EVIDENCE—SELF-INCRIMINATION—NEW JERSEY COMMON LAW SELF-INCRIMINATION PRIVILEGE INAPPLICABLE TO CONTENTS OF SUBPOENAED BUSINESS RECORDS OF SOLE PROPRIETOR—*In re Grand Jury Proceedings of Guarino*, 104 N.J. 218, 516 A.2d 1063 (1986).

A hallmark of American jurisprudence is the notion that compelling a person's unwilling testimony to convict him of a crime is an improper exercise of governmental authority.[1] Commonly referred to as the "privilege against self-incrimination," the "privilege" is actually a federal constitutional right guaranteed by the self-incrimination clause of the fifth amendment.[2] Additionally, the privilege against self-incrimination exists independently in state law, either in state constitutions or at common law.[3] With respect to voluntarily prepared sole proprietorship business records,[4] the United States Supreme Court has held that the fifth amendment privilege is inapplicable because the con-

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[1] *See* D. FELLMAN, THE DEFENDANT'S RIGHTS TODAY 304 (1976).

[2] U.S. CONST. amend. V. The fifth amendment provides: "[N]o person shall be . . . compelled in any criminal case to be a witness against himself . . . ." *Id.* Developed at common law, the privilege is historically rooted in English resistance to the excesses of the Court of Star Chamber under the Stuarts. State v. Deatore, 70 N.J. 100, 113 n.8, 358 A.2d 163, 170 n.8 (1976) (citing 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 440 (1883)). Brought to the American colonies as part of the common law heritage, the privilege was ultimately enshrined as a federal constitutional right. *Id*; *see also* Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935). In 1964, the fifth amendment privilege was extended to the states via the fourteenth amendment due process clause. Malloy v. Hogan, 378 U.S. 1, 6-8 (1964); *see also* MCCORMICK ON EVIDENCE § 117 (3d ed. 1984).

[3] *See* MCCORMICK, *supra* note 2, at § 115. New Jersey guarantees the privilege as a doctrine of common law. *See* FELLMAN, *supra* note 1, at 305-06, 306 n.8. *See also* State v. Vinegra, 73 N.J. 484, 376 A.2d 150 (1977); State v. Fary, 19 N.J. 431, 117 A.2d 499 (1955); State v. Zdanowicz, 69 N.J.L. 79, 55 A. 743 (1903); Fries v. Brugler, 12 N.J.L. 79 (Sup. Ct. 1830). As stated by the *Zdanowicz* court: "Although we have not deemed it necessary to insert in our constitution this prohibitive provision, the common law, unaltered by legislation or by lax practice, is deemed by us to have its full force. In New Jersey, no person can be compelled to be a witness against himself." 69 N.J.L. at 622, 55 A. at 743. The New Jersey privilege is codified as a rule of evidence. *See* N.J. R. EVID. 23-25, *codified at*, N.J. STAT. ANN. §§ 2A:84A-17 to -19 (West 1986). This rule provides: "Every person has in any criminal action in which he is an accused a right not to be called as a witness and not to testify." N.J.R. EVID. 23.

[4] The business documents discussed in this casenote are not records required to be kept by law, the contents of which have been held to be unprivileged under the fifth amendment. *See* Shapiro v. United States, 335 U.S. 1, 33 (1948); State v. Stoeger, 97 N.J. 391, 405, 478 A.2d 1175, 1182 (1984). *But cf.* Marchetti v. United States, 390 U.S. 39, 57 (1968); Albertson v. SACB, 382 U.S. 70, 79 (1965) (both holding the exception to the privilege against self-incrimination for records re-

tents of such documents are not the product of governmental coercion, and therefore not compelled testimony.[5] Notwithstanding this interpretation, since the privilege exists independently in state law, a state court can conclude that its state law privilege affords a broader scope of protection than that provided by the fifth amendment.[6] The New Jersey Supreme Court recently recognized a broader state self-incrimination privilege in principle, but concluded that the privilege did not extend to the voluntarily prepared business records of a sole proprietor in *In re Grand Jury Proceedings of Guarino*.[7]

In 1984, Green Acres Estates, a sole proprietorship real estate concern operated by Joseph Guarino became the target of a state grand jury investigation.[8] During the investigation of Green Acres' activities, Guarino was served with a subpoena duces tecum.[9] The subpoena ordered him to produce business doc-

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quired to be kept by law inapplicable where documentary requirement is "directed at a highly selective group inherently suspect of criminal activities").

5 *See, e.g.*, United States v. Doe, 465 U.S. 605 (1984) (contents of sole proprietor's business records not privileged under fifth amendment); Fisher v. United States, 425 U.S. 391 (1976) (compelled production of voluntarily prepared tax records in possession of taxpayer's attorney not violative of fifth amendment).

6 *See* PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) (States have the "sovereign right to adopt in [their] own constitution[s] individual liberties more expansive than those conferred by the Federal Constitution."). Justice Brennan commented in 1977 that "state constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). It is a growing trend among state courts to use state constitutions to provide greater protection of individual rights than that afforded by parallel provisions in the United States Constitution. State v. Hunt, 91 N.J. 338, 359, 450 A.2d 952, 962 (1982) (Handler, J., concurring). In support of this proposition, Justice Handler's concurrence cited inter alia, Shiras v. Britt, 267 Ark. 97, 99, 589 S.W.2d 18, 19 (1979); People v. Rucker, 26 Cal.2d 368, 389-91, 605 P.2d 843, 856, 162 Cal. Rptr. 13, 26 (1980); O'Connor v. Johnson, 287 N.W.2d 400, 405 (Minn. 1979); Keene Publishing Corp. v. Cheshire County Super. Ct., 119 N.H. 710, 711, 406 A.2d 137, 138 (1979); Cooper v. Morin, 49 N.Y.2d 69, 79, 399 N.E.2d 1188, 1194, 424 N.Y.S.2d 168, 174 (1979), *cert. denied*, 446 U.S. 984 (1980). *See generally* Developments in the Law—The Interpretation of State Constitutional Rights, 95 HARV. L. REV. 324 (1982).

The Supreme Court of New Jersey has vigorously applied this principle with respect to the state constitutional provision governing search and seizure, despite textual similarity to its federal counterpart. *See* State v. Hunt, 91 N.J. 338, 344, 450 A.2d 952, 955 (1982); State v. Alston, 88 N.J. 211, 225, 440 A.2d 1311, 1318 (1981); State v. Johnson, 68 N.J. 349, 353 n.2, 349 A.2d 66, 68 n.2 (1975).

7 104 N.J. 218, 516 A.2d 1063 (1986).

8 *Id.* at 220-21, 516 A.2d at 1064.

9 *Id.* at 221, 516 A.2d at 1064. A subpoena duces tecum is defined as "[a] process by which the court, at the instances of a party, commands a witness who has in his possession or control some document or paper that is pertinent to the issues of

uments related to Green Acres' real estate transactions since 1970.[10] Guarino moved to quash the subpoena.[11] The trial court dismissed Guarino's motion as untimely, however, and ordered him to appear before the grand jury.[12]

Guarino made an appearance before the grand jury in June 1984, but refused to produce the subpoenaed documents, invoking his fifth amendment right against self-incrimination.[13] Pursuant to the state immunity statute, the attorney general applied for, and was granted, an order compelling Guarino to produce the documents.[14] The order also immunized Guarino from the

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a pending controversy, to produce it at the trial." BLACK'S LAW DICTIONARY 1279 (5th ed. 1979).

[10] *Guarino*, 104 N.J. at 221, 516 A.2d at 1064. The subpoena specifically directed Guarino to produce the following records:

> 1) all contracts for the sale of real estate (including conditional land sales contracts) by or on behalf of Joseph Guarino d/b/a Green Acres Estates, seller-grantor, in Burlington County and Cumberland County (regardless of whose signature appears on behalf of the seller);
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> 2) cash receipts journal and general ledger recording all payments made by purchasers/grantees of property from Joseph Guarino d/b/a Green Acres Estates in Cumberland and Burlington Counties (whether payments are complete on [sic] ongoing; whether or not the deed has been transferred);
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> 3) all payment coupons or other documentation which reflect and record payments made by purchasers/grantees of property from Green Acres Estates in Burlington and Cumberland Counties.

