The London School of Economics and Political Science

MANDATORY SELF-REPORTING OF CRIMINAL CONDUCT BY A COMPANY: CORPORATE RIGHTS AND ENGAGING THE PRIVILEGE AGAINST SELF-INCRIMINATION

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ABSTRACT

This thesis considers whether the privilege against self-incrimination is engaged when a company is required to make a suspicious activity report which discloses criminal conduct committed by an officer or employee pursuant to section 330(1) of the Proceeds of Crime Act 2002. If the assertion of the privilege is not recognised, a company's failure to disclose suspicious information will constitute a criminal offence punishable by unlimited fine. Whilst the scope of an individual's obligation to self-report criminal conduct is relatively narrow, there is much wider exposure for a company which acts only through the conduct of its officers and employees.

The research is doctrinal and addresses important theoretical issues. Locating mandatory reporting within a contemporary narrative which embraces criminal liability for omissions, the thesis develops a theoretical foundation for the law's recognition of a company's claim to assert the privilege against self-incrimination in response to the self-reporting aspect of the mandatory requirement. As a fundamental civil liberty, the underlying rationales of the privilege are enlivened by the coercive force which the mandatory reporting requirement presents. The privilege serves to maintain evidential reliability, and protect dignity, autonomy, and privacy.

To develop the claim that a company is entitled to assert the privilege against self-incrimination, the basis on which a company may assert rights is comprehensively explored. Traditional approaches struggle to provide an adequate basis for the recognition of corporate rights. The research draws on consequentialist arguments which sustain the law's acknowledgment of corporate rights and, in particular, a company's right to assert the privilege against self-incrimination where the company is exposed to the risk of criminal investigation and prosecution. This line of contention engages with the work of modernist theorists who conceptualise a company as a moral agent.

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LIST OF ABBREVIATIONS

AML	Anti-money laundering
CMA	Competition and Markets Authority
DPA	Deferred prosecution agreement
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
FATF	Financial Action Task Force
FCA	Financial Conduct Authority
HMRC	HM Revenue & Customs
MLRO	Money Laundering Reporting Officer
NCA	National Crime Agency
PACE 1984	Police and Criminal Evidence Act 1984
POCA 2002	Proceeds of Crime Act 2002
SAR	Suspicious activity report
SFO	Serious Fraud Office

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CHAPTER ONE
INTRODUCTION

1.1 RESEARCH QUESTION

The *research question* in this thesis asks whether the law should recognise a corporate claim to assert the privilege against self-incrimination in answer to a statutory obligation requiring a company to disclose information which gives reasonable grounds to suspect a company acting by its officers and employees has been engaged in money laundering. The thesis proposes an affirmative answer.

The legal duty to disclose a suspicion of money laundering which is imposed by section 330(1) of the Proceeds of Crime Act 2002 ("POCA 2002") applies to persons working in the regulated sector in England and Wales. The person concerned may be an individual or, importantly for the purposes of the thesis, a company. The duty is established by the creation of a criminal offence which penalises a failure to make the disclosure. This offence is known as the "failure to disclose" offence. The offence is triable summarily or on indictment. The offence is punishable after trial in the Crown Court by a maximum of five years imprisonment in the case of an individual, and an unlimited fine in the case of an individual or a company.

Where a disclosure made by a company involves a suspicion that one or more of its officers or employees is engaged in money laundering in the course of their work, a company may self-incriminate when the disclosure is made.

Disclosure of involvement in suspected money laundering is made by the submission of a suspicious activity report ("SAR") to a law enforcement authority, typically to the National Crime Agency ("NCA"). Money laundering is widely defined as involving the handling of property which represents the benefit from criminal conduct, details of which are described in the SAR. Where the substance of a disclosure involves a self-incriminating acknowledgement of participation in criminal conduct on behalf of a corporate discloser, the disclosure is variously described in this thesis as "a mandatory self-report", "mandatory self-reporting", and "the mandatory self-reporting requirement". Where reference is made more widely to the reporting requirement set out

in section 330(1) and the reporting of self-incriminating information is not involved, the terms "mandatory reporting" and "mandatory reporting requirement" are used.

Also, the thesis refers generically to law enforcement authorities such as the NCA as "the State" and "the State authorities".

In addition to the legal duty to report in section 330(1), duties to disclose are imposed by sections 331(1) and 332(1) of POCA 2002. In both cases, the duty is imposed on a "nominated officer", who is sometimes called a "Money Laundering Reporting Officer", or "MLRO". This thesis concentrates exclusively on the duty to disclose imposed by section 330(1) since it is this duty which applies to a company operating in the regulated sector and gives rise to an issue concerning self-incrimination.

1.1.1 Additional questions

Implicit within the *research question* is an assumption that a company can assert the privilege against self-incrimination in circumstances where the law acknowledges that the privilege may be engaged by an individual. This begs a question as to the basis on which a corporate claim to benefit from rights associated with the protection of an individual can be made. In addressing this question, the thesis explores theoretical foundations for the recognition of corporate rights in the modern age, which include the ability to assert the privilege against self-incrimination. Critically, the *research question* posits whether the law should recognise the engagement of the privilege against self-incrimination as a shield to exempt a company from criminal liability where it has failed to make a mandatory self-report. In seeking to locate the answer, the thesis develops an extensive critique of the various rationales underlying the privilege against self-incrimination. The mandatory reporting requirement is expressed to apply to "a person", individual and corporate.

By exploring the engagement of the privilege against self-incrimination with mandatory self-reporting through a corporate model, the thesis tests the rationales underpinning the privilege against self-incrimination at their outer edge, whilst simultaneously exploring the foundation of corporate rights and the justification for claims which may be made. Thus, the *research question* demands the attention of developing jurisprudential thought in two areas which have significant contemporary resonance.

In fact, the *research question* can be broken down into five distinct sub-questions. In the *first sub-question*, the thesis asks whether it is possible to conceptualise a coherent model for mandatory self-reporting by a company within traditional understandings of the criminal law. The thesis does not challenge the statutory establishment of a legal duty to disclose suspicious information as antithetical to an understanding of criminal law which countenances the punishment of conduct by omission as well as acts of commission. Rather, it presents a critique of the extent to which a mandatory self-reporting requirement can be assimilated within a developing theory of omissions liability in criminal law.

After delineating the contours of the anti-money laundering regime ("AML regime") and, particularly, the reach of the mandatory self-reporting requirement in section 330(1) of POCA 2002, the *second sub-question* enquires whether, as one of the core liberties at common law, the rationales underlying the privilege against self-incrimination are sufficiently broad to engage with the mandatory reporting requirement. The extent of a company's ability to assert rights comes into sharp focus, in this instance, with reference to the exercise of the privilege against self-incrimination in the protection of the company's interests.

This gives rise to the *third sub-question*, since it would be surprising if the corporate ability to assert the privilege against self-incrimination inhabited a hermetically sealed space, separated from the generality of other corporate rights which a company may wish to assert. The thesis asks how the law recognises the ability of a company to assert rights in the protection of its interests, and if so, on what basis. The thesis presents an approach to the recognition of corporate rights which focuses on the value which the right protects. The purpose of the exploration is to develop an understanding of the way in which the law's recognition of corporate rights can be supported.

In this respect, the substance of the *third sub-question* and the *fourth sub-question* are closely related, with the *fourth sub-question* asking whether it is possible to develop a narrative which argues that the law should recognise the ability of a company to assert the privilege against self-incrimination as one of these rights in a larger basket of rights. This is closely followed by the *fifth sub-question* which addresses the heart of the *research question* whether the privilege against self-incrimination is engaged by the mandatory self-reporting

requirement in section 330(1) of POCA 2002, and if so, how a corporate claim to exercise the right is legally recognised.

1.2 CHAPTERS

1.2.1 Chapter 2 (Mandatory Reporting)

Chapter 2 explores the practice of self-reporting contextually. It begins by defining the notion of self-reporting as a practice distinct from the making of a plea bargain and a confession more traditionally associated with the effective operation of a mature criminal justice system. The chapter considers guidance on consensual corporate self-reporting by enforcement agencies and how corporate self-reporting operates in practice, with outcomes involving deferred prosecution agreements justified by reference to the public interest.

The chapter is foundational and establishes the legal framework for the corporate self-reporting of criminal conduct under the AML regime set out in Part 7 of POCA 2002. The legislation is complex, and the chapter explains that there are two reporting routes established by the legislation. The first involves a form of voluntary reporting. In order to avoid committing a money laundering offence (known as a prohibited act) contrary to sections 327(1), 328(1) and 329(1) of POCA 2002, the legislation provides that a person is exempt from criminal responsibility where information relating to the prohibited act is disclosed to the NCA before the act is committed. The second reporting route is set out in section 330(1) and is compulsory in nature. It involves the making of a SAR. Under this section, a person (individual and corporate) working in the regulated sector who fails to disclose information relating to another person's involvement in suspected money laundering commits a criminal offence.

The chapter focuses on the breadth of the mandatory requirement, and how it operates in the case of a company to capture the disclosure of self-incriminating information in certain circumstances. The scope for the legislation requiring the reporting of self-incriminating information and the criminal exposure of a company, its officers, and employees, is fully developed. The chapter uncovers a company's exposure to the risk of criminal prosecution in these circumstances. The origin of the obligation in section 330(1)

to self-report criminal conduct is traced from its international gestation into contemporary domestic law. The coercive nature of the statutory architecture is explained, and the legislative purpose underlying the reporting requirement is explored.

1.2.2 Chapter 3 (Theoretical Perspectives)

Chapter 3 addresses whether a mandatory reporting requirement to report suspicious money laundering conduct can be assimilated within the norms of omission liability in criminal law. This is the *first sub-question* to be considered in this thesis. Although the engagement of the privilege against self-incrimination with mandatory self-reporting supported by penal sanction is not dependent on its coherence with theoretical norms of criminal law, nevertheless the answer is relevant. A sound jurisprudential foundation for the mandatory reporting requirement assists the theoretician in gaining an understanding of the criminal peril against which the privilege against self-incrimination operates to protect.

The chapter explains how a duty to report suspected money laundering is most appropriately located in the recognition of a person's civic duty to support the State in the promotion of a just society by assisting in the detection of criminal activity. This duty is not limited to an individual. As a legal person, a company has duties too. It is, therefore, not difficult to locate mandatory reporting in the recognition of a person's perceived moral obligation to promote the interests of justice by assisting in the identification of criminal activity. This obligation is influenced by policy considerations which underpinned the old common-law offence of misprision. The offence required proof of the deliberate concealment of a person's knowledge of the commission of a felony, or where a person knowing of the criminal design refrained from disclosing it to a Justice of the Peace to prevent its commission.

With the offence of misprision swept away, a more sophisticated analysis is now required. Andrew Ashworth has placed the theoretical foundation for mandatory reporting of suspected money laundering in the discourse around civic obligation, and he begins with the premise that the criminal law captures an omission where there is a failure to carry

out a duty, whether or not the duty is reinforced by the criminal law.[1] Andrew Ashworth and Lucia Zedner posit whether mandatory reporting can be viewed as an example of a preventive criminal law since it serves to restrict future criminality involving the handling of proceeds of crime.[2] The question arises as to whether Ashworth's approach is valid where a self-report of criminal conduct is made by a corporate entity. In addition, the chapter considers whether coercive reporting of criminal conduct can be theorised through the prism of Hohfeldian rights and duties, common pool resources, the notion of nudges, and the economic theory of crime.

1.2.3 Chapter 4 (Privilege against self-incrimination)

This chapter addresses the *second sub-question* whether the rationales underlying the privilege against self-incrimination are sufficiently broad to embrace the criminal peril established by the mandatory reporting requirement in section 330(1) of POCA 2002.

The chapter begins with a critique of the application of the privilege against self-incrimination in the courts. Historically, the courts in England and Wales confined the application of the privilege to circumstances where a witness declines to answer questions either in court or during an investigation, in order to avoid real danger of prosecution for the commission of a criminal offence. Cases in common law jurisdictions are also reviewed. The European Court of Human Rights ("ECtHR") and the European Court of Justice ("ECJ") have tended to adopt a more liberal approach, and alongside the approach taken by the Supreme Court in the United States, an analysis of contrasting legal approaches forms a pertinent part of this critique. Whilst a narrow application of the privilege against self-incrimination suggests there is little engagement with the requirement for the mandatory self-reporting of criminal conduct, the chapter argues that this approach is too simplistic since it fails to acknowledge the rationales which support the contemporary recognition of the privilege. The boundaries of the privilege should be set by the perils against which it seeks to protect.

In developing this argument, the various rationales for supporting the privilege are fully explored. The origin of the privilege against self-incrimination is rooted in the Judeo-

[1] Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing 2013) 56–65.
[2] Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014) 100–101.

Christian tradition, and the objections to the continuing recognition of the privilege are thoroughly examined. The chapter discusses how contemporary academic and judicial thinking is more concerned about issues involving loss of privacy, individual dignity and personal autonomy than worries regarding the potential reliability of self-incriminating information.

1.2.4 Chapter 5 (Traditional conceptions of corporate rights)

In chapters 5, 6 and 7, the thesis interrogates the assumption embedded in the *research question* that a company has a right to assert the privilege against self-incrimination in appropriate circumstances. The assumption is easy to make but challenging to support. A company has multiple interests to protect, whether on behalf of itself, and on occasions, on behalf of others such as its officers and employees. The *third sub-question* explores the jurisprudential framework for the law's acknowledgment of these rights.

In addressing this topic, chapter 5 begins by reviewing the nature of corporate personhood and corporate personality. The chapter explores whether traditional conceptions of the corporate entity can sustain the recognition of corporate rights, and if so, on what basis. The chapter examines the relationship between rights and corporate personality with reference to the three theories which have customarily inhabited this space, namely corporate contract theory, corporate concession theory and corporate real entity theory. From a different perspective, the chapter examines whether the imposition of corporate criminal liability can contribute to an understanding of the nature of the corporate personality. Then, the chapter explores whether any intelligence can be derived from the judicial treatment of corporate rights in the United States, where corporate rights have been canvassed within the curtilage of constitutional rights.

Traditional corporate law theories are challenged by the tension which emerges in the cases between recognising corporate rights based on corporate personhood on the one hand and utilising corporate personhood as a vehicle for the protection of individual rights on the other. It is axiomatic that recognition of a company's rights cannot constitute a reflective image of individual rights, since certain rights – such as the right against torture guaranteed in Article 3 of the European Convention on Human Rights ("ECHR") – cannot be claimed by a corporate entity. The critique in this chapter makes

clear that traditional understandings of corporate personhood and corporate personality provide an insufficient platform on which a theory of corporate rights can be based. Whilst the existence of certain corporate rights (such as a right to property and a right to sue) are readily identifiable, in the absence of a thread which binds recognition of these rights, the basis on which a company can assert an entitlement lacks coherence and raises the risk of inconsistent outcomes.

1.2.5 Chapter 6 (Moral conceptions of corporate rights)

In this chapter, an alternative narrative for the formulation of corporate rights is presented. This narrative moves away from traditional notions of contract, concession, and real entity theories and delivers a coherent foundation for the recognition of corporate rights in a modern model which is fit for purpose. The declared intention is to provide a convincing basis for understanding why the law should extend its recognition of individual legal rights to a corporate person and enable a company to assert legal rights which facilitate the protection of its interests.

The answer, it is suggested, lies in conceptions of value which flow from functions which companies perform. As a participant in the corporate sector, a successful trading company contributes to the strength of the economy. Companies are the vehicles through which economic growth is generated, and when the value of the beneficial contribution of each company is aggregated, the positive contribution of the corporate sector to the national economy is immense. In terms of individual value, a successful company provides value to its company's officers and its employees by providing the means for their well-being. This approach posits that the State's appreciation of value in the flourishing of the corporate sector is reflected in its recognition of corporate rights. The benefit from the preservation of a strong corporate sector, composed of a collection of successfully trading companies, redounds to the State. From this perspective, the State has a clear interest in facilitating the prospering of corporate activity. Moreover, if corporate rights are left unprotected by law, the standing of a company is undermined, and harmful consequences follow. The company has intrinsic value to its officers and employees, and it is this value, or interest, which an assertion of corporate rights defends. The argument is consequentialist, and by virtue of the value they deliver, the State should treat companies with moral concern.

Although this narrative does not rest on the conception of a company as a moral agent, recognition that a company delivers benefits worthy of protection suggests that a company represents something more than an artificial legal construct through which business is conducted. In recent years, the increasing realisation of corporate personality has precipitated renewed academic interest in presenting a company as a moral agent, with implications for an understanding of the basis on which corporate rights can be founded. This represents a more controversial understanding of the notion of corporate personality, with an analysis which sees a company's claim to assert rights as deriving from a company's standing as a moral agent. The perceived status of a company as a moral agent provides a platform for the recognition of a basket of moral rights and catalyses a discussion about whether legal recognition should be afforded to some, or all, of these rights. An analysis of a corporate moral right through the prism of value assists in this determination.

1.2.6 Chapter 7 (Corporate privilege)

Having established a theoretical platform for the recognition of corporate rights, chapter 7 addresses the *fourth sub-question* by asking whether a company's ability to assert the privilege against self-incrimination should be recognised as one of these rights.

The chapter advances a sound theoretical foundation for the recognition of a corporate right which is rooted in an acknowledgement of value which an assertion of the privilege against self-incrimination protects, viewed from the triple perspectives of the State, a company, and a company's stakeholders. The chapter includes a critique of the judgments in the leading cases in common law jurisdictions where the ability of a company to assert the privilege has arisen. A study of the cases is interesting for three reasons. First, where a corporate right to assert the privilege is recognised, the cases illuminate the value of a company's right to assert the privilege which the law is willing to protect. Secondly, in cases where a court has denied a company a right to assert the privilege, the outcome demonstrates the attendant risk of harmful consequences which flow for a company and its stakeholders. Thirdly, the critique reveals the sharply divergent judicial approaches in this area. The different views reflect the division between those who see a company as having an ontological existence, and those who view the corporate entity as no more than

an artificial legal construct lacking a moral component. The conflicting judgments bear out the concern that the absence of a coherent narrative leads to inconsistent decisions across jurisdictions in the orbit of the common law.

Building upon the value-based analysis articulated in chapter 6, the problem of divergent outcomes is resolved if issues relating to the corporate ability to assert the privilege against self-incrimination is approached through a value-based analysis. The chapter argues that there is a sound basis for recognising that the privilege against self-incrimination falls into a basket of corporate rights which the law should acknowledge, within the terms of a modern morally based model focusing on the value which the exercise of a corporate assertion of the privilege protects. The chapter argues that a judicial approach which denies a company the ability to assert the privilege against self-incrimination is misconceived, unfair and unsustainable. Where a corporate right to assert the privilege is recognised, a company can choose between exercising the right or making voluntary disclosure. The ability to make this choice reflects the company's autonomy and its ability to determine how it should proceed. If the State denied a company's right to assert the privilege, it would significantly damage a company's standing and restrict its autonomy to act.

1.2.7 Chapter 8 (Engaging the privilege)

In chapter 8, the thesis addresses the *fifth sub-question* whether there is a sound theoretical basis for recognising the application of the privilege against self-incrimination to relieve a company from an obligation to make a mandatory self-report under section 330(1).

To date, neither the legislature nor the judiciary have addressed the question, and the potential engagement between the privilege against self-incrimination and mandatory self-reporting under the AML regime cannot be assumed. The chapter develops a sound narrative which supports this engagement and explains how the peril of criminal prosecution arises when a self-incriminating SAR is made. The niceties of the arguments are elegantly enlarged when the maker of a mandatory self-report is a corporate entity since the narrative in a SAR may incriminate both the company and its officers and employees. It is only through the deeds of its officers and employees that a company can act.

The chapter contends that a corporate entity is entitled to assert the privilege against self-incrimination in answer to the mandatory reporting requirement. As a preliminary step in the argument, the legislative purpose underlying the mandatory reporting requirement and its coercive elements are considered. Next, the chapter discusses the incriminating nature of the reporting process, and how a corporate reporter becomes exposed to possible, and on occasions, inevitable, self-incrimination. This is followed by a consideration of the factors militating strongly in favour of the law's recognition of the privilege against self-incrimination. These factors demonstrate how, and why, the law recognises, and should recognise, an assertion of the privilege as a valid response to the mandatory reporting requirement. The counterarguments are reflected in a comprehensive discussion of the decision of the Supreme Court in *Beghal v DPP*[3] and duly answered. Assuming the privilege against self-incrimination can be raised by a company in response to the mandatory reporting requirement, the mechanism by which the law gives effect to this claim is identified.

1.3 METHODOLOGY

The methodology of the thesis follows a classical model, developing the research in seven substantive chapters (chapters 2 to 8) covering distinct topics which combine to deliver a holistic consideration of the subject. These chapters are bracketed by introductory and concluding chapters. The introductory chapter (chapter 1) identifies the research question and sub-questions, and the concluding chapter (chapter 9) presents a summary response to the research questions which the thesis has posited, drawing together the conclusions developed in the preceding chapters.

In terms of research method, the research is doctrinal, drawing on academic literature pertaining to the theorizing of criminal law, the privilege against self-incrimination and corporate rights. The legislative framework for mandatory self-reporting is illustrated by a review of some "hard law" and "soft law" sources. Although section 330(1) of POCA 2002 also applies in Northern Ireland and Scotland, the focus of the research fixes on sources from England and Wales. Occasional references are made to international

[3] *Beghal v DPP* [2015] UKSC 49.

sources, either in support of an argument or to demonstrate a difference. Essentially, however, the thesis draws on the common law heritage of the tri-partite relationship between an individual, a corporate entity and the State which is firmly rooted in the jurisprudential physiology of England and Wales.

Since the thesis focuses on the theorizing of criminal law, the privilege against self-incrimination and corporate rights, an empirical exploration of the operational aspects of the mandatory self-reporting requirement has not been undertaken. Consideration of the theoretical issues raised in the thesis would not be advanced by an empirical study. Whatever the outcome of empirical work, whether it reveals there are numerous instances of corporate self-reporting or none, the theoretical challenges presented by the enactment of the mandatory self-reporting requirement remain extant. Assuming the privilege against self-incrimination is engaged in section 330(1), consideration of whether the application of the privilege should be abrogated or otherwise statutorily restricted by the legislature might be influenced by the outcome of an empirical study, but this is another matter. The thesis engages with the topic at a prior stage, focusing on whether the privilege against self-incrimination is engaged in the first instance.

1.3.1 Companies

The scope of the research is narrow in the sense that it relates to companies, and not individuals, operating in the commercial sector in the UK, and their engagement with the AML regime in Part 7 of POCA 2002. These individuals and companies form part of "the regulated sector" to which the mandatory self-reporting requirement in section 330(1) applies.[4] The regulated sector is defined in Schedule 9 Part 1 of POCA 2002,[5] as amended by the Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities) Order 2007.[6]

Occasional references are made to jurisprudence in the United States where the term "corporation" is used. Typically, in the United States a corporation denotes a large

[4] POCA 2002, s 330(3) requires a disclosure to be made where suspicious information has become known 'in the course of a business in the regulated sector'.
[5] POCA 2002, s 330(12).
[6] The Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities) Order 2007, SI 2007/3287, arts 1, 2. Amendments to the definition of the regulated sector are referenced in The Money Laundering and Terrorist Financing (Amendment) Regulations 2019, SI 2019/1511, reg 15.

company or group of companies, whereas in the United Kingdom the word "corporation" means any company of any size. In this thesis, the word "corporation" is employed in the British sense and is treated interchangeably with the word "company". The words "shareholder" and "member" are used interchangeably to denote a person who holds a propriety interest in a company's ownership.

The word "stakeholder" is used generically to mean company directors, employees, shareholders, creditors, and debtors. More frequently, in the context of mandatory self-reporting and the possibility of self-incrimination, company officers[7] and employees are referenced.

1.3.2 Other compulsory disclosure regimes

The research is limited to the corporate application of the mandatory reporting requirement in section 330(1) of POCA 2002, and the thesis does not address whether the potential engagement of the privilege against self-incrimination with section 330(1) has broader implications for other disclosure regimes in the UK or elsewhere.[8]

A review of these provisions would burden the thesis with an unnecessary consideration of differently worded legislation and the exercise has not been undertaken for this reason.[9] There are differences between the legislative objectives to be accomplished by compulsory disclosure regimes, the use to which disclosed information is put, the gravity of criminal exposure, and the evidential threshold for compulsory reporting which is applied. Also, there are differences in the category of persons to whom each reporting

[7] Companies Act 2006, s 1437 defines an "officer" of a company 'as including a director, manager or (company) secretary …'.

[8] Mandatory reporting of suspicious information relating to terrorist property is required by the Terrorism Act 2000, ss 19, 21A, 38B and 39. Pursuant to the Sanctions and Anti-Money Laundering Act 2018, delegated legislation can require professional and financial services providers to disclose knowledge or reasonable cause to suspect that there has been a breach of sanctions. The Syria (Sanctions) (EU Exit) Regulations 2019, SI 2019/792, reg 69(6) is an example. In Scotland, the Criminal Justice and Licensing (Scotland) Act 2010, s 31 criminalises the failure to report knowledge or suspicion that another person has committed an offence involving serious organised crime. In Ireland, under the Offences Against the State (Amendment) Act 1998, s 9(1), a person is guilty of an offence if he fails to disclose information which he knows or suspects will materially assist in the apprehension, prosecution, or conviction of another person for a serious offence, or in preventing the commission of such an offence.

[9] Additional reporting regimes may be established in due course. Luke Danagher has suggested the creation of a new offence of failing to report cartel activity, along the lines of the mandatory reporting requirement set out in the POCA 2002, s 330(1). See Luke Danagher, 'Strict Liability and the Mens Rea of Cartel Crime' [2020] Cr L R 789, 802.

requirement applies, the statutory language used in establishing the reporting requirement, and the extent to which exemptions and defences are acknowledged. In respect of each disclosure regime, a corporate ability to assert the privilege against self-incrimination requires a discrete analysis. If a company is entitled to assert the privilege against self-incrimination in answer to the mandatory self-reporting requirement in section 330(1), it does not follow that an equivalent entitlement can be raised in response to a self-reporting requirement in a differently configured regime, and *vice versa*. For these reasons, this thesis does not travel beyond section 330(1) of POCA 2002 and the application of the UK's AML reporting regime.

The thesis does not make any assertion whether the engagement of the privilege against self-incrimination with the mandatory reporting requirement in section 330(1) is *sui generis* or not.

1.3.3 Privilege against self-incrimination

The burden of the thesis concentrates on the question whether a company can assert the privilege against self-incrimination in response to the mandatory reporting requirement contained in section 330(1) of POCA 2002. Although the narrative of a corporate self-report may reference the criminal activities of a company's officers and employees, the personal responsibility of a company's officers and employees is not the focus of concern. The exposure of a company's officers and employees may also arise in a case where a company makes a mandatory disclosure which is not self-incriminating, but nonetheless the narrative exposes the company's officers and employees to criminal investigation and potential prosecution. It is not part of the thesis to argue that a company should be permitted, or required, to assert the privilege against self-incrimination to protect its officers or employees in these circumstances.

Nor does the thesis address similar issues relating to the extent to which an individual may seek to assert the privilege where information incriminates an individual's relative or friend.[10]

[10] In Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, OUP 2010) 154–55, the authors questioned whether, in connection with the mandatory reporting requirement under the Terrorism Act 2000, s 38B, compulsory disclosure was objectionable where the suspected person was the report-maker's sibling.

These issues raise important questions concerning the place where the margins of the privilege against self-incrimination should be drawn. However, an exploration of the margins would distract attention from the central proposition in the thesis which argues that the privilege against self-incrimination is engaged where a company is required to make a mandatory report which is self-incriminating, in the strict sense of incriminating the company as a legal entity as opposed to officers or employees who represent it. The thesis is focused on a corporate right to assert the privilege, rather than any perceived right of an individual to demand that a company should act to protect their personal interests by asserting a claim to the privilege on their behalf.

Further, the thesis resists a temptation to consider whether there are circumstances in which it is morally inappropriate for an individual or a company to assert the privilege against self-incrimination where there is a legal right to do so. Although these issues merit careful reflection, their consideration would distract from the core of the thesis and its concentration on the ability of a company to assert the privilege against self-incrimination as of right.

Finally, in terms of methodology, the thesis has eschewed any consideration of the competing public interests which militate for and against the legislative abrogation of the privilege.

In Chapter 4, contemporary judicial attitudes towards the continuing recognition of the privilege against self-incrimination are referenced. Similarly, in Chapter 7, circumstances in which the legislature has established a statutory framework for disclosure of information which abrogates the privilege against self-incrimination are considered. In these cases, the legislature has sought to strike a balance between the public interest in securing access to evidential material on the one hand, and balancing rule-of-law considerations such as privacy rights and the privilege against self-incrimination on the other. Whilst the competing public interests are acknowledged, they are not pertinent in the context of the thesis. There is no statutory abrogation or limitation of the privilege in section 330(1) of POCA. The sole question is whether the law should recognise a company's entitlement to assert the privilege against self-incrimination at common law in response to the mandatory reporting requirement in section 330(1), as of right.

1.4 AIMS

The research has three aims.

First, the research sets out to contribute to a developing understanding of the UK's AML regime and its enforcement through the criminal law, with an especial concern to ensure that fundamental rights such as the privilege against self-incrimination are not compromised in an effort by the State to support the detection, investigation, and prosecution of financial crime. As an aside, the research highlights the increasing use of the criminal law to compel individual and corporate citizens to initiate the disclosure of information to law enforcement authorities giving rise to suspicious conduct, and its assimilation into an emerging theory of responsibility for omissions.

Secondly, and integral to delivery of the first aim, the research seeks to show that multiple rationales support the privilege against self-incrimination and their application are not limited to the presentation of questions during legal proceedings or answering questions or producing documents in investigations under compulsion. The research aims to demonstrate that, notwithstanding some judicial scepticism over the place of the privilege against self-incrimination in a modern legal system, there is sound theoretical support for the contemporary application of the privilege where a corporate person is exposed under the UK's AML legislation to criminal sanction for failing to divulge self-incriminating information.

Thirdly, the research seeks to show that there is a strong conceptual foundation for the protection of corporate rights, to include the privilege against self-incrimination, which is materially strengthened when the corporate entity is perceived as a legal construct which delivers value to individuals as well as the State. The research sets out to establish that the law's denial of a company's claim to assert the privilege against self-incrimination in answer to the mandatory self-reporting requirement in section 330(1) of POCA 2002 would be unfair and unjust and undermine a company's autonomy to function.

The thesis is innovative in its development of a coherent narrative which strongly supports the right of a company to assert the privilege against self-incrimination as a

shield in response to the mandatory self-reporting requirement in section 330(1) of POCA 2002. It is also innovative in its approach to the recognition of corporate rights by developing a consistent approach by application of a value-based analysis.

CHAPTER 2
MANDATORY SELF-REPORTING

2.1 INTRODUCTION

The central theme of the thesis is that the law should recognise a corporate claim to assert the privilege against self-incrimination as a shield in response to the statutory obligation in section 330(1) of POCA 2002 requiring a company to report information to the State authorities which gives reasonable grounds to suspect the company (acting through its officers and employees) has been engaged in money laundering. Unless relieved by the privilege against self-incrimination, the law stipulates that a company must report knowledge or suspicion of its own criminal wrongdoing. The central question is whether the privilege against self-incrimination should be recognised as a shield to corporate mandatory self-reporting where money laundering is, or is suspected to be, taking place.

The focus of this chapter is to establish the legal framework for the corporate self-reporting of criminal conduct under the AML regime set out in Part 7 of POCA 2002. The legislation is complex, and a sharp distinction is drawn between voluntary self-reporting of criminal activity and mandatory reporting. In addition to the detailed legislative provisions in Part 7 of POCA 2002, the chapter considers the mandatory self-reporting requirement contextually, comparing and contrasting guidance on consensual corporate self-reporting by enforcement agencies and how corporate self-reporting operates, with outcomes involving a deferred prosecution agreement (known by its acronym, "DPA") justified by reference to the public interest.

In the first part of the chapter, the place of self-reporting in criminal and regulatory processes is reviewed. Requirements to self-report wrongdoing form a significant component of many professional regulatory regimes for individuals and companies alike. Moreover, in recent years, the practice of a company voluntarily self-reporting its involvement in unlawful activity has been integrated into the criminal justice system. Companies are incentivised to make reports disclosing self-incriminating information to the State authorities, and there is a strong perception that these arrangements promote the public interest in the detection, investigation, and prosecution of financial crime. An individual or company receives a lesser sanction for criminal wrongdoing as a reward for

co-operation, and the State authorities enjoy a reduction in investigative costs and the elimination of the risk-bearing element associated with a criminal trial.[11] Plea negotiation and unforced confessions are also mechanisms by which self-incriminating statements enter the trial process. Under section 144 of the Criminal Justice Act 2003, a court is obliged to consider the fact that an offender has pleaded guilty when passing sentence. The Sentencing Guidelines make clear that the sentencing discount can be as much as one-third of the sentence which would otherwise have been imposed.[12] In each of these instances, the self-incriminating admission is entirely voluntary.

This form of voluntary self-reporting is different to the making of a mandatory report. The common characteristic is the disclosure of self-incriminating information, and cases can be envisaged where the making of a mandatory disclosure to one State authority (such as the NCA) may catalyse the submission of a voluntary disclosure to another organ of the State (such as the Serious Fraud Office ("SFO")), but conceptually the two forms of reporting are inherently distinct. In law, voluntary self-reporting is an avowedly consensual activity, whereas mandatory self-reporting is unambiguously forced by imposition of law. The choice for a person legally obliged to self-report is binary, between obeying the law and breaking the law, at risk of penal sanction. In the absence of any circumstance which would excuse a failure to report, this is no choice at all. The public interest factors supporting voluntary self-reporting are also different from those which underpin the imposition of a mandatory disclosure requirement. In the case of voluntary self-reporting, the efficacy of the criminal process is the paramount consideration. The State authorities are concerned to ensure that the criminal justice system secures a desired result by encouraging those who break the law to address their offending behaviour and remediate. In the case of mandatory self-reporting, it is the ability of the State authorities to detect the commission of criminal activity which acts as the motivating determinant. Whilst the outcome is the same in both cases, the means by which it is achieved is quite different.

The dichotomy between voluntary self-reporting and mandatory self-reporting is reflected in the framework which supports the UK's AML regime. The framework is

[11] L Kaplow and S Shavell, 'Optimal Law Enforcement with Self-Reporting of Behaviour' (1991) National Bureau of Economic Research, Working Paper No 3822.
[12] Sentencing Council Guidelines, Overarching Guidelines, Reduction in sentence for a guilty plea <www.sentencingcouncil.org.uk/crown-court/> accessed 23 April 2021.

explored in the second part of this chapter, where the sharp distinction between voluntary reporting and mandatory reporting becomes apparent. The chapter demonstrates the width of the AML mandatory reporting requirement in section 330(1) and the exposure of companies to the possibility of reporting self-incriminating information.

Accordingly, the chapter has two objectives. First, the chapter seeks to place mandatory self-reporting within the broader context of self-reporting in the criminal law. Secondly, the chapter seeks to critique the mechanisms for disclosure of self-incriminating information within the UK's AML regime, and, in particularly, how a company can become exposed to the commission of a criminal offence where it fails to disclose information which is contrary to its interests.

2.2 SELF-REPORTING

2.2.1 Defining self-reporting

The term "self-reporting" is not a technical phrase known to the legal lexicon. Rather, it is a phrase used in everyday language to describe a situation where a person makes a report in the form of a descriptive account of some particular matter to a third person and the substance of the account relates to the person who is making the report. It is the application of the reflexive pronoun which serves to identify the reporter as the subject of the account.

In recent years, the UK has moved in the direction of imposing self-reporting obligations in certain situations.[13] In some cases, the reporting obligation is derived from a "hard law" requirement in the sense that its origin is to be found in primary or secondary legislation, whereas in other cases the reporting obligation is a "soft law" requirement associated with the regulatory process. Invariably a "hard law" reporting obligation is supported by a criminal sanction whereas breach of a "soft law" reporting requirement triggers regulatory enforcement action, typically some form of disciplinary process resulting in the imposition of a civil penalty or other non-custodial measure.

[13] M Hall, 'An Emerging Duty to Report Criminal Conduct: Banks, Money Laundering, and the Suspicious Activity Report' (1995–96) 84 Ky L J 643; Sandra Guerra Thompson, 'The White-Collar Police Force: Duty to Report Statutes in Criminal Law Theory' (2002) 11 Wm & Mary Bill of Rts Jo 3.

An example of a "hard law" reporting obligation is found in the context of health and safety at work, under regulation 3(1) of the Reporting of Injuries, Disease and Dangerous Occurrences Regulations 1995,[14] now replaced by Schedule 1 of the Reporting of Injuries, Disease and Dangerous Occurrences Regulations 2013.[15] Pursuant to this provision, Parliament has required an employer to report to the State authorities every occasion where a person died or suffered a major injury as a result of an accident arising out of or in connection with work. Failure to make a report constitutes a criminal offence contrary to section 33(1) of the Health and Safety at Work Act 1974. Parliament established a similar criminal offence in the Chemical Weapons (Notification) Regulations 1996[16] made under the Chemical Weapons Act 1996, where a company produces a listed chemical without obtaining prior authorisation. Another "hard law" example, mentioned in Chapter 1, is contained in legislation governing the imposition of financial sanctions. As already noted, Parliament has imposed a mandatory self-reporting obligation on a financial institution to inform the relevant law enforcement authority where it knows, or has reasonable grounds to suspect, that a natural or corporate person has committed a breach of financial sanctions.

The provision of financial services is regulated by a combination of "hard law" and "soft law" provisions, with soft law requirements for self-reporting market irregularities. Sections 64 and 65 of the Financial Services and Markets Act 2000 empower the Financial Conduct Authority ("FCA") to issue a Code of Practice for the purpose of determining whether or not a person's conduct complies with the statement of principle to which the FCA requires an approved person to adhere. Breach of a statement of principle triggers exposure to disciplinary action against an approved person for misconduct resulting in the imposition of a fine. The mandatory reporting obligation is foreshadowed in Principle 2.11 of the FCA's Principles for Business which requires an approved person to deal with its regulator in an open and co-operative way, and to disclose anything relating to the firm of which the regulator would reasonably expect notice.[17]

[14] Reporting of Injuries, Disease and Dangerous Occurrences Regulations 1995, SI 1995/3163.
[15] Reporting of Injuries, Disease and Dangerous Occurrences Regulations 2013, SI 2013/1471.
[16] Chemical Weapons (Notification) Regulations 1996, SI 1996/2503.
[17] FCA Handbook, 2018, PRIN 2.1 <www.handbook.fca.org.uk/handbook> accessed 27 July 2020.

Section 15 of the FCA's Supervision Sourcebook offers more specific guidance on the reporting requirements as they apply to both individuals and firms. Paragraph 15.3.1 requires an authorised firm to notify the appropriate regulator immediately it becomes aware of information which (amongst other things) reasonably suggests that it could have a significant adverse impact on the firm's reputation or could result in serious financial consequences to the UK financial system or to other firms. Paragraphs 15.3.8 provides further guidance on the types of matters which need to be reported to the FCA in accordance with the mandatory obligation established in Principle 2.11. These matters include, but are not limited to, giving the appropriate regulator notice of any significant failure in the firm's systems or controls, including those reported to the firm by the firm's auditor.

Additional provisions contain guidance on the types of matters which need to be reported to the FCA. These embrace notification by a firm of a significant breach of a regulatory rule, breach of any requirement imposed by statute, awareness that an employee may have committed a fraud against one of its customers or a fraud against it, the identification of any irregularities in its accounting or other records, whether or not there is evidence of fraud, and also where it suspects that one of its employees may be guilty of serious misconduct concerning his honesty or integrity and which is connected with the firm's regulated activities or ancillary activities.[18] There is special provision where an investment firm or credit institution suspects transactions relating to market abuse. A mandatory report must be made to the regulator where are reasonable grounds to suspect that a transaction might constitute market abuse, with the firm or institution examining each transaction on a case-by-case basis.[19] In these instances, the mandatory report may incriminate the firm as well as its employees.

The law is replete with self-reporting "soft law" regulatory regimes. Another illustration of a "soft law" self-reporting requirement is the requirement in the National Health Service (NHS) Commissioning Board Standard Contract for 2020–21 where the Government has included a mandatory reporting requirement on all NHS and non-NHS providers of services to NHS patients to comply with an expanded duty of candour. The mandatory requirement is found in regulation 20 of the Health and Social Care Act 2008

[18] FCA Handbook, 2018, SUP 15.3.11 and SUP 15.3.17.
[19] FCA Handbook, 2016, SUP 15.10.

(Regulated Activities) Regulations 2014[20] which requires a service provider to report to the regulator, amongst others, where a patient safety incident has occurred. Similarly, a barrister is obliged to self-report to his relevant regulatory body any circumstances in which he has been guilty of serious professional misconduct.[21]

The fact that an individual or a company is required to make a self-report to a regulatory authority does not necessarily carry the implication that the maker of the report has committed a criminal offence. The level of culpability admitted by the maker of a self-report depends on a series of variables, such as the nature and extent of the reporting requirement, as well as any nuanced language which the reporter may choose to use. Although there will be some cases where the content of the report has an inculpatory dimension for the reporter, to the point where the content amounts to an admission of criminal wrongdoing on the part of the reporter, this form of self-report is distinguishable from a written confession or the entering of a plea of guilty when charged with a criminal offence.

Whilst conceptually it is uncontroversial to posit that a confession may be made voluntarily and without prompting, invariably a written confession is made in response to an accusation presented by a third party, typically an officer of the State, that a person has committed a criminal offence. By the time an accusation is made, an investigation will have revealed the existence of reasonable grounds for suspecting that the accused has committed a criminal offence, and the purpose of the accusation is to seek the accused's response to it. As for a plea of guilty, this represents no more than a direct response to an allegation of criminal conduct put to an accused by a Court after a prosecutor has initiated the criminal process against him. In these respects, making a written confession and entering a plea of guilty contrast sharply with the making of a self-report following discovery of the existence of certain facts and not in response to an accusation. The role played by self-reporting is different. A self-report will often pre-date any external knowledge of an irregularity or wrongdoing, and the maker of the self-report will have taken the initiative in bringing the matter to the attention of the State authorities.

[20] Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, SI 2014/2936.
[21] Bar Standards Board Handbook (2020, Version 4.4) r C65.7.

2.2.2 Incentivising corporate self-reporting

Any review of the landscape for self-reporting of criminal conduct would not be complete without an appreciation of the encouragement afforded by the State to a company to make voluntary confession of its criminal wrongdoing.

During the last sixty years, the Commissioners of Inland Revenue have been the most pervasive users of this approach, dating back to the practice which came to be known as "the Hansard Statement" (or "reading Hansard") where the Commissioners would offer taxpayers suspected of committing fraud an opportunity to settle their outstanding liabilities and penalties without criminal prosecution in return for a full confession of previous wrongdoing. The language of the Hansard statement, which was drawn from a commitment given to Parliament in 1944 by the then Chancellor of the Exchequer, Sir John Anderson, was unmistakably clear:

> [T]he Commissioners have a general power under which they can accept pecuniary settlements instead of instituting criminal proceedings in respect of fraud or wilful default alleged to have been committed by a taxpayer. They can, however, give no undertaking to a taxpayer in any such case that they will accept a settlement and refrain from instituting criminal proceedings even if the case is one in which the taxpayer has made full confession and has given full facilities for investigation of the facts. They reserve to themselves discretion in all cases as to the course they will pursue, but it is their practice to be influenced by the fact that the taxpayer has made a full confession and has given full facilities for investigation into his affairs and for examination of such books, papers, documents or information as the Commissioners may consider necessary.[22]

Today, HM Revenue & Customs ("HMRC") offers a similar arrangement. The scheme is known as Code of Practice 9 and the Contractual Disclosure Facility.[23] HMRC invites a taxpayer to admit to committing tax fraud, in return for which HMRC agrees not to criminally investigate and prosecute the taxpayer for the fraud he discloses in the Contractual Disclosure Facility contract. HMRC also offer several "disclosure facilities"

[22] HC Deb 6 July 1944, vol 401, col 1313.
[23] HMRC, Code of Practice 9 'HM Revenue & Customs investigations where we suspect tax fraud' (06/14).

which enable a taxpayer to voluntarily disclose hidden assets with a view to making a financial settlement of outstanding tax liabilities and penalties with extremely limited exposure to criminal prosecution. HMRC makes clear that whilst it retains the right to pursue a criminal investigation in cases of tax fraud, "If you make a full disclosure of your deliberate conduct, we will not pursue a criminal investigation with a view to prosecution."[24]

The investigation and prosecution of cartels is another long-established instance of a prohibited economic activity where corporate self-reporting has been handsomely rewarded by the State. Leniency programmes are a major component of almost all anti-cartel regimes internationally, and the UK is no exception. In March 2014, the Competition and Markets Authority ("CMA") published guidance which indicated that it would offer automatic immunity to the first business cartel member who came forward with information relating to an infringement would be granted total immunity from criminal prosecution and payment of fines.[25]

Today, the most influential self-reporting guidance for companies emanates from the SFO. Current guidance issued by the SFO indicates that a voluntary self-report of corporate wrongdoing will be "taken into consideration as a public interest factor tending against prosecution" where it forms part of a "genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice."[26] Voluntary corporate self-reporting is also highly influential when deciding whether the SFO should enter into a DPA with a company. The guidance makes clear that "a company would only be invited to enter … negotiations if there [is] full cooperation with [the SFO's] investigations".[27] Under a DPA, the pursuit of criminal proceedings is suspended where a company agrees to abide by various terms and conditions which involve, amongst other things, payment of a large fine and corporate remediation.[28]

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[24] ibid 2.

[25] CMA Guidance, 'Cartels: Come Forward and Apply for Leniency' (March 2014) <www.gov.uk/guidance/cartels-confess-and-apply-for-leniency> accessed 6 July 2020.

[26] Serious Fraud Office, 'Corporate self-reporting' (October 2012) <www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/> accessed 6 July 2020.

[27] Serious Fraud Office, 'Deferred Prosecution Agreements' (undated) <www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/> accessed 6 July 2020.

[28] Crime and Disorder Act 2013, sch 17 paras 1, 2.

In each case, a corporate entity cooperates with the State by abandoning any claim to assert the privilege against self-incrimination, in return for a significantly increased chance that its confession to corporate wrongdoing will result in a more lenient outcome. A company is heavily incentivised to confess to its wrongdoing by the offer of a reward, sustained by the justification that the public interest is best served by this disposal. The SFO is required to apply to the Crown Court for a declaration that the making of the DPA "is likely to be in the interests of justice".[29] In practice, the Crown Court has little difficulty in concluding that this threshold has been crossed. First, as a result of self-reporting, the existence of corporate criminality has been exposed. Secondly, due to the making of a DPA, the high cost of an expensive criminal investigation and trial will have been avoided. Thirdly, the SFO has certainty of outcome and the State benefits from payment of a punitive fine. Fourthly, the miscreant company is compelled to remediate. As Sir Brian Leveson PC explained in the first case in the UK where a DPA was made between the SFO and Standard Bank:

> It is obviously in the interests of justice that the SFO has been able to investigate the circumstances in which a UK registered bank acquiesced in an arrangement (however unwittingly) which had many hallmarks of bribery on a large scale and which both could and should have been prevented. Neither should it be thought that, in the hope of getting away with it, Standard Bank would have been better served by taking a course which did not involve self-report, investigation and provisional agreement to a DPA with the substantial compliance requirements and financial implications that follow. For my part, I have no doubt that Standard Bank has far better served its shareholders, its customers, and its employees (as well as all those with whom it deals) by demonstrating its recognition of its serious failings and its determination in the future to adhere to the highest standards of banking. Such an approach can itself go a long way to repairing and, ultimately, enhancing its reputation and, in consequence, its business. It can also serve to underline the enormous importance which is rightly attached to the culture of

[29] ibid para 7(1).

compliance with the highest ethical standards that is so essential to banking in this country.[30]

The development of this form of negotiated justice for the resolution of corporate crime cases has its critics, and anxieties have been voiced whether criminal justice is accomplished in this way. One key concern is whether there is differential justice in terms of equality and fairness in the treatment between wrongdoing committed by an individual and criminal activity committed by a company.[31] A consideration of these issues falls beyond the scope of this thesis. Suffice it to note that in any consideration of mandatory reporting under the AML regime, the contemporary incentivisation of a company to voluntarily self-report its criminal wrongdoing forms part of the wider narrative when assessing the place of mandatory self-reporting as an enforcement tool.

