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Is It Time to Revisit the Corporate Privilege Against Compelled Self-Incrimination?

For well over a century, the law in the United States has been settled that corporations do not benefit from the Fifth Amendment's privilege against compelled self-incrimination. In 1906, in *Hale v. Henkel*, the Supreme Court held that an individual officer of a corporation could not assert the Fifth Amendment privilege on behalf of the corporation, stating that "[t]he amendment is limited to a person who shall be compelled in any criminal case to be a witness against himself; and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation."¹ Following *Hale*, the Supreme Court has repeatedly reiterated that corporations do not receive the benefit of the Fifth Amendment's protection against self-incrimination.² But long-settled is not necessarily forever-settled. The law evolves in response to societal developments and legal challenges. For example, until 1986, it was settled law that prosecutors could strike black jurors unless the defendant could demonstrate a prima facie case of invidious discrimination.³ Until 2004, testimonial hearsay could be admitted as evidence if there were sufficient indicia of reliability.⁴ Similarly, for many years before

2005, criminal defense lawyers accepted the federal sentencing guidelines as mandatory until enterprising defense counsel challenged their constitutionality.⁵ It is the obligation of sophisticated defense attorneys not to simply know what the law is, but to consider where the law is heading and even where it *should* be heading. Failure to anticipate these legal developments and raise appropriate challenges may mean missing an opportunity to protect a client's rights.

With these obligations in mind, it is time to revisit the issue of a corporation's right against compelled self-incrimination, and upon such review, it is clear that the basis for *Hale* and its progeny is no longer consistent with how society or the Supreme Court views corporations or with the principles underlying the right against self-incrimination.⁶ Indeed, while the Supreme Court has not looked at the issue of corporate assertion of the right against self-incrimination in decades, the Court has been otherwise busy redrawing the landscape for other corporate constitutional rights, including in high-profile cases such as *Citizens United v. FEC*⁷ and *Burwell v. Hobby Lobby Stores, Inc.*⁸ Significantly, with the exception of the protection against self-incrimination, the courts have now held, through various cases, that *each* of the protections of the Fifth Amendment, as well as the Fourteenth Amendment's due process and equal protection provisions, extends to corporations.⁹ With these decisions, the Supreme Court has eroded — if not directly contradicted — the basis upon which *Hale* was decided. As a result, the reasonable practitioner ought to wonder when, not whether, the Supreme Court will revisit *Hale* and its progeny and find that corporations cannot be compelled to incriminate themselves.

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To be clear, there is room for a policy debate as to whether corporations ought to benefit from the protection against self-incrimination. Some might argue that providing such protection would encourage corporate misconduct and make it harder to hold corporations accountable for criminal acts. However, this article is not focused on policy arguments regarding how to best influence corporate behavior or on the ease or difficulty in investigating and prosecuting corporations. Instead, it is focused on where the law has been and where it might be going on the question of whether a corporation can assert a right against compulsory self-incrimination. It is worth noting that other robust criminal justice systems, including, for example, the systems in some European countries, provide such protection for corporations. Moreover, though the individual right against compulsory self-incrimination — as well as other constitutional rights held by individuals and corporations — undoubtedly adds inconvenience and challenges in investigating and prosecuting criminal conduct, constitutional protections are not designed to make things easier for the government, but rather to preserve the integrity of the criminal justice system and protect against government overreach.

This article discusses the relevant background on the origins of the privilege against self-incrimination, its application (or not) to corporations, and the expansion of corporate constitutional protections and the evolving rationale for those protections. Upon review of this history and evolution, it will be clear that it is anomalous and inconsistent that each of the due process and other protections of the Fifth and Fourteenth Amendments has been extended to corporations *except* the right against compelled self-incrimination. Moreover, it will be clear that the legal landscape has shifted, and that corporations ought to be able to assert the full panoply of Fifth and Fourteenth Amendment protections, including the protection against self-incrimination.

The Fifth Amendment's protection against self-incrimination is a broad right fundamental to the system of criminal justice.

The Fifth Amendment's protection against self-incrimination — “No person ... shall be compelled in any criminal case to be a witness against

himself”¹⁰ — was described in *Miranda* as “the essential mainstay of our adversary system,”¹¹ and in *Kastigar* as “an important advance in the development of our liberty.”¹² Indeed, the right is so fundamental that, as to individuals, the Supreme Court has held it essential to due process under the Fourteenth Amendment and thus it is incorporated into the protections individuals have in nonfederal prosecutions. Thus, the Supreme Court has instructed that the privilege against compelled self-incrimination should “be accorded liberal construction in favor of the right it was intended to secure.”¹³ Given the centrality of this principle to the system of criminal justice, one should question any constitutional interpretation that purports to withhold the right to an entity under government investigation or facing criminal prosecution.

