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THE BUSINESS PAPERS RULE: PERSONAL PRIVACY AND WHITE COLLAR CRIME

by

JOHN S. APPLEGATE*

INTRODUCTION

WHITE COLLAR CRIME has recently been the focus of much attention by law enforcement agencies and legal commentators. One reason for this interest is the substantial increase in this kind of criminal activity and the staggering costs it imposes on society.¹ Significantly, because white collar crime uses the institutions and techniques of legitimate financial and commercial activities, it is extremely difficult to initially detect, investigate, and prosecute such crime.²

Successful enforcement often necessitates the use of large amounts of personal financial information.³ Prosecution for bank robbery does not require the financial records of the bank, but prosecution for embezzlement may require those records and also the records of all bank employees and customers who may be involved in the embezzlement. However, because it is considered very private this information is, or ought to be, very difficult to obtain. This creates a major dilemma in formulating a comprehensive policy for combating white collar crime. A full commitment to either privacy goals or law enforcement goals could seriously compromise the other.

The legal site of this conflict between competing goals has been the constitutional protections of privacy in criminal matters, the fourth and fifth amendments. Where law enforcement goals were given primacy, as in the recent bank records cases,⁴ disturbing questions about the future of personal privacy were raised. On the other hand, it is not reasonable to sacrifice law enforcement goals on the basis of notions of privacy derived from application of the fourth amendment.

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³See Wilson & Matz, supra note 2, at 651.

amendment to more traditional criminal acts. This problem can be satisfactorily resolved only by a broad, coherent scheme of accommodation between privacy and law enforcement needs, recognizing the unique problems raised by white collar crime.

Constructing such a scheme will require more than a simple suggestion for judicial interpretation of a constitutional provision. White collar crime cannot be treated like any other crime. Privacy rights may be expended in some areas and limited in others. While current doctrines must be taken into account if the solution proposed here is to be realistic, the thrust of this article will be an analysis of the problems presented by white collar crime and of various approaches to its solution. The "business papers rule" proposed here is presented as both a basis for discussion of how to formulate an approach to white collar crime and as one possible overall approach.

The first step in this endeavor will be the development of a definition of white collar crime which adequately accounts for the difficulty in combatting it. The next step will be to examine individually the two competing goals — law enforcement and privacy — to try to get a sense of the requirements of each. This will lead into a discussion of the conflict between the goals. The article will then move on to consider several unsatisfactory resolutions of the conflict, making that the basis for sketching out the necessary specifications of a good solution. Finally, the "business papers rule" will be proposed and analyzed, for the purpose not only of responding to the problems raised in the first part of the article, but also of describing an analytical approach to white collar crime enforcement policies. The article will conclude with a discussion of the stability of this suggested approach to white collar crime.

I. A GENERAL DEFINITION OF WHITE COLLAR CRIME

The law enforcement problem presented by white collar crime can be illustrated by an examination of four different crimes: bankruptcy fraud; government contracting bribery; bank embezzlement; and personal income tax evasion. The four do not exhaust the range of white collar crime nor are they exhaustively analyzed. Their differences, however, demonstrate the wide variety of economic crimes possible, and their similarities provide the basis for a workable definition of white collar crime.

Bankruptcy fraud usually consists of a bankruptcy planned to follow the hiding of assets and merchandise and the obtaining of large amounts of credit using false or incomplete records. A great deal of documentary evidence is

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1For a more exhaustive list of white collar crimes, see INVESTIGATION MANUAL, supra note 1, at 277-313. The few crimes listed there which do not fit into the definition presented herein may be excluded from present consideration. For some other useful categorizations, see HOUSE COMM. ON THE JUDICIARY, 95th CONG., 2d Sess., WHITE COLLAR CRIME: THE PROBLEM AND THE FEDERAL RESPONSE 1-7 (Comm. Print 1978) [hereinafter cited as Comm. Print No. 16]; R. HAGEN, THE INTELLIGENCE PROCESS IN WHITE-COLLAR CRIME INVESTIGATION 27 (1979); M. Moore, Notes Towards a National Strategy to Deal with White Collar Crime (1979) (unpublished paper, available in Harvard School of Government Library).

necessary even to determine that fraud exists. Once the investigators are
reasonably certain that something is amiss, the merchandise and assets must
be traced through financial records, many of which will be those of other per-
sons who may or may not be involved in any criminal activity. The illegal
purpose must usually be proven by indirect evidence, that is, the records must be
used to show that the bankruptcy was planned. And even if all the necessary
books and records and merchandise are obtained, the analysis of this material
is a very complex and time-consuming process.

Contracting bribery creates its own difficulties. The most significant aspect
of bribery is that it is self-contained, involving governmental institutions only
as unknowing victims. It is different from extortion in that there is no one
with any incentive to report the crime. The victim is ignorant of the crime and
the culpable participants all have too much to gain. Another major law enforce-
ment problem is that bribery transactions are almost always conducted in cash.
Massive surveillance, confessions, or grants of immunity are often necessary.
But in all cases the basic law enforcement need is to explore in minute detail
the finances of the companies and persons suspected of making and accepting
the bribes. The recent investigation of corruption in the awarding of contracts
for state and county buildings in Massachusetts provides an excellent picture
of the problems of discovering, investigating, and proving bribery. The
Massachusetts Special Commission had both to discover the pertinent cash trans-
actions and then to tie them to the company’s funds. This required huge amounts
of data — all of the records of a suspected company for the relevant time period
were summoned — and a computer to analyze it.

Self-dealing or embezzlement by a bank officer is similar to bankruptcy
fraud in that records of many persons and entities are required simply to
determine initially whether any questionable connections or interests exist.
However, in an embezzlement investigation, unlike most bankruptcy cases,
personal bank accounts will be important in determining who is embezzling and
where the money is going. With planned bankruptcy investigators know whose

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1 M. Moore, supra note 5, at 31. Moore provides a very helpful analysis of the characteristics of various
types of white collar crime.
2 Id. at 31.
3 See Ogren, The Ineffectiveness of the Criminal Sanction: Losing the Battle Against White Collar Crime,
11 AM. CRIM. L. REV. 959 (1973). The recent controversy over the Abscam investigation demonstrates the
lengths to which law enforcement agencies feel compelled to go to counter this self-contained crime. In
Abscam, the Government was forced, in effect, to create the crime in order to stop it. See United States
4 Commonwealth of Massachusetts, Special Commission Concerning State and County Buildings, Final Report to the General Court (1980) [hereinafter cited as Special Commission Report]. Volumes
1-5 and 9 are germane to this article. This report is an invaluable account of an actual bribery investigation.
It describes in detail the investigative method and findings of the Special Commission concerning the pervasive
corruption in the awarding of building contracts in Massachusetts. The commission also produced, but
did not have time to publish before its mandate expired, a section of its Report entitled “Investigative
Techniques for Political Corruption and Other ‘White-Collar’ Cases.” It is still in outline form, but in
scope and testedness it will be very useful if and when it is published. See also R. Cohen & J. Whitecover,
5 Special Commission Report, supra note 10, at 78-83.
personal accounts to review initially, but with embezzlement a much wider net must be cast at an early stage in the investigation. This represents a substantial intrusion into privacy, especially since it involves bank records of individuals.

Personal income tax evasion is the crime involving the most private of personal documents. It is at the opposite end of the spectrum from bankruptcy fraud, where most of the evidence comes from business records and the bankrupt's personal finances are voluntarily disclosed because applying for bankruptcy is a voluntary act. A person's income, deductions, and exemptions reveal a great deal about a person's private life, and extensive inquiry into these matters will seriously compromise that privacy. This problem is particularly acute because of the difficulty of spotting evasion without that extensive inquiry.

All of these crimes have several similarities, different ones of which have been emphasized by different studies. White collar crime was first identified as a sociological phenomenon, and beginning with Sutherland's work there has been a distinct school viewing it as a social rather than a legal concept. These sociological definitions concentrate on the socioeconomic fact that white collar criminals are not part of the traditional "criminal element" at all. While this is not legally relevant, it points to a key problem in enforcement. White collar criminals blend in well with the law-abiding pillars of the community, and sometimes are the pillars of the community. So, they are initially less subject to suspicion, and are also the beneficiaries of a certain reluctance to prosecute. These people are routinely involved in completely legitimate transactions of the same type that can later be twisted to criminal purposes and so they are further removed from immediate suspicion.

Another crucial similarity between white collar crimes is that all involve use of the economic system in general, and financial and public institutions in particular. The tools of white collar crime — unlike a sawed-off shotgun or a jimmy — are indistinguishable from those of the millions of legitimate transactions in the same medium. Filing for bankruptcy, acquiring a government contract, withdrawing money from a bank account, or earning income are not inherently illegal acts. And the transactions themselves are not discrete, recognizably criminal acts, like a murder or a burglary, but are ongoing activities which appear no different from legitimate ones. This obviously makes the crime difficult to detect. It also means that the primary way in which the illegal transactions differ from legal ones is not in their substance and appearance but in their purpose and intent. The point is that the illegal transactions, like

12White collar crime was originally described as a sociological rather than a legal phenomenon. See E. SUTHERLAND, WHITE-COLLAR CRIME 9 (1949). There continues a distinct school viewing it as a social rather than a legal concept. See SUBCOMM. ON CRIME OF THE HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 1ST SESS., NEW DIRECTIONS FOR FEDERAL INVOLVEMENT IN CRIME CONTROL 64 (Comm. Print 1977) (hereinafter cited as Comm. Print No. 2); WHITE-COLLAR CRIME (G. Geis & R. Meier ed. 1977) (a collection of sociological essays).

13INVESTIGATION MANUAL, supra note 1, at 32. This is related to the tendency for perpetrators not to look like criminals so there is a certain reluctance to investigate these persons as well as their businesses.

14See H. EDELHERTZ, THE NATURE, IMPACT AND PROSECUTION OF WHITE-COLLAR CRIME 27 (1970). This is obviously far harder to prove. Ogren, supra note 9, at 969.
their perpetrators, blend in with legal ones and so become very difficult to detect.

Presently, the most generally accepted definitions emphasize that deceit and guile are the basis of white collar crime. The American Bar Association defines white collar crime as "any non-violent, illegal activity which principally involves deceit [or] misrepresentation . . . ." The Federal Bureau of Investigation defines it as "non-physical illegal acts associated and accomplished largely by concealment and deceit . . . ." These descriptions are accurate as far as they go, but they seem to describe symptoms rather than basic elements. In the same vein, Edelhertz provides a detailed and very useful list of symptoms. He identifies five main characteristics: (1) intent and premeditation; (2) disguise of purpose; (3) reliance on victim's ignorance or carelessness; (4) voluntary victim action; and (5) concealment of violation. Of these, disguise of purpose and concealment of violation are identified as the crucial characteristics.

Deception and guile are indeed the sine qua non of white collar crime. This appears in the ability to hide the illegality in apparently legitimate transactions or statements. Non-violence is part of this ability, as is the premeditation inherent in this type of crime. Concealment in fact is the means and end of the illegal activity, and concealment is aided immensely by the complexity of the institutions and transactions used. It is misleading to characterize the victim as unwatchful or voluntarily helping the criminal. "Business as usual" is the means both of effecting and of disguising the crime. Concealment of purpose is more than a symptom of the crime, it is the crime. The transactions do not have a "facade of legitimacy" if that implies that concealment is a separate, post hoc operation; concealment is the crime.

When the concealment characteristic is considered with the other similarities noted, the result is a persistent pattern of intermingling legal with illegal, legitimate with illegitimate. This intermingling is the essence of white collar crime. It is characteristic of the type of criminal, of the method of committing the crimes, of the types of crimes committed, and, most importantly, of the primary difficulty encountered in combating white collar crime. Sorting out the legal and illegal, when possible, first requires access to large amounts of documentary evidence, and then requires careful evaluation of complex contents of the documents. This intermingling is also at the root of the important privacy issues which are raised by a proactive investigation. To sum up, white collar crime is a pattern of apparently routine economic transactions, which has the effect of bringing to the perpetrator economic gain to which he or she is not legally entitled.

"White collar crime is "any non-violent, illegal activity which principally involves deceit [or] misrepresentation." A.B.A. SECTION OF CRIMINAL JUSTICE, ECONOMIC OFFENSES 17 (1977). See also JUSTICE DEPT. REPORT, supra note 1, at 5.


"INVESTIGATION MANUAL, supra note 1.

"Id. at 21-25.

"Id. at 22.
There are basically three stages in the enforcement process: detection, investigation, and prosecution. While each stage poses different problems, and each creates different evidentiary needs, they all share a need for huge amounts of information, a requirement which is incompatible with traditional views of personal and corporate privacy.

A. Detection

Because white collar crime uses the same methods as legitimate transactions, because the harm is inapparent, and because the crime often involves only acts of omission, detection is very difficult. Victims, a standard source of criminal complaints, often do not know that they have been victimized, or learn about it well after the victimization has been accomplished. The other usual source of complaints, observation by a third party, is not effective either, because white collar crime is by its nature concealed and intermingled with legitimate business activities.

The success of a bankruptcy fraud, a bribe, embezzlement, or tax evasion is in the concealment. If others were aware of it happening, the crime would not occur. Thus, in white collar crime there will often not even be the possibility of informers, other than culpable participants.

The law enforcement response to this state of affairs must be some sort of general intelligence activity. Intelligence is distinguished from investigation in that it is not related to a specific crime but is instead directed at a group of persons or transactions which in the past have been associated with illegal activities. This might also include identification of a high-risk area and making random checks. It is plain that intelligence does not fit into our notions of a limited and essentially reactive police force. Strategic intelligence requires, in the absence of distinct criminal acts and victim or third-party observation, affirmative searches for information.

The amount and different types of information required are large. A major source, especially from businesses, will be information already in government hands as the result of regulatory activities. All kinds of personal information will be required. Data centers, like those created by credit accounts, will be

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20 Comm. Print No. 16, supra note 5, at 29-30.
21 H. Edelhertz, supra note 14, at 36-37.
24 For example, vehicle registration, real estate transaction records, licenses, civil actions, bank records, credit information, corporate registers, and membership lists. Investigation Manual, supra note 1, at 117; R. Hagen, supra note 5, at 4, 6-8.
25 This includes name, address, aliases, description, date of birth, licenses, family, friends, and education. E. Godfrey & D. Harris, Basic Elements of Intelligence 83-86 (rev. ed. 1978).
of great help. The mail cover surveillance technique would also be useful. During the gathering of intelligence, much information of a type which is considered private will be obtained concerning people who have committed no crime. Nor can the intelligence system be limited to illegal activity. It must include all information which might be helpful, especially since white collar crime is concealed within legal activity.

More than the fact of its collection, the analysis methods applied to the information gathered by intelligence activities conflict with the idea of a limited, reactive police force. What a broad intelligence system is looking for — what its computers can find — are patterns, mainly patterns of association. The most common intelligence technique is "link analysis," in which, by means of charts or graphs, the investigator connects people with other people or groups by analyzing the number, nature, extent, and duration of contacts between and among them. This is a powerful technique, yielding a great deal of extremely valuable information, but also posing a real danger of misuse. Recalling the crimes illustrated at the outset, it will be noted how much detection depends on where money is going, and following the money requires checking out associates. Associates will be found not only through financial data, but also through surveillance and non-economic documents.