2.3 ORIGIN OF MANDATORY REPORTING

2.3.1 UK

The voluntary reporting mechanism in the AML legislation was first introduced into the UK in 1986 and it applied where a person knew or suspected that another person was handling the proceeds of drug trafficking. Under section 24(1) of the Drug Trafficking Offences Act 1986, it became a criminal offence to assist another person (A) to retain the proceeds of drug trafficking, knowing, or suspecting that A is a person who carries on or has carried on drug trafficking or has benefited from drug trafficking. The offence was punishable by a maximum of fourteen years imprisonment on indictment. Section 24(3)(b) contained a statutory defence which applied where a person disclosed to a State authority that he knew or suspected the monies were derived from drug trafficking. Under this legislation, there was no mandatory reporting requirement. Instead, reporting of knowledge or suspicion was utilised as an incentive to insulate a person against the criminal consequences of handling property where he knew or suspected it represented the proceeds of drug trafficking. The impact of the money laundering offence in section

[30] *Serious Fraud Office v Standard Bank plc*, Case No U20150854 (Southwark Crown Court, 30 November 2015) [66].
[31] C King and N Lord, *Negotiated Justice and Corporate Crime* (Palgrave Macmillan 2018).

24 was limited since it applied only to knowledge or suspicion of drug trafficking and no other criminal activity.

The position changed seven years later when sections 29 to 31 of the Criminal Justice Act 1993 inserted three money laundering offences into section 93 of the Criminal Justice Act 1988, namely, sections 93A, 93B and 93C. In each case, by virtue of section 93A(7) the money laundering offences were expressed to apply to the proceeds of criminal conduct "which constituted an offence to which this Part of this Act applies or would constitute such an offence if it had occurred in England and Wales or (as the case may be) in Scotland". The criminal offences to which this Part of the Act applied were referenced in section 71(9)(c) of the Criminal Justice Act 1988 which specified that this Part of the Act applied to all indictable offences with the exception of drug trafficking and terrorism offences, and the offences listed in Schedule 4 to the Act, such as copyright and social security offences. In this way, money laundering offences were extended to cover not only the proceeds of drug trafficking, which were contained in the drug trafficking legislation, but also the proceeds of other serious criminal conduct such as fraud and corruption. However, there was no mandatory reporting requirement for suspected money laundering in the early drug-trafficking legislation.

Mandatory reporting was introduced in 1993 when section 18 of the Criminal Justice Act 1993 was enacted. This section inserted a new section 26B into the Drug Trafficking Offences Act 1986 introducing for the first time a mandatory reporting requirement, the breach of which constituted a criminal offence punishable by a maximum of five years imprisonment and/or an unlimited fine. The statutory rubric for section 26B(1) described the offence as "Failure to disclose knowledge or suspicion of money laundering". This provision remained in force for ten months between 1st April 1994 and 2nd February 1995, when it was superseded in identical terms by section 52(1) of the Drug Trafficking Act 1994. There are two aspects to note about the mandatory reporting requirement in these statutory provisions. First, the mandatory reporting offence applied only where a person suspected that another person was laundering the proceeds of drug trafficking. In this sense, the legislation was asymmetrical since although there were separate money laundering offences for drug-trafficking and serious criminal conduct, the mandatory reporting provision applied only to the proceeds of drug-trafficking. Secondly, the reporting requirement was triggered by a person's knowledge or suspicion that another

person was engaged in money laundering. The test was subjective, and there was no suggestion that a person would be guilty of the criminal offence of failing to report where he did not know or suspect money laundering but there were, objectively speaking, reasonable grounds for such suspicion.

The introduction of mandatory reporting in the money laundering legislation was introduced into Parliament on a false prospectus. When the provision establishing mandatory reporting of drug money laundering was introduced into the House of Lords for its second reading on 3rd November 1992, the Minister of State for the Home Office, Earl Ferrers, made clear that clause 18 of the then Criminal Justice Bill had to be included in order to ensure that the UK fully implemented the requirements of the European Council on Money Laundering which had been agreed in 1990.[32] In fact, this was not correct. What the European Council Directive on Money Laundering[33] required was an administrative provision which established mandatory reporting. There is nothing in the Directive to suggest that a failure to report should constitute a criminal offence, and this remains the position in subsequent Directives. But more to the point, Earl Ferrers devalued the difference between voluntary reporting to avoid the commission of a money laundering offence, and mandatory reporting as a free-standing obligation. When winding up the debate for the Government, Earl Ferrers addressed a point made by Lord Nelson, saying:

> My noble friend also asked whether the reporting of suspicious transactions had to be mandatory. Institutions disclose information to protect themselves from existing money laundering offences. Only a small change is necessary to meet the terms of the Directive; in other words, to introduce a special offence of failing to disclose knowledge or suspicion of money laundering.[34]

In actuality, the change from permissive reporting to mandatory reporting of money laundering suspicions could hardly be described as "only a small change". On the contrary, there is a huge difference between voluntary reporting and mandatory reporting. With reference to any proper understanding of criminal law, the change was seismic.

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[32] HL Deb 3 November 1992, vol 539, cols 1347–88.
[33] Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [1991] OJ L166/77.
[34] HL Deb (n 32) col 1387.

2.3.2 Financial Action Task Force

The origin of a mandatory reporting requirement can be traced to the establishment in July 1989 of the Financial Action Task Force (FATF) when the G7 leaders (United States, Japan, Germany, France, United Kingdom, Italy, and Canada) and the President of the European Commission met in Paris to discuss the threat which money laundering posed to the international banking system. This was followed in May 1990 by the FATF's publication of a comprehensive programme of Forty Recommendations to fight money laundering.[35] These Recommendations included the provision of a gateway for financial institutions to make a disclosure to an enforcement authority in circumstances where suspicious activity involving the proceeds of criminal conduct was suspected. At the outset in 1990, the FATF members could not agree between themselves as to the circumstances which should trigger a reporting requirement. The United States was keen to build upon its domestic system which required mandatory reporting of all currency transactions above a certain monetary threshold. However, most countries opposed the bluntness of this approach and instead argued for a suspicion-based system which would be more cost-effective and expose fewer citizens to the scrutiny of the law enforcement authorities.[36]. The Forty Recommendations were revised in 1996 when the reporting gateway was upgraded from a discretionary recommendation to a mandatory reporting requirement after the FATF concluded that some financial institutions were using the absence of compulsion as an excuse for ignoring suspicious behaviour.[37] Reflecting the change, Recommendation 15 stated that "If financial institutions suspect that funds stem from a criminal activity, they should be required to report promptly their suspicions to the competent authorities".[38]

There were further revisions to the Forty Recommendations in 2003 and 2012, and today the mandatory reporting requirement is found in Recommendation 20.[39] The Interpretative Note to Recommendation 20 advises the international community that the

[35] FATF, 'Annual Report 1990–91' (Paris 13 May 1991) 4.
[36] Guy Stressens, *Money Laundering, A New International Law Enforcement Model* (CUP 2000) 97–98, 161–62; S Mortman, 'Putting Starch in European Efforts to Combat Money Laundering' (1992) 60 Fordham L. Rev. S429, fn 55.
[37] FATF, 'Annual Report 1995–96' (Paris 28 June 1996) Annex 1, p 7.
[38] ibid Annex 1, p 26.
[39] FATF Recommendations, 'International Standards on Combating Money Laundering and The Financing of Terrorism & Proliferation' (February 2012, updated June 2019).

reporting requirement must be a direct mandatory obligation. An indirect reporting requirement, where a report is made voluntarily to avoid prosecution for the commission of a money laundering offence, is not sufficient to satisfy the FATF Recommendation. [40]

Significantly, the FATF Recommendations remain silent as to how the mandatory obligation to report suspicion of money laundering is to be enforced. There is nothing to suggest that an administrative or regulatory requirement would not be sufficient, providing that the reporting was obligatory and not voluntary. The requirement to enact criminal offences are confined to offences relating to the handling of criminally obtained monies and not a failure to report a money laundering suspicion.[41] Rather, discussion focused on the nature of serious criminal offences to be treated as predicate offences for the purpose of the money laundering offence.

2.3.3 European Union Directives

The European Union ("EU") was alive to the important place of mandatory reporting in the anti-laundering regime when enacting the EU Directive on Money Laundering in June 1991.[42] The Recitals foreshadowed that the Directive would "institute a mandatory system of reporting suspicious transactions which ensure[d] that information [wa]s transmitted to the … authorities without alerting the customers concerned …".[43] More particularly, Article 6 required member States to ensure that financial institutions and their directors and employees cooperated fully with the authorities responsible for combating money laundering "by informing those authorities, on their own initiative, of any fact which might be an indication of money laundering". However, the Directive was not prescriptive about the way in which the new mandatory system was to be enforced. The Recitals included a reference to combating money laundering "mainly by penal means",[44] and applying the guidance set out in Recommendation 3 of the FATF Recommendations, Article 2 required member States to ensure that "money laundering as defined in this Directive is prohibited". However, in so far as other requirements such as the reporting obligation were concerned, Article 14 left the matter open, requiring no more than each

[40] FATF Recommendations (2012) Interpretive Note 20(4), 80.
[41] FATF Recommendations (2012) Recommendation 3 and Interpretive Note 3, 32–33.
[42] Council Directive 91/308/EEC (n 33).
[43] ibid Recital 15.
[44] ibid Recital 3.

member State to "take appropriate measures to ensure full application of all the provisions of this Directive" and to "determine the penalties to be applied for infringement of the measures adopted pursuant to this Directive".

The EU has maintained this position in subsequent Directives. Article 1(2) of the Fourth Directive on Money Laundering agreed in 2015 simply provides that "Member States shall ensure that money laundering and terrorist financing are prohibited".[45] There is no provision for criminalising a failure to report suspected money laundering in the Sixth Directive on Money Laundering,[46] which is the most recent Directive. Instead, as Article 1 makes clear, the Directive establishes minimum rules for defining criminal offences and identifying predicate offences for money laundering which will be uniform across member States.

Several EU member States have established an administrative and not a criminal sanction where a person fails to report a suspicion of money laundering to the enforcement authorities. In Belgium, criminal offences are triggered only where a person commits a substantive money laundering offence which involves the handling of the proceeds of crime. Where a person fails to report a suspicion of money laundering but does not commit a substantive money laundering offence, the enforcement authorities may impose an administrative fine of anywhere between Euro 250 and Euro 1,250,000.[47] A similar position pertains in Italy, where a failure to notify a suspicious transaction to the competent authority is punishable by an administrative fine ranging between 1% and 40% of the value of the relevant transaction.[48] In France, whereas substantive money laundering offences have been inserted into the Criminal Code, the reporting of suspicious transactions is required pursuant to the Monetary and Financial Code, which is an administrative code.[49] In Germany also, the substantive money laundering offences

[45] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L141/73.
[46] Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law [2018] OJ L285/22.
[47] Berger & Anckaert, 'Belgium' in Srivistava, Simpson & Moffatt (eds), *International Guide to Money Laundering Law and Practice* (4th edn, Bloomsbury 2013) 468.
[48] Fornari & Borsani, 'Italy' in Srivistava, Simpson & Moffatt (eds), *International Guide to Money Laundering Law and Practice* (4th edn, Bloomsbury 2013) 922.
[49] Freedman, 'France' in Srivistava, Simpson & Moffatt (eds), *International Guide to Money Laundering Law and Practice* (4th edn, Bloomsbury 2013) 613, 618, 628–29.

are found in the Criminal Code. The reporting obligation is found in the Anti-Money Laundering Act, in respect of which violation constitutes a regulatory offence punishable by an administrative fine of up to Euro 100,000.[50] In Spain, the substantive money laundering offences are included in the Criminal Code as a form of receiving stolen goods, contrasting with a breach of the reporting requirement which is classified as a very serious regulatory infringement punishable by a fine of between Euro 150,000 and a maximum fine of 5% of an entity's equity, or double the amount of the transaction, or Euro 1.5 million, whichever is the greatest.[51]

Compared with these European jurisdictions, a sentence of imprisonment for a maximum period of five years for committing the "failure to report" offence in section 330(1) of POCA 2002 is a disproportionate legislative response.

2.4 PROCEEDS OF CRIME ACT 2002

2.4.1 History

The current UK law on money laundering offences is to be found in Part 7 of POCA 2002. The new legislation was foreshadowed in a Cabinet Office report which recommended the alignment of drugs and non-drugs money laundering offences.[52] The Cabinet Office also recommended that the use of disclosures needed to be improved, noting that at the time of its report there was no requirement to make an "all crime" disclosure.[53] The Government endorsed the Cabinet Office's approach and decided to introduce an "all crime" mandatory reporting requirement applying to all persons working in the financial, or more accurately, the regulated, sector.[54] Also, the obligation would be triggered not only where a person subjectively knows or suspects money laundering, but where, objectively, there are reasonable grounds for knowing or suspecting that another person is engaged in money laundering.[55] These significant changes were introduced in

[50] Lorenz, 'Germany' in Srivistava, Simpson & Moffatt (eds), *International Guide to Money Laundering Law and Practice* (4th edn, Bloomsbury 2013) 663, 669.
[51] Rubio & Olivares, 'Spain' in Srivistava, Simpson & Moffatt (eds), *International Guide to Money Laundering Law and Practice* (4th edn, Bloomsbury 2013) 1202, 1212–13.
[52] Cabinet Office, 'Performance and Innovation Unit Report: Recovering the Proceeds of Crime' (June 2000) para 9.62.
[53] ibid para 9.12.
[54] Home Office, Proceeds of Crime Bill, Publication of Draft Clauses (CM 5066, 2001) para 8.5.
[55] ibid para 8.6.

Part 7 of POCA 2002, and the new legislation was implemented on 24 February 2003 pursuant to article 3 of the Proceeds of Crime Act 2002 (Commencement No.4, Transitional Provisions and Savings) Order 2003.[56]

With reference to the issue of reporting a money laundering suspicion, there are two reporting avenues set out in Part 7 of POCA 2002. The first avenue involves the making of an "authorised disclosure". Although the failure to make an authorised disclosure may render a person liable for the commission of a money laundering offence, the making of an authorised disclosure is not mandatory. The legislation nudges a person into making a disclosure to the State authorities of the suspected handling of criminal property, but the disclosure is not compelled. This contrasts with the second reporting avenue, where a failure to make a SAR constitutes the commission of a criminal offence, irrespective of whether an act of money laundering is taking place. The obligation to make a SAR is mandatory, and subject to certain exemptions involving suspicious information covered by legal privilege and reasonable excuse, criminal liability ensues if the disclosure is not made.

2.4.2 Voluntary reporting

Referencing the provisions for voluntary disclosure in the AML regime, the starting point is the prohibitions set out in sections 327(1), 328(1) and 329(1) of POCA 2002 which specify the acts of money laundering that constitute criminal offences under the Act. The prohibited acts described in these sections are widely configured. They embrace laundering by a third party who was not involved in the commission of the predicate offence, as well as the "self-laundering" of criminal property where the laundering – i.e., the prohibited act – is performed by the same person who committed the predicate offence. The inclusion of self-laundering within the scope of money laundering offences accords with international standards. Paragraph 6 of the Interpretive Note to Recommendation 3 of the FATF Recommendations contemplates that the definition of money laundering offences may be sufficiently broad to encompass self-laundering of criminal property, whilst recognising that "some countries may provide that the offence of money laundering does not apply to persons who committed the predicate offence,

[56] Proceeds of Crime Act 2002 (Commencement No.4, Transitional Provisions and Savings) Order 2003, SI 2003/120.

where this is required by fundamental principles of their domestic law".[57] This is not the position in the UK where it is well established that in appropriate cases a person may be prosecuted for the commission of the predicate offence as well as laundering the proceeds of the offence which he has committed.[58]

Section 327(1) prohibits a person from concealing, disguising, converting, or transferring criminal property, or removing criminal property from the jurisdiction. An act of conversion is construed broadly and connotes dealing with property, such as paying money, or withdrawing money from, a bank account.[59] Section 328(1) is a broader prohibition and captures the entering into or becoming concerned in an arrangement which facilitates the acquisition, retention, use or control of another person's criminal property. "An arrangement" embraces some form of specific conduct which assists a third party in his efforts to launder money.[60] The third offence in section 329(1) is wider still in its application. It prohibits a person from acquiring, using, or possessing criminal property. As a self-launderer, a thief obtains an interest in property he stole since, at the time of stealing the property, he claims a possessory interest in it.[61] If any of the money laundering offences are committed, a person is subject to a maximum sentence of fourteen years imprisonment and/or an unlimited fine.[62] Money laundering is defined in section 340(11) of POCA 2002 to mean an act which constitutes a criminal offence under sections 327, 328, or 329, as well as any act which constitutes an attempt, conspiracy or incitement to commit one of these offences, or the aiding, abetting, counselling or procuring the commission of such an offence.

The common thread running through the money laundering offences is the notion of criminal property which is defined as property that "(a) constitutes a person's benefit from criminal conduct or … represents such a benefit (in whole or part and whether directly or indirectly), and (b) the alleged offender knows or suspects that it constitutes or represents such a benefit".[63] "Criminal conduct" is conduct "which (a) constitutes an offence in any part of the United Kingdom, or (b) would constitute an offence in any part

[57] FATF (n 41).
[58] CPS, 'Legal Guidance, Money Laundering Offences' (updated 1 March 2018) <www.cps.gov.uk/legal-guidance/proceeds-crime-act-2002-part-7-money-laundering-offences> accessed 20 July 2020.
[59] *R v Fazal* [2009] EWCA Crim 1697.
[60] *CPS v Dare* [2012] EWHC 2074 (Admin).
[61] *R v Rose; R v Whitwam* [2008] 1 WLR 2113.
[62] POCA 2002, s 334(1)(b).
[63] ibid s 340(3).

of the United Kingdom if it occurred there".[64] This latter provision expands the reach of the money laundering offences to include property which derives from conduct committed lawfully abroad, but where the conduct if transposed to the UK, would be unlawful. An obvious example is the case of a company which receives sales from a contract obtained through payment of a bribe made in a country where private sector bribery is not illegal. However, the conduct would be captured by the extra-territorial reach of sections 1 and 12 of the Bribery Act 2010.

Where an offence of money laundering is alleged, in addition to proving performance of the prohibited act, a prosecutor must establish two elements. First, a prosecutor must show that the property involved in the prohibited act represented the benefit from criminal conduct.[65] Secondly, a prosecutor must establish that the defendant knew or suspected this was the case.[66] The type of criminal offence which constituted the predicate offence and gave rise to the existence of criminal property does not need to be shown. It is sufficient for a prosecutor to show that criminal property was derived from conduct of a specific kind, or circumstantially there is an irresistible inference that the property must have been derived from criminal activity.[67] There is further guidance for a prosecutor in section 340(4) of POCA 2002. This provides that for the purpose of committing the money laundering offences, "[I]t is immaterial (a) who carried out the conduct; (b) who benefitted from it; (c) whether the conduct occurred before or after the passing of this Act". Finally, in noting the expansive application of the money laundering offences, the threshold test for the formation of suspicion or reasonable grounds for suspicion is the recognition of a possibility which is more than fanciful that the property consists in whole or in part of a person's benefit from criminal conduct.[68] This is a low threshold in terms of the mental state which must be established.

In respect of each offence, a person is exempted from criminal liability where he makes an "authorised disclosure" externally to the State authorities or internally within his organisation to a nominated officer, and the State authorities or internal nominated officer grant "appropriate consent" to the commission of the prohibited act in question.[69]

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[64] ibid s 340(2).
[65] *R v Montila* [2004] UKHL 50; *R v GH* [2015] UKSC 24.
[66] *R v Saik* [2006] UKHL 18.
[67] *R v Anwoir* [2008] EWCA Crim 1354.
[68] *R v Da Silva* [2007] 1 WLR 303.
[69] POCA 2002, ss 327(2)(a), 328(2)(a), 329(2)(a).

The meaning of an "authorised disclosure" is given in section 338. To constitute an "authorised disclosure", it is sufficient for a person to disclose that the property involved in the prohibited act is criminal property.[70] By section 338(5), a disclosure to a nominated officer is a disclosure to a person nominated by the discloser's employer to receive authorised disclosures made during the discloser's employment.

There is no statutory requirement to reveal the basis on which knowledge or suspicion has been formed, although in reality this is unavoidable since it is difficult to see how the State authorities can decide whether to give "appropriate consent" to the commission of a prohibited act without knowing the basis on which knowledge or suspicion that the property was criminal property was formed. "Appropriate consent" is defined in section 335(1) to mean consent given externally by the State authorities, or internally by a nominated officer, to do a prohibited act. Although the nominated officer is authorised to give consent for a prohibited act to take place, where an authorised disclosure is made internally to the nominated officer, section 336(1) provides that a nominated officer must not give appropriate consent unless he had made his own prior disclosure to the State authorities, and the latter have given the nominated officer consent to proceed. Whether an employee discloses externally to the State authorities or internally to his nominated officer, the decision whether to give appropriate consent rests, unsurprisingly, with the State authorities.

Whilst the legislation distinguishes sharply between voluntary reporting and mandatory reporting, it fails to acknowledge any difference in reporting obligation between the position of a third party who handles suspected criminal property and the position of a predicate criminal who has committed the underlying criminal offence which gives rise to the existence of the property. Both the third party and the predicate criminal are treated alike in terms of the reporting obligations. This is true in the case of a company as well as an individual. The exposure to criminal liability for the commission of a predicate offence and a money laundering offence in the case of a company which has received payments pursuant to a contract obtained by a bribe is no different from that of a thief who steals money from a bank with a sack of cash marked "swag" swung over his

[70] ibid s 338(1(a).

shoulder. In both instances, if criminal liability for the commission of a money laundering offence is to be avoided, an authorised disclosure will need to be made.

Realistically, as already noted, it is a company rather than the predicate criminal which will be contemplating the making of a voluntary self-report to the State authorities, directly to the SFO and/or by making an authorised disclosure to the NCA. However, whilst a company incriminates itself in this situation, the privilege against self-incrimination will not be engaged. The company is not obliged to incriminate itself pursuant to the authorised disclosure model. Circumstances may dictate the advantages for a company in making a self-report, but a self-incriminating disclosure remains a voluntary act. The State authorities may offer indirect advantages to a company for making a self-incriminating disclosure, but there is no element of compulsion. Accordingly, this thesis does not advance an argument that the privilege against self-incrimination should be engaged in a case involving voluntary reporting. Unlike the position for a person or company operating in the regulated sector, in the case of the making of an authorised disclosure, patently the company has a choice.

2.4.3 Mandatory reporting

The mandatory reporting offences applying to those working in the regulated sector are set out in sections 330 to 332 of POCA 2002 and are designated as "failure to disclose" criminal offences punishable by a maximum term of five years imprisonment and/or unlimited fine when convicted on indictment.[71]

Pursuant to section 330(1) of POCA 2002, a person commits a criminal offence if, when working in the course of a business in the regulated sector, he fails to make a SAR when he knows or suspects, or has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering.[72] The offence is committed where a person fails to disclose reasonable grounds that another person is engaged in money laundering, even though no money laundering is taking place. It is the reasonable grounds for suspecting money laundering rather than the fact of money laundering which must be reported.[73]

[71] ibid s 334(2).
[72] ibid s 330(1) and (2).
[73] *Ahmad v HM Advocate* [2009] HCJAC 60.

The information on which knowledge or suspicion is based must have come to the person during his business in the regulated sector.[74] In addition, under section 330(3A), the obligation to make a report arises where a person can identify the other person suspected to be engaged in money laundering or locate the whereabouts of any of the laundered property. The reporting obligation also arises where a person believes, or it is reasonable to expect him to believe, that the information giving rise to the knowledge or suspicion will or may assist in identifying that other person or the whereabouts of laundered property. By section 340(4), the SAR must be made to the discloser's internal nominated officer, or externally to the State authorities. Section 330(5) stipulates that the mandatory report must disclose "(a) the identity of the other person who is suspected to be engaged in money laundering, (b) the whereabouts of the laundered property, so far as he knows it, and (c) the information or other matter [on which knowledge or suspicion has been based]." Section 330(5A) clarifies that the laundered property refers to property forming the subject-matter of the money laundering that a person knows or suspects, or has reasonable grounds for knowing or suspecting, another person to be engaged in. Again, the SAR is made externally to the State authorities or internally, to a nominated officer.[75] There is no statutory prohibition against the appointment of a company as a nominated officer. However, guidance issued by HMRC suggests that the role should not be performed by an external party. The guidance adds that the nominated officer should be a senior person in the organisation who can act independently when determining when a SAR should be made.[76]

Regulated sector business is defined to include almost all commercial activity in the financial sector. More specifically, the regulated sector embraces business undertaken by credit institutions, financial institutions, auditors, insolvency practitioners, external accountants and tax advisers, solicitors and barristers when participating in financial or real property transactions, trust or company service providers, estate agents, letting agents, high value dealers who accept cash payments of Euro 10,000 or more, art market participants and casinos.[77]

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[74] POCA 2002, s 330(3).
[75] ibid ss 330(4), 330(9).
[76] HMRC, 'Guidance on Money Laundering Regulations' (26 June 2017) <www.gov.uk/guidance/money-laundering-regulations-nominated-officers-and-employee-training> accessed 21 July 2020.
[77] POCA 2002 sch 9, and The Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities) Order 2007, SI 2007/3287. Amendments to the definition of the regulated sector

Section 330 provides for four exemptions from criminal liability under the mandatory reporting requirement. First, under section 330(6)(a) there is no obligation to report where a person has a reasonable excuse for not making the report. Secondly, where information has come to a legal adviser or other relevant professional adviser in legally privileged circumstances, there is no obligation for the information to be reported pursuant sections 330(6)(b), 330(7B), 330(10) and 330(11). Thirdly, a person is exempt from liability under sections 330(6)(c) and 330(7) where he does not know or suspect that another person is engaged in money laundering, and he has not been provided with professional training by his employer. Fourthly, pursuant to section 330(7A), a person does not commit a criminal offence where he fails to make a mandatory report if he knows, or believes on reasonable grounds, that the money laundering is occurring in a particular country or territory outside the UK, and the money laundering is not unlawful under the criminal law applying in that country or territory. Also, the activity must not fall within a narrow category of offences specified by the Secretary of State for the Home Department.

There is no statutory provision in the "failure to disclose" offence which references the privilege against self-incrimination or limits the use of a SAR or any information derived from a SAR in any criminal or administrative proceedings which may subsequently be brought against the maker of the SAR and/or or any persons, individual or corporate, identified in the SAR. Section 339ZI of POCA 2002, introduced by section 12 of the Criminal Finances Act 2017, provides that any statement made in response to a further information order may not be used in evidence against the information provider in criminal proceedings against him. This provision concerns the response to a further information order made by a Magistrates' Court on the application of the State authorities where access to specific information not included in a SAR is sought. It would be incoherent if the evidential use of further information were restricted in circumstances where the antecedent provision of information was not, both having been obtained in a coercive manner.

are referenced in The Money Laundering and Terrorist Financing (Amendment) Regulations 2019, SI 2019/1511, reg 15.

There are two further mandatory reporting obligations contained in Part 7 of POCA 2002 which have been enacted to cover the situation where either a voluntary disclosure or a mandatory disclosure has been made internally to a nominated officer. In both instances, depending on the facts of the case, a mandatory obligation to make a SAR may be triggered. The legislative objective is to place a mandatory reporting obligation on a person operating in a commercial organisation (both inside and outside the regulated sector) who has responsibility for ensuring the organisation's compliance with the making of external disclosures to the State authorities. The internal nominated officer becomes a conduit under the legislation for the transmission of suspicious information which he has received internally to the State authorities.

The first additional mandatory reporting obligation is found in section 331(1) of POCA 2002 and applies to a nominated officer who has received a disclosure from an employee acting pursuant to the mandatory disclosure obligation in section 330(1). If the nominated officer knows or suspects, or has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering, the nominated officer must submit a SAR to the State authorities.[78] The mandatory disclosure obligation filed under this section applies only where a nominated officer is working in the regulated sector. The second additional mandatory obligation in section 332(1) applies to other internal nominated officers where they are operating outside of the regulated sector. Again, if the nominated officer knows or suspects that another person is engaged in money laundering, a mandatory disclosure to the State authorities must be made.[79]

The difference between the two provisions in sections 331 and 332 is both subtle and significant. Consistent with the test for making a disclosure under section 330 where the discloser is working in the regulated sector, the threshold in section 331 for forming suspicion is an objective standard. The position is different where a nominated officer is required to make a disclosure under section 332. Here, the threshold test is subjective, so that it aligns with the circumstances where an authorised disclosure is made under sections 327(2)(a), 328(2)(a) and 329(2)(a). This, it will be remembered, is a voluntary disclosure which triggers an exemption from liability for the commission of a money laundering offence where the mental ingredient is entirely subjective. Although at first

[78] POCA 2002, s 331(4).
[79] ibid s 332(4).

blush the provisions in sections 331 and 332 of POCA 2002 appear unbalanced, in fact they accurately reflect the dichotomy between the subjective and objective thresholds for voluntary reporting[80] and mandatory reporting[81] which have been written into Part 7 of the Act.

2.4.4 A company's obligation to report

The mandatory reporting obligation in section 330(1) applies to a company as well as an individual. The legislation does not make any distinction between reporting money laundering suspicions by individuals and reporting suspicious by a corporate entity. Throughout Part 7 of POCA 2002, the obligation to act is placed on "a person" who is defined in Schedule 1 of the Interpretation Act 1978 to include "a body of persons corporate or unincorporated". It follows that both natural persons and companies are equally affected by the voluntary and mandatory reporting provisions set out in Part 7 of the Act. A company officer's or senior employee's knowledge or suspicion of money laundering, or failure to recognise reasonable grounds for suspecting money laundering, binds a company where the officer or senior employee can be said to constitute the company's directing mind for this purpose.[82] The application of the mandatory reporting obligation to a company is consistent with Interpretive Note 3 (7 d & e) of the FATF Recommendations. This states that criminal and administrative liability and sanctions should apply to legal persons, without prejudice to the criminal liability of natural persons.[83]

As an instructive example of the imposition of corporate criminal liability for failing to make a mandatory disclosure, the High Court in New Zealand recorded a conviction against a company for failing to report suspicious transactions under section 92 of the Anti-Money Laundering and Counterfeiting Financing of Terrorism Act 2009. The company operated a money remittance and currency exchange business. There were 311 suspicious transactions in question, to the value of around NZ$53 million, equivalent to around £27.5 million.[84] As well as imposing significant fines on the director and

[80] ibid ss 327(2)(a), 328(2(a), 329(2(a), 332.
[81] ibid ss 330, 331.
[82] Tesco Supermarkets Ltd v Nattrass [1972] AC 153 (HL).
[83] FATF (n 41).
[84] Calculated at an exchange rate of 0.52 NZ$ to the UK pound.

underlying client's agent, the Court fined the company NZ$2.55 million (equivalent to around £1.3 million). The Judge rejected an argument that fines on the director and company would be duplicative since the legislation contemplated separate penalties for individuals and companies. The company was convicted as a principal offender, and the director and client's agent were secondary parties to the offending.

If the company had made a mandatory disclosure in accordance with its statutory obligation, the company would have incriminated itself, its director and the client's agent, in relation to the commission of criminal offences involving the handling of multiple suspicious transactions. The sensitivity of the matter was rendered more acute by the fact that the client's agent was the director's mother. Notwithstanding, in the absence of any consideration of the privilege against self-incrimination, by requiring a mandatory disclosure to the State authorities the law expected the company to incriminate itself, its director and the director's mother, jointly and severally, in relation to the commission of these serious criminal offences.[85] It follows that, pursuant to the mandatory disclosure obligation, the scope for a company making a mandatory disclosure which contains self-incriminating information is significant, and it is not necessarily limited to a breach of money laundering regulations.

2.4.5 Self-incrimination and the reporting obligation in section 330

In the case of an individual, a question arises as to whether the mandatory disclosure requirement captures a failure to report where the person obliged to make a SAR is the same person as the person engaged in money laundering. In its plain meaning, where section 330(2) uses the pronoun "he" to designate the person obliged to make a report in order to avoid committing an offence of failure to disclose, this person is clearly distinguishable from "another person" engaged in money laundering. There are two persons contemplated in section 330(2), not one. On this analysis, if an obligated individual is the sole criminal participant engaged in money laundering, no issue of self-incrimination arises since the mandatory obligation to make a disclosure is not triggered. Here, there is no "other" person in respect of whom the report could be made.

[85] *R v Jiaxin Finance Limited* [2020] NZHC 366.

In practice, often more than one person is involved in criminal offending. If a person working in the regulated sector handles proceeds of criminal conduct along with another person, the requirement to make a mandatory disclosure is engaged. There are two people involved in this scenario – the obliged individual, and another person with whom he has acted – and both are engaged in money laundering. When a person working in the regulated sector articulates the money laundering narrative, there will be cases where, inevitably, he incriminates himself. This is exactly what would have happened in *R v Jiaxin Finance Limited*[86] if a mandatory disclosure had been made by the director of the company in his personal capacity as a person working in the regulated sector. The narrative would have recorded an acceptance that he had caused his company to conduct a series of suspicious transactions without conducting adequate customer due diligence and making a SAR, to the prejudice of his own, as well as his mother's and the company's, interests.

The scope for the reporter's potential criminal liability as a secondary participant is wide and includes responsibility for encouraging or assisting criminal activity contrary to sections 44 to 46 of the Serious Crime Act 2007. Whilst the imposition of secondary liability requires proof of an intention to encourage or assist, the evidential burden is not difficult to discharge. As the Court of Appeal in England and Wales has made clear, knowledge of a company's offence, plus an ability to control the company's actions together with a decision not to exercise such control, may constitute an aiding and abetting of the company's offence.[87] Therefore, to return to *R v Jiaxin Finance Limited*,[88] if the director was aware of the suspicious nature of the transactions, he would have intended to encourage or assist the company in executing the transactions, without undertaking sufficient customer due diligence and making a mandatory disclosure of suspected money laundering to the State authorities. The legislator may not have intended to establish a mandatory reporting regime which compelled a company to self-incriminate and incriminate others, but on a plain reading of the statutory text, this is the outcome which follows.

Thus, in a case involving the mandatory self-reporting of criminal conduct by a company, there are three candidates for incrimination. First, there is the company, as the principal

[86] ibid.
[87] *R v J F Alford Transport Ltd* [1997] 2 Cr App R 326.
[88] *Jiaxin* (n 85).

offender with responsibility for handling criminal property, and/or committing the underlying predicate offence. Secondly, there are the company's officers and employees whose actions fix the company with criminal liability and who are exposed as encouraging or assisting the company's actions. Thirdly, there may be associated individuals whose involvement in the predicate offending is revealed in the narrative of the company's self-report.

The width of the corporate self-reporting obligation in cases of serious financial crime is demonstrated by positing an unexceptional hypothetical case of a board of directors of a financial institution such as a bank discovering that one of its senior employees acting in collusion with a director has been engaged in criminal conduct involving making false representations to the financial markets in an effort to increase corporate profits and, in turn, dishonestly inflate their personal annual bonuses. The bank knows or suspects, or has reasonable grounds for knowing or suspecting, that other persons – its senior employee and director – are engaged in money laundering. The information has come to the attention of the bank's audit committee, and subsequently its board of directors, during the bank's business in the regulated sector. As well as identifying the relevant employee and director, the bank has a shrewd idea of the whereabouts of the laundered property, which in the case of dishonestly making false representations to the financial markets in an effort to increase corporate profits and personal annual bonuses, is retained in the bank's own bank account. In these circumstances, because the bank is operating in the regulated sector, there is a mandatory reporting obligation resting on the bank to self-report the criminal conduct of its director and senior employee, both of whom are sufficiently senior to have embroiled the bank itself in the commission of a serious criminal offence for corporate as well as personal gain. A similar situation arose in the case involving Standard Bank and allegations of bribery committed by a subsidiary company in Tanzania. The case proceeded as a self-report to the SFO and a DPA was made. However, the matter first came to light when Standard Bank made a SAR five days before it decided to approach the SFO.[89]

To further illustrate how a corporate obligation to self-report can arise, other examples of companies operating in the regulated sector and required to make a mandatory self-

[89] ibid; *Serious Fraud Office v Standard Bank plc*, Case No U20150854 (Southwark Crown Court, 30 November 2015) [16] (Sir Brian Levenson P).

report can be posited. Criminality around a breach of economic sanctions provides an instructive example. Suppose an associate in a bank receives a secret payment from a customer for providing him with banking services in breach of an economic sanction issued by HM Treasury. The secret commission constitutes criminal property in the hands of the associate, and when the associate's conduct comes to the attention of the bank, there are reasonable grounds for the bank to know or suspect that the associate is a person who is engaged in money laundering. If a mandatory report is made pursuant to section 330(1), in addition to providing incriminating information against the associate, the bank would be providing self-incriminating information which acknowledged that it had provided financial services in breach of an economic sanction. Also, in so far as the bank obtained any financial benefit from the arrangement made by the associate with the sanctioned person, the bank would have acquired possession of criminal property. In the absence of making a voluntary disclosure, the bank would commit a continuing money laundering offence contrary to section 329(1) of POCA.

Another illustration of mandatory corporate self-reporting may involve a company operating a company within the regulated sector such as an estate agency business. If a sales agent employed by the company receives a bonus payment as part of his salary which is calculated by reference to the number of properties the agent has sold, and in one or more instances the sales agent has dishonestly made misrepresentations to purchasers during a course of dealing with them, the need to make a corporate self-report arises. Like the banker, the sales agent receives a benefit from criminal conduct, and leaving aside the question of whether the company is liable in criminal law for the dishonest representations which the sales agent has made, potentially the company has an exposure to the commission of a money laundering offence from the time when it knows or suspects that the sales agent has acted dishonestly. This is because monies received from dishonestly obtained sales would represent the benefit from criminal conduct at the time when they are paid to the company. In this situation, the question of the company's liability for money laundering depends on whether the company knew or suspected that the monies had been dishonestly obtained.

This scenario can be replayed with any company operating in the regulated sector, such as an art gallery where a sales agent sells a painting by dishonestly misrepresenting its provenance. Or where a firm of solicitors discovers that a solicitor has deliberately mis-

recorded time and inflated an invoice which has been paid by a client. When discovered, the firm knows that it has come into possession of criminal property. The same considerations in the application of the mandatory reporting requirement under section 330(1) will arise. In these examples, unless relieved by the exercise of the privilege against self-incrimination, a company is compelled to provide self-incriminating information as a hidden consequence of the mandatory reporting requirement set out in section 330(1) of POCA. In the company's possession, the information is private and highly sensitive. The company must determine how it responds to the conduct of its miscreant employee as well as resolve matters with the company's customer, in the best interests of the company. Making a confidential settlement with the customer, and taking disciplinary action against the employees, are options the company may wish to consider, without involving the State authorities if the privilege against self-incrimination can be engaged.

Pursuant to section 330(3), the mandatory reporting obligation is triggered where the information giving rise to knowledge or suspicion that another person is engaged in money laundering comes to the company in the course of its business. Internally, the information may come to the company as a result of confidential internal processes which have identified suspected wrongdoing, triggering an investigation. Information received from a whistle-blower falls into this category. Alternatively, information could come to the company's attention from an external source. For example, the company's professional advisers such company's accountants may share information with the company which gives rise to reasonable grounds for suspecting that another person is engaged in money laundering, Whilst the requirement is clear in section 330(3) that the information must come to the company "in the course of a business in the regulated sector", information communicated from reports in the media or resources available on the internet may prompt enquires which give rise to knowledge or suspicion that another person is engaged in money laundering. Information triggering an enquiry may also be passed to a company by one of its stakeholders, or a counterparty in a transaction.

The prospect of corporate self-incrimination in response to the reporting requirement in section 330(1) is recognised beyond peradventure and, absent any right to assert the privilege against self-incrimination, the prospect of a company divulging self-incriminating information by reference to the acts or omissions of its officers and

employees, as well as incriminating the same officers and employees simultaneously, remains extant.

2.4.6 Self-incrimination under the reporting obligations in sections 331 and 332

The same issue does not arise under the mandatory reporting obligations set out in sections 331(1) and 332(1) of POCA 2002 since in both cases the reporting obligation fixes on "a person nominated to receive disclosures", in contrast to the reporting obligation in section 330(1) which applies to all persons working in the regulated sector, individual and corporate, who come into possession of information about suspected money laundering. Whether the nominated officer is individual or corporate,[90] when the nominated officer makes the SAR, no issue of self-reporting arises. This is because the persons making the suspicious activity report under sections 330(1) on the one hand, and sections 331(1) and 332(1) on the other, will be different. Under section 330(1), the person operating in the regulated sector, in this instance a company, is required to report the suspicious acts of its officers and employees, which may establish the company's criminal culpability in the process, whereas under sections 331(1) and 332(1), where a nominated officer makes a SAR in identical terms, no criminal exposure for the nominated officer arises. The outcome in this scenario is unhappy because the nominated officer would be reporting incriminating information about the company as his employer and his co-workers, but the key point, for the purpose of this analysis, is that unless the nominated officer is himself criminally implicated as a participant in the wrongdoing,[91] the information reported under sections 331(1) and 332(1) would not be *self*-incriminating.

2.5 CONCLUSION

The review of the AML regime which has been undertaken in this foundational chapter establishes the differences between the two avenues for reporting money laundering

[90] It is not clear whether a company may be appointed as a nominated officer. Guidance issued by the NCA contemplates that a company may make a suspicious activity report on behalf of another company within the group. NCA, 'SAR Online User Guidance' (v 4.1, February 2021) <www.nationalcrimeagency.gov.uk/who-we-are/publications/498-sar-online-user-guidance-february-2021/file> accessed 3 March 2021, para 2.6. Whether an independent company may be appointed by a person working in the regulated sector to act as its nominated officer is moot.

[91] In this event, if the mandatory reporting obligation engages the privilege against self-incrimination, the nominated officer could assert the privilege in his own right, as an individual.

suspicions. The key difference is that voluntary reporting is consensual, whereas mandatory reporting is not. The legal provisions governing voluntary reporting and mandatory reporting are complex, and the legislative framework established in Part 7 of POCA 2002 presents several challenges which need to be addressed. Criminal law is the instrument chosen by the legislature to enforce compliance with the mandatory reporting requirement, by the introduction of three "failure to report" offences in sections 330(1), 331(1) and 332(1) of POCA 2002.

Detailed consideration of the provisions in Part 7 of POCA 2002 has exposed other matters, as it is clear that the mandatory reporting requirement in section 330(1) is sufficiently wide to compel a company to report information which is self-incriminating, and which may incriminate its officers and employees. In the case of an individual, the mandatory reporting requirement can present awkward moments where there is a relationship between the reporter and the other person who is suspected of involvement in money laundering. Unlike the position with a company, no issue of self-incrimination arises since the incriminating information relates to another reporter and not himself. In the case of a company, the position is different. By making a mandatory disclosure, a company self-incriminates by disclosing the wrongful conduct of its officers and employees, and the individual culpability of the company's officers and employees is simultaneously exposed.

This gives rise to several questions which are considered in due course. Is this a situation in which the privilege against self-incrimination might apply? In what circumstances may a company assert a right to protect its interests, and does the privilege against self-incrimination constitute such a right? The absence of any reference in the legislation to the privilege against self-incrimination or the evidential or investigative use to which information contained in a SAR can be put presents fertile ground for discussion as to whether the law should recognise a corporate claim to assert the privilege against self-incrimination as an authentic response to resist the mandatory reporting requirement. The breakdown of mandatory reports submitted by individuals and companies is not known. Similarly, there is no information publicly available recording whether mandatory reports submitted by companies disclose information which self-incriminates the reporting company or its officers and employees. The number might be small, but this is

none to the point. The mandatory reporting obligation lays down a gauntlet to the corporate sector, leaving open an important principle of law in its wake.

CHAPTER 3
THEORETICAL PERSPECTIVES

3.1 INTRODUCTION

This chapter addresses whether a mandatory self-reporting requirement to report suspicious money laundering conduct can be assimilated within the norms of omission liability in criminal law. This is the *first sub-question* to be considered in the thesis. In one sense, the answer to this question does not have any impact on the resolution of the *research question*, since the engagement of the privilege against self-incrimination with mandatory self-reporting supported by penal sanction is not dependent on its coherence with theoretical norms of criminal law. In another sense, though, the answer does have resonance. A sound jurisprudential foundation for the mandatory reporting requirement assists the theoretician in gaining an understanding of the criminal peril against which the privilege against self-incrimination operates to protect. There is an attractive symmetry where the imposition of a mandatory reporting requirement and the engagement of the privilege against self-incrimination can be coherently justified with reference to their distinct conceptual narratives.

The chapter begins with a short account of the traditional approach towards the recognition of criminal liability for conduct by omission. The notion of duty is central to a consideration of when the law requires a person to act, and the identification of a duty to act draws heavily on the concept of social responsibility in the case of an individual and a company alike. This is followed by an extensive critique of the academic literature which addresses the theoretical conceptualisation of the mandatory reporting requirement in section 330(1) of POCA 2002.

To this point, the chapter proceeds on the assumption that a breach of the duty to report suspected money laundering constitutes a public wrong which is punishable by criminal sanction. Although the chapter addresses as part of the narrative the factors which are presented as sufficient justification for invoking the criminal law, decidedly the legislature has opted for coercive enforcement of an obligation to disclose suspicious information which may be self-incriminating on occasions. The legislative power of the State is harnessed to compel a company to confess its wrongdoing, and that of its officers and

employees. The criminal law is the favoured enforcement tool, and a company is forced to choose between admission of criminal wrongdoing or non-disclosure and the commission of a further criminal offence. Theorisation of the mandatory reporting requirement in terms of duty exposes the full extent of the criminal jeopardy for a company, its officers, and employees. Applying Hohfeldian analysis, the chapter explains how this corporate peril could be mitigated if the law recognised the ability of a company to assert the privilege against self-incrimination, in the protection of its interests and those of its stakeholders. A potential conflict between corporate self-reporting and a company's ability to assert the privilege against self-incrimination is resolvable when viewed through the prism of duties and correlative rights.

The final section of the chapter evaluates corporate reporting through the perspective of an economic approach to the theory of crime. Economic theory illuminates the multiple benefits which flow from the encouragement of corporate reporting where a company and the State authorities are spared the ordeal of lengthy engagement with the legal process. This rationale underpins both voluntary and compulsory models of corporate self-reporting. Economic benefits in terms of reduced public expenditure and lower corporate defence costs form part of this dynamic, as a company is encouraged by the State to act in a manner which remediates its criminal wrongdoing at comparatively little cost to the public purse. In this way, the economic costs associated with corporate wrongdoing are shifted from the State to the corporate sector.

3.2 OMISSIONS LIABILITY

Criminal liability is imposed on a company when it conducts business in the regulated sector and fails to report suspected money laundering in contravention of section 330(1) of POCA 2002. In this way, the law imposes criminal liability not for an act of commission but rather for conduct by omission. The effect of the legislation is to place a duty on a person, individual or corporate, to disclose self-incriminating information, or incriminating information relating to a third party, to the State authorities. The extent of the legal obligation to report is determined by the scope of the statutory provision.

Although the theoretical foundation for criminal liability by omission has generated much discussion over the centuries,[92] the idea that there are occasions when the common law should punish a person for omitting to do something is uncontroversial. Whilst Sir James Fitzjames Stephen described crimes by omission as exceptional,[93] Sir William Blackstone had been content to define a crime or misdemeanour as "an act committed, or omitted, in violation of a public law, either forbidding or commanding it".[94] In his seminal work, Glanville Williams noted that in occasional instances an omission could trigger criminal responsibility without any positive act, citing a passage from Thomas Babington Macaulay's writings to explain the underlying philosophy that there are circumstances sufficiently distinguishable from the vast majority of omissions "which marks them as peculiarly fit objects of penal legislation".[95] The challenge, as with Blackstone's reference to the violation of a public law, is definitional. What public laws, and what character of omission, should be punished by the criminal law? This difficult task is compounded by an equivocality which hovers over whether there is any moral distinction which falls to be drawn between an act of commission and conduct by omission.

3.2.1 Conventional view

Historically, the common law reflected a conventional understanding that there was a qualitative moral difference between an act of commission and conduct by omission. In Williams' view, since active wrongdoing is more commonly associated with causing physical damage to a person or property than conduct by omission, the latter is necessarily less threatening. Accordingly, it is said that greater moral culpability attaches to an act of commission than conduct by omission.[96] For Williams, there is a clear moral distinction to be drawn "between (for example) killing a person and failing to save his life (the former being the worse; and similarly between other acts and corresponding omissions".[97] This line of thought reflects the judicial approach taken by the Court of Appeal (Criminal

[92] See George Fletcher, *Rethinking Criminal Law* (Little Brown and Company 1978) ch 8, discussing the theory of direct and derivative liability for omissions.
[93] James Fitzjames Stephen, *A History of the Criminal Law of England*, vol II (1883) ch 28, 97. In the year before publication, Hawkins J had remarked in *R v Coney* [1882] 8 QB 557 'It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder'.
[94] William Blackstone, *Commentaries on the Law of England*, vol IV, Of Public Wrongs (1769) chs 1, 5.
[95] Glanville Williams, *Criminal Law: The General Part* (Stevens & Sons 1953) ss 2, 3–4.
[96] Glanville Williams, 'Criminal Omissions – The Conventional View' [1991] 107 LQR 86, 87.
[97] ibid 88.