Id.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 221-22, 516 A.2d at 1064 (citing N.J. STAT. ANN. § 2A:81-17.3 (West 1986)). This section provides:

> In any criminal proceeding before a court or grand jury, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby and if the Attorney General or the county prosecutor with the approval of the Attorney General, in writing, requests the court to order that person to answer the question or produce the evidence, the court shall so order and that person shall comply with the order. After complying and if but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, such testimony or evidence, or any information directly or indirectly derived from such testimony or evidence, may not be used against the person in any proceeding or prosecution for a crime or offense concerning which he gave answer or produced evidence under court order. However, he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce evidence in accordance with the order. If a person refuses to testify after being ordered to testify as aforesaid, he may be adjudged in contempt and committed to the county jail until such time as he purges himself of contempt by testifying as ordered

use of any evidence arising from the act of production.[15] Guarino again moved to quash the subpoena, contending that use of the contents of the subpoenaed papers against him would violate both his fifth amendment and New Jersey common law privilege against self-incrimination.[16]

The trial court denied Guarino's motion to quash the subpoena based on federal case law construing the fifth amendment.[17] The judge refrained from deciding whether the state privilege against self-incrimination provided greater protection than the federal constitution, however, because the New Jersey Supreme Court had never given a clear mandate on that issue.[18] The trial court, therefore, ordered Guarino to produce the subpoenaed documents, but stayed the order pending appeal.[19]

In an unpublished per curiam decision, the appellate division reversed the trial court's order but urged that the supreme court grant certification in order to conclusively determine the scope of the state self-incrimination privilege with respect to business records.[20] The New Jersey Supreme Court subsequently granted certification.[21] The supreme court reversed the appellate division judgment, and reinstated the order of the trial court.[22] The court held that the New Jersey common law privilege against self-incrimination, while broader than its fifth

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without regard to the expiration of the grand jury; provided, however, that if the grand jury before which he was ordered to testify has been dissolved, he may then purge himself by testifying before the court.

N.J. STAT. ANN. § 2A:81-17.3 (West 1986).

15 *Guarino*, 104 N.J. at 221-22, 516 A.2d at 1064. The trial court's order specifically immunized Guarino from "the use of the evidence against him *of the act of production* of said records in any proceeding or prosecution for a crime or offense, concerning matters arising out of the act of production of the records produced under order of the court pursuant to the provisions of N.J.S.A. § 2A:81-17.3. . . ." *Id.* at 222, 516 A.2d at 1064.

16 *Id.*

17 *Id.* The trial court relied on the United States Supreme Court's decision in United States v. Doe, 465 U.S. 605 (1984). *See infra* notes 93-111 and accompanying text (discussing *Doe*). *See generally* Note, *Abolition of Fifth Amendment Protection for the Contents of Preexisting Documents: United States v. Doe*, 38 S.W. L.J. 1023 (1984).

18 *Guarino*, 104 N.J. at 222, 516 A.2d at 1064.

19 *Id.* at 222, 516 A.2d at 1064-65.

20 *In re* Grand Jury Proceedings of Joseph Guarino, No. A-229-84T5, slip op. at 4 (App. Div. Mar. 28, 1985), *rev'd*, 104 N.J. 218, 516 A.2d 1063 (1986). The appellate court relied on the New Jersey Supreme Court's decision in *In re* Addonizio, 53 N.J. 107, 248 A.2d 531 (1968). *See infra* notes 56-71 and accompanying text (discussing *Addonizio*).

21 *In re* Grand Jury Proceedings of Guarino, 101 N.J. 306, 501 A.2d 962 (1985), *granting cert. to* No. A-229-84T5, (App. Div. Mar. 28, 1985).

22 *Guarino*, 104 N.J. at 235, 516 A.2d at 1072.

amendment counterpart, does not afford protection to business records of any kind, including those of a sole proprietor, or sole practitioner.[23]

The long-enduring axiom that an individual's incriminating private papers are privileged from compelled disclosure derives from *Boyd v. United States*,[24] a landmark case in fifth amendment self-incrimination clause analysis. In *Boyd*, a forfeiture action in rem was brought by federal prosecutors against a business partnership, alleging a fraudulent failure to pay an import tax.[25] At trial, the government entered into evidence a copy of an invoice which had been subpoenaed from the partners.[26] Objections were raised both to the compulsory discovery of the invoice and to its evidentiary use against the partnership.[27] Concluding that the government's actions were "subversive of all the comforts of society,"[28] the United States Supreme Court held that the subpoena and use of the invoice against the property interests of the partners violated the fourth and fifth amendments.[29]

The *Boyd* Court maintained that compelling an individual to produce his private papers was equivalent to an unreasonable search and seizure in violation of the fourth amendment.[30] The Court reasoned that governmental searches and seizures of private papers were invasions of the owners "indefeasible right" to private property.[31] The Court determined that the constitution-

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23 *See id.*

24 116 U.S. 616 (1886).

25 *See id.* at 617. The Court identified the forfeiture action as a quasi-criminal proceeding. *Id.* at 634.

26 *Id.* at 618.

27 *Id.* at 621. Specifically, the Boyds raised fourth and fifth amendment objections. *Id.*

28 *Id.* at 628 (quoting Entick v. Carrington, 19 How. St. Tr. 1029, 1066 (K.B. 1765), *reprinted in abbreviated form* at 95 Eng. Rep. 807 (1765)).

29 *Id.* at 634-35.

30 *Id.* The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The Court equated a subpoena with a search and seizure because a subpoena "effects the sole object and purpose of [a] search and seizure." *Boyd*, 116 U.S. at 622.

31 *Boyd*, 116 U.S. at 630. The *Boyd* court elaborated: "The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole." *Id.* at 627 (citation omitted).

ality of a search and seizure under the fourth amendment turned on the question of common law property rights.[32] In this regard, the Court distinguished governmental seizure of stolen, forfeited, or smuggled goods from seizures of an individual's private books and papers: "In the [former] case, the government is entitled to possession of the property; in the [latter] it is not."[33] Accordingly, the Court concluded that search warrants and subpoenas were only permissible where the government was acting under a superior claim to title or possession.[34]

Addressing the defendants' fifth amendment claim, the *Boyd* Court ruled that compelling an individual to submit his private papers to be used as evidence against him violated the right against self-incrimination.[35] The Court reasoned that there was no substantial difference between using a person's private papers against him and compelling his incriminating oral testimony.[36] Thus, the Court declared that any attempt to compel production of a person's property to obtain incriminating evidence against him violated the fifth amendment.[37]

In the years following *Boyd*, through the mid-1970's, the

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[32] *See id.* at 623.

[33] *Id. Boyd's* fourth amendment property rights rationale served as the basis for the "mere evidence rule." *See* Bradley, *Constitutional Protection for Private Papers*, 16 HARV. C.R.-C.L. L. REV. 461, 465-66. The mere evidence rule prohibited as unreasonable the seizure of property which did not fall within the categories of fruits and instrumentalities of criminal activity or contraband. *Id.*; *see also* Gouled v. United States, 255 U.S. 298, 309 (1921). The protection of property rights also served to generally protect privacy. Bradley, *supra* at 466. The mere evidence rule was ultimately abandoned. Warden v. Hayden, 387 U.S. 294, 309-10 (1967) ("[T]he principle object of the [f]ourth [a]mendment is the protection of privacy rather than property"). For a discussion of the *Boyd* opinion and its subsequent abandonment by the Supreme Court, see generally Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 UCLA L. REV. 343 (1979).

[34] *Boyd*, 116 U.S. at 623-24.

[35] *Id.* at 634-35. The *Boyd* court stated: "Compelling the production of . . . private books and papers . . . is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." *Id.* at 631-32.

[36] *Id.* at 633. The Court repeatedly referred to the invoice as a "private paper." Commentators generally agree that this was only intended to mean that the invoice was private property. Heidt, *The Fifth Amendment Privilege and Documents—Cutting Fisher's Tangled Line*, 49 MO. L. REV. 439, 446 (1984); *see also* Bradley, *supra* note 10, at 465; Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 955 (1977). Cases citing *Boyd* have suggested, however, that the Court was attempting to protect an expectation of privacy in the contents of an invoice. *See, e.g.*, Bellis v. United States, 417 U.S. 85, 91-92 (1974); Couch v. United States, 409 U.S. 322, 348 (1973) (Marshall, J., dissenting).

[37] Heidt, *supra* note 36, at 446.

United States Supreme Court gradually modified and rearticulated the various policies and criteria determinative of the scope of the fifth amendment privilege.[38] Some of *Boyd's* specific pronouncements were attenuated or discredited in this process.[39] The Court continued to cite *Boyd*, however, as an authoritative decision in fifth amendment jurisprudence.[40]

The standard that evolved from *Boyd* generally sought to protect the individual against overbearing or inhuman governmental treatment[41] and to preserve "an accusatorial rather than an inquisitorial system of criminal justice."[42] In particular, the Court adhered to the so-called collective entity rule, which holds that the fifth amendment privilege is strictly personal and applies only to natural persons.[43] On this basis, the Court held that the privilege does not extend to corporations and other collective or organizational entities, or to their representative agents.[44] Furthermore, the Court required that some form of "physical or moral compulsion" be exercised upon the individual to be incriminated before it finds that the fifth amendment has been violated.[45] Thus, voluntary admissions or incriminating evidence produced by a third party are not privileged.[46] Finally, the Court required that to invoke the privilege it is necessary that the evidence sought to be compelled is "testimonial or communicative" in nature.[47] Abandoning *Boyd's* property oriented conception of

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38 *See* Note, *supra* note 36, at 945; *see also infra* notes 40-49 and accompanying text.