The intelligence methods of the Massachusetts Special Commission on contracting bribery were an extension of link analysis. With a computer the Commission correlated the contracts awarded and adjusted, to whom they were awarded, who granted them, where they were to be carried out, and when these events occurred. At this early stage, then, the Commission obtained a great deal of suggestive information about people and on the basis of it, and some informants, launched a massive investigation of their financial records.

Even when used totally in good faith, strategic intelligence violates basic privacy concepts in three ways. First, the type of information it requires is not only drawn from public records which are not ordinarily combined, but it is also material which is generally considered private. Second, the basic analytical tool

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27 INVESTIGATION MANUAL, supra note 1, at 178. Mail cover surveillance "is the process by which a record is made of any data appearing on the outside cover of any class of mail matter, including checking the contents of any second-, third-, or fourth-class mail matter . . . . . . ." 39 C.F.R. § 233.2(c)(1) (1981). Such surveillance is authorized at 39 C.F.R. § 233.2 (1981).
28 Draper, Privacy and Police Intelligence Data Banks, 14 HARV. J. ON LEGIS. 1, 10-13 (1976).
29 Id. at 3, 15; E. GODFREY & HARRIS, supra note 25, at 94.
30 For a detailed discussion of this technique, see E. GODFREY & D. HARRIS, supra note 25, at 124-26; R. HAGEN, supra note 5, at 10-12.
32 See Draper, supra note 28, passim.
33 SPECIAL COMMISSION REPORT, supra note 10, at 78-83.
34 Id.
is guilt by association. While patterns of association will sometimes be suspect in themselves (for example, joint business ventures of a bank officer and a borrower from the bank), more often the patterns will be discovered by investigating all of the associates of one person. Finally, it vests huge discretion in the investigators as to what information to gather and how to analyze and use it.\textsuperscript{35} Probable cause is not operative in obtaining and analyzing this information, and the constitutional propriety of such a system must be questioned although its necessity as a technique for detection cannot be.

B. Investigation

The detection phase uses strategic intelligence to decide where a further look is indicated. The investigation phase attempts to discover whether a crime has been committed, and if so, what crime or crimes. Again, white collar crime's unique characteristic of being intermingled with legitimate transactions creates the basic problem. At the outset there is reluctance to investigate a legitimate business and pressure not to do so.\textsuperscript{36}

The real problem, however, is the identification of the suspicious activity and the acquisition of information demonstrating it to be a crime. The question of existence of criminal intent is important to both the investigation and prosecution. If there is no criminal intent the activity is not a proper subject for prosecution or further investigation. In any case, criminal intent is generally a matter proven by indirect evidence, and such indirect proof usually requires more evidentiary material than would be needed if direct proof of intent were possible. Edelhertz describes several indicia of criminal intent, including: facts which admit of virtually no legitimate explanation; activities which could have no legitimate motive; repeated wrongful activity; inconsistent statements; systematic misleading statements; admissions; obstruction of investigations; and knowingly false statements.\textsuperscript{37} Many of these indicia in fact beg the question, but it must be apparent that a great deal of information is required before even a tentative conclusion can be reached about most of the threshold criminal intent questions.

Nothern describes "badges of fraud" which likewise presume the possession of a great deal of information, including: double sets of records, mixing of personal and business funds, failure to record transactions, fictitious expenses and invoices, destruction of records, large cash transactions, putting assets in the names of others, and suspiciously low income.\textsuperscript{38} According to the Massachusetts Special Commission, the "badge" of bribery is cash generation. Bribery transactions are almost always in cash and in amounts not normally kept in an office.\textsuperscript{39} Discovering cash generation requires the inspection of huge

\textsuperscript{35}Analysis is by no means a self-executing process. R. HAGEN, supra note 5, at 9.

\textsuperscript{36}INVESTIGATION MANUAL, supra note 1, at 32.

\textsuperscript{37}Id. at 124-37.


\textsuperscript{39}SPECIAL COMMISSION REPORT, supra note 10, at 78-79.
amounts of documents as it is not immediately apparent and can be accomplished in many ways.40 One company used checks written to "Cash," checks written to its treasurer, reimbursement checks, and sizeable "bonus" checks written to secretaries.41 Many of these checks were inherently suspect, e.g., huge bonuses to a low-paid employee, but in other cases it was necessary to trace the entire transaction to discover its actual purpose. In one instance, investigators discovered that a check for an odd amount of money (rather than for the even hundreds apparently preferred by bribers), paid as a bonus to an employee, was intended to reimburse the additional tax liability incurred by the employee because of the other false bonus checks.42

If discovering just these initial "badges" requires so much, the actual investigative work of separating out the legal from the illegal will be tremendous.43 As well as being time-consuming, expensive, and requiring a highly skilled team of accountant-investigators,44 the investigation will, from its initiation, require large amounts of documentary evidence, as that is the only kind which cannot change.45 Investigators will require bank records, loan files, cashed checks, securities records, and records of cashiers' checks, money orders, and travellers' checks.46 The goal is to separate suspicious from innocuous transactions so that a fuller investigation of the former can be made.47

The purpose in assembling all of this material is to follow the "paper trail" of a criminal transaction. In order to follow that trail huge discretion must be placed in the hands of the investigators. An Assistant United States Attorney has said that "[Enforcement] require[s] extensive examination of financial records in order to follow the often complicated and sophisticated methods devised to hide illegal transactions. As a result, the operation of corporations, partnerships, and other business entities is often closely scrutinized by investigators."48 It is preferable, of course, that the investigation be kept secret for as long as possible so that the suspect will not be able to react by destroying records. As a result, there is a certain pressure on the courts to allow as

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40 Id. at 2:103-13, 5: "Case Studies of Cash Generation."
41 Id. at 4: "Desmond & Lord," 54-61.
42 Id. at 4: "Desmond & Lord," 60.
44 Comm. Print No. 16, supra note 5, at 21, 27, 31-33.
45 R. O'NEILL, INVESTIGATION PLANNING 7 (1979). Documents are also important to corroborate witness' statements, see Watergate Special Prosecution Force, Policy and Procedure in the Investigation and Prosecution of Government Officials, 12 CRIM. L. BULL. 26, 35 (1976).
46 See R. NOSSEN, DETERMINATION OF UNDISCLOSED FINANCIAL INTEREST (1979). See also R. CONDON, MANAGING AN INVESTIGATION INTO PUBLIC CORRUPTION 12 (1979); Notherrn, supra note 38, at 24; Webster, supra note 16, at 667.
47 R. NOSSEN, supra note 46, at 8.
much ex parte examination of material as possible.49

Warrants and subpoenas issued in these circumstances cannot be models of particularity and limited discretion. Clearly a thorough investigation will have to be made of a suspect's personal and business records to sort out the wheat from the chaff.50 Additionally, use of associative "guilt" must be made by the investigators, in that those parties who have done business with the suspect will also be subject to wide-ranging scrutiny, not only to see if the person is an accomplice but also simply to determine whether a record of the original suspect is false or incomplete.51 Where the boundaries of the illegality are so hazy, as in white collar crime, the boundaries of the investigation will be equally hazy and consequently discretionary.

C. Prosecution

As has been noted from the outset, the key question in white collar crime cases is why a particular transaction or series of transactions took place, not the mere fact that they occurred.52 This question of purpose and intent, troublesome in investigation, is the center of a prosecution because it often makes the difference between a legitimate transaction and an illegal one.53 It is also true that direct evidence of intent is very rare. The crime would not be perpetrated if the intent were obvious. Intent to defraud, for example, "must be inferred from a series of seemingly isolated acts and instances."54 These instances are complex transactions recorded in, or wrongfully omitted from, voluminous books and records.55 And because the complex transactions are only indirect proof, the complexity is multiplied.56 Not only is information required from more than the suspect's own files, but often information from earlier or later periods is needed.57 The boundaries of the crime are indistinct and the material used to prove it can go far afield.

49Since bank records are not clothed with a "legitimate expectation of privacy" for fourth amendment purposes, United States v. Miller, 425 U.S. 435 (1976), this is already the case with such records as a constitutional matter.

50For example, in a real estate fraud investigation the police used a warrant which included the phrase, "together with other fruits, instrumentalities and evidence of crime at this [time] unknown," and the Court found that this was not overly broad under the circumstances. Andresen v. Maryland, 427 U.S. 462, 478-81 (1976). Accord Shaffer v. Wilson, 523 F.2d 175, 180 (10th Cir. 1975), cert. denied, 427 U.S. 912 (1976).

51INVESTIGATION MANUAL, supra note 1, at 137-45.

52H. Edelhertz, supra note 14, at 47. See also Practicing Law Institute, Defending White Collar Crimes 97 (1976).

53Ogren, supra note 9, at 969. Motive is crucial in convincing a jury. INVESTIGATION MANUAL, supra note 1, at 30-31.

54Aiken v. United States, 108 F.2d 182, 183 (4th Cir. 1939). See also United States v. Bernstein, 533 F.2d 775, 779 (2d Cir.) (FHA mortgage fraud), cert. denied, 429 U.S. 998 (1976). These cases can become so complex that the Government has been given extra time to prepare its case. See, e.g., United States v. MacClain, 501 F.2d 1006, 1010 (10th Cir. 1974); United States v. MacKay, 491 F.2d 615, 620 (10th Cir. 1973), cert. denied, 416 U.S. 972 (1974).


56Confusion is hardly surprising in such cases. See, e.g., Lowther v. United States, 455 F.2d 657 (10th Cir.), cert. denied, 409 U.S. 857 (1972).

57See, e.g., United States v. Waller, 468 F.2d 327, 329 (5th Cir. 1972), cert. denied, 410 U.S. 927 (1973); Feichtmeir v. United States, 389 F.2d 496 (9th Cir. 1968).
Tax evasion provides an excellent study of proof by indirect evidence. Direct proof from the taxpayer is possible for the fact of deficiencies, through proof of omission of specific items. Of course, the entire records of the taxpayer are required for this effort. However, it is more often the case that the taxpayer does not have such records and the investigator is immediately forced to go to third parties to obtain information.

By far the most common method of proof in tax cases is the "net worth" method. This requires establishing with certainty the taxpayer's net worth at the beginning of the period being studied. Then the Internal Revenue Service must prove that there was an increase in net worth at the end of the period, that the source of that increase is likely to be taxable, and that it was not reported. Proving beginning net worth is a very difficult process, as the Government must locate every possible source. This requires extremely broad canvassing of banks, assets, transactions, and associates.

Other indirect methods are less broad in scope, but are often used in connection with each other or with the net worth method. The "expenditures" method attempts to show that the taxpayer's expenditures were too great given his reported income. The "deposits" method is the inverse, showing that deposits were too high for the reported taxable income. In both methods, two complicating factors must be noted. First, the acquisition of records of all of these transactions will be very difficult. For example, expenditures can be made anywhere; cash placed in a safe deposit box will be hard to discover. Second, the inferences drawn here can be weak, and much care must be taken to foreclose all legitimate explanations. Especially with a sophisticated concealer, a great deal of sorting out of transactions will have to be done before this can be achieved.

Also, in addition to the fact of the deficiency, intent must be proven as well if the case is to be criminal rather than civil. It is indicative of the difficulties in this field that Miranda warnings are now required at all initial interviews with taxpayers, even where the original inquiry is civil.

The characteristic of intermingling legitimate and illegal business activity in white collar crime means that at every step of the enforcement process, from detection to investigation to prosecution, investigators must cast a very wide net. The standard of relevance is very broad at all stages and it necessarily subjects people to scrutiny on little evidence and vests a large amount of discretion in the police. Neither of these results comport well with conceptions of

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61United States v. Dickerson, 413 F.2d 1111, 1115 (7th Cir. 1969).
personal privacy, and it is to that conflict that the article now turns.

III. THE CONFLICT WITH PERSONAL PRIVACY

Four constitutional privacy doctrines have developed from the core concept of a "right to be let alone." These doctrines are: a general right to privacy as enunciated in the *Griswold v. Connecticut* and *Roe v. Wade* cases; the fourth amendment restrictions on searches and seizures; the fifth amendment privilege against self-incrimination; and the first amendment rights to freedom of association and expression. These protect certain areas of a person's life from governmental interference and limit official discretion in those intrusions which are permitted. Leaving detailed discussion of constitutional doctrine for later, the article now discusses the scope of the privacy policies found in the Constitution and describes the conflict between these goals and the law enforcement methods mandated by the nature of white collar crime.

A. The Right to Be Let Alone

A right of privacy per se was first enunciated in the celebrated article by Warren and Brandeis. The privacy they described was a common law concept based on "the principle ... of an inviolate personality." Dean Griswold worked from Brandeis' later application of privacy ideas to the Constitution and found privacy to be "the underlying theme of the Bill of Rights."
The Supreme Court, citing these commentators, decided in *Griswold v. Connecticut* that “[v]arious guarantees [of the Bill of Rights] create zones of privacy.” In *Griswold*, a zone of privacy, not expressly mandated by the Constitution, was held to protect the choice to practice birth control in marriage. *Roe v. Wade*, relying heavily on *Griswold*, extended that privacy rationale to include a woman’s right to terminate her pregnancy. This right of privacy is “founded on the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action.”

It is apparent that a right to be let alone is seriously compromised by a system of general intelligence which gathers superficial information from all, concentrates on a random few, or relies on brief encounters with others. It is also compromised by the combining of information which, while in government hands, is not normally used in such a manner.

**B. Search and Seizure**

The fourth amendment protects “personal security, personal liberty . . . a man’s home and the privacies of life.” Personal papers, named in the text of the amendment, are at the center of this privacy. Fourth amendment protection is accomplished by limiting the discretion of government officials by requiring that any intrusion on personal privacy be accompanied by a warrant executed by an impartial magistrate. These warrants must meet two requirements: they must be supported by probable cause; and they must name the objects of the search with particularity.

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381 U.S. 479 (1965).

∗Id. at 484.

∗∗Id.

∗410 U.S. 113 (1973).

∗∗Id.

∗∗∗Id. at 153.

∗Justice Douglas described privacy thus:

Privacy involves the choice of the individual to disclose or to reveal what he believes, what he thinks, what he possesses. The article may be a nondescript work of art, a manuscript of a book, a personal account book, a diary, invoices, personal clothing, jewelry, or whatnot. Those who wrote the Bill of Rights believed that every individual needs both to communicate with others and to keep his affairs to himself. That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of that sharing.