Division) in *R v Lowe*[98] where Phillimore LJ explained that "there is a clear distinction between an act of omission and an act of commission likely to cause harm. Whatever may be the position [concerning the imposition of criminal liability] regarding the latter, it does not follow that the same is true of the former".[99] Williams explained that there are differences in the psychological approach towards an act of commission and conduct by omission, with much greater condemnation of an action which inflicts damage than passive conduct which merely permits damage to occur. At a basic level, Williams observed that "it is in every way easier not to do something (personal needs apart) than to do it".[100] As a result, Williams believed that criminal liability for conduct by omission should be exceptional and established by statute only where the legislative intent is clear.[101]

Andrew Ashworth's contribution to the academic discourse surrounding criminal liability for an omission has been immense, in terms of the general part of criminal law as well as more specifically, his work on the new breed of "failure to disclose" offences which includes the mandatory reporting of suspected money laundering. Ashworth's conception of criminal liability for conduct by omission is different from the conventional view espoused by Williams. Ashworth rejects the sharpness of a moral distinction between active and passive conduct and sees no impediment to the principle of criminal liability in common law where a duty to act can be established:[102]

> The general principle in criminal law should be that omissions liability should be possible if a duty is established, because in those circumstances there is no fundamental moral distinction between failing to perform an act with foreseen bad consequences and performing the act with identical foreseen bad consequences.[103]

Ashworth points out that the moral culpability of criminal acts of commission vary in their seriousness, and there is no reason to suppose that conduct by omission is less suitable for criminal prosecution than acts of commission.[104]

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98 *R v Lowe* [1973] QB 702.
99 ibid 709.
100 Williams (n 96) 88.
101 ibid 87.
102 Andrew Ashworth, 'The Scope of Criminal Liability for Omissions' [1989] 105 LQR 424.
103 ibid 458.
104 ibid 425.

Ultimately, the division between the view taken by Williams, which is known as "the conventional view", and the approach articulated by Ashworth, which he terms "the social responsibility view", focuses on their differing conceptions of duty and when a breach of duty should be recognised as deserving of condemnation as a public wrong. Williams recognises a category of duty triggering criminal liability for an omission to act which is narrow and confined to "particular classes of persons" who have accepted a responsibility to act, "sometimes only for the protection of particular classes".[105] In contrast, Ashworth sees the notion of duty through a much wider lens, and in terms of social responsibility which "draws attention to the co-operative elements in social life".[106] Ashworth explains that "[T]he social responsibility view of omissions grows out of a communitarian social philosophy which stresses the necessary relationship between individual behaviour and collective goods".[107] The difference in approach between Williams and Ashworth is rudimentary. Williams' limited conception of criminal liability for conduct by omission maximises the room for private independence, whereas Ashworth's conception expands the boundaries to embrace changing social perceptions, with reduced space for autonomy in consequence.

3.2.2 Social responsibility view

Ashworth's language of social responsibility posits the recognition of wider societal duties which include the imposition of criminal liability on a person who has omitted to assist in law enforcement and the wider interests of the community have been damaged. Ashworth identifies this obligation as part of a duty of citizenship which focuses primarily on a duty to assist other members of a community in distress.[108] The argument is:

> … not founded on a simple benefit/burden calculation, that whoever takes the benefits of living in a certain society must in fairness expect to have to submit to its burdens … The reasoning is rather that the imposition of certain minimal

[105] Williams (n 96) 88.
[106] Ashworth (n 102) 425.
[107] ibid 431.
[108] ibid 447. For a broader on civic duties and the criminal law, see Andrew Ashworth, 'Public Duties and Criminal Omissions: Some Unresolved Questions' [2011] Journal of Commonwealth Criminal Law 1; Anthony Duff, 'Legal Reasoning, Good Citizens, and the Criminal Law' [2018] 9(1) Jurisprudence 120. See also Gerard Bradley, 'Plea Bargaining and the Criminal Defendant's Obligation to Plead Guilty' [1999] Scholarly Works, Paper 272 (Notre Dame Law School) for a focused consideration of circumstances in which a defendant has a duty to plead guilty.

> duties shows a concern for the rights of other members of the community and therefore for the community itself, and so tends to promote the maximisation of liberty.[109]

Ashworth acknowledges that identifying the nature and scope of citizenship duties is a challenging task, and he asks whether the narrative of social responsibility includes a general duty to take action to prevent crime, or to notify the police about the commission of crime:[110]

> It is not difficult to construct *prima facie* arguments for imposing duties to assist. Whether the criminal law should yield to those arguments then depends on such factors as the significance of the interests which would be upheld by such a duty (i.e. the argument is stronger where a citizen's life is at stake than where property of small value is concerned), the actual impact of such duties on the liberty of citizens (how much sacrifice and how often would the obligations demand?), and consequential effects on social life such as the possibility of turning citizens into busybodies, creating vigilantes and other possible changes.[111]

Reflecting the deep division between Williams and Ashworth, Williams commented that Ashworth's approach "looks like translating law into morals rather than morals into law".[112]

If Williams' approach were to be adopted, the theorization of the mandatory reporting obligation in section 330(1) of POCA 2002 into the norms of criminal law will be difficult to accomplish since it would be reliant upon an argument that, by operating in the regulated sector, a person has accepted a voluntary responsibility to assist the State in the detection of suspected money laundering. Whether it is accurate to suggest that a person genuinely accepts a voluntary responsibility in these circumstances is considered later in the chapter. In any event, William's position contrasts with Ashworth's broader approach which can coherently theorize the mandatory reporting obligation if a societal duty to

[109] Ashworth (n 102) 448.
[110] ibid 449.
[111] ibid 449.
[112] Williams (n 96) 88.

assist the State authorities in the detection of the suspected money laundering can be found.

3.2.3 Misprision

There is historic precedent for recognising the existence of a duty to assist the State by reporting the commission of criminal conduct in the form of the offence of misprision at common law. The offence was classified as a high misdemeanour involving the concealment of a felony, and as Courtney Stanhope Kenny recorded,[113] there was some authority to suggest the offence might have been committed where a felony was planned (as opposed to having been committed) and a person knowing of the design but not assenting to it refrained from disclosing it to a Justice of the Peace in order to prevent its commission.

The jurisprudential foundation for the common law offence of misprision lay in considerations of public policy, with the recognition of a legal duty imposed on a citizen to assist in the detection and apprehension of fellow citizens who have committed serious criminal offences injurious to the public weal.[114] In his work on misprision, [115] Peter Glazebrook pointed out that in medieval societies:

> … it is reasonably clear that the system was predominantly one of communal responsibility and communal liability, which relied very heavily on the numerous bodies of jurors under oath to tell of all they knew about administrative failings and revenue evasions, as well as ordinary crimes.[116]

This societal analysis may have worked well six hundred years ago, but it bequeathed to the twentieth century a criminal offence of omission which was, in Williams' words, "impossibly wide". As Williams noted, "[r]ead literally, it would make it an offence for a mother to fail to inform the police that her eight year old son has taken a cake from the pantry, knowing that it is wrong to do so".[117] Prosecutorial restraint limited the number

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[113] Courtney Stanhope Kenny, *Outlines of Criminal Law* (15th edn, Cambridge University Press 1936) 320–21. See also Hawkins, *Treatise on Pleas of the Crown*, vol II (1716) ch 29 s 23.
[114] Joseph Chitty, *Criminal Law*, vol I (2nd edn, 1828) 2–3. See also *R v Crimmins* [1959] VR 270.
[115] Peter Glazebrook, 'Misprision of Felony – Shadow or Phantom' (1964) 8 AJLH 189, 283.
[116] ibid 197.
[117] Williams (n 96) 69, 236.

of cases brought before the courts for misprision[118], and although the existence of the offence was confirmed by the House of Lords in *Sykes v Director of Public Prosecutions,*[119] the offence was abolished by section 1 of the Criminal Law Act 1967.[120]

There is a further aspect which should be mentioned before leaving the offence of misprision. The example given by Williams is interesting not only for its focus on trivial offending, but also because it posits that the reporting requirement would not be relieved in a case where the subject of the disclosure was a close relative, and in this instance, consanguineous. In *Sykes v Director of Public Prosecutions*,[121] Lord Denning cited a case from 1315 in which it was held that it was the duty of a brother "to raise hue and cry" against his brother, and he was fined for failing to do so. There was also a case in 1938 – *Mrs Casserley's Case*[122] - where a mistress was convicted of misprision for concealing criminal conduct committed by her lover. Unfortunately, none of their Lordships reflected on the more difficult question of whether the common law offence required a person to self-report criminal conduct. However, in argument Sir Jocelyn Simon QC, appearing for the Director of Public Prosecutions, explained that a person could be "a misprisor of one's own offence".[123] For Sir Jocelyn, the common law offence of misprision established a duty to make a report which was, "*ex hypothesi*, … a public duty".[124]

Four years after *Sykes v Director of Public Prosecutions* was decided, it was judicially established that the common law offence of misprision could not be committed where the discloser would incriminate himself in the commission of a criminal offence by his disclosure. In *R v King*,[125] the defendant had been charged with misprision after giving false information to the police during an interview under caution in order to conceal his involvement, and the involvement of his two accomplices, in a robbery. Following his conviction, the defendant argued that the offence of misprision would not be committed where disclosure of the commission of criminal conduct, in this case a robbery, would have been self-incriminating. In developing the argument, the defendant relied on "the cardinal

118 Kenny (n 6) 321; Williams (n 96) 236.
119 *Sykes v Director of Public Prosecutions* [1962] AC 528.
120 Abolition of the offence was recommended by the Criminal Law Revision Committee, *Seventh Report on Felonies and Misdemeanours* (Cmnd. 2659, May 1965) paras 37–43.
121 *Sykes* (n 119) 564.
122 *Mrs Casserley's Case*, The Times, 28 May 1938.
123 *Sykes* (n 119) 545.
124 ibid 546.
125 *R v King* [1965] 1 WLR 706.

principle of English law that a man is not bound to incriminate himself'.[126] The Court of Criminal Appeal confirmed the existence of this limitation and quashed the conviction.[127] In the view of the Lord Chief Justice, Lord Parker, "there clearly is such a limitation on the duty to disclose".[128]

There are two points which emerge from a consideration of the offence of misprision before its abolition. First, the common law has not shied away from imposing criminal liability for omitting to report the existence of a serious criminal offence. On the contrary, the offence of misprision was consistent with the notion that a citizen had a moral as well as a legal duty to assist the police to discover and apprehend offenders. The history of misprision at common law supports the argument advanced by Ashworth that an attribute of citizenship incorporates an obligation to notify the State authorities of another person's commission of serious criminal conduct. This sits unhappily with the conception of the conventional view of omissions liability which Williams has espoused. Secondly, the tension between the application of the offence and the privilege against self-incrimination was an acknowledged issue which has the potential to be problematic where disclosure of self-incriminating information is concerned.

In addition to the protection afforded by the Court of Appeal (Criminal Division) in *Sykes v Director of Public Prosecutions*, the Judges' Rules,[129] which set out in 1964 the principles to be followed by the police when interviewing suspects, made clear that there were other limits which remained extant. This was confirmed by the High Court in the seminal case of *Rice v Connolly*[130] when Lord Parker CJ said that it was:

> … quite clear that though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority, and to refuse to accompany those in authority to any particular place; short, of course, of arrest.[131]

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126 ibid 708F.
127 ibid 709E-F, per Lord Parker CJ.
128 ibid 709A.
129 *Practice Note (Judge's Rules)* [1964] 1 WLR 152, in force until Codes of Practice were issued under PACE 1984.
130 *Rice v Connolly* [1966] 2 QB 414.
131 ibid 419 E-F.

The rationale supporting the common law offence of misprision and Lord Parker's reasoning in *Rice v Connolly* are reconcilable. It is one thing for a person to withhold information incriminating a third party where the information already exists and relates to serious criminality which has been committed. It is another thing to require a person to answer a question asked by a person in authority which may be speculative and where criminal activity may not have taken place.

In recommending the abolition of misprision, the Criminal Law Revision Committee expressed its concern over the application of the common law offence to the reporting of minor offences, as well as offences committed by near relatives.[132] However, the mandatory reporting requirement in section 330(1) of POCA 2002 has mimicked the extensive reach of the old common law offence. The duty to report under section 330(1) includes reporting the handling of criminal property derived from the commission of low-level offences and regulatory breaches,[133] as well as reports on suspected money laundering committed by third parties including relatives and friends. Williams would have deprecated this legislative development. In a passage which reiterates the extent of his disagreement with a social responsibility approach to omissions liability in criminal law, Williams accused Ashworth of presenting an analysis which would revive the offence of misprision in an expanded form:

> This would be an appalling way of extending the circle of criminality beyond the immediate doers and omitters and their accomplices. It is inconceivable that a proposal to revise misprision in some modernised form, and to turn us all by force of law into subsidiary policemen and tell-tales, would have any chance of legislative acceptance.[134]

Far from being inconceivable, this is precisely what Parliament accomplished when enacting the mandatory reporting obligation in 2002.

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[132] Criminal Law Revision Committee, *Seventh Report, Felonies and Misdemeanours* (Cmnd 2659, 1965) para 39.
[133] For examples, see Law Commission, *Anti-Money Laundering: the SARS Regime* (Law Com No 384, 2019) para 4.10.
[134] Williams (n 96) 90.

3.3 STATUTORY DUTY TO REPORT

It is against this background that academic writers have sought to locate the theoretical foundation for the mandatory reporting requirement imposed by the AML regime. Here, the focus of consideration shifts from a generic consideration of how omissions liability can be conceptualised in terms of duty to the more specific task of locating a theoretical foundation for a corporate duty to report, and self-report, suspected money laundering established in section 330 of POCA 2002.

The issue was first addressed in the United States when Matthew Hall noted that, notwithstanding the general position in American law that there is no duty to report criminal activity, there was "an emerging acceptance of legally-mandated reporting in specific instances despite the prevailing reluctance to recognise a broader duty".[135] Hall recognised the competing interests between public interest in reducing financial crime and the importance of financial privacy, but he did not offer any formative analysis as to how this clash could be resolved in terms of conventional omissions liability in criminal law.[136] Hall identified a potential dichotomy between companies and individuals, noting that "[T]he world of business associations has its own set of specific, and growing, duties and incentives to report criminal conduct … [which] …. differ dramatically from those imposed on the citizenry as individuals".[137] Hall acknowledged that these reporting obligations often require a company to inform upon itself.

Hall's recognition of the emergence of an acceptance of legally mandated reporting was supported six years later when Sandra Thompson suggested that "reporting requirements [were] quietly and incrementally reshaping American criminal law traditions".[138] Thompson sought to explore how mandatory reporting requirements could sit happily with the absence of a "Good Samaritan" law which would punish an individual for failing to rescue a person in need of immediate assistance. Thompson's point was that mandatory reporting is a variant of Good Samaritan laws in the sense that it required disclosure of possible harm or injury to the State authorities so that they could intervene

[135] Matthew Hall, 'An Emerging Duty to Report Criminal Conduct: Banks, Money Laundering, and the Suspicious Activity Report' (1995–96) 84 Ky L J 643, 645.
[136] ibid 662–63.
[137] ibid 646–47.
[138] Thompson (n 13) 5.

and rescue the victims. Thompson concluded that mandatory reporting could be theoretically conceptualised as resting somewhere between the rationale which underlay Good Samaritan laws and public welfare criminal offences.[139]

Academic scholars in the UK have tackled the intellectual challenge presented by mandatory reporting by asking more questions about the nature of citizenship in modern society. Shlomit Wallerstein has asked "[W]hat information can the State legitimately require from persons who have knowledge concerning the involvement of others in criminal activity?"[140] Wallerstein divides disclosure obligations into two forms. A direct obligation imposes a positive duty on a citizen to disclose information concerning another person's participation in criminal activity, whereas an indirect obligation places a negative restriction on a citizen not to obstruct the police in the execution of their duty. Plainly, mandatory reporting under the AML legislation falls into the former category. Echoing Sandra Thompson's work, Wallerstein appreciates that the arguments against mandatory reporting are associated with concerns about the introduction of a general duty to rescue and the enactment of a "bad Samaritan law" which would significantly undermine individual freedom by the State dictating to a citizen how he must behave.[141] Notwithstanding, Wallerstein posits circumstances in which the imposition of a duty to disclose can be justified.

With reference to mandatory reporting in money laundering cases, Wallerstein identifies two bases of justification, and both are associated with personal choice. First, Wallerstein articulates a distinction between the imposition of a direct duty to disclose which applies to all citizens and the imposition of a duty on persons who choose to enter a relationship or position. Wallerstein's point is that it is less problematic to recognise a direct obligation to disclose where a person has chosen to accept the obligation when entering the relationship or position. The second basis is broader and posits that if a person suspects that a particular activity may contravene the criminal law, where the person declines to disclose his suspicion, he should be regarded as responsible for the subsequent harm which results. The justification for this responsibility rests in the person's failure to inquire into his suspicion and accords with the criminal law doctrine of "Nelsonian blindness"

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[139] ibid 36–37.
[140] Shlomit Wallerstein in Sullivan and Dennis (eds), *On the Legitimacy of Imposing Direct and Indirect Obligations to Disclose Information on Non-Suspects, Seeking Security* (Hart Publishing 2012) 37–58.
[141] ibid 42.

or closing an eye to the obvious.[142] However, as Wallerstein recognises, any attempt to ground a theory of mandatory reporting in notions of personal choice is not all-embracing since apart from anything else it does not provide an answer to issues concerning the justification for mandatory reporting where the reporter is engaged in the underlying criminal activity. This situation, as Wasserstein acknowledges, raises different issues, and requires further consideration.[143]

3.3.1 Identifying duties

Building on his earlier consideration of omissions liability in criminal law, Ashworth has developed his analysis of the theoretical foundation for mandatory reporting under the AML legislation in the discourse around civic obligation.[144] In his recent work, Ashworth divides duties into four identifiable groups. First, there are family obligations such as the duty of parents to provide for the needs of their children and household members to protect vulnerable adults in the house from serious harm. Secondly, there are voluntarily incurred obligations such as the duty of persons in possession of hazardous materials such as explosives to protect people from danger and the duty of a person who contractually agrees to undertake care for another person. Thirdly, there are obligations arising from personal responsibility where, for example, there is a duty owed by a property owner to use his influence to prevent criminal activity taking place on his property. Fourthly, there are civic obligations. Ashworth identifies four offences, these being a broad duty to assist in law enforcement, a duty to notify the police about suspected terrorist offences, a duty to notify suspected child abuse, and a duty to make reasonable efforts to ascertain the criminal law.[145] Ashworth locates the duty of mandatory reporting under section 330(1) of POCA 2002 in the second group, whilst the duty to mandatorily report terrorist activity is placed in the fourth group.[146] The rationale for the distinction rests in the fact that section 330 of POCA 2002 applies only to persons working in the financial sector, and therefore in this sense these people can be said to have accepted a voluntarily incurred obligation, whereas the duty to inform the authorities about suspected terrorist activity applies to every person in the UK.

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142 ibid 52–53.
143 ibid 39.
144 Ashworth (n 1) 31–80.
145 ibid 42–43, 57–65.
146 The terrorist activity offences are to be found in the Terrorism Act 2000, ss 19, 21A, 38B.

It is clear that Ashworth is not entirely comfortable with his classification of the mandatory reporting of suspected money laundering offences as falling within his second group of voluntarily incurred obligations since he acknowledges that "the force of this cannot derive simply from the argument that if one voluntarily takes on a position one must accept all the duties that go with it".[147] If a person's business falls within the regulated sector, there is no choice about whether the reporting obligation should be accepted. Indeed, there are many individuals and companies operating in the regulated sector whose businesses pre-date their inclusion in the regulated sector. A raft of professional service providers such as solicitor and accountants were included in the regulated sector on 24 February 2003,[148] and most recently, since 10 January 2020, art market participants have been included in the regulated sector.[149] If these individuals and companies declined to accept the mandatory reporting obligation which the legislature has imposed, they could not conduct any future business.

Moreover, employees in the regulated sector have differing degrees of responsibility. The benefit enjoyed by a lowly paid employee in the regulated sector may be no greater than the benefit which would be enjoyed by the employee undertaking the same work outside the regulated sector. So, if there are sound policy arguments for applying the mandatory reporting obligation to a lowly paid employee in the regulated sector, the question arises as to whether this burden should apply to all citizens. Also, the mandatory reporting obligation prioritises money laundering which is odd since, as Ashworth points out, even where it is associated with organised crime and gang culture, "[money laundering] is a crime which should not be ranked as high as significant physical or sexual abuse".[150] This leads Ashworth to ask whether there should be a general duty on citizens to report serious criminal offences or perhaps a special duty to report abuse of the vulnerable.[151] Ashworth concludes that there are strong arguments in favour of an offence of failure to report offences against the person, since the law should be concerned to impose a duty which promotes the better protection of victims.[152]

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147 Ashworth (n 1) 60.
148 POCA 2002, sch 9; The Proceeds of Crime Act 2002 (Commencement No. 4, Transitional Provisions and Savings) Order 2003, SI 2003/120.
149 POCA 2002, sch 9, as amended; Money Laundering and Terrorist Financing (Amendment) Regulations 2019, SI 2019/1511, reg 15.
150 Ashworth (n 1) 60.
151 ibid 61.
152 ibid 62–65.

3.3.2 Reflections

Ashworth offers a rationally defensible account of how the mandatory reporting requirement in section 330(1) of POCA 2002 can be coherently theorised within the norms of criminal law. However, there remain some important outstanding issues which need to be addressed.

First, Ashworth does not tackle the issue which arises in the regulated sector where a company is legally obliged to self-report criminal conduct, or the wrongdoing of one of its officers or employees. It is true that the company is participating in regulated sector activity, and in so doing it has notionally agreed to abide by additional obligations which are not placed on other companies operating outside the regulated sector. This approach provides a jurisprudential foundation for the application of the mandatory reporting obligation where a company is compelled to report suspected money laundering committed by a third party, but whether it extends to embrace the making of a corporate self-report of criminal conduct is not discussed. Whilst the company's officers may have steered the company into the regulated sector, a company employee will not have voluntarily accepted an enhanced level of personal responsibility to make a mandatory report simply by virtue of the fact that they have secured employment with a company which is operating in the regulated sector. To share in Ashworth's jurisprudential foundation of "voluntary acceptance" for mandatory reporting, a company employee will need to be subsumed into the company's persona for this purpose. Again, there is considerable artificiality regarding an understanding of this sort.

Secondly, Ashworth considers section 330 of POCA 2002 in isolation, without discussing its relationship with the money laundering offences contained in sections 327 to 329 of POCA 2002. There are many occasions when the mandatory reporting obligation in section 330 is co-extensive with the need to make an authorised disclosure under sections 327 to 329. As explained in chapter 2, this arises where a company operating in the regulated sector comes into possession of criminal property which derives from criminal conduct committed by its director or senior employee, a principal money laundering offence will be committed unless an authorised disclosure is made. Strictly speaking, as previously noted, the authorised disclosure is voluntary since the company has the option

of not reporting and committing the criminal offence. But, in reality, the disclosure is precipitated by force of circumstance because if corporate criminal liability for a money laundering offence is to be avoided a voluntary disclosure which recites the underlying predicate criminal offending will need to be made.

Whilst technically speaking an authorised disclosure remains a voluntary act, whereas a report under section 330 is compelled, the decision to make an authorised disclosure is far from voluntary. The decision-maker's course of action is driven by the mandatory disclosure obligation in section 330(1) which applies to the company, as well its professional advisers such as its solicitor and accountant. Even if the company is not conducting business in the regulated sector, the company's professional advisers (solicitors, accountants etc) will be bound to make a mandatory disclosure in relation to suspected money laundering. To be consistent with his analysis, presumably Ashworth would list this form of "voluntary" disclosure as falling within the second category of duties to report which he identifies.

Thirdly, although Ashworth acknowledges the significance of mandatory reporting as a response to the limitations of conventional policing and perceives this factor may form "part of the reasoning for co-opting the regulated sector into law enforcement",[153] the point is undeveloped. There is considerable force in the point, and, as with the previous two points, it would militate in favour of shifting mandatory reporting of suspected money laundering from Ashworth's second group of voluntarily incurred obligations into the fourth group of identifiable civic obligations. Whilst a company elects to undertake business on terms laid down by government, obligations such as mandatory reporting of suspected money laundering are imposed and not the subject of negotiation. This reality weakens Ashworth's classification since it is artificial to categorise the corporate obligations as voluntarily incurred in circumstances where it is the State which determines the content and degree of risk which is inherent in the terms of business which it has laid down. This contrasts sharply with an arrangement by private treaty where a company knows the nature and extent of its obligations which have been the subject of prior negotiation between the parties. By moving both mandatory reporting and voluntary reporting into Ashworth's fourth category, a single narrative could be articulated. A

[153] ibid 60.

combined narrative for corporate reporting founded upon the notion of civic responsibility would be achieved, although it would still leave the tension with the privilege against self-incrimination unaddressed in cases where corporate self-reporting of criminal conduct is concerned.

Fourthly, Ashworth's conceptualisation of mandatory reporting under the AML legislation begs a wider question about the place of causation in the continuing development of omissions liability in criminal law. Traditionally, the duty to act has been recognised where the omission is causally connected with harmful behaviour for which the duty-bearer has accepted personal responsibility.[154] In effect, the criminal responsibility of a person who fails to act is equated with the criminality of a person who perpetrates the offending act. The common thread between acts of commission and acts of omission is causation of harm, rather than identification of different forms of harm. As Gideon Yaffe explains:

> [T]he difference between omission cases and positive act cases is not a difference in *what is done*; both omitters and actors commit the crime. The difference is in *how* they commit the crime. It's a difference in *means*. A person can commit murder by omission, or by action; but either way he commits murder.[155]

With the devaluation of the distinction between criminal liability for acts and omissions which Ashworth has promoted, Yaffe regards the continuing recognition of the "duty requirement" as a critical limitation on the expansion of liability in criminal law for omissions conduct. Almost thirty years earlier, Arthur Leavens had downgraded the distinction between acts and omissions for the purposes of determining criminal liability.[156] For Leavens, the concept of legal duty was "no more than an imperfect proxy for the law's requirement that there be an appropriate causal relationship between an actor's conduct and the prohibited harm".[157]

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[154] See, for example, *R v Gibbins and Proctor* [1918] 13 Cr App R 134 where a defendant was convicted of murder after withholding food from his child. See also *R v Stone and Dobinson* [1977] QB 354 for an application of the same principle in a case involving manslaughter.
[155] Gideon Yaffe, 'The Duty Requirement', in Dana Kay Nelkin and Samuel C Rickless (eds), *The Ethics and Law of Omissions* (Oxford Scholarship Online 2017).
[156] Arthur Leavens, 'A Causation Approach to Criminal Omissions' [1988] 76 Calif L Rev 547.
[157] ibid.

Applying considerations of causal connection to the mandatory reporting of suspected money laundering, the legal duty to report established in section 330(1) of POCA 2002 does not fit into this theoretical mould. In many cases, the maker of a mandatory report has no connection or association with the third parties who are involved in suspected money laundering, and a failure to make a report will not have caused the offending conduct to have taken place. Ashworth leaves open whether there is a need for a causal connection or association to be established between the actor's failure to report and the predicate offending. Presumably, the answer is "no" since as Ashworth recognises, it is sufficient for the jurisprudential foundation to support a duty to assist the State in the detection of crime to rest solely on the notion of civil responsibility. Paradoxically, in the case of corporate mandatory reporting, the reporting obligation fits more snugly into this traditional construct, especially where a corporate self-report is made, and the company has been involved in the underlying criminality which forms the substance of the report.

3.3.3 Corporate responsibility

Ashworth's construction of omissions liability around a civic duty of social responsibility is supported by Jeremy Horder's work in this area. Horder does not use the language of social responsibility, but he does recognise legislative developments which look towards an enhanced level of civic commitment by cajoling the citizenry into acting in the wider public interest. For Horder, criminalising a failure to disclose a money laundering suspicion is a paradigm example of a wider development in English criminal law which has established a polity termed as the "bureaucratic-participatory state".[158] "In the bureaucratic-participatory state, the relevant measurement of participation, as a means to an end, is the extent to which citizens can be persuaded or coerced into contributing to better bureaucratic decision-making in the public interest".[159]

The State's interest in receiving disclosures is "diachronic", as "businesses handling money" are coerced into "not [missing] an opportunity to "blow the whistle" on possible money launderers".[160] The "good citizen of the bureaucratic-participatory state is the co-operative, honest, and truthful citizen" who assists "officials whose task it is to secure

[158] Jeremy Horder, 'Excusing Information-Provision Crimes in the Bureaucratic State' [2015] 68 CLP 197.
[159] ibid 198.
[160] ibid 201.

regulatory goals".[161] Corporate entities are part of the landscape in the "bureaucratic-participatory state", and the notion that the legislature has been "persuaded or coerced into contributing to better bureaucratic decision-making in the public interest" applies equally to a company as it does to an individual. The "bureaucratic-participatory state" no longer permits a company to define its duties exclusively by reference to the maximisation of profit for its shareholders.

In recent years, the legislature has recognised an increasing range of corporate responsibilities and issues concerning social responsibility which are the subject of burgeoning academic literature and extensive discourse in the commercial world.[162] The obligations are framed as civil law obligations and are not directly freighted with criminal liability, although consequential criminal liability hovers in the background as an enforcement tool. The enactment of section 172(1)(d) of the Companies Act 2006 is an oft-quoted instance, where the legislature requires a company director to act in a way which is most likely to promote the company's success, having regard to several factors including "the impact of the company's operations on the community and the environment". In a further development, large companies must include in their "non-financial information statement" a description of how the directors have had regard to the duty in section 172,[163] as well as other communitarian considerations such as social matters, respect for human rights, and anti-corruption and anti-bribery matters.[164] A criminal offence is committed by every company officer if a section 172 statement is not uploaded onto the company's website and is punishable summarily buy a maximum fine of £1,000.[165]

3.4 A PUBLIC WRONG

So far, the discussion has proceeded on the assumption that a breach of civic duty by failing to report suspected money laundering constitutes a justifiable public wrong which

[161] ibid 198.
[162] See, for example, Andrew Crane, Dirk Matten, Abagail McWilliams, Jeremy Moon, and Donald S. Siege (eds) *The Oxford Handbook of Corporate Social Responsibility* (OUP 2008).
[163] Companies Act 2006, s 414CZA, inserted by the Companies (Miscellaneous Reporting) Regulations 2018, SI 2018/860, reg 4.
[164] Companies Act 2006, s 414CA, inserted by Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016, SI 2016/1245, reg 4.
[165] Companies Act 2006, s 426B, inserted by the Companies (Miscellaneous Reporting) Regulations 2018, SI 2018/860, reg 5.

is supported by criminal sanction. In this section, this assumption is subjected to scrutiny. Nearly thirty years after the publication of his article outlining the difference between the conventional view and the social responsibility view of liability for omissions in criminal law, Ashworth returned to the topic and asked hard questions about the justification of deploying the criminal law as a mechanism for enforcing an expanding number of positive duties which include duties to report such as the mandatory reporting obligation in section 330(1) of POCA 2002.[166] The issue is not whether the legislature is able to impose criminal liability for an omission, but rather, whether it is a proportionate and appropriate response for a criminal sanction to be invoked.

Ashworth begins by noting that the determination whether to invoke the criminal law for a breach of a civic duty is "a threshold decision":[167]

> Where the moral wrong is serious (in terms of the direct harm to victims), there is a strong case for criminalisation in order publicly to mark and condemn the wrong. Both elements have considerable indeterminacy. Thus, the seriousness of the moral wrong may be assessed by reviewing the harmfulness of the act or omission and the culpability involved. In determining the harmfulness of an omission, the interests at stake must be identified (e.g., the right to life, physical integrity), and the arguments for placing the duty on the individual must be clear and strong. The second element, whether the wrong "properly concerns the public" such that only the State should punish it, is manifestly opaque since it is difficult to be sure when the State has (or has not) the standing to prosecute for a particular type of violation in order to lead to conviction and punishment.[168]

3.4.1 Failure to report suspected money laundering

In the case of a failure to report suspected money laundering, the State's entitlement to prosecute the failure, as well as those responsible for the predicate offending, is not in doubt, and therefore, the second element is easily satisfied. Satisfying the first element is more challenging. The interests at stake are readily identifiable as the discovery,

[166] Andrew Ashworth, 'Positive Duties, Regulation, and the Criminal Sanction' [2017] 133 LQR 606.
[167] ibid 611.
[168] ibid 612.

investigation, and prosecution of those involved in the commission or serious criminal activity and the laundering of its illicit proceeds. There are also strong arguments in favour of requiring an individual or corporate person to disclose this information to the State authorities since, by virtue of their confidential work in the regulated sector, they are uniquely placed to know or suspect the handling of criminally obtained funds.

Ultimately, as Ashworth recognises, whether a failure to report suspected money laundering should be criminalised "depends on the view [which is taken] about the seriousness of money laundering",[169] and one should add, the underlying predicate offence which is likely to be revealed in the narrative of the disclosure report, or during the course of an investigation. Ashworth expresses reservations about the criminalisation of a failure to report suspected money laundering, although he does not articulate a concluded view. Ashworth's main concerns focus on the maximum penalty of five years for an offence of negligence which "appears disproportionately high",[170] and the illogicality of a criminal offence of failing to report suspected money laundering in circumstances where there is no equivalent criminal offence for failing to report homicide or rape.[171] In addition, Ashworth draws attention to the lack of causal connection or association, since "the harm factor is at one remove, as it were, and the culpability (knowingly or dishonestly) must be assessed in relation to that (discounted) harm".[172]

Where there is a strong case for criminalising an omission, Ashworth notes that there are many countervailing factors against criminalisation which must also be considered. One of these factors is whether the criminalised conduct will interfere with fundamental rights such as freedom of expression or the right to privacy.[173] In terms of fundamental rights, the engagement of the privilege against self-incrimination is presently unrecognised, but as Ashworth commented in connection with the offence of misprision, "[i]f the privilege against self-incrimination and right to silence are to mean anything, they ought to stand in the way of such an offence".[174]

[169] ibid 620.
[170] ibid 620.
[171] ibid 626.
[172] ibid 626.
[173] ibid 614–15.
[174] ibid 626.

As Ashworth acknowledges, the decision whether to criminalise conduct by omission is a question of judgment and priority:

> In the final analysis, the fairness of imposing the various duties on individuals or on commercial organisations depends on contest political conceptions of whether crime prevention in these spheres is an 'inherently government function' and to what extent it is acceptable to expect individuals or companies to take a hand in the suppression of crime.[175]

Suffice it to note that in the case of criminalising individuals and companies working in the regulated sector for failure to report, and self-report, suspected money laundering, the UK Government is able to present a strong case. Between April 2019 and March 2020, the NCA received 573,085 disclosures of suspected money laundering.[176] Following investigation, proceeds of criminal activity totalling £172 million was restrained or forfeited,[177] and in three cases the UK was able to restrain criminal assets on behalf of a foreign jurisdiction. As reported by NCA previously, "[t]his demonstrates the unique value of the SARs regime – in that SARs submitted are directly leading to new law enforcement investigation."[178] Information from AML disclosures triggered multiple investigations into tax avoidance and tax evasion, leading to the recovery by HMRC of over £40 million in public revenue.[179] The NCA stores disclosures on its computer data base for six years,[180] which means that somewhere between 1.5 million and 2 million disclosures are held at any one time. This is a significant "common pool resource" available to the State in the fight against serious and organised crime.

Whether the societal benefits to the State authorities are sufficiently significant to justify criminalising an individual or corporate failure to report, especially when the costs of

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[175] ibid 630.
[176] NCA, 'UK Financial Intelligence Unit Suspicious Activity Reports Annual Report 2020' <www.nationalcrimeagency.gov.uk/who-we-are/publications/480-sars-annual-report-2020/file> accessed 11 March 2021, 4
[177] ibid.
[178] NCA, 'UK Financial Intelligence Unit Suspicious Activity Reports Annual Report 2019' <www.nationalcrimeagency.gov.uk/who-we-are/publications/390-sars-annual-report-2019/file> accessed 11 March 2021, 5. On the value of financial disclosures generally, see Europol, Financial Intelligence Group, 'From Suspicion to Action' (Publications in Luxembourg 2017).
[179] NCA (n 178) 11.
[180] Law Commission (n 133) 14.

compliance by those working in the regulated sector are considered,[181] is a matter which has been much discussed. The UK Government's response to criticisms of the AML reporting requirement has been expressed on many occasions.[182]

In several instances, the legislature's judgment in the enactment of the mandatory reporting offence has been judicially supported as a proportionate response to the challenges inherent in the detection, investigation and prosecution of money laundering the proceeds of serious and organised crime. In *Ahmad v HM Advocate*, [183] when upholding a conviction for failing to report suspected money laundering contrary section 330(1) of POCA 2002, the High Court of Justiciary noted that "the apparent purpose of the section is to prevent money laundering and in particular to provide assistance to the investigatory authorities, so that they may investigate [money laundering]".[184] The Court added that the reporting obligation is "entirely consistent with the [European] Directives which the legislation was designed to implement".[185]

In *R v Duff*,[186] the Court of Appeal (Criminal Division) highlighted the importance of imposing a custodial sentence on a solicitor for failure to report suspected money laundering. The Court remarked that the omission was "a very serious matter and breaches of the legislation by professional people cannot be overlooked".[187] Likewise, in *R v McCartan*,[188] a solicitor had been convicted of a failing to report offence. Citing with approval the decision in *R v Duff*, Lord Kerr explained that the Court "needs to take a firm line where a breach of this important species of legislation by a professional person has occurred. A custodial sentence will almost invariably be required to make clear the importance of scrupulous adherence to the requirements of the legislation".[189] To the same effect in *R v Griffiths,*[190] which again involved a solicitor convicted of an offence of

[181] See, for example, Corporation of London, 'City Research Series Number 6, Anti-Money Laundering requirements: Costs, Benefits and Perceptions' (June 2005).
[182] See, for example, the UK Government's rejection of criticisms of the AML regime made by the House of Lords European Union Committee in its reply, Government Reply to the Nineteenth Report from the House of Lords European Union Committee (Session 2008–09 HL Paper 132), *Money laundering and the financing of terrorism* (Cm 7718, 2009).
[183] *Ahmad v HM Advocate* [2009] SLT 794.
[184] ibid [30].
[185] ibid [32].
[186] *R v Duff* [2003] 1 Cr App R (S) 88.
[187] ibid [22].
[188] *R v McCartan* [2004] NICA 43.
[189] ibid [18].
[190] *R v Griffiths* [2007] 1 Cr App R (S) 95.

failing to report suspected money laundering, the Court of Appeal (Criminal Division) reduced a sentence of fifteen months to six months imprisonment. The Court added that it did not leave the case "without underlining to all professional people involved in the handling of money and with an involvement in financial transactions the absolute obligation to observe scrupulously the terms of this legislation and the inevitable penalty that will follow failure so to do".[191]

The AML reporting requirement has also successfully withstood scrutiny in the ECtHR and the ECJ. In *Michaud v France*[192] an argument that the mandatory reporting provision is incompatible with rights to privacy and due process guaranteed by the ECHR failed. Here, the failure to report suspected money laundering triggered an administrative and not a criminal sanction, but nonetheless the attack on the reporting requirement failed in the light of the 'legitimate aim pursued' by the reporting requirement and "the particular importance of that aim in a democratic society".[193] The legitimacy of the AML regime has also been upheld by the ECJ in the face of similar attack.[194]

Looking beyond the parameters of the AML regime, the legislative imposition of a duty to report information relating to the commission of serious crime has been judicially upheld in Ireland. In *Sweeney v Ireland*, [195], the Irish Supreme Court held that a requirement to disclose information to the State authorities contained in section 9(1)(b) of the Offences Against the State (Amendment) Act 1998 was compatible with the provisions of the Irish Constitution. Section 9(1)(b) criminalises a person's failure to disclose information which he knows, or suspects, will materially assist in securing the apprehension, prosecution, or conviction of another person in the commission of a serious offence, or in preventing the commission of such an offence. In reaching its decision, the Court was heavily influenced by the fact that the reporting requirement applied only to a serious criminal offence committed by another, thereby implicitly preserving the ability of a person to assert the privilege against self-incriminating information in appropriate circumstances. The Court rejected a construction of the

[191] ibid [17].
[192] *Michaud v France* App no 12323/11 (ECtHR, 6 December 2012).
[193] ibid [131].
[194] Case C-305/05 *Ordre des Barreaux Francophones et Germanophone v Conseil des ministers* [2005] ECR I-5335. For a case where the AML reporting regime has been successfully attacked in part, albeit on different grounds where the liberty interests of lawyers were infringed, see *Attorney General of Canada v Federation of Law Societies of Canada* [2015] SCC 7.
[195] *Sweeney v Ireland* [2019] IESC 39.

reporting requirement in section 9(1)(b) which would have obligated a person involved in a crime to confess their participation.[196]

3.5 HOHFELDIAN ANALYSIS

Having located the foundation for criminalising a failure to report suspected money laundering in the twin notions of civil duty and social responsibility, Hohfeldian analysis provides a useful tool through which the nature of the duties and responsibilities may be illuminated. Wesley Newcomb Hohfeld's analysis of legal conceptions promotes the notion that all legal relations may be adequately described in terms of "rights" and "duties".[197] However, Hohfeld criticised reliance on these twin concepts as reflecting a "paucity and confusion" regarding actual legal conceptions and suggested the term "rights" tended to be used indiscriminately to refer to a privilege, power or immunity rather than a right in the strictest sense which is most frequently applied to an interest *[sic, a right]* in property.[198] The solution, Hohfeld believed, was to limit the broad and indiscriminate use of the term "right" to "a definite and appropriate meaning" by aligning it with the concept of "duty" as its invariable correlative.[199] "In other words", Hohfeld explained, "if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place …. The privilege of entering is the negation of a duty to stay off".[200]

One of the difficulties with this analysis is the problem of defining all legal relationships within a matrix which recognises legal duties and correlative rights to the exclusion of other concepts. Hohfeld cited by way of example the difficulty experienced by an

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196 ibid [65]–[69], [88]. There are differences between the reporting provision in s 9(1)(b) and s 330(1) of POCA 2002, but in terms of jurisprudential analysis they are not significant. In one respect, the reporting obligation in s 9(1)(b) is wider than the reporting obligation in s 330(1) of POCA 2002, in that it applies to all citizens and not only those persons working in the regulated sector. In another respect, though, the reporting obligation is narrower. Under s 9(1)(b) the report must relate to information which materially assists in the commission or prevention of serious crime, whereas under s 330(1) of POCA 2002 the obligation to report is triggered where there is information which gives rise to reasonable grounds for suspecting that another person is engaged in money laundering activity. The position of a company required to make a disclosure under s 9(1)(b) was not considered in the Supreme Court's judgment, or the judgment below ([2017] IEHC 702).

197 Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as applied in Judicial Reasoning' (1913–14) 23 Yale L J 16, 28.

198 ibid 29–30.

199 ibid 31.

200 ibid 32; see also Arthur Corbin, 'Rights and Duties' (1924) Yale Law School Faculty Scholarship Series, paper 2932.

academic writer in conceptualising the duty placed upon an innkeeper who exercises a public calling to serve every person who is a member of the public. The writer observed that "[i]t is somewhat difficult to place this exceptional duty in our legal system. The truth of the matter is that the obligation resting upon one who has undertaken the performance of public duty is *sui generis*".[201] Hohfeld explained that the writer experienced this difficulty because he failed to appreciate that the innkeeper was "holding out" under a personal liability rather than a personal duty.[202] In this instance, the innkeeper takes upon himself an altruistic responsibility, in respect of which there is no correlative right.

Applied to the AML regime, in so far as mandatory reporting under section 330 is concerned, considerations of *sui generis* do not arise. Persons working in the regulated sector obtain their special status by virtue of their occupation which carries with it a personal duty to report suspected money laundering when required to do so. In Hohfeldian terms, by virtue of the mandatory reporting requirement, the State has a right to receive from an individual or company a report of suspected money laundering, and there is a correlative duty on the part of an individual or company to report suspected money laundering in accordance with the statutory requirements. The State has a right to expect that this duty to be met.

The relationship between mandatory reporting and the engagement of the privilege against self-incrimination can also be analysed in Hohfeldian terms, although in order to achieve a coherent outcome the circumstances in which the privilege can be asserted must be widened beyond Hohfeld's perception. Hohfeld viewed the privilege narrowly, as reflecting no more than the negation of a duty to give evidence as a witness in court proceedings. To quote from Hohfeld, "in the law of evidence the privilege against self-incrimination signifies the mere negation of a duty to testify, a duty which rests upon a witness in relation to all ordinary matters; and quite obviously such privilege arises, if at all, only by virtue of general laws".[203] Hohfeld describes the privilege as the negation of a duty, but more accurately, the privilege is a right which belongs to a witness who is at risk of giving self-incriminating evidence. Where there is an obligation on a person to testify in Court, there is a correlative right to require that the witness answers questions which

[201] Hohfeld (n 197) 52.
[202] ibid 51–52.
[203] ibid 39–40.

he is asked. But where the answers may be self-incriminating, the witness has the right to assert the privilege, and the State has a duty to protect this right and ensure that self-incriminating questions are not answered.

In his reference to the privilege, Hohfeld was intent on demonstrating the nature of the correlative relationship between right and duty. Hohfeld was not seeking to delineate the boundaries of the privilege or the rationale which sustains it. Suffice it to note that when it is appreciated the privilege has a wider application beyond the situation where a witness is testifying in court, an analysis of the mandatory reporting obligation and the privilege in Hohfeldian terms becomes possible.

Therefore, with reference to corporate self-reporting, there are multiple rights and correlative duties. Hohfeldian reasoning posits that if the State has a right to demand a corporate self-report of criminal conduct, this right is reflected in a correlative duty on the part of the company to make the self-report. Then, with regard to the privilege against self-incrimination, if a company has a right to assert the privilege, this right correlates with a duty on the part of the State not to require a company to disclose information which is self-incriminating. Hohfeldian discourse illustrates the existence of rights and correlative duties which operate in parallel with each other.

3.6 ECONOMIC THEORY OF CRIME

Economic analysis provides an interesting perspective when seeking to understand developments in criminal law, and corporate reporting of criminal conduct is a perfect topic for consideration. As a legislative regime directed at the detection of money laundering and serious criminal activity, it would be surprising if economic considerations had not influenced the architecture of the AML regime. The economic advantages flowing from corporate self-reporting, whether voluntary or compulsory in nature, serve the interests of the State, and to a lesser extent, the interests of a company which has self-reported. The exposition of a duty-based model of corporate self-reporting is fortified by an analysis which visibility through the lens of economic theory can offer.