In fact, the notion of protection against compelled self-incrimination preceded the Fifth Amendment by centuries. The traditional view of the origin of the privilege is that it was born out of the ecclesiastical courts of the Star Chamber and High Commission, which conducted their investigations through an “ex officio oath” procedure in which the defendant was forced to swear an oath to answer questions put to him by the court.¹⁴

In particular, the Fifth Amendment owes a lot to one John Lilburn, who in 1637 faced trial by the Council of the Star Chamber, and rather than proceed under the traditional oath, told the court, “I am not willing to answer you to any more of these questions, because I see you go about by this examination to ensnare me.”¹⁵ Lilburn reportedly argued: “Another fundamental right I then contended for, was, that no man's conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so.”¹⁶ After being sentenced for his “boldness in refusing to take a legal oath,” Lilburn petitioned Parliament for reparation, and his counsel argued that it was “contrary to the laws of God, nature, and the kingdom, for any man to be his own accuser.”¹⁷ The House of Lords agreed and ordered the sentence vacated “as illegal, and most unjust, against the liberty of the subject and law of the land and Magna Charta.”¹⁸ Parliament later abolished the Council of Star Chamber and the Court of High Commission for Ecclesiastical Causes, and forbid requir-

ing any person to give an ex officio oath that would incriminate himself.¹⁹ This right against self-incrimination was quickly adopted by common law judges and extended to all witnesses.²⁰

While the Fifth Amendment may be most closely tied to the developments arising out of the litigation by the courageous Mr. Lilburn, scholarship has found invocation of the privilege centuries earlier. The Latin maxim “*nemo tenetur prodere seipsum*” — “no one is bound to betray oneself” — appears as early as 1234 in a medieval guide to canon law.²¹ In the *Miranda* decision itself, the Supreme Court recognized that “[t]hirteenth century commentators found an analogue to the privilege grounded in the Bible. ‘To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree.’”²²

Regardless of its precise origins, the privilege against self-incrimination had been adopted in America even prior to the drafting of the Bill of Rights. At least six states had constitutions that allowed for protections against compelled self-incrimination. For example, Virginia's Declaration of Rights stated: “in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation ...; nor can he be compelled to give evidence against himself.”²³ An early draft of the federal Bill of Rights applied the privilege to civil and criminal proceedings, but the version of the Bill of Rights that was ratified limited the privilege to criminal cases.²⁴ By the end of the 19th century, it was settled law that the privilege against self-incrimination applied not only to forced interrogation at criminal trial, as was the case in the Star Chamber, but also to station house interrogation.²⁵

But what is the purpose of the right against self-incrimination? Certainly, one prevailing concern is that in the adversarial system, it is the government's burden to prove its case by its own evidence, not the defendant's burden to defend his or her actions or to produce any evidence. This concern is apparent in the Star Chamber cases, and it is what the Supreme Court has referred to as a “preference for an accusatorial rather than an inquisitorial system of criminal justice.”²⁶ A related consideration stems from concerns about the interplay between governmental intrusion and liberty, privacy and dignity, which may be why some of the early cases about the right against self-incrimination blended

the Fourth and Fifth Amendment analyses. Lastly, the right is clearly animated by a concern that compelled testimony may be less reliable, with the Supreme Court referring to compelled testimony as the “cruel trilemma of self-accusation, perjury, or contempt.”²⁷ In *Miranda v. Arizona*, the Court captured the essence of the importance of the privilege:

All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government — state or federal — must accord to the dignity and integrity of its citizens. To maintain a fair state-individual balance, to require the government to shoulder the entire load, to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. In sum, the privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will.²⁸

All these reasons the right against self-incrimination is so fundamental to the criminal justice system apply to corporations, if not with the same force as to individuals then certainly with near equal force. The government’s burden and the accused’s right to the presumption of innocence are no less important in prosecutions of corporations, nor is the preference for an accusatorial rather than inquisitorial system of justice. Concerns about reliability of compelled testimony and the “cruel trilemma” of self-accusation, perjury or contempt, are present with respect to corporations and indeed may impose an increased pressure on corporations to cooperate with the government in criminal investigations. Even the concern about governmental intrusion is relevant to corporations. Though “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” may be less directly applicable to corporations, the belief that corporations should be free from government intrusion is fundamental, as is clear

from the application of the Fourth Amendment’s protections against unreasonable searches and seizures to corporate premises.²⁹

Given the importance of the right against self-incrimination to the system of criminal justice, there must be compelling rationales for any refusal to provide the protection to any target of a government investigation, including a corporate target.

The current doctrine of corporate privilege against self-incrimination is based on a dated understanding of corporations.

