.* at 104-09. Documents in an agent's possession in a representative capacity give rise to a duty to produce records on proper demand by the government. The agent's act of production is not considered a personal act, but rather, the act of the corporation. *Id.* at 109-10.

FN4. The majority seems to assume *arguendo* that the privilege protects "the individual from being compelled to produce incriminating books and documents...." *Caltex*, 178 C.L.R. at 503.

FN5. Id. at 504.

FN6. See id. at 501.

FN7. Id. at 508.

FN8. Id. at 535.

FN9. Id. at 497.

FN10. Id. at 493 (citing *Rio Tinto Zinc Corp v. Westinghouse Electric Corp*, 1978 App. Cas. 547 (appeal taken from Eng.); *Triplex Safety Glass Co., Ltd. v. Lancegay Safety Glass (1934) Ltd.*, [1939] 2 K.B. 395).

FN11. Id. at 494-96 (citing *Webster v. Soloway Mills & Co.*, [1931] 1 D.L.R. 831 (Alta. Sup. Ct.); *R. v. Amway Corp.*, 56 D.L.R.4th 309 (1989) (Can.)).

FN12. Id. at 496 (citing *New Zealand Apple and Pear Marketing Bd. v. Master & Sons Ltd.*, [1986] 1 N.Z.L.R. 191).

FN13.

Parliament has recognised the unsatisfactory results of the common law privilege against self-incrimination and has been willing to abrogate or modify that privilege.... The rule has been abrogated with regard to theft when the plaintiff is deprived of money.... The rule has been abrogated in favour of the intellectual property monopolist seeking damages for fraudulent interference with his statutory rights.... Under the Act of 1987 the privilege against self-incrimination does not apply to investigation of serious or complex fraud.

A.T. & T. Istel Ltd. v. Tully, 1993 App. Cas. 45, 55 (appeal taken from Eng.).

FN14. Justice Sopinka points out in *R. v. Amway Corp.*, 56 D.L.R.4th, 309 (1989), that although there might be a common law privilege against self- incrimination afforded to a corporation, the adoption of the Charter of Rights and Freedoms § 11(c) limits the availability of the privilege to a witness and, since a corporation cannot be a witness, it has no privilege. Id. at 322. See also *Caltex*, 178 C.L.R. at 495-96.

FN15. In *British Steel v. Granada Television*, 1981 App. Cas. 1096 (appeal taken from Eng.), Lord Denning "boldly asserted that 'in these courts, as in the United States, the privilege is not available to a corporation.'" *Caltex*, 178 C.L.R. at 494 (citing *British Steel*, 1981 App. Cas. at 1127).

FN16. See supra note 3.

FN17. *Caltex*, 178 C.L.R. at 499-500.

FN18. Id. Both English and Canadian courts have held that the production of documents and testimony of corporate agents against their employer could not be used against the agent in subsequent criminal prosecutions as mandated by statutory provisions. *R. v. Judge of the General Sessions of the Peace for the County of York, ex parte Corning Glass Works of Canada Ltd.*, (1970), 16 D.L.R.3d 609, 613 (Ont. Ct. App. 1970); *A.T. & T. Istel Ltd. v. Tully*, 1993 App. Cas. 45, 55 (appeal taken from Eng.). However, the United States courts have not recognized statutory immunity for corporate agents regarding the production of documents against their accused employer. In the subsequent criminal prosecution of the agent, the prosecution may not introduce evidence linking the accused agent to the previous subpoena or production of documents, but the evidence of the subpoena and production by the company may be used for purposes of authentication of the same documents sought to be introduced at trial. *Braswell v. United States*, 487 U.S. 99, 118 (1988).

FN19. *Caltex*, 178 C.L.R. at 499.

FN20. *Braswell*, 487 U.S. at 115 (Rehnquist, C.J.). What Mr. Chief Justice Rehnquist states in the text is in the context of the privilege against self-incrimination guaranteed by the Constitution of the United States and applied to a closely held corporation and its custodian of records. However, this statement represents the animating viewpoint of those courts elsewhere that have similarly voted against the availability of the privilege to corporations. The High Court of Australia noted that the effect of the privilege "is to shield corporate criminal activity." *Caltex*, 178 C.L.R. at 504 (opinion of Justices Mason & Toohey). Those same Justices went on to say that the "availability of the privilege to corporations has a disproportionate and adverse impact in restricting the documentary evidence which may be produced to the court in a prosecution of a corporation for a criminal offense." *Id.*

FN21. *Fisher v. United States*, 425 U.S. 391, 409-12 (1976).