In his Treatise on Crimes and Punishments published in 1764, Cesare Beccaria perceived that the relationship between crime and punishment was proportionate, in the sense that

if an arithmetical calculation could be applied, there would be sale of punishment which "descend[ed] from the greatest to the least" depending upon the severity of criminal conduct in question.[204] The idea of applying an arithmetical calculation to crime and punishment was novel, and sixteen years later, Jeremy Bentham developed this idea as part of his utilitarian theory which held that the general object shared by all laws, including criminal law, was the total happiness of the community.[205] More particularly, Bentham explained that "the value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence",[206] and that "the greater the mischief of the offence, the greater is the expense which it may be worthwhile to be at, in the way of punishment".[207]

The contemporary approach, as exemplified by Gary Becker, is to view economic theory as a tool for analysing choices made by the legislator and the criminal alike.[208] It is the role of the legislator to minimize the costs to society of the crime which the criminal commits, together with the costs to society associated with the prevention, detection, and enforcement of the crime. Meanwhile, the criminal makes a calculation of a different sort. The criminal calculates the utility in terms of his gain from the criminal conduct, comparing the costs likely to be incurred by him as a result of committing the criminal conduct, and then reaching a rational determination as to whether or not to commit the criminal conduct in question. It is the aggregate effect of each decision made cumulatively by the totality of criminals to commit crime which becomes impactful. Whilst not all criminals act rationally, for instance in crimes of violence involving loss of self-control, it is economic crime which poses the greatest threat to the economy. In 2019, economic crime was estimated to cost £37 billion in the UK.[209]

The next step in the emergence of a modern perspective on economic theory was taken by Richard Posner when he analysed the substantive doctrines and concepts of criminal law which had not been previously addressed.[210] Posner derived the basic criminal prohibitions from the concept of efficiency and contended that judges and legislators

[204] Cesare Beccaria, *On Crimes and Punishments* (1764) Of the Proportion Between Crimes and Punishments.
[205] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1780) ch XIII, s 1.
[206] ibid ch XIV, VIII r 1.
[207] ibid ch XIV, X, r 2.
[208] Gary Becker, 'Crime and Punishment, An Economic Approach' (1968) 76 J Pol Econ 169.
[209] HM Government and UK Finance, 'Economic Crime Plan, 2019 to 2022' (July 2019) para 1.2.
[210] Richard Posner, 'An Economic Theory of the Criminal Law' (1985) 85 Colum LR 1192.

often reasoned implicitly in economic terms. Neal Katyal provided a paradigm example of this approach with the offence of conspiracy, arguing that co-conspirators have significant economic value to a prosecuting authority since they are valuable sources of information and many prosecutions would not be possible without them.[211] Katyal cited a study in 1998 which found that conspirators implicating their co-conspirators "helped the government obtain guilty pleas of co-defendants, additional convictions and arrests, prosecution of new defendants, recovery of assets, cooperation of known and new co-defendants, and deportations".[212]

In the area of corporate criminal liability, economic analysis of enforcement models in the United States has been associated with a discussion of the advantages and disadvantages of the imposition of strict vicarious liability which renders a company criminally liable for the actions of its employees, however senior or junior they may be. Conventional understanding suggests that the imposition of vicarious liability operates to reduce corporate crime, since the wider exposure to financial sanction is said to deter the future commission of criminal activity. Hence, criminal conduct is deterred efficiently. Jennifer Arlen challenges this view on the ground that it ignores the corporate enforcement expenditure which needs to be considered.[213] In fact, Arlen believes that the policy of increased corporate vicarious liability may even lead to an increase in criminal activity rather than a decrease.[214] The burden of Arlen's argument is that the imposition of vicarious liability presents companies with conflicting incentives. Increased enforcement expenditure ought to reduce the number of employees who commit criminal acts by increasing the probability of detection, but as a result of detecting these criminal acts and self-reporting them to the enforcement authorities the company increases its exposure to large criminal fines.[215] In addition, rather than lead to a greater level of transparency in relation to corporate wrongdoing, the imposition of vicarious liability would create an incentive for a company to cover up rather than disclose wrongdoing committed by any of its employees.

[211] Neal Katyal, 'Conspiracy Theory' (2003) 112 Yale LJ 1307.
[212] ibid.
[213] Jennifer Arlen, 'Potentially Perverse Effects of Corporate Criminal Liability' (1994) 23 J Legal Stud 833.
[214] ibid 836.
[215] ibid 836.

3.6.1 Self-reporting: an economic solution

The solution, according to Arlen and Reinier Kraakman, lies in the utility of the voluntary self-reporting model. Corporate policy should incentivise companies by exempting them from criminal penalties where they have self-reported criminal activities committed by their employees and co-operated with the prosecution authorities to convict the individual employees who are involved.[216] The effect of this solution would be to place a duty on a company to undertake extensive monitoring, corporate self-reporting and police co-operation, and in consideration the company would escape criminal sanction.[217] This would not remove company policing from the criminal law arena since if a company failed to self-report its employee's wrongdoing or declined to co-operate with the prosecution authorities, the company would commit a criminal offence and incur a substantial financial penalty. Alan Mitchell Polinksy and Steven Shavell follow Arlen and Kraakman's approach in a review of the theory of the public enforcement of law, asking whether sanctions should be reduced in cases where a company self-reports before an enforcement authority discovers the wrongdoing for itself.[218] Polinsky and Shavell conclude that it is "generally socially desirable for the structure of enforcement … to encourage self-reporting".[219] There are three reasons. First, self-reporting reduces enforcement costs because the enforcement authority is not required to identify the violator. Secondly, self-reporting reduces risk because potential violators know their wrongdoing will be reported to the enforcement authorities. If no self-report is made, there is considerable risk as to whether the wrongdoing will be discovered or not. Thirdly, self-reporting allows harm to be mitigated and facilitates its containment and rectification.

It is not difficult to see how mandatory corporate self-reporting under the AML legislation can also be viewed in this manner, as an economically efficient way of policing corporate misconduct applying a duty-based approach supported by criminal sanction where necessary. In the case of voluntary self-reporting, the State "nudges" a company

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[216] Jennifer Arlen and Reinier Kraakman, 'Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes' (1997) 72 NYU L Rev 687, 693; see also Eliakim Katz and Jacob Rosenberg, 'Property Rights, Theft, Amnesty and Efficiency' (2003) E J L & E 219 and Kevin Wu and Klaus Abbink, 'Reward Self-Reporting to Deter Corruption: An Experiment on Mitigating Collusive Bribery' (2013) Monash University Department of Economics Discussion Paper 42/13.

[217] Stephen (n 93) 837.

[218] A Mitchell Polinsky and Steven Shavell, 'The Economic Theory of Public Enforcement of Law' (1999) NBER, Working Paper 6993.

[219] ibid 35.

into making a self-report,[220] whereas in the case of a mandatory self-report, a company is compelled. Either way, a company makes a self-report, and the same economic analysis applies. The three factors identified by Polinsky and Shavell which promote voluntary self-reporting apply with equal force to the economic forces which support the compulsory model.

The impact of corporate self-reporting shifts the costs of detection from the State onto companies operating in the private sector. Pejoratively, the State has recruited the company to act as an unpaid, involuntary (and sometimes deeply resentful) informant, to assist in the detection of suspected money laundering and the underlying predicate crimes. The cost shifting arrangement requires a company to make this contribution in the broader interests of the community. Putting in place corporate procedures to reduce exposure to economic crime is also part of the remediation process associated with the corporate self-reporting.[221] Costly compliance processes require individuals and companies to identify a customer and any individual or company beneficially associated with a customer. A company is also required to obtain information on the source of a customer's monies.[222]

Ronald Coase would have regarded these corporate contributions as a "social cost".[223] Coase draws on cases involving the tort of nuisance to establish his point that there is always a "transaction cost" to be paid. A claimant may complain about noisy machinery emanating from a nearby factory, but in determining whether to grant an injunction for nuisance, the law will require him to accept some degree of discomfort for the general good.[224] This is the "social cost" which is required to paid. Here too, in the context of corporate reporting of suspected money laundering, a company is required to accept some degree of discomfort as the costs of detecting money laundering and the underlying

[220] See Karen Yeung, 'Nudge as Fudge' [2012] 74 MLR 122.
[221] Crime and Courts Act 2013, sch 17 para 5(3)(e) empowers a prosecuting authority to require a company to implement a compliance programme or make changes to an existing compliance programme as a requirement of a deferred prosecution agreement.
[222] A person working in the regulated sector is required by the Money Laundering Regulations 2017 as amended to undertake 'customer due diligence' on every customer with whom a business relationship is established. This involves identifying the customer and the customer's beneficial owner and making enquiries about the legitimacy of the customer's source of funds. Failure to perform these tasks constitutes a criminal offence punishable by a maximum of two years imprisonment. See regs 4, 27–38 and 86.
[223] Ronald Coase, 'The Problem of Social Cost' [2013] 56 Journal of Law & Economics 837, originally published in 1960.
[224] ibid 854.

predicate crimes shift from the public to the private sector. The burden of Coase's argument is that it is inefficient to impose the cost of detecting money laundering on the State, because the detection can be achieved at lower cost, and probably at a higher rate, by companies. The "social cost" of engaging in commercial financial activity rests in the acceptance of the reporting duty. The choice rests with a company, either to withhold information and commit a criminal offence or accept the need to self-report and suffer the attendant cost which accompanies this course of action.

3.7 CONCLUSION

The discussion in this chapter regarding a theoretical home for mandatory reporting has borne out the sharp distinction between a corporate model of self-reporting which is voluntary and consensual, and a coercive model which compels corporate self-reporting by threat of criminal prosecution. Whilst there are commonalities shared by the two models which an economic approach illuminates, mandatory self-reporting is characterised by the imposition of a legal duty, whereas in the case of voluntary self-reporting, if there is any duty, it is no more than a duty to act morally by confessing to the corporate criminality which has been committed. The moral element is clouded by the hope or expectation of reward, in the form of leniency, and in reality, voluntary self-reporting constitutes no more than a bargain struck between a company and the State in which both sides perceive themselves to be winners. In contrast, there is no deal to be struck in the case of mandatory self-reporting. It is the brute force of the law, or as Robert Cover would have said, the violence of the law,[225] which compels corporate self-reporting of criminal conduct, subject to any relief which may be asserted in the form of the privilege against self-incrimination.

In so far as corporate reporting of third-party criminality and corporate self-reporting are concerned, the critique in this chapter has demonstrated that they are mitochondrially two branches of the same tree. The mandatory reporting requirement in section 330 of POCA 2002 is adequately theorised as a criminal offence of omission supported by notions of civic duty and social responsibility which individuals and companies are required to discharge. The theoretical foundation for the use of coerciion is soundly

[225] Robert Cover, 'Violence and the Word' [1985–86] 95 Yale LJ 1601.

established in terms of corporate third-party reporting and equally, in the absence of any acknowledgment of the privilege against self-incrimination, the compulsory making by a company of a self-report.

CHAPTER 4

THE PRIVILEGE AGAINST SELF-INCRIMINATION

4.1 INTRODUCTION

The *second research question* explores whether the mandatory obligation to self-report engages the spirit, if not the letter, of one of the most important liberties at common law, namely, the privilege against self-incrimination. In 2007, the Grand Chamber of the ECtHR described the Latin maxim "*nemo tenetur seipsum accusare*" ("no man is bound to accuse himself") as a principle which "goes back to the very origins of Western legal tradition".[226]

In addressing the second research question, this chapter researches the rationales which support the privilege, before developing an argument in chapter 8 that the mandatory requirement to self-report criminal conduct engages, or ought to engage, the privilege against self-incrimination. An assessment of the risk to the report maker of criminal prosecution is fact specific. In a case where the State authorities have no prior knowledge of the criminality, they may initiate a criminal investigation following receipt of a mandatory self-report. In due course, the report maker may, or may not, be prosecuted for the commission of criminal conduct identified in the report. The key point is that once a self-report is made, the maker loses control of his information and exposes himself to a risk of criminal prosecution which, prior to the filing of the self-report, was not there. In cases where the State authorities have some prior knowledge of the criminality, the filing of the self-report could increase the risks of prosecution where the narrative of the self-report is incriminating and indicates new avenues for the gathering of evidence which could be presented against him.

The continuing place of the privilege against self-incrimination in English law has been the subject of much judicial and academic discussion.[227] On several occasions, the judges have sought to limit the application of the privilege,[228] and there are multiple instances of

[226] *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006) per Judge Zupančič at page 39 of the judgment.
[227] For a comprehensive review, see Andrew Choo, *The Privilege Against Self-Incrimination and Criminal Justice* (Hart Publishing 2013). See also, Hannah Quirk, *The Rise and Fall of the Right to Silence* (Routledge 2017).
[228] See, for example, *Sociedade Nacional de Combustiveis de Angola v Lundqvist* [1991] 2 QB 310 (the privilege cannot be claimed by a company for the protection of its office holders); *R v Hertfordshire CC, ex p Green*

the legislature disapplying the ability to assert the privilege or restricting its application.[229] The courts have upheld these provisions at the highest level as proportionate restrictions on the privilege's application,[230] and in applying a legislative provision which abrogates the privilege the courts will not lean against the abrogation if this would frustrate the legislative purpose such as reducing the risk of injustice to victims of crime.[231] This is part of a wider trend which has witnessed the erosion of the right to silence at trial,[232] and the increasing tendency of the legislature to require defendants to accept criminal responsibility or prove their defence.[233] The application of the privilege is threatened in a criminal justice system which demands a person's co-operation in the detection of crime which they have allegedly committed. The stakes are high, when the legislature imposes a mandatory self-reporting requirement based, at least in part, on a supposition that a person – individual or corporate – is expected to divulge self-incriminating information.

The purpose of this chapter is not to critique these developments or weigh the respective arguments which militate for and against the contemporary application of the privilege. The public interest consideration which supports the abolitionist, or at least restrictive, approach is acknowledged, but it is not the subject of consideration. Rather, this chapter is devoted to the discovery of theoretical justifications which have underpinned the law's recognition of the privilege from the time of its origin. The boundaries of the privilege should be set by the perils which it has sought to protect against, and their identification influenced by the purposes which the privilege has been developed to serve.

The development of multiple rationales has been evolutionary, from the time of the privilege's origin until the present day. Historically, the rationale underlying the recognition of the privilege against self-incrimination rested on the concern that information obtained as a result of physical threat would not be regarded as reliable. Today, as the use of physical threat has become an anathema and prohibited by Article 3 of the ECHR, the element of coercion is more commonly reflected in other forms of pressure which are brought to bear on an individual to elicit self-incriminating

Environmental Industries [2002] 2 AC 412 (the privilege does not apply to the compulsory provision of information in extra-judicial inquiries).

[229] See, for example, Theft Act 1968, s 31(1) (questions regarding recovery of stolen property); Road Traffic Act 1988, s 7 (breath, blood, or urine sample on a drink-driving charge).

[230] See, for example, *Brown v Stott* [2003] 1 AC 681.

[231] Phillips v News Group Newspapers Ltd [2012] UKSC 28 [14]

[232] Criminal Justice and Public Order Act 1994, s 34.

[233] Bribery Act 2002, s 7(2); Criminal Finances Act 2017, ss 45(2), 46(3).

information. These forms of pressure undermine the dignity of an individual and his right to privacy, and whilst physical pressure may not be exerted, the element of coercion is extant. The common denominator between the use of physical pressure and other forms of pressure is an attack on an individual's freedom to make an unforced determination as to whether or not he should disclose self-incriminating information. In both instances, an individual's freedom to choose is lost and the individual's right to make an autonomous decision is overborne. The purpose of the disclosure is none to the point. The underlying rationale supporting the privilege is not affected by the nature of proceedings in which the information is sought, and the reach of the privilege is not limited to situations where incriminating information is sought during the course of criminal investigation or civil proceedings.

4.2 A PRIVILEGE, OR A RIGHT

Before exploring the origin of the privilege against self-incrimination and the light which history can shed on the rationales supporting the privilege, a moment of linguistic reflection is helpful. There are occasions where a study of terminology used to express a legal concept can assist in revealing the depth of its meaning and the nature of its application.

The legal protection against self-incrimination is most frequently expressed as a privilege, although sometimes it is referenced as a right. In this instance, there is no significance in the articulation of the protection as a privilege and not a right, even though the two concepts are different in meaning and effect. The ability of an accused person to remain silent in the face of an accusation is almost always expressed as a right, and as becomes apparent from a study of its historical origin, the privilege against self-incrimination and the right to silence have a common origin. This suggests that, unusually, the variation in terminology is a distinction without a difference and where the privilege against self-incrimination is described, it is the right of silence which is being referenced. And *vice versa*.

This approach is consistent with the understanding of a privilege in common parlance. The Oxford English Dictionary defines a privilege as "a right, advantage, or immunity granted to or enjoyed by an individual, corporation of individual which is beyond the

usual rights or advantages of others".[234] Therefore, in its literal meaning the privilege against self-incrimination operates to exempt a person by reason of a right or advantage from answering questions or producing information or documents, which would incriminate himself. To reflexively self-incriminate is to accuse oneself; it is "the action of making oneself appear guilty of a crime or misdemeanour".[235]

Arthur Corbin's seminal analysis of legal terminology and the philosophical dichotomy notes that the difference between a privilege and a right is not always as pronounced as the language would suggest.[236] Certainly, in ordinary parlance, a privilege connotates an advantage granted by a person in authority which is concessionary in nature. In this way, the notion of a privilege contrasts sharply with the notion of a right, which connotes a moral or legal entitlement. As Corbin explains in a passage which establishes the dichotomy:

> If A invades B's house, we are able to predict that the police will eject A, that a court will give judgment for damages, and that the sheriff will levy execution. We say that B had a *right* that A should not intrude, and that A had a *duty* to stay out. But if B had invited A to enter, we know that those results would not occur. In such case we say that B had no *right* that A should stay out and that A had the *privilege* of entering.[237]

However, in a later passage Corbin develops the understanding that there are instances where a privilege sits alongside a right and transforms into one. Corbin makes the point that although a privilege does not itself include conferral of a right to non-interference from another person, a privilege and a right are very commonly found together.[238] Corbin gives as an example the case of self-defence to an assault in criminal law: "A assaults B. This gives B the legal privilege of striking back (commonly called the "right" of self-defence)".[239]

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[234] <www.oed.com/> accessed 13 April 2021.
[235] ibid.
[236] Arthur Corbin, 'Legal Analysis and Terminology' [1919] 29(2) Yale Law Journal 163.
[237] ibid 164–65.
[238] ibid 167.
[239] ibid 168.

Whether the right to self-defence is conceptualised as a right or a privilege, the outcome is the same. Either way, the law permits B to strike back, and provided he uses no more than reasonable force, the law exempts B from criminal responsibility by reason of his conduct.

Self-defence arises where a defendant has committed a criminal offence but seeks exemption from criminal responsibility on the ground that his action was justified. In this instance, the common law has long recognised that force used in defence of a private interest such as personal safety, or to reference the language of human rights, individual autonomy, is permitted where the force was reasonable. Although the ability to self-defend is described loosely as a right or entitlement, Corbin's conceptualisation of self-defence as a legal privilege is noted.[240]

Thus, the law arrives at the same place whether protection from self-incrimination is conceptualised as a privilege or a right. The emerging question is not the significance of any distinction between an understanding of a privilege in contrast to a right, but rather, why the law should regard it as appropriate to permit an exemption from a legal requirement to answer questions or initiate a disclosure of information, where the content of the answer or disclosure is self-incriminating.

4.3 ORIGIN OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

As a first staging post on the journey to understand the nature of the privilege against self-incrimination and the rationales which underpin it, it is helpful to trace the origins of the privilege. If the foundation stone of the privilege can be identified, a review may shed light on the discussion about the potential engagement between the privilege and the

[240] In *Social Philosophy (Foundations of Philosophy)* (Prentice-Hall Inc 1973), 56–58, Joel Feinberg discusses the notion of privilege, in the context of duties and rights. Whether Feinberg would afford equivalence to the ability to self-defend and the privilege against self-incrimination is uncertain. Feinberg recognises that self-defence affords an individual liberty to strike back and override a duty of forbearance, in contrast to another type of privilege which is no more than a benefit, and which is not necessarily justified. An example is the rule in some US jurisdictions that physicians are not required to appear in court if they are a defendant in a negligence claim. Whilst the philosophical analysis is impeccable, Feinberg's application is questionable. It is by no means clear that the law imposes a duty of forbearance on an individual when his interests are threatened. In contemporary academic literature, privilege has assumed a broader connotation, forming the substratum of discussion about social injustice. The discussion frames privilege as a vehicle for maintaining established systems of racist, gender and classist narrative domination. See Alison Bailey, 'Privilege: Expanding on Marilyn Frye's "Oppression"' [1998] 29(3) Journal of Social Philosophy 104.

mandatory self-reporting obligation, and in due course the ability of a corporate entity to assert the privilege.

4.3.1 Biblical origins

The first recognisable mention of the Latin maxim *"nemo tenetur accusare seipsum"* in the Western legal tradition can be traced to the writings of Saint John Chrysostom who was Archbishop of Constantinople at the start of the fifth century. Regarded as an important Early Church Father who fought against abuse of power by authority, in his work Epistle to the Hebrews Saint John Chrysostom instructed his followers that they should remain silent in the face of public accusation: "I do not tell you to display your sin before the public like a decoration, nor to accuse yourself in front of others". *[Non tibi dico ut ea tamquam pompam in publicim proferas, neque ut apud alios te accuses]"*.[241]

Although the context of St Chrysostom's exhortation is obscure, the spirit of the instruction took root in canonical law. By the 12th century the jurist known as Gratian, writing in his Decretum (a restatement of early canon law) was able to declare that Christians should not self-incriminate themselves. "I do not tell you to incriminate yourself publicly or to accuse yourself before others" *[Non tibi dico, ut te prodas in publicum, neque apud alios accuses]*.[242]

These two closely associated formulations gave way to the shorter maxims, *"nemo tenetur prodere seipsum"* and "*nemo teneur accusare seipsum*", with which the common law is familiar today.

The rule against self-incrimination in canon law, encapsulated in these Latin maxims, appears to have been drawn from a principle in Biblical law which focused on the lack of evidential weight which could be placed on a statement made by a person who had been accused of committing serious wrongdoing.[243] Different scenarios may be posited. An

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[241] John Chrysostom, 'Homiliae in Epistuluam ad Hebraeos' in JP Migne (ed), *Patrologiae Graeca*, vol 63, 186, 213, 216

[242] Gratian, *Decretum Gratiani*, 2nd Part, Causa 33, Qu (de poenitentia) c.87, 1 in Aemilius Friedberg (ed), *Corpus Juris Canonici* (1879–81) 1184.

[243] Richard Helmholz, 'Origins of the Privilege against Self-Incrimination: The Role of the European IUS Commune' (1990) 65 NYUL Rev 962; Jonathan Fisher, 'Self-incrimination at Common Law – Its Origin in Jewish Law' in Nahum Rakover (ed), *Jerusalem City of Law and Justice* (The Library of Jewish Law 1998)

individual may be pressurised into making a false confession, or he may seek to acquit himself by casting wrongful aspersion on others. Either way, an individual subject to accusation is cast as a potentially unreliable witness. In the Old Testament there is an injunction which instructs a court of law "not to accept a false report or extend your hand with the wicked to be a corrupt witness".[244]

The principle is summarised in the Talmud[245] in a shorter formulation that a person who has committed wrongdoing is not permitted to act as a witness in his defence.[246] The Talmud explains that a person cannot be convicted of a criminal offence by his own testimony, since his statements cannot be treated as credible. An individual stands in the same place as a relative to the accused, whose statements would also be rejected for the same reason.[247] A respected religious commentator in the thirteenth century summarised the position regarding the evidential incompetence of an accused person as follows: "The root reason for this injunction is obvious: Any person who has no concern for himself and will not care about his evil deeds, will have no care or concern for others. Therefore, it is not proper to believe him about anything".[248]

The parallelism between testimony given by an accused person and evidence tendered by a relative presented as a guardrail against unreliable testimony, which may or may not be self-incriminating. Indeed, a suspected person and a relative may wish to give evidence in their favour which is not self-incriminating. But in both cases the suspected person and relative are treated as incompetent witnesses because of the risk that their evidence is unreliable. In the case of a person suspecting of committing culpable activity, the Biblical concern is not that an accused person may be compelled by threat or violence to make an admission against his interest, but rather that he may choose to do so, by virtue of his unbalanced state of mind[249] or a preconceived motivation to mislead. As Norman Lamm

461–74; Samuel Levine, 'An Introduction to Self-Incrimination in Jewish Law, with Application to the American Legal System' (2006) Loy LA Int'l & Comp L Rev 28, 2, 257.

[244] Exodus 23:1.

[245] The Talmud is the central text of Rabbinic Judaism and the primary source of Jewish religious law and Jewish theology.

[246] Babylonian Talmud, Tractate Sanhedrin 9b.

[247] ibid.

[248] Sefer Ha-Hinnukh, Exodus (Shemot) 23:1. Sefer Ha-Hinnukh is a Jewish rabbinic text which systematically discusses the commandments of the Torah. It was published anonymously in 13th-century Spain.

[249] Psychological study has revealed that false confessions may be made voluntarily for several different reasons. Irrationally, a suspect may have a 'morbid desire for notoriety', feelings of guilt about perceived criminal conduct, or an inability 'to distinguish fact from fantasy'. More rationally, a suspect may have

explained: "[Biblical law] … is obviously concerned with protecting the confessant from his own aberrations which manifest themselves, either as completely fabricated confessions, or as exaggerations of the real facts".[250]

In due course, the invocation of the privilege in the courts came to be associated with the need to protect suspected persons against making unreliable admissions in the face of coercive practices, but in its earliest conception the Biblical root of the privilege was more concerned with the unreliability of a self-incriminating statement than the use of compulsion to obtain it.

4.3.2 Self-incrimination in Tudor and Stuart England

During the late sixteenth and early seventeenth century, the privilege against self-incrimination became recognised as a vitally important shield against oppression. Queen Elizabeth I restored Protestantism following the reign of her Catholic half-sister Mary Tudor, and Archbishop Whitgift prosecuted many members of clergy suspected of not conforming to the Protestant faith. Under Elizabethan law, an individual could be compelled to testify as to his innocence by answering a series of interrogatories on oath. The judges expressed concern about the legality and operation of the oath, known as the *ex officio* oath,[251] and the matter became the subject of public controversy.

Sir Edward Coke successfully argued in *Cullier v Cullier*[252] that the oath could not be administered in an ecclesiastic prosecution before a secular court. The law report discloses Coke's citation of the maxim "*nemo tenetur prodere seipsum*" in support of his argument. A few years later, when sitting as a Judge on an application for a writ of *habeas corpus* to the High Commission Court in *Burrowes v The High Commission*,[253] the maxim having been cited many times in argument and judgment, Coke (by now, Chief Justice) said that the

decided to protect himself or a third party from admitting some other fact such as more serious criminal wrongdoing or some other embarrassing conduct. In short, he may have decided that the benefits of a false confession outweigh the costs. See Memon, Vrij and Bull, *Psychology and Law: Truthfulness, Accuracy and Credibility* (Wiley 2003) 78.

[250] Norman Lamm, 'The 5th Amendment and Its Equivalent in Jewish Law' 17 Decalogue Jour 1 (January to February 1967) 10, 12.

[251] The *ex officio* oath was a religious oath made by an accused before questioning by Star Chamber to answer all questions truthfully.

[252] *Cullier v Cullier* (1589) Croke, Elizabeth 201, 78 ER 457

[253] *Burrowes v The High Commission* (1615) 3 Bulstrode 48, 81 ER 42

Elizabethan statute was a penal law, "and so they are not to examine one upon oath upon this law; thereby to make him to accuse himself".[254]

Charles Firth treated the circumstances in *R v John Lilburn* (1639) as a pivotal event in the recognition of the privilege against self-incrimination, calling into question the usual procedure in Star Chamber which led to the abolition of the oath in due course.[255] Lilburn, an anti-royalist leveller, refused to take the oath and was tortured until he obeyed. Subsequently, in May 1641, the House of Commons resolved that Star Chamber had behaved in a manner which was "illegal, and against the liberty of the subject: and also bloody, cruel, barbarous, and tyrannical".[256] Writing in the mid-seventeenth century, the English jurist John Selden summarised the position as follows: "By an old law, moreover, it becomes established that no person should be delivered up to be executed … or for punishment by lashes by his own confession, but by the testimony of others …".[257]

In the reign of James II (1633–1701) the privilege was firmly established as applying generally in connection with an accused's inability to give self-serving testimony. In 1680, it was noted in Emlyn's Edition of Hale's Pleas of the Crown that "a man concerned in point of interest is not a lawful accuser or witness in many cases".[258] For Sir Matthew Hale, the fact that an individual is *parti prix* is stated as the reason for the privilege and harks back to the rule's Biblical origins.

4.3.3 Self-incrimination in the United States

In the United States, the privilege against self-incrimination was incorporated into the Constitution as a fundamental right under the "due process" provision. The Fifth Amendment, ratified on 15 December 1791, provides that "no person shall … be deprived of life, liberty or property without due process of law", and as the United States Supreme Court has made clear, "due process of law" embraces the privilege against self-incrimination and the right to silence. At the beginning of his judgment in *Miranda v*

[254] ibid.
[255] Charles Harding Firth, 'Lilburne, John' in Leslie Stephen (ed), *Dictionary of National Biography, 1885–1900*, vol 33, 243–44.
[256] James Fitzjames Stephen, *A History of the Criminal Law of England*, vol I (1883), 345. See generally 343–45.
[257] John Selden, De Synhedriis Veterum Ebraecorum, (1653), 2:545.
[258] Emlyn's Edition of Hale's *The History of Pleas of the Crown*, (1736), I-302.

Arizona,[259] which concerned the interrogation of an accused while in police custody, Chief Justice Warren cited at length from the 1896 judgement of the Supreme Court in *Brown v Walker*.[260] The citation, from Mr Justice Brown's judgment, is worthy of attention because it demonstrates the Supreme Court's understanding of the historical origin of the privilege against self-incrimination and its underlying rationale:

> The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688 and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, [were] not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier State trials … made the system so odious as to give rise to a demand for its total abolition.[261]

Echoing the Tudor and Stuart development of the privilege, it is the potential unreliability of self-incriminating statements which underpins the privilege where coercive measures have been applied. Pressure exerted by representatives of State authorities when questioning an individual about the alleged commission of criminal behaviour can produce inconsistent or contradictory answers, causing the reliability of the answers to be heavily compromised.

In one sense, this contrasts with the Biblical formulation where, as noted, the concern about the unreliability of self-incriminating statements is promoted not by the application of physical threats but by the mental state or purpose of the individual. The former is an

[259] *Miranda v Arizona*, 384 US 436 [1966]
[260] *Brown v Walker*, 161 US 591 [1896]
[261] *Miranda*, 442–43.

external catalysing force, whereas the latter is inherently internal. In another sense, though, there is a unifying thread which connects the common law and Biblical approaches. The common denominator is concern about the potential unreliability of self-incriminating statements. The touchstone is the need for reliability, with both approaches operating to safeguard the dignity of the individual as well as the efficacy and integrity of the trial process.

4.3.4 A wider application of the privilege

To this point, the application of the privilege has been discussed in the context of its role in Court proceedings. However, as the application of the privilege developed, broader considerations about the fairness of due process came into sharper focus, especially where physical threats or coercive measures were brought to bear on an accused person during an investigation by the State authorities. The ability to assert the privilege against self-incrimination was no longer confined to relieve an accused person from incriminating himself when giving evidence during legal proceedings. In time, the treatment of suspects during a criminal investigation became equally important. This expansion in the application of the privilege is reflected in the theoretical justifications for the existence of the privilege which have been articulated in the post-Second World War era.

With legal protections against the use of oppressive practices in securing confessions increasing, the concern here transcended the reliability of the evidence and began to focus on the nature of the relationship between the individual and the State, and whether it was acceptable in terms of fairness and justice for State authorities to require a person to make self-incriminating statements during an investigation into their suspected wrongdoing. Considerations relating to the respect for a person's dignity, their personal autonomy and their entitlement to privacy came into play. Edwin Driver notes in his comment on the seminal decision of the United States Supreme Court in *Miranda v Arizona*,[262] "[t]he Court … evidenced a shift in concern from fear of the untrustworthiness of coerced confessions to protection of the individual".[263]

[262] *Miranda* (n 259).
[263] Edwin Driver, 'Confessions and the Social Psychology of Coercion' [1968] 82 Harvard Law Review 42, 43.

As Justice Goldberg explained in *Murphy v Waterfront Commission* two years earlier:

> [The privilege against self-incrimination] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial, rather than an inquisitorial, system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life; our distrust of self-deprecatory statements; and our realization that the privilege, while is sometimes a shelter to the guilty is often a protection to the innocent.[264]

These sentiments were echoed by Mr Justice Murphy in the High Court of Australia in the following terms:

> The privilege against compulsory self-incrimination is part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigation. It protects the innocent as well as the guilty from the indignity and invasion which occurs in compulsory self-incrimination; it is society's acceptance of the inviolability of human personality. [265]

Referencing an association between the privilege against self-incrimination and concerns for human dignity, these citations articulate a value which penetrates the root of the human condition. As Sir Geoffrey Gilbert explained in the early part of the 19th Century in his Law of Evidence, the privilege against self-incrimination was associated with "the natural duty of self-preservation", since the "Law of Nature … commands every Man to

[264] *Murphy v Waterfront Commission* [1964] 378 US 52, 55.
[265] *Pyneboard Pty Ltd v Trade Practices Commission* [1983] 152 CLR 328.

endeavour his own Preservation …".[266] For Gilbert in England, and others such as Justice Goldberg in the United States and Mr Justice Murphy in Australia, the association between a wide application of the privilege and the law's respect for individual dignity, personal autonomy, and enjoyment of privacy was clearly established.

This association is visible in the approach of the ECtHR to the topic. In recent times, the breadth of the privilege's application was articulated by the ECtHR in *Murray v United Kingdom,*[267] with the Court declaring that "… there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure".[268]

The broadest exposition of the privilege against self-incrimination is to be found in the judgment of the ECtHR in *Heaney and McGuiness v Ireland* [269] where legislation compelling a citizen to give a full account of his movements and actions during a specified period was held to be incompatible with the privilege against self-incrimination if the citizen's answers might have tended to incriminate him. The Court:

> recalled its established case-law to the effect that, although not specifically mentioned in Article 6 of the [European] Convention [on Human Rights], … the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6.[270]

Stressing that the privilege "must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory",[271] the Court re-iterated

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[266] Geoffrey Gilbert, *The Law of Evidence* (1805), cited by Mike MacNair, 'The Early Development of the Privilege against Self-Incrimination' [1990] 10 OJLS 66, 84.
[267] *Murray v United Kingdom* [1996] 22 EHRR 29.
[268] ibid 45.
[269] *Heaney and McGuiness v Ireland* [2001] 33 EHRR 12.
[270] ibid 40.
[271] ibid 45.

that a mandatory requirement to provide information would not be allowed to "destroy[ed] the very essence of the privilege against self-incrimination".[272]

This reasoning accorded with the ECtHR's previous decision in *Funke v France*[273] and clearly established that in so far as an international human rights court was concerned the privilege against self-incrimination can be engaged in cases involving the compelled disclosure of information more generally and is not confined to potentially incriminating answers given by a witness during the course of legal proceedings. Certainly, the theoretical justification for a wider application of the privilege is strong when viewed through the prism of fundamental rights and human dignity.

4.4 SELF-INCRIMINATION IN THE ENGLISH COURTS

Recognition of a wider role for the privilege intertwined with considerations of human dignity, personal autonomy, and privacy entitlements, can sometimes lead to a different outcome to that which would have been reached if a more traditional understanding of the rationale underlying the privilege had been applied. The difference can have important practical consequences, and, in respect of one aspect of criminal investigatory powers English law remains in a state of confusion as a result of appellate judges expressing different views about their understanding of the scope of the privilege.

In two recently decided cases, judges expressed divergent opinions on whether the privilege can protect an individual from a requirement to produce pre-existing documents which were created independently of the investigation. A narrow conception sees the privilege as a protection against the production of evidence in the face of threat and coercion, whereas a wider conception recognises the value of the privilege more extensively, as part and parcel of respect for individual dignity, personal autonomy, and enjoyment of privacy. In the narrower conception, the privilege does not operate to protect the production of pre-existing documents which are self-incriminating, since they were not created as a result of threat or coercion. In the wider conception, the privilege does attach to these documents, since the compelled production of self-incriminating documents whenever created is an affront to individual dignity, personal autonomy, and

[272] ibid 54.
[273] *Funke v France* [1993] 16 EHRR 297; see also *Murray v United Kingdom* [1996] 22 EHRR 29.

enjoyment of privacy. The point is important in the context of the making of a mandatory self-report of criminal conduct in accordance with section 330(1) of POCA 2002. In the case of a mandatory self-report where is no criminal investigation afoot, the self-incriminating information will necessarily be pre-existing.

4.4.1 River East Supplies

The first of the two cases is *R (River East Supplies Ltd) v Crown Court at Nottingham*,[274] a decision of the High Court in 2017. In this case, an order was sought against a company to produce documents for the purposes of a criminal investigation into the company's alleged involvement in counterfeit activity. The company was awaiting trial in the Crown Court and unsuccessfully resisted the making of an order on the ground that the privilege against self-incrimination may be violated.

Following a line of earlier cases decided in the English courts and several key cases decided in the ECtHR, the High Court held that the application of the privilege against self-incrimination did not extend to the production of documents whose creation pre-existed the commencement of the criminal investigation. In the Court's view, there is a clear distinction to be drawn between pre-existing documents, and documents – or other material - created only by virtue of criminal or regulatory investigation or proceeding. The former category of documents falls to be regarded as made independently of the will of the person seeking to assert the privilege, and therefore one to which the privilege does not apply, whereas the latter category may have been produced by compulsion. Production of documents or other materials falling into the latter category engages the privilege where there is risk that the documents or material may be adduced by a prosecutor as evidence to incriminate the suspect.

The position is complicated by the fact that the limitation on the application of the privilege to pre-existing incriminating documents is a comparatively recent innovation in English law emerging from the decision in the ECtHR in *Saunders v United Kingdom.*[275] In this case, the Court ruled that answers given by a defendant in a compulsory interview held during the investigation of his case should not have been used as evidence against

[274] *R (River East Supplies Ltd) v Crown Court at Nottingham* [2017] EWHC 1942 (Admin).
[275] *Saunders v United Kingdom* [1993] 23 EHRR 313

him. However, in reaching this conclusion, the Court made clear that the application of the privilege was limited, and the admission of documents or material independent of the will of the suspect would not be precluded:

> 68. The Court recalls that … the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure ... Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice … The right not to incriminate oneself … presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence …
>
> 69. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood…, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.[276]

Prior to the decision of the ECtHR in *Saunders v United Kingdom*, there had been a trilogy of cases decided in England at the highest level in which the limitation was not acknowledged. In *Re Westinghouse Electric Corporation Uranium Contract Litigation*[277], the House of Lords declined to quash a production order in civil litigation relating to the production of pre-existing incriminating documents not because they were pre-existing, but because their production would not increase the risk of penal proceedings. As Simon LJ noted in *R (River East Supplies Ltd),*[278] the argument proceeded on the assumption that the privilege could apply to pre-existing documents. The same assumption was made by the House of Lords in *Rank Film Distributors Ltd v Video Information Centre*[279] where the

[276] ibid [68], [69].
[277] *Re Westinghouse Electric Corp Uranium Contract Litigation* [1978] AC 547 (HL).
[278] *River East Supplies* (n 274) [44].
[279] *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380.

privilege was raised in answer to an order for search and seizing of documents made in civil proceedings.[280] Similarly, in *AT & T Istel Ltd v Tully*[281] the House of Lords upheld the application of the privilege in answer to an order against a defendant to disclose incriminating pre-existing documents in civil litigation.

Disregarding the House of Lords cases and treating them as overtaken by subsequent decisions, the High Court in *R (River East Supplies Ltd)* drew on the reasoning in *Saunders v UK* in support of its conclusion that the privilege against self-incrimination was not engaged by the production of pre-existing incriminating documents. In reaching this conclusion, the Court reviewed an extensive literature of domestic[282] and ECtHR[283] judgments which populate this disputed area of law. The High Court was fortified in its decision by some of the judicial comments made in *AT & Istel Ltd* where the House of Lords considered itself conscripted into deciding the case in the way in which it did. Lord Templeman thought the application of the privilege was very limited since its purpose was to ensure only voluntary confessions would be adduced into evidence.[284] Lord Templeman added that the application of this reasoning was non-sensical where a court has directed the production of documents or imposed a requirement on a defendant to specify his dealings with another's property.[285] Earlier in his judgment, Lord Templeman described the privilege as representing no more than "an archaic and unjustifiable survival from the past".[286] For Lord Griffiths, his Lordship considered that pre-existing incriminating documents spoke for themselves and there was no risk of a false confession on the part of the person who has produced them.[287]

[280] ibid 446, per Lord Fraser.
[281] *AT & T Istel Ltd v Tully* [1993] AC 45.
[282] *R (Bright) v Central Criminal Court* [2001] 1 WLR 662; *Attorney General's Reference (No 7 of 2000)* [2001] 1 WLR 1879; *R v Hertfordshire County Council, ex p Green Environmental Industries Ltd* [2002] 2 AC 412; C plc v P [2008] Ch 1; *R (Malik) v Manchester Crown Court* [2008] EWHC 1362; *R v S (F)* [2009] 1 WLR 1489.
[283] *Funke v France* [1993] 16 EHRR 297; *Heaney v Ireland* [2000] 33 EHRR 12; *JB v Switzerland* [2001] 0503JUD0033182796; *Allen v United Kingdom* [2002] 35 EHRR CD 289; *Shannon v United Kingdom* [2005] 42 EHRR 31; *Jalloh v Germany* [2006] 44 EHRR 32; *O'Halloran v United Kingdom* [2008] 46 EHRR 21.
[284] *AT & T Istel Ltd* (n 281) 53B.
[285] ibid 53B.
[286] ibid 53B-D. For a critical account of the continued operation of the privilege against self-incrimination, see Adrian Zuckerman, 'The Right against Self-incrimination: An Obstacle to the Supervision of Interrogation' [1986] 102 LQR 43.
[287] *AT & T Istel Ltd* (n 281) 57F.

4.4.2 Volaw Trust

The second case to address the same point is *Volaw Trust and Corporate Services v HM Attorney General for Jersey,*[288] a decision of the Board of Privy Council in 2019. In *Volaw Trust*, the Privy Council was more nuanced about the ability of a person under criminal investigation to assert the privilege in response to a notice requiring the compulsory production of pre-existing incriminating documents. The judgment left open the possibility that the privilege could apply to pre-existing incriminating documents in a situation where legislation had established a regime for compelled production. In this case, Jersey's Comptroller of Taxes had been required by the Norwegian tax authorities to serve a compulsory production notice on the first appellant, a trust company incorporated in Jersey, and seven further appellants who were associated entities and effectively the trust company's clients. The notice required production of information for multiple purposes, one of which involved the investigation or prosecution of criminal tax matters relating to an individual and his associated companies (i.e., the seven further appellants) to whom Volaw Trust had provided trust services. One of the issues raised was whether the trust and the associated companies could assert the privilege against self-incrimination under Jersey customary law which follows English common law.

In denying the appellants the ability to assert the privilege, the Privy Council sought to achieve a synthesis between the divergent positions articulated in the House of Lords trilogy of cases and *R (River East Supplies Ltd).* On the one hand, the Privy Council was concerned to recognise the potential engagement of the privilege narrowly. On the facts of *Volaw Trust*, the Privy Council held that the coercive nature of the notices was relatively benign. Failure to produce documents in response to the notice was punishable by a fine and not loss of liberty; there was no physical or psychological pressure to respond to the notices; if the potentially incriminating materials was sought to be adduced in criminal proceedings in Norway, as an ECHR signatory country Article 6 due process protections would fall to be honoured; and in any event the notices did not call for any admission of liability but rather the production of documents containing objective factual information about the taxpayer's affairs.

[288] *Volaw Trust and Corporate Services v HM Attorney General for Jersey* [2019] UK 29.

In a tilt towards the notion of qualified due process protections, the Privy Council noted there was a strong public interest in the investigation and prosecution of tax crimes, and it was not unreasonable to expect co-operation from financial service providers in this regard. On the other hand, the Privy Council declined to reject the appellants' assertions that, at least in principle, the privilege could apply in common law to pre-existing incriminating documents.[289] Although the point was acknowledged and left open, the Board's judgment, delivered by Lord Reed, was significant, in so far as it addressed the rationales which underlay the application of the privilege. The rationale of the right lay, according to Lord Reed, "in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice …".[290]

Lord Reed noted that production of information under compulsion renders evidence potentially unreliable only where the compulsion is "improper" and proceeded to ask what renders compulsion "improper" for this purpose. Drawing on the ECtHR judgment in *Ibrahim v United Kingdom*,[291] Lord Reed indicated that in determining the propriety or otherwise of compulsion, four factors needed to be considered:

> … the nature and degree of compulsion used to obtain the documents in question, the weight of the public interest in the investigation and punishment of the offences at issue, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained may be put.[292]

It is a pity that Lord Reed did not consider the different rationales which underlie the privilege against self-incrimination, and how their application might produce different outcomes where the production during a criminal investigation of self-incriminating pre-existing documents is involved. The judicial reasoning is weak; furthermore, there was no consideration in Lord Reed's judgment of the High Court decision in *R (River East Supplies Ltd)*. This was unquestionably unhelpful, on any view.

In the first section of this chapter, the effort to discern the underlying rationales has focussed on a critique of the origin of the privilege and a snapshot of judicial decisions in

[289] ibid [74].
[290] ibid [42].
[291] *Ibrahim v United Kingdom* (ECtHR, 13 September 2016).
[292] *Volaw Trust* (n 288) [61].

criminal and civil cases. In the next section, the thoughts of three leading academic writers are discussed.

4.5 THEORISED APPROACHES

4.5.1 Dolinko

In a comprehensive paper published in 1986,[293] David Dolinko subjected the theoretical foundation of the privilege against self-incrimination to robust analysis. Dolinko's thesis is that justification for the privilege can be anthologized in two different ways. The first way identifies principles perceived to be critical for the proper administration of the criminal justice system and articulates the justification for the privilege through this prism. Dolinko categorises these arguments as "systemic rationales" since their essence "encourages third-party witnesses to appear and testify by removing the fear that they might be compelled to incriminate themselves" and "removes the temptation to employ short cuts to conviction that demean official integrity".[294] In other words, the application of the privilege against self-incrimination is deemed to be necessary in order to maintain a fair system of criminal justice predicated on an accusatorial approach.[295]

The second way identifies principles perceived to be essential for the maintenance of human dignity and the recognition of personal human rights. Dolinko classifies this approach as "individual rationales" since they bring together "the arguments that compelled self-incrimination works an unacceptable cruelty or invasion of privacy, as well as the notion of respect for the inviolability of the human personality, and the belief that punishing an individual for silence or perjury when he has been placed … in a position in which his natural instincts and personal interests dictate that he should lie … is an intolerable invasion of his personal dignity".[296] In addition to the perceived cruelty associated with compelling a person to confess his wrongdoing, coercive self-incrimination presents a person with an extremely difficult choice.

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[293] David Dolinko, 'Is there a rationale for the privilege against self-incrimination?' [1985–86] 33 UCLA L Rev 1063.
[294] ibid 1065.
[295] For a consideration of the contribution of the privilege against self-incrimination as a functional device which supports the criminal justice system in the retention of its internal coherence, see Ian Dennis, 'Instrumental protection, human right or functional necessity' [1995] 54(2) CLJ 342.
[296] Dolinko (n 293) 1066.

As Dolinko explains:

> A person who has in fact broken the law must decide to produce the evidence of that violation (and subject himself to criminal penalties), or to lie (and subject himself to punishment for perjury), or to remain silent (and incur liability for contempt). The notion that it is cruel to subject someone to this "trilemma" has influenced the Supreme Court [in the United States] as well as some scholars.[297]

Dolinko concludes that "neither of these justificatory strategies succeeds" and that "the role of the privilege … can be explained by specific historical developments but cannot be justified functionally or conceptually".[298] In so far as "systemic rationales" are concerned, Dolinko contends that none of the three goals of a criminal justice system are advanced by the privilege against self-incrimination. These goals are identified as the accurate determination of guilt, minimizing the chances of convicting the innocent and ensuring that State officials are not tempted to abuse their power. In point of fact, the privilege obstructs these goals by preventing the State from obtaining evidence which would convict the guilty.[299] The concern about convicting the guilty also appears to underlie Dolinko's objection to the principal arguments in the alternative "individual rationales" wrapper. Whilst it may be cruel to compel self-incrimination and contrary to basic human instinct, the fact remains that a person "certainly has the capacity to tell the truth – he just does not want to, because he believes it will greatly increase the likelihood that he will be found guilty".[300]

At first blush, it is difficult to undermine the logic of Dolinko's objections to "systemic rationales" arguments. It is self-evident that a witness might prefer not to answer questions when he has something to hide, and although the information may not necessarily relate to the commission of a criminal offence, common sense suggests this is often the case. Moreover, Dolinko is not alone in his conclusion that the privilege against self-incrimination defies rational justification. As Judge Henry Friendly reminded his audience in a lecture over fifty years ago,[301] the learned writer John Wigmore was less than

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[297] ibid 1093.
[298] ibid 1147.
[299] ibid 1072, 1074.
[300] ibid 1096.
[301] Henry Friendly, 'The Fifth Amendment Tomorrow: The Case for Constitutional Change' [1968] 37 U Cin L Rev 671.

enthusiastic about any extension to the application of the privilege beyond the walls of a court, urging that the privilege should be "kept within limits the strictest possible".[302] Friendly proceeded to record that in 1934 Dean Roscoe Pound criticised the privilege "as a device which serves not the innocent, but rather the evil purposes of criminals and malefactors who are well advised.[303] In similar vein, three years later Mr Justice Cardozo commented in *Palko v Connecticut*[304] that "justice would not perish if the accused were subject to a duty to respond to orderly inquiry".[305] Certainly, the interests of justice are served where an accused person voluntarily confesses to the commission of his crime. It is trite to observe that a voluntary confession is recognised as a significant mitigating factor to be considered when a criminal court passes sentence on an accused.

However, there are difficulties with Dolinko's analysis.