Though the right against compelled self-incrimination has historically been viewed as a broad and fundamental right essential to the adversary system, corporations currently have no ability to rely upon the Fifth Amendment right against self-incrimination to resist compulsion by the government. In *Hale v. Henkel*, the Supreme Court first held that a corporation did not have a privilege against compelled self-incrimination.³⁰ A few years later, the Court used the same logic to find that an officer of a corporation could not refuse production of a corporation’s records on the basis that the corporation’s records incriminated the officer.³¹ Since then, the Court has repeatedly confirmed these prior decisions and has upheld compelled production of documents from a partnership, the Joint Anti-Fascist Refugee Committee, the Communist Party of Denver, and a local labor union.³² As recently as 1988, the Supreme Court reiterated its view on compelled production by corporations (though it simply restated the precedents and did not revisit the rationale).³³

Importantly, however, these decisions are based upon the since-discarded premise that corporations are not distinct legal entities capable of asserting their own rights but rather undefined entities who rely upon corporation officers to assert rights on their behalf. Thus, in *Hale*, the Court held that a corporate officer could be forced to testify and produce documents that incriminated the corporation because the documents did not incriminate him personally. “The amendment is limited to a person who shall be compelled in any criminal case to be a witness against himself,” the Court said in *Hale*. “[A]nd if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation.”³⁴

The conception of the corporation that underlies *Hale* is anachronistic. Until the early 20th century, it was believed that “a corporation cannot commit treason, or felony, or other crime, in its corporate capacity”; rather, any criminal act by the company was attributed to its officers.³⁵ Laws attributing criminal liability to corporations themselves were only in their infancy when the seminal cases on the corporate right against self-incrimination were decided. It is now abundantly clear that corporations can commit crimes in their corporate capacity, and it is common for corporations to have their own counsel — separate from the board of directors, the CEO, and other corporate officers — who are capable of asserting rights on behalf of the corporation itself.

In denying the self-incrimination privilege in *Hale*, the Supreme Court relied on a notion of corporations that sounds nothing like how they are viewed, or treated, today:

[T]he corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. . . . Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose.³⁶

This rationale countenances a relationship of subservience and obeisance between a corporation and the state that bears no relationship to the current understanding of corporations and their legal status, as set out in the more recent cases extending other constitutional rights to corporations. The current economic and legal view of corporations is not that they are subjects of the state, subject to demand for what-

ever the state wishes, but rather that they are independent legal entities that work for the benefit of their shareholders. As a result, one must wonder whether *Hale's* assertion of the “sovereignty” of the state over corporations is still legally sound.

For most other constitutionally protected rights, corporations have been treated similarly to individuals.

Corporations were well-established but still rare at the time the Constitution was adopted.³⁷ Still, it did not take long for the Supreme Court to bestow rights upon corporations. In 1809, the Court held that the Constitution granted corporations the right to sue in federal court.³⁸ A decade later, the Court recognized that the contracts clause of the Constitution³⁹ protected corporations from state laws impairing contracts.⁴⁰

The largest expansion of corporate constitutional rights came with the ratification of the Fourteenth Amendment, which stated most notably that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁴¹ Though this amendment refers only to “person[s],” it seems the Supreme Court always believed that corporations were entitled to its protection. Less than two decades after the adoption of the amendment, before argument in *Santa Clara County v. Southern Pacific Railroad Co.*, Chief Justice Waite said, “The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.”⁴² Two years later, the Court said explicitly: “Under the designation of ‘person’ [in the Fourteenth Amendment] there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution.”⁴³

In recent years, the extension of personal constitutional rights to corporations has continued to expand, particularly regarding the First Amendment, further reflecting the evolving view that a corporation is not a mere collection of individuals but its own entity worthy of its own constitu-

tional protections. Prior to *First National Bank of Boston v. Bellotti*, it was thought that First Amendment rights were available to corporations only for speech that materially affected the corporation’s business interests. That changed in *Bellotti* when the Court rejected “the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation.”⁴⁴ This principle was further confirmed in *Citizens United v. Federal Elections Commission*, where the Court said it had “recognized that First Amendment protection extends to corporations. ... The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”⁴⁵ Rather, “[c]orporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.”⁴⁶

In 2014, the Court also provided religious freedom protections to corporations on the basis of a statute, the Religious Freedom and Restoration Act of 1993, that protects “a person’s” exercise of religion.⁴⁷ Though the Court did not in that case need to reach the constitutional question of whether the First Amendment free exercise clause protects corporations, it noted the broad personal rights that have been given to corporations:

A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corpo-

rations’ financial well-being. And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.⁴⁸

In the criminal context, the Supreme Court has found that the protections of the Fourth and Sixth Amendments apply to corporations. Indeed, in *Hale v. Henkel* — the same case that established that corporate officers could not assert the Fifth Amendment right against compelled self-incrimination — the Court also held that the Fourth Amendment’s protection against unreasonable searches and seizures did apply to corporations: “[W]e do not wish to be understood as holding that a corporation is not entitled to immunity, under the 4th Amendment, against unreasonable searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body.”⁴⁹ Thus, for example, it is indisputable that the government must get a warrant before searching a corporation’s offices.⁵⁰ It is also clear that corporations have a Sixth Amendment right to trial by jury.⁵¹