39 *See* Note, *supra* note 36, at 945.

40 *Id.*; *see also* Bellis v. United States, 417 U.S. 85, 87-88 (1974); Couch v. United States, 409 U.S. 322, 330 (1973); Schmerber v. California, 384 U.S. 757, 763-64 (1966). By the end of its ninety year metamorphosis, *Boyd* was primarily cited in support of the limited propositions that the fifth amendment "privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life." *Bellis*, 417 U.S. at 87-88.

41 *E.g.*, Miranda v. Arizona, 384 U.S. 436, 460 (1966).

42 Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

43 United States v. White, 322 U.S. 694, 698 (1944).

44 *Id.* at 701; *see also* Bellis v. United States, 417 U.S. 85, 94-96 (1974) (fifth amendment privilege does not extend to business partnerships); McPhaul v. United States, 364 U.S. 372, 380 (1960) (fifth amendment privilege does not extend to political organizations); Wilson v. United States, 221 U.S. 361, 382 (1911) (fifth amendment privilege does not extend to corporations).

45 Perlman v. United States, 247 U.S. 7, 15 (1918).

46 *Id.*; *see also* Couch v. United States, 409 U.S. 322, 328 (1973) (fifth amendment prohibits compelling an individual to bear witness against himself, not against obtaining incriminating evidence from a third party).

47 Schmerber v. California, 384 U.S. 757, 761 (1966). In *Schmerber*, the Court stated that "the privilege protects an accused only from being compelled to testify

the fifth amendment, the Court maintained that protection of personal privacy was the underlying objective of the fifth amendment.[48] Consequently, while a person's "communicative" private papers continued to be privileged,[49] the privilege extended only to those papers in which "an expectation of protected privacy or confidentiality" had been demonstrated with respect to the contents.[50]

While the United States Supreme Court was defining the parameters of the fifth amendment privilege against self-incrimination, the New Jersey common law privilege was also evolving along essentially parallel lines.[51] Although not expressly guaran-

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against himself, or otherwise provide . . . evidence of a testimonial or communicative nature." *Id.* Specifically included within this definition of protected evidence were the contents of an individual's incriminating private papers. *Id.* at 763-64.

[48] *See, e.g.*, Couch v. United States, 409 U.S. 322, 327 (1973) (the privilege "respects a private inner sanctum of individual feeling and thought"); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("The [f]ifth [a]mendment . . . enables the citizen to create a zone of privacy."); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (the fifth amendment respects "the right of each individual 'to a private enclave where he may lead a private life.' "). In *Murphy*, Justice Goldberg summarized the values and policies protected by the fifth amendment privilege:

> [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 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;" our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a "shelter to the guilty," is often "a protection to the innocent."

Id. at 55 (citations omitted).

[49] *See supra* note 47.

[50] *Couch*, 409 U.S. at 335-36 (1973); *see also* Bellis v. United States, 417 U.S. 85, 92 (1974) (business partnership financial records not sufficiently private or confidential for fifth amendment privilege to attach).

[51] *Compare* Board of Health, Weehawken Tp. v. New York Central R.R. Co., 10 N.J. 284, 289, 90 A.2d 736, 738 (1952) (privilege against self-incrimination unavailable to corporations and other artificial entities) *and* State v. Alexander, 7 N.J. 585, 589, 83 A.2d 441, 445 (1951) (privilege against self-incrimination does not proscribe compelled submission of physical evidence), *cert. denied*, 343 U.S. 908 (1952) *and* Bianchi v. Hoffman, 36 N.J. Super. 435, 438, 116 A.2d 206, 208 (App. Div. 1955) (privilege against self-incrimination does not proscribe compelled disclosure of records required by law to keep) *with* United States v. White, 322 U.S. 694, 698 (1944) (fifth amendment privilege against self-incrimination applies only to natural individuals) *and* Schmerber v. California, 384 U.S. 757, 764 (1966) (fifth amendment privilege does not proscribe compulsion upon accused to submit real or phys-

teed by the state constitution,[52] the common law privilege was statutorily confirmed in 1855,[53] and is presently codified in the state rules of evidence.[54] In 1964, the fifth amendment privilege was also explicitly extended to the states through the fourteenth amendment.[55] Four years later, the New Jersey Supreme Court analyzed the scope of the fifth amendment privilege within the context of a grand jury subpoena duces tecum for personal financial papers in *In re Addonizio*.[56]

A state grand jury investigating the alleged corrupt practices of Newark city officials, subpoenaed the personal financial records of the mayor, Hugh Addonizio.[57] Addonizio objected to the subpoena and refused to produce the records.[58] He con-

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ical evidence) *and* Shapiro v. United States, 335 U.S. 1, 17 (1948) (fifth amendment does not proscribe compelled production of records required to be kept by law).

The parallel between the fifth amendment and New Jersey privilege against self-incrimination is evidenced further by the reliance upon federal precedent in the legislative history of New Jersey evidence rules 23, 24, and 25, which codify the state common law privilege. *See* COMMISSION TO STUDY THE IMPROVEMENT OF THE LAW OF EVIDENCE, REPORT TO THE SENATE AND GEN. ASSEMBLY OF NEW JERSEY OF 1956, at 28-31 (1956). Regarding the definition of incrimination in rule 24, the report stated: "The definition adopted by this Commission is that enunciated by the Supreme Court of the United States in United States v. Hoffman." *Id.* at 30 (Comment to proposed amendment to rule 24) (citing 341 U.S. 479 (1951)). Similarly, discussing exceptions to the privilege against self-incrimination in rule 25, the report stated: "This rule is the corollary to the constitutional right against self-incrimination." *Id.* at 31 (Comment to proposed amendment to rule 25). *See also* Supplemental Letter in Lieu of Brief and Appendix on Behalf of the State of New Jersey at 4-5, *In re* Grand Jury Proceedings of Guarino, 104 N.J. 218, 516 A.2d 1063 (1986) (No. 23,926).

52 *See supra* note 3.

53 *See* Act of April 5, 1855, ch. 236, 1974 N.J. Laws 668 (codified as amended at N.J. STAT. ANN. §§ 2A:84A-17 to -19 (West 1986)).

54 *See supra* note 3.

55 *See* Malloy v. Hogan, 378 U.S. 1, 8 (1964). "The [f]ourteenth [a]mendment secures against state invasion the same privilege that the [f]ifth [a]mendment guarantees against federal infringement—the right of a person to remain silent unless he choose[s] to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Id.*

56 53 N.J. 107, 248 A.2d 531 (1968).

57 *Id.* at 113, 248 A.2d at 534. The subpoenaed records included Addonizio's personal savings and checking account statements, lists of his real and personal property holdings, and lists of all his investments. *Id.* at 113, 248 A.2d at 534-35.

58 *Id.* at 113, 248 A.2d at 534. Addonizio raised fourth and fifth amendment objections to the subpoena. *Id.* Addonizio also attempted to quash a second subpoena directed to a bank and brokerage company demanding records of their transactions with him. *Id.* at 112, 248 A.2d at 534. The court rejected Addonizio's contention that the bank and brokerage house records were also privileged. *Id.* at 131, 248 A.2d at 545. The records were unprivileged because they did not belong to him, and therefore, "the subpoena touched nothing in which Addonizio [had] a property right." *Id.*

tended that the subpoenaed records were privileged because they could be used to incriminate him of official misconduct.[59] He further contended that absent a grant of immunity, production of the records could not be compelled even for the limited purpose of in camera review.[60]

The New Jersey Supreme Court upheld Addonizio's claim of privilege because he was a target of the grand jury's investigation and not merely a witness.[61] Chief Justice Weintraub, writing for a unanimous court, observed that in most instances a witness' claim of privilege must be reviewed and sustained by the trial court to ensure the claim's validity, before requiring the attorney general to decide whether or not to offer the witness immunity.[62] Chief Justice Weintraub reasoned that a review of the merits was required to prevent "fraudulent or frivolous interruption[s] of trials and hearings,"[63] and to provide the attorney general with information on which to base a decision on whether to offer immunity.[64] The Chief Justice noted, however, that when a witness is in fact the target of investigation, no more than his claim of possible self-incrimination is needed to validate his fifth amendment privilege.[65] Concluding that it was "inconceivable" that

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59 *Id.* at 114, 248 A.2d at 535.

60 *See id.* Addonizio sought immunity pursuant to N.J. STAT. ANN. § 2A:81-17.3 (West 1986). *Id. See supra* note 14 for text of this statute.

61 *Addonizio*, 53 N.J. at 116-17, 248 A.2d at 536 (citing State v. DeCola, 33 N.J. 335, 341-42, 164 A.2d 729, 732 (1960); *In re* Boiardo, 34 N.J. 599, 604-06, 170 A.2d 816, 819-20 (1961)).

62 *Id.* at 115, 248 A.2d at 536.

63 *Id.* at 116, 248 A.2d at 536.