First, it assumes the abrogation of the privilege against self-incrimination will always promote the accurate determination of guilt. This would be true if self-incriminating statements could be treated as reliable, but as already noted, this is not always the case. The same flaw undermines the proposition advanced by Alan Dershowitz that there are circumstances where the obtaining of a coerced statement may be lawfully approved. Dershowitz posits the obtaining of advance judicial approval for the use of non-lethal torture in a hypothetical ticking bomb case where a captured terrorist refuses to divulge self-incriminating information about the planning of an imminent attack. In this type of case, Dershowitz maintains that the aim of a judicial torture warrant is "to reduce the use of torture to the smallest amount and degree possible, while creating public accountability for its rare use".[306] But again, the accuracy of answers given under torture cannot always be guaranteed. History is replete with occasions where an accused wrongly confessed under torture. As John Langbein noted, "the agony of torture created an incentive to speak, but not necessarily to speak the truth".[307]

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[302] ibid 673. See John Henry Wigmore, *Wigmore on Evidence* (1st ed, 1905), section 2251, 3102.
[303] ibid. See Dean Roscoe Pound, 'Legal Interrogation of Persons Accused or Suspected of Crime' [1934] J Crim L C & P S 1014, 1015.
[304] *Palko v Connecticut* [1937] 302 US 319.
[305] ibid 325–26.
[306] Alan Dershowitz, 'Torture Reasoning' in Sanford Levinson (ed), *Torture, A Collection* (OUP 2004) 259.
[307] John Langbein, 'The Legal History of Torture' in Sanford Levinson (ed), *Torture, A Collection* (OUP 2004) 97.

Secondly, Dolinko's arguments are detached from the reality of the circumstances which pertain when an interview takes place during the course of a criminal investigation. An interview, whether under caution or not, presents considerable potential for unfairness. Typically, the interview takes place in a specially designed interview room in a police station, with minimal furniture and facilities. The interviewers sit directly opposite the interviewee, in close proximity. The interviewers set the agenda and lead the questioning, with an objective of obtaining a confession from the interviewee. The expectation in an interview is that an interviewee will answer questions, and silence in response to a question pre-supposes the expectation that an interviewee will speak. The interviewers can present the interviewee with evidence against him, in the form of a narrative account or a witness statement.

Where the interviewer develops a *prima facie* case on reasonable grounds which points at the interviewee's culpability, whilst there is no legal requirement on the interviewee to respond, arguably there is a moral expectation that the allegations will be answered. Very often interviewers are highly experienced, whereas the interviewee is not. The interviewee will have legal representation, but he is denied access to his family and friends. Although an interview must be conducted strictly in accordance with a statutorily approved Code of Practice,[308] an interview is a hostile and intimidating experience. The operation of the privilege against self-incrimination partially redresses the imbalance between the force of the State authorities and offers the suspect under interview some element of protection against this unfairness. As Chief Justice Warren commented in *Miranda v Arizona*, "incommunicado interrogation of individuals in a police-dominated atmosphere, while not physical intimidation, is equally destructive of human dignity".[309]

When key protections are diluted, whether in the shape of the absolute prohibition against the use of torture enshrined in Article 3 of the ECHR,[310] or the qualified right against self-incrimination as recognised in Article 6 of the Convention, criminal justice is the inevitable casualty.[311]

[308] PACE 1984 Code C: Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers.
[309] *Miranda* (n 259) 457.
[310] Dershowitz (n 306).
[311] Dolinko (n 293).

4.5.2 Gerstein

Robert Gerstein takes an entirely different approach to locating the rationale justifying the privilege against self-incrimination, viewing the justification not through considerations of relieving a person from cruel dilemmas but instead the protection of a person's right to privacy and his ownership of the incriminating information.[312]

Gerstein's starting point is Charles Fried's work on the subject of personal privacy, in which Fried points out that "privacy is not simply an absence of information about us in the minds of others; rather, it is the control we have over information about ourselves".[313] It follows that when compulsory investigation powers are exercised, in many instances the process will involve an involuntary disclosure of private information which the discloser might not have wished to disclose. Whilst the right to privacy is not an absolute right and historically the State has sought disclosure of certain types of information from its citizens, the compulsory divulgence of self-incriminating information raises sharper concerns. It is one thing for the State to require a citizen to disclose his income for tax purposes; it is quite another for the State to require a citizen to disclose that he has lied about his income and dishonestly evaded payment of tax, thereby guaranteeing himself a criminal conviction and a period of imprisonment. This is because, as Gerstein explains, self-incriminating information falls into a special category of information which it is acutely important for a citizen to control:

> I am thinking about what is likely to be involved in a confession beyond the bare recital of facts about the crime: the admission of wrongdoing, the revelation of remorse. I would argue that a man ought to have absolute control over the making of such revelations as these. They have generally been regarded as a matter between a man and his conscience or his God, very much as have been religious opinions. This, it seems to me, is a very important part of what lies behind the privilege against self-incrimination … It is not the disclosure of the facts of the crime, but the *mea culpa*, the public admission of the private judgment of self-condemnation, that seems to be of real concern.[314]

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[312] Robert Gerstein, 'Privacy and Self-Incrimination' [1970] 80 Ethics 87.
[313] Charles Fried, 'Privacy' [1968] Yale L J 77 75, 477, cited by Gerstein, ibid 89.
[314] Gerstein (n 312) 90–91.

Gerstein acknowledges the distinction to be drawn between the situation where an individual's confession is adduced in evidence against him and the position where a confession provides clues which lead an enforcement authority to establish his guilt. Noting that on occasions the line between the two situations can be a fine one, Gerstein continues by positing the situation where the State requires a citizen to submit records and reports in circumstances where the provision of information will be self-incriminating. Here, Gerstein questions the extent to which the right to privacy is infringed:

> If … the information is of a sort which would normally be kept private and revealed only in the context of a confidential relationship, if the individual is being required, for example, to keep a private diary and reveal it to the government so that it can be examined for expressions of self-incrimination, then the privacy interest is very strong.[315]

Although the production of self-incriminating information through the exercise of compulsory powers does not expose the reporter to immediate risk of prosecution, a serious breach in the reporter's right of privacy and ability to retain control of incriminating information remains extant. As Gerstein points out, "the absence of this danger [of criminal prosecution] would have no effect whatever on the relevance of the privacy argument".[316]

Gerstein's recognition of the privilege against self-incrimination through the prism of privacy is important because it sustains a wide application of the privilege. Any operative constraint needs to be justified in terms of proportionality, acknowledging as Gerstein does, that the right of privacy is not an absolute right and on occasions it will be qualified by a broader public interest in the State's ability to obtain information from its citizens in circumstances where public interest considerations trump the rights of an individual. Typical examples arise in the context of public safety where there has been an accident at

[315] ibid 96. In a criminal trial, infringement of privacy rights can support the exclusion of evidence where the admission of this evidence would adversely affect the fairness of the trial. See *Khan v UK* [2001] 31 EHRR 1016. In this instance, the privacy justification for excluding evidence would stand independently of the self-incrimination justification.
[316] Gerstein (n 312) 98.

work, or a road traffic accident and the police wish to identify the driver of the offending motor vehicle.

Brown v Stott[317] is the seminal decision in English law, where the Privy Council held that answers obtained pursuant to powers of compulsory questioning under section 172 of the Road Traffic Act 1988 overrode the privilege against self-incrimination. In contrast to the position where a notice for compulsory interrogation is served on a suspect under section 2(2) of the Criminal Justice Act 1987, section 172 provided for the putting of a single question and not prolonged questioning. As Lord Bingham pointed out, "[t]he answer cannot of itself incriminate the suspect, since it is not without more an offence to drive a car".[318] Nonetheless, the making of an admission in response to the exercise of compulsory interrogation powers is necessarily an invasion of privacy. A suspect may welcome the opportunity to make a confession of his criminal activity, and to this extent, his privacy has not been invaded. But notwithstanding, the admission will still have been made within a coercive framework.

Gerstein's approach has special resonance in the context of the AML reporting regime where an obligation to make a mandatory self-report of criminal conduct is concerned. In a situation where a suspect is interrogated under compulsory interview powers during a criminal investigation, the State authorities are already aware, or at least partially aware, of a certain amount of incriminating information. In this situation, if there is an appreciable risk of criminal prosecution after the investigation has concluded, the privilege against self-incrimination is engaged and operates to prevent the State authorities from adducing in evidence at trial any self-incriminating answers which the suspect has given. However, in the case of the mandatory reporting obligation under the anti-money laundering regime, the position is different. It is true that in this situation the State authorities have not designated a person to be a suspect and in this sense, there is no existential threat against him. But that said, where a person (whether individual or corporate) is mandated to make a self-report, he is required to proactively take the initiative by informing the State authorities of information about his own criminality, of which the State has no prior knowledge. There is a risk that ultimately the State authorities

[317] *Brown v Stott* [2003] 1 AC 681. The decision in *Brown v Stott* was affirmed by the Grand Chamber of the European Court of Human Rights in *O'Halloran and Francis v United Kingdom* [2008] 46 EHRR 21.
[318] *Brown* (n 317) 705 B–C.

may initiate a criminal prosecution against the person making a self-report, but there is no such risk at the time when the self-report is made. So here, applying rationales underpinning the privilege which pivot around the importance of evidential reliability, the privilege would not apply.

In these circumstances, Gerstein's approach of conceptualising the rationale for the privilege against self-incrimination through the prism of privacy rights is apposite. If an individual is required to respond to questions based upon facts already known by the State authorities, the infringement of privacy rights will be significant. But the impact of the infringement is much larger in the case of a person who is mandated to disclose self-incriminating information where the State has no prior knowledge of the conduct in question, and a person's loss of control over his private information will be greater.

With reference to an invasion of privacy rights, it is one thing to require a person to act responsively in the face of an accusation; it is quite another to mandate a person to initiate a disclosure of his incriminating conduct in circumstances where the State authorities have shown no prior interest. Alongside an invasion of privacy, a person's individual dignity and personal autonomy is also undermined. A requirement, supported by a threat of penal sanction positively to disclose information in the public interest represents a significant infringement of a person's freedom to make important decisions about the way in which he chooses to live his life, whether the decision is made for good or ill. This is especially so in circumstances where the person is not under investigation and the State authorities have no knowledge or suspicion that he has participated in criminal activity of any sort.

4.5.3 Owusu-Bempah

Abenaa Owusu-Bempah offers another perspective on the role played by the privilege against self-incrimination in a criminal justice system.[319] Viewing the privilege positively, Owusu-Bempah suggests the privilege reflects an integral element of the compact made between the State and its citizens which acknowledges that a person should not be required to provide the State with self-incriminating information. As a constraint

[319] Abenaa Owusu-Bempah, Defendant Participation in the Criminal Process (Routledge 2017).

operating in a legal system which seeks to achieve a fair and efficient outcome in criminal cases, the privilege contributes to the legitimisation of the legal process.[320]

Instead of conceptualising the criminal trial process as the mechanism by which individual and corporate persons are required to accept responsibility for their actions, Owusu-Bempah reverses the perception by conceiving of a criminal trial as a process in which the State is "[called] to account for the accusations which it has brought against the individual, before that individual can be subjected to official condemnation or punishment."[321] It is the State which accounts to the person accused of committing a crime, and not the other way around. As part of this accountability, the State affords a person with an opportunity to be informed of the evidence against him.

Owusu-Bempah takes an absolutist approach and makes clear that a defendant's role in this demonstration of State accountability is entirely passive: "The defendant should be under no requirement to actively participate by answering questions or providing information during the pre-trial and trial stages, not least because to do so may assist the State in accounting for its accusations".[322]

This approach, adds Owusu-Bempah, is not undermined by the tendering of a pleas of guilty. This signifies no more than that a person has made a free and informed decision to admit his guilt and forfeited his right to require the State to prove the case against him.[323]

In a powerful passage which resonates with a contemporary consideration of the value of the privilege against self-incrimination in a criminal justice system, Owusu-Bempah explained:

> The theory, and its absolutist approach, is grounded in political liberal theory and in the values of dignity, autonomy and freedom. The importance of these values, in relation to the contemporary liberal State, can be traced back to the emphasis placed on individualism during the age of enlightenment, and to social contract

[320] ibid 101, 102.
[321] ibid 9.
[322] ibid 9.
[323] ibid 9, fn 30.

> theory. The meaning of dignity is often context specific, but at its core is a requirement that the intrinsic worth of every human being be recognised and respected. As part of our intrinsic worth, we have the authority to demand respect for our autonomy. To be treated with dignity this includes being treated as an autonomous individual; and able to make choices for oneself.[324]

As Owusu-Bempah points out, this approach to the justification of the privilege affords it a wide application, protecting an individual against a requirement to provide self-incriminating information and its subsequent use in a criminal trial.[325]

Although Owusu-Bempah doubts whether the privilege should be abrogated on grounds of public interest, she accepts that limited exceptions may be justified where a person undertakes a regulated activity, and it would be impossible to prosecute a criminal offence without the defendant's co-operation. Owusu-Bempah presents as an example the requirement in section 172(1) of the Road Traffic Act 1988,[326] the terms of which have already been noted.[327] The mandatory reporting requirement in section 330(1) of POCA 2002 would not fall within Owusu-Bempah's classification of limited exceptions since the position there is strikingly different. Although a person, individual or corporate, operates in the regulated sector and undertakes regulated activity, when the State authorities become aware of criminal activity which would otherwise form the substance of a self-incriminating suspicious activity report, the need for self-incriminating information is not present in order to prosecute those persons responsible for the commission of the criminal activity in question. There are many different ways in which the State authorities may become aware of the existence of the criminal activity without the submission of a mandatory self-report. Unlike the position in section 330(1) of POCA 2002, the requirement in section 172(1) of the Road Traffic Act 1988 to disclose self-incriminating information is made in circumstances where the State authorities will always know that the commission of a criminal offence has taken place.

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[324] ibid 9, 10. Owusu-Bempah references in her footnotes Christopher McCrudden's article, 'Human Dignity and Judicial Interpretation of Human Rights' [2008] 19 European Journal of International Law 655, 659–60, 679.
[325] Owusu-Bempah (n 319) 101.
[326] ibid 94–99.
[327] ibid.

4.6 PRIVACY, DIGNITY AND AUTONOMY

The critique of academic and judicial thinking demonstrates a shift away from an approach which articulates a rationale for the privilege based exclusively on a concern to ensure evidential reliability in circumstances where admissions against interest have been obtained under compulsion. Alongside this rationale, a second approach has emerged which favours the location of the rationale for the privilege in the coercive undermining of an individual's rights to privacy, dignity, and autonomy. This dynamic is unsurprising in circumstances where, in societies governed by the rule of law, the use of physical threats to produce self-incriminating statements has markedly reduced, along with concerns about the unreliability of statements produced in this way. Today, the element of compulsion most frequently lies in the coercive mechanics of a legal framework which requires the production of incriminating information during the course of an investigation or legal proceedings where issues of criminal wrongdoing are involved.

Viewing the underlying rationale of the privilege through prisms of privacy, dignity, and autonomy, has consequences. Instead of a model supporting the privilege which focuses on the pragmatic consideration of ensuring the reliability of evidence, a model founded on notions of privacy, dignity and autonomy has a strong moral dimension. If an individual has a moral right to enjoy his privacy, dignity and autonomy, and these rights are protected by the exercise of the privilege against self-incrimination, a denial of the ability to exercise the privilege infringes a person's individual rights. Although connected by their intrinsic value to the person, the notions of dignity and autonomy are distinct. In the ordinary meaning of the words, dignity suggests a sense of worth, merit and esteem,[328] whereas autonomy is more closely associated with the ability of a person to make free choices and, in terms of Kantian philosophy, "the capacity of reason for moral self-determination".[329]

Joseph Raz explains the nature of personal autonomy in the following terms:

[328] Oxford English Dictionary, <www.oed.com/view/Entry/52653?redirectedFrom=dignity#eid> accessed 12 April 2021.
[329] Oxford English Dictionary, <www.oed.com/view/Entry/13500?redirectedFrom=autonomy#e> accessed 12 April 2021.

> The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is a vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.[330]

Autonomy is the key attribute of personhood, and by recognising a person's right to assert the privilege against self-incrimination, the law is protecting the value of the person's autonomy and personhood.[331]

A narrative for recognising the rationale underlying the privilege against self-incrimination which focuses on concepts of privacy, dignity, and autonomy has broader implications for the application of privilege where concerns of evidential unreliability are not paramount. The mandatory self-reporting requirement pursuant to section 330(1) of POCA 2002 is a case in point. The coercive nature of the AML reporting regime is unlikely to cause a maker of a SAR to disclose self-incriminating statements in the text which are untrue or unreliable. But without question the coercive framework in which the SAR is required to be made has implications for the protection of the maker's privacy, dignity, and autonomy.

An approach to the privilege which does not regard unreliability as the exclusive hallmark validating for the inadmissibility of evidence is consistent with established principles at common law. Certainly, the truthfulness or otherwise of an admission is disregarded as irrelevant when a court considers whether a confession was made voluntarily and therefore admissible in evidence against the person who made it.[332]

Confession evidence is commonplace in criminal trials, and in England and Wales it is enough to convict a defendant on his own admission without the need for corroborating evidence. Section 76(1) of the Police and Criminal Evidence Act 1984 ("PACE 1984") provides that "a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded

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[330] Joseph Raz, *The Morality of Freedom* (OUP 1986) 166.

[331] For further discussion of the relationship between personhood, dignity, and autonomy, see James Griffin, *On Human Rights* (OUP 2008) ch 8, 149–58, and Aharon Barak, *Human Dignity, The Constitutional Value and the Constitutional Rights* (CUP 2015) 124–29.

[332] The relevant statutory provision is to be found in s 76 of PACE 1984.

by the court in pursuance of this section". A confession is afforded an inclusive definition in section 82(1) of PACE 1984 to include "any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise". Where a defendant represents the content of a confession is likely to have been obtained involuntarily in consequence of anything said or done, section 76(2) requires the prosecutor to prove beyond reasonable doubt that the confession had not been obtained in this way.

This posits a scenario whereby, even if the content of a confession is reliable and truthful, the confession cannot be adduced into evidence unless the prosecution is able to establish that it was made voluntarily, in the absence of any threat made or inducement offered. As Lord Hailsham explained in *Wong Kam-Ming v R*,[333] the common law recognised that admissions obtained by improper means should be excluded from evidence partly because of their potential unreliability "but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions".[334] Lord Hutton cited this passage with approval in *R v Mushtaq*,[335] noting that in recent years, the courts had held that "in a civilised society a person should not be compelled to incriminate himself, and a person in custody should not be subjected by the police to ill-treatment or improper pressure".[336] The judicial references to the application of the privilege against self-incrimination in a civilised society is noted.

4.7 CONCLUSION

It is clear from this critique that the development of underlying rationales in support of the privilege against self-incrimination has been evolutionary. At its Biblical origin, the concern of the courts to rely exclusively on independent evidence when making a fact-finding determination was dominant, with the elimination of evidence adduced by a suspected person or a relative of one of the parties involved. Developed at common law in the furnace of Tudor and Stuart England, the rationale of the privilege shifted to a focus on the exclusion of self-incriminating evidence in criminal or civil proceedings

[333] *Wong Kam-Ming v R* [1980] AC 247.
[334] ibid 261.
[335] *R v Mushtaq* [2005] UKHK 25.
[336] ibid [7].

where coercion or pressure had been brought to bear. In both instances, the need to ensure the reliability of evidence was the paramount concern. In more recent times, broader rationales for the privilege have been articulated, and these have been closely associated with considerations of human dignity, personal autonomy, and the entitlement to privacy. The privilege became enshrined as a constitutional right in the United States, and there is sound support for this view amongst leading judges, in the shape of Justice Goldberg in the United States and Mr Justice Murphy in Australia. Gerstein's writings burnish this position with academic substance. Thus, multiple rationales have evolved to support the privilege against self-incrimination. Each rationale has, and retains, validity, and no single approach is mutually exclusive or wholly persuasive. Concerns to ensure evidential reliability in judicial determinations sit happily within a legal system which values the human dignity and a consensual balance between individuals and the interests of the State. As noted, when considering Gerstein's contribution, there is a distinction to be drawn between the situation where a criminal investigation has been initiated, with due process rights already engaged, and a situation where the maker of a self-report may never become the subject of criminal investigation, let alone criminal prosecution. The other side of coin, of course, is that a person's failure to self-report criminal conduct under section 330(1) of POCA 2002 constitutes a substantive criminal offence punishable by penal sanction, whereas compulsory interrogation powers are concerned with criminal process.

To date, neither the legislature nor the judiciary have addressed the potential interaction between the privilege against self-incrimination and the mandatory reporting obligation set out in section 330(1) of POCA 2002.[337] The key question which falls to be addressed is the extent to which the application of the privilege against self-incrimination operates to exempt a person from the obligation to self-report his criminal conduct pursuant to the otherwise mandatory reporting requirement. The nicety of the question is enlarged when the maker of the self-report is a corporate entity, where the narrative in a SAR incriminates both the company as reporter, and its officers and employees, since it is only through the deeds of its servants and agents that a company can act.

[337] The Supreme Court decision in *Beghal v DPP* [2016] UKSC 49 is the closest comparator. The case concerned sch 7 of the Terrorism Act 2000, where Parliament had introduced a power which allowed police officers, immigration officers and customs officers to require an individual to answer questions for the purpose of determining whether a person was associated with terrorist activity. Failure to answer questions is punishable by penal sanction. There was neither a prior criminal investigation, nor an obligation on the individual to initiate contact with the State authorities. The case is considered more fully in chapter 8.

CHAPTER 5

TRADITIONAL CONCEPTIONS OF CORPORATE RIGHTS

5.1 INTRODUCTION

In the last chapter, the thesis established that the reach of the privilege against self-incrimination is potentially wide, embracing any situation where the law seeks to compel an individual or company to disclose information which prejudicially exposes the individual or company to the risk of criminal prosecution. In the case of a company, the position is complicated by a lack of academic (and judicial) clarity over the ability of a corporate entity to assert the privilege, in the same way as the privilege may be asserted by an individual. The question of corporate entitlement catalyses a broader discussion as to the basis on which the law recognises the ability of a company to assert any right or privilege, and whether the assertion of the privilege against self-incrimination is distinguishable from a company's ability to lay claim to more instantly recognisable rights such as the right to protect its property or good name. An individual's right to claim the benefit of the privilege against self-incrimination predates the evolution of the modern corporate entity, and at first blush, with the development of the privilege at common law rooted in the concern of judges to provide protection for the individual against torture and other forms of oppressive behaviour, the justification for affording equivalence between an individual and a company is not obvious.

The case for equivalence raises a wider issue since it exposes the juridical nature of the corporate entity to scrutiny. Does the law recognise that a company possesses rights which may be asserted against the State, and if so, on what basis? As Ernst Freund asked long ago:

> … if the corporation is a distinct person in law, of what nature is this person? Can we conceive of the holding of rights otherwise than as an attribute of physical personality? How is it possible, on any other basis, to deal with notions that are constantly applied to the holding of rights, and which explain their most important incidents: intention, notice, good and bad faith, responsibility?[338]

[338] Ernst Freund, *The Legal Nature of Corporations* (University of West Virginia 1897) 7.

This is the *third sub-question* explored in this thesis. The chapter addresses the matter simply framed – Is a company entitled to assert a right, in the form of a legal claim on something or some other course of action, in the same way as an individual right?

It is not possible to address the issue without excavating the attributes of the corporate form. There are some important questions which arise. Whilst an individual may contemplate their inner self, introspection is more challenging in the case of a company which lacks a natural origin and is constructively formed. The starting point for this enquiry is the exploration of a company as an entity which stands to be recognised as a legal person, and an evaluation of the incidents in terms of rights and responsibilities which characterise the nature of legal personhood. Is it possible to identify the incidents of corporate existence with rationally defensible criteria and conceptualise them within a traditional understanding of company law? The courts have consistently repeated that a company has an existence which is separate from its directors and shareholders, but what does this mean? There are two distinct but related questions here. The first involves the determination of legal personhood. Does legal theory accommodate the recognition of legal personhood in a corporate entity, and if so, on what basis is this recognition formulated? The second involves an examination of corporate personality. Does a corporate person have rights and responsibilities, and if so, on what basis are they grounded? Legal personhood is the consequence of incorporation, whilst legal personality reflects the nature of the corporate relationship.

The burden of this chapter suggests that whilst traditional approaches to corporate personhood provide a sound structural footing to secure a theoretical framework for the creation and management of a company, they are inadequate to support a holistic approach to the recognition of corporate rights beyond those which flow from (a) the contractual ontology of the company's existence, or (b) are integral to the company's business, or (c) serve to protect individual interests which would otherwise be exposed if the corporate right was not acknowledged.

The chapter begins with an exploration of the notion of legal personhood, and how corporate personhood has been recognised in three different models which have inhabited this space, known respectively as "contract theory", "concession theory", and "real entity theory". The chapter reviews how civil and criminal cases in the courts have

contributed to an understanding of legal personhood and the assertion of company rights which the law has recognised. In many cases, recognition of corporate rights has been motivated by pragmatic considerations. Unlike the case of an individual, the fact of legal personhood alone has not provided a sufficient basis for the assertion of a corporate right, and the challenge for theoreticians of company law is to articulate a sound jurisprudential foundation for the recognition of corporate rights in these cases. The chapter proceeds to consider the development of a school of thought which seeks to determine the nature and extent of corporate personality by reference to the internal workings of a company's social organisation. Although this approach emphasises the independent development of a company's character, the chapter demonstrates that ultimately the organisational theory is unable to escape its dependency on the acts and omissions of individuals such as directors and senior employees who guide the company's conduct.

5.2 LEGAL PERSONHOOD

The endeavour to uncover a foundation for the recognition of corporate rights begins with an examination of what is meant by the notion of legal personhood. This notion, to borrow language from Hans Kelsen[339], is the *grundnorm*, or point of origin, of the corporate form. Definitionally, in the United States Restatement a "person" is expressed to mean "(a) an individual; (b) an organisation that has legal capacity to possess rights and secure obligations; (c) a government, political subdivision, or instrumentality or entity created by government; or (d) any other entity that has legal capacity to possess rights and incur obligations".[340] The definition is wide and embraces, potentially, non-human actors such as animals[341] and robots,[342] generating much discussion about the extent to which, in the case of robots, moral personality accompanies legal personhood.

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339 Hans Kelsen, *Pure Theory of Law* (Knight (tr), 2nd edn, University of California Press 1967) (English translation).

340 Restatement (Third) of Agency, 2006, Ch 1, para 1.04.

341 See Raffael Fasel, 'More Equal Than Others: Animals in the Age of the Human Rights Aristocracy' (Doctoral Thesis) <www.repository.cam.ac.uk/handle/1810/297914> accessed 30 December 2020; David Allen Green, 'Should animals have legal personality?' *Financial Times*, 26 October 2020, <www.ft.com/content/b6f0b022-2c70-42c3-b850-ab6b48841fcf> accessed 30 December 2020.

342 See John Sullins, 'When is a Robot a Moral Agent?' [2006] 6 International Review of Information Ethics 23; Amanda Sharkey, 'Can robots be responsible moral agents? And why should we care?' [2017] 29:3 Connection Science, 210; Ian McEwan, *Machines Like Me* (Jonathan Cape London 2019) 303–04 ('You weren't simply smashing up your own toy, like a spoiled child. You didn't just negate an important argument for the rule of law. You tried to destroy a life. He was sentient. He had a self. How it's produced, wet neurons, microprocessors, DNA networks, it doesn't matter').

Viewed from the perspective of a company lawyer, the interest in this chapter is narrower. The question is whether a company is recognised as "a person" in English law. As noted in chapter 2, the formal answer is found in Schedule 1 of the Interpretation Act 1978 which provides that "a 'person' includes a body of persons corporate or unincorporate." Although the definition makes clear that a company falls to be treated as "a person" in so far as the law is concerned, it is silent about the consequences which follow. It is one thing to confer legal status on a company by recognising the corporate construct as a legal person. It is another thing to articulate the consequences which flow from this designation. This precipitates a second question concerning the nature of legal personhood in law, and more particularly, whether these attributes afford a company equivalence with other persons, such as an individual?

There is, however, extensive academic literature which seeks to theorize the concept of legal personhood and give it meaning. An exhaustive consideration of this literature falls outside the scope of this work, but a cursory understanding is helpful in forming an insight into the attributes of legal personhood and legal personality. Drawing on the weight of academic thought, Ngaire Naffine identifies three different approaches to the characterisation of legal personhood.[343]

5.2.1 Endowed by law

The first approach depicts personhood as a status endowed by law for the purposes of bearing rights and duties. As Frederick (Henry) Lawson explains:

> All that is necessary for the existence of the person is that the lawmaker … should decide to treat it as a subject of rights or other legal relations. Once this point has been reached, a vista of unrestricted liberty opens up before the jurist, unrestricted, that is, by the need to make a person resemble a man or collection of men.[344]

[343] Ngaire Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' [2003] MLR 346, 349–50.
[344] Frederick (Henry) Lawson, 'The Creative Use of Legal Concepts' [1957] 32 New York University Law Review 907, 915.

This approach is legally formulaic. In the case of a company, it means that if the lawmaker (the legislature or judiciary) decides to recognise a corporate entity as a subject of rights or other legal relations, the company is afforded the status of legal personhood. The fact that a company is the subject of rights and responsibilities is acknowledged, but in the absence of any moral or ethical input into the notion of corporate personhood, the legal theorist must search further afield to discover norms which identify and support the rights and responsibilities which are envisaged.

5.2.2 Attribute of human condition

The second approach views personhood as an innate attribute of the human condition. As Naffine explains, quoting the International Encyclopaedia of Comparative Law, "[p]eople everywhere acquire general legal personality at birth … [and] all laws establish the self-evident prerequisite that a child must come into the world alive in order to attain legal personality".[345] This line of thought underpins the first paragraph of the preamble to the Universal Declaration of Human Rights which declares "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family" as "the foundation of freedom, justice and peace in the world."[346] Since human dignity is the kernel of this highly individualised notion of legal personhood, the corollary is that in hard cases the legal status of personhood will depend on medical assessment. Issues relating to the unborn child, or the patient whose heart continues to beat following brain death, present strong challenges to this second approach. On any view, the corporate entity cannot be theorised within this model of personhood since as a matter of biology, like Shakespeare's Macduff, a company is "none of woman born".[347]

5.2.3 Anthropomorphic

The third approach is anthropomorphic and perceives legal personhood as the embodiment of an individual. Naffine explains that in this conception a legal person is "quintessentially, an intelligent and responsible subject, that is a moral agent".[348]

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345 Naffine (n 343) 357.
346 Universal Declaration of Human Rights <www.un.org/en/universal-declaration-human-rights/> accessed 10 January 2021.
347 William Shakespeare, *Macbeth* (1623) Act IV, Scene 1 lines 81–83.
348 Naffine (n 343) 350.

Although the anthropomorphic approach shares with the first approach the notion that personhood has a technical meaning in law, it recognises that not all human beings have sufficient mental or physical capacity to be regarded by the law as legally competent. Michael Moore expresses the idea in this way: "A person is a rational being, a being who acts for intelligible ends in light of rational beliefs".[349] Naffine notes that Moore "does not resile from the consequences of his own logic: those who are not yet sufficiently rational that they can reason about moral or legal norms and adjust their behaviour to them are simply not persons".[350] This is not so much to exclude a person from recognition of their personhood, but rather to deny that the same rights and duties conferred by personhood can always be exercised by individuals in equal measure. Referencing Hans Kelsen, Neil MacCormick notes that:

> … legal systems exclude some human beings from the category of persons or admit them only to reduced forms of it. To treat people as persons in law is as much conditional on legal provisions as it is to treat corporations (or whatever) as persons in law.[351]

MacCormick explains that "the personality of human beings in law is neither less nor more 'juristic' than that of any other entity that the law recognizes".[352] The law of minors is a paradigm illustration of a reduced person in both criminal and civil law jurisdictions and demonstrates how the law determines the rights and duties of all persons, individual and corporate.

Naffine points out that because the legal framework for the establishment of a company generates its own legal status, it would be wrong to dichotomise a company as an artificial person and a human being as a natural person.[353] Naffine acknowledges that the conceptualisation of a company presents difficulty in the effort to achieve a neat categorisation. Noting the lack of clarity in the analysis of corporate personhood, Naffine quotes Nicola Lacey's comment that "in both doctrinal scholarship and legal theory, the debate about the liability of corporations is marked by a sustained use of metaphors,

[349] Michael Moore, Law and Psychiatry, Rethinking the Relationship (CUP 1984) 66.
[350] Naffine (n 343) 363.
[351] Neil MacCormick, *Institutions of Law* (OUP 2007) 83. See Kelsen (n 339) 168–92.
[352] MacCormick (n 351) 83.
[353] Naffine (n 343) 352.

contrasts, images which depend upon analogies and disanalogies between 'corporate' and 'human' persons".[354]

Lacey is surely correct, and in the traditional conception of corporate personhood there are moral constraints bearing down on an individual which would not apply in the case of a company. That said, the imagery identified by Lacey does not detract from the elemental truth that whichever approach is followed, a company is properly conceptualised as a legal person which is afforded recognition in law. The nature of corporate personality which flows from the recognition of corporate personhood, is not so easily articulated. Sometimes the phrases "corporate personhood" and "corporate personality" are used interchangeably in academic and judicial literature. This is a mistake because they are subtly, but importantly, different. Corporate personhood is the status which the law affords to a non-human actor such as a company, whereas corporate personality references the attributes of the actor which flow from this status.

5.3 COMPANY LAW THEORY

Explaining the notion of corporate personhood, three models of corporate law theory have emerged in the last one hundred and fifty years. These models are known by their labels - "contract theory", "concession theory", and "real entity theory." Each theory clothes the corporate entity with legal personhood, but with differences between them which impact on the nature of corporate personality to which each theory lays claim. Within each theory, a basis for supporting a claim to assert a corporate right may be recognised, but the foundation for support is not the same, and the nature of the corporate right is different.

5.3.1 Contract theory

As the establishment of a limited liability company for trading and investment purposes became more popular, the nature of the legal relationship established by a company was analysed in contractual terms. Section 16 of the Companies Act 1862 provided that a company's Articles of Association "bind the company and the members thereof to the

[354] ibid 348. See Nicola Lacey, 'Philosophical Foundations of the Common Law, Social not Metaphysical' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence* (OUP 2000).

same extent as if each member had subscribed his name and affixed his seal thereto", and monies owed by a member to a company were deemed to be "a debt due from such a member" enforceable by the company in the courts. This provision was maintained in section 14 of the Companies (Consolidation) Act 1908, and subsequently section 20 of the Companies Act 1948 and section 14 of the Companies Act 1985. Today, the relevant provision is to be found in section 33 of the Companies Act 2006. The statutory language has been modernised and records that "[T]he provisions of a company's constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions". David Kershaw describes the arrangement as a constitutional contract which a company can enforce against its members, and *vice versa*.[355]

This understanding of a corporate entity as a creature which owes its origin to a contract made between its founding members accords with a line of judicial authority in the United States. In *Trustees of Dartmouth College v Woodward*,[356] where the Supreme Court was considering the constitutional validity of a provision which altered the company's charter, Chief Justice Marshall explained that a corporation is conceived as a contractual arrangement between the founding members and the State. The company's charter was:

> … a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is, then, a contract within the letter of the Constitution …[357]

The contractual analysis is helpful to the extent that it focuses on the nature of the arrangements made between a company and its members, and *vice versa*, and it seeks to answer the antecedent question which dwells on the juristic nature of the corporate entity by reference to the charter which was agreed by the shareholders at the time of its creation. The contractual analysis recognises that company shareholders have made a contractual arrangement *inter se* to conceive a corporate entity. Further, the Supreme Court demonstrated a willingness to provide a mechanism for the enforcement of rights

[355] David Kershaw, *Company Law in Context* (2nd edn, OUP 2012) 87.
[356] *Trustees of Dartmouth College v Woodward* [1819] 17 US (4 Wheat) 518.
[357] ibid 644.

and responsibilities which arise pursuant to the contractual arrangement. The difficulty is that this approach necessarily delineates the limit of the analytical contribution which a contractual model of corporate theory can deliver.

The contractual analysis is silent as to whether the company has any rights or responsibilities beyond the terms of its instrument of creation, or whether it has an identity which is independent of the contractual arrangement which had been made between the members. The contractual theory leaves at large the question of whether there are any corporate rights and responsibilities beyond those which flow from the contractual arrangements which have been made between the company's members. If so, what are these rights and responsibilities, and how are they ascertained, and on what basis? A company's ability to assert the privilege against self-incrimination in the face of compelled testimony or investigation provides a paradigm example of a species of right which stands apart from the contractual analysis.

5.3.2 Concession theory

Moving away from contractual analysis, legal theoreticians have explored whether the corporate roots of legal personhood can be found in the legislative framework within which the establishment of a corporate entity is permitted. If operation of law confers legal personhood, it is axiomatic that a company achieves this status not through agreement between shareholders but rather when established in accordance with requirements set down by a legislative authority. Historically, a company, or corporation, was established *ex nihilo* by way of Royal Charter or Private Act of Parliament and its legal status as an entity would be exclusively dependent on its instrument of creation. Subsequently, Parliament introduced a mechanism for the incorporation of a company which was less individualised, and with the enactment of the Companies Act 1844 the notion of corporate birth by registration was established.

As John Dewey explained, quoting from Freund:

> The somewhat vague theory of the later Middle Ages that communal organization not sanctioned by prescription or royal license was illegal was at least from the fifteenth century on supplemented by the technical doctrine, developed under

> canonist influences, that there is no capacity to act as a body corporate without positive authorisation. To grant this authority has remained in England an attribute of the royal prerogative . . . It is hardly possible to overestimate the theory that corporate existence depends on positive sanction as a factor in public and legislative policy. It is natural that the charter or incorporation law should be made the vehicle of restraints or regulations which might not be readily imposed upon natural persons acting on their own initiative, and the course of legislative history bears this out.[358]

As a formalistic approach to company law theory, it is unsurprising this analysis has attracted judicial support. In *Salomon v Salomon*,[359] Lord Halsbury LC noted that, when dealing with the nature of a company, he was "simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence …".[360]

A concessionary analysis of legal personhood is not necessarily inconsistent with a contractual approach, and on occasion concessionary and contractual notions have been articulated in the same case. Chief Justice Marshall's description in *Trustees of Dartmouth College v Woodward* of the company as an artificial construct established by agreement has already been noted in the context of the contractual approach. But in the sentences which follow, a more concessionary approach is espoused. Building on the contractual analysis, Chief Justice Marshall explained that:

> The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant.[361]

This is the language of concession theory, and it does not exclude a contractual analysis of corporate personhood. Thus, it is wrong to see adherence to either contractual theory

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[358] John Dewey, 'The Historical Background of Corporate Legal Personality' [1926] 35 Yale L J 655, 667, citing Ernst Freund, *Standards of American Legislation* (University of Chicago Press 1917) 39.
[359] *Salomon v Salomon* [1897] AC 22.
[360] ibid 30.
[361] *Trustees of Dartmouth College* (n 356) 636–37.

or concession theory as a binary choice. Contract theory looks towards the role of private treaty in the establishment of a company, whereas concession theory defaults to an exercise of State power. In both instances, the dignification of corporate personhood is explained, and whereas contract theory is limiting in its recognition of rights and duties to those agreed by the parties, concessionary theory is equally limiting in its determination of rights and responsibilities to those conceded by the State. In concession theory, corporate rights and responsibilities are linked not to the nature of the contract made between the members and the company, but rather to the extent of the concession which the State has been willing to permit when establishing the legal framework within which a company is required to operate.

5.3.3 Real entity theory

"Real entity theory" provides an interesting alternative tool for analysing the root of corporate personhood, and unlike contractual theory and concession theory, real entity theory affords greater space for the recognition of corporate personality. In real entity theory, an association such as a company develops its own personality, separate to the identity of its individual members.

At the beginning of the last century, Otto von Gierke made the point that recognition of a corporate entity as a "right-and-duty" bearing unit presumed the prior existence of properties on which a right-and-duty bearing unit is founded: "A *universitas* [or corporate body] … is a living organism and a real person, with body and members and a will of its own. Itself can will, itself can act … it is a group-person, and its will is a group-will".[362]

Citing this passage, Dewey interpreted Gierke as presupposing a corporate will in the existence of a legal person: "In short, some generic or philosophical concept of personality, that is, some concept expressing the intrinsic character of personality *uberhaupt* [in the first place] is implied".[363]

Whilst contractual and concession theory models provide frameworks for recognising corporate personhood as a bare legal construct without reference to the character of those

[362] Otto von Gierke, *Political Theories of the Middle Age* (Maitland (tr), CUP 1902) xxvi.
[363] Dewey (n 358) 658.

who form them, real entity theory offers a different analysis. As a legal person, a company is acknowledged as having an existential presence, but with a will and personality of its own. It is not simply a fiction in the eyes of the law. In this sense, real entity theory presents a deeper analysis, by its acknowledgment that corporate existence is not limited to legal personhood.

Harold Laski acknowledged the separate nature of corporate personality, arguing that "[j]ust as we have been compelled … to recognise that the corporation is distinct from its members, so, too, we have to recognise that its mind is distinct from their minds".[364] Laski posited the situation where a company votes an annual pension to an employee. The gratitude expressed to the employee is the appreciation of the individual members conveyed as a unit, notwithstanding that one of the members may have voted against the pension award. It follows that the nature of corporate personality has consequences. If the company had acted differently by not conferring the pension, it would have suffered in circumstances when it is morally but not legally at fault: "Its men work for it with less zeal. It finds it difficult to retain their services. The quality of its production suffers. It loses ground and is outstripped in the industrial race".[365]

Although Laski was clear that the existence of corporate personality is something independent of the company members, in Laski's example the nature of the corporate personality still remains reflective of the views of the individual members who voted in favour of the pension award. The company may be recognised as a real entity, but in this instance its personality reflects no more than a collective snapshot of views held by most of its members. Laski must have been aware of the point, for he was careful to write that the company's personality was *distinct* from that of its members, rather than *independent* of them.

More recently, developments in the notion of corporate purpose have militated in favour of an understanding of corporate personality which is independent from that of its members. Through the articulation of its shared purpose, a company gives expression to a group identity which stands apart from the individual personality of its members. To this end, corporate purpose is defined in a British Academy paper as "the expression of

[364] Harold Laski, 'The Personality of Associations' [1915–16] 29 Harvard Law Review 404, 415.
[365] ibid 416.

the means by which a business can contribute solutions to societal and environmental problems".[366] The paper adds that corporate purpose should be formulated though a statement made by the company which identifies how it "assist[s] people, organisations, societies and nations to address the challenges they face, while at the same time helping companies to avoid or minimise the problems they might cause".[367] The hallmark of a well-run modern company is the recognition of its corporate purpose. As David Kershaw and Edmund Schuster explain:

> Purpose as a driver for corporate behaviour, and perhaps ideally as a catalyst for corporate success, has in recent years received growing attention in the business literature, and the ability to create 'purposeful companies' is increasingly seen as essential in a technology- and innovation-driven economy. [368]

The separation of corporate personality from the personality of its members is less clear when the question is asked whether it is possible for a company to experience emotions in the same way as an individual experiences a strong feeling deriving from the individual's circumstances, mood, or relationships with other human beings. At first blush, it is strange to contemplate ascribing an emotional state such as love or hatred to the corporate form, but if it is correct that a company may have intentions and desires which are directed at the achievement of a corporate purpose, there is no reason in principle why the corporate personality cannot experience other mental states of awareness less commonly associated with the dispassion of a legal construct. It is against this background that Sylvia Rich asks whether a company can experience a level of fear which could support a claim of duress in appropriate circumstances.[369] Rich answers the question in the affirmative, seeing no distinction to be drawn between other mental states such as knowledge and intention which a company is able to form.[370]

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366 The British Academy, 'Principles for Purposeful Business' (November 2019) 16. <www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-purposeful-business/> accessed 10 November 2020.
367 ibid.
368 David Kershaw and Edmund Schuster, 'The Purposive Transformation of Company Law' LSE Law, Society and Economy Working Papers 4/2019.
369 Sylvia Rich, 'Can Corporations Experience Duress? An Examination of Emotion-Based Excuses and Group Agents' [2019] 13 Criminal Law, Philosophy 149.
370 ibid 154.

There is, however, subtlety in Rich's argument which explicates her answer to this important question. Rich draws a distinction between intention and desire as "functional" emotional states which a company may experience, and emotions such as fear as "phenomenal emotional states" and dependent on the emotions of individuals:

> I am saying that corporations have emotional states but am being reductionist to the extent that I admit that the emotional state has its components in the emotions of individuals, and that these components are where the phenomenal experience of the emotion resides.[371]

Here, Rich's reductionism demonstrates the limitation of the real entity approach. Rich concludes:

> There is no contradiction between accepting that group entities are real, that they have an effect and a presence that is separate from that of their members, but also accepting that everything they think, feel, and do occurs through their individual members.[372]

Moreover, it is not always possible for corporate personality to capture the free range which characterises the depth of individual personality. As George Deiser explains, with reference to the implications for the assertion of corporate rights:

> The implication of corporate personality is power to act only within a certain sphere - the corporate sphere. There is nothing absurd in the statement that there are no such things as the natural rights of corporations. Certain of them are in their nature impossible. Such are rights of family and other rights by their nature incompatible with collective exercise. There is no need to visualize further the juristic person. We do not need to feel its antennae to feel certain of its existence.[373]

[371] ibid 154.
[372] ibid 162.
[373] George Deiser, 'The Juristic Person' [1908–09] 57 U Pa L Rev 131, 216, 300, 301.

Deiser does not explore why some rights are necessarily to be regarded as incompatible with corporate life, nor does he seek to identify exhaustively the rights in question. Arguably, there is a pressing need to visualise further the company as a juristic person, not so much to "feel certain of its existence" but more especially, to understand the atomic structure of its existence and the basis on which corporate rights are founded. There are clearly more questions to be asked. One such question is whether a corporate claim to exercise the privilege against self-incrimination constitutes a right which Deiser would say is "incompatible with the collective exercise"? As already mentioned, this issue is addressed in Chapter 7.

5.4 CORPORATE RIGHTS IN THE CIVIL COURTS

The judicial perspective adds an interesting dimension in the quest to understand the theoretical basis on which corporate rights can be asserted. Although the reasoning in court judgments on both sides of the Atlantic is articulated in pragmatic rather than theoretical terms, the decisions shine a spotlight on the factors which the courts will consider when a company petitions to protect a right to which it believes it is entitled. In particular, the review focuses on cases in the United States, where companies have sought to enforce a right which is discrete and free-standing, existing independently of a contractual arrangement made between the company and its shareholders, and its instruments of creation. In determining these claims, the judicial approach contributes to a better understanding of the contours of corporate existence, even though the judgments may not have been expressed in the language of contract, concession, or real entity theory.

However, before considering the leading cases from the United States involving the assertion of corporate rights, it is worth noting that the established approaches for analysing the existence of corporate rights do not always provide a foundation for resolving a corporate claim in a case where the issue has arisen in the context of a contractual dispute between the company and a third party with whom the company has had dealings. The application of established principles of contract law where a company brings a civil law claim for breach of contract neatly demonstrates the point. It is trite to observe that there are countless cases in the courts each day in which a company seeks to assert its contractual rights for breach of contract or tortious actions for breach of duty. Cases at the edge are more complicated, where the circumstances in which the assertion

of a corporate right is less common. Here, a sound understanding of the basis on which the law recognises the existence of company rights would be helpful.

A case involving a corporate claim for non-pecuniary loss is a nice example. It is an established principle at common law that damages for breach of contract may be awarded to a claimant for loss of amenity, injured feelings, or physical inconvenience. Typically, for example, a holidaymaker may obtain damages for loss of enjoyment in a claim for breach of contract against the travel company which provided the holiday.[374] Suppose, however, the holiday had been booked by a company for the benefit of an employee who had won its "employee of the year" award. If the quality of the holiday fell below the contractual representations, how should a court respond to a claim by the company for loss of enjoyment in these circumstances? The conventional response that "a corporation is a legal person just as much as an individual"[375] is inadequate since the company, as an artificial construct and lacking emotional capacity other than by reference to its individual members, is incapable of suffering non-pecuniary loss. Albeit both legal persons, the mere fact of legal personhood is not enough to place an individual and a company on an equal footing.

This issue has not been addressed by an English court. At first blush, a company's inability to recover damages for non-pecuniary loss might be regarded as palpably obvious. But conceptually, there is no impediment which prevents a company from claiming the right to recover damages for non-pecuniary loss. By reason of its employee's poor experience, the company has been exposed to the adverse impact of the breach. In addition to sustaining pecuniary loss for the cost of allowing the employee a replacement holiday, the company has suffered non-pecuniary loss, having been discredited in the minds of its employees for choosing a travel company which failed to deliver. No single individual has sustained any loss, but the company's reputation for competence has been damaged. The company's ability to recruit high quality workers is diminished, and this impacts upon its standing in the marketplace.