Most notably, as to the Fifth Amendment, each of its other protections — the grand jury clause, double jeopardy clause, due process clause, and takings clause — have all been held to apply to corporations. This is true even though each clause other than the takings clause stems from the exact same language — in a single sentence — with the root being: “No person shall”:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.⁵²

In the 1930s, the Supreme Court held that the takings clause of the Fifth Amendment applied to corporations such that a corporation whose property was taken by the government was entitled to just compensation.⁵³ In the 1970s, the Court held that in a criminal prosecution of a corporation, double jeopardy barred an appeal by the United States from judgments of acquittal entered under Rule 29(c).⁵⁴ And, though the Supreme Court has not weighed in, the Ninth Circuit said in the 1980s that corporations are also protected by the Fifth Amendment grand jury clause, requiring an indictment for infamous crimes.⁵⁵ Similarly, due process rights have long been understood to apply to corporations. Not only did the Supreme Court recognize in *Hale* that a corporation “can only be proceeded against by due process of law,”⁵⁶ but there also exists an entire body of personal jurisdiction law based upon the due process rights of corporations.⁵⁷

From a textual perspective, it is impossible to reconcile that, under existing Supreme Court precedent, the exact same word in a single sentence (i.e., the reference to “person” in the Fifth Amendment) has different definitions when it is being applied to the right against self-incrimination as opposed to the right to grand jury indictment, the protection against double jeopardy, and the right to due process. In essentially all other contexts besides the right against self-incrimination, constitutional protections applying to “persons” have been found to apply to corporations. And that is consistent with how the term “person” is typically interpreted in statutes. One recent 50-state survey of state laws found that 47 states have a broad definition of the term “person” that includes corporations as well as natural persons.⁵⁸

The plain text of the Fifth Amendment thus makes a compelling case that its protections cannot be differentiated in their application, depending on which clause is being considered, as does the plain text of the Fourteenth Amendment, which has always been understood to apply to corporations. A relatively simply syllogism also makes the point:

- ❖ Corporations are included in the protections captured by the Fourteenth Amendment’s due process clause.
- ❖ Due process rights under the Fourteenth Amendment include a right against compelled self-incrimination.

- ❖ Therefore, corporations have a right against compelled self-incrimination.

The Supreme Court would not have had the benefit of this syllogism when *Hale* was decided in 1906 because — though *Hale* recognized that corporations “can only be proceeded against by due process of law”⁵⁹ — the Supreme Court had not yet recognized that the right against self-incrimination was, in fact, a due process right. However, in 1964, the Supreme Court held that the due process clause of the Fourteenth Amendment incorporated the right against compelled self-incrimination,⁶⁰ completing the syllogism and making clear that the right should apply to corporations just as it does to natural people.⁶¹

A corporate right against self-incrimination would not severely hamper law enforcement.

Courts that have considered the Fifth Amendment right against self-incrimination have often warned of the dangers that such a right would bring if applied to corporations. In *Hale*, the

porate right against self-incrimination is consistent with how the Court has interpreted the Fifth and Fourteenth Amendments. Presumably, even inconvenient constitutional rights must nevertheless be recognized and protected. But in any event, for at least three reasons, such policy concerns — if raised — would not counsel against reversing the archaic holding of *Hale v. Henkel*. First, even regarding individuals, the Fifth Amendment right against self-incrimination applies only to testimonial evidence; this would clearly remain true with respect to corporations. Second, in response to the individual right against self-incrimination, Congress and state governments have created immunity statutes that allow the government to obtain information with the simple grant of immunity; such statutes or similar statutes could be used to obtain corporate testimony. And finally, anecdotally, other countries have recognized a corporate right against self-incrimination without sacrificing their ability to investigate and prosecute corporate criminal conduct.

The legal landscape has shifted since *Hale v. Henkel*. Corporations have a sensible argument that they should be able to assert the Fifth Amendment protection against self-incrimination.