64 *Id.*

65 *Id.* at 117, 248 A.2d at 536. The protection afforded grand jury target witnesses in New Jersey has traditionally been broadly construed. *See* State v. DeCola, 33 N.J. 335, 342, 164 A.2d 729, 732 (1960). The *DeCola* court stated that "a person whose criminal liability is the object of the grand jury inquiry must be informed of his privilege to withhold evidence tending to his own incrimination." *Id.* The court reasoned that "[i]f there is a duty to warn, the privilege not to testify is implicit." *Id.* The remedy for failing to warn a target witness is to quash the ensuing criminal indictment. *See* State v. Vinegra, 73 N.J. 484, 488, 376 A.2d 150, 152 (1970) (noting with approval the lower court practice of quashing criminal indictments resulting from evidence obtained from uninformed grand jury targets). In this respect, the New Jersey privilege against self incrimination offers greater protection to potential criminal defendants than does the fifth amendment. *Cf.* United States v. Washington, 431 U.S. 181 (1977) (holding that failure to warn grand jury witness that he is the target of investigation is insufficient grounds to quash resulting criminal indictment, or suppress evidence derived from his testimony under federal law.).

This "target doctrine" has been modified as applied to public employees. *See* N.J. STAT. ANN. § 2A:81-17.2a1 (West 1986). Enacted in 1970, the statute requires all public employees "to appear and testify upon matters directly related to the

Addonizio's records "could reveal criminality upon the part of others without also implicating him,"[66] the court held the contents of the records privileged.[67] Although specifically framed in terms of the fifth amendment, the court noted that its holding was also consonant with principles of state common law predating the fifth amendment mandate on the states.[68]

In reaching its decision, the court observed that the fifth amendment privilege precludes use of a subpoena to obtain incriminating evidence from a criminal suspect that should be seized by search warrant.[69] By way of example, the court noted that a criminal defendant cannot "be subpoenaed to produce the gun or loot, no matter how probable the cause."[70] Equating the enforcement of a subpoena for incriminating documents with the compulsory production of the instrumentality or fruit of a crime, the court concluded that the fifth amendment proscribes the use of governmental coercion upon the individual to compel the production of anything that might incriminate him.[71]

Eight years later, however, the United States Supreme Court reassessed the goals and principles of fifth amendment jurisprudence as they relate to production of personal papers in *Fisher v. United States*.[72] In *Fisher*, the Court held for the first time that the fifth amendment does not protect individuals from being compelled to produce their own incriminating records.[73] *Fisher* involved challenges by taxpayers to IRS summonses requiring the taxpayers to produce tax records which had been prepared by accountants and subsequently transferred to the taxpayers' attorneys.[74] The Court rejected the taxpayers' assertion of fifth amendment privilege, holding that compliance with the sum-

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conduct of [their] office and subjecting [them] to removal if [they] fail to do so." *Vinegra*, 73 N.J. at 489, 376 A.2d at 152 (citing N.J. STAT. ANN. § 2A:81-17.2a1 (West 1986)). The statute, however, also confers use immunity upon the employee for any incriminating evidence that may be derived from his testimony. *See* N.J. STAT. ANN. § 2A:81-17.2a2 (West 1986).

66 *Addonizio*, 53 N.J. at 117, 248 A.2d at 536.

67 *Id.*

68 *Id.*

69 *Id.* at 129, 248 A.2d at 543.

70 *Id.*

71 *Id.*

72 425 U.S. 391 (1976).

73 *See id.* at 415. *See also* Note, *supra* note 36, at 975 (commenting on the unprecedented nature of the Court's holding).

74 *See Fisher*, 425 U.S. at 393-95. The Supreme Court consolidated the cases of Fisher v. United States, 500 F.2d 683 (3rd Cir. 1974) and United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974). *See* 420 U.S. 906 (1975). Both cases involved almost identical facts. *See Fisher*, 425 U.S. at 393-95.

monses did not require any form of coerced self-incrimination.[75] The Court determined that the records did not contain testimonial declarations of the taxpayers because they were prepared by persons other than the taxpayers themselves.[76] The Court reasoned, moreover, that since the records had been voluntarily prepared, their contents had not been compelled.[77] The criteria for fifth amendment protection, the Court concluded, was not whether the person asserting the privilege had written the document, but whether the government had compelled the writing.[78] The Court acknowledged that the proscription against compulsory disclosure of a person's incriminating papers had been consistently upheld in cases dating back to *United States v. Boyd*, but stated that much of the rationale underlying this rule had "not stood the test of time."[79]

Writing for the majority, Justice White stated that in order for the fifth amendment privilege to attach, three elements must be present: compulsion, incrimination, and a testimonial communication.[80] Privacy was specifically rejected as a factor in this analysis.[81] While conceding that privacy may be incidentally protected by the privilege, Justice White flatly rejected the notion that protection of privacy is a fifth amendment goal.[82] He as-

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75 *Fisher*, 425 U.S. at 414.

76 *Id.* at 409.

77 *Id.* at 409-10.

78 *Id.* at 410 n.11.

79 *Id.* at 407. The Court noted the limited applicability of the fourth amendment to subpoenas. *Id.* (citing Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946); Hale v. Henkel, 201 U.S. 43 (1906)). The Court also noted that *Boyd's* property based fourth amendment rationale, the "mere evidence" rule, had been abandoned. *Id.* (citing Warden v. Hayden, 387 U.S. 294 (1967)). The Court further observed that, under certain circumstances, the seizure and use of "testimonial" evidence was constitutionally permissible. *Id.* at 407-08 (citing Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); Osborn v. United States, 385 U.S. 323 (1966) (all approving, under appropriate safeguards, the recording of conversations of persons suspected of crimes)).

80 *See id.* at 410.

81 *See id.* at 399.

82 *Id.* at 399-401. Justice White explained that the fifth amendment was not violated by all privacy invasions, only by those which come within the purview of its specific language. *Id.* at 399. The Court limited fifth amendment personal privacy guarantees to those invasions involving "compelled testimonial self-incrimination of some sort." *Id.* Justice White reasoned that:

> If the [f]ifth [a]mendment protected generally against the obtaining of privation information . . . its protections would presumably not be lifted by probable cause and a warrant or by immunity. The privacy invasion is not mitigated by immunity; and the [f]ifth [a]mendment's strictures, unlike the [f]ourth's, are not removed by showing reasonableness.

Id. at 400. Justice White asserted that only the fourth amendment provides general

serted, rather, that the fifth amendment does not protect "against the obtaining of private information from a man's mouth, or pen, or house," unless morally or physically extorted from him.[83]

While rejecting fifth amendment protection for the contents of subpoenaed documents, the Court acknowledged that certain unspoken communicative features implicit in the act of producing them in compliance with a subpoena may be protected.[84] These include the subpoenaed person's admission of the document's existence, his possession or control over them, and his belief that the documents produced are the documents requested.[85] Justice White observed that these tacit averments may, under some circumstances, rise to the level of incriminating testimony worthy of fifth amendment protection.[86] With respect to the records in question, however, the Court concluded that these concerns were inapposite because "[t]he existence and location of the [tax records were] a foregone conclusion" and the government therefore was "not relying on the 'truthtelling' of the taxpayer[s]."[87]

The *Fisher* majority's approach to fifth amendment document production analysis drew criticism from Justice Brennan in a concurring opinion.[88] Justice Brennan took issue with the majority's rejection of privacy protection as a factor in determining the scope of the fifth amendment.[89] He expressed concern that the

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protection for private information. *Id.* at 400-01. The Court interpreted the specific reference to privacy interests in the fourth amendment and the exclusion of such references in the text of the fifth amendment as evidence of the framers' intent to provide for the protection of privacy only within the scope of the fourth amendment. *Id.* The Court concluded, therefore, that potentially incriminating private information not obtained by compelled testimony is protected only under the fourth amendment. *Id.* at 401. Consequently, the protection of subpoenaed private information is limited to only the fourth amendment requirements of specificity and reasonableness. *Id.*

83 *Id.* at 400.

84 *Id.* at 410.

85 *Id.*

86 *Id.* The Court stated that categorical answers may not be appropriate to determine whether admissions implicit in the act of production merit fifth amendment protection, and suggested that such determinations may depend on the facts and circumstances of each case. *Id.*

87 *Id.* at 411.

88 *Id.* at 414 (Brennan, J., concurring).