The Supreme Court has not used “unreasonableness” as an independent test for violation of the fourth amendment. Rather, the Court has made the second clause, the warrant requirement, dispositive of the question of what is an “unreasonable” search or seizure, perhaps because this appears to create a bright line. See, e.g., Chapman v. United States, 365 U.S. 610, 613 (1961); Agnello v. United States, 269 U.S.
The probable cause requirement is a problem for enforcement efforts because of the large amount of material needed to establish that a crime took place at all, and because a basic requirement of probable cause is a showing that a crime has been committed. The affidavit requirements of the fourth amendment are very hard to meet when investigators are at the detection phase just looking for patterns, or at the investigation phase having only the slightest clues that something is wrong.\(^4\) It turns the constitutional scheme on its head to use warrants to obtain real probable cause, but in many instances this is what law enforcement officials must be able to do when general intelligence points in a certain direction but there is as yet no hard evidence.\(^5\) 

Particularity is also a problem. The need to go through the complete files of a person or business (or both), as well as those of related third parties, is hardly conducive to limited intrusion. The historical purpose of the fourth amendment was to limit general incursions into people's privacy,\(^6\) and this constitutional policy against general warrants has been carried through to the present day.\(^7\) Justice Holmes, speaking for the Court, enunciated this pur-

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20, 33 (1925). See also N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 103 (1937). Thus, attention has centered on whether or not a "search" has taken place, e.g., Katz v. United States, 389 U.S. 347, 353-54 (1967). If a "search" has taken place, then the probable cause and particularity requirements apply with full force; if no "search" has taken place, then these requirements do not apply at all. See, e.g., Chimel v. California, 395 U.S. 752 (1969); Warden v. Hayden, 387 U.S. 294 (1967). While much of the material that law enforcement needs to obtain is no longer considered subject to a "search" by the Supreme Court, for example, bank records, much needed material, such as private and business records, are still subjects of "searches." Also, probable cause and particularity illustrate the fundamental policies of the amendment, which can be validly used to analyze the state of the law whether or not they actually apply in the particular case.\(^4\) The probable cause cases concern the hearsay reports of informers, reporting a discrete crime. See, e.g., Jones v. United States, 362 U.S. 257 (1960); Spinelli v. United States, 393 U.S. 410 (1969); United States v. Harris, 403 U.S. 573 (1971). The problem here is different.\(^5\) 


General warrants, which were used to support the Crown's licensing of printed matter, and writs of assistance, which were used to combat colonial smuggling, are the targets of the fourth amendment. J. Landynski, Search and Seizure in the Supreme Court 20, 22 n.8 (1966). See also Stanford v. Texas, 379 U.S. 476, 481-84 (1965). These warrants were limited in England by the courts in the landmark case of Entick v. Carrington, 19 Howell's State Trials 1029 (C.P. 1765), see also Wilkes v. Wood, 98 Eng. Rep. 489 (C.P. 1763). Parliament was also aroused to limit them in 1766. T. Taylor, Two Studies in Constitutional Interpretation 35 (1969). However, they were employed with great regularity in the American Colonies in the 1760's to combat the colonists' printing presses and smuggling. N. Lasson, supra note 83, at 57-63. The public reaction to them was so fierce that they could seldom be enforced even in the two colonies (Massachusetts and New Hampshire) where they were issued. Id. at 73-75. After the Revolution, the several states built safeguards against unreasonable searches into their constitutions, and these served as the model for the fourth amendment. J. Landynski, supra, at 38-42. One cannot emphasize enough that the fourth amendment was meant to protect the people (and their privacy) against the hated general search. Provisions for searches must therefore be narrowly and carefully worded, to ensure that specific searches, serving legitimate law enforcement needs, are not abused, or expanded into more pervasive searches. The amendment finds its force in the fact that it limits governmental intrusion into people's privacy to a particular object based on particular facts. Stanford v. Texas, 379 U.S. at 477.\(^7\) 

The Supreme Court has occasionally found general warrants, and when it has, the results of the search have been suppressed. The classic case, Stanford v. Texas, 379 U.S. 477 (1965), involved a warrant authorizing the search for and seizure of two thousand of the petitioner's books and pamphlets in an effort to confiscate communist literature. Id. at 477. The searchers seized, in addition to Marxist literature, books by Pope John XXIII and Justice Black. Id. at 480. In Berger v. New York, 388 U.S. 41, 55 (1967),
pose in *Federal Trade Commission v. American Tobacco Co.*, stating that the Government may not "direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime." However, the actual breadth of this rule has been cut back in the face of the needs of white collar crime enforcement.

The recurrent theme in fourth amendment cases is the limitation of police discretion: "As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Yet the use of expert investigators and vast documentary material is the very model of discretion. The fourth amendment, adopted in 1791, is aimed at traditional, discrete crimes and is severely strained in its application to white collar crimes which involve the intermingling of legitimate and illegal activity.

For the purposes of analysis, this article will discuss the standards for searches rather than for subpoenas or other compulsory process. Since policies are being discussed here, it is appropriate to consider the limits of the more intrusive kind of invasion of privacy. The Supreme Court has rejected any constitutional mandate that a subpoena rather than a search warrant be used in certain situations, so the more intrusive method is always a present possibility. And, of course, there are times when a subpoena is inadequate from a law enforcement perspective, for example, where double sets of books are suspected. In those cases, the police will need to be able to operate within the warrant requirements.

C. Self-Incrimination

As a privacy policy, the fifth amendment protects the innermost core of privacy, a "private enclave" from which a person can exclude the whole world. The important early interpretation of the amendment, *Boyd v. United States*, linked the fourth and fifth amendments very closely by equating the illegal seizure

an important precursor of *Katz*, the Court based its rejection of the New York wiretap statute on the lack of particularization of the material to be seized.

"264 U.S. 298 (1924).
"Id. at 306. See also Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
"Andresen v. Maryland, 427 U.S. 462, 478-81, 482 n.11 (1976). The Court held that it was sufficient "in the context," but provided no other guidance. Justices Brennan and Marshall dissented on this point. *Id.* at 492 (Brennan, J., dissenting); *id.* at 493 (Marshall, J., dissenting).
"Zurcher v. Stanford Daily, 436 U.S. 547, 559 (1978). Justice Stewart argued that because a first amendment value was implicated here, burdening a free press, only a subpoena should be permitted. *Id.* at 571 (Stewart, J., dissenting). Justice Stevens made the important point that it was the demise of the "mere evidence" rule in *Warden v. Hayden* that permitted warrants to be used for any evidence. *Id.* at 577-78 (Stevens, J., dissenting).
"116 U.S. 616 (1886).
of private books and papers with compulsion to testify. Under *Boyd*, the fifth amendment was viewed not so much as a restriction on police procedure as a guarantee of a privileged "private inner sanctum," expressing policy that documents which a person writes for his own use and kept private and in his possession ought not to be reachable by the Government.

*Boyd* itself involved business papers (invoices), and such records, precisely the kinds of records most necessary to white collar crime enforcement, were held to be part of that "private inner sanctum." This broad view of the privacy guaranteed by the fifth amendment has not lasted, but it has been dismantled in such a patchwork way that it often provides too much access to private information.

**D. Association and Expression**

That the first amendment could be a limitation on police activity on the basis of privacy concerns is a relatively new idea and not fully accepted, but it illustrates an important privacy policy based on the frequent need for privacy in practicing the basic freedoms of thought, association, and expression. This right, first clearly articulated in *NAACP v. Alabama*, originated in the need by many associations to maintain the privacy of their membership lists to ensure the survival of their organizations. Check stubs and expense records are highly relevant to white collar crime investigations. They are also sure leads to a person's private, first amendment-protected associations, as are contributions, collections of literature, and correspondence, all of which would be examined either to get a full picture of a person's finances for, say, the net worth method, or simply inevitably in going through his files.

The association-link technique so often used in these investigations is objectionable in first amendment terms. People will be less likely to associate with organizations or with other persons if their associations are likely to lead
to their being investigated. "[A] person must have a right to draw a cloak of secrecy around his personal associations and his more intimate relationships if he is to retain his autonomy."[^104] In addition, the type of information acquired — attendance at meetings,[^105] correspondence, and financial records — raise first and fourth amendment problems.

White collar crime presents a new and unique characteristic, the intermingling of legal and illegal, which raises acute problems for law enforcement. While privacy needs have always been to some extent in conflict with the requirements of effective law enforcement, in white collar crime the conflict is especially serious. Law enforcement needs are fundamentally at odds with basic privacy rights and desires of citizens. To say this, however, cannot predetermine the resolution of the conflict. The real problem, to which the article now turns, is developing an approach which meets both needs in such a way as not to sacrifice the essentials of either.

### IV. Toward A Resolution of the Competing Goals

#### A. Two Polar Solutions

Two polar solutions might be adopted in accommodating the competing goals of effective law enforcement and personal privacy. That is, one could be sacrificed for the other, and the converse. Rather than being extreme or silly alternatives, used merely to prove that as always the truth lies somewhere in the middle, these solutions are the rational result of a decision that for virtually all purposes one goal is more socially desirable than the other. In more innocent times, the dominant attitude on the Supreme Court was that a person's home was his castle, inviolable by the government except in the rarest of circumstances.[^106] More recently, the legitimate needs of law enforcement have been stressed by the Court, resulting in a less deferential approach to personal privacy.[^107] The two polar solutions set out below, then, are not caricatures but two real alternatives.

It could be decided that, because personal privacy is so deeply implicated by the investigation of certain crimes, it is better not to try actively to prosecute those crimes. Income tax evasion, for example, makes use primarily of personal financial records. So, it is preferable not to make random checks of all of a person's records at all but simply to accept the fact that tax evasion will not be prosecuted except when it is obvious (an unaccounted for W-2 form is received by the IRS, for example) or otherwise revealed (an informer) to a


[^107]: See cases cited supra note 4.
purely reactive investigator. The "net worth" method necessarily involves delving into a person's whole lifestyle, his association, thoughts, and activities. Such private books and records are exactly the things protected in Boyd. 108

Bribery, likewise, would be impossible to detect without examining business records as well as personal financial records and statements, 109 so perhaps it is preferable to wait for a reliable informer to provide the basis for an investigation. 110 Of course, these informers will be rare, since bribery is a self-contained crime with none of the culpable participants having an incentive to betray their cohorts. 111 But an informer would provide probable cause for searches and also limit the searches to particular persons and, to a lesser extent, to particular things. This is probably the kind of basis for investigation envisioned by Justice Holmes in the American Tobacco case. 112 A clear suspicion of the crimes committed, by whom, and when would provide "[s]ome evidence of the materiality of the papers demanded." 113

In both of these cases, a paramount regard for privacy does not mean a total lack of law enforcement or a license to commit white collar crimes. What it does mean is that the role of law enforcement is limited to a reactive investigation, rather than a proactive or aggressive one. 114 It has been previously noted that effective enforcement requires proactive measures, 115 but if privacy is to be placed paramount it may be necessary to forego such vigorous law enforcement efforts.

At the opposite pole is the attitude that personal privacy just cannot be that important. Living in a highly technological, information-based society, with checks, bank cards, securities, credit cards, and the rest, a person cannot reasonably expect to conduct his affairs in any real privacy. Indeed, this technological revolution is responsible for the rise of the kind of crime which takes advantage of the complexities of modern life and hides itself within them. It seems only fair that such technology should carry with it certain burdens. The conditions of modern, interdependent society do not permit a "right to be let alone."

108 116 U.S. 616 (1886).
109 R. Nossen, supra note 46, at 4.
110 Informers are not unknown and are often invaluable. See, e.g., United States v. Harper, 458 F.2d 891 (7th Cir. 1971), cert. denied, 406 U.S. 930 (1972). In Harper, a former employee of a wagering operation (with the unforgettable name of Mattie Turnipseed) contacted the I.R.S. of her own volition, without any prior relationship between them, and gave them very important records. The Government in this case was able to discover a white collar crime without any governmental invasion of privacy. Id. at 894. However, the world is not populated entirely with Mattie Turnipseeds.
111 See supra text accompanying note 8.
112 264 U.S. at 306.
113 Id.
114 An example of a purely reactive approach was the discovery that international currency regulations were being violated when federal agents inadvertently found large amounts of currency in a package from the Philippines. United States v. Beusch, 596 F.2d 871 (9th Cir. 1979).
115 See supra text accompanying note 23.
This approach is exemplified in the recent bank records cases, California Bankers Association v. Schultz\textsuperscript{116} and United States v. Miller.\textsuperscript{117} The background of the cases was the realization by Congress that (to quote the first sentence of the Senate Report on the Bank Secrecy Act of 1970\textsuperscript{118}) “law enforcement authorities . . . [require] greater evidence of financial transactions in order to reduce the incidence of white collar crime.”\textsuperscript{119} The Bank Secrecy Act requires that banks keep permanent records of the identity of account holders, microfilm copies of all checks drawn on or received by the bank, and records of large currency transactions.\textsuperscript{120}

The importance of photocopies of checks to effective law enforcement, especially where white-collar crimes are concerned, simply cannot be overestimated . . . . In many instances, payments by check which are not necessarily illegal in and of themselves may constitute the only way that the prosecution can establish the existence of a relationship or pattern of conduct which may be essential to making its case.\textsuperscript{121}

Officials of the banks which would have to pay for this recordkeeping and who prefer to keep their clients’ confidences were less enthusiastic, claiming that this was “tantamount to a declaration that a person’s bank account is no longer private”\textsuperscript{122} and suggesting that the cost of this program far outweighed its usefulness.\textsuperscript{123} But Congress was convinced by the law enforcement officials who forcefully asserted the need for these materials.\textsuperscript{124}

After passage of the Bank Secrecy Act, depositors and banks filed suit to have the record-keeping rules declared unconstitutional. Explicitly recognizing the needs of law enforcement vis-a-vis white collar crime, the Supreme Court upheld the Act in California Bankers Association v. Schultz,\textsuperscript{125} insisting that this was not a general warrant authorizing general rummaging.\textsuperscript{126} Given the

\textsuperscript{116}416 U.S. 21 (1974).
\textsuperscript{117}425 U.S. 435 (1976). The views in the preceding paragraph, though only implicit in California Bankers and Miller, lead to the same result.
\textsuperscript{118}Pub. L. No. 91-508, 84 Stat. 1114 (1970). The Act emphasized secret foreign accounts, but litigation has concentrated on domestic reporting requirements.
\textsuperscript{121}H.R. REP. No. 975, 91st Cong., 2d Sess. 16 (1970).
\textsuperscript{124}Bank Secrecy Senate Hearings, supra note 122, at 248-50 (statement of Anatole G. Richman, IRS); Bank Secrecy House Hearings, supra note 128, at 27, 90, 100-01 (statement of Robert M. Morganthau).
\textsuperscript{125}416 U.S. 21 (1974).
\textsuperscript{126}California Bankers, 416 U.S. at 28, 62. A concurrence joined by two of the justices out of the six in the majority, however, stressed the high threshold ($10,000 in currency) for the reporting requirements, pointing out that a lower amount would “touch upon intimate areas of an individual’s private affairs.” Id. at 78-79 (Powell and Blackmun, JJ., concurring). Justice Douglas objected to the broad scope of the record-keeping requirements, arguing that just because everything is incrementally useful to law enforcement the fourth amendment does not simply disappear. Id. at 80-85 (Douglas, J., dissenting).
inherently intermingled nature of bank records of legitimate and illegitimate activities, one may question the realism of this insistence.\textsuperscript{127}

Subsequently the Court held that a person has no legitimate expectation of privacy in bank records — and so no fourth amendment protection of them\textsuperscript{128} — because of their existence as government-required records, on the grounds that they only existed and were not released.\textsuperscript{129} The circularity of this reasoning is troubling as it effectively permits the government to determine the extent of the individual's legitimate expectations of privacy.\textsuperscript{130} Thus, all limitations on breadth of and reason for intrusions are lifted, ignoring entirely the clear Congressional intent to require “existing legal process” to be used for access.\textsuperscript{131} The Fifth Circuit has held that \textit{United States v. Miller}\textsuperscript{132} “allows wide discretion to investigatory bodies in obtaining information concerning bank activities,” citing white collar crime as the reason for this broad discretion.\textsuperscript{133}

People reveal information about themselves to others for various, often very limited, purposes. Much financial information is conveyed to a bank so that the bank will process the request, not so that it will consider the transaction and evaluate, or prosecute, the person in light of it. The Supreme Court in \textit{Miller}, however, reasoned that bank records are “information voluntarily conveyed to banks and exposed to their employees in the ordinary course of business,”\textsuperscript{134} and so the records “are not confidential communications.”\textsuperscript{135} The \textit{Miller} Court based this “assumption of risk” argument on two informer cases, \textit{United States v. White}\textsuperscript{136} and \textit{Hoffa v. United States}.\textsuperscript{137} But to name them suggests the distinction. One expects a human being to evaluate, digest, recall, and perhaps repeat information. One expects a bank merely to register and perform a transaction.\textsuperscript{138} As one government agency report has said “[t]here must

\textsuperscript{127}This characteristic of bank records, that it is difficult if not impossible to sort out the relevant entries prior to examining them, has long been recognized. \textit{E.g., United States v. First Nat'l Bank of Mobile, 295 F.142 (S.D.Ala. 1924), aff'd per curiam, 267 U.S. 576 (1925).}

\textsuperscript{128}\textit{Miller, 425 U.S. at 442.}

\textsuperscript{129}\textit{California Bankers, 416 U.S. at 52-53.}

\textsuperscript{130}\textit{See Miller, 425 U.S. at 455-56 (Marshall, J., dissenting).}

\textsuperscript{131}\textit{H.R. REP. No. 975, 91st Cong., 2d Sess. 10 (1970).}

\textsuperscript{132}\textit{425 U.S. 435 (1976).}

\textsuperscript{133}\textit{In re Grand Jury Proceedings, 532 F.2d 404, 408-09 (5th Cir. 1976).}

\textsuperscript{134}\textit{Miller, 425 U.S. at 40-42.}

\textsuperscript{135}\textit{Id.}

\textsuperscript{136}401 U.S. 745 (1971).