Court said that allowing a corporation to assert a Fifth Amendment right would permit a witness “to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such a person.” The court concluded that “[a] privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation.”⁶² In 1988, the Court in *Braswell v. United States* noted that “recognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities 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.”⁶³

These kinds of concerns are not relevant to whether recognition of a cor-

To expand on these points, it is notable that, even with regard to an individual’s right against self-incrimination, the Fifth Amendment is not absolute. The right “protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature.”⁶⁴

As early as 1910, the Court held that the Fifth Amendment did not prevent the government from compelling a defendant to put on a blouse that fit him.⁶⁵ More recently, the Court held that a compelled blood sample and use of toxicology analysis did not violate the Fifth Amendment.⁶⁶ The Supreme Court has said that “[i]n the case of a documentary subpoena, the only thing compelled is the act of producing the document” and therefore “compliance with a summons directing the taxpayer to produce the accountant’s documents involved in these cases would involve no

incriminating testimony within the protection of the Fifth Amendment.”⁶⁷ Thus, even if the Court recognizes a corporation’s right against self-incrimination, the right would not protect the disclosure of pre-existing nonprivileged documents. Though a corporation would be able to argue that the act of production authenticated the documents in a way that was equivalent to compelled testimony,⁶⁸ it may have a difficult time shielding from disclosure, for example, incriminating emails about a transaction or relevant financial records.

The real change that might result from the recognition of a corporate right against self-incrimination would be a process change: protection from self-incrimination might have an effect on a corporation’s calculation regarding whether to cooperate with a government investigation and the manner of such cooperation. This is not to suggest that corporate cooperation would no longer be the norm if the Supreme Court were to recognize a corporate right against compelled self-incrimination. Indeed, as with natural persons who are targets of criminal investigations, there are myriad reasons the pressure to cooperate with the government will still be substantial in most cases, most notably, the credit the government gives for such cooperation. Thus, at best, the recognition of a corporate right against compelled self-incrimination may alter, to some degree, how a corporation assesses its options with respect to a government investigation. And it would potentially affect how the government gathers its evidence and proves its case.⁶⁹

Second, even if a corporate assertion of its right against compelled self-incrimination stymied a government investigation, the government would have an important trump card: a grant of immunity. As the individual right against self-incrimination solidified itself as a broad and fundamental right in the second half of the 20th century, legislatures (state and congressional) introduced immunity statutes in an attempt to compel individuals to testify. The government first passed a use immunity statute, declaring that no statement or evidence shall be used against the party that gave it. After the Supreme Court ruled that such a narrow immunity statute was insufficient to overcome the assertion of a privilege against self-incrimination, because it did not prevent the government from using the witness’s testimony to seek out additional witnesses or

evidence to use against him, Congress passed transactional immunity statutes that protected witnesses from prosecution regarding “any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise.” Thereafter, the Supreme Court held that compelling people to testify after they were provided with transactional immunity did not violate the Fifth Amendment privilege against self-incrimination.⁷⁰ Given the early Court rulings about the breadth of the Fifth Amendment, immunity statutes have “become part of our constitutional fabric.”⁷¹ Thus, the essential Fifth Amendment dichotomy developed through the U.S. common law was one in which the right against compelled self-incrimination was broad on its face but did not prevent the government from getting information that it felt it truly needed by providing proper immunity to the witnesses it wanted to compel. There is no reason why the same system could not be used with regard to corporations.

Finally, if the Supreme Court reconsiders the rule on corporate self-incrimination, the United States would not be the first country to provide such protections to corporations. Multiple countries with advanced criminal law systems provide for corporate protections against compulsory self-incrimination. Since at least 1938, corporations in England have at times relied upon “the existence of a privilege against compulsory self-incrimination by discovery or by answering interrogatories.”⁷² In a 1982 case, a corporate defendant in a copyright case in England successfully challenged discovery orders on the ground that it might expose the company to liability.⁷³ In addition, the European Union has recognized that the government may not compel from a corporation answers that might involve admissions by the corporation.⁷⁴ The court recognized that providing the right would limit the government’s “powers of investigation” but asked whether those limitations were required “by the need to safeguard the rights of the defence which the Court has held to be a fundamental principle of the Community legal order.”⁷⁵ Though concerns about criminal investigations have sometimes caused courts to create exceptions to this rule,⁷⁶ the point here is simply that other countries have in fact provided corporations with protection against compelled self-incrimination.

Counsel representing a corporation should consider asserting a right against self-incrimination where apt and in the client’s interest.

At this point, it seems clear that counsel representing entities should consider raising a right against compelled self-incrimination in response to any government requests for information that would implicate such a right. That is not to say that asserting a Fifth Amendment privilege against self-incrimination will be easy. With a century of Supreme Court precedent standing in the way, the odds of victory in the lower courts are small until the issue reaches the Supreme Court, meaning that the first corporation to take this approach will likely be ordered to produce the self-incriminating testimony. But as the above analysis makes clear, the legal landscape has shifted significantly in the century since *Hale* such that corporations have a more than nonfrivolous argument that they ought to be able to assert the Fifth Amendment protection against self-incrimination just as they can for the other rights protected by the Fifth and Fourteenth Amendments.