89 *Id.* at 416 (Brennan, J., concurring). Justice Brennan concurred in the judgment because he determined that the accountants' access to the records voided any legitimate expectation of privacy on the part of the petitioners. *Id.* at 414. Justice Brennan also stressed that the records were business rather than personal private papers. *Id.*

majority's analysis foreshadowed the end of self-incrimination protection for "private papers."[90] Declaring that preserving individual privacy was a fundamental purpose of the privilege against self-incrimination,[91] Justice Brennan asserted that the reasoning of the majority ran contrary to the history and principles of fifth amendment jurisprudence.[92]

In the 1984 decision of *United States v. Doe*, the Supreme Court reaffirmed and clarified *Fisher's* analysis of compulsory document production under the fifth amendment.[93] *Doe* involved a sole proprietor's effort to quash several grand jury subpoenas requiring him to produce certain personally prepared business records in his possession.[94] In a two-part holding, the Court stated that the voluntarily prepared contents of a sole proprietor's business records are not privileged from compelled production under the fifth amendment,[95] but any incriminating testimonial admissions arising from the act of producing them in compliance with a subpoena are privileged.[96] Consequently, the Court concluded that, absent a grant of use immunity for the act

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90 *Id.* at 414-15 (Brennan, J., concurring).

91 *See id.* at 419. Justice Brennan provided the following rationale for the continued protection of private papers:

> An individual's books and papers are generally little more than an extension of his person. They reveal no less than he could reveal upon being questioned directly. Many of the matters within an individual's knowledge may as easily be retained within his head as set down on a scrap of paper. I perceive no principle which does not permit compelling one to disclose the contents of one's mind but does permit compelling the disclosure of the contents of that scrap of paper by compelling its production. Under a contrary view, the constitutional protection would turn on fortuity, and persons would, at their peril, record their thoughts and the events of their lives. The ability to think private thoughts, facilitated as it is by pen and paper, and the ability to preserve intimate memories would be curtailed through fear that those thoughts or the events of those memories would become the subject of criminal sanctions however invalidly imposed.

Id. at 420.

92 *See id.* at 416-17 (Brennan, J., concurring). Justice Marshall also filed a concurring opinion. *Id.* at 430 (Marshall, J., concurring) Justice Marshall reiterated many of Justice Brennan's concerns, but expressed confidence that the new approach would continue to provide almost complete protection against the compelled disclosure of private papers. *Id.* at 432 (Marshall, J., concurring). Justice Marshall concluded that the recognition of testimonial admissions in the act of production, particularly the verification of a document's existence possession, would afford almost total protection for private papers because the existence and possession of these papers could rarely be assumed. *Id.*

93 465 U.S. 605 (1984).

94 *See id.* at 606-07.

95 *Id.* at 612.

96 *Id.* at 617.

of production, a person cannot be compelled to produce his records if the act of producing them serves to implicitly admit their existence, his possession or control of them, and their authenticity.[97]

Writing for the majority, Justice Powell stated that the respondent could not "avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing."[98] Citing *Fisher*, Justice Powell reasoned that the possession and preparation of the contents of subpoenaed papers were not the crucial issues in self-incrimination analysis.[99] Rather, the pivotal determination was whether preparation was the result of governmental coercion.[100] Finding no allegation of coercion in the record, the Court held that the contents of the subpoenaed business documents were unprivileged.[101]

Turning to the question of whether privilege exists in the act of producing documents in compliance with a subpoena, the Court recognized, as it had in *Fisher*, that the act of production "may have testimonial aspects and an incriminating effect."[102] The Court reiterated that compliance with a subpoena may implicitly authenticate the contents of the documents, and in addition concede their existence, possession or control.[103] Faced with the district court's express finding that the act of production would compel testimonial self-incrimination, the Court affirmed the extension of privilege to the act of production.[104] The Court observed that production could have been compelled if use immunity had been granted with respect to the potentially incriminating evidence.[105] It noted, however, that immunity would not have extended to the contents of the documents.[106]

In a concurring opinion, Justice O'Connor clarified a point she believed was implicitly adopted in the majority's opinion:

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97 *See id.*

98 *Id.* at 611 (quoting *Fisher*, 425 U.S. at 410).

99 *Id.* at 611-12.

100 *See id.* at 610.

101 *See id.* at 611-12.

102 *Id.* at 612.

103 *Id.* at 612-13.

104 *Id.* at 613-14.

105 *Id.* at 614-15. *See* 18 U.S.C. §§ 6002 to -03 (1982) (detailing procedural requirements for grant of federal use immunity).

106 *Doe*, 465 U.S at 617 n.17. The Court explained that immunity for the contents was not required, because a "grant of immunity need be only as broad as the privilege against self-incrimination." *Id.* (citation omitted).

"that the [f]ifth [a]mendment provides absolutely no protection for the contents of private papers of any kind."[107] Justice Marshall, joined by Justice Brennan, disputed Justice O'Connor's assertion in a concurring and dissenting opinion.[108] In Justice Marshall's view, the majority opinion did not consider whether the contents of private papers were protected under the fifth amendment.[109] He asserted, rather, that the papers at issue in *Doe* were business papers involving a lesser privacy interest than truly private papers.[110] Justice Marshall maintained that while the documents in question were not protected, nonetheless "there are certain documents no person ought to be compelled to produce at the Government's request."[111]

Against the background of federal reassessment of the principles and goals of fifth amendment jurisprudence, the New Jersey Supreme Court granted certification in the *Guarino* case. In *Guarino*, the court analyzed for the first time the underlying policies and principles of New Jersey's common law self-incrimination privilege with respect to the compelled disclosure of incriminating documents.[112] While rejecting the analytical framework endorsed by the *Fisher* and *Doe* cases,[113] the court nonetheless held that the New Jersey privilege against self-incrimination does not afford protection to a sole proprietor's business records.[114] The court ruled that a sole proprietor lacked an expectation of privacy regarding business records and therefore the common law privilege did not attach.[115]

Justice Garibaldi, writing for the majority, began her legal analysis with an examination of the protections afforded a sole

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107 *Id.* at 618 (O'Connor, J., concurring). Justice O'Connor maintained that "the notion that the fifth amendment protects the privacy of papers originated in *Boyd v. United States*." *Id.* (citing *Boyd*, 116 U.S. at 630). Justice O'Connor observed, however, that "the Court's decision in *Fisher v. United States* sounded the death knell for *Boyd*" a decision which the Justice stated "ha[d] long been a rule searching for a rationale." *Id.* (citing *Fisher*, 425 U.S. at 409).

108 *Id.* at 619 (Marshall, J., concurring in part and dissenting in part).

109 *Id.*

110 *Id.*

111 *Id.* Justice Marshall contends that the fifth amendment continues to protect the privacy interests of inherently personal papers which "lie at the heart of our sense of privacy," such as personal diaries and letters. *Id.* (quoting Couch v. United States, 409 U.S. 322, 350 (1973) (Marshall, J., dissenting)).

112 *See Guarino*, 104 N.J. at 231, 516 A.2d at 1069. Justice Garibaldi noted that the case was one of first impression. *Id.*

113 *Id.* at 232, 516 A.2d at 1070.

114 *Id.*

115 *Id.*

proprietor's business papers under the fifth amendment.[116] Citing the collective entity rule, the court noted that the strictly personal nature of the constitutional privilege precludes its use by corporations, partnerships and other organizational entities, or by their representative agents.[117] Justice Garibaldi posited that the United States Supreme Court had employed the collective entity rationale in *Fisher* and *Doe* to further restrict fifth amendment protection of business records, including those of sole proprietors.[118]

The court observed that before *Fisher*, the Supreme Court had consistently held that individuals were protected from compelled disclosure of their private papers by the self-incrimination clause of the fifth amendment.[119] Justice Garibaldi explained that the rationale behind this proscription was to protect privacy and to extinguish "the fear that private thoughts recorded on paper might become the object of criminal sanction."[120] The *Guarino* court further observed that prior to *Fisher* and *Doe* the Supreme Court had expansively interpreted the proscription against compelled disclosure to protect the contents of a sole proprietor's business records in addition to the more intimate information contained in an individual's private papers.[121]

The court recognized, therefore, that the reasoning articulated in *Fisher* and *Doe* represented a significant departure from prior decisions.[122] Justice Garibaldi observed that in *Fisher* the Court had narrowed the scope of the self-incrimination privilege by adhering to a literal interpretation of the proscriptions of the fifth amendment.[123] Under the Supreme Court's new criteria, the privilege was perceived not as a shield against government discovery of private information, but rather as a proscription against the use of coercion to compel the making of an incriminating testimonial communication.[124] The *Guarino* court also noted that the fact the papers in *Fisher* were prepared by an accountant, rather than the taxpayer, was crucial to the Court's

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116 *Id.* at 222, 516 A.2d at 1065. Justice Handler, joined by Justices Clifford and Pollock, filed a dissenting opinion. *Id.* at 235, 516 A.2d at 1072.

117 *See id.* at 222-23, 516 A.2d at 1065.

118 *Id.* at 223, 516 A.2d at 1065.

119 *Id.*

120 *Id.* at 223-24, 516 A.2d at 1065.

121 *Id.* at 224, 516 A.2d at 1065 (citing Bellis v. United States, 417 U.S. 85, 87 (1974)).

122 *Id.*

123 *See id.* at 224, 516 A.2d at 1066 (citing *Fisher*, 425 U.S. at 396).