\textsuperscript{137}The informer cases might be analogized to one-party consent wiretapping. A human recipient is capable of consenting to government wiring of him for sound, and, according to \textit{White}, a speaker takes this risk in choosing persons with whom to speak. Justice Harlan vigorously disagreed in his very eloquent dissent. \textit{White, 401 U.S. at 786. The bank is not analogous. The “speaker” cannot choose whether or not to reveal information to the bank. This argument was developed in the House Intelligence Committee. See H.R. REP. No. 1283, 95th Cong., 2d Sess. 53 (1978).}

\textsuperscript{138}The “mail cover” technique, see supra note 27, also involves a transaction in which the post office is intended to be simply the medium, not an evaluator or recorder. Yet mail covers have been held not to be searches because the envelope is “voluntarily conveyed to the Postal System,” based on the analogy with \textit{Miller. United States v. Choate, 576 F.2d 165, 175 (9th Cir.), cert. denied, 439 U.S. 953 (1978) (mail covers to determine the address in South America of defendant's source of smuggled goods).
be a way for an individual to prevent information about him obtained for one purpose from being used or made available for other purposes without his consent.9 Exposure of information to one individual is not exposure of that information to the whole world.10

Congress, it turned out, did not have Miller's wide discretion in mind when it passed the Bank Secrecy Act, and it enacted the Right to Financial Privacy Act of 197811 to require legal process for access to bank records. When law enforcement goals are placed paramount generally to privacy, the result is destruction of privacy safeguards across the board.

In another white collar crime case, the Court weakened the fourth amendment particularity requirement to the vanishing point by upholding a warrant which specified the crime and some documents but which ended, "together with other fruits, instrumentalities and evidence of crime at this [time] unknown."12 The Court justified its stand on the basis of a detailed exegesis of the warrant's text, which, while plausible, is more a post hoc rationalization than an effective limitation on the actual execution of the warrant.13

Neither this nor the privacy response to the problem of white collar crime is satisfactory. White collar crime is a very serious problem. The costs to the nation, in money, in the public sense of well-being, and in faith in the integrity of government and the economic system, are staggering, and the problem is worsening.14 On the other hand, as privacy becomes a less common and accessible commodity it becomes more valuable. A general diminution of privacy rights is repugnant to constitutional guarantees. Institutions, like banks, are used out of necessity, not choice, and it is not fair to burden their use with the possibility of disclosure of one's private life. As a matter of public policy it has been noted that Congress was unwilling to go along with the Supreme Court's idea that bank records create no expectation of privacy.15

**B. Specifications for a Privacy Doctrine**

A substantive privacy doctrine is needed which permits the kind of broad investigation necessitated by white collar crime, but which is limited to white collar crime because the needs of white collar crime investigators and prosecutors are unique. A rule must be fashioned which gives priority to law enforcement.

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14Compare the Court's statement in Katz that one who speaks into a telephone "is surely entitled to assume that the words . . . will not be broadcast to the world." 389 U.S. at 532.
15Pub. L. No. 95-630, 92 Stat. 3697 (1978). The Act provides that, except for narrowly defined emergencies and exigent circumstances, bank records kept pursuant to the Bank Secrecy Act may only be obtained by customer consent, subpoena, search warrant, or "formal written request."
16Andresen, 427 U.S. at 479-82. In dissent, Justices Brennan and Marshall assailed the warrant as "impermissibly general." Id. at 492-93 (Brennan, J., dissenting); id. at 493 (Marshall, J., dissenting).
17Cf. supra text accompanying note 91 (officer executing warrant to be allowed little if any discretion).
18Investigation Manual, supra note 1, at 10-11.
19See supra text accompanying note 141.
where it most needs it and priority to privacy in those areas which should be most private. To be workable, the rule must also meet several other requirements. It must make a difference. It must help law enforcement officials to fight white collar crime. Also, to the extent possible, it should provide access to all types of information generated by white collar crime, both so that it makes a practical difference and so that there is not later overwhelming pressure to erode privacy rights further to get at novel or more subtle white collar crimes.

The rule must provide a clear guide to law enforcement officials and to the courts. The police should not have to take the chance when they obtain documents that they will later be suppressed. The courts in turn should be able to give a clear and consistent interpretation of what is on one side of the line and what is one the other. The rule should also not be susceptible to misinterpretation or hostile reinterpretation, as has happened with current fourth amendment doctrine. The basic test for the application of the fourth amendment was set out in *Katz v. United States* as a person’s justifiable expectation of privacy. This test was originally used by the Warren Court to expand the applicability of the fourth amendment to intangible objects (in the *Katz* case, to a telephone conversation). The vagueness of the "expectations" test has resulted in the Burger Court generally narrowing privacy interests, as in the bank records cases. Such shifts are antithetical to clarity for the purposes of law enforcement officers and also destructive of a coherent law enforcement policy.

The above requirements aim ultimately at a third, and the most important specification, that the rule be stable. This means in part that the rule should not be susceptible to reinterpretation on an ad hoc basis. It should be made stable by eliminating strong substantive pressures to change it. That is, it should balance the goals well enough that it is not unacceptable either to the police or to the private citizen. The *Miller* case demonstrated that white collar crime can put considerable pressure on a privacy rule.

The ultimate goal here is the protection of personal privacy, as law enforcement needs always have a voice in the courts and in government generally. A person who does not actively seek outside involvement should not become the subject of general surveillance, and the person who does should still be allowed some areas of real privacy. With the foregoing considerations in mind,

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145 1989 at 353.
146 See infra text accompanying note 389. The Court’s theory in *Miller* was that checks are disclosed to the bank as a party to the transaction and the person cannot expect his checks to be private. The same rationale has been used by the Supreme Court to withdraw pen registers from fourth amendment protection, Smith v. Maryland, 442 U.S. 735 (1979) (a person voluntarily exposes the numbers he dials on a telephone to the telephone company), and by some lower courts to remove protection from mail covers, see United States v. Choate, 576 F.2d 165 (9th Cir.) cert. denied, 39 U.S. 953 (1978).
147 See supra text accompanying notes 126-41.
the article now turns to the "business papers rule," a proposed resolution of the conflicting law enforcement and privacy goals relating to white collar crime.

V. THE BUSINESS PAPERS RULE

A business papers rule would make available to law enforcement officials, on a consideraly more relaxed basis than a fourth amendment search warrant, records of commercial transactions, but would require the full panoply of constitutional protections for other personal records. The model for the business papers warrant would be the administrative search warrant. At the opposite end of the spectrum, the fifth amendment would be applied to the contents of most personal records.

This proposal will be discussed in three parts. Section A will refine the idea as a theoretical matter, arriving at an exact description of the rule. It will also discuss the various alternatives for structuring the rule, as they contribute to the form of the final proposal. Section B will argue that the business papers rule is a good solution, that in practice it would aid law enforcement and at the same time provide basic privacy protections. Finally, Section C will discuss where the business papers rule fits into the present constitutional scheme, the point being to show the rule's foundations in the Constitution and its compatibility with basic constitutional policies and doctrines.

A. A Description of the Business Papers Rule

Why think of such a rule in the first place? The most common milieu of white collar crime is commercial activity of one kind or another. Bankruptcy involves a business, as would a contractor attempting to secure an advantage by a bribe. Embezzlement involves a commercial entity as the principal victim and holder of records. In personal income tax evasion, the common violation of underreporting taxable income involves income derived from some type of commercial enterprise, an employer or an issuer of securities. The use of business or financial institutions in one way or another is a common denominator of white collar crime, and it suggests this solution.

Furthermore, commercial activities are not part of the private inner sanctum of the personality which has been said to be at the core of privacy rights. While personal financial records are private while in one's own hands, those which are in the hands of commercial enterprises do not intrude on the inner sanctum because: (a) they are known to other persons, and (b) they provide only a partial picture of personal finances. That partial picture will be sufficient for intelligence purposes. The IRS summons of a taxpayer's employer's

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151 For simplicity, personal bankruptcies are not considered with other bankruptcies. As a privacy issue, personal bankruptcies would be more like personal income tax evasion.

152 United States v. Blank, 459 F.2d 383, 386-87 (6th Cir. 1972) cert. denied, 409 U.S. 887 (1973) (contrasting "privately recorded and privately held thoughts . . . as in [a] . . . diary" with "business records of which other persons must have knowledge"). See Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments, 90 HArv. L. Rev. 945, 989 (1977). See also Model Code of Pre-Arraignment Procedure § SS 210.3(2) (1975) (list of documents which are not subject to seizure).
records as to Social Security number used, Forms W-2, employment records, and contracts, was held not to violate the employee’s fourth amendment rights.\textsuperscript{153} Where a person holds himself out to do business he exposes that part of himself.\textsuperscript{154} In the commercial area the state also has traditionally had the greatest rights to regulate, and the business papers rule is in a sense an extension of current economic regulation.

At least at first glance, this line based on commercial activities appears to be clear and stable. It is a distinction not unknown to the law, and indeed is already to some extent part of our privacy rights.\textsuperscript{155} While the actual criteria for making the choice will have to be worked out, the distinction itself is intuitive.

Finally, these are the documents needed by law enforcement to combat white collar crime. The business papers rule is not a token concession to an otherwise rapacious police department. Commercial documents are, by and large, the place where original suspicion arises and the stuff of which white collar prosecutions are made. Except for a few, but important to the individual, materials, the business papers rule would put nothing entirely beyond reach. It would require a warrant which meets the strict fourth amendment standards. Thus, police would have relatively easy access to materials upon which they could build probable cause and particularized warrants. This appears to be a realistic allocation of interests which tries to meet the basic needs of both sides.

The line between business and private papers may be drawn in several ways. The distinctions about to be discussed generally have the virtue of greater simplicity than the eventual line suggested, but they all have the vice of being too crude. Their discussion is intended to present for consideration alternatives to the business papers rule and graphically to describe the elements of the eventual rule.

It might make a great deal of sense to have the amount of intrusion permitted depend upon the type of crime involved, i.e., white collar or not. This is not an unknown or impossible distinction to make. The federal wiretapping statute makes it, on the theory that only the more serious crimes should have this extra-intrusive level of investigation.\textsuperscript{156} It has also been suggested that wiretapping be limited not so much by the seriousness as by the type of crime, for instance, organized crime.\textsuperscript{157} Former Secretary of Education and Circuit

\textsuperscript{153}Donaldson v. United States, 400 U.S. 517, 530-31 (1971).

\textsuperscript{154}Id. at 537. (Douglas, J., concurring). The expression “holds himself out” is intended to convey the difference between active business transactions and the storing of money, as in a bank. In a savings account, the only active business is payment of interest, and that is disclosible like any Form W-2. \textit{See infra} text accompanying notes 177-78.

\textsuperscript{155}For a discussion of this distinction as it relates to the proposed business papers rule, \textit{see infra} text accompanying notes 203-22.


\textsuperscript{157}Blakey, \textit{supra} note 85, at 100-03. Professor Blakey was involved in drafting the federal wiretap statutes.
Judge Hufstedler, a strong supporter of privacy rights, also sees this as a relevant distinction in the kinds of surveillance to be used:

[T]he means used both to prevent and to detect white collar crime, like securities fraud, are obviously very different from those used in fighting street crime, like mugging. Mail covers, electronic surveillance, and examination of bank records may have some utility in capturing white collar crooks but are virtually useless in controlling street crime.158

White collar crime created this particularly acute conflict between law enforcement and privacy values, so it makes sense to concentrate on those crimes.

The threshold problem with this approach is the detection problem. It is often unknown whether or not a crime has been committed at all. And since the loosened requirements are needed at precisely this point, the line must be invoked before it is factually known where the investigation stands vis-a-vis the line. It would be an invitation to abuse if the police needed only to allege a white collar crime investigation to obtain access to any documents on a reduced protection basis.

In addition, there would be a real problem in defining white collar crime for these purposes. It can be defined for sociological purposes, or as here, for detection and investigation purposes, but it is quite clearly not a legal category.159 White collar crime, for present purposes, can be a complex of crimes, or a complex version of a simple crime. Even if it were possible to draw such a line satisfactorily, it would necessarily be legislative, not constitutional. The relevant constitutional provisions deal only in terms of privacy, not crimes. This makes the line inherently more unstable and subject to an ever-widening scope for the looser requirements because the constitutional mechanics would have to be a wholesale acceptance of the lower standard, with legislative limits on its scope.160

The most important objection, however, is that the type of crime is quite irrelevant to privacy interests. Simply to allow wide inspection, without making distinctions as to types of documents, would be counterproductive. Particularly private documents would be available simply by alleging a white collar crime. Although the needs of white collar crime prosecution are the motive for the "business papers rule," the fact that a particular transaction involves white collar crime is too crude a standard to protect privacy adequately.

At first glance, a distinction based on where documents are kept makes a great deal of sense in terms of expectations of privacy. A home is a more

159See Comm. Print No. 2, supra note 12, at 64; INVESTIGATION MANUAL, supra note 1, at 4-7.
160This is what happened, for example, with the Right to Financial Privacy Act of 1978, see supra text accompanying note 141.
private place than a business, intuitively and constitutionally. In addition to
the general privacy interest, a search of home files would certainly require the
examination, at least cursorily, of far more personal information than would
a search of business files. This line would also have the formal value of being
easy, in general, to apply.