Similarly, if a company contracted with a photographer to take photographs of new recruits but the photographer failed to appear, the company's ability to recover its aborted

[374] *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.
[375] *Re Sheffield and South Yorkshire Permanent Building Society* [1889] 12 QBD 470, 476 (Cave J).

costs is uncontroversial. The company's inability to use photographs until another photographer is engaged would not give rise to loss capable of financial calculation, but nonetheless the company has been damaged, in the sense of inconvenienced, by the photographer's failure. An award of damages for non-pecuniary loss may be nominal, but in principle there is no conceptual impediment to an award. Again, this proposition is uncontentious, since it is well established that a company may claim for damage done to it in its corporate capacity.[376] This includes a libel affecting its property, or a libel reflecting on the management of its trade or business.[377]

5.4.1 Corporate rights in the United States

The limitations inherent in the traditional approaches to providing a sound foundation for the assertion of corporate rights are exemplified in a consideration of three seminal cases which have arisen in the United States where the right to be exercised is not associated with a claim for breach of contract or tortious duty. Invariably, these cases have concerned the assertion of corporate rights, viewed from the perspective of the United States constitution. The courts determined that there were cases where a company could assert constitutional rights which the State was bound to protect.

In reaching these conclusions, the United States Supreme Court applied one of two approaches. In the first two cases to be considered, *First National Bank of Boston v Bellotti*[378] and *Citizens United v Federal Election Commission,*[379] the Supreme Court recognised that the acknowledgment of corporate rights can be supported by reference to broad societal interests, in this instance the freedom of speech. In the third instance, *Burwell v Hobby Lobby Stores,*[380] the outcome was realised by a different route. Instead of recognising the ability of a company to assert a right in a manner which stands independently from the rights of its individual members, the American courts viewed the source of corporate rights as flowing from the need to safeguard the rights of individuals who were the company's shareholders. Studied through the American prism and the paramountcy attributed to the provisions of the United States constitution, if the position had been

[376] *Halsbury Laws of England*, vol 24 'Corporations', s 4(6), para 481.
[377] *Linotype Co Ltd v British Empire Type-setting Machine Co Ltd* (1899)] 81 LT 331; *Thorley's Cattle Food Co v Massam* [1880] 14 Ch D 763.
[378] *First National Bank of Boston v Bellotti* [1978] 435 US 765.
[379] *Citizens United v Federal Election Commission* [2010] 558 US 1.
[380] *Burwell v Hobby Lobby Stores* [2014] 573 US 1.

otherwise, the constitutional protections afforded to the company's stakeholders would have been rendered nugatory.

In *First National Bank of Boston v Bellotti*,[381] several banks challenged the constitutional propriety of a State enacted criminal statute which prohibited business corporations from making donations directed at influencing the outcome of a public referendum. Having lost before the Supreme Judicial Court of Massachusetts, the banks successfully appealed to the Supreme Court, arguing that the legislation was unconstitutional because it contravened the prohibition against any legislative measure which abridged free speech. The Supreme Court was clear that a company should not be deprived of its constitutional freedom to make political donations simply because it could not show that the issues materially affected the corporation's business.[382] Delivering the majority opinion of the Court, Justice Powell explained that if the speakers, in this case the donors, had not been companies, it would not have been suggested that the State could silence their proposed free speech:

> It is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual.[383]

This approach was endorsed thirty years later when a majority of the Supreme Court in *Citizens United v Federal Election Commission*[384] determined that a Federal law in Washington DC prohibiting companies from using their funds to support electioneering communications was unconstitutional. The company, a non-profit corporation, had released a documentary which was critical of Hilary Clinton at a time when she was candidate for the Democratic Party's Presidential nomination. The company became concerned that it might be prosecuted for contravening the Federal law and sought declaratory and injunctive relief. Citing the decision in *Bellotti*, Justice Kennedy giving the opinion of the Court made clear that there was "simply no support for the view that the

[381] *Bellotti* (n 378).
[382] ibid 776.
[383] ibid 777.
[384] *Citizens United* (n 379).

First Amendment … would permit suppression of political speech by media corporations".[385]

A different analysis underpinned the decision in *Burwell v Hobby Lobby Stores.*[386] Here, the Supreme Court recognised the application of corporate rights where legislation concerning a person's exercise of religion was involved. In this instance, however, the Court's reasoning was focused more on the need to protect the interests of the company's owners than the recognition of corporate rights as an attribute of corporate personality. In *Burwell v Hobby Lobby Stores,*[387] three companies operated employers' group health plans to provide preventative care and screenings for women pursuant to regulations made under the Patient Protection and Affordable Care Act 2010. Care would also include coverage for contraceptive methods which the Government's Food and Drug Administration had approved. The three companies objected to the requirement that they should offer contraceptive coverage because it offended their sincere Christian beliefs that life begins at conception. This requirement amounted to a violation of their religious beliefs protected under State legislation in the form of the Religious Freedom Restoration Act 1993 which prohibited the Government from "substantially burdening a person's exercise of religion even if the burden results from a rule of general application". The companies also relied upon the First Amendment of the Constitution which stipulated that the legislature shall not make any law "respecting an establishment of religion".

Robustly rejecting a submission that a company could not claim an infringement of a right affecting religious practice, the majority of the Court said that this suggestion was entirely baseless. The conventional understanding of a reference to a person in legislation included a legal person and there was no need to depart from this construction here.

Giving the majority judgment, Justice Alito explained that:

> … Congress provided protection for people like [the companies' owners] by employing a familiar legal fiction: It includes corporations within [the legislation's] definition of "persons". But it is important to keep in mind that the purpose of

[385] ibid 37.
[386] *Burwell* (n 380).
[387] ibid.

> this fiction is to provide protection for human beings. A corporation is simply a form of organisation used by human beings to achieve a desired end. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporation's financial well-being. And protecting the free-exercise rights of corporations [like the claimants in this case] … protects the religious liberty of the humans who own and control those companies.[388]

Consideration of the decision in *Burwell v Hobby Lobby Stores*[389] reinforces the stereotypical image of the company as a proxy for the individual.[390] However, the discussion in the United States cases is not without interest. Two points emerge. First, the United States Supreme Court is comfortable with the ability of a company to assert rights widely where there is a public interest to support, even where the exercise of the right does not materially affect the company's business.[391]

Secondly, in his dissent, Justice Rehnquist in *First National Bank of Boston v Bellotti*[392] expressed the view that corporate rights would be recognised where the need for protection was central to the company's existence. As he explained, "Since it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties

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[388] ibid 18.

[389] ibid.

[390] Carl Meyer has questioned whether the wider recognition of corporate rights in the United States ought to have been determined by constitutional amendment rather than a process of judicial accretion. See Carl Meyer, 'Personalizing the Impersonal: Corporations and the Bill of Rights' (1989–1990) 41 Hastings LJ 577, 664.

[391] The strong approach taken by the Supreme Court to the recognition of corporate constitutional rights may be explained in part by the emphasis in the United States on the public element to the company's existence. 'In the United States, the corporation is a different creature than it is in the United Kingdom: in the United States, it is a private entity that is firmly contained within the orbit of public creation; in the United Kingdom, it is an endogenous private association assisted by the state provision of entity status in order to address some of the practical difficulties associated with unincorporated business activity …'. See David Kershaw, 'The Path of Corporate Fiduciary Law' [2012] NYU Journal of Law & Business 395, 407, 419.

[392] *Bellotti* (n 378).

enjoyed by natural persons, our inquiry must seek to determine which constitutional protections are 'incidental to its very existence'".[393]

In presenting this line of thought, Justice Rehnquist drew on Chief Justice Marshall obiter dictum in *Dartmouth College v Woodward*,[394] where he expressed his view that a company possesses "only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence".[395] It follows that, in the absence of the constitutional influence in these corporate rights cases, a narrower conception supports the recognition of a corporate right where its affirmation is "incidental to [the company's] very existence".

As Martin Petrin explains:

> [A] legal entity's rights (constitutional, statutory, and common law) should reflect its core economic function and purpose. For instance, it is justifiable to protect corporate commercial speech – although there may be limits – in order to increase sale of products. Beyond this obvious case, a legal entity may also be given other rights, including rights to privacy, political speech, and even religious rights, albeit on the preliminary condition that there is a sufficiently strong link to its economic goals.[396]

Certainly, recognition of corporate rights can be supported by reference to social and economic factors which are essentially utilitarian in nature. Giving effect to a corporate right to privacy provides a striking example. Although interests protected by privacy such as dignity and personal autonomy are unquestionably human values, privacy rights can be equally important to a company where an invasion of impacts adversely on a company's economic interests. Failure to protect a company's copyright, intellectual property and trade secrets can be financially damaging to the company as well as adversely impactful on the wider economy. The relevance of corporate purpose, together with utilitarian and consequentialist concerns, to the discourse on the recognition of corporate rights, is

[393] ibid 824.
[394] *Dartmouth College v Woodward* [1819] 4 Wheat 518.
[395] ibid 636.
[396] Martin Petrin, 'Reconceptualising the Theory of the Firm – From Nature to Function' [2013] 118 Penn State Law Review 1, 44.

considered at greater length in the next chapter. Suffice it to note at this point that Justice Rehnquist's approach is valuable. If the attribution of corporate personhood has meaning, the ability of a company to assert rights which are "incidental to its very existence" must be recognised.

5.5 CORPORATE RESPONSIBILITY IN THE CRIMINAL COURTS

In contrast to cases in the civil courts which have focused on the exercise of rights, cases in the criminal courts have concentrated on responsibility for corporate action by attributing the acts or omissions of the company's directors and officers to the corporate form. Again, the approach of the criminal courts is interesting in so far as it assists in an understanding of the nature of corporate personhood, and how corporate accountability has been recognised in light of the relationship between the company as a legal entity on the one hand, and the conduct of its directors, employees, and shareholders on the other.

Historically, the base line in common law is that the law fixes a company with criminal liability only where the acts or omissions of a company officer or senior employee is identified as the acts of the company, so that the conduct is attributed to the company as the acts or omissions of the company. This first model of corporate criminal liability is commonly conceptualised as liability by attribution or identification theory. The leading authority is *Tesco Supermarkets Ltd v Nattrass*,[397] where the House of Lords held that actions could be attributed to a company, or identified with a company, only where the actions were undertaken by a company officer or senior employee who represented "the directing mind and will" of the company. Shareholders have no role to play in the attribution of a director's conduct to the company, and in so far as attribution theory addresses the nature of corporate personhood, it recognises the company's legal standing but judges its actions by specific reference to the individual conduct of its directors.

However, this is not to say that criminal law does not have a valuable contribution to make in an effort to understand the attributes of corporate personhood. On the contrary, in a different category of cases where the legislature imposes criminal responsibility for organizational fault, this approach directly confronts the internal workings of the

[397] *Tesco Supermarkets Ltd v Nattrass* [1971] UKHL 1, [1972] AC 153.

company and how this may reflect on the character of corporate personality. This is the second model of corporate criminal law, and unlike the first model which is the subject of much criticism and regular review,[398] this "failure to prevent" model is popular with the legislature and has much contemporary traction.[399] The defining characteristic of these criminal offences is that the company has failed to prevent the commission of a crime, and the offences are loosely described as "corporate offences" on the basis that they can be committed only by a corporate person. Proof of the commission of the crime renders a company strictly liable for offending conduct, subject to a statutory defence where the company can show that it took reasonable precautions to prevent the occurrence of the offending conduct in question.[400] In this model of corporate criminal liability, a company is held legally responsible as a result of its internal functional failings and not as a result of an individual person's culpable conduct where the actions of the individual can be attributed to the company.

The expansion of criminal liability under the second model reinforces the law's treatment of a company as a real entity with responsibility for its own wrongdoing, independent of the conduct of any individual with whom the company may be associated. As the dynamic of corporate criminal liability continues to move away from liability based on the acts of individuals in favour of liability founded on organisational failings in its role as an entity, the need to articulate a narrative for the recognition of corporate rights detached from the interests of the individual becomes more pressing.

5.5.1 Criminal responsibility at common law

The starting point for English common law is that, as a matter of general principle, criminal liability will not be established without proof that the offending conduct was not

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398 In November 2020, the UK Government instructed the Law Commission to review the law on corporate criminal liability and consider, in particular, whether the attribution/identification approach should be reformed. <www.lawcom.gov.uk/project/corporate-criminal-liability/> accessed 27 December 2020.

399 The UK Government is considering the enactment of a corporate offence for the failure to prevent economic crime. The Ministry of Justice responded to an earlier Call for Evidence <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/932169/corporate-liability-economic-crime-call-evidence-government-response.pdf> accessed 27 December 2020. See also a speech by Lisa Osofsky, Director of the Serious Fraud Office, 9 October 2020, <www.sfo.gov.uk/2020/10/09/future-challenges-in-economic-crime-a-view-from-the-sfo/> accessed 27 December 2020.

400 There is another model of criminal corporate liability involving the enactment of statutory offences of absolute liability where proof of fault is not required. This model of criminal liability does not add anything to a discussion on the nature of corporate personhood.

only committed but was committed intentionally, recklessly, or negligently. If a company is required to accept responsibility in a criminal court for its offending conduct, the criminal law presents a formidable challenge which involves the location of the company's mind and identification of the way in which the capacity for forming the requisite mental state of mind is accomplished. The question is powerful since it sheds light not only on the extent of a company's responsibilities in law but also by hermeneutical methodology (*a fortiori*), the recognition of company rights involving due process. It would be surprising if legal theory could accommodate such an asymmetrical arrangement whereby a company could be held criminally liable for breach of its responsibilities but lacks any entitlement to claim the benefit of rights exercisable to safeguard due process in any engagement with the criminal process.

The courts have responded to the challenge of imposing criminal liability on a company by enquiring whether the individuals in control of the company had the requisite mental intent to accompany the offending conduct. As Viscount Haldane explained in *Lennard's Carrying Co v Asiatic Petroleum Co Ltd*:

> A company is an abstraction. It has no mind of its own any more than it has a body; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.[401]

In this way, the court attributes the director's level of mental awareness to that of the company and treats the company as if was an individual for the purposes of establishing criminal responsibility. The company is personalised for this purpose and clothed with the attributes of human behaviour. Lord Reid famously articulated the point in *Tesco Supermarkets v Nattrass*[402] when he said that it is the person in control of the company whose guilty mind becomes identified with the company, "so that his guilt is the guilt of the company".[403] The veil of incorporation remains intact, and the courts are not

[401] *Lennard's Carrying Co v Asiatic Petroleum Co Ltd* [1915] AC 705, 715.
[402] *Tesco Supermarkets* (n 397).
[403] ibid 170D.

penetrating the company's legal personhood in order to hold the company criminal liable for the acts of its directors and most senior officers.

As Lord Sumption observed in *Prest v Petrodel Resources Ltd*,[404] the phrase "piercing the corporate veil" "is an expression rather indiscriminately used to describe a number of different things. Properly speaking, it means disregarding the separate personality of the company".[405] This not what is happening here. In the criminal jurisdiction, the company is held responsible in its capacity as a legal person, with the mental ingredient of the criminal offence established by reference to the conduct of its director or other senior officer.

Although the corporate veil remains in place, there is an anthropomorphic element to establishment of criminal liability in this way. Inexorably, the company's liability depends on the acts or omissions of an individual, in this instance a director or senior officer, which are imputed to be the acts or omissions of the company. In this way, if corporate criminal liability by attribution is to be theorised within the norms of company law theory, it is real-entity theory rather than any contractual or concessional model which offers the snuggest fit. Neither the contractual theory nor the concession theory of corporate personhood has a dialogue with a model of corporate criminal liability by attribution or identification of a director's guilty mind.

As Mark Hager explained, "[i]f contract or State concession established corporations, "they could not possess their own 'personality' or 'will'.[406] The wrongful "state of mind" requisite to criminal and tort liability could not therefore be imputed to them". As Hager proceeded to explain, "[t]he real entity theory … avoided these difficulties by recognizing that corporate actions could be real, even if they were illegal, that is, ultra vires. No anomaly would arise in holding corporations liable for such actions".[407]

Apart from anything else, there is a public policy argument underlying this approach. Mark Dsouza argues there is much value in retaining the attribution doctrine in the

[404] *Prest v Petrodel Resources Ltd* [2013] 2 AC 415.
[405] ibid 478–79, [16].
[406] Mark Hager, 'Bodies Politic, The Progressive History of Organizational Real Entity Theory' [1989] University of Pittsburgh Law Review 575, 586.
[407] ibid 587.

application of corporate criminal liability since it sits happily with a lay person's concept of the criminal law which is based on individuals taking responsibility for their criminal acts:

> The identification doctrine reinforces this association by conceiving of a company anthropomorphically, and thus demonstrating to the general public the close parallel between the criminal law (including its principles of culpability) as applied to individuals, and as applied to corporations.[408]

Judicial support for the retention of the attribution principle was recently afforded in *Serious Fraud Office v Barclays plc*[409] when, in the course of affirming the decision in *Tesco v Nattrass*,[410] Lord Justice Davis noted that the focus of criminal law more generally rests on culpability, which envisages liability where a defendant is shown to have been at fault.[411]

However, although this speaks loudly to the basis on which the common law recognises the criminal liability of an entity invested with corporate personhood, it says little about the nature of corporate personality, other than to see the company as a cloak in which the conduct of the directors and senior officers has been wrapped. It is in a study of the second and more contemporary model of English criminal liability that the search for answers about the nature of corporate personality can be advanced.

5.5.2 Criminal responsibility for organisational fault

In addition to the model of corporate liability in common law, there is a second model of fault-based corporate criminal liability which runs in parallel with corporate attribution theory. This model imposes criminal liability on a company in circumstances where the company has failed to prevent an undesired outcome. As Jeremy Horder notes, the impetus behind this development was pioneered in the nineteenth century for reasons of

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408 Mark Dsouza, 'Lessons from Analogizing Natural and Corporate Persons in the Criminal Law', Working Paper delivered at University College London, 29 May 2018.
409 *Serious Fraud Office v Barclays plc* [2018] EWHC 3055 (QB).
410 *Tesco Supermarkets* (n 397).
411 ibid [67].

social protection, especially in the context of consumer safety in the early days of railway travel.[412]

Nicola Lacey anthologizes this model of criminal liability as demonstrating a shift in emphasis away from attribution towards an understanding of requiring responsibility for harmful outcomes in corporate cases where criminal intent could not be shown.[413] Lacey notes that the second model of criminal liability has traction in the case a company, where a division between "real crime" and "regulatory crime" began to develop:

> One important and distinctive aspect of the increasing deployment of criminal law as a tool of modern regulatory governance had to do with the emerging legal framework governing corporations. Once again, the gradually emerging doctrines of corporate criminal capacity strongly reflected the distribution of both economic and political interests, with strict liability offence serving the regulatory interest of political elites as well as serving legitimation functions in relation to corporate power.[414]

Today, the trend in favour of imposing corporate criminal liability for failing to prevent the occurrence of harmful conduct manifests itself in the form of new corporate criminal offences such as failing to prevent bribery or failing to prevent the facilitation of tax evasion offence.[415] Instead of judging the level of a company's responsibility by reference to the conduct of its directors or officers who stand independent from the company and external to it, in this second model a company's exposure to criminal liability for harmful conduct is measured by reference to the internal workings of the company which characterize its organisational character.

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[412] Jeremy Horder, *Ashworth's Principles of Criminal Law* (8th edn, OUP 2016) 165.
[413] Nicola Lacey, In Search of Criminal Responsibility (OUP 2016) 89–91.
[414] ibid 90.
[415] See Corporate Manslaughter and Corporate Homicide Act 2007, s 1; Bribery Act 2010, s 7; Criminal Finances Act 2017, ss 45, 46. For a discussion of the 'failure to prevent' model, see Nicholas Lord and Rosemary Broad, 'Corporate Failures to Prevent Serious and Organised Crimes: Foregrounding the Organisational Component' [2017] European Review of Organised Crime 27; Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' [2018] 12(2) Law and Financial Markets Review 57.

In its recent development, this model of corporate criminal liability has been stimulated by a Council of Europe Recommendation in 1988.[416] This promotes the broadly configured principle that generally a company should be held liable for the criminal actions of its employees unless it can be shown that it has taken all the necessary steps to prevent its commission. By focusing on the steps which company management ought to have taken to prevent the commission of harmful conduct, the criminal law is requiring companies to perform their compliance obligations at a high level. As Andrew Ashworth explains, "[t]he avowed purpose of corporate failure to prevent offences is to change corporate culture by giving companies an incentive to put preventative procedures into place".[417] In this way, the burden of these offences lies in the notion of organisational fault. In terms, the company is held criminally liable because, in its standing as a corporate organisation, there has been a failure in its governance processes. In a case where negligent directors have been replaced by competent directors, the company would remain criminally liable for its organisational failure, even though the failure had occurred on the previous directors' watch.

The clue to the significance of this approach lies in the term which is used. By referencing "organisational fault", the language makes clear that it is the company in its capacity as an entity which is at fault, and that the fault is systemic and not limited to an isolated failure. James Gobert and Maurice Punch explain the concept of organisational fault in the following way:

> Organisational fault inheres where a company has organised its business in such a way that person and property are exposed to criminal victimisation or the unreasonable risk of harm, when the company has failed to devise and put into place systems for avoiding criminological risk, when its monitoring and supervision of those whom it has put in a position to commit an offence or cause harm is inadequate, and when the corporate ethos or culture is such as to tolerate or encourage offences.[418]

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[416] Liability of enterprises for offences: Recommendation No. R (88) 18 adopted by the Committee of Ministers of the Council of Europe on 20 October 1988 and explanatory memorandum <https://rm.coe.int/16804c5d71> accessed 24 April 2021.

[417] Andrew Ashworth, 'A new generation of omissions offences?' [2018] Criminal Law Review 354, 360.

[418] James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003) 81. See Jonathan Clough, 'Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability' [2007] 18 Criminal Law Forum 267.

Endorsing Brent Fisse and John Braithwaite's work on the development of "reactive fault", Horder notes this requires a court to assess the adequacy of measures taken to prevent the occurrence of a prescribed harm:

> Rather than struggling to establish some antecedent fault within the corporation, the prosecution would invite the court to infer fault from the nature and effectiveness of the company's remedial measures after it has been established that it was the author of a harm-causing or harm-threatening act or omission. The court would not find fault if it was persuaded that the company had taken realistic measures to prevent a recurrence, had ensured compensation to any victims, and had taken the event seriously in other respects.[419]

By focusing on the adequacy or otherwise of the company's internal processes, the concept of organisational fault endows the company for better or worse with a character which is reflected within its corporate personality and culture.

Harry Glasbeek expresses the position forcefully:

> The message is clear. An organisation is to be held responsible because those responsible for its system of operations, knowing of the rights created on behalf of the organisation, did not, on its behalf, take appropriate case to eliminate them. The organisation is to be certainly criminally responsible because it creates the risks, and it can and should reduce them … Those who create risks and are in a position of control have a duty to avert the materialisation of those risks; it is right and proper to hold them responsible if they fail to meet the standard of this duty. They need not do anything positive to invite the wrath of the law. An omission to ensure that appropriate care is taken may be enough to attribute criminal responsibility.[420]

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[419] Gobert (n 418) 171. See Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (CUP 1993).

[420] Harry Glasbeek, *Class Privilege* (Between the Lines 2017) 113. See also, Harry Glasbeek, *Wealth by Stealth* (Between the Lines 2002) 7 'No one has ever seen a corporation, smelled a corporation, touched a corporation, lifted a corporation, or made love to a corporation'.

5.6 LIMITS OF CORPORATE PERSONHOOD

The recognition of individual engagement returns the narrative to the key questions under consideration in this chapter, namely, whether a company is entitled to assert a right in the same way as an individual, and if so, on what basis? The review of the traditional approaches to company law theory suggests that the conventional answer to these questions is "sometimes", depending on the nature of the right, the company's social and economic objectives, and the circumstances in which the exercise of the right falls to be considered. In addition, the review demonstrates there are conceptual limits to the weight which can be placed on the principle of legal personhood as a vehicle for carriage of corporate rights without resort to some form of anthropomorphic association.

MacCormick expresses the position well. Legal personhood is no more, and no less:

> … a device for recognising the unitary and purposive character of various kinds of group activity among human beings. By this device, certain actions or events are recognised in law as bringing into existence a group that has its own personality distinct from that of any individual human beings who are in law its members, servants, or agents.[421]

The consequence of this analysis is that "certain acts, decisions and intentions can be imputed to the group as its acts, decisions or intentions".[422] This is undoubtedly correct, but the converse is equally true, so when determining the nature of the company's rights and responsibilities, it is the "acts, decisions and intentions" of individuals which must be explored. On occasions, these individual interests require protection and when this acknowledged, recognition of the right is derivatively based. A company is not able to claim the protection solely by reason of its legal personhood.

As MacCormick explains:

> Especially as to the fundamental rights of persons, it should be noted that the most fundamental are *human* rights and hence primarily for the protection of each

[421] MacCormick (n 351) 85.
[422] ibid.

> and every human person. No doubt the protection of humans sometimes requires the protection of corporations derivatively, and some human interests – e.g., in freedom of worship – are distinctively corporate rather than individualistic in kind. But in principle that passive protection which human beings constitute is protection for humans, and there should be no presumption of an extension thereof to corporate persons in their own right rather than as human instruments.[423]

MacCormick's view that "there should be no presumption of an extension … to corporate persons in their own right" is noted. To be clear, in relation to individual rights, MacCormick is saying that legal personhood does not have a role to play in a conception of individual rights, other than as a transparent barrier through which an individual right may be asserted.

One of the difficulties with MacCormick's approach is that the distinction between an individual right and a corporate right is not always easy to delineate. The substance of the right may overlap or be coterminous. Consider, for example, the case of a one-man company, where the director/shareholder is the same person. Whilst the director and sole shareholder is alive, conceptualisation of his rights as derivative rights is persuasive. A corporate right to privacy, for example, in the maintenance of the company's financial records stands as no more than a derivation of the privacy rights of the director and sole shareholder. But when the director and sole shareholder dies, the position is radically altered. Unless the corporate ability to claim the right to privacy is conceptualised as flowing directly from the ontology of corporate existence, a company's ability to assert any right to privacy falls away. A similar point can made with reference to the United States Supreme Court cases where the Court recognised a corporate right to free speech could not be explained within the scope of a derivative approach to the recognition of corporate rights.

The traditional limitation on recognising corporate rights based on its standing as a legal person on the one hand and treating corporate personhood as a vehicle for the protection of individual rights on the other, suggests that neither approach can provide a sustainable

[423] ibid 96.

foundation for the articulation of corporate rights in a contemporary narrative. The dichotic approaches share an interest in the notion of personhood, in the sense that they personify the company as if it were an individual or treat it as a conduit for an individual's interests. But a weakness is revealed since by human personification of the company, the attributes of a company as a legal personality and social organisation is significantly diminished, if not extinguished.

5.6.1 Detaching individuals from the personification of the company

The narrative of derivative rights does not sit happily with the reality of much corporate business in the twenty first century, especially where international companies and groups of companies are concerned. Today, a combination of high-net-worth individuals and venture capitalists have eclipsed the single entrepreneur conducting business through a private company. In the case of public limited companies whose shares are traded on recognised exchanges, the dominant force in the control of a company is institutional, with the key investors consisting of pension funds, insurance companies, hedge funds, merchant banks, and sovereign wealth funds. An institutional investor may be heavily invested in a company, but in no sense does the company personify the investor or its interests. It is fair to say that in much large-scale business activity, the second half of the twentieth century witnessed a detachment between the director and shareholder, and the human personification of the company. Decision-making within the company no longer always vests with a dominant individual. Decisions are made collectively, by a combination of executive and non-executive directors drawn from a wide spectrum of the business community. The chairperson and chief executive officer represent the public face of the company, but the ultimate decision-making function has become anonymous.

The consequence of this change is far-reaching. Historically, a company was viewed as a vehicle through which an investor could engage in a commercial venture, with the extent of financial exposure capped by the amount of his contribution in the purchase of shares. This was the advantage of incorporation, and an investor's motive was the undiluted maximisation of profit which would be re-invested in the company to facilitate its expansion or withdrawn for the shareholder to enjoy in the form of dividends.

Today, the description of the corporate motive is more sophisticated. Section 172 of the Companies Act 1980 articulates a director's duty to promote the success of the company, but in so doing he has wider considerations to consider. The success of the company connotes much more than the singular maximisation of profit. As part of a director's duty to act in the way he considers is most likely to promote the success of the company for the benefit of its members as a whole, the interests of the company's employees must also be considered, alongside the impact of the company's operations on the community and the environment, and the desirability of the company maintaining a reputation for high standards of business conduct.

As Meir Dan-Cohen reflects:

> When a corporation can no longer be identified with a relatively homogeneous group of shareholders, when its behaviour can no longer be portrayed as the inert mechanical execution of an owner's will, and as our attention is drawn to the distinctive organisational properties and processes, the posture of simply equating the corporation via personification or aggregation to a natural person loses whatever surface plausibility it might once have had.[424]

Eric Orts makes the same point when he emphases the contemporary strength of the corporate personality as a legal construct which bears rights and responsibilities in a manner which is divorced from its directors and shareholders. In his concluding thoughts on the legal theory of the company, Orts explains:

> Although they are artificial fictions, business firms have become socially real through widespread practice and belief. Business firms act as persons in the world. Firms own property, make contracts, and shoulder legal rights and responsibilities. We say and mean "Exxon Mobil" or "Patagonia" just as we say and mean the "United States of America" or the "People's Republic of China". Theories that disregard these social facts will be discarded into the proverbial dustbins of history.[425]

[424] Meir Dan-Cohen, *Rights, Persons, and Organisations* (2nd edn, Quid Pro Books 2016) 17–18.
[425] Eric Orts, *Business Persons, A Legal Theory of the Firm* (OUP 2013) 256.

5.7 CONCLUSION

In conclusion, it is clear that the traditional approaches to the conceptualisation of the company and legal personhood do not provide a sound unitary foundation for the recognition of corporate rights. The contractual, concession and real-entity theories reflect different approaches to the theorization of legal personhood, and in relation to the recognition of corporate rights, each theoretical construct has a role to play. But there is no unitary or overarching principle which can be applied, and there are limits to the conventional understanding of legal personhood which constrain its ability to fill the void. In the traditional conception of company law theory, three approaches can be identified as supporting different species of corporate rights. First, the law recognises corporate rights which flow from the incidents of a company's creation. Secondly, there are corporate rights to which the law gives effect where they are inextricably associated with a company's purpose and ability to function. Thirdly, the law acknowledges a corporate right where it is necessary to protect the interests of individuals whose human rights would otherwise be compromised. None of the three approaches can claim exclusivity, and the review of corporate rights in their traditional conception produces a pluralist outcome.

There is no reason why the justification for the recognition of corporate rights should not be multi-faceted, as with a contract of employment where Alan Fox was able to espouse a pluralist view of the relationships between the contracting parties. As Fox explained in a paper written for the Donovan Report, it was possible to articulate the nature of the employment relationship in one of two ways.[426] On the one hand, an employment contract could be viewed as a relationship of social membership which promoted a common interest. On the other hand, the employment arrangement could be said to reflect a negotiated, contractual relationship which satisfied the interests of separate albeit interdependent groups. Just as different conceptions of the employment relationship can sit happily together, different approaches to corporate rights could also share the same space as fellow roommates.

[426] Royal Commission on Trade Unions and Employer's Associations 1965–68 (the Donovan Report), 'Research Paper 3 by Alan Fox, Industrial Sociology and Industrial Relations' (HMSO 1966).

The difficulty with a pluralist outcome, however, is that it ignores the actuality of the contemporary narrative. The three models of corporate theory provide a sound footing to secure a framework for the creation and management of a company, but they fail to provide a uniform approach for the recognition of corporate rights to which a company may lay claim. The momentum of the contemporary narrative is evidenced not only by modern real entity thinking which embraces group culture and organisational elements, but also by movement in the conception of corporate criminal responsibility away from individual conduct in favour of a collective responsibility on the part of the corporate entity. The impact of this development for the recognition of corporate rights is significant if not transformative, since it provides a firm platform for the development of corporate rights based on an understanding of corporate value rather than elemental components of the company's existence and individual rights. As the thesis proceeds to demonstrate, this includes a corporate assertion of the privilege against self-incrimination which is based not on the risk of prosecution to an individual but risk to the corporate person.

CHAPTER 6

MORAL CONCEPTIONS OF CORPORATE RIGHTS

6.1 INTRODUCTION

The struggle to locate a single foundation for a theory of corporate rights within traditional conceptions of company law theory presents the jurist with a strong challenge. The existence of certain corporate rights (such as a right to property and a right to sue) are readily identified, but in the absence of a thread which binds recognition of these rights, the basis on which a company can assert an entitlement lacks coherence and raises the risk of inconsistent outcomes. A corporate right may be articulated in company contract theory where a company seeks to enforce a right against its members, but in other instances, such as a claim to protect property or reputation, a corporate right is more cogently developed within concession or real entity theory. The law offers different routes to the recognition of different rights, with the juristic support for each right considered individually. The outcomes are piecemeal and there is no generic conception which supports the recognition of corporate rights.

In recent years, the increasing realisation of corporate personality has precipitated renewed academic interest in presenting a company as a moral agent, with implications for an understanding of the basis on which corporate rights can be founded. This represents a more controversial understanding of the notion of corporate personality, with an analysis which sees a company's claim to assert rights as deriving from a company's standing as a moral agent. This chapter offers a critique of this theory and contests whether it can support a theory of corporate rights. The thesis argues that a corporate moral agency model fails to answer why the law should extend its recognition of individual rights to corporate persons. The problem is that the theory omits to develop an adequate connection between the existence of corporate moral agency and the recognition of a corporate right. The argument in support of a claim to a corporate right is an inherently moral one, and it rests on the bedrock of a proposition which needs to be established rather than assumed. If a company has moral agency as an incident of its corporate personality, a corporate moral agency model suggests that recognition of a basket of moral rights follows as a logical consequence. The law must then determine whether legal recognition should be afforded to some, or all, of these rights, and it is here

the model falls short since it does not offer a moral basis for determining how a corporate right is enlivened. A dependency on a company's status as a moral agent is not enough. A moral foundation for the law's recognition of corporate rights needs to be found.

The thesis argues that the answer is to be found in an alternative analysis of corporate rights which grounds the foundation of a corporate right in an understanding of the value which the exercise of the right serves to protect. In this way, this chapter presents an alternative narrative for the formulation of corporate rights which moves away from traditional notions of contract, concession, and real entity theories and delivers a coherent foundation for the recognition of corporate rights in a modern model which is fit for purpose. The declared intention is to provide a convincing basis for understanding why the law should extend its recognition of individual legal rights to a corporate person and enable a company to assert certain legal rights which facilitate the protection of its interests.

The crux of the theory, which this thesis terms as "the corporate value theory", lies in conceptions of value flowing from the functions which companies perform. As a participant in the corporate sector, a successful trading company contributes to the strength of the economy. It is the vehicle through which economic growth is generated, and when the value of the beneficial contribution of each company is aggregated, the positive contribution of the corporate sector to the national economy is immense. A successful corporate sector is the powerhouse of a strong economy. Alongside aggregate value, each company has individual intrinsic value to its officers[427] and employees, whose lives are shaped by their involvement in the company's activities. The benefits flowing from an individual's association with a trading company are manifold and range from the provision of income to sustain the individual and his family to the maintenance of relationships and enjoyment of daily activities which contribute to life's meaning.

Although aggregate value and individual value are presented as separate branches, they are hewn from the same tree. The common characteristic is the successful operation of a company as the legally acknowledged vehicle through which these benefits are enabled.

[427] A company officer is defined in s 1437 of the Companies Act 2006 'as including a director, manager or (company) secretary, and any person who is to be treated as an officer of the company for the purposes of the provisions in question'.

Therefore, in response to the question why the law should extend its recognition of individual rights to corporate persons, the answer is clear. The law should recognise a company's ability to assert rights in order to facilitate the protection of the company's interests and the value it delivers to the economy and individual interests. The narrative rests on a consequentialist view of corporate rights. In each case, a corporate right is recognised where its assertion is supported in value-based terms.

The chapter develops the case for setting the recognition of corporate rights in the context of value in stages. An understanding of the corporate value theory is presented in summary form. This is followed by an exploration of how value interests are protected by law, with especial reference to the law's protection of values inherent in the application of criminal law. Then, in the context of value protected by the assertion of corporate rights, this line of thinking explores the aggregate value which flows from the operation of a strong corporate sector in a free market economy. The chapter identifies additional interests at play, and important pockets of value are explored in a more granular form. Here, the focus rests on the provision of intrinsic value to individuals associated with a company, principally its officers and employees. By acting to support companies and prevent the occurrence of harmful consequences, the law's recognition of the corporate right has a moral dimension. If the State failed to recognise the right, it would have a "moral spill-over effect" for the company and its active participants, as well as the corporate sector at large. The morality of preventing these harmful consequences catalyses the recognition of a corporate right. In addition, it would be unfair for the law to deny recognition of corporate rights in circumstances where companies deliver benefits which enhance the lives of individuals and, more broadly, the interests of society as a whole. The law's recognition of a company's assertions of rights is consistent with the principles of a fair legal system in which the rights of all persons – individual and corporate – are equally respected.

6.2 THE COMPANY AS A MORAL AGENT

A narrative of corporate rights founded on a corporate value theory does not require a company to be acknowledged as a moral entity. If there is value protected by the assertion of corporate rights from the perspective of the State and the company's officers, employees, and shareholders, this ranks independently of the company irrespective of

whether the company is regarded as a moral agent or not. However, company law theorists who recognise a company as a moral agent view the matter differently. For these jurisprudential thinkers, the existence of corporate rights is seen as deriving from a company's standing as a moral agent. The challenge for a corporate moral theorist is not to identify whether or not a company can lay claim to a basket of moral rights, but rather, within the basket, how moral rights can be identified, and which moral rights should be legally recognised. In this section of the chapter, the approach of the corporate moral theorist is critiqued.

6.2.1 Defining moral agency

The notion of agency in social science conveys the idea of freedom to act independently and to make choices. The concept stands at the heart of Western philosophical thought associated with the ideas of John Locke and his theory of liberty.[428] Thus, when a company is described as an agent, this means no more than the company is an independent entity with freedom to act. When agency is qualified as moral, this signifies that the company's freedom to act must be exercised with reference to some idea of right and wrong. To this extent, the obligation to act morally may constrain the agent's actions and make it accountable for its conduct. To define terms carefully, moral agency in this context is the referencing of a state of awareness by a company that it is responsible for its actions.

As individuals, directors have capacity as moral agents to act on behalf of a company, but when acting collectively, their actions do not convey moral agency to the company. Since a company has a personality which is independent from those of its stakeholders, the key question is whether moral agency is embedded in a company's personality as a separate and distinct attribute.[429] There is strong disagreement amongst academic thinkers about the answer to this question. Attributing legal personality to a corporate entity is one thing, but attributing moral personality is something else.

[428] See John Locke, *An Essay Concerning Human Understanding* (OUP 1975) Peter H. Nidditch (ed).
[429] For a discussion on the attribution of moral agency, see Joel Parthemore and Blay Whitby, 'What makes any agent a Moral Agent? Reflections on Machine Consciousness and Moral Agency' [2013] 5(2) International Journal of Machine Consciousness 105.

6.2.2 'Idealist claims dressed up in empirical garb'

G R (Bob) Sullivan vigorously rejects the idea that there is any basis for claiming that a company acts as a moral agent which can commit corporate wrongs.[430] Sullivan believes there is nothing in terms of corporate development which suggests that a company has an independent moral personality which is capable of detection.[431] Sullivan adds that claims to recognise corporate moral agency are "merely idealist claims dressed up in empirical garb".[432] This is because, according to Sullivan, "[c]orporations and bureaucracies rest on human agency and do not transmute that agency into some form of non-human phenomena".[433] Robin Loof goes further and considers the issue of moral personality to be irrelevant in so far as the application of the criminal law is concerned.[434] The fact that a company has agency to act does not mean that it has moral agency; rather, the company demonstrates no more than the fact that it has a "rational and physical capacity" to commit crime. In the same way as the criminal law holds an individual responsible for his actions in circumstances where he lacks moral discernment, Loof perceives the position of a corporate entity is no different.[435] A company has corporate agency to commit crime, and whether this agency is laced with morality is none to the point.[436]

In the eyes of those who deny corporate moral agency, this narrow conception of corporate personality to exclude the element of moral agency should not restrict a company's potential liability in criminal law. After tracing the anthropomorphic approach to corporate criminal liability which rests heavily on individual identification and attribution ideas, Sullivan advocates a corporate criminal liability system which treats vicarious liability as the sole basis for determining criminal responsibility.[437] Meanwhile, Loof argues that causation of loss should be the pivot around which corporate criminal liability should turn.[438] Corporate moral agency does not enter Sullivan's or Loof's

[430] GR (Bob) Sullivan, 'The Attribution of Culpability to Limited Companies' [1996] 55(3) MLR 515, 516.
[431] ibid 532–33.
[432] ibid 535.
[433] ibid 535.
[434] Robin Loof, 'Corporate Agency and White-Collar Crime – An Experience-led Case for Causation-based Corporate Liability for Criminal Harms' [2020] Crim LR 275.
[435] ibid 285.
[436] ibid 286.
[437] Sullivan (n 430) 539–46.
[438] Loof (n 434) 288.

conception of corporate criminal liability in a system which moves away from established identification and attribution principles.

Similarly, from a philosophical standpoint, Yuval Noah Harari views the limited company as no more than a legal structure through which commercial enterprises are run. A company exists in the legal aether, with little or no connection to the physical world.[439] Harari considers the example of a car manufacturer whose legal existence would continue even if a disaster befell the company, causing the death of all its employees and the destruction of its factories and offices. Nothing physically would exist, but the company would retain its legal construct. Conversely, if a court ordered the dissolution of the company, the legal construct would disappear, but as individuals the employees would survive, albeit not in their roles as employees. During its existence, a company owns property and functions fully within the financial community, but as a legal construct it remains, in Harari's words, no more than "a figment of our collective imagination".[440] Harari comments that the technical term for a company in the US is "a corporation", "which is ironic because the term derives from [the word] 'corpus' ('body' in Latin) – which is the thing these corporations lack".[441] It seems clear there is no room for moral personality in Harari's conception of the modern company.

Whether the proponents of a narrow view of corporate agency absent any moral ingredient are correct in their analysis is a matter for debate. In this chapter, the discussion is acknowledged, but not resolved. As previously noted, if a company has moral agency, for adherents of a corporate moral agency model this has significant implications in the search for a narrative which supports the recognition of corporate rights.

6.2.3 Legal personhood as 'cluster property'

The weakness in the reductionist view of corporate personality lies in its failure to appreciate the consequences which flow inherently from the way in which the common law has held a company responsible for the commission of a criminal offence. In the last chapter, when exploring the parameters of corporate criminal liability, attention was

[439] Yuval Noah Harari, *Sapiens, A Brief History of Humankind* (Harvill Secker 2011) 28–31.
[440] ibid 29.
[441] ibid 30.

focused on the way in which a company was deemed to have acquired a mental state of awareness by the attribution or identification of the conduct of its officers with that of the company. Here, attention attaches to the importance of the law requiring the company to take responsibility for its actions. Whereas the former discussion focuses on the pragmatic circumstances in which a company is to be held criminally liable, the latter draws attention to the theoretical imperative which requires a legal person, in this instance a company, to accept responsibility for its actions. The relevance of the point is that the company is required by the law to accept responsibility for an inherently immoral act. Since the law requires a company to accept responsibility in this way, the company must be something more than a legal fiction which lacks the component of moral agency.

In his recent work, Visa Kurki demonstrates that legal personhood constitutes much more than an artificial shell and is best understood as "a cluster property", by which he means to explain that the notion of legal personhood connotes the bearing of rights and duties which the law has assigned or ascribed.[442] Kurki accepts that companies are formed as "collectivities of human beings",[443] and, consistent with an understanding of real-entity theory discussed in the last chapter, there are some acts that are performed as legal persons in their own right, separated from the actions of their members.[444]

Kurki demonstrates the point by employing an example from Ronald Dworkin's work in which he posits a scenario involving a car manufacturer which produced defective motor vehicles and caused multiple deaths. Moral responsibility is ascribed to the company in its role as a collective of individuals rather than to any particular individual in question. "The moral requirement for group responsibility is accentuated in such a situation, where a wrong has clearly taken place but placing the blame on any particular individual would be unjust".[445] The key point, as Matthew Kramer explains, also quoted by Kurki, is that although individual interests are components of the corporate structure, the group interests "do not amount to a sum or welter of individual interests, since its interests are those which characterise its members *qua* collectively rather than those which characterise its members *qua* individuals".[446] If the position were otherwise, the notion that a company

[442] Visa Kurki, *A Theory of Legal Personhood* (OUP 2019).
[443] ibid 155.
[444] ibid 157.
[445] ibid 161, citing Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 169.
[446] Kurki (n 442) 164, citing Matthew Kramer, 'Rights Without Trimmings' in NE Simmons and Hillel Steiner (eds), *A Debate over Rights: Philosophical Enquiries* (OUP 1998) 56.

is no more than a legal wrapper for the conduct of business would amount to a denial of its corporate personality, even if its standing as a legal person remained intact.

6.2.4 Corporate apology

The contemporary willingness of a company to deliver a corporate apology is a strong indication of the acceptance that a company does not operate in a hermetically sealed legal vacuum but rather engages in society and recognises its responsibility which may be moral rather than legal in nature. An expansive academic literature has emerged in recent years which has explored the role of a corporate apology in the context of dispute resolution.[447] After examining the impact of an apology in civil actions, Jonathan Cohen concluded that an apology can facilitate a settlement, especially where it is well timed and appropriately nuanced.[448] Whilst critics might suggest the notion of a corporate apology reflects no more than a cynical form of "virtue-signalling" which is lacking in substance,[449] this would be unfair. Apart from anything else, irrespective of whether the motive is malign or altruistic, the fact remains that an apology is tendered by the company, in recognition of its responsibility as a company. Even if a company is engaged in "virtue signalling", the fact of its engagement suggests that some level of moral sensibility is extant.

Aaron Lazarre noted the effect of an apology may be transformative in nature. It represents "an exchange of shame and power between offender and the offended,[450] and "[b]y apologizing, you take the shame of your offence and direct it to yourself".[451]
Lazare's notion of shame travelling between the offence and the offender may be artificial, but again, as with virtue signalling, an offender's acknowledgment of the shameful nature of the offending is a positive step in the direction of accepting responsibility for wrongdoing. Since a company has an identity independent of its

[447] See, for example, Michael B Runnels, 'Dispute Resolution & New Governance: Role of the Corporate Apology' [2011] 34 Seattle U L Rev 481.
[448] Jonathan R Cohen, 'Advising Clients to Apologize' [1999] 72 Cal L Rev 1009, 1031, where the author notes that 'mediation often offers a useful and very safe space for making an apology'.
[449] See Joe W (Chip) Pitts III, 'Corporate Social Responsibility: Current Status and Future Evolution' [2008–09] 6(2) Rutgers J L & Pub Pol'y 334, 337, where the author records the criticism of corporate social responsibility as 'at best, toothless and market-oriented, and at worst a malevolent strategy to co-opt or render powerless the critical forces helping to tame corporations with the more meaningful constraints of law'.
[450] Aaron Lazarre, 'Go Ahead Say You're Sorry' [1995] 28(1) Pyschol Today 40.
[451] ibid 42.

members and officers, and no single individual can be identified as responsible for damaging conduct, the making of a corporate apology is a function of its role as a legal personality with moral agency. An implied duty to apologize flows from the company's standing as an agent with moral responsibilities. The essence of making an apology is a moral act. As Lee Taft said, "[a]pology is moral because it acknowledges the existence of right and wrong and confirms that a norm of right behaviour has been broken".[452]

6.2.5 The company as a moral agent

Assuredly, the common law has demonstrated its willingness since Victorian times to hold a company criminally liable for corporate misconduct, and if moral responsibility is a prerequisite for the imposition of criminal punishment, the existence of a company as a moral agent is implicitly acknowledged.

Gardner explains the purpose of a criminal trial "affirms the moral agency and moral responsibility of the offender",[453] with the measure of moral agency and responsibility judged by reference to a person's "blameworthiness or culpability".[454] Blameworthiness has four constituent elements. "To be blameworthy, one must (a) have done something wrong and (b) have been responsible for doing it, while lacking (c) justification and (d) excuse for having done it".[455] Since criminal liability is imposed on a company by reference to the acts and omissions of the company's directing mind, the element of corporate blameworthiness and culpability is established. In this way, the company is justly punished for the commission of its criminal conduct as a morally responsible agent in its own right.