124 *Id.* at 224-25, 516 A.2d at 1066.

determination that the fifth amendment was not offended by the compulsory production of a taxpayer's incriminating workpapers.[125] Justice Garibaldi observed that, according to *Fisher*, the workpapers were not considered the taxpayer's testimonial communication; nor were they considered his compelled declaration because they were prepared voluntarily.[126] Consequently, under *Fisher*, the fifth amendment was not offended, even though the subpoena for the workpapers production involved a considerable degree of compulsion upon the taxpayer.[127]

The *Guarino* court further observed, however, that *Fisher* had recognized two situations where the potential for testimonial self-incrimination might exist in the act of production.[128] First, the act of production might serve to concede the existence of evidence as well as its control or possession by the subpoenaed party.[129] Second, the act of producing evidence in response to a subpoena might serve to "authenticate" the contents of the evidence produced.[130] Under these circumstances, the *Guarino* court concluded that the act of producing subpoenaed evidence may have privileged "communicative aspects of its own wholly aside from the contents of the papers produced."[131]

The *Guarino* court next analyzed the application of the *Fisher* test to the personally prepared sole proprietorship business records in *United States v. Doe*.[132] The court observed that in *Doe*, the fact that the records were compelled from the petitioner's possession was irrelevant to the determination of whether their preparation was compelled.[133] The court noted that the contents of the records were unprivileged because the subpoena for their production compelled neither their involuntary preparation nor an oral restatement, repetition or affirmation that their contents were true.[134] Under this analysis, the *Guarino* majority concluded, "the contents of business records, whether from a corpo-

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125 *Id.* at 225, 516 A.2d at 1066 (citing *Fisher*, 425 U.S. at 409).

126 *Id.* (citing *Fisher*, 425 U.S. at 409-10).

127 *Id.* (citing *Fisher*, 425 U.S. at 409).

128 *Id.* at 226, 516 A.2d at 1067 (citing *Fisher*, 425 U.S. at 410).

129 *Id.*

130 *Id.* (citing United States v. Beattie, 522 F.2d 267 (2d Cir. 1975)). Justice Garibaldi noted the court's observation in *Beattie* that "[a] subpoena demanding that an accused produce his own records is . . . the equivalent of requiring him to take the stand and admit their genuineness." *Id.* (quoting *Beattie*, 522 F.2d at 270).

131 *Id.* (quoting *Fisher*, 425 U.S. at 410).

132 465 U.S. 605 (1984).

133 *Guarino*, 104 N.J. at 227, 516 A.2d at 1067.

134 *Id.*

ration, a partnership or a sole proprietor are no longer privileged under the [f]ifth [a]mendment."[135]

The *Guarino* majority noted, however, that the *Doe* Court continued to recognize the distinction drawn in *Fisher* between a subpoenaed document's contents and the act of its production.[136] In *Doe*, the act of production was privileged, even though the contents were not, because the act of production was found to involve a self-incriminating testimonial admission.[137] Justice Garibaldi also observed that under *Doe* the production of subpoenaed documents may still be compelled by granting use immunity even when the documents contain potentially incriminating testimonial evidence.[138]

Applying the *Fisher-Doe* analysis to the facts of *Guarino*, Justice Garibaldi observed that the subpoenaed real estate contracts and payment documentation "were clearly business, not personal records."[139] The justice also recognized that the subpoena did not compel the involuntary creation of the documents, nor did it require the repetition, restatement, or authentication of the truth of their contents.[140] Moreover, the justice noted that the prosecutors had extended use immunity for any incriminating testimonial evidence arising from the act of producing the documents.[141] The court held, therefore, that the subpoena of records from Guarino's sole proprietorship did not violate the fifth amendment.[142]

The court next examined New Jersey common law to determine whether independent state principles might provide a basis for resisting compulsory production of a sole proprietor's business records.[143] In this regard, the court emphasized that "[s]tate common law may provide greater protection to individual rights than afforded under the United States Constitution."[144] The court observed that criminal defendants were provided greater protection under the state privilege than under

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135 *Id.* at 228, 516 A.2d at 1068.

136 *Id.* at 228, 516 A.2d at 1067-68 (citing *Doe*, 465 U.S. at 612-13).

137 *See id.* (citing *Doe*, 465 U.S. at 614-15).

138 *Id.* (citing *Doe*, 465 U.S. at 614-15, 617-18).

139 *Id.* The court further observed that the underlying facts of the case were nearly identical to those in *Doe*. *Id.* at 226, 516 A.2d at 1067.

140 *Id.* at 228, 516 A.2d at 1068.

141 *Id.*

142 *Id.* at 228-29, 516 A.2d at 1068.

143 *Id.* at 229, 516 A.2d at 1068.

144 *Id.* (citations omitted).

the fifth amendment.[145] The court explained that although the New Jersey privilege is not expressly incorporated in the state constitution, but rather is only codified as a rule of evidence, the common law doctrine has always been rigorously applied to ensure that "no person can be compelled to be a witness against himself."[146]

Citing *Boyd v. United States*,[147] Justice Garibaldi stated that the concept of personal privacy was fundamental to the New Jersey common law privilege against self-incrimination.[148] She posited that the *Boyd* concept of fifth amendment privacy had been incorporated in New Jersey common law as a significant factor determining the scope of the privilege even before the fifth amendment was held binding upon the states.[149] Justice Garibaldi asserted that the privilege against self-incrimination "enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment."[150] She noted further that the New Jersey Supreme Court recognized in *In re Addonizio* that protection of privacy was a fundamental goal of the privilege against self-incrimination and held that personal financial records were privileged from compelled production.[151]

On the basis of these principles, the *Guarino* court declined to follow the *Fisher-Doe* criteria in determining the scope of the common law privilege.[152] Rather, the court noted that *Fisher* and *Doe* failed to recognize the basic principles of personal privacy

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145 *Id. See, e.g.*, State v. Vinegra, 73 N.J. 484, 376 A.2d 150 (1977) (state privilege affords greater protection to grand jury "target witnesses" than that provided under the fifth amendment); State v. Deatore, 70 N.J. 100, 358 A.2d 163 (1976) (holding that defendant's post-arrest silence may not be used in cross-examination to impeach his alibi defense, even if such protection is not required by federal law).

146 *Guarino*, 104 N.J. at 229-30, 516 A.2d at 1068-69 (quoting State v. Hartley, 103 N.J. 252, 286, 511 A.2d 80, 98 (1986), quoting State v. Zdanowicz, 69 N.J.L. 619, 622, 55 A. 743, 744 (1903)).

147 116 U.S. 616 (1886).

148 *Guarino*, 104 N.J. at 230, 516 A.2d at 1069.

149 *See id.* (citing *In re* Pillo, 11 N.J. 8, 93 A.2d 176 (1952)). The *Guanino* court noted that in *Pillo*, Justice Brennan, then a member of the New Jersey Supreme Court, stated that the "wide acceptance and broad interpretation [of the privilege] rests on the view that compelling a person to convict himself of a crime . . . 'cannot abide the pure atmosphere of political liberty and personal freedom.' " *Id.* (quoting *Pillo*, 11 N.J. at 15-16, 93 A.2d at 179-80, quoting *Boyd*, 116 U.S. at 632) (brackets by the court)).

150 *Id.* at 230-31, 516 A.2d at 1069 (quoting *Fisher*, 425 U.S. at 416 (Brennan, J., concurring)).

151 *Id.* at 232, 516 A.2d at 1069 (citing *Addonizio*, 53 N.J. at 107, 248 A.2d at 531 (1968)).

152 *Id.* at 232, 516 A.2d at 1070.

underlying the New Jersey privilege.[153] Justice Garibaldi emphasized that the significant question in determining the availability of the state common law privilege was not whether testimonial compulsion was involved in producing subpoenaed papers, but whether a legitimate expectation of privacy was manifest with respect to the contents of particular documents.[154] The justice ruled that to make this determination a court must examine the contents of subpoenaed papers to protect "the individual's right 'to a private enclave where he may lead a private life.' "[155]

While affirming that the protection of personal privacy was an underlying goal of the New Jersey common law privilege, the majority nonetheless determined that business records, even those of a sole proprietor, were not entitled to protection.[156] The majority reasoned that business records, the purpose of which is merely to record business transactions, are devoid of the essential element of confidentiality or privacy necessary for common law privilege to attach.[157] The court distinguished business records from personal papers, explaining that business records may be "disclosed to a significant number of individuals," unlike diaries and letters, and thus are not extensions of the intimate aspects of an individual's life.[158] The court posited that "[i]n today's highly computerized, commercialized and regulated world" such business records inherently lack any expectation of privacy.[159]

The *Guarino* majority further stated that to protect a sole proprietor's business records and not those of other business associations would constitute an inequitable anomaly.[160] The ma-

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153 *Id.*

154 *Id.* at 231-32, 516 A.2d at 1070.

155 *Id.* (citations omitted).

156 *Id.* at 232, 516 A.2d at 1070.