On the other hand, this is at best a rough approximation of the interests
really at stake. Privacy in fact attaches to particular information, not to par-
ticular places. While it is certainly more discomfiting to have a house
searched, that is due at least in part to the greater potential for revelation of
personal information, as well as the violation of personal space. And private
correspondence, for example, could be received and held at a place of business.

The more obvious difficulty is that declaring one place safe invites the
secreting of material there. This problem should not be overstated. It would
be impossible for a business to move its entire records into homes, and selec-
tive moving would surely create enough reasonable suspicion, especially if the
omissions followed a pattern, to satisfy the stricter warrant requirements. A
greater problem would be posed by small family businesses or sole proprietor-
ships. Nevertheless, it should be possible to arrive at a more accurate test for
a "business papers rule," though this one does have some important benefits.

Another option is to make the rule hinge on the type of entity that owns
the documents. The basic distinction here would be between natural persons,
who would receive full protections, and corporations, which would receive
minimal protections. The corporate persona has none of the attributes of per-
sonality to which important privacy values attach. While privacy may be valuable
to the corporation, it is still in essence a profit-making machine using privacy
only as a means of economic gain. Because corporations are voluntary associa-
tions, receive special privileges, and indeed are created only by law, as a
constitutional matter they do not have the same privacy rights as natural
persons. Thus, as a line, corporateness is attractive because it would fit fairly
easily into current constitutional doctrine.

A further virtue of this line is that it is fairly accurate in attacking only
white collar crime. The corporation is the pervasive form of doing business
on any sort of scale, and it is in large scale business that the concealing-
by-intermingling problem is most acute. Furthermore, it would serve the
employee-employer distinction urged above with relation to salary informa-
tion on tax returns.

For a more extensive discussion of this distinction, see infra text accompanying notes 301-14.
Cf. Katz, 389 U.S. at 351 ("For the Fourth Amendment protects people, not places.").
It should be added that corporations do have fourth amendment rights, and it has been so held for nearly
a century. For a fuller discussion of the reasons for and the problems with this rule, see infra text
accompanying notes 279-86.
See supra text accompanying note 153.
However, this attempt to equate corporation with employer exposes the clumsiness of this test. Not all corporations are businesses and not all businesses are corporations. To take the first proposition first, non-profit corporations, like the NAACP, implicate the very kinds of privacy with which this article is concerned. Complete access to documents of non-business corporations would reveal not only the “business side” of their operations but also the membership lists, which are private. The second proposition is equally troubling. A great deal of business capable of being involved with white collar crime is carried on through partnerships or sole proprietorships. Not only would a corporate line fail to pick those up, but it would encourage the use of noncorporate forms of business associations in criminal ways, thus vastly increasing the amount of business crime that the line misses. While the advantage of the corporate form of doing business would remain, a large loophole in enforcement would be created.

Nor would remedying this loophole by including partnerships be an unmixed blessing. While it would partially close the loophole, it would also destabilize the whole line because it destroys the corporate rationale. The visitation rights of the state are based essentially on the voluntariness of joining the corporate form and on the fact that the entity is purely the creation of the state. Neither of these are necessarily true of partnerships, which are often constructive and do not give rise to liabilities very different from those that would be imposed in the absence of a partnership.

Finally, it must be questioned how well a distinction based on the type of owning-entity protects privacy. The real virtue of the place test was that place is very important in one’s expectations of privacy. The home is more private than a business. The corporation test ignores the interest in limiting searches of the home. Nor is ownership necessarily an obvious characteristic of a document, so rummaging would be necessary under such a test. So, in terms of what it covers, the corporation test is too narrow, and in terms of where it covers, it is too broad.

The corporation line might be refined by applying it to the type of document involved rather than the owning entity. First, one would determine one’s attitude toward each kind of entity, and then decide what sort of nexus with the entity is required to characterize the document. It is not necessary to discuss all of the possible combinations to show the strengths and weaknesses of this test. Bank records are a good example. A bank, being a corporation, would be an unprotected entity. A natural person who is a depositor would be protected. What is done with personal checks? Who has the dispositive nexus? The Miller majority insisted that the bank is an active party in such transactions.

167 This theory will be discussed in more detail, see infra text accompanying notes 270-86.
The dissenters insisted just as cogently that it is not. This is no way to formulate a coherent privacy policy. Also, what sort of factors are to be used in assessing nexus? Ownership of the piece of paper? Or does one simply say (with the *Miller* majority) that exposure to an unprotected entity automatically destroys protection?

What this discussion shows is that while these tests may correlate acceptably with white collar crime and with privacy considerations, they fail to address the real privacy issue — the contents of documents. While the type of entity which produces or processes a document may give one a good idea of the privacy of its contents, it is at best a rough approximation.

While it is clear that content is the ultimate privacy issue, there are problems with such a test. If asked why certain information is private, one would be forced to look to other factors, such as the parties involved in the communication, who generated it, and who has access to it. Furthermore, privacy may be amply protected by the fact that only partial information is available. As a type of privacy, this idea has not yet been recognized by the courts. To use the example of mail cover surveillance, the Ninth Circuit has held that, like bank records, all expectations of privacy are lost completely by exposing the information on the outside of an envelope to the U.S. Postal Service. But it should be obvious that one's correspondence is carried on in small, discrete parts. "Privacy is not a discrete commodity, possessed absolutely or not at all." As Judge Hufstedler pointed out in *United States v. Choate*, "[W]hile an individual may realize that an isolated piece of mail may attract the attention of postal employees, he knows that ordinarily no one would have the ability or inclination to remember who writes to him." It is incorrect to assume that by exposure of isolated pieces of information one intends to expose an entire pattern of activities.

This distinction is also seen in tracking device (beeper) cases. While one undoubtedly has no expectation of privacy in being sighted once by a single individual or policeman while driving in one's car, the combination of all of the sightings by all of the individuals who saw the car is another matter entirely. To argue that since each sighting is not private the total also is not is to ignore why the tracking device was installed in the first place. The total route taken

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172 *Choate*, 576 F.2d at 202 (Hufstedler, J., concurring and dissenting).

173 This failure to see that individual disclosure is not the same as general disclosure reflects a general disregard of the principles of specificity in the fourth amendment. The Court recognized the problem of massive collections of personal information, *Whalen v. Roe*, 429 U.S. 589, 605-06 (1977) (New York recorded, *inter alia*, names and addresses of physicians and patients dispensing and receiving dangerous but legitimate drugs held constitutional but did not reach the issue in the absence of an actual public disclosure. Justice Brennan, dissenting, found the issue dispositive, saying such collections in themselves violate privacy rights. *Id.* at 606-07 (Brennan, J., dissenting).

174 The person driving circuitously to his destination so as to maintain his privacy is depending on the fact that even hundreds of separate sightings, taken individually, do not undermine that privacy.
is in fact private, unless a surveillance device is used.\footnote{United States v. Holmes, 521 F.2d 859, 866 n.13 (5th Cir. 1975). Indeed, the facts of \textit{Holmes} deny the visual contact theory. The plane which was monitoring the beacon “was never able to spot the van visually.” \textit{Id.} at 861. In \textit{Holmes} a tracking device was attached to a van suspected of transporting marijuana and government agents used the device to follow the van to a shed where the marijuana was stored. \textit{Contra} United States v. Moore, 562 F.2d 106 (1st Cir. 1977) (agents used tracking devices attached to a car, a van, and placed in a box of chemicals to find the location of a “factory” for controlled substances); United States v. Hufford, 539 F.2d 32 (9th Cir.) \textit{cert. denied}, 429 U.S. 1002 (1976) (tracking device attached to a drum of caffeine to be used to produce illegal amphetamines).}{175}

What is being said is not that there is a theoretical reason that all of a person’s income could not be discovered from minimal-protection searches, but that such a procedure would by very difficult and uncertain. When does one know one has covered all sources? It would be far more efficient to use the lower protection area to develop probable cause, and then examine personal records under the full panoply of fourth amendment protections. In addition, because a content-based test must examine content to determine protection, such a test itself defeats the protection. A broader, more workable rule is needed.

The best test is one based on the type of transaction recorded or accomplished by the document in question. Only those transactions which record business activities would be subject to lowered protection. All of the records of corporations, partnerships, and other business entities would be given lower protection, practically by definition. It would permit access to the records of an individual, however, only to the extent that they represent the voluntary reaching out by that individual to another entity (person or group) in a commercial activity. Thus, records of purchases for personal use would receive higher protection, while purchases for manufacture or subsequent resale would receive the lower protection. Money earned would be business-related for these purposes, therefore, basic employment information would be more accessible.\footnote{See \textit{supra} text accompanying notes 134-41.}{176}

To return once again to the bank records example, the component parts of such transactions can be easily separated. To the extent that a profit-making activity is involved, such as the bank making use of its deposits or the depositor earning interest, related records should be accessible. To the extent, however, that records reflect only personal expenditures and receipts they are private.\footnote{See \textit{supra} text accompanying notes 170-75.}{177}

In practical terms, this fits in with the totality idea.\footnote{See \textit{supra} text accompanying note 153. “[I]t is difficult to see how the summoning of a third party, i.e., the employer, and the records of a third party, can violate the rights of the taxpayer, even if a criminal prosecution is contemplated or in progress.” Donaldson v. United States, 400 U.S. 517, 537 (Douglas, J., concurring).}{178} Bank records showing interest paid would be accessible, but it would only show part of an individual’s financial situation.

There are three important aspects of this rule which serve to protect privacy. First, the transactions must involve a reaching out by the party to join the stream of commerce. The Supreme Court has argued that anytime a person exposes
information to another person or business he "assumes the risk" that that person will make it public. This is not entirely fair where the individual has virtually no choice but to use services like telephones and banks. Under the business papers rule the telephone company's records of income from sale of its services would not be protected because it is a business. However, the individual's bills and toll records would be protected as private because they are not commerce but merely purchase of personal services.

Voluntariness cannot be the sole test here because earning a living is not really voluntary, but this is unavoidable. Income information seems an appropriate amount of access to permit because it is the closest to commerce of personal transactions in that it is always carried on with a business entity and with a profit motive, and because it is information which must be revealed anyway for tax purposes.

A second key aspect of this rule is that less protection is only given to records which involve transactions with others. This means that documents which are created by oneself for one's own use are never accessible without at least the fourth amendment safeguards. It also means that transactions like withdrawals from one's own bank account would receive the higher protection.

The third aspect of this is that only business and commercial relationships are subjected to more discretionary scrutiny. These are areas in which people have the least expectation of privacy. In economic areas the government has traditionally exercised greater visitorial powers because of its great interest in economic regulation. Also, commercial ventures cannot be truly private, as they necessarily involve the participation of other persons or institutions. In sum, the business papers rule protects the most private matters, makes accessible at least private matters, and provides a standard for separating out mixed transactions.

The process for applying the business papers rule would have three basic components: an administrative warrant system for business papers; a per se classification regarding certain business entities and certain noneconomic private papers; and an intermingled documents procedure to handle the difficult cases.

As a threshold matter, a subpoena should always be preferred to a search warrant. With or without the business papers rule, the relevance requirements of a subpoena are very relaxed. While there is no constitutional requirement to prefer a subpoena, as a matter of general privacy policy it is preferable not to use searches. There are situations, however, where the possibilities of destruction or apparent noncompliance make a subpoena inappropriate.

2 Smith v. Maryland, 442 U.S. at 750 (Marshall, J., dissenting).
3 Fifth amendment protection will be discussed later, see infra text accompanying notes 223-60.
5 See supra notes 92-93.
The administrative search warrant is the lower standard of protection granted to business papers. Rather than being based on a strict probable cause standard, an administrative warrant is based on a need to inspect and an administrative procedure which reasonably indicates that this particular place is a proper subject of inspection. Thus, classification as business papers would not make documents public records at all, nor would they be available simply at the government’s whim. They would, however, be available through a warrant procedure based on a showing of reasonableness. Reasonableness in this context would involve consideration of the various factors suggested above as criteria for the rule, including particularity and the need for such surveillance, as applied to the administrative procedures used to determine the target of the search.

In a bribery case, for example, it might be discovered that a particular contractor was getting all of the business of a particular agency. This would be reason to look more closely, but it hardly rises to the dignity of probable cause in a particular case. If, upon inspecting the business papers, evidence of cash generation were found, then real probable cause would be created to inspect personal records. The role of the administrative warrant would be to provide access to less private records as a way of confirming or refuting suspicions based on weak evidence.

An initial problem in the warrant process will be the classification of the subject documents as business or personal. The applicants for a warrant would have to supply affidavits containing sufficient information for the magistrate to classify the documents. And because an intermingled documents procedure is available in cases of doubt, mistakes should be subject to suppression. To avoid resort to the intermingled documents procedure in all cases, however, a policy should be established that records which are owned by or in the custody of a corporation or partnership and are kept at its place of business are per se business papers, unless the subject entity can show otherwise. Sole proprietorships would be a somewhat more difficult problem, but the existence vel non of a separate place of business should in most cases indicate that the papers are a business record. Conversely, there would be a per se rule that documents in the home or in a personal safe deposit box, if they are to be obtained by a search at all, must go through the intermingled documents procedure. By putting the burden on the object of the search in the clearer cases, the use of an exclusionary rule would not unduly intimidate the government from obtaining business paper warrants. In case of a dispute, the intermingled documents procedure would be used.

185Barlow’s 436 U.S. at 323.
186See supra text accompanying notes 176-81.
187This adopts the place and custody tests suggested above to the extent that they are feasible, using the clearest rule where possible.
Where a broad, clear, easily administered rule will not work, the use of the corollary intermingled documents procedure eliminates the need to use several different but inadequate rules for these documents. The clearest statement of such a procedure is in the Model Code of Pre-Arraignment Procedure (hereinafter Model Code). The Model Code anticipates that the intermingled documents provision will be used to keep a search within the scope of the pre-existing warrant. Here, however, where the scope is not likely to be limited very much, the procedure will be used to determine what documents are subject to lesser protection, that is, where scope is not important.

The Model Code procedure, as applied here, would require that wherever an investigator could not satisfy the issuing magistrate that only business papers would be found, or wherever an investigator inadvertently came across personal papers, to the extent that the investigators could not classify the papers without examining the content of the papers, the papers would be sealed and returned to the issuing magistrate who would hold an adversary hearing to determine which documents would be classified in what way. The magistrate would then separate the documents to the extent possible and impose appropriate limitations on the search of those few that are not separable.

190 MODEL CODE OF PRE-ARRAIGNMENT PROCEEDURE, §§ 220.2(4) & SS 220.5 (1975) [hereinafter cited as MODEL CODE].

191 Id. at § 220.5(2).

192 This is not to suggest that the MODEL CODE intermingled documents rule should not be embraced for fourth amendment searches. While the conduct of these is generally beyond the scope of this article, it is entirely consistent with the attempt to limit unnecessary discretion in the conduct of searches by law enforcement officers.

193 The text of the MODEL CODE proposal states:
   (2) Intermingled Documents. If the documents to be seized cannot be searched for or identified without examining the contents of other documents, or if they constitute items or entries in account books, diaries, or other documents containing matter not specified in the warrant, the executing officer shall not examine the documents but shall either impound them under appropriate protection where found, or seal and remove them for safekeeping pending further proceedings pursuant to Subsection (3) of this Section.