Clearly, not every corporate client is apt for such an approach, given the array of interests confronting a corporation facing governmental inquiry. For example, some corporations have independent regulatory or other disclosure obligations that would necessitate providing the same information in any event. Others may be concerned about reputational or other market-based risks arising from the assertion of a right against self-incrimination. Corporations consider a host of strategic concerns when facing a government inquiry, and many of the same concerns are relevant to the analysis of whether it is advantageous to assert a privilege against compelled self-incrimination. The resultant strategy will turn on *sui generis* concerns, but some factors counsel must consider as to advising corporate clients in this context include:

- ❖ Is the client a public or private company?
- ❖ Does the conduct at issue affect top management or lower level employees?
- ❖ Is the government’s potential case apparently strong, or relatively weak?

- ❖ Would there be negative (or, potentially, positive) collateral consequences from fighting the government?
- ❖ Would the corporation be eligible for cooperation credit based on the facts of the case and how the issue surfaced to the government?
- ❖ Is there information that would be subject to an assertion of the privilege that the corporation would want to withhold?
- ❖ Without the information that the corporation would want to withhold on privilege grounds, would the government be able to prove its case?

All these factors will have to be carefully considered on a case-by-case basis, along with numerous others, as counsel seeks the best result for her client when facing a government investigation or prosecution. The attorneys for the company will also have to work through some practical issues as the client attempts to assert the Fifth Amendment on behalf of the company, including for example, how to direct the employees of the company to assert the right on behalf of the company. However, these practical issues should be relatively easy to navigate for experienced counsel. Corporate employees cannot waive the corporation's attorney-client privilege and an employee must generally keep an employer's confidences.⁷⁷ Corporations therefore often direct employees to assert an attorney-client privilege that belongs not to the individual testifying but instead to the company.⁷⁸ In that context, attorneys for the company typically work closely with the attorneys for the individual — when the individual is separately represented — to discuss the scope of the privilege. In some instances, company counsel may accompany the individual to a government interview to ensure that the privilege is protected. In others, company counsel is available for consultation should a potential privilege issue arise and need to be addressed on the spot. Assertion of the corporation's Fifth Amendment privilege against self-incrimination would likely work the same way: The individuals empowered to act on behalf of the corporation would decide to assert the privilege on behalf of the corporation and would then instruct employees not to answer questions that would incriminate the corporation. Preparing a witness not to disclose incriminating information would need to be done carefully, but it would

not be new ground for an attorney experienced in representing corporations.

Until now, defense attorneys have not considered whether a corporate client can resist, or at least not cooperate, with a government inquiry, on the basis of a corporate privilege against self-incrimination. As defense attorneys consider their advice in such cases, they should determine whether to recommend that their client assert this privilege and how such an assertion will impact the myriad other considerations impacting the best strategic course. It will not be apt in all cases, but for the right client, the time is ripe to explore whether the Fifth and Fourteenth Amendments require the Supreme Court to recognize a corporate right against compelled self-incrimination.

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Notes

1. *Hale v. Henkel*, 201 U.S. 43, 70 (1906) (overruled on other grounds).

2. *See Braswell v. United States*, 487 U.S. 99, 102-19 (1988) (collecting cases and discussing the history of the right against self-incrimination as it pertains to corporations).

3. *Batson v. Kentucky*, 476 U.S. 79 (1986) (overruling *Swain v. Alabama*, 380 U.S. 202 (1965)).

4. *Crawford v. Washington*, 541 U.S. 36 (2004) (overruling *Ohio v. Roberts*, 448 U.S. 56 (1980)).

5. *United States v. Booker*, 543 U.S. 220 (2005).

6. This article discusses the right of a corporation to assert its Fifth Amendment right against self-incrimination. The analysis would be the same for other organizations or associations, and indeed some of the cases discussed herein relate to partnerships, labor unions or other organizational entities. However, for clarity and brevity the article refers only to corporations.

7. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

8. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

9. The Supreme Court has not decided whether the right to grand jury indictment extends to corporations, but the Ninth Circuit has. All other Fifth Amendment rights have been found by the Supreme Court to apply to corporations.

10. U.S. CONST. amend. V.

11. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

12. *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

13. *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *see also Ullmann v. United States*, 350 U.S. 422, 427 (1956) ("The privilege against self-incrimination serves as a protection to the innocent as well as to the guilty, and we have been admonished that it should be given a liberal application.").

14. John H. Wigmore, *The Privilege Against Self-Crimination; Its History*, 15 HARV. L. REV. 610, 619-20 (1902); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1073 (1994) (discussing Leonard Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (2d ed. 1986)); *Miranda*, 384 U.S. at 458-60 (describing the history of the privilege).

15. *See supra* note 14 Wigmore, 15 HARV. L. REV. at 625.

16. *Miranda*, 384 U.S. at 459 (citing Haller & Davies, *The Leveller Tracts 1647-1653*, at 454 (1944)).