157 *Id.* at 232-33, 516 A.2d at 1070 (citing Bellis v. United States, 417 U.S. 85, 92 (1974)).

158 *Id.* at 233-34, 516 A.2d at 1070-71. The court identified the subpoened documents requested in *Guarino* as illustrative of the records of a sole proprietor which are not entitled to protection: "contracts of sale, cash receipts, journals and general ledgers." *Id.* at 234, 516 A.2d at 1071. The court explained that because such documents "are presumedly reviewed by the purchasers, their attorneys and their accountants, [and] then [are] used in preparing the purchasers tax returns and possibly filed at county recording offices," these business records lose any expectation of privacy. *Id.*

159 The court concluded that records such as the subpoenaed documents in *Guarino* may be available to others "to an extent [which is] totally inconsistent with any claim of privacy." *Id.*

160 *Id.* at 233-34, 516 A.2d at 1070-71 (citing Butcher v. Bailey, 753 F.2d 465, 469 (6th Cir. 1985); United States v. Schlansky, 709 F.2d 1079, 1083 (6th Cir. 1983); *In*

jority maintained that the validity of subpoenas requiring the production of organizational entity business records have long been recognized, and that even an individual's personal business records are generally not privileged if their contents have been disclosed to a third party.[161] The court reasoned that it would be inequitable for sole proprietors, who may operate substantial businesses, to be permitted to suppress their records because of a fortuitous choice of business organization and also would afford white-collar criminals a means to insulate themselves from criminal prosecutions.[162] Withholding the privilege from the contents of all business documents could be accomplished, the majority concluded, without violence to *Boyd's* privacy rationale which would "still retain[] its full vigor as to those 'privacies of life' which are beyond the pale of legitimate government intrusion."[163]

Justice Handler filed a dissenting opinion.[164] He asserted that the majority had actually redefined and attenuated New Jersey's common law privilege while claiming to affirm a *Boyd*-based privacy interest underlying the privilege.[165] Justice Handler stated that the majority's withdrawal of the privilege from sole proprietorship business records was inconsistent with its affirmation of the privilege's privacy rationale.[166] He declared that the majority "succeed[ed] only in corrupting the rationale while diluting the privilege."[167]

Justice Handler concurred with the majority's assessment of the scope of the fifth amendment self-incrimination privilege in the instant case.[168] After reviewing the evolution of the fifth amendment privilege in federal decisional law, Justice Handler acknowledged that the federal interpretation of the self-incrimination privilege does not prevent the enforcement of a subpoena compelling discovery of the contents of a sole proprietor's voluntarily prepared records or their production "as long as immunity is furnished against the prosecutorial use of any of the testimo-

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re Grand Jury Proceedings (United States), 626 F.2d 1051, 1054 n.2 (1st Cir. 1980); *Developments In The Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1286 (1979)).

161 *Id.* at 232, 516 A.2d at 1070.

162 *Id.* at 235, 516 A.2d at 1071-72.

163 *Id.* at 234, 516 A.2d at 1071.

164 *Id.* at 235, 516 A.2d at 1072 (Handler, J., dissenting).

165 *Id.* at 237, 516 A.2d at 1072 (Handler, J., dissenting).

166 *See id.* at 237, 516 A.2d at 1072-73 (Handler, J., dissenting).

167 *Id.* at 237, 516 A.2d at 1073 (Handler, J., dissenting).

168 *Id.*

nial effects attending such production."[169] He asserted, however, that the federal interpretation of the fifth amendment was unsound.[170] Justice Handler posited that the focus of fifth amendment analysis should include the contents of subpoenaed documents, in addition to the testimonial incidents arising from the act of their production.[171] The dissenting justice reasoned that it is "the contents of documents, which are the heart of the [f]ifth [a]mendment's solicitude for privacy and the true object of the government's compulsory efforts."[172]

Accordingly, Justice Handler asserted that the New Jersey common law privilege against self-incrimination should not be corrupted by adoption of the federal distinction between a document's contents and its production.[173] He asserted that in practice the federal "bifurcation" of the disclosure of a document's contents and the act of its production had proven problematic and artificial.[174] Justice Handler observed that by limiting the focus of fifth amendment privilege to the act of compelled production, courts are forced to determine whether the act of producing subpoenaed documents is "testimonial," since only compelled testimonial evidence is privileged.[175]

Justice Handler argued that this "somewhat unreal" determination would require "dissecting the act of production for evidence of such elusive and esoteric constructs as the 'tacit concessions of evidence' or the 'implicit authentication' of documents."[176] He noted confusion and discomfort expressed by lower federal courts applying the new fifth amendment test.[177] The justice counseled against the adoption of the new fifth amendment analysis of *Fisher* and *Doe*.[178]

Justice Handler next examined whether the documents in question might be protected under the state privilege.[179] On this point, the dissenting justice stated that decisional precedent as

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169 *Id.* at 243, 516 A.2d at 1076 (Handler, J., dissenting).
170 *Id.* at 246, 516 A.2d at 1077 (Handler, J., dissenting).
171 *Id.*
172 *Id.* at 246, 516 A.2d at 1077-78 (Handler, J., dissenting).
173 *Id.* at 237, 516 A.2d at 1073 (Handler, J., dissenting).
174 *Id.* at 244, 516 A.2d at 1076 (Handler, J., dissenting) (citation omitted).
175 *Id.* at 244-45, 516 A.2d at 1077 (Handler, J., dissenting).
176 *Id.* at 245, 516 A.2d at 1077 (Handler, J., dissenting) (citation omitted).
177 *Id.* at 245-46, 516 A.2d at 1077 (Handler, J., dissenting) (citing *In re* Grand Jury Subpoena Duces Tecum dated November 13, 1984, 616 F. Supp. 1159, 1161 (E.D.N.Y. 1985); and United States v. *In re* John Doe No. 462, 745 F.2d 834 (4th Cir. 1984), *cert. granted*, 469 U.S. 1188 (1985)).
178 *Id.* at 244, 516 A.2d at 1076 (Handler, J., dissenting).
179 *Id.* at 243, 516 A.2d at 1076 (Handler, J., dissenting).

well as state tradition and public policy grounds support the proposition that New Jersey common law is fully protective of individual privacy.[180] Justice Handler reasoned that this underlying principle of state common law was derived from *United States v. Boyd*.[181] He posited that this incorporation of *Boyd* "provides firm grounds for rejecting, as a matter of common law, any analysis which diminishes the import of privacy interests."[182]

Justice Handler stressed that the need for judicial vigilance to protect privacy interests was particularly compelling in instances involving a subpoena duces tecum.[183] The justice noted that the primary purpose of a documentary subpoena is to enhance the prosecution's case by compelling disclosure of the subpoenaed person's potentially incriminating papers.[184] With this in mind, Justice Handler stated that in *In re Addonizio*,[185] the New Jersey Supreme Court recognized the seriousness of such intrusions on individual liberties and prohibited compulsory disclosure of the personal financial records of a grand jury target witness.[186] Justice Handler asserted that this was done "[p]urely to protect an individual from the damaging consequences of his personal papers."[187] Therefore, he concluded that the state common law privilege prohibits compulsory production of an individual's incriminating "private and personal records relating to the conduct of his sole business."[188]

Criticizing the majority opinion, Justice Handler commented that the majority "purports to do what the [United States] Supreme Court and other authorities have recognized to be impossible: to withdraw the privilege while retaining the privacy rationale supporting it."[189] Justice Handler reasoned that, unlike a corporation or other collective entity, a sole proprietorship does not have an identity independent from that of its owner.[190] Consequently, the difference between a sole proprietor's business and private affairs is so obscure that a clear distinction can-

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180 *Id.*

181 *See id.* at 248, 516 A.2d at 1079 (Handler, J., dissenting).

182 *Id.*

183 *Id.* at 250, 516 A.2d at 1080 (Handler, J., dissenting).

184 *Id.*

185 *See supra* notes 57-71 and accompanying text (discussing *In re Addonizio*).

186 *Guarino*, 104 N.J. at 250, 516 A.2d at 1080 (Handler, J., dissenting).

187 *Id.* at 251, 516 A.2d at 1080 (Handler, J., dissenting).

188 *Id.* at 252, 516 A.2d at 1081 (Handler, J., dissenting).

189 *See id.* at 253, 516 A.2d at 1081-82 (Handler, J., dissenting).