Nick Friedman describes the justification of corporate criminal liability as the "Agency Defence".[456] It is a curious phrase, by which Friedman seeks to signify the defence of the law's imposition of corporate criminal liability on the ground that the company is a moral agent. Friedman articulates a broader foundation for the Agency Defence which neatly coheres with the notion of moral responsibility in criminal law, and he draws on the idea

[452] Lee Taft, 'Apology Subverted: The Commodification of Apology' [2000] 109 Yale L J 1135, 1142.
[453] John Gardner, *Offences and Defences* (OUP 2007) 218.
[454] ibid 225.
[455] ibid 227.
[456] Nick Friedman, 'Corporations as Moral Agents: Trade-Offs in Criminal Liability and Human Rights for Corporations' [2020] 83 MLR 255, 256.

that a company's intentions can be discerned from its internal decision-making processes which determine its personality and character.[457] Friedman quotes from Peter French's work, where French explains that a company's internal structure "accomplishes a subordination and synthesis of the intentions and acts of various biological persons into a corporate decision".[458]

Philosophical support for the Agency Defence is found in the idea promoted by Philip Pettit that a company is a morally responsible agent which can act in accordance with its own intentions.[459] Friedman references Pettit's hypothetical "discursive dilemmas" in which company executives vote on different proposals, resulting in a compromise proposal which is adopted but which none of the executives supported at the outset of their discussions. For Pettit, company attitudes can include the holding of beliefs and attitudes. "It is the ability to make … value judgments that supply the benchmarks of responsibility".[460]

6.2.6 Moral agents have moral rights

During the course of his work, Friedman makes clear the significance of his approach for the assertion of corporate rights. For Friedman, once it is established that a company is a moral agent with moral responsibilities, recognition of a company's ability to claim rights is necessarily asserted:

> If corporations really are moral agents, what basis can there be for denying that they are eligible, on the traditional account, to be holders of human rights? The traditional account … holds that moral agency is both a necessary and sufficient condition for being a human rights holder … Thus, if corporations share this capacity – as the Agency Defence claims – it seems there is a powerful argument that corporations should be saddled with not just the responsibilities, but also the rights and privilege which usually attend that status. In fact, French expressly acknowledges this consequence: because "corporations can be fully-fledged

[457] ibid 264.
[458] Peter French, 'The Corporation as a Moral Person' [1979] 16 AM Phil Q 207, 212.
[459] Friedman (n 456) 265–67.
[460] Philip Pettit, 'Responsibility Incorporated' [2007] Ethics 171, 186.

> moral persons", he says, they "have whatever privileges, rights and duties as are, in the normal course of affairs, accorded to moral persons".[461]

Friedman reiterates the point later, describing corporate moral agency as a "powerful theoretical basis" for the judicial recognition of corporate rights.[462]

As a broad approach to the basis on which corporate rights may be founded, this understanding is interesting. But it omits any insight on the nature of the rights which a company can assert, and whether, for example, the privilege against self-incrimination is one such right. In addition, the possibility that the legal treatment of companies is asymmetrical cannot be entirely discounted. Whilst companies are recognised as moral agents for the purpose of imposing duties, recognition of corporate rights does not necessarily follow. Friedman is aware of this limitation in his work and notes that:

> [T]he simple fact that a corporation is a moral agent still leaves open which particular rights it would be appropriate for a corporation to hold … It is more likely that questions about what human rights there are and what their content is – for humans as well as corporations – turn on more complex moral arguments in which moral agency plays only a part.[463]

Friedman notes that the moral content of human rights is "dynamic and subject to contestation" and "derived from fundamental moral arguments about the nature and demands of moral agency".[464]

The determination of which rights a company can assert is not straight-forward. Friedman acknowledges it is difficult to limit the scope of corporate rights claims once the principle of corporate moral agency has been established.[465] The cases in the United States Supreme Court discussed in chapter 5 demonstrate the width of corporate rights extending beyond due process and privacy rights, as they have applied to political and religious expression. The fundamental point here is that the establishment of "corporate moral agency changes

[461] Friedman (n 456) 270–71.
[462] ibid 276.
[463] ibid 271.
[464] ibid 272.
[465] ibid 271.

the debate from a conversation of one order – about whether corporations are eligible for human rights at all – to a conversation of a different order – about which human rights it makes sense for them to have".[466] As foreshadowed, the next chapter discusses whether the privilege against self-incrimination is a right to which a company may lay claim, and if so, on what basis.

Friedman envisages that the recognition of companies as moral agents able to assert human rights may facilitate a claim to rights which had thought to have been confined to individuals. By way of analogy and metaphor, there are "legally intelligible arguments" that a company's premises are its home, with rights to privacy and free speech duly safeguarded:

> If that is so, it is not obvious why, as a legal matter, a corporation could not cast a "vote" in an election, why a merger could not be defended on grounds of a right to "marry", why a corporation threatened with dissolution could not plead its right to "life", or why corporations could not rely on similar legal analogies to avoid themselves of a wide range of codified human rights.[467]

6.2.7 Criticisms

However, Friedman's approach is vulnerable to several criticisms.

First, Friedman does not explain why it follows that a company can assert a moral right simply by virtue of its identity of a moral agent. The fact that a company is obliged to discharge certain legal and moral responsibilities does not necessarily entitle a company to exercise moral rights. There needs to be something in the texture of a connection between the existence of corporate moral agency and the recognition of a corporate moral right which remains to be developed. Friedman's analysis explains how group activity can constitute more than the sum of the individual parts, but without explaining how an inert corporate body can spring into moral life by virtue of formalistic creation.

[466] ibid 271.
[467] ibid 272.

Secondly, by failing to assemble a codex for identifying which moral rights a company can exercise, the ability of a company to lay claim to particular moral rights is left hanging in the air. Friedman acknowledges the criteria for determining recognition will turn on "more complex arguments in which moral agency plays only a part",[468] but he fails to identify, let alone develop, these arguments or any other arguments which bear down on the issue. The answer, it is suggested, lies in an application of a corporate value theory, scrutinising value in the form of benefits enjoyed by a company's stakeholders, and the wider public. The need to protect these benefits underpins the law's recognition of a corporate right to protect its interests against hostile action and prevent harmful consequences which would otherwise follow. Whilst individual human rights are necessarily implicit in the dignity of man, if it is the case that recognition of a corporate right requires an additional justification, the need to protect corporate value is the criterion which should be applied.

Writing shortly before Friedman's article was published, Avia Pasternak attempted to address these two aspects with partial success.[469] Pasternak is clear that companies as corporate moral agents have moral entitlements which may require legal protection. "The corporate moral agency thesis suggests that corporate entities are members of our moral community – they are capable of moral reasoning and are the appropriate subjects of more responsibility". [470] However, unlike Friedman, Pasternak advances the proposition that corporate moral agency does not, of itself, support a company's claim to assert moral rights. Instead, to substantiate a claim to a moral right, the moral right must be "necessary for the protection of individual rights".[471] This is important because it explains why the law should give effect to some moral rights but not others. In determining whether a company is entitled to claim moral rights, and if so, which rights, Pasternak identifies two connections. The first connection is *conceptual* and consists of an exploration of whether "[corporate moral agency] is the type of thing to which [corporate moral rights attach]". The second connection is *substantive*. "Here, we investigate whether there are sufficiently strong normative reasons to grant a [corporate moral agent] a right".[472]

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[468] ibid 272.
[469] Avia Pasternak, 'From Corporate Moral Agency to Corporate Moral Rights' [2017] 11(1) Law & Ethics of Human Right 135.
[470] ibid 236–37.
[471] ibid 137.
[472] ibid 140.

There is a third criticism to which Friedman is vulnerable. The argument for locating corporate rights in the notion of a company as a moral agent is further complicated by the fact that the exercise of a legal right is not always morally supported. The facts of the case in *First National Bank of Boston v Bellotti*[473] provide a good example. The Supreme Court determined that the company had a legal right to make a political donation, but even though the legal right was supported by a moral right, it did not follow that the company was morally right to exercise the legal right. It may be argued that although the company was legally entitled to donate to a political cause, it was not morally permissible for a donation to be made. The making of a political donation is sometimes a divisive act, and very often it does not advance the financial interests of the donor company. The same tensions arise in an assertion of the privilege against self-incrimination. A company may have a legally and morally grounded right to assert the privilege, but whether it is morally appropriate to assert the privilege is another matter. Suppose, for example, a company is responsible for an aircraft accident in which 300 passengers were killed. The company asserts the privilege against self-incrimination in response to efforts to obtain information which evidences the company's criminal culpability. The company's legal right to assert the privilege at common law is firmly established, but the moral implications of remaining silent are more obscure. A theory which recognises corporate rights as an appendage of corporate moral agency does not address this issue.

Fourthly, a strong point can be made that an obligation to treat companies with moral concern by recognising their right to protect themselves against hostile action is not dependent on recognition of a corporate entity having status as a moral agent. The State becomes obliged to treat companies with moral concern not by virtue of their status as moral agents, but rather because they add aggregate value to the corporate sector as a whole, and instrumental and intrinsic value to individual lives. Moral concern arises in circumstances where conduct has the potential to affect the lives of people, in either a positive or negative respect. In the case of aggregate and individual value delivered by companies the societal impact is resoundingly positive. Accordingly, a corporate entitlement to exercise rights is more easily founded on recognition of moral value delivered by companies than the more controversial conception of companies as moral agents.

[473] *Bellotti* (n 378), discussed in Chapter 5.

6.3 A CORPORATE VALUE THEORY

6.3.1 A consequentialist approach to corporate rights

The vision for a corporate value theory which sustains the recognition of corporate rights is a consequentialist one, with a focus on the value that morally justifies the law's recognition of the corporate right in question. The emphasis on value protected by the recognition of the right gives the approach a utilitarian tilt,[474] since the beneficial consequence of the action provides the support for the law's recognition of the right.

In his work, Meir Dan-Cohen locates the conceptual foundation for corporate rights in a theory of organizational rights, and harvesting Benthamite ideas, he argues that the identification of these rights falls to be determined by principles of consequentialist utilitarianism.[475] Utility is a value-driven concept with the maximisation of utility as the litmus test. In the corporate context, its boundaries are sufficiently wide to embrace the interests of employees and the wider community alongside those of the company and its shareholders. In a consequentialist model, the recognition of corporate rights depends not upon notions of individual or corporate personhood but rather on the sufficiency of social utility, value or worth which underpins recognition of the right in question. Social utility embraces economic interests as well as broader notions pertaining to society's well-being. The law's recognition of the corporate right is morally sound since the consequence of the right's recognition promotes both economic and public interests. Acknowledgment of a corporate property right is a case in point. As with other proprietary interests, economists justify the recognition of the right by acknowledging that the right facilitates a stable and efficient allocation of financial resources which benefits social welfare.[476]

Dan-Cohen offers an approach to the recognition of corporate rights which circumvents the rigidity of personalisation and provides a model which accommodates the modern conception of a company. A corporate right is not reliant on any notion of individual

[474] For classic works on utilitarianism, see Bentham (n 205); John Stuart Mill, *Utilitarianism* (1863).
[475] Dan-Cohen (n 424) 49–50.
[476] ibid 73.

personhood but rather stands independently of it. There is no crutch of dependency founded on a legal fiction which transposes recognition of individual rights into the corporate arena. Instead, in the terms of a consequentialist vision, the existence of a corporate right depends on its value in terms of social and economic worth. Therefore, if the recognition of a corporate right contributes to improving the economic and social well-being of the general population, or enhances the rule of law, the utilitarian consequence of the conduct is established.

In some instances, the level of benefit flowing from the law's recognition of a claim to exercise a corporate right is obvious. In the previous chapter, examples involving the assertion of contractual, tortious and property rights were considered, and as a supporting accessory to sustain the company's financial standing, a sophisticated analysis of value was not required. The outcome of such an analysis is less obvious in other cases where a company seeks to assert a right which does not fall into this category. The right to corporate privacy, or to assert a claim to exercise the privilege against self-incrimination, are good examples of rights where there is consideration of the benefit in terms of social value which can be said to flow from an acknowledgement of rights of this sort. Here, a consequentialist approach requires a more detailed exploration of value, in terms of an analysis of the benefit protected by a company's assertion of the right in question. The question to be asked is whether consequentially, the outcome of the law's acknowledgement of corporate rights is morally good in terms of its contribution to support the economy and the individual value afforded to those actively associated with a company, or morally bad because the assertion of the corporate right serves to harm the common weal. If the former, a consequentialist utilitarian approach can sustain the recognition of corporate rights *in abstracto*.

6.3.2 Value-based analysis

In an application of a value-based analysis of corporate rights, attention is focused on the value which society places on individual and collective interests to be protected in terms of benefit and worth. In the context of a claim to assert corporate rights, value may be assessed in social and economic terms, as a cost/benefit analysis. The law's acknowledgement of corporate rights is the cost, and the positive contribution to public

and private welfare is the benefit. Yehezkel Dror[477] explains that the relationship between social values and the law is not so much an inextricable link as a dependency:

> By its very nature, law consists of a number of norms which constitute obligatory rules of behaviour for the members of the society. These legal norms are closely related to various social values, being either a direct expression of them or serving them in a more indirect way.[478]

In this way, "the operation of law depends on the existence of extra-legal values which support the substantive content of the legal norms".[479] Dror was much influenced in his analysis by Lon Fuller's approach which regarded the law's purpose as its value content:

> It is impossible to assign meaning to any part of the law and apply it to concrete cases without regarding the purpose (or purposes) which that part of the law is designed to serve; that purpose constitutes the value or values reflected in the law.[480]

6.3.3 Value protected by criminal law

The criminal law provides a useful illustration of the way in which value, or multiple values, promote the establishment of criminal offences and punishments. Developing this analysis, Jeremy Horder explains how different formulations of value function within the contours of criminal law, supporting the law's application especially when new criminal offences are enacted and their foundational support is unclear.[481] To begin with, an understanding of the notions of ultimate value, intrinsic value and instrumental value is required:

> In the secular state, an individual's life has ultimate value, value not derived from any higher value. What gives real meaning and significance to individual life, over its course, is engagement in activities and relationships, and with other things –

[477] Yehezkel Dror, 'Value and the Law' [1957] 17(4) The Antioch Review 440.
[478] ibid 440.
[479] ibid 453.
[480] ibid 442.
[481] Jeremy Horder, *Ashworth's Principles of Criminal Law* (9th edn, OUP 2019) ch 3.

> "goods" – that have "intrinsic" value. That which is intrinsically valuable has value separate from or beyond being - like a bus ticket or a shoelace – simply a means to an end. Things that have intrinsic value are activities, relationships, and other goods that are valued for their own sake, because they contribute constitutively to (they are an integral part of) a way of life.[482]

Identifying the intrinsic value of a good as a candidate for the criminal law's protection is an essentially existential exercise. "The intrinsic value of a good may be expressed in the way we are, in the way we think, in what we say, and in what we do".[483] But what, in this context, is "a good"? Horder notes that it is not exclusively individualistic and in actuality references the interests of the collective, in the form of "public goods" through which the lives of individuals take place.[484]

Horder quotes from Joseph Raz's definition of a public or common good as a good which "refers not to the sum of the good of individuals but to those goods which, in a certain community, serve the interests of people generally in a conflict-free, non-exclusive and non-excludable way".[485] In Horder's view, the law may become engaged in the protection of public goods where the goods have become "fragile". Horder defines fragile public goods as "goods whose value or existence may be threatened by over-use (commonly, in virtue of scarcity), or which are likely to be prone to injustice in point of access (perhaps, because of the way supply is used to satisfy demand)." [486] An example of a fragile public good is faithfulness to the rule of law which would be upheld by the courts on behalf of the State.

The concern to protect the value of "fragile public goods" coheres with an understanding of the benefits delivered to the wider community, and not as a narrower perception of benefit afforded to any particular member of the community. It is not that the individual does not enjoy benefit; rather, the benefit to the individual is enjoyed in his capacity as a participant in the wider community. The benefit to the individual is a communitarian one. There is value in both community and individual interests, and this justifies the law's

[482] ibid 42.
[483] ibid 42.
[484] ibid 44.
[485] Joseph Raz, *Ethics in the Public Domain* (Clarendon Press 1994) 52.
[486] Horder (n 481) 47.

protection. This is not to suggest that this conceptualisation of benefit to an individual is exhaustive. It is not. As explained shortly, a successful company has significant intrinsic value to an individual such as a company officer or employee, for instance, by providing him with the means for sustaining his lifestyle and well-being, and that of his family too. Whilst Horder's approach focuses on a communitarian benefit, his analysis paves the way for a wider value-based analysis which explores instrumental and intrinsic value in the context of a company, and the delivery by the company of benefits to its members, officers, and employees.

6.3.4 Corporate rights: a traditional paradigm

In company law, there are instances where it is possible to theorise juridical support for an established corporate right within the terms of a value-based analysis. The decided cases show that when the exercise of a corporate right promotes value and worth, the courts will recognise the existence of the claim and facilitate its acknowledgment. In this way, the recognition of a corporate right is supported, whether it is a substantive right such as the right to property or a procedural right such as the right to a fair trial. The notion of value is utilised as an optical prism through which the recognition and exercise of corporate rights is viewed. In some instances, there is a singular value or worth which can be identified. In other cases, there is a plurality. This line of thinking begs the question as to how the value and worth of the exercise of a right is to be articulated. The immediate response might surely focus on the construction of a narrative which draws attention to the economic value or worth of the right to the company itself, and its stakeholders.

A company's ability to take legal action when defamed is a paradigm case for the importation of value into a construct for corporate rights. A company may bring legal proceedings for defamation where a libel affects its property, or the management of its trade or business.[487] The company has neither a right to a good reputation, nor a right for its reputation not to be attacked. But it does have a right to take legal action where its reputation has been attacked by a falsehood. The law recognises and protects this right. The law's response is unsurprising, since a company's good reputation has enormous value for the company, and the company's ability to continue trading successfully has

[487] *Halsbury Laws of England*, vol 16 'Companies' para 301.

wider value for the economy and society at large. In the Sixth Edition of Salmond on Torts published in 1924, the text noted that:

> An incorporated company or other body corporate has in truth no reputation to be injured. It is a fictitious person and cannot in the nature of things be brought into hatred, ridicule, or contempt by any manner of falsehood. The reputation that is in reality assailed by a charge against a corporation is the reputation of the members or other agents by whom the affairs of the corporation are conducted. Yet by attacking in this manner the reputation of its members and agents damage may be caused in the corporation itself in respect of its business and property. For any defamatory statement, therefore, which produces such actual damage the corporation may sue …[488]

Notwithstanding the artificial nature of a corporate construct, Salmond recognised the company had a right to protect its interests by commencing legal proceedings in respect of the damage which it had suffered. The legal requirement that the false accusation impacted adversely on the company's property or management of its business coheres with the narrative of value and worth. By providing a legal remedy for the aggrieved company to pursue, the law is protecting an interest which has economic or social value to the company, and society at large. In this instance, the value is articulated as the company's continuing ability to trade successfully in a manner which delivers benefit for the economy and society at large. The law safeguards the company's ability to sue because the interests protected by the right have social utility and worth. The presence of value protected by the assertion of the right is a necessary component of this analysis. A value does not precipitate the existence of a right, but if a legal right is to be asserted, existential value in the protected interest has to be shown.

6.4 AGGREGATE VALUE

6.4.1 Aggregate value and a strong corporate sector

[488] John Salmond, *Salmond on the Law of Torts* (6th edn, Sweet & Maxwell 1924) Ch 14 para 134.2. For the most recent edition, see RFV Heuston and RA Buckley, *Salmond & Heuston on the Law of Torts* (21st edn, Sweet & Maxwell 1996) 408.

One wider interest in which there is clear value for the State is the importance of facilitating a strong and flourishing corporate sector in a free-market economy. It is axiomatic that the State welcomes economic growth with its attendant benefits in the provision of employment and contribution to public revenue. In this analysis, the development of a corporate value theory of corporate rights is fixed on the contribution made by the corporate sector as a whole, rather than an individual company's value or worth to its officers and employees. Here, the value to the corporate sector is an aggregate value which reflects the collective efforts of single companies whose contributions, when combined, deliver enormous benefits to the economy. Instead of determining consequential value by looking at the worth of a particular company, in this understanding of value it is the recognition of aggregated value delivered by the corporate sector to the national economy which underwrites the law's recognition of corporate rights. The purposeful and beneficial effect of the corporate sector has intrinsic value to the nation, and the law becomes obliged, acting through the legislature and the courts, to develop rules which protect and promote this value by facilitating individual companies in the ability to assert their rights. If the State fails to support the corporate sector, it leads to an increase in unemployment and a reduction of public revenue, and the State's desire to promote economic growth is undermined.[489]

It is none to the point whether the business of an individual company does, or does not, make a positive contribution to the economy and social well-being. In either case, the company's ability to exercise its rights are respected. This means the law is obliged to recognise and protect the exercise of company rights, even in the case of an individual company whose contribution to the economy is negative. The right to privacy, or procedural rights involving due process, are typical examples of rights which the law permits a company to claim, notwithstanding the company's lack of any positive contribution to the corporate sector and society at large. In this instance, the law affords protection not because it sees worth in a company which has no value from the perspective of the State, but rather because it recognises the positive value in supporting

[489] In its report on corporate governance, the Government has acknowledged that 'major corporate collapses cause serious economic and social damage', and 'the effects are felt far and wide with job losses and the British taxpayer picking up the tab'. See Department for Business, Energy & Industrial Strategy, 'Restoring trust in audit and corporate governance' (MP 382, March 2021) Executive Summary and accompanying press release (18 March 2021).

the corporate sector as a whole which is an essential requisite for the successful functioning of free markets in a liberal democracy.

6.4.2 The importance of the corporate sector

The importance of a strong corporate sector to the UK economy cannot be underestimated. Today, the company is the chosen vehicle for the organisation and delivery of business activity, both domestically and internationally. As Lord Sumption said in *Prest v Pretodel Resources Ltd*[490] when describing the separate nature of corporate personality as a fiction on which the whole of English company and insolvency law rests, "limited companies have been the principal unit of commercial life for more than a century. Their separate personality and property are the basis on which third parties are entitled to deal with them and commonly do deal with them".[491]

The beneficial contribution made by companies to the success of the UK economy is huge. Statistics from Companies House for June 2020 confirm that in the UK there are 4.3 million companies listed on the companies' register.[492] In March 2020, companies and public corporations represented 73.6% of total UK businesses. The figure is continuing to rise and between March 2019 and March 2020, there was an increase of 1.2% in the number of corporate businesses in existence.[493] The UK's gross domestic product (GDP) was worth approximately £2,019 ($2,827) billion in 2019, representing 2.33% of the world economy.[494] In taxation revenue, total net corporation tax receipts in 2018–2019 were £54.6 billion,[495] and represented almost 10% of the UK's total income from all forms of taxation levied across the economy.[496] This economic contribution is driven by the work

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490 *Prest* (n 404).
491 ibid 476 [8].
492 UK Government statistics <www.gov.uk/government/publications/companies-register-activities-statistical-release-2019-to-2020/companies-register-activities-2019-to-2020> accessed 18 February 2021.
493 UK business; activity, size and location: 2020 <www.ons.gov.uk/businessindustryandtrade/business/activitysizeandlocation/bulletins/ukbusinessactivitysizeandlocation/2020> accessed 29 December 2020.
494 UK gross domestic product <https://tradingeconomics.com/united-kingdom/gdp> accessed 29 December 2020.
495 UK Government Statistics 2020, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919769/CT_stats_commentary_2020.pdf> accessed 29 December 2020.
496 UK Government Statistics 2019 <www.statista.com/statistics/284319/united-kingdom-hmrc-tax-receipts-corporation-tax/> accessed 29 December 2020.

of smaller companies. Since 2004, private limited companies have consistently accounted for over 96% of all corporate body types.[497]

6.5 INDIVIDUAL VALUE

6.5.1 Intrinsic value and well-being

So far, the value protected by law has been articulated from the perspective of the State's interest in supporting a strong corporate sector. However, for company officers and employees involved in the activities of a company on a daily basis, the value to be protected by the assertion of corporate rights which protect the company's interests is much more personal. As Horder points out, when a person engages in occupational, commercial, or recreational activity, the ability to participate in company affairs has intrinsic value and contributes to a person's general well-being:

> In other words, for such people it is engaging in the activity itself or, in some occupational cases, engaging in the role that one' activities give one (say within the local community), rather than simply securing a given outcome (say, profit) of the activity, that contributes to their well-being and hence to their individual autonomy. As Raz puts it, 'freedom [autonomy] consists of valuable forms of life, and … its value derives from the value of that pursuit' (my emphasis).[498] Moreover, for Raz, forms of life include 'socially defined and determined pursuits and activities',[499] meaning recognised and socially organised hobbies as well as (say) occupations serving the community.[500]

Raz discusses that nature of well-being in the context of an assumed duty common to every individual "to protect and promote the well-being of all people".[501] Raz explains that well-being "has a strong active aspect", consisting of "the (1) whole-hearted and (2) successful pursuit of (3) valuable (4) activities".[502] Above all, the central element of well-

[497] UK Government statistics (n 492).
[498] Raz (n 330) 395. See also 145–46 and 308–13.
[499] ibid 309.
[500] Jeremy Horder, 'Strict liability, statutory construction, and the spirit of liberty' [2002] LQR 458, 460. Horder's argument is that '[t]he imposition of strict liability in a regulatory context may seriously threaten the participation of individuals in activities of intrinsic value to their pursuit of an autonomous life'.
[501] Raz (n 485) 3.
[502] ibid.

being is the autonomic quality of personal self-determination to enable the enjoyment of a good life. Raz gives several examples of intrinsically valuable activities, which include "devotion to one's family, conscientious performance of a job, good neighbourliness, weekends spent bird-watching, volunteer work for social or political causes, etc".[503] As success in such activities enhances their intrinsic value to the individual participating in these activities, failure detracts from well-being to a point where individual self-esteem may be irreversibly undermined. Raz gives an example of a university teacher who is made redundant for financial reasons. The compelled departure from his chosen career represents "a blow to his life from which, depending on age and circumstances, it may be impossible for him to recover".[504]

In his consideration of the content of the general part of the criminal law, John Gardner notes that the focus of criminal law fixes on "activities" and the preservation of "active well-being".[505] This leads Gardner to an extensive consideration of the meaning of value and well-being. Emphasis is placed on the nature of the activity rather than the end-result. Drawing on Raz's understanding of well-being, Gardner gives an example of a mountaineer who climbs to the top of the mountain. "It was not that one ended up on top of a mountain that made the contribution to one's well-being. It was the fact that one climbed the mountain all the way to the top … Climbing the mountain to the top was what ultimately mattered".[506] Echoing Raz's view, Gardner re-iterates that "well-being, actively conceived, consists in the successful and wholehearted pursuit of worthwhile activities, and however the activities may *come* to be worthwhile, one's well-being is constituted by one's successful and wholehearted pursuit of them *qua* activities".[507]

Specifically referencing commercial activity, Horder considers the contribution to well-being made by the large number of small businesses operating in the UK. Quoting Judith Freedman, Horder notes the individual contribution of these businesses to the economy may be small, but, in Freedman's words, "this is not a matter for criticism, since these firms have a real value for their owners and users".[508] Horder concludes that:

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[503] ibid 5.
[504] ibid 5.
[505] John Gardner, 'On the General Part of the Criminal Law' in RA (Anthony) Duff (ed), *Philosophy and the Criminal Law* (CUP 1998) 219–24.
[506] ibid 220.
[507] ibid 224.
[508] ibid 472. See also Judith Freedman, 'Limited Liability: Large Company Theory and Small Firms' [2000] 63 MLR 317, 320.

> The autonomous character of the lives of millions of individuals and families, in small businesses, is commonly sustained by the intrinsic value of such wholehearted participation, perhaps particularly when it serves a local community.[509]

6.5.2 Intrinsic value and corporate rights

The resonance of this analysis for the law's recognition of corporate rights is clear. As already established, a company promotes activity which has intrinsic value in the lives of company's officers and employees. In the case of an employee, a company provides rewarding employment and a career structure. An employee makes plans and lifestyle choices with reference to his extensive association with the company's activities. His decisions, made in the capacity as an autonomous individual with choices, affect his choice of place to live with his family, and the location of the schools to which his children attend. In short, an employee becomes heavily invested in the daily life of corporate activity, and the intrinsic value of this investment is significant. In these circumstances, the law is morally justified in facilitating the exercise of a company's claim to protect these interests.

It follows that, if a company is unable to protect its interests in response to hostile action from the State or a private sector actor, the interests of its officers and employees are adversely impacted. Here, the intrinsic value enjoyed by those working in the company is threatened, and in cases where hostile action undermines the ability of the company to function successfully, the intrinsic value enjoyed by the company's officers and shareholders is severely damaged, if not destroyed. This scenario posits the occurrence of a multitude of harmful consequences, ranging from unemployment to economic hardship and family breakdown. These damaging consequences can be described as the "moral spill-over effect" of unrestrained hostile action. Typically, a "spill-over effect" occurs where an incident in one context has an adverse impact in another. The Oxford English

[509] Gardner (n 505) 473.

Dictionary defines "spill over" to mean an "incidental development; a consequence, a repercussion, a by-product". [510]

In this analysis, the law recognises the company's entitlement to assert rights which protect its interests in order to safeguard the intrinsic value of the company to its officers and employees, and to prevent the occurrence of resultant harmful consequences. The corporate right is supported by reference to the intrinsic value which would be lost if the ability to assert a corporate right was not acknowledged. Indeed, it is a moral imperative for the law to support the assertion of a corporate right in these circumstances. This is not to say the law can be mobilised to protect a company from other threats which may impact adversely on the company's interests or those of its officers and employees. There is no expectation that the law should support a company by insulating it from the vicissitudes of commercial life, even though a company's trading failure may severely injure the interests of the company, its officers, and employees. In this respect, the State's obligation to afford protection to a company is different from the nature of protection afforded by the State to an individual.

The State's protection of an individual involves the taking of appropriate measures to safeguard an individual's interests and prevent others from interfering with these interests. Typically, the obligation requires a State to act proactively.[511] Here, in the corporate context, the law's recognition of a company's right to safeguard its interests is mostly reactive. It is triggered as a response to hostile attack where the intrinsic value of the company to the lives of company officers and employees is vulnerable to diminution. As Ovadia Ezra notes, "[t]he State, *per* the *parens patriae* doctrine is supposed to guarantee not only the freedoms and negative rights of its residents, but also their positive rights".[512] For example, State intervention may be required to protect the interests of children, or individuals with severe physical or mental challenges. There is no suggestion the *parens patriae* (literally, "parent of the nation") doctrine applies to companies.[513] Where the law

[510] Oxford English Dictionary <www.oed.com/view/Entry/186647?redirectedFrom=spillover#eid> accessed 7 April 2021.
[511] Office of the United Nations High Commissioner for Human Rights, 'Frequently Asked Questions on Economic, Social and Cultural Rights' (Fact Sheet No. 33, 2008) 11.
[512] Ovadia Ezra, Moral Dilemmas in Real Life, Current Issues in Applied Ethics (Springer 2006) 15.
[513] Margaret Hall, 'The Vulnerability Jurisdiction: Equity, Parens Patriae, and the Inherent Jurisdiction of the Court' (2016) 2(1) CJCCL 185, 188 defines the *parens patriae* doctrine as 'the State's responsibility to protect the members of identified "vulnerable populations": persons who are deemed incapable of protecting their own interests by reason of their particular personal characteristics'.

gives effect to a corporate right, a different justificatory basis such as a value-based analysis has to be found.

6.5.3 Socioemotional wealth

In support of this analysis, the importance of preserving the experience of well-being resulting from corporate participation emerges from academic literature involving a consideration of the incidence of bribery in family-controlled companies. Shujun Ding, Baozi Qu and Zhenyu Wu suggest that family control of a business reduces the incidence of bribery committed by the business in countries where corporate governance mechanisms to prevent bribery are perceived to be weak.[514] In reaching this conclusion, the authors draw on a body of literature which explores the effect of family involvement on the way in which a business makes its decisions. According to Ding, Qu and Wu, the reason for a reduced level of bribery in a family-controlled business is explained by a family's desire to preserve its "socioemotional wealth" and sense of well-being.[515]

The authors take the definition of socioemotional wealth from earlier studies which addressed decision-making processes in family-controlled businesses:

> [Socioemotional wealth] is the ability to exercise authority; the satisfaction of needs for belonging, affect, and intimacy; the perpetuation of family values through the business; the preservation of the family dynasty; the conservation of the family firm's social capital; the fulfilment of family obligations based on blood ties rather than on strict criteria of competence; and the opportunity to be altruistic to family members.[516]

Thus, socioemotional wealth reflects a sense of well-being which has intrinsic value to the family and each of its members. The concern of family members to maintain their socioemotional wealth ensures that a business trades ethically, without resort to payment or receipt of bribes. If a family-controlled business acted otherwise and behaved

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514 Shujan Ding, Baozhi Qu and Zhenyu Wu, 'Family Control, Socioemotional Wealth, and Governance Environment: The Case of Bribes' [2016] J Bus Ethics 639.
515 ibid 640.
516 ibid 641. The authors note this definition was first put forward in work by LR Gomez-Mejia, M Nunez-Nickel and I Gutierrez, 'Socioemotional Wealth and Business Risks in Family-Controlled Firms: Evidence from Spanish Olive Oil Mills' [2007] 52 Administrative Science Quarterly 106.

corruptly, it would impact adversely on the firm's image and reputation. The firm's sense of well-being, and that of its family members, would be significantly weakened and undermined. The value of socioemotional wealth to family members lies in their enjoyment of autonomy and the ability presented by this wealth to facilitate the maintenance of family life. It is the same value encapsulated as a sense of well-being, which company officers and employees enjoy from their participation in a company with which they are associated, and which the exercise of corporate rights serves to protect.

6.5.4 Instrumental value

To this point, the discussion about individual value has focused on the value which flows from the active participation of company officers and employees in the affairs of a company, without consideration of the value which a company delivers to its shareholders. Assuming the shareholders are not also company officers or employees, it is artificial to conceive of their benefit as having intrinsic value since their involvement in the company's affairs is more passive. Rather, the value of a company to its shareholders presents as a mechanism for the investment of the shareholder's capital in pursuit of financial gain, and in this sense the value of a company to a shareholder is instrumental rather than intrinsic. This is not to say that, from the perspective of a shareholder, there is no value for the shareholder which the law should support a company in protecting. On the contrary, a company has value to the shareholder, but this value is differently defined from the value of a company to its officers and employees. A shareholder's interests are profoundly associated with the financial success of the company in which the shareholder has investment, and whilst not intrinsic value, the instrumental value of the company to the investor is clear.

It follows that the instrumental value of the company will be safeguarded automatically where the intrinsic value of a company to its officers and employees is protected. The instrumental value of a company to the shareholder is necessarily protected as a by-product of the law's recognition of the company's right to safeguard the intrinsic value of the company's worth to its officers and employees. As a legally recognised entity with which trade can be undertaken, the instrumental value of the company for debtors and creditors as a vehicle for the conduct of trading and commercial exchange is similarly protected.

6.5.5 Morally doubtful corporate purpose

In a situation where a corporate purpose is morally doubtful, instrumental value and intrinsic value remain extant. An example of a company with a purpose which might be thought to be inimical to the public good is the formation of a company established solely for the purpose of minimising liability to taxation. The tax avoidance scheme is lawful, [517] but the public good is damaged by the arrangement. As Lord Goff explained, referring to the establishment of companies for this purpose: "These structures are designed to achieve an adventitious tax benefit for the taxpayer, and in truth are no more than raids on the public funds at the expense of the general body of taxpayers, and as such are unacceptable". [518]

In this instance, the company delivers an effective tax avoidance arrangement, and to this extent it has instrumental value to those involved in its activity. But it is not the instrumental value of the company to its officers and employees which provides an argument for the law's recognition of the company's right to protect itself. It is the intrinsic value of the company which provides employment to its officers and employees and contributes to their sense of well-being. Even in the most morally deplorable of corporate purposes, the establishment and functioning of the company remains lawful. The State has power to place limits on corporate objectives, and in the absence of legislative intervention to this effect, company officers and employees continue to behave lawfully in the enjoyment of intrinsic value which association with the company delivers, and which the assertion of corporate rights is required to protect.

6.5.6 Fairness in the protection of interests

The development of a position which ascribes consequential value to the law's recognition of a corporate right avoids a situation whereby there would be an unfair

[517] '… the distinction between lawful tax avoidance and illegal tax evasion is well-known. Tax-saving schemes that involve transactions having little or no commercial benefit apart from the scheme are a common feature of commercial life. In the absence of statutory criminal prohibitions, the transactions involved in the scheme and the scheme itself are lawful. Whether the scheme is effective depends on the provisions of the tax legislation in question. Tax-saving crosses the border from lawful to criminal when it involves the deliberate and dishonest making of false statements to the Revenue …', *R v Commissioners of Inland Revenue and Kingston Crown Court, ex p John* [2001] EWHC Admin 581 [2] (Stanley Burnton J).
[518] *Ensign Tankers (Leasing) Ltd v Stokes* [1992] 1 AC 655, 681.

differentiation between the law's treatment of an individual on the one hand, and a company on the other. A variety of policy considerations come into play. Distinctions made between different types of legal persons must be based on defensible criteria, for otherwise the law becomes arbitrary and capricious, and inimical to the rule of law. In the case of a company, the State has established a statutory framework which clothes a company with legal personhood and endows it with capacity to enter into legal relationships, as a result of which duties and responsibilities are owed. The State requires a company to answer in the civil and criminal courts for corporate wrongdoing it may have committed, and there is legislation which provides for corporate regulation. Further, as established in this chapter, companies provide significant aggregate value to the economy, and extensive individual value to their officers, employees, and shareholders.

In the case of an individual, the law treats the individual with moral concern even where the individual is felonious and does not contribute positively to society's welfare. This is because, by nature an individual is recognised as a moral agent. In the case of a company, as discussed earlier in the chapter, there is no consensus as to whether a company has standing as a moral agent. Nonetheless, a company is entitled to treatment with moral concern, not because of any status as a moral agent, but by virtue of the overall aggregate and individual intrinsic value of corporate activity which is generated. The value of corporate activity to the State does not convert a company into an entity which has moral agency, but rather, it explains why the law should treat a company with moral concern, as if it were a moral agent, with the ability to assert corporate rights to protect its interests when necessary.

In these circumstances, the law's recognition of corporate rights reflects a fair outcome. It would be manifestly inconsistent for the State to receive the benefits flowing from corporate activity whilst at the same time denying a company the ability to protect its interests, and those of its officers, employees, and shareholders. If the position were to be otherwise, the value enjoyed by company officers, employees, and shareholders, would be unprotected, in circumstances where, if the members were trading as a collective of self-employed individuals, the law's protection against hostile action would be afforded. The State's denial of protection would constitute a threat to well-being enjoyed by company officers and employees, and the failure to recognise a company's claim to assert protective rights would constitute an unfair response.

The importance of fairness as a component of the rule of law cannot be exaggerated. In its original formulation, Albert Dicey explained that the rule of law requires the legal system to respect, amongst other things, "the rights of private persons in particular cases brought before the courts".[519] The importance of the rule has become embedded in English law, with Lord Steyn noting some years ago that the rule of law "enforces minimum standards of fairness, both substantive and procedural".[520] The commitment to fairness in law has infused society's governing institutions. It is not just *a* hallmark, but *the* hallmark, of a fair society in the Western tradition.

6.6 CONCLUSION

In conclusion, an exploration of corporate rights utilising a value-based approach has considerable traction and serves as a model for the recognition of individual corporate rights by reference to uniform criteria. Essentially a consequentialist argument, a corporate value theory provides a compelling framework within which the justification for the law's recognition of individual corporate rights can be supported. The question why the law should recognise corporate rights in the same way as individual rights is answered by reference to the value which a company delivers to those actively associated with the company's operation. The company has intrinsic value to its officers and employees, and it is this value, or sense of well-being, which an assertion of corporate rights defends. The law's protection prevents the occurrence of harmful consequences which would otherwise result from hostile action, whether initiated by the State or a private (individual or corporate) actor. Alongside the value to individuals produced as a result of their corporate participation, the combined or aggregated value of companies delivers strong support to the economy. This approach posits that the State's appreciation of value in the flourishing of the corporate sector is reflected in its recognition of corporate rights. The benefit from the preservation of a robust corporate sector, composed of a collection of successful trading companies, redounds to the State. From this perspective, it is the State which has an interest in the prospering of economic activity produced by the corporate sector. Finally, it would be an unfair state of affairs if the law

[519] Albert Dicey, An Introduction to the Study of the Law of the Constitution (9th edn, Macmillan 1945) 195.
[520] *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539, 591.

recognised the rights of individuals but not companies. Indeed, the State having provided a legal architecture for a company's establishment and regulation, it would be morally wrong for the law not to afford companies the same rights as individuals, where companies deliver significant instrumental and intrinsic value to the economy and individuals who are actively participating in the affairs of the company.

The idea that a foundation for the recognition of corporate rights can be associated with the conceptualisation of a company as a moral agent adds an additional dimension to the discussion. Although there are weaknesses in a vision of corporate rights founded on the platform of corporate moral personality, Friedman and Pasternak's work in this area commands attention. The problem with an approach to corporate rights based on a corporate moral agency model is that it leaves a gap between recognition of a company's status as a moral agent and the identification of the moral rights to which the company may claim. The gap is filled by a corporate value theory which is both morally consequentialist and independent of the conception of a company as a moral agent.

CHAPTER 7
CORPORATE PRIVILEGE

7.1 INTRODUCTION

This chapter addresses the *fourth research question* which explores the extent to which the law should recognise a company's ability to assert the privilege against self-incrimination in circumstances where the disclosure of information exposes the company, or its officers or employees, to the risk of criminal prosecution. The chapter advances a sound theoretical foundation for the recognition of a corporate right rooted in an acknowledgement of value which an assertion of the privilege protects, viewed from the triple perspectives of the State, a company, and a company's stakeholders.

The chapter includes a critique of the judgments in the leading cases in common law jurisdictions where the ability of a company to assert the privilege has arisen. A study of the cases is interesting for three reasons. First, where a corporate right to assert the privilege is recognised, the cases illuminate the value of a company's right to assert the privilege which the law is willing to protect. Secondly, in cases where a court has denied a company a right to assert the privilege, the outcome demonstrates the attendant risk of harmful consequences which flow for a company and its stakeholders. Thirdly, the critique reveals the sharply divergent judicial approaches in this area.

The different views reflect the division between those who see a company as having an ontological existence, and those who view the corporate entity as no more than an artificial legal construct lacking a moral component. Broadly speaking, the ontological school of thought locates support for the ability of a company to assert the privilege in an innate sense of justice which requires equal treatment for different types of legal persona. The constructionist approach rejects this line of thinking. In this conception, the idea that a company can assert libertarian rights as if it acts as an individual is an anathema, since a company is no more than an artificial creation which is permitted to function within parameters set down by the State. One parameter is the requirement that it should not be permitted to conceal from the State authorities any wrongdoing with which it, or its officers and employees, have been involved.

The difference between the two approaches harks back to the division of opinion between company law theorists who conceive the attributes of corporate personhood narrowly, and those who believe that a company has a separate identity which is independent from the collective sum of its members. The latter views a company as something more than a ventriloquist's dummy. The conflicting judgments bear out the concern articulated in the last chapter that the absence of a coherent narrative leads to inconsistent decisions across jurisdictions in the orbit of the common law. The diverging approaches demonstrate the need for a singular narrative for the recognition of a corporate right to assert the privilege against self-incrimination which delivers consistent outcomes within and between jurisdictions.

The problem of divergent outcomes is resolved if the issue of corporate rights recognition is approached through a value-based analysis. The chapter argues there is a sound basis for recognising that the privilege against self-incrimination falls into a basket of corporate rights which the law should acknowledge, within the terms of a modern morally based model which focuses on the value which the exercise of a corporate assertion of the privilege protects. The chapter argues that a judicial approach which denies a company the ability to assert the privilege against self-incrimination is misconceived, unjust and unsustainable.

7.2 VALUE PROTECTED BY THE PRIVILEGE

The chapter presents the value protected by an assertion of the privilege against self-incrimination as uncontroversial. Axiomatically, an assertion of the privilege protects a company from the risk of prosecution for the commission of a criminal offence arising from the disclosure of factual information which is self-incriminating. In addition, where factual information would incriminate a company officer or employee, a claim by a company to assert the privilege protects the company officer or employee from the risk of personal prosecution where, if the disclosure of incriminating information had been made, its participation in criminal wrongdoing would have become apparent. In this context, information may be self-incriminating where it falls short of a confession to the commission of a criminal offence. An admission of activity which constitutes some but

not all the elements of a criminal offence, or an admission of facts which connect a company officer or employee to criminal activity, will be equally incriminating.[521]

Consideration of the value delivered by an assertion of the privilege is a study in negativity, in the sense that the value becomes visible in circumstances where the ability to claim the privilege is denied. An assertion of privilege operates as a shield. It is defensive in nature and raised in response to an attack on the company's interest by a hostile actor which seeks the production of self-incriminating information. The shield does not deliver positive benefits. Instead, it prevents the infliction of a myriad of negative consequences which would flow if the shield is lowered or removed completely. Most obviously, self-incriminating information is disclosed and the risk of criminal prosecution of the company and its officers or employees is increased. The more incriminating the information, the greater the likelihood of criminal prosecution. Therefore, the value of the privilege lies in the prevention of harm which its assertion averts. The participants benefitting from an assertion of the privilege are the company, its officers, and employees. Wider beneficiaries are the company's other stakeholders such as its members and trading associates, and the State itself.

The extent of damage inflicted on a company, its officers and employees may vary according to the nature of the self-incriminating information which would be disclosed. But even where the damage is small, recognition of a company's right to assert the privilege continues to be sustained by an application of corporate value theory. The aggregated value of the corporate sector reflecting the collective efforts of single companies, alongside the intrinsic value contributed by an individual company to the sense of well-being to its officers and employees, remains extant.

The point is borne out by a consideration of the ultimate scenario where the assertion of the privilege forms a course of conduct which damages the interests of a company. If a company's wrongdoing becomes known to the State authorities after the privilege against self-incrimination has been asserted, the benefits of self-reporting are lost. In this instance, by exercising its discretion to assert the privilege, a company's officers will have

[521] The privilege against self-incrimination applies where the information adds to the existing risk of prosecution, or where its disclosure may lead to prosecution or the discovery of further evidence of an incriminating nature, *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380, 443 (Lord Wilberforce), 446 (Lord Fraser). See also *Den Norske Bank ASA v Anotonatas* [1999] QB 271.

made an error of judgment which prejudices the company's interests. But this is not to say that, if the law fails to recognise a company's right to assert the privilege, no harmful consequences follow. As well as encroaching on a company's right to control the dissemination of its private information, the mandatory reporting requirement removes from a company its ability to decide how it wishes to proceed. A determination whether to make a self-report is an exercise in the management of risk, and it enables a company to take a decision which reflects its values and shape its destiny. Denial of a company's ability to make this determination reduces the extent of a company's autonomy. A company is weakened where the extent of its agency is diminished**.**

7.2.1 Harmful consequences

Certainly, a company convicted of a criminal offence is vulnerable to the imposition of an unlimited fine. In some instances, the fact of criminal conviction may impact more adversely on a company's interests than the payment of a fine. Significant legal costs may be incurred. Confidence in the management of the company is undermined, and the reputation of the company's good name besmirched. Public sentiment may turn against a company, and in the case of a company whose shares are listed on a recognised public exchange, share value falls. Where a company is operating in a regulated sector of activity, the fact and circumstances of conviction need to be disclosed to the company's regulator. Similarly, if the nature of a company's activity requires the company to be a licence holder. In both instances, a company's authorisation or licence to continue trading activities may be terminated or subjected to restriction. Disclosure of the facts and circumstances to a company's insurer may be required, and possibly to a company's bankers as well. The bank may withdraw lending facilities or increase the cost of borrowing. There is also the question of future public procurement contracts. Although conviction of a "failure to comply" offence does not automatically exclude a company from public contracts under regulation 57 of the Public Contracts Regulations 2015[522] and Article 57 of the Public Procurement Directive,[523] a public authority is likely to consider when awarding a public contract that a corporate applicant had declined to cooperate with the authorities when investigating serious fraud. There are other circumstances such as where a company is

[522] Public Contracts Regulations 2015, SI 2015/102.
[523] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Text with EEA relevance) [2014] OJ L94/65.

convicted of an offence of bribery. In this instance, debarment from public contracts is automatically imposed. If a company is listed on a recognised stock exchange, a disclosure would need to be made, and publicity of the conviction would be most unwelcome.