FN22. *Caltex*, 178 C.L.R. at 503.

FN23. See *Braswell*, 487 U.S. at 119.

FN24. Remember, *Caltex* was 4-3 and *Braswell* was 5-4. However, the United States Supreme Court decision that eliminated the private papers privilege against self-incrimination, *Fisher v. United States*, 425 U.S. 391 (1976), was a 6-2 decision, with only Justices Brennan and Marshall objecting to the demise of the "private papers" doctrine and yet concurring in the result reached in the case.

FN25. *Caltex*, 178 C.L.R. at 508.

FN26. *Id.* at 498.

FN27. *Id.*

FN28. Although the English decisions, most notably *A.T. & T. Istel Ltd. v. Tully*, make it clear that the demise of the privilege in any setting, including its application to corporations, is for Parliament, not the courts, to declare. *Istel*, 1993 App. Cas. at 57 (judgment of Griffiths, J.).

FN29. *Caltex*, 178 C.L.R. at 489-500.

FN30. 8 WIGMORE, EVIDENCE § 2251, at 310-17 (McNaughton rev. 1961).

FN31. 378 U.S. 52 (1964).

FN32. *Id.* at 55 (referencing 8 WIGMORE, EVIDENCE, 317 (McNaughton rev., 1961); *United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting), rev'd, 353 U.S. 391 (1957); *Quinn v. United States*, 349 U.S. 155, 162 (1955)) (altered to outline style).

FN33. *Caltex*, 178 C.L.R. at 499 (quoting 8 WIGMORE, EVIDENCE § 2251, at 310-17 (McNaughton rev. 1961)).

FN34. *Id.*

FN35. 1993 App. Cas. 45 (appeal taken from Eng.). The *Istel* case did not specifically involve the privilege in the corporate setting. However, it is very significant that the Lords' judgments, particularly Lord Templeman's, do not deny the view that the privilege against self-incrimination is generally available to bodies and persons, which, by these terms, include corporations. *Id.* at 51-70.

FN36. *Caltex*, 178 C.L.R. at 499 (referencing *Istel*, 1993 App. Cas. 45). As Lord Templeman put it: "Parliament has recognized in a piecemeal fashion that the privilege against self-incrimination is profoundly

unsatisfactory when no question of ill-treatment or dubious confessions is involved." *Istel*, 1993 App. Cas. at 53.

FN37. "Neither the fact that the privilege had its origin in the necessity of protecting human beings from compulsion to testify on pain of excommunication or physical punishment nor the modern justification of discouraging ill-treatment of individuals and dubious confessions requires that the privilege be available to corporations. Although corporations are susceptible to punishment, whether by means of imposition of fines or sequestration, they cannot suffer physical punishment. Nor can they testify or be required to testify except through their officers." *Caltex*, 178 C.L.R. at 499-500.

FN38. *Id.* at 500.

FN39. *Id.*

FN40. *Caltex Refining Co. Pty. Ltd. v. State Pollution Control Comm'n*, 25 N.S.W.L.R. 118 (1991).

FN41. *Caltex*, 178 C.L.R. at 500 (citations omitted).

FN42. *Id.*

FN43. *Id.* However, small corporations consisting of two or more shareholders would not have any more advantage against the state than would an individual charged with a crime. See Ross Ramsay, *Corporations and the Privilege Against Self-Incrimination*, 15 U.N.S.W. L.J. 297, 309 (1992).

FN44. *Caltex*, 178 C.L.R. at 500-01.

FN45. See *Woolmington v. Director of Pub. Prosecutions*, 1935 All E.R. 1, 7-8 (H.L.).

FN46. *Caltex*, 178 C.L.R. at 500-01.

FN47. *Id.* (emphasis added).

FN48. *Id.* at 508.

FN49. *Id.* at 501.

FN50. *Id.* at 502.