194 MODEL CODE, supra note 189, at § SS 220.5(2)-(3).

195 The Reporter's Note suggests searches by an independent party, in the presence of counsel, and other possible limitations. MODEL CODE, supra note 189, at § SS 220.5, REPORTER'S NOTES.

196 Given the nature of the business papers rule, this is unlikely to be large amounts of materials. Almost by definition, business papers are those papers, or copies, which have been physically used in commerce.
The courts have not always been entirely sympathetic to the problem of intermingling. An early Supreme Court case dismissed the problem of irrelevant entries as inevitable in the nature of business records. More recently, the wiretapping problem of obtaining irrelevant personal phone calls was held not to be a constitutional problem. "[T]he interception of private conversation which occurred in this case was the inevitable consequence of the decision of the appellants to intermingle their private lives and their narcotics activities." This is hardly satisfying because it presumes guilt as the basis of the search. It is backwards reasoning. An equally disturbing doctrine would permit the admission of other items in the same file or book as those for which there was a warrant on a plain view theory.

A more sensitive approach was taken by Judge Gurfein in United States v. First National City Bank, a case involving a warrant to search a safe deposit box. While the warrant was not overbroad in its search for seizable assets (by IRS levy), it was too broad for the purpose of going through private papers to find them. Judge Gurfein recommended that a procedure like the Model Code's be used. The Supreme Court has indirectly asserted the value of such a system for protecting privacy. In Nixon v. Administrator of General Services the Court held that the intermingling of personal papers with presidential papers was not a bar to placement in the National Archives because government archivists, who have an excellent reputation for confidentiality, could sort out the private papers, because of the limited intrusion involved, and because the private papers were a miniscule proportion of the total collection.

The cases demonstrate that an intermingled documents procedure is both necessary to prevent the abuse of the plain view doctrine and effective in limiting such intrusions. Thus, the business papers rule provides a single standard for determining access to documentary evidence of white collar crime, and, through an intermingled documents procedure, avoids a rule which is too general to be accurate or too specific to be workable.

B. The Practical Effect of the Business Papers Rule

The practical impact of the business papers rule has three aspects: the improvement of enforcement efforts; the stabilization of privacy rights; and the workability of the distinction between business and private papers.

The business papers rule will improve law enforcement access to
documentary evidence relevant to white collar crime, particularly at the initial stages of detection and investigation when probable cause is virtually impossible to obtain. This can be demonstrated in the four crimes described at the outset.

Bankruptcy fraud necessarily involves a business and its business relations primarily with other businesses. While hidden assets may eventually be found in private accounts, the major part of the transactions will be to and from various business entities. The individual in these cases is holding himself out to commerce. Obviously, the bankrupt's own records are open to the trustee supervising the proceeding. Beyond that, the building up of assets, the obtaining of credit, and the unloading of some assets can be traced through business records. Thus, without needing an informant or a clear inconsistency in the bankrupt's books, the police will be able to confirm or refute any suspicions they have which are otherwise raised. Having put together the relevant business transactions, and at least one end of the personal transactions, the investigators are in a good position to find or not to find probable cause to obtain a warrant to examine the personal records of some of the persons involved for particular crimes and particular records. The immediacy of the original access will limit the problem of destruction of relevant materials.

In bribery cases, as noted, investigators are usually looking for income to individuals and expenditures by businesses. Having initial suspicions based on noneconomic indicators, like repeated awards of contracts to an undistinguished or incompetent firm, the business papers rule would allow investigators immediate access to such a firm's records. These may well be the most probative anyway, since the cash income to the official may never appear in his records while expenditures must appear in the records of the business. At this stage the search is for signs of cash generation. Travel, phone, and entertainment logs can be correlated with the cash generation and with stages in the contract process. Again, it is not necessary to have proved the case by this point. The information gathered in this period will provide probable cause for the issuance later of specific warrants for private documents. Thus, searches of personal records will be limited to important instances and the government will have the information necessary to make more particular requests.

This final point is worth noting. Up to now it might have been assumed that the widening of governmental surveillance at one point was a diminution of privacy in general. From this example, however, it is apparent that diminution of privacy in one area can increase it in another because later requests for more intrusive searches can be made with more particularity regarding the objects of the search. And if the privacy expectations in the two areas are quite different, sacrificing some of the less private to help the more private is a very

103 This is an excellent place for the MODEL CODE procedures to be used for a high protection search. See supra note 191.
105 SPECIAL COMMISSION REPORT, supra note 10.
good trade-off. In the case of cash generation by paying bonuses which are cashed and then returned, the checks themselves might actually say “cash” on them, or “for deposit only” in the opposite instance, but a limited examination of the employee’s deposits in that time period would clearly indicate how the check was handled.

Embezzlement by self-dealing and theft would also be significantly easier to investigate with the business papers rule. Presumably the victimized bank would make its records available anyway, but if it did not the business papers rule would make them available. The only records so released would be of the transactions to which the bank is an active party, such as making loans, paying interest, assessing service charges, making investments, and the like. At this point personal accounts would be excluded. An examination of these transactions will reveal much, since the ability to embezzle or self-deal comes from the power to approve bank financial actions, and approval is seldom needed for the virtually automatic saving and checking functions. To the extent that an investigation of bank documents reveals any significant involvement with particular businesses, the business papers rule would permit examination of the records of that business to determine whether a bank official had an interest in it.

Eventually, of course, resort would be necessary to the personal accounts of the suspect bank officials, but there is nothing objectionable about this. The key is that a foundation for investigation has been built in terms of probable cause for specific materials. The purpose of the business papers rule is not to remove things from scrutiny altogether, but to order the investigation in such a way as to limit discretionary invasions of privacy.

It was noted earlier that one possible solution to the conflict between law enforcement and privacy goals in white collar crime prosecution is simply to accept the fact that we cannot combat some crimes in a proactive manner. Personal income tax evasion comes closest to this situation under the business papers rule, although active investigation is by no means precluded. The taxpayer is required by the Internal Revenue Code to have documentation to support returns filed. Income records, under the business papers rule, are not a problem; since they involve business, the lower-standard access seems reasonable.

Support for deductions and credits and exemptions, however, tends to expose a great deal of personal information, much of the type considered extremely private. Finding this objectionable, however, mistakes the scope of documentation required and the status of deductions. If one wants privacy

\[10\] See supra text accompanying notes 114-20.

\[10\] See supra text accompanying notes 114-20.

\[10\] For example, political and charitable contributions.

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that badly, he can either not claim deductions or stay within the zero-bracket amount. As to scope, it would seem that a receipt or a single cancelled check would be sufficient for these purposes. That should be all that is available to the I.R.S. on an administrative warrant basis, as it currently is under a civil summons provision with requirements similar to an administrative warrant.

The familiar pattern then takes over. If audit of those materials reveals serious discrepancies or omissions, the I.R.S. will be in a position to establish probable cause for a more specific search. Specificity may not be possible if under-reporting of gross income is at issue and the "net worth" or other indirect method is to be used. However, presumably the I.R.S. would not leap headlong into such a broad search without first making more limited inquiries in search of more direct evidence. If no such evidence were found to exist, and suspicion still remained, then only as a last resort would this very broad search be authorized.

In personal income tax evasion cases, the business papers rule adds less to the law enforcement arsenal than it does in the case of other crimes. But this is as it should be. A due concern for privacy clearly distinguishes personal tax evasion from other white collar crimes because it is so much more intimately related to the individual’s private life. Nor is this a minor sacrifice. Personal income tax evasion is a serious problem. But the business papers rule is a trade-off, not a mutual maximization of goals, and some sacrifice is to be expected somewhere.

In analyzing the effect of the business papers rule on privacy, the most important thing to note is that the expanded access at the initial stages of the investigatory process actually expands privacy in the more personal areas. By mandating a step-by-step process, beginning with the least private material and building a foundation for access to the most private, the resulting intrusions are more specific and more necessary.

The personal papers kept at home or in a safe deposit box, and personal transactions, are protected from general searches based on mere suspicion. This protection is accomplished, as has been seen, by the substantive scope of the rule. It is also accomplished by the procedural aspects of the rule, most notably the intermingled documents procedure. The latter is not simply a gloss on the substantive rule. It is inherent in any content-based, document-specific standard.

Finally, nothing in the business papers rule suggests that any eviden-


210 The regulations only specify "sufficient to establish." Treas. Reg. § 1.6001-1(a) (1982).


212 The per se rules as to place of documents are designed to ease administration; they are not implicit in the rule.
tiary privileges should be affected. Foremost is the fifth amendment privilege against self-incrimination. As it provides a basis for the privacy policies upon which the business papers rule relies, it can hardly be inconsistent with the rule. In the business papers scheme it is seen as an absolute privilege against revelation of certain of the most private documents. In sum, a salutary effect on privacy is achieved by designating personal privacy more important than business privacy and then making access more difficult to materials whose content, rather than their location or contacts, is most private.

A final question must be whether the distinction between business and personal documents will work or whether it will become the subject of endless, self-defeating litigation. The distinction between personal and business activities is hardly unknown to the law. The Internal Revenue Code makes this distinction for very different purposes and in different ways than the business papers rule does, but the fact that it makes these distinctions and they work is encouraging and some of the concepts will provide guidance.

The first relevant Code classification describes "personal, living, or family expenses" which are never deductible. These are expenses which may be called "of a character applicable to human beings generally, and which exist on that plane regardless of the occupation." A second concept is that "the origin and character of the claim with respect to which an expense was incurred, rather than its potential consequences upon the fortunes of the taxpayer, is the controlling basic test of whether an expense was business or personal . . . ." The I.R.S. then draws a line between personal expenses and those "for the production or collection of income." This is not at all unlike the line drawn by the business papers rule which permits easy access to personal income records but not to personal expenditures.

The most directly relevant line drawn by the Code defines expenses incurred in a "trade or business." Justice Frankfurter described trade or business best saying it "involves holding one's self out to others as engaged in the selling

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113See infra text accompanying notes 223-60.
114The distinction is also recognized as a constitutional matter. See infra text accompanying notes 223-355.
117"Henry Smith, 40 B.T.A. 1038 (1939), aff'd per curiam, 112 F.2d 114 (2d Cir. 1940) (child care). This rationale sustains similar findings as to commuting, see Comm'r v. Flowers, 326 U.S. 465 (1945); Rev. Rul. 432, 1975-2 C.B. 6, and home offices, see Bodzin v. Comm'r, 509 F.2d 679 (4th Cir.), cert. denied, 423 U.S. 825 (1975).
120See supra text accompanying notes 176-78.
of goods or services." It is this characteristic of actively going out into the world, with the exception that Frankfurter does not include employment, that the business papers rule tries to capture as its soul.

As a practical matter it can be concluded that the business papers rule would give important additional tools to law enforcement efforts against white collar crime and would at the same time provide better privacy protections for the individual. Further, there is good reason to believe that the test involved is capable of sufficient clarity that it will not be bogged down in endless litigation. Without these characteristics, it would be pointless to adopt a new standard at all.

C. The Business Papers Rule and the Constitution

The business papers rule is not, and is not intended to be, capable of simple legislative or judicial implementation. However, many aspects of the business papers rule have a strong constitutional basis or are at least consistent with the constitutional scheme for personal privacy.

The fifth amendment privilege against self-incrimination is considered a personal privilege and so fifth amendment doctrine has long recognized a distinction between business and personal papers. It is well settled that a corporation cannot claim the privilege, and it follows that an individual cannot assert the privilege in the records of a corporation. In applying this rule the court is governed by the "nature" of the documents, not merely their possessor or custodian.

On this rationale, the rule was first expanded to cases where the person claiming the privilege was sole owner and officer of the corporation or sole owner and professional employee of a professional corporation, and then to unincorporated associations. Recently, the Supreme Court in Bellis v. United States held that to the extent that a partnership is an independent


For text of the amendment, see supra note 66.


Curcio v. United States, 354 U.S. 118, 122 (1957) (union records); United States v. White, 322 U.S. 694, 704 (1944) (labor union); Wilson v. United States, 221 U.S. 361, 376-77 (1911) (president of corporation had no privilege even though the documents were kept by him for his almost exclusive use).

Grant v. United States, 227 U.S. 74 (1913) (look at nature and not the possessor of documents); Wheeler v. United States, 226 U.S. 478, 490 (1913) (dissolution of corporation and subsequent possession of its documents by defendant does not change their "nature"); Drier v. United States, 221 U.S. 394, 400 (1911) (companion case to Wilson); Wilson v. United States, 221 U.S. 361 (1911).

Fineberg v. United States, 393 F.2d 417, 420 (9th Cir. 1968).


Brown v. United States, 276 U.S. 134, 142 (1928).

http://ideaexchange.uakron.edu/akronlawreview/vol16/iss2/2
entity, its records cannot have a fifth amendment privilege. The “business papers rule” is consistent with Bellis in cutting through mere form of the business entity by examining its separateness as an entity from its members, and in demanding a clear showing of these things prior to access.

At the same time, however, the Supreme Court has narrowed severely the extent to which the privilege applies to documents which are owned and in the custody of an individual natural person. Indeed, the Court has narrowed the privilege to a point where it may no longer cover the contents of any documents but only the method of obtaining them. Up to Bellis, it was assumed that a sole proprietor could not be forced to surrender his records, based on the landmark Boyd v. United States which dealt with business records and established that documents can be testimonial in the fifth amendment sense.

The first break in this doctrine came in Couch v. United States, which held that a sole proprietor’s records, to which the proprietor had title, in the possession of her accountant were not protected because possession and not ownership is the key to fifth amendment protection. In Fisher v. United

232Id. at 95-98. The Court considered Pennsylvania partnership law, the partnership’s employees, existence of bank accounts, responsibilities of owners, among other things.

The group must be relatively organized and structured, and not merely a loose, informal association of individuals. It must maintain a distinct set of organizational records, and recognize rights in its members of control and access to them. And the records subpoenaed must in fact be organizational records held in a representative capacity.

Id. at 92-93. The test was also formulated in an earlier case:

The test, rather, is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only.

233Bellis, 417 U.S. at 93.
234As a doctrinal matter, the Court has chosen to view the fifth amendment as a privilege against producing but not against production. See Johnson v. United States, 228 U.S. 457, 458 (1913). Therefore, the emphasis shifts to the compulsion issue and the question of what is testimonial. See Schmerber v. California, 384 U.S. 757, 768 (1966) (the fifth amendment applies only to communicative acts). See also Note, Supreme Court Delineates the Relationship Between the Fourth and Fifth Amendments, 1967 DUKE L.J. 366 (1967).