17. *See supra* note 14 Wigmore, 15 HARV. L. REV. at 625.

18. *Id.*

19. *Id.* at 626 (citing 1641, St. 16 Car. I. c. 11, § 4 (no person "exercising spiritual or ecclesiastical power, authority, or jurisdiction," shall "ex officio, or at the instance or promotion of any other whatsoever, urge, enforce, tender, give, or minister" to any person "any corporal oath, whereby he or they shall or may be charged or obliged to make any presentment of any crime or offence, or to confess or to accuse himself or herself of any crime or offence, delinquency, or misdemeanor, or any neglect, matter, or thing, whereby or by reason whereof he or she shall or may be liable or exposed to any censure, pain, penalty, or punishment whatsoever").

20. *Id.* at 633-34.

21. R.H. Helmholtz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962, 967 (1990).

22. *Miranda*, 384 U.S. at 458 n.27 (citing Maimonides, *Mishneh Torah (Code of Jewish Law)*, *Book of Judges, Laws of the Sanhedrin*, c. 18, 6, III Yale Judaica Series 52-53; Lamm, *The Fifth Amendment and Its Equivalent in the Halakhan*, 5 JUDAISM 53 (Winter 1956)).

23. Steven M. Salky & Paul B. Hynes Jr., *The Privilege of Silence: Fifth Amendment Protections Against Self-Incrimination* (2015) available at http://apps.americanbar.org/abastore/products/books/abstracts/5090120_chap1_abs.pdf.

24. *Id.*

25. *See Bram v. United States*, 168 U.S. 532, 557 (1897) ("The attempt on the part of a police officer to obtain a confession by

interrogating has been often reproved by the English courts as unfair to the prisoner, and as approaching dangerously near to a violation of the rule protecting an accused from being compelled to testify against himself.”).

26. *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 55 (1964).

27. *Id.*

28. *Miranda*, 384 U.S. at 460 (internal citations and quotations omitted).

29. See, e.g., *Hale*, 201 U.S. at 76.

30. *Id.* at 70.

31. *Wilson v. United States*, 221 U.S. 361, 377–78 (1911).

32. See *Bellis v. United States*, 417 U.S. 85, 89 (1974) (citing cases).

33. *Braswell*, 487 U.S. at 102-19 (discussing the long history of the right against self-incrimination as it pertains to corporations).

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

35. Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* 164 (2018) (quoting William Blackstone, Commentaries) (citing Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U.L. Q. 393, 396 (1982)).

36. *Hale*, 201 U.S. at 74–75.

37. Though corporations date back hundreds of years before the founding —

and indeed the Virginia Company of London, a corporation, was integral to the founding of Jamestown in 1607 — according to a 1917 survey by a Stanford historian, in the colonies in the years immediately preceding the Constitutional Convention, there existed only two banks, two insurance companies, six canal companies, and two toll bridge operators. See *supra* note 35 Winkler at 3–4.

38. *Bank of U.S. v. Deveaux*, 9 U.S. 61 (1844).

39. U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.”).

40. *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 621 (1819) (“The constitution speaks of contracts, and ought to include all contracts for property or valuable privileges. There is no distinction or discrimination made by the constitution itself, which will exclude this case from its protection.”).

41. U.S. CONST. amend. XIV.

42. *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 394 (1886). In *We the Corporations*:

How American Businesses Won Their Civil Rights, Adam Winkler provides an interesting discussion of *Santa Clara County*, and the suspect nature of the assertions that the Fourteenth Amendment was meant to apply to corporations. Given that there is no doubt that, as of today, the protections of the Fourteenth Amendment have been applied to corporations, this article does not explore whether it was meant to do so.

43. *Pembina Consol. Silver Mining & Milling Co. v. Commonwealth of Pa.*, 125 U.S. 181, 189 (1888).

44. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978).

45. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 342–43 (2010) (quoting *First Nat’l Bank of Boston*, 435 U.S. at 776).

46. *Id.* at 343 (quoting *First Nat’l Bank of Boston*, 435 U.S. at 776). In a 2011 law review article, Christopher Slobogin highlighted this expansion of First Amendment rights to argue that “if corporations can possess and exercise a right to speak (per *Citizens United*), they can possess and assert a right not to speak.” See Christopher Slobogin, *Citizens United and Corporate and Human Crime*, 41 STETSON L. REV. 127, 135 (2011).

47. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707 (2014).

48. *Id.* at 706–07.

49. *Hale*, 201 U.S. at 76.

50. See Brandon Garrett, *The Constitutional Standing of Corps.*, 163 U. PA. L. REV. 95, 122-128 (discussing the Fourth Amendment protections).

51. *Southern Union Co. v. United States*, 567 U.S. 343, 352 (2012).