FN51. *Id.*

FN52. *Id.*

FN53. One should, perhaps, distinguish between compelling production of documents (or other materials) by subpoena on the one hand, and by warrant, on the other. This paper only addresses the issues relating to the privilege against self-incrimination raised by the state's attempt to obtain incriminating materials by subpoena. Although the issues relating to securing such material by way of warrant, presumably based upon probable cause, are somewhat connected to this topic and are of interest, those issues are beyond the scope of this paper.

FN54. 425 U.S. 391 (1976).

FN55. *Id.* at 409.

FN56. *Id.* at 393-95.

FN57. *Id.* at 405 (referencing *Boyd v. United States*, 116 U.S. 616 (1886)).

FN58. 116 U.S. 616 (1886). *Boyd* was a civil forfeiture proceeding in which the government had subpoenaed the partners of an importing business to produce incriminating invoices. The Supreme Court held that the invoices were inadmissible. The Court ruled that the subpoena violated the Fourth Amendment's probable cause requirements with respect to search and seizure and that "the accused in a criminal case or the defendant in a forfeiture action could not be forced to produce evidentiary items without violating the Fifth Amendment as well as the Fourth." *Fisher*, 425 U.S. at 405-06 (summarizing the holding of *Boyd*).

FN59. *Fisher*, 425 U.S. at 407.

FN60. *Id.* (referencing *Hale v. Henkel*, 201 U.S. 43 (1906)). *Hale v. Henkel* is, of course, most renowned for its declaration that the privilege against self-incrimination is not available when immunity is granted, when asserted on behalf of another, or on behalf of a corporation. *Hale*, 201 U.S. at 69. See generally *Fisher*, 425 U.S. 391 (1976).

FN61. 389 U.S. 294 (1967).

FN62. *Fisher*, 425 U.S. at 407 (citing *Warden*).

FN63. *Id.*

FN64. 389 U.S. 347 (1967) (cited in *Fisher*, 425 U.S. at 407-08).

FN65. 389 U.S. at 357-59.

FN66.

A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications.

Fisher, 425 U.S. at 409 (1976).

FN67. *Id.* at 410.

FN68. *Fisher* was heard together with No. 74-611, *United States v. Kasimir*, on certiorari to the United States Court of Appeals for the Fifth Circuit.

FN69. *Id.*

FN70. 487 U.S. 99 (1988).

FN71. See *infra* note 88 and accompanying text.

FN72. *Caltex*, 178 C.L.R. at 502.

FN73. *Id.*

FN74. *Id.* at 503.

FN75. *Id.*

FN76. *Id.*

FN77. *Id.* at 504. The Caltex majority gave an indication of how the privilege has slipped in importance by noting the following two points:

First, the Justices pointed out that the "right to silence" confuses the issue, since "a number of separate and distinct immunities are generally clustered together under the label the 'right to silence,' thereby leading to the misconception that 'they are all different ways of expressing the same principle, whereas in fact they are not.'" *Id.* at 503. (quoting Lord Mustill's speech in *Regina v. Director of Serious Fraud Office, Ex parte Smith*, 1993 App. Cas. 1, at 30-34 (appeal taken from Eng.)).

Secondly, the Caltex majority noted that even though the self-incrimination privilege "has been described as 'deep rooted in English Law,'" there have been numerous legislative abrogations of the privilege "in many of its aspects, including its application to the production of documents." *Caltex*, 178 C.L.R. at 503 (citation omitted). For example, there have been statutes "regulating examinations and inquiries into the affairs of corporations, whether undertaken by liquidators, inspectors or other investigators...." *Id.* at 503-04.

FN78. See *supra* notes 3, 20, and accompanying text.

FN79. *Caltex*, 178 C.L.R. at 499-503.

FN80. *Id.* at 500-01.

FN81. The American courts have disclaimed the power of visitation as a justification for denial of a corporate privilege. See C.J. Rehnquist's opinion in *Braswell v. United States*, 487 U.S. 99 (1988), citing *United States v. White*, 322 U.S. 694, 700-01 (1944): "In applying the collective entity rule to unincorporated associations such as unions, the Court jettisoned reliance on the visitatorial powers of the State over corporations owing their existence to the State—one of the bases for earlier decisions." *Braswell*, 487 U.S. at 108. There is also a flavor of that reasoning in the language of the opinion of Chief Justice Mason and Justice Toohey in *Caltex*. See *Caltex*, 178 C.L.R. at 491.