In Andresen the Supreme Court states that papers (voluntarily written prior to the search) are no different than other tangible evidence and that the fifth amendment requires only that the holder cannot be physically compelled to produce them himself. The police, however, may seize them, against the holder’s will, with a warrant. 427 U.S. at 474. While the case law has not extended the Andresen rationale so far, for the view that such extension is unavoidable, see Note, supra note 152, at 979.
235Bellis, 417 U.S. at 87-88.
236416 U.S. 616 (1886).
237116 U.S. at 633.
239Couch, 409 U.S. at 330-33, 336. Accord, Meister v. Comm’r, 504 F.2d 505 (3d Cir. 1974), cert. denied, 421 U.S. 964 (1975) (sole proprietor’s records were stolen by bookkeeper and were discovered upon death of bookkeeper). At this point the Court still maintained a zone of privacy, and Justice Brennan was able to assert that safe deposit boxes and personal papers were left protected. Couch, 409 U.S. at 357 (Brennan, J., concurring). Justices Douglas and Marshall dissented, asserting that the Court had abandoned privacy as a rationale. Id. at 340-42, 349-51. (Douglas and Marshall, JJ., dissenting).
The Court explicitly abandoned the privacy basis of the fifth amendment, holding that virtually regardless of what the documents contained the fifth amendment is not implicated unless the holder of the privilege is personally compelled to produce them. While Fisher expressly declined to decide whether a taxpayer's own records would be protected, there is reason to believe that they no longer are. Commentary, and at least one case, have suggested that after Fisher papers of all kinds are only covered when the "actual preparation of the documents or the making of the written declarations which they contain [have] been compelled." Finally, in Andresen v. Maryland the Court held that a search warrant does not constitute compulsion in fifth amendment terms where the individual voluntarily prepared the documents and was not forced in his person to authenticate them. Papers are tangible objects like any other piece of evidence.

The concurrences and dissents of Justices Brennan and Marshall in Couch, Fisher, and Andresen suggest an alternative theory of the fifth amendment privilege based on the type of document, which correlates better to privacy interests than the existence vel non of compulsion. The theory distinguishes between business and private papers, and it has its origins in the earlier United States v. White.

The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found

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247 U.S. at 397, 402, 409-13. So, when the documents are in someone else's possession, the holder of the privilege isn't personally compelled. Fisher involved accountant's work papers in the hands of the defendant's attorney. Of course, privileged material given to the attorney stays privileged, id. at 404-05, but here the documents themselves were not privileged. Id. at 409.

248 Id. at 414. Justice Brennan speculated that this might be the case. Id. at 415 (Brennan, J., concurring in the judgment).


251 Id. at 473, 477. For the prior, and opposite, rule, see Hill v. Philpott, 445 F.2d 144 (7th Cir.), cert. denied sub nom., 404 U.S. 991 (1971).


253 U.S. at 377-38 (Brennan, J., concurring); id. at 344-51 (Marshall, J., dissenting).

254 U.S. at 414-30 (Brennan, J., concurring in the judgment); id. at 430-34 (Marshall, J., concurring in the judgment).

255 U.S. at 484-93 (Brennan, J., dissenting); id. at 493-94 (Marshall, J., dissenting).

256 U.S. 694 (1944).
in the official records of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible. 252

Justice Marshall argued that business papers are "impersonal" in contrast to diaries and the contents of safe deposit boxes. 223 Justice Brennan, emphasizing an inviolate zone of privacy, attempted to define private papers on a spectrum from state-created documents like drivers' licenses, through business records, nonbusiness economic records, and letters, and finally to diaries. 254 He concurred in Fisher precisely because the documents sought there were "wholly business rather than personal" and so did not implicate the fifth amendment's zone of privacy. 255

The Andresen Court itself acknowledged that the fifth amendment protects privacy "to some extent," but permitted the search of an individual's office for business records. 256 While this might be seen as the establishment of a private papers category, the distinction does not flow necessarily from the Court's logic and so cannot be given far-reaching significance.

A privacy basis for the fifth amendment privilege is most compatible with the business papers rule. The line should be drawn to protect letters and diaries but not economic records. More than just business papers (in the sense they have been defined here) should be excluded from the fifth amendment privilege because the privilege would entirely bar certain evidence rather than simply demand a stiffer procedure to get it. "Nonbusiness economic records in the possession of an individual, such as cancelled checks or tax records, would also seem to be protected. They may provide clear insights into a person's total lifestyle." 257 While such records certainly require strict probable cause and particularity standards, they do not demand entire exclusion.

The Government has argued for such a line in some recent First Circuit cases. Following the logic of Couch, Fisher, and Andresen, the Government suggested that the fifth amendment now affects only "the mechanism of . . . production" of papers and not the nature of such papers. 258 Rather than urging that position, however, it suggested a distinction based on the business records exception to the hearsay rule. 259 Noting that in Fisher the Court hinted that there may be a different treatment of diaries, the Government suggested that

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252 Id.
223 Couch, 409 U.S. at 349-51 (Marshall, J., dissenting); Blank, 459 F.2d at 386-87.
255 Id. at 414.
256 Andresen, 427 U.S. at 477.
227 Fisher, 425 U.S. at 427 (Brennan, J., concurring in judgment). Justice Brennan would also have sole proprietorships covered by the fifth. Id.
258 Brief for Appellant at 15, United States v. John Doe, Witness, 628 F.2d 694 (1st Cir. 1980).
259 Fed. R. Evid. 803(b).
"business papers made and kept in the ordinary course of a regularly conducted business activity" should be available through subpoena.260

Thought and expression are at the core of the personality and so the Supreme Court has protected the privacy of thought and expression where lack of privacy will interfere with or discourage the exercise of first amendment rights.261 The need for privacy in association is one of the main reasons for classifying personal checks as private papers rather than as business papers. Checks not only reveal political and religious beliefs and associations, but they may also "provide clear insights into a person's total lifestyle,"262 which is a first as well as fifth amendment concern.

The private reading of pornographic material in one's own home is protected on first amendment grounds.263 The relationship between the first and fourth amendments has been noted in the context of the particularity requirement of the fourth amendment.

The general requirement of particularity in warrants is more strictly applied in situations involving the seizure of materials which arguably fall within the First Amendment's protection of free expression. This is necessary to guard against an executing officer's seizing "protected expression," if he is not given some guidelines to direct his exercise of discretion.264

Thus, where the privacy of personal papers has been needed to protect first amendment rights, the Court has been willing to protect that privacy, at least to a certain extent.

In the context of expression, however, the Court has not limited first amendment rights of corporations,265 so it is hard to tell as yet whether the existence of a business makes a difference to first amendment doctrine in relation to privacy. The only clue might be that Chief Justice Warren made a major distinction between business and personal activities in the first amendment pornography

260Brief for United States at 14 & n.19, United States v. John Doe, Witness, 628 F.2d 694 (1st Cir. 1980). The First Circuit took the position that while business records do not enjoy fifth amendment protection based on their contents, the sole proprietor has a fifth amendment privilege against himself producing them in response to a subpoena. Doe, 628 F.2d at 695 (relying on In re Grand Jury Proceedings (Martinez), 626 F.2d 1051 (1st Cir. 1980)). Two recent notes suggest a similar line, urging absolute protection for "a core of one's expressions and effects" "intimately related to the private aspect of personality," and emphasizing the privacy of diaries and letters. See Note, supra note 152, at 985, 988-99; Note, supra note 241, of 694-702. A three-tiered approach, business, personal, and privileged, similar to the business papers rule is suggested in Comment, Papers, Privacy and the Fourth and Fifth Amendments: A Constitutional Analysis, 69 NW. U. L. REV. 626, 648-49 (1975).
262See supra note 159.
cases. To avoid putting ideas on trial Warren wanted to judge only conduct, and so he distinguished between a defendant who was "engaged in the business of purveying" or "engaged in the commercial exploitation of the morbid and shameful craving for [these] materials," and a defendant who simply read the materials in the privacy of his home. The Court never accepted Warren's reasoning directly, but it seems to have followed it in holding that the power of the United States to ban obscene materials from the mails derives from the fact that they may be sold, not from the mere fact of their being obscene.

The business papers rule is doctrinally part of the fourth amendment and finds analogues in several doctrines within the amendment. The article will first examine three doctrines which govern the amount of privacy afforded to certain entities and documents: the rights of corporations, documents required by the government to be maintained, and documents to which differing expectations of privacy attach. It will then examine less strict procedures for obtaining documents covered by the fourth amendment: administrative summonses, administrative search warrants, and an intermingled documents rule.

The Supreme Court's unwillingness to extend full fourth amendment rights to corporations has important implications for the privacy which business papers in general can expect under the Constitution. The question whether a corporation has fourth amendment rights was decided before it was decided. Early on, in a summary statement by Chief Justice Waite before argument in Santa Clara County v. Southern Pacific Railroad, the Court held that corporations were persons for the purposes of the fourteenth amendment. This was apparently based on opinions delivered on circuit by Justice Field which held that to deprive corporations of certain rights (notably property rights, which is how the fourth amendment was viewed) would deprive their natural-person owners of those rights. The result of making corporations persons was that they had full fourth amendment rights, a conclusion drawn at the beginning of this century in Hale v. Henkel.

266 Stanley v. Georgia, 394 U.S. 557 (1969) (private possession of pornographic material may not be made a crime in itself).
268 118 U.S. 394 (1866).
Mr. 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 the opinion that it does. Id. at 396. See Minneapolis Ry. Co. v. Beckwith, 129 U.S. 26, 28 (1889). Santa Clara gave "no history, logic, or reason . . . to support" its conclusion that the fourteenth amendment applies to corporations. Wheeling Steel Corp. v. Glander, 337 U.S. 562, 577 (1949) (Douglas, J., dissenting).
269 County of San Mateo v. Southern Pacific R. Co., 18 F. 385, 402-03 (Cir. Ct. D. Calif. 1883) (Field, Cir. J.). See generally O'Kelly, Jr., The Constitutional Rights of Corporations Revisited, 67 GEO. L.J. 1347, 1353-58 (1979). For this reason the fifth amendment, viewed as a personal right, was not extended to corporations.
This doctrine has been subjected to much thoughtful criticism. In *Hale* itself the first Justice Harlan stated that "a corporation is 'an artificial being, invisible, intangible and existing only in contemplation of law' [and so] cannot claim the immunity given by the Fourth Amendment." He felt that the *Hale* rule destroyed the government’s inherent visitorial power to examine corporate records. More recently, Justices Black and Douglas have made essentially the same points in questioning the appropriateness of granting fourteenth amendment rights to corporations. In his discussion of the nature of the corporation in *Bell v. Maryland*, Douglas attacked the whole idea of a corporate "person" having personal rights, especially personal privacy rights. "The property involved is not, however, a man’s home . . . . Private property is involved, but it is property that is serving the public."

The Supreme Court has recognized for years that corporations are not simply private entities entitled to private rights like natural persons, and while the Court has supported the corporation’s fourth amendment rights it has given it only "limited application [to] compulsory production of corporate documents and papers." United States v. Morton Salt Co. emphasized the privileges received by a corporation, to act as an artificial entity and to engage in interstate commerce, and the consequent power of the government to burden those privileges with duties. The idea of a reciprocity of powers and privileges has been reiterated in various contexts since then.

The *Morton Salt* rationale was echoed in Justice Rehnquist’s dissent in a recent first amendment case, *First National Bank of Boston v. Bellotti*. Rehnquist suggested that newspaper corporations in a sense have a property right in full first amendment rights because they are necessary to a newspaper, but that, since those rights are not so necessary to a bank, the bank would not have them or at least not to the extent. Under this theory, a corpora-

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273 Id. at 78 (Harlan, J., concurring).
274 Id. at 78-79. Harlan reiterated this regulation theory later that year in sustaining state regulation of life insurance companies against a fourteenth amendment due process attack. See Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243, 253-54 (1906).
277 Id. at 262-63, 265-66 (Opinion of Douglas, J.).
278 Id. at 252 (Opinion of Douglas, J.).
279 Essgee v. United States, 262 U.S. 151, 158 (1923).
282 Id. at 824-25 (Rehnquist, J., dissenting). The Court posed the degrees of privacy issue in a footnote, but then failed to answer it. Id. at 778 n.14.
tion has fourth amendment rights, not inherently as a person as is now the law, but only to the extent necessary to protect its property. The restraint on government action then would be, for corporate documents, not privacy but whether the requests are excessive or burdensome. This standard was suggested for subpoenas in *Morton Salt*, and it would give needed flexibility in obtaining search warrants for business papers.

It is well established that if the government has the power to require the maintenance of certain records, it can obtain access to them fairly easily because such records become public or quasi-public instead of personal.

The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained.

*Wilson*, in fact, suggested that under *Hale v. Henkel* all corporate records have this public quality. The issue is to what extent the *Wilson* suggestion can be expanded beyond corporations.

*Wilson* was reaffirmed in the minimum wage case, and was again relied upon in *Davis v. United States*, which held that gasoline rationing coupons and other records relating to amounts of gasoline sold were government property. Three years later the Court enunciated a broad standard in *Shapiro v. United States*. "[T]here are limits which the Government cannot constitutionally

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286 *Morton Salt*, 338 U.S. at 252-54. *Morton Salt* dealt with subpoenas, of course, so to the extent that a warrant is more disruptive the burdensome test would be correspondingly adjusted.


289 *221 U.S. 361* (1911).

290 *202 U.S. 43* (1906).

291 *Id.* at 382-83.

292 The *Wilson* rule was reaffirmed in the minimum wage case, *United States v. Darby*, 312 U.S. 100, 125 (1941).

293 *Davis v. United States*, 328 U.S. 582 (1946) (gasoline rationing laws). This decision was preceded by the denial of certiorari in a case involving OPA rules which emphasized the "quasi-public" nature of such records, see *Bowles v. Glick Bros. Lumber Co.*, 146 F.2d 466, 571 (9th Cir.), *cert. denied*, 325 U.S. 877 (1945). The public records doctrine was followed, see *Hughes v. Johnson*, 305 F.2d 67, 69 (9th Cir. 1962) (records and contraband games birds subject to search without warrant). *See also In Re Grand Jury Subpoena to Custodian of Records*, 497 F.2d 218 (6th Cir.) (availability of escrow records required to be kept by state law), *cert. denied*, 419 U.S. 1009 (1974).

294 335 U.S. 1 (1948).
exceed in requiring the keeping of records" for inspection, but it has not overstepped them if there is "a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity . . . ." Clearly, this standard refers almost exclusively to business and commercial activities, the areas in which the government has the greatest regulatory interest.

It was only natural, then, that limitation of the Wilson-Davis-Shapiro doctrine came in two personal income tax cases, Marchetti v. United States and Grosso v. United States, both involving wagering income. The Court found that records of personal income from illegal gambling are essentially private and that Shapiro and the other required records cases were inapposite. Grosso modified Shapiro to apply only where: (1) the inquiry was "essentially regulatory;" (2) the documents would be customarily regain; and (3) the "records themselves . . . assumed 'public aspects' which rendered them at least analogous to public documents." For the purposes of the business papers rules, Grosso establishes a constitutional difference between business and private papers that permits easier access to, and only to, business papers.

It is clear that the existence of a business is not a talisman which deactivates the fourth amendment, but it is equally clear that the fourth amendment applies differently to businesses. The Davis case strongly suggested that the place where the records were kept played a large part in the validity of that search, because "the search was of the office adjacent to the pumps — the place where petitioner transacted his business . . . . And the demand was made during business hours." In constitutional doctrine, a place of business has a lower expectation of privacy.