52. U.S. CONST. amend. V.

53. *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 492 (1931). This fundamental principle had already been recognized in *Hale*. See *Hale*, 201 U.S. at 76 (“In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation.”).

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

55. *United States v. Yellow Freight Sys., Inc.*, 637 F.2d 1248, 1254 (9th Cir. 1980). Though the court said that the Elkins Act violation with which the corporation was charged was not an “infamous” crime, it went on to say that a crime that was an infamous crime as to a corporation (because, for example, Congress declared it to be so) would require a grand jury indictment.

56. *Hale*, 201 U.S. at 76.

57. See, e.g., *International Shoe Co. v. State of Wash.*, 326 U.S. 310, 317 (1945) (“Those demands may be met by such con-

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tacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.”).

58. Debbie Haskins, *What Is a Person?*, National Conference of State Legislatures (2014), available at http://www.ncsl.org/documents/lss/tue_haskins_handout1.pdf; see also Debbie Haskins, *Default Definitions of ‘Person’ in State Statutes*, National Conference of State Legislatures (2014) available at http://www.ncsl.org/documents/lss/tue_haskins_handout2.pdf.

59. *Hale*, 201 U.S. at 76.

60. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

61. All of the provisions of the Fifth Amendment have been incorporated against the states with the exception of the right to a grand jury indictment, which the Ninth Circuit has held applies to corporations. The Supreme Court is primed to incorporate the Sixth Amendment’s right to unanimous juries this term. See *Ramos v. Louisiana*, No. 18-5924, 139 S. Ct. 1318 (2019), cert. granted.

62. *Hale*, 201 U.S. at 69-70.

63. *Braswell*, 487 U.S. at 115 (citing John Conyers Jr., *Corporate and White Collar Crime: A View by the Chairman of the House Subcomm. on Crime*, 17 AM. CRIM. L. REV. 287, 288 (1980)).

64. *Schmerber v. California*, 384 U.S. 757, 761 (1966).

65. *Holt v. United States*, 218 U.S. 245, 247 (1910).

66. *Schmerber*, 384 U.S. at 761.

67. *Fisher v. United States*, 425 U.S. 391, 410 n.11 & 414 (1976).

68. *Id.* at 413 n.12 (“The ‘implicit

authentication’ rationale appears to be the prevailing justification for the Fifth Amendment’s application to documentary subpoenas.”).

69. See generally U.S. Dep’t of Justice, *U.S. Attorneys’ Justice Manual* tit. 9 § 9-28.000 (Principles of Federal Prosecution of Business Organizations), available at <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>.

70. *Brown v. Walker*, 161 U.S. 591, 620 (1896).

71. *Ullmann v. United States*, 350 U.S. 422, 438 (1956). Ullman was specifically discussing the Compulsory Testimony Act of 1893, which the *Kastigar* Court described as “the model for almost all federal immunity statutes.” *Kastigar*, 406 U.S. at 447 n.21.

72. *River East Supplies Ltd. R (On the Application Of) v. Crown Court at Nottingham* [2017] EWHC 1942 (Admin) available at <http://www.bailii.org/ew/cases/EWHC/Admin/2017/1942.html> (discussing the privilege against self-incrimination in English law generally through cases that involved corporations).

73. *Id.* (discussing *Rank Film Distributions Ltd. and others v. Video Information Centre* [1982] AC 380).

74. *Okrem SA v. Commission*, Case 374/87, [1989] E.C.R. 3283, 3351, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61987CJ0374&from=GA>. Belgium also appears to have recognized a right against self-incrimination for corporations. See *A Corporate Right to Silence and Privilege Against Self-Incrimination?*, OECD Insights

(Nov. 25, 2016), available at <http://oecdinsights.org/2016/11/25/a-corporate-right-to-silence-and-privilege-against-self-incrimination>.

75. *Okrem SA* ¶ 32; see also Scott A. Trainor, *A Comparative Analysis of a Corporation’s Right Against Self-Incrimination*, 18 FORDHAM INT’L L.J. 2139 (1994).

76. Lynn Loschin, *A Comparative Law Approach to Corporations and the Privilege Against Self-Incrimination*, 30 U.C. DAVIS L. REV. 247, 258-60 (1996) (discussing exceptions).

77. *United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996).

78. *United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996) (“[T]he power to waive the corporate attorney-client privilege rests with the corporation’s management and is normally exercised by its officers and directors. ... [W]hen control of a corporation passes to new management, the authority to assert and waive the corporation’s attorney-client privilege passes as well.”); *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348, 105 S. Ct. 1986, 1991, 85 L. Ed. 2d 372 (1985) (“The administration of the attorney-client privilege in the case of corporations, however, presents special problems. As an inanimate entity, a corporation must act through agents. A corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interest. Each of these actions must necessarily be undertaken by individuals empowered to act on behalf of the corporation.”). ■

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