FN82. Beginning with the case of *Hale v. Henkel*, 201 U.S. 43, 69 (1906), where the Court declared the privilege against self-incrimination inapplicable to corporations, the Court has consistently held the privilege inapplicable to any collective entity on the same rationale (i.e., that the privilege is strictly personal.). See, e.g., *Bellis v. United States*, 417 U.S. 85 (1974) (partnerships); *United States v. White*, 322 U.S. 694 (1944) (labor unions). The "collective entity" rule or doctrine is specifically referred to as such in *Braswell*, 487 U.S. at 104, where the Court distinguished between the applicability of the privilege to sole proprietorships and its inapplicability to collective entities. With respect to sole proprietorships, the Court specifically relied upon *United States v. Doe*, 465 U.S. 605 (1984), where the Court recognized the validity of a claim of privilege against self-incrimination in the act of production of incriminating documents by a sole proprietor even where the documents themselves were not protected.

FN83. See, e.g., *United States v. Leon*, 468 U.S. 897 (1984).

FN84. See, e.g., Justice Kennedy's dissent in *Braswell*, where he notes that there cannot be a balancing of interests arising out of the Fifth Amendment based on some "vague sense of fairness." 487 U.S. at 128.

FN85. *Caltex*, 178 C.L.R. at 503.

FN86. *Id.* at 498-99.

FN87. *Id.* at 499-500.

FN88. *Id.* at 502-03.

FN89. This same argument was addressed by the British Court of Appeal in *Triplex Safety Glass Co., Ltd. v. Lancegaye Safety Glass*, [1939] 2 All E.R. 613 (C.A.), which upheld refusals by both a corporation and a corporate agent to answer interrogatories that would tend to incriminate themselves. Lord Justice Du Parcq agreed that a company cannot "suffer all the pains to which a real person is subject," but he also recognized that a corporate defendant can still be "convicted and punished, with grave consequences to its reputation and to its members." *Id.* at 621.

FN90. *Bellis v. United States*, 417 U.S. 85 (1974).

FN91. See WIGMORE, *supra* note 30, at 315.

FN92. See *supra* notes 30-31 and accompanying text.

FN93. 9 WIGMORE, EVIDENCE § 2511, at 530 (Chadbourn rev. 1981) (citations omitted).

FN94. *Id.*

FN95. 1935 All E.R. Reprint 1 (H.L.).

FN96. *Id.* at 8.

FN97. In *Re Winship*, 397 U.S. 358, 363 (1970) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

FN98. *Winship*, 397 U.S. at 364.

FN99. 349 U.S. 155 (1955).

FN100. *Id.* at 162 (*italics added*) (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)).

FN101. *Caltex*, 178 C.L.R. at 504.

FN102. See *id.* at 497.

FN103. 487 U.S. 99 (1988).

FN104. *Id.* at 100-01.

FN105. *Id.* at 101.

FN106. *Id.* at 108-09.

FN107. *Id.* at 110.

FN108. *Id.* at 117-18.

FN109. *Id.* at 118.

FN110. *Id.*

FN111. Id.

FN112. Id.

FN113. Id. at 118 n.11.

FN114. Id. at 126.

FN115. Id. at 127.

FN116. Id. at 127-28.

FN117. Id. at 128.

FN118. *Caltex*, 178 C.L.R. at 535-36.

FN119. Id.

FN120. Id.

FN121. Id.

FN122. Id.

FN123. Id. at 535. The Justices note two subpoints under point 5:

Even in criminal proceedings, a notice to produce may be served on an accused corporation, not as a means of compelling it to produce the documents sought, but to lay the foundation for proof of their contents by secondary evidence. And the prosecution's powers of search and seizure are an important resource for discharging the onus which the prosecution bears. As Justice Holmes observed in *Johnson v. United States*: "A party is privileged from producing the evidence, but not from its production."

Id. (referencing *Johnson*, 228 U.S. 457, 468 (1913)) (citation omitted).

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