190 *Id.* at 240, 516 A.2d at 1074 (Handler, J., dissenting) (citing Bellis v. United States, 417 U.S. 84, 92-93 (1974)).

not be made between them.[191] Thus, Justice Handler disputed the majority's contention that the protection of a sole proprietor's business records was an anomaly.[192] He asserted that the abandonment of fifth amendment protection for sole proprietorship business records "resulted not from a change of mind on the narrow issue of whether such records are private . . . but from a change of heart on the general proposition that the privacy . . . implicate[d] [in such documents] matters."[193] The Justice observed that the authorities cited by the majority reject a privacy based distinction between a sole proprietorship and other business entities.[194] This rejection resulted from the recognition that under fifth amendment analysis the privacy expectation in the contents of subpoenaed documents is irrelevant.[195] Therefore, Justice Handler argued that the anomaly results from the erosion of the fifth amendment's privacy rationale, not from its faithful application.[196]

Justice Handler concluded by noting that he would also extend protection to the records in the instant case by broadly construing the state immunity statute.[197] He asserted that the scope of protection afforded by the statutory immunity provision must correspond directly with the scope of the common law privilege itself.[198] Accordingly, Justice Handler posited that when the state has not shown that it obtained the incriminating testimonial admissions independently of the privileged act of production, the statutory language calls for independent protection of "all contents or, at a minimum . . . derivative protection of a document's contents."[199]

In *Guarino*, the New Jersey Supreme Court departed from the federally established analytical framework used to determine the scope of the privilege against self-incrimination.[200] Rejecting the focus of the United States Supreme Court on the process of compulsion rather than on the contents of subpoenaed documents, the New Jersey Supreme Court has demonstrated its re-

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191 *Id.* at 253, 516 A.2d at 1082 (Handler, J., dissenting).
192 *See id.* at 252-53, 516 A.2d at 1081 (Handler, J., dissenting).
193 *Id.* at 253, 516 A.2d at 1081 (Handler, J., dissenting).
194 *Id.*
195 *Id.* at 252, 516 A.2d at 1081 (Handler, J., dissenting).
196 *Id.* at 253, 516 A.2d at 1081 (Handler, J., dissenting).
197 *Id.* at 254, 516 A.2d at 1082 (Handler, J., dissenting).
198 *Id.* at 255, 516 A.2d at 1082 (Handler, J., dissenting). *See supra* note 14 for text of the New Jersey immunity statute.
199 *Guarino*, 104 N.J. at 255, 516 A.2d at 1082.
200 *See id.* at 232, 516 A.2d at 1070.

solve to use principles of state constitutional and common law to provide broad protection against compelled self-incrimination.[201] Regardless of the merits of the court's specific holdings, the clear result of the *Guarino* case is the creation of two separate standards of self-incrimination protection in document production cases. While inconsonant with the express intent of the United States Supreme Court when it extended the fifth amendment mandate to the states in 1964,[202] the development of separate criteria is consistent with the contemporary trend toward a new standard of federalism.[203]

On a more pragmatic level, however, a problematic effect of the *Guarino* court's holding will be the imposition of a heavy, perhaps intolerable, burden upon trial courts required to exercise its mandate. While it held that sole proprietorship business records are unprivileged,[204] the court continued to draw a distinction between the protection afforded business and private information under the state privilege. The court specifically stated that the result of the case might have been different if Guarino's business records contained personal information.[205] The logical conclusion to be drawn from this assertion is that trial courts will be required to ascertain whether a documentary demand for sole proprietorship records impermissibly intrudes upon private aspects of the subpoenaed person's life.

This process may, under certain circumstances, prove highly burdensome. As Justice Handler aptly noted in his dissent, the distinction between the private and public affairs of a sole proprietor is often unclear, since the business has no true identity aside from that of its owner.[206] Under the *Guarino* criteria, when a trial court is confronted with a subpoena for sole proprietorship business records and the subpoenaed party contends that the subpoenaed records reflect protectible aspects of his private life, the judge will be compelled to examine these records in camera in

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201 *See id.* at 231-32, 516 A.2d at 1070.

202 *See* Malloy v. Hogan, 378 U.S. 1, 11 (1964). The *Malloy* Court asserted that "[i]t would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court." *Id.*

203 *See, e.g.*, Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 709 (1983) ("[T]he Bill of Rights in the United States Constitution establishes a floor for basic human liberty. . . . [T]he state constitution establishes a ceiling.").

204 *Guarino*, 104 N.J. at 235, 516 A.2d at 1072.

205 *Id.* at 232 n.9, 516 A.2d at 1070 n.9.

206 *Id.* at 240, 253, 516 A.2d at 1074, 1082 (Handler, J., dissenting).

order to effectuate suppression of privileged material. Rather than having to "dissect" the act of production in search of "incriminating testimonial communications" as required under the federal test, New Jersey courts will be engaged in the equally disheartening task of having to pore over business documents and financial records to determine whether they contain personal information. In those cases involving large numbers of documents, the trial court's task may become insurmountable.

Another problematic aspect of the court's holding, is the assertion that a goal of the privilege against self-incrimination is the protection of privacy.[207] Arguably, a form of privacy protection has always been one of the effects of the privilege, but the notion that privacy protection is fundamental to the interests protected by the privilege against self-incrimination is seriously flawed. The fallacy in ascribing privacy concerns to the self-incrimination privilege arises from the incompatibility between the limited goal of proscribing coerced self-condemnation and the broad protection required to assure personal privacy. This incompatibility is highlighted by the fact that the self-incrimination privilege protects only incriminating testimony. Private information of a non-incriminating nature is not afforded protection from governmental inquiry, and may not be withheld regardless of the individual's subjective desire to keep the information private.[208] Additionally, the disclosure of even privileged, incriminating information may be compelled by a grant of immunity. Thus, the claim that the privilege protects privacy cannot be sustained in light of the government's ability to extract private information.

The *Fisher* Court recognized the incompatibility between the self-incrimination privilege and protection of privacy.[209] The Court chose to eliminate privacy protection as a goal of the fifth amendment privilege. Justice White perceived that the rule proscribing compulsory production of private papers derived from *Boyd's* long mooted premise that a search warrant or subpoena for "mere evidence" transgresses both the fourth and fifth amendments.[210] Consequently, the fifth amendment proscrip-

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207 *Id.* at 230, 516 A.2d at 1069.

208 *See* MCCORMICK, *supra* note 2, at § 121 (privilege against self-incrimination does not protect against disclosure of information that will result only in societal condemnation or personal disgrace).

209 *See Fisher*, 425 U.S. at 400 (fifth amendment does not protect private information unless self-incriminating and compelled).

210 *Fisher*, 425 U.S. at 409.

tion against compelled production of private papers was a rule without an adequate rationale.[211]

The foregoing is not intended to suggest, however, that a person's expectation of privacy in his personal papers is not constitutionally protected. The fourth amendment expressly provides for the privacy protection of papers.[212] Moreover, the United States Supreme Court has never addressed the question of whether the contents of an individual's personal private papers are constitutionally protected. It is therefore premature to conclude that the privacy of such information is no longer privileged from compelled disclosure. As this area of the law continues to evolve, the Court may formulate a specific constitutional standard of protection for the inherently private information contained in an individual's personal writings.[213] What is made clear by the *Fisher* and *Doe* cases, however, is that the protection of these voluntarily created writings does not derive from the fifth amendment.

In its eagerness to subsume the protection of individual privacy to the privilege against self-incrimination, the *Guarino* court failed to address the *Fisher* Court's analysis of the evolution of the fourth and fifth amendments in the context of document production. The court chose instead to rely on a flawed interpretation of *Boyd v. United States* as controlling precedent for the notion that the privilege against self-incrimination affords a special sanctity to the contents of private papers.[214] While correctly concluding that business records are not privileged from compelled discovery, the court erred by refusing to recognize that a rationale consistent with the privilege against compelled incriminating testimony, as it has evolved since *Boyd*, may no longer exist for the proscription against compulsory production of private papers. Rather, the court perpetuates a rule of privacy for these

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211 *Id.*; *see also id.* at 432 (Marshall, J., concurring) (recognizing the need for a rationale consistent with the interests protected by the fifth amendment).

212 *See supra* note 30 for text of the fourth amendment; *see also supra* note 88 (discussing limitations of fourth amendment protection of private papers).

213 *See generally* Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States*, 95 HARV. L. REV. 683 (1982) (discussing alternative constitutional grounds for safeguarding the contents of private papers).

214 *See supra* notes 25-37 and accompanying text (discussing *Boyd*). *Boyd's* fourth and fifth amendment prohibitions against the seizure of mere evidence by search warrant or subpoena did not distinguish between documents and other forms of evidence. *See* Heidt, *supra* note 36, at 456; *see also* Gouled v. United States, 255 U.S. 298, 309 (1921) ("[t]here is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure . . .").

papers under the rubric of the state privilege without thoroughly examining the adequacy of its self-incrimination privilege rationale. Indeed, the analysis of both the majority and the minority appears to be premised on a rejection of the federal limitation on the scope of the fifth amendment, rather than on an adequate, independent state ground. Consequently, in terms of both its analysis and holdings, the court's opinion is problematic at best.

The privilege against self-incrimination is intended to protect individuals from governmental coercion to compel unwilling, self-incriminating testimony. In applying the state or federal guarantee, courts should focus on this specific interest. The protection of privacy or property should not enter into consideration as factors in this analysis. Having sprung from a common root, the federal and state self-incrimination privileges should not proceed to develop along divergent paths.

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