The Supreme Court has consistently held that the home is the principal object of fourth amendment protection. This protection disappears, however, when the home is turned into a business. In Lewis v. United States, the Court

194Id. at 32.
195Compare the equal protection cases using minimum scrutiny in economic regulation cases, e.g., Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 393 (1937); Nebbia v. New York, 291 U.S. 502, 531 (1934). See also United States v. Carolene Products Co., 304 U.S. 144, 152-53 & n.4 (1938) (Justice Stone's celebrated footnote suggesting heightened scrutiny for political, as opposed to economic, rights).
198Grosso, 390 U.S. at 68; Marchetti, 390 U.S. at 55-57. Thus, prosecutions on the basis of failure to report illegal income or failure to pay taxes on illegal income violate the fifth amendment, when reporting or paying is tantamount to confession. Grosso, 390 U.S. at 69; Marchetti, 390 U.S. at 54.
199Grosso, 390 U.S. at 67-68.
200See, e.g., See v. City of Seattle, 387 U.S. at 543.
201Davis, 328 U.S. at 593. Justice Frankfurter specifically took issue with this assertion. Id. at 596 (Frankfurter, J., dissenting).
202Davis, 328 U.S. at 592.
dealt with a decoy buyer of drugs who went into the defendant’s house to purchase narcotics.

Without question, the home is accorded the full range of Fourth Amendment protections. But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. Justices Brennan and Fortas concurred, “solely on the reasoning on which the Court ultimately relies, namely that petitioner’s apartment was not an area protected by the Fourth Amendment as related to the transactions in the present case.” Consistent with this distinction, later cases have limited this business exception to extend to the actual doing of business, not to a general search of the home. The characteristic of a business to “[hold] itself open to the public” generally for the transaction of business undeniably lessens the privacy which can be expected to surround such transactions. “[A] business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context.” And surely records of such transactions can claim no greater secrecy.

This sort of reasoning is followed in two other business doctrines. In United States v. Turner the court found that the “intermingling of the defendants’ private lives and their narcotics activities” made electronic interception of private conversations inevitable and unobjectionable. And the first amendment right of access cases, beginning with Marsh v. Alabama, hold that the creation of a business district to which the public is generally invited limits the owner’s right to exclude people.
While invitation theories reduce expectations of privacy in business places, the absence of "personhood" in business records also reduces expectations of privacy in them. It is only in fifth amendment doctrine, however, that doctrine has concentrated (at times) on the content of the subject papers.\(^{315}\) James McKenna has recommended a "hierarchical Fourth Amendment" based primarily on content.\(^{316}\) While his claim that such a rule had been implicitly adopted by the Supreme Court has been seriously undercut by subsequent developments,\(^{317}\) his arguments in support of such a system are strong. He relies on the fourth amendment's primary purpose of protecting private papers, noting the personal nature of such papers, the highly intrusive nature of a search through them, and the fifth and first amendment values implicated by such papers.\(^{318}\) The McKenna article effectively demonstrates, as has been argued here, that a content-based rule would be appropriate to fourth amendment concerns and that a business papers rule would be consistent with the amendment in attaching constitutional significance to the difference between personal and business activities.

The most common procedures for obtaining information in a white collar crime investigation are administrative summonses or grand jury subpoenas. Searches have been discussed in this article because, being more intrusive, they represent the area where privacy concerns are most clearly implicated. Compulsory process is mentioned very briefly here to suggest ways that a broad standard might be drawn within the constitutional framework.\(^{319}\)

The power to summon and inspect derives from the regulatory power,\(^{320}\) and in those situations it extends to relevant records,\(^{321}\) and "the Fourth, if applicable, at most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant."\(^{322}\) The probable cause standard is satisfied by relevance to a power within Congressional authority,\(^{323}\) and the particularity standard of the summons so authorized is virtually nonexistent.\(^{324}\)

\(^{311}\)See supra text accompanying notes 102-13.

\(^{316}\)McKenna, supra note 81.

\(^{317}\)See Note, supra note 152, at 979. See, e.g., Blank, 549 F.2d at 386-87. A contrary claim is forcefully made, McKenna, supra note 81, at 72, but this argument is seriously undercut by the Supreme Court, Zurcher v. Stanford Daily, 436 U.S. 547 (1978). Judge Friendly described the fourth amendment as limiting the object of the search, not for the purpose of suppressing relevant evidence, but for limiting the search itself. United States v. Bennett, 409 F.2d 888, 897 (2d Cir. 1969).

\(^{318}\)McKenna, supra note 81, at 68-72. McKenna goes on to recommend extra procedural safeguards for private papers. Id. at 72-91.

\(^{319}\)An overview of the law in this area can be found in Wilson & Matz, supra note 2, at 653-90 (administrative summonses and grand jury subpoena).


\(^{321}\)Oklahoma Press, 327 U.S. at 204; Wilson, 221 U.S. at 383; Hale v. Henkel, 201 U.S. at 77.

\(^{322}\)Oklahoma Press, 327 U.S. at 208.

\(^{323}\)Id. at 309. See Morton Salt, 338 U.S. at 652-54.

\(^{324}\)Morton Salt, 338 U.S. at 651-52.
Summonses have been more closely scrutinized in personal tax cases, where the I.R.S. must show that: the investigation is pursuant to a legitimate purpose; the inquiry is relevant to that purpose; the information sought is not already possessed by the I.R.S.; and the administrative procedures of the I.R.S. have been followed. The standard is still basically relevance, with some protection from the administrative procedure. Here again a distinction is made between business and private papers, with the latter receiving more protection.

Returning to search warrants, there is strong fourth amendment precedent for the kind of relaxed-standards warrant used in the business papers rule. Administrative search warrants were approved by the Supreme Court in *Camara v. Municipal Court* and *See v. City of Seattle* as an alternative to requiring no warrant at all in such situations. *Camara* and *See* involved warrantless routine inspections of (respectively) houses and businesses. The problem with these inspections was the total discretion accorded the inspectors, but the realities of the situation demanded routine inspections. The Court's compromise was that a warrant can issue where there are administrative reasons for suspecting a particular dwelling. The administrative procedures are intended to curb discretion, but the examples of administrative criteria given in *Camara*, e.g., the age of a building or the neighborhood in which it stands, were still extremely broad with respect to the amount of intrusion into the particular building which was searched.

Subsequent cases have not been clear or consistent in their results or rationales. Nevertheless, governmental need to inspect seems central to all of them. The need issue has been discussed before, and it was concluded that while it is irrelevant to privacy *per se*, it is highly relevant to the development of an overall policy. *United States v. Martinez-Fuerte* emphasized that individual stops on major roads would be impractical if a reasonable suspicion

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323 387 U.S. 541 (1967).

324 This approach had been taken earlier in Frank v. Maryland, 359 U.S. 360 (1959) (which was overruled by *Camara*, 387 U.S. at 534).

325 *Camara*, 387 U.S. at 532, 535-37.

326 *Camara*, 387 U.S. at 538. This has been called probable cause in gross, as opposed to probable cause in particular. Note, *Administrative Searches and the Fourth Amendment: An Alternative to the Warrant Requirement*, 64 CORNELL L. REV. 856, 861 (1979).

327 *Camara*, 387 U.S. at 538. Substituting procedure for a standard in these cases is strongly advocated by the Note, *supra* note 330, at 871-73.

328 United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (no warrant required at a checkpoint on a major highway, sixty miles from the Mexican border, at which all cars are stopped); South Dakota v. Opperman, 428 U.S. 364 (1976) (routine inventory search of car including glove compartment impounded for multiple parking violations permitted without warrant); Almeida-Sanchez v. United States, 413 U.S. 226 (1973) (individual searches near the border require a warrant); Wyman v. James, 400 U.S. 309 (1971) (no warrant required for caseworker to visit home of AFDC recipient).

329 See supra text following note 106.

were required in each case. Wyman v. James said that the home visit is at the center of the AFDC program and that the rehabilitative aspects of the program require close supervision. The premise that need is relevant comes from Camara itself, where the Court justified its new type of warrant in large part on the fact that administrative inspections are the only effective means of policing the housing code.

Need, however, is not a criterion well suited to judicial determination, nor is it a self-limiting rationale. Its boundaries are indistinct, leaving wide discretion in the hands of those who must decide what is needed, often the inspectors themselves. But even this rationale has resulted in a distinction between homes and businesses. The Court in See conceded that, while businesses have the same rights as individuals in this area, there are more situations in which a business may be inspected than a home. The Court specifically analogized the business records cases in establishing the application of the fourth amendment to these situations.

In 1977 the Sixth Circuit found that See applied to required records. The search might be unannounced and the probable cause less strict, but some limiting warrant was needed. And in 1978 the Supreme Court reaffirmed this policy in Marshall v. Barlow's, Inc.

Probable cause in the criminal sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on a specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." Camara.

Martinez-Fuerte, 428 U.S. at 557. Justice Brennan took issue with this as a factual matter, pointing out that an overloaded station wagon, for example, would provide an articulable reason to stop. Id. at 575 (Brennan, J., dissenting). See also Note, Administrative Searches and the Fourth Amendment's Warrant Requirements, 32 Ark. L. Rev. 755, 770-71 (1979) (questioning the competence of judges to answer "empirical questions" like need).


Wyman, 400 U.S. at 319-20.

Camara, 387 U.S. at 537. See also Note, supra note 330, at 856-57.

See Comment, supra note 98, at 306-07.

Compare Powell, 379 U.S. at 58 (Commissioner of Internal Revenue determined a necessity).

See v. City of Seattle, 387 U.S. at 543, 545-46. Indeed, the Court has held that See does not apply and no warrant is needed at all in closely regulated businesses, like liquor, Colonnade Corp. v. United States, 397 U.S. 72, 76 (1970) (See not applicable where Congress has broad powers "of inspection under the liquor law"), Peeples v. United States, 341 F.2d 60, 64 (5th Cir. 1965) (same rationale as Colonnade where business is operated, illegally, out of a home), and firearms, United States v. Biswell, 406 U.S. 311, 316 (1972) (warrant would frustrate the necessary surprise element).


United States v. Consolidation Coal Co., 560 F.2d 214 (6th Cir. 1977). See also Almeida-Sanchez, 413 U.S. at 271 (Colonnade and Biswell do not apply to Border Patrol searches of individual cars not at checkpoints).


Id. at 320.
This is the standard for the proposed business papers warrant. The approved procedures would be sound intelligence procedures followed by people familiar with white collar crime enforcement. While the probable cause and specificity standards would not be rigorous, the warrant would have some basis and the very fact of having to go through a process is its own protection.

The courts have not been entirely sympathetic to the problem of intermingled documents. An early Supreme Court case dismissed the problem of irrelevant entries in business records as inevitable in the nature of such records. More recently, in the context of wiretapping, the Court stated, "the interception of private conversation which occurred in this case was the inevitable consequence of the decision of the appellants to intermingle their private lives and their narcotics activities." The Court has also applied the plain view doctrine to items in the same file or book as those which the original warrant specifies. However, in the case of personal safe deposit boxes, the Second Circuit in United States v. First National City Bank held that a search warrant, not overbroad in designating (essentially) "seizable assets," was too broad for the purpose of going through private papers to find the assets. The Court recommended a procedure like the Model Code. The Supreme Court indirectly recognized the validity of this view in Nixon v. Administrator of General Services. There the Court held that the intermingling of personal papers with presidential papers was not a bar to placement in the National Archives because, among other things, government archivists, who have an excellent reputation for confidentiality, could sort out the private papers.

It may be concluded that the business papers rule, while not a reflection of current constitutional doctrine, is not antithetical in any of its major characteristics with constitutional privacy policies. Indeed, much doctrine points in the direction of the rule, and the doctrines' goals would be aided by the rule's implementation.

VI. CONCLUSION: THE STABILITY OF THE BUSINESS PAPERS RULE

The business papers rule was developed in response to the serious increase in white collar crime and to a growing insensitivity in the courts to privacy interests. Those concerns pull in different directions and the business papers

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34 Compare Note, supra note 330, at 871.
35 Weinreb, Generalities of the Fourth Amendment, 42 U. CHI. L. REV. 47, 72 (1974). See also McKenna, supra note 81, at 80-81.
36 First National Bank of Mobile, 295 F. at 143.
37 United States v. Turner, 528 F.2d 143, 159-60 (9th Cir. 1975).
38 Beusch, 596 F.2d at 877 (violations of currency reporting regulations of the Bank Secrecy Act).
39 568 F.2d 853 (2d Cir. 1977).
40 Id. at 860-61 (Gurfein, J., concurring and dissenting).
41 Id. at 861 n.3.
43 Id. at 462.
rule is the result of attempting to reconcile the need for privacy with the need to have more effective prosecution of white collar crime.

Looking at the problem from a constitutional perspective, one is faced with the choice of having a flexible warrant standard which applies in all cases or having a rigid warrant standard which applies only in some cases. At present, both systems exist. For administrative searches, a weak warrant is required in most cases, but no warrant is required in others. In criminal searches, a broad warrant is permitted in some cases and no warrant is required in others. It is apparent that privacy rules based on a unitary reasonable expectations of privacy standard have eroded a great distance from _Katz v. United States_ where the expectations test was developed to expand constitutionally protected privacy beyond mere place. It is therefore the central goal of the business papers rule to be a stable rule which, while it aids law enforcement, will securely protect the privacy of individual citizens.

The formal reasons for the rule’s stability are the criteria which it employs. “Reasonable expectation of privacy” was intended to be a clear standard, but it turned out to be subject to very different interpretations, not only among and within courts, but between the courts and the Congress. The business papers rule, on the other hand, looks to the fact of doing business or actively engaging in commerce. This criterion depends on external facts rather than on “expectations.” The business papers distinction is a tested one: the existence of a business *vel non* has been an important issue in tax matters and in the fourth amendment itself. Depending on objective fact is more stable also than tests which are based on the raw subjective concept of privacy. The tests devised by Justices Marshall and Brennan and by Mr. McKenna are in themselves objective, but their foundation and later application depends to a great extent on the personal beliefs of the test’s author.

The more important reason to expect stability is the substantive one. As a policy the business papers rule tries to take account of both competing goals. Law enforcement’s need to proceed without having developed probable cause or particularized suspicions is recognized and given expression. At the same time the rule protects private documents.

While the overall effect of the business papers rule is to concentrate on the type of document, this effect is accomplished by having two procedural standards. The privileged area is small, so that very little evidence is ultimately unobtainable, and that evidence — diaries, letters, or the like — unless it contains an outright confession will be of relatively little use in fighting economic

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354 In the administrative search field, _Camara_, 387 U.S. at 523, chose the former scheme as a better protection than the latter scheme, which had been established in _Frank_.


356 See also _Mancusi v. DeForte_, 392 U.S. at 368.

357 The bank records cases and their subsequent overruling by Congress, see _supra_ text accompanying notes 119-41, surely point to the extent to which people can differ on such expectations.
crime. Instead of a privilege, the protection is provided by a higher standard of probable cause and specificity. This not only has the traditional fourth amendment effect of limiting police discretion by limiting the occasions on which and the scope with which they may search through private papers, it also interlocks with the lower standard areas which provide the information needed to limit these intrusions. The low standard complements the high, and makes the high standard stable by making it easier for law enforcement to live with it.

The best guarantee of stability is acceptance by all interests. It is hoped that law enforcement would be satisfied that the easy-access area will provide the way into the difficult-access area where appropriate, and that very little relevant information is ultimately barred. It is hoped that private citizens, too, would be satisfied that their private affairs will not be examined except where there is good cause for it, in the most limited possible fashion, and that the most private matters will be kept private. The business papers rule attempts to set out a general privacy policy with respect to law enforcement efforts against white collar crime. To the extent that it is able to recognize and satisfy the competing interests involved, it will not be subject to the kind of destructive further balancing which has afflicted current privacy doctrines.