These consequences, individually and cumulatively, would have a seriously adverse impact on the economic interests of the company, and in terms of a coercive influence on a company to answer questions or furnish information, the spectre of criminal conviction constitutes an extremely powerful threat to a company's financial well-being. Irrespective of a company's size and standing in the marketplace, the value of preventing the occurrence of these harmful consequences is huge in terms of benefit to company stakeholders and the wider economy. It is for this reason that these considerations weigh heavily on company directors when deciding whether to enter into a DPA with a prosecuting authority after some form of corporate wrongdoing has been uncovered. An agreement enables a company to manage the harmful consequences which would otherwise follow if the company were criminally prosecuted and convicted at trial. As the UK Government's Consultation Paper on Deferred Prosecution Agreements noted, this form of disposal "enable[s] commercial organisations to be held to account – but without unfairly affecting employees, customers, pensioners, suppliers, and investors who were not involved in the behaviour that is being penalised".[524] Constantine Grasso notes that from the company's perspective, the company is able to "mitigate the potentially destructive damage to its reputation".[525] As an alternative to assertion the privilege against self-incrimination, by negotiating an arrangement which suspends criminal prosecution or reduces the seriousness of the charge, harmful consequences are avoided. The ability of a company to determine whether its interests are best served by an assertion of the privilege against self-incrimination or alternatively make a voluntary disclosure to the State authorities is a matter which goes to the heart of a company's autonomy.

The State has an interest in avoiding harmful consequences too. If a company is financially diminished to the extent where its profitably suffers a long-term reduction, the State's interest in the encouragement of a flourishing economy is undermined. The extent of the undesirable impact will vary, depending on the size of the company which is

[524] Ministry of Justice, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements (Cm 8348, 2012).
[525] Constantine Grasso, 'Peaks and Troughs of the UK Deferred Prosecution Agreement: The Lesson Learned from the First-ever DPA between the SFO and ICBC SB Plc' [2016] 5 JBL 388.

involved and the degree of damage which is inflicted. Even in the case of a small company with a single director and shareholder, the adverse impact will be measurable. The value of a company to the State is weakened if a company contributes less corporation tax because of a fall in trading income. If a company reduces the number of its employees, the State loses income tax revenue and may be required to pay social benefits. Further State support may be required, depending on the nature of any collateral damage which the company's stakeholders may suffer. It follows that if the State is seriously motivated to encourage a flourishing economy, the need to support individual companies is a strong economic reason for the State to recognise that a company should be afforded legal benefits in order to secure its rights and protect its property against exposure to hostile attack. Although the State has a legitimate interest in securing a conviction where a company has committed wrongdoing, a hostile attack can include the risk of criminal prosecution where a company seeks to protect itself by asserting rights of due process.

The intrinsic value enjoyed by a company's employees is also severely diminished by a devaluation in a company's financial prospects. If a company's interests are threatened, the spectre of lost employment hangs heavily over the company's employees. The harmful consequences are speculative and fact-specific, but in principle an employee's benefit from daily interaction with the company may be lost, leading to unemployment and financial hardship, with a consequential adverse impact on the employee's family. In this, an employee suffers a severe loss in his personal autonomy as his ability to live as he chooses becomes circumscribed. Moreover, where the self-incriminating information references the criminal wrongdoing of a company officer or employee, the potential exposure is greater. There is the spectre of loss of liberty if a company officer or employee is prosecuted for the commission of criminal conduct. The intrinsic value delivered by a company which is enjoyed by its shareholders, creditors and suppliers could be similarly affected. The company's ability to assert the privilege against self-incrimination as a shield prevents the occurrence of these harmful consequences. There are sound moral arguments which support this outcome. There is considerable moral value in the assertion of the privilege against self-incrimination in order to avoid these injurious consequences. The law's support for a restraint which prevents this harm is conveyed by its recognition of a company's right to assert the privilege. The law's recognition of the right to assert the privilege is not dependant on the standing of a company as a moral person which is debatable. Rather, the argument for sustaining the privilege is a moral one, motivated by

the concern to prevent loss of intrinsic value generated by a company for the benefit of its officers and employees. The State's acknowledgment of a company's right to assert the privilege against self-incrimination reflects the State's commitment to respect fundamental rights when a company is faced with a requirement to disclose self-incriminating information.

7.2.2 Unfair and unjust

As Lord Bingham explained in his seminal work on the Rule of Law,[526] Government should exercise its powers fairly[527] and adjudicative procedures provided by the State should be fair and just.[528] As foreshadowed in paragraph 6.5.6 of chapter 6, in a situation where the legal personhood of a company is recognised in law, there are strong reasons which suggest it would be unfair and unjust for a legal system to withhold recognition of a corporate right on the ground that the company is no more than a legal construct. It is unnecessary to repeat these reasons here.

More particularly, with specific reference to the corporate assertion of the privilege against self-incrimination, there are additional matters to consider, especially where the respective positions of a company and its officers are juxtaposed. By way of illustration, if the corporate ability to assert the privilege is denied, self-incriminating information would be compulsorily disclosed by a company in circumstances where if the officer had been approached for disclosure of the information as an individual, the privilege against self-incrimination could – and most probably would - have been asserted. This outcome is legally incoherent since it means that if the corporate privilege is unrecognised, a company officer would be required to give self-incriminating answers in circumstances where, if working as a self-employed individual, the privilege against self-incrimination would have been engaged. The effect would render commercial participation through a company more hazardous, and potentially it would discourage senior executive managers from accepting employment as company officers in the corporate sector. The fact that criminal wrongdoing has been committed in the corporate context is none to the point.

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[526] Lord Bingham, *The Rule of Law* (Penguin Group 2010).
[527] ibid 60.
[528] ibid 90.

In the review of leading cases later in this chapter, a line of argument advanced by some judges which seeks to justify a discriminatory approach between individuals and companies is criticised as misconceived. One aspect of judicial concern focuses on the fact that, as an entity permitted to operate by permission of the legislature, a company should be obliged to disclose information to the State as it sees fit, whether self-incriminating or not. This concern would have some validity if there were no other routes by which the State can discover information about the conduct of the company's affairs, but this is not the case. Suffice it to note that routinely companies are required by multiple legal requirements to disclose more information about their annual activity than individuals who carry on business as self-employed traders. For example, in the case of a UK company, unless a company is subject to the small companies' regime, the directors' annual report must contain a business review which conveys a fair review of the company's business, and a description of the principal risks and uncertainties facing the company.[529]

Beyond the requirements for disclosure of corporate information in respect of which there is legislative provision, information relating to a company's affairs is private information, and the State should respect the company's right to privacy in this regard. It would be unfair and unjust for the State to impose burdens on companies which individuals do not bear, whilst acknowledging the ability of individuals to assert protective fundamental rights of which their corporate counterparts have been deprived. As a fundamental right and civil liberty, it behoves the State to support a company's assertion of the privilege against self-incrimination. The idea that the right to exercise the privilege could be permitted by one category of legal person but not another does not sit happily with a wholehearted commitment on the part of the State to the principle of fairness in the application of the rule of law which Bingham identified. Where there is a risk of criminal prosecution, the contemporary rationales supporting an assertion of the privilege against self-incrimination by an individual applies equally to the coercive disclosure of self-incriminating information which is sought against a company during the course of an investigation or litigation involving an incident of corporate wrongdoing.

[529] Companies Act 2006, s 417(1).

7.2.3 Abrogation, but not negation

The fact there are many instances in which the legislature has intervened to set aside, or restrict, the ability of a person (human and corporate) to assert the privilege against self-incrimination does not undermine the recognition of the value which is protected by an assertion of privilege where there is a risk of criminal prosecution in the absence of legislative intervention. When legislating to abrogate the application of the privilege in specified circumstances, the legislature does not assume an absence of valuable interests to be protected. Rather, the legislature determines that in the particular circumstances of the case, the public interest in requiring persons suspected of committing criminal offences trumps the value, in the form of harmful consequences, which otherwise would have been averted by the assertion of the privilege. Effectively, the legislature decides to discount the value in favour of other interests such as the detection of crime, in its perception of what best reflects the public good.

The provision contained in section 2(2) of the Criminal Justice Act 1987 is a case in point, where the legislature implicitly provided that a person suspected of committing serious or complex fraud was not entitled to assert the privilege to avoid the giving of self-incriminating answers.[530] The legislative compromise provides that self-incriminating answers cannot be adduced as a part of a prosecution case against a suspect who is the subject of an interview, although the answers may be used against the suspect if inconsistent statements are made during the defence case at trial.[531] In situations where the legislature has neither expressly nor impliedly enacted a provision overriding the application of the privilege against self-incrimination, the clear inference is that the legislature continues to recognise the importance of the value protected by the privilege when it is asserted. By its failure to abrogate the privilege, the legislature acknowledges that the privilege constitutes an interest which it is appropriate for the State to protect. The operation of the privilege is extant in English law, unless and until it is overridden.

As a consideration relating to the possible abrogation of the privilege against self-incrimination by legislative intervention, recognition of a company's ability to assert the privilege against self-incrimination in cases where there is a risk of criminal prosecution

[530] See *Saunders v United Kingdom* App no 19187/91 (ECtHR, 17 December 1996).
[531] Criminal Justice Act 1987, s 2(8), (8AA).

does not impede the efforts of the State to regulate companies and reduce corporate wrongdoing. This is because the privilege has no place in the framework for the use of administrative sanctions to regulate businesses which have grown exponentially in the last fifty years. Increasingly, companies have become subject to regulatory regimes in which civil penalties are imposed. In a report on regulatory justice in 2006 commissioned by the UK Government Cabinet Office, Richard Macrory recorded that regulatory authorities undertook more than 3.6 million enforcement actions each year. In terms of civil enforcement, the regulators performed 2.8 million inspections a year and issued 400,000 warning letters, and 3,400 cautions, and 145,000 statutory notices.[532] In addition, there were approximately 25,000 criminal prosecutions brought for regulatory non-compliance. In these cases where sanctions for non-compliance are imposed, the privilege against self-incrimination is not engaged since the participation of a business in the sanctions regime is essentially consensual. The requirement to disclose self-incriminating information is not supported by threat of penal action.

The movement towards regulatory sanctions has grown from an awareness that the criminal justice system had failed to control companies and inhibit the incidence of corporate crime.[533] As John Braithwaite explains, regulatory sanctions are needed to "blossom into control strategies more potent than our forlorn existing armoury of weapons against corporate crime".[534] The regulatory model requires companies operating in their specialist field of activity to develop their own regulatory standards, with supervision from a regulatory authority. In this way, the rule-making task is localised, conferring ownership and responsibility to the company for the creation of its regulatory rules. The company monitors itself for non-compliance, and where there are rule breaches the company acts internally to punish wrongdoers and minimise the opportunity for any recurrence. This form of self-regulation is not entirely voluntary, in the sense that its efficacy is dependent on the appointment of a compliance officer whose function requires

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[532] Richard Macrory, 'Regulatory Justice: Making Sanctions Effective' (Final Report November 2006) E.3 <https://webarchive.nationalarchives.gov.uk/20121205164501/http://www.bis.gov.uk/files/file44593.pdf> accessed 29 March 2021. See also HM Treasury, 'Philip Hampton Review, Reducing administrative burdens: effective inspection and enforcement' (March 2005). <https://web.archive.org/web/20090704105121/http://www.hm-treasury.gov.uk/d/bud05hamptonv1.pdf> accessed 29 March 2021.

[533] See, for example, Ralph Nader, Mark Green, and Joel Seligman, *Taming the Giant Corporation* (Norton & Co 1976); Marshall Clinard and Peter Yeager, *Corporate Crime* (The Free Press 1980); Sally Simpson, *Corporate Crime, Law and Social Control* (CUP 2002) ch 4.

[534] John Braithwaite, 'Enforced Self-Regulation: A New Strategy for Corporate Crime Control' [1982] 80 Michigan Law Review 1466.

him to report to the regulatory authority any management failing to devise, implement or monitor the self-regulatory process which has been described. A compliance officer who fails to perform this requirement becomes guilty of a serious criminal offence.

The application of this model is intended to lead to the discovery of a larger number of cases in which wrongdoing has occurred, and these become visible to regulatory inspectors upon examination of the company's records. The criminal process is invoked only where a compliance officer reports a corporate default, and in this event the recommendations of the compliance officer together with the company's default constitute powerful evidence for a prosecutor to place before the court. The criminal process is also invoked in cases where a compliance officer fails to make a report about an uncorrected violation, and the regulatory authorities need to maintain a system for external auditing of companies so that these rare instances could be discovered and acted upon.[535] As Braithwaite explains, "[o]nce an offence had been discovered, the agency would subpoena the relevant compliance unit reports and uncover any failure of the compliance director to report an unrectified violation. Even a small number of prosecutions for this offence would probably be sufficient to encourage compliance directors to put the company's head on the chopping block – instead of their own".[536] Companies and their officers subject to regulatory investigation are not exposed to the risk of criminal prosecution for any underlying criminal offending, and, in the language of the autonomous jurisprudence of the ECtHR, they are not the subject of a criminal charge.[537]

7.3 THE CASES IN SUPPORT

In the next part of the chapter, the leading cases on the ability of a company to assert the privilege against self-incrimination are critiqued. Different courts have reached different determinations, and it is impossible to discern a common thread running through the decisions. The decisions are characterised by the influence of policy considerations rather than incisive legal analysis, and there is no suggestion in the judgments that a value-based

[535] Simpson (n 533) ch 4.
[536] Braithwaite (n 534) 1499.
[537] In *Fleurose v Securities and Futures Authority Association* [2001] EWCA Civ 2015, the Court of Appeal (Civil Division) held that the privilege against self-incrimination did not arise during the course of an investigation which was regulatory and not criminal in nature.

analysis has been applied. As foreshadowed at the start of this chapter, the different approaches replicate the debate between those who see a company as having a distinct persona with legal personality, and constructionists who view a company as no more than a legal wrapper within which a company's members have agreed to be bound. Two points of interest emerge from the critique. First, the cases illuminate the interests to be protected in any consideration of circumstances in which the corporate privilege against self-incrimination may apply. Secondly, the divergent approaches serve to emphasise the importance of developing a coherent approach for the recognition of corporate rights to avoid inconsistent outcomes.

7.3.1 England and Wales

In England and Wales, the English courts have proceeded on the simplistic basis that there is clear equivalence to be drawn between the position of an individual and a corporation in circumstances where there is a risk of criminal prosecution. This outcome was established shortly before the outbreak of the Second World War in *Triplex Safety Glass Company Limited v Lancegaye Safety Glass (1934) Limited*[538] where a company acting by its company secretary refused to answer interrogatories in civil proceedings for libel on the ground that the answers would tend to incriminate the company and one of its directors. On appeal, the company argued that since it could be prosecuted for criminal libel, the company was entitled to the same protection as its directors and the Court agreed. Sitting with Sir Wilfred Greene MR, Du Parcq LJ explained that the court could not see any reason in principle why the application of the privilege against self-incrimination should be limited to natural persons and could not be claimed by a limited company:

> It is true that a company cannot suffer all the pains to which a real person is subject. It can, however, in certain cases be convicted and punished, with grave consequence to its reputation and to its members, and we can see no ground for depriving a juristic person of those safeguards which the law of England accords even to the least deserving of natural persons. It would not be in accordance with

[538] *Triplex Safety Glass Company Ltd v Lancegaye Safety Glass* (1934) Ltd [1939] 2 KB 395.

> principle that any person capable of committing, and incurring the penalties of, a crime should be compelled by process of law to admit a criminal offence.[539]

In this way, the Court of Appeal acknowledged the company's entitlement to claim the privilege as an assertion of its birth right. The privilege reflected an ancient feature of the common law, and by virtue of its status as a legal person, a company should not be deprived of this protection simply because it was corporeal and not human in form. In the absence of any reason why equivalence between these two different categories of persons should not be acknowledged, the court defaulted to a liberal position. In its reasoning, the Court was clearly influenced by the principled concern to ensure fairness of treatment between individual and corporate persons. The maintenance of a fair and just legal system would have been diminished by a different outcome. It is also interesting to note that in the eyes of an English court, there was no basis on which to withhold equivalence between human and corporate persons. This contrasts with the approach of the Supreme Court in the United States to which reference is made shortly. The difference in approach may reflect a closer adherence in the English courts to a contractual theory of company law, whereas the Supreme Court in the United States has focussed more intently on a concessionary approach.[540]

The decision in *Triplex Safety Glass* has been applied consistently in the English courts, and in 1977 it was explicitly approved by the House of Lords in *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation.*[541] The parties proceeded on the assumption that a company stood to be regarded as "a person" for the purposes of section 14(1)(a) of the Civil Evidence Act 1968 which recognised "[T]he right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty". This assumption was not open to criticism since section 19 of the Interpretation Act 1889 had stipulated long ago that unless a contrary intention appeared, any reference in legislation to a "person" included "a body of persons corporate …".

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[539] ibid 409

[540] The differences between a contractual and concessionary approach to company law theory are discussed in chapter 5.

[541] *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547 (HL).

Whilst the courts have been clear in their recognition of a company's ability to assert the privilege where there is a risk of the company's prosecution, the courts have not permitted a company to claim the privilege in order to protect an associated third party such as a company officer or employee. In *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation,* Lord Diplock noted that "the privilege against self-incrimination was restricted to the incrimination of the person claiming it and not anyone else".[542] He added that there was "no trace in the decided cases that it is of wider application; no textbook old or modern suggests the contrary".[543] Where a company officer's answers are not personally incriminating but incriminate the company, a company officer is able to assert the privilege on behalf of the company. Conversely, where a company officer's answer is personally incriminating but does not incriminate the company, the company is unable to assert the privilege on the company officer's behalf. This outcome is consistent with an analysis which affords equivalence between human and corporeal forms as disconnected persons, but the question arises whether it is unduly harsh on the company officer where individual criminal vulnerability is starkly exposed.

The situation becomes more acute where a company officer's answers are both personally incriminating and also incriminate the company. In this situation, is the company officer's personal exposure subsumed in the exercise of the privilege by the company? The answer is affirmative for if it were to be otherwise, any protection afforded to the company would be rendered nugatory. At some stage, this point is likely to come before an appellate court for further consideration. Lord Diplock's obiter dicta is strong, but it is not necessarily conclusive. In the same case, Lord Wilberforce observed[544] that although this issue raised a novel point, it was not necessary to decide it. Viscount Dilhorne expressed no opinion on the point, except to say that "it renders a company's privilege of little value if it can be got round in that way."[545] Lord Keith did not comment.[546] If the approach taken in *Triplex Safety Glass* is followed, a Court would acknowledge the entitlement of a company to assert the privilege so as to protect its officers in these circumstances. Certainly, an application of a value-based analysis suggests that the law should recognise a company's

[542] ibid 637–38.
[543] Cited with approval in *Sociedade Nationale de Combustiveis de Angola v Lundqvist* [1991] 2 QB 310, 336 (Bedlam LJ); see also *Gold Nuts Ltd v Commissioners for HM Revenue & Customs* [2016] Lloyds Rep FC 249, [233]–[245] (Judge Redston).
[544] *Rio Tinto* (n 541) 617
[545] ibid 632.
[546] ibid 653ff.

ability to assert the privilege in circumstances where incriminating information involving a company officer would be disclosed.

7.3.2 New Zealand

The Court of Appeal in New Zealand applied *Triplex Safety Glass* in a significant decision in 1986, *New Zealand Apple and Pear Marketing Board v Master & Son Limited.*[547] In that case, a company operating a greengrocer's shop had been prosecuted for failing to permit a government inspector to examine its fruit and an examination would have provided the inspector with incriminating information. The relevant statute provided that no offence would be committed where a person incriminates himself by providing information to a government inspector, and the High Court had no difficulty in determining that this plea was available to corporate bodies as well as individuals. Relying on the principle that the law recognised a company as a distinct but equivalent legal personality, the Court repeated the sentiment expressed in *Triplex Safety Glass* that there was no policy reason why a corporation should not claim the privilege against self-incrimination since it is identified in law with the actions of its officers and employees. The Court of Appeal added that there were "sound practical reasons" for recognising that a company could claim the benefit of the privilege:

> There are over 140,000 companies registered in New Zealand, indicating the extent to which the commercial enterprise is carried on by them. One writer, somewhat extravagantly perhaps, has described the limited liability corporation as the greatest single discovery of modern times (cited in Sealy, Company Law and Commercial Reality, 1984, at page 1). Many small family businesses, including corner dairies and fruit shops, have a corporate status. It would be unrealistic to deny the directors and other officers of those companies the right to plead incrimination just because they have changed the legal status of the business for considerations which are irrelevant to the issue of self-incriminating admissions.[548]

[547] *New Zealand Apple and Pear Marketing Board v Master & Son Ltd* [1986] 1 NZLR 191.
[548] ibid 197.

This passage is interesting because it shows the High Court tilting towards the identification of economic considerations as a supporting justification for permitting a company to assert the privilege against self-incrimination in circumstances where a company, its officer or employee could be incriminated by the compulsory production of damaging information. It is a consequentialist approach towards the recognition of corporate rights. In this instance, the right is the privilege against self-incrimination.

7.3.3 European Court of Justice

To date, the ECtHR has not been required to determine whether a company can assert the privilege against self-incrimination under Article 6(1) of the ECHR in the same way as an individual. The ECJ, however, has considered the issue and its determinations have been influenced by the concern to protect a company from self-incrimination in cases where corporate criminal liability can be incurred. The Court has also been concerned to ensure that company officers are protected where their vulnerability to criminal prosecution may be exposed as collateral damage if a company's right to assert the privilege is not recognised. Again, although not articulated in this way, the Court has recognised the importance of fairness as a fundamental value in the legal system.

The issue arose in *Orkem v Commission*[549] after the European Commission served a notice requiring a company to provide information and disclosure of documents during an investigation into whether the company had breached European competition law. As the ECJ had explained in an earlier decision,[550] the European Commission had been clothed by a European Council Regulation[551] with power to serve a notice of this sort to enable it to discharge its policing function of ensuring that the rules on completion were applied in the common market, so that competition would not be distorted to the detriment of the public interest, individuals, and consumers. The Regulation required a company under investigation to co-operate actively with the Commission, and in the absence of any provision permitting a company to refuse to provide information or produce documents on the ground that they would be self-incriminating, the ECJ was required to determine

[549] Case 374/87 *Orkem v Commission* [1989] ECR 3283.
[550] *National Panasonic (UK) Ltd v Commission* [1980] ECR 2033.
[551] Article 11(5) of EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204.

the extent to which the general principles of European Union Community law fell to be interpreted in accordance with a general understanding of fundamental rights.[552]

The matter was not entirely straight-forward, for as the Court noted, "[I]n general, the laws of the Member States grant the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings".[553] Accordingly, it was necessary to consider whether, in the case of a company, any equivalent limitation should be implied on the exercise of the Commission's investigatory powers in order to protect defence rights.[554] On this point, the Court had received some trenchant guidance from the Judge-Rapporteur who advised in the following terms:

> Neither the International Covenant [on Civil and Political Rights] nor the European Convention [on Human Rights] distinguishes between natural and legal persons. Several States, bound by those international instruments, in particular the United Kingdom and the United States of America, expressly recognise the criminal liability of legal persons. Community competition law expressly regards them as capable of committing acts classifiable as criminal offences … The pronouncement of penalties against undertakings may also have repercussions for the executives thereof – natural persons – against whom a right or recourse may be enforced in civil proceedings or who may have criminal penalties properly so called imposed upon them.[555]

Plainly influenced by this guidance, the ECJ held that although the Commission could require production of information and disclosure of documents which could be used to establish a breach of competition laws, it would not be able to compel a company through its officers to provide answers to questions where the answers would amount to an admission or acknowledgment that competition law had been infringed.[556] The Court's reasoning was two-fold. First, aligned with the reasoning in *Triplex Safety Glass,* there was no basis for holding that a corporate person should not enjoy the same protection as an individual person. Secondly, if the corporate right to assert the privilege were denied, the

[552] *Orkem* [28].
[553] ibid 29.
[554] ibid 32.
[555] ibid 3295 (Judge-Rapporteur Schockweiler).
[556] ibid [35].

vulnerability of the company's officers to criminal prosecution would have been exposed. Acknowledgment of a corporate right to assert the privilege was necessary in order to protect an individual right which would otherwise have been compromised.

Although the decision has been applied in a series of competition cases where issues relating to due process have been raised,[557] the subsequent judgments do not develop the Court's reasoning in *Orkem v Commission* that a company can assert the privilege against self-incrimination where it is exposed to criminal liability as an entity in its own right. In *DB v Commission Nazionale per le Societa e law Borsa*,[558] the Court recognised the ability of an individual to assert the privilege against self-incrimination in administrative proceedings where the potential sanction is criminal in nature.[559] The Court ruled that the right to silence is infringed "where a suspect is obliged to testify under threat of sanctions and either testifies in consequence or is sanctioned for refusing to testify".[560] The Court added that the right to silence is not confined to admissions of wrongdoing but "also covers information on questions of fact which may subsequently be used in support of the prosecution and may thus have a bearing on the conviction, or the penalty imposed on that person".[561] Accordingly, it is clear that in so far as the ECJ is concerned, recognition of the privilege against self-incrimination is entrenched, for an individual and a company alike.

7.3.4 European Court of Human Rights

It is the exposure of individuals to potential criminal prosecution by reason of their incriminating statements which will almost certainly provide the rationale for a decision of the ECtHR when ultimately it is asked to determine whether a company can assert the privilege against self-incrimination alongside other due process rights protected by Article 6(1) of the ECHR.

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[557] T-34/93 *Societe-Generale c Commission* [1995] ECR II-545; T-112/98 *Mannesmannrohren-Werke AG v Commission* [2001] ECR II-929; C-244/99 *Limburgse Vinyl Maatschappij NV v Commission* [2002] ECR I-8375; T-236/01 *Tokai Carbon Co v Commission* [2004] ECR II-1200; T-474/04 *Pergan v Commission* [2007] ECR II-4225; C-301/04 *Commission v SGL Carbon* [2006] ECR I-5915.

[558] Case C-481/19 *DB v Commissione Nazionale per le Società e la Borsa* EU:C: 2021:84 (ECJ, 2 February 2021).

[559] 'Three criteria are relevant to assess whether penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the intrinsic nature of the offence, and the third is the degree of severity of the penalty that the person concerned is liable to incur', C-537/16 *Garlsson Real Estate and Others* EU:C:2018:193 (ECJ, 20 March 2018) [28].

[560] *Garlsson* (n 559) [39].

[561] ibid [40].

Certainly, as the starting point, it is clear the ECHR operates to protect the rights of a legal person, notwithstanding its nomenclature as a convention for the protection of *human* rights. Marius Emberland explains that the history of the ECHR reveals the drafters had always intended the Convention to apply to companies as well as individuals. The first draft of the ECHR's text envisaged that a right of petition to the international court would be afforded to "any natural or corporate person", and although the language changed to "any person, non-governmental organisation or group of individuals"[562] there was nothing to suggest that a company would be excluded from these categories.[563] Emberland notes that it is a "striking aspect of the *travaux preparatoires*" that they "seem to take for granted that companies and other for-profit actors were to be included in the Convention".[564]

There is no shortage of decided cases illustrating the application of Convention rights to companies. The ECtHR has not hesitated to determine that the protection of a company's business premises and its correspondence fall within the ambit of Article 8(1) which guarantees respect for a person's private and family life, his home, and his correspondence. In *Niemietz v Germany,*[565] the ECtHR concluded that the notion of "private life" should not be taken to exclude activities of a professional or business nature since it is often difficult to delineate the boundary between domestic life and business activities with any precision. On the facts of this case, the Court held that a lawyer could claim an infringement under Article 8(1) in circumstances where his business premises had been searched. This outcome, the Court said, was "consonant with the essential object and purpose of Article 8, namely, to protect the individual against arbitrary interference by the public authorities".[566] Here, although the applicant's claim focused on the unlawful invasion of his privacy at work, he was not operating as a corporate entity. But if his law practice had been incorporated, the Court's determination would almost certainly have been the same.

[562] Article 34(1) ECHR.
[563] Marius Emberland, *The Human Rights of Companies* (OUP 2006) 4 fn 20.
[564] ibid 35.
[565] *Niemietz v Germany* [1992] ECHR 80.
[566] ibid [31].

In *Societie Colas Est v France*,[567] three companies asserted that their rights to privacy under Article 8(1) had been violated when a French Government investigative authority entered the companies' premises and seized various documents containing evidence of unlawful agreements. The investigation concerned an allegation that the companies had colluded in rigging local tendering procedures for roadwork contracts and the operation of mixing plants. The French Government resisted the claim on the ground that the ruling in *Niemietz* was limited to the situation where a natural person was performing his professional activities. The Government argued that whilst companies could enjoy similar rights under the Convention to those afforded to individuals, companies could not claim a right to protection of their business premises with the same degree of persuasion as an individual.[568] The ECtHR rejected the argument, holding that the protection afforded under Article 8(1) "should be construed as including the right to respect for a company's registered office, branches or other business premises".[569] It is a pity that the Court did not develop its reasoning and explain why it considered that Article 8(1) should be construed in this way.

Similarly, the ECtHR permits a limited company to claim that its rights had been infringed contrary to Article 6(1) of the Convention which guarantees the fairness of the trial process. The high watermark is found in *Yukos v Russia*[570] where the applicant was a holding company established by the Russian Government to own and control several stand-alone companies specialising in oil production. The Russian tax authorities subsequently claimed the holding company owed large amounts of outstanding tax, initiating legal proceedings in Moscow which culminated in the holding company's liquidation and asset sale. The ECtHR determined the case in the holding company's favour principally on the basis that it had not been afforded enough time to prepare its defence at first instance. In addition, the Court also found that in certain respects the company's right to property had been violated under Article 1 Protocol 1 of the ECHR. Although the importance of the case in political terms was high, the Court's recognition of the violation of the holding company's rights was unexceptional. The first sentence of Article 1 Protocol 1 makes clear that "every natural or legal person" is entitled to the peaceful enjoyment of his possessions.

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[567] *Societie Colas Est v France* App no 37971/97 [2002] ECHR 418, 962.
[568] *Niemietz* (n 565) [30].
[569] ibid [41].
[570] *Yukos v Russia* [2012] 54 EHRR 19

In fact, it is suggested there are very few ECHR rights, if any, which cannot apply to a company.[571] It is often said that it is impossible to conceive how the right to life (Article 2), the prohibition against torture (Article 3) or slavery (Article 4) and freedom from arbitrary detention (Article 5) could sensibly be applied in the case of a company. This is because these rights are thought to be inherently human and can have no application to corporate life. But this does not necessarily follow. There are circumstances in which a court may make orders which can impact on a company's ability to sustain itself. If a court makes an order for a company's liquidation, its right to life will have been adversely impacted (Article 2).

Whilst at first blush the lifespan of a company may be characterised alongside the lifespan of inanimate objects such as a car or a book, there is a distinction to be drawn between the two situations. Unlike a car or a book, a company is recognised as a person in its own right, with equivalent legal standing to an individual. With an eye to a company's entitlement to protect its property within the terms of Article 1 Protocol 1 of the ECHR,[572] the courts in England and Wales have held that a winding-up order should not be made if it would cause disproportionate injustice.[573] If company assets are unlawfully expropriated, the right to property will have been infringed, and the company degraded by this treatment (Article 3). It is not inconceivable to imagine in a totalitarian regime that the State could impose a law requiring a company to provide its services for no reward (Article 4). Similarly, a law which restricted a company's ability to continue its business by service of a prohibition order could be said to constrain its liberty (Article 5).

The academic understanding of these cases suggests that the ECtHR's philosophical approach is more closely concentrated on the need to protect an individual's fundamental

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[571] For a contrary view, see *Company X v Switzerland* [1979] 16 DR 85 where the European Commission on Human Rights determined that an application by a Swiss company was inadmissible after it sought to challenge an obligation to pay ecclesiastical taxes as an infringement of its right under Art 9(1) of the Convention which guaranteed to everyone the right of freedom or thought, conscience and religion. Although a company had the right to bring a petition, a limited company could neither enjoy nor rely upon the right which was protected under Art 9(1). See also *Verein Kotakt-Information-Therapie v Austria* [1988] 57 DR 81 where it was said that Arts 3 and 9 are 'by their very nature not susceptible of being exercised by a legal person such as a private association'. It is unlikely that this approach would be followed today.

[572] Article 1 Protocol 1 provides that 'every natural or legal person is entitled to the peaceful enjoyment of his possessions'.

[573] *Breyer Group plc v RBK Engineering Ltd* [2017] EWHC 1206 (Ch) [48] (Daniel Alexander QC). See also *Secretary of State for Business, Enterprise, and Regulatory Reform v Amway (UK) Ltd* [2008] EWHC 1054 (Ch) upheld on appeal [2009] EWCA Civ 32.

rights rather than the rights of a company itself. In the narrative articulated by Winfried Van den Muijsenbergh and Sam Rezai, the ECtHR's willingness to recognise the application of corporate rights in an international convention is explained by a focus on the protection of individual human rights and fundamental freedoms.[574] Paraphrasing Van den Muijsenbergh and Rezai's position, the ECtHR recognises corporate rights for the purpose of giving effect to individual rights which the ECHR was signed to protect. The Court's recognition of corporate rights is catalysed by the need to ensure that the fundamental rights of the company's officers and other stakeholders are fully protected, in the same way as they would have been protected if the corporate vehicle had not existed. A company's entitlement to assert a corporate right is not the focus of attention. Instead, the corporate vehicle is characterised as an obstacle to the protection of individual rights which must be cast aside in order to afford full protection to the individual and maintain the Convention's values.[575] Van den Muijsenbergh and Rezai consider that the decision in *Yukos v Russia*[576] did not involve elevated legal analysis of whether ECHR rights could be claimed by a company. "Instead, the interesting feature of this high-profile case entails its potent and compelling demonstration of the importance of the mere availability of the Court, as an international independent judicial venue, for a brutalized corporation which simply had nowhere else to go".[577] It was the individual interests of the majority shareholder, Mikhail Khodorkovsky, which were prejudiced by Russia's oppressive conduct in this case.

Emberland sees the Court's methodology differently. For Emberland, it is not so much an individual's interests *qua* shareholder that fall to be protected. Rather, it is the company's commercial interests which require protection, as inextricably associated with the protection of fundamental liberties for the public at large. In connection with the recognition of a company's right to assert an infringement of the right to free speech which is protected by Article 10(1) of the ECHR, Emberland noted that:

> [T]he Court adheres to a special teleological approach whereby it accepts that protection of a company applicant's commercial interests is worthy of protection

[574] Winfried van den Muijsenbergh and Sam Rezai, 'Corporations and the European Convention on Human Rights' [2012] 25 Pac McGeorge Global Bus & Dev L J 43.
[575] ibid 52–53.
[576] *Yukos* (n 570).
[577] van den Muijsenbergh (n 574) 62.

since that protection is instrumental for the protection of the freedom of expression of the public at large or society in general.[578]

Whichever foundation for the recognition of corporate rights is adopted, one aspect is reasonably certain. It is only a matter of time before the ECtHR recognises a corporate right to exercise the privilege against self-incrimination, whether as a necessary outcome in order to protect the individual rights of its stakeholders (*qua* Van den Muijsenbergh and Rezai), or as an entitlement in its own right (*qua* Emberland). In this way, following the Court of Appeal's line of thinking in *Triplex Safety Glass*,[579] a corporate right to assert the privilege becomes founded on the recognition of an individual right to benefit from the privilege which would be discarded if a corporate right were unacknowledged. In the language of value-based analysis, the value in preventing harmful consequences for a company and its individual stakeholders by enabling the company to protect itself from attack is recognised as the consequential justification for the recognition of the corporate right.

7.4 THE CASES AGAINST

However, as noted, there is no unanimity of approach. In other common law jurisdictions, the courts have been hostile to a corporate claim which seeks to assert the privilege against self-incrimination.

7.4.1 Australia

The position in Australia was firmly established by the High Court in *Environment Protection Authority v Caltex Refining Co Pty Ltd*[580] There, following commencement of a prosecution for pollution offences, the prosecution served two notices on the defendant company, each requiring production by the company of identical documents relating to the offences with which the company had been charged. The sole purpose of the notices was to obtain evidence and information for use against the company in the prosecution. After a seminal review of the history of the privilege against self-incrimination and its application to

[578] Emberland (n 563) 145.
[579] *Triplex* (n 538).
[580] *Environment Protection Authority v Caltex Refining Co Pty Ltd* [1993] 178 CLR 477.

companies in different jurisdictions, the Court concluded the privilege could not be claimed by a company.

First, the Court noted the traditional justification for the privilege could not apply in the case of a company, since a company could not be subjected to physical punishment.[581] Consequently, the historical reasons for the creation and recognition of the privilege do not support its extension to corporations. Moreover, the Court made the point that at the time when the privilege developed in 17th century English law, although there were companies proclaimed by Royal Charter, other companies did not exist.[582] Also, the Court felt that the treatment of the privilege as a human right promoting human dignity was not convincing in the case of a company.[583] "The discouragement of ill-treatment of suspects and the extraction of dubious confessions … cannot apply to the compulsion by process of law to produce documents".[584] More fundamentally, there was a strong public interest in depriving companies of the ability to claim the benefit of the privilege. The notion of corporate limited liability and the complexity of some corporate structures had been used by fraudsters, and since most fraud cases involved a large volume of documentary evidence, the adverse impact of a corporate assertion of the privilege would be disproportionate in these cases.[585]

As Chief Justice Mason and Justice Toohey explained, "[i]t makes no sense at all to make the privilege available to a corporation in respect of these books and documents when officers of the corporation are bound to testify against the corporation unless they are able to claim the privilege personally".[586] Justice McHugh acknowledged there were powerful reasons for allowing a company to assert the privilege as "a natural, although not a necessary, consequence of the adversary system".[587] This is because "[i]t is a fundamental rule of the common law that, whatever the charge and wherever it is tried, the onus of proving the guilt of the accused rests upon the Crown and never shifts to the accused".[588] However, there was a stronger countervailing policy argument concerning the production of documents which influenced the court. Justice McHugh asked:

[581] ibid 498.
[582] ibid 498.
[583] ibid 500.
[584] ibid 499.
[585] ibid 504.
[586] ibid 504.
[587] ibid 556.
[588] ibid 556.

> Why then should this evidence be allowed to remain hidden in the files of the corporation when it is relevant to an issue to be tried in criminal proceedings? It is difficult to see how the administration of justice, even under the adversary system of criminal justice can be advanced by allowing a corporation to refuse to produce documents on subpoena simply because the documents tend to incriminate the corporation. If a corporation can refuse to produce documents, the public interest in detecting and punishing crime is diminished so that the integrity of the adversary system can be maintained for the benefit of an artificial entity. This is much too high a price to pay for allowing corporations to claim the privilege.[589]

It is quite clear that, basing itself on its perception of where the public interest lies, the High Court was unwilling to expand the application of the privilege in circumstances where a company could not be subjected to physical pressure. In reaching this decision, the Court acknowledged it was establishing differential rules for individuals and companies, but it thought that this would not undermine the integrity of the criminal justice system since the position of an individual was weaker than a company in its dealings with the State. The Court explained that "the resources which companies possess and the advantages they tend to enjoy, many stemming from incorporation, are greater than those possessed and enjoyed by natural persons".[590] These resources were vulnerable to abuse, and, as the Court added, "the complexity of many corporate structures and arrangements have made corporate crime and complex fraud one of the most difficult areas for the State to regulate effectively".[591]

There was a final point to bear in mind. By drawing a clear line between the position of an individual and a company when it comes to the application of the privilege, the Court took a limited view of corporate legal personhood and the attributes of corporate personality. In particular, the Court rejected the idea that a company, as a corporate citizen, should be afforded the same benefits of the privilege as an individual.[592] As McHugh J commented, somewhat sharply, "The current widespread use of the

[589] ibid 556.
[590] ibid 500.
[591] ibid 500.
[592] *Caltex Refining Co v SPCC* [1991] 25 NSWLR 188, 127 (Gleeson CJ).

expression 'corporate citizen' seems to owe more to the objects of the public relations industry than to an analysis of the legal concept of citizenship".[593]

7.4.2 Canada

The position in Canada regarding the ability of a company to claim the privilege against self-incrimination has evolved. In 1931, the Supreme Court of Alberta decided that a claim of privilege could be asserted by a company since the common law had not developed any basis for determining otherwise.[594] However, subsequent decisions have taken a different view. In *R v Judge of General Sessions of the Peace for County of York*,[595] the court held that a company officer or employee could not claim the privilege on behalf of his company in respect of evidence given at trial.

This was followed by the determination of the Canadian Supreme Court in *R v Amway Corporation*[596] that the constitutional protection for the privilege against self-incrimination did not apply to companies. Admittedly the Court was interpreting a statutory provision rather than measuring the bandwidth of the common law, but the tenor of the judicial reasoning remains interesting. In denying the ability of the company to assert the privilege, the Court focused on the fact that a company could testify only through the evidence of its officers and employees. It was the witness who took the oath and who would be subject to a prosecution for a perjury, and whose interests which the constitutional provision had been established to protect. In this sense, the company did not self-incriminate itself. As far as the company officers and employees were concerned, if there was a risk of personal self-incrimination, the privilege would be engaged. The Court strongly made the point that the privilege was intended "to protect the individual against the affront to dignity and privacy inherent in a practice which enabled the prosecution to force the person charged to supply the evidence out of his or her own mouth."[597] This was not applicable in the case of a company.

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[593] *Caltex* (n 580) 549.
[594] *Webster v Sollway, Mills & Co* [1931] 1 Dom LR 831, cited with approval in *Triplex* (n 538).
[595] *R v Judge of General Sessions of the Peace for County of York* [1970] 16 DLR (3d) 609. See also *R v JJ Beamish Construction Co Ltd* [1967] 59 DLR (2d) 6.
[596] *R v Amway Corporation* [1989] 1 SCR 21.
[597] ibid [40] (Sopinka J). This passage was cited with approval by the Supreme Court of Canada in *British Columbia Securities Commission v Branch* [1995] 2 SCR 3, [39]– [40] (Sopinka and Iacobucci JJ).

7.4.3. United States

A similar position pertains in the United States, although supported by different reasons. In *Hale v Henkel*,[598] the Supreme Court established long ago that the privilege against self-incrimination could not be asserted by a company officer acting on behalf of a company. As Justice Brown explained, there was a fundamental difference between the capacity of an individual and that of a company:

> The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbours to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the State since he receives nothing therefrom beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.
>
> Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose … While an individual may lawfully refuse to answer

[598] *Hale v Henkel*, 201 US 43 (1906).

> incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.[599]

In *United States v White*,[600] Justice Murphy supported this outcome by imputing an intention to the drafters of the US Constitution that the privilege was never expected to be claimed by a company:

> The framers of the constitutional guarantee against compulsory self-disclosure, who were interested in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organisations so as to nullify appropriate governmental regulations.[601]

The Supreme Court further developed the jurisprudence in *Braswell v United States*,[602] when the Court, led by Chief Justice Rehnquist, held that a company officer could not assert the privilege against self-incrimination where the information or answers incriminated him personally as well as the company. It was none to the point that the information or answers would have been protected by the privilege if the company officer had been a self-employed trader. The fact remained that the company officer was a representative of the company, and he was producing the records in the capacity as a representative of the company. Although the company officer was the sole owner of the two companies through which he operated his business, both companies had three directors (the company officer, his wife, and his mother) and traded actively.

The Court left open for further consideration the position where a company officer can show that he is the sole director and employee, and in effect he would be producing the records in a personal capacity. The Court's reservation is surprising since the factual distinction is not great, and if this approach were applied, the Court would be required to look through the corporate veil in order to secure the interests of an individual in respect of whom the company was operating as his *alter ego*. It was precisely this point which underwrote the dissenting opinion in the case by Justice Kennedy, with which Justices

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599 ibid 75.
600 *United States v White* [1944] 322 US 694.
601 ibid 699–700.
602 *Braswell v United States* [1988] 487 US 99.

Brennan, Marshall and Scalia agreed. The minority concern centred around the fact that the "collective entity" rule in American law was used by the Court's majority to prevent an individual from asserting the privilege against self-incrimination as a constitutional right to which he was entitled. In a key passage from Justice Kennedy's judgment:[603]

> The question before us is not the existence of the collective entity rule, but whether it contains any principle which overrides the personal Fifth Amendment privilege of someone compelled to give incriminating testimony. Our precedents establish a firm basis for assertion of the privilege. Randy Braswell … is being asked to draw upon his personal knowledge to identify and to deliver documents which are responsive to the Government's subpoena. Once the Government concedes there are testimonial consequences implicit in the act of production, it cannot escape the conclusion that compliance with the subpoena is indisputably Braswell's own act. To suggest otherwise "is to confuse metaphor with reality." *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California.*[604]

> It is not that the dissenting minority wanted to recognise the application of the privilege to a corporate claim in its own right. They did not. Rather, the minority's sole concern was that an individual should not be deprived of the benefit of protection afforded by the Fifth Amendment simply because he elects to conduct his business through a company. As the minority explained, the individual is being deprived of his constitutional protection "in order to vindicate the rule that a collective entity which employs him has no such privilege itself.[605]

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[603] ibid 125.

[604] *Pacific Gas & Electric Co v Public Utilities Comm'n of California*, 475 US 1, 475 US 33 (1986), Justice Rehnquist dissenting.

[605] *Braswell* (n 602) 119. For a critical discussion of the decision in *Braswell v United States*, see Timothy W Barbrow, *'Braswell v. United States*: Using the Corporate Fiction to Deny an Individual His Fifth Amendment Rights' (1990) 12 Geo Mason U L Rev 405.

7.5 FLAWED REASONING

On careful analysis, the reasoning put forward by the courts to deny a company's ability to assert the privilege against self-incrimination is flawed and unable to withstand rigorous scrutiny. Although the Australian, Canadian, and American courts expounded several reasons as to why it would not be unfair, unjust, or inappropriate to deny a company the same ability to assert the privilege as an individual, these reasons are not sustainable.

7.5.1 Coercion

Whilst it is axiomatic that a company cannot suffer physical punishment as an incorporeal body, the emphasis in the High Court of Australia on the origin of the privilege as a protection against torture is misconceived. As explained in Chapter 4, the rationales for supporting the recognition of the privilege have been evolutionary, but the common thread has been a concern to ensure the reliability of confessionary statements and the absence of undue pressure. It is the intensity of coercion which determines whether the privilege is engaged, and no single form of coercive practice can claim exclusivity in this regard. In the case of a company, there are multiple coercive factors to which a company may be exposed if its claim to assert the privilege against self-incrimination were not recognised. Mention has already been made of the requirement in section 2(2) of the Criminal Justice Act 1987 to compulsorily answer questions during the course of a criminal investigation into suspected serious or complex fraud. By section 2(13), failure to answer questions is punishable by a maximum sentence of six months imprisonment or a maximum fine. The consequences for a company of a criminal conviction recorded against it were canvassed earlier in this chapter. In the context of an order to produce self-incriminating information in civil proceedings, the physicality of punishment may be absent, but if a court held that a company's failure to comply constituted a contempt of court, similar adverse consequences could be expected to follow. By focussing on the physicality of punishment inflicted on individuals in the seventeenth century, the High Court of Australia misdirected itself as to the fundamental rationale of the privilege.

7.5.2 Unbalanced financial resources

The suggestion made in the *Environmental Protection Authority v Caltex Refining Co Pty Ltd*[606] that the position of an individual is weaker than a company in its dealings with the State is based on a false premise. Far from domination by large companies with substantial financial resources, the corporate sector is populated by a large number of small companies, as referenced in Chapter 6. The factual scenario in *Braswell v United States*[607] is a case in point. The reality of the situation is that the resources possessed by most companies pales into insignificance when balanced against those of the State, and whilst there are a minority of international companies with extensive commercial power, the majority of investigations into suspected corporate criminal activity will involve companies whose financial reserves are eclipsed by those of the State. The suggestion is that the complexity of corporate structures and arrangements facilitates the commission of serious corporate crime, but again, this is no reason to deny a company from exercising the privilege against self-incrimination. This reasoning applies equally to companies and individuals who are beneficial owners of these companies. From the perspective of the investigating authorities, incriminating information needs to be unearthed from these individuals as well as their companies, but there is no suggestion that the ability to assert the privilege should be withheld from a class of individual associated with a company where the corporate activity is not transparent. In any event, the number of companies vulnerable to abuse is likely to represent a small proportion of companies operating in the corporate sector.

7.5.3 Corporate jeopardy for perjury

In its effort to configure a narrow perspective on the characteristics of corporate personhood, the Australian, Canadian, and American courts erred in their swiftness to point out that in cases involving oral evidence, testimony would be given by an individual who could assert the privilege against self-incrimination in the event of any personal jeopardy. If an individual gives false evidence, he is the person who is vulnerable to prosecution for perjury and not the company. According to this argument, as an artificial construct it would not be possible for a company to commit perjury. However, this

[606] *Caltex* (n 580).
[607] *Braswell* (n 602).

analysis fails since it overlooks the obvious point that when a company officer is called to give evidence on a matter relating to the company's affairs, the officer speaks for and on behalf of the company. In effect, he becomes the company for this purpose. The vulnerability of a company to prosecution for perjury was considered by the Court of Appeal in *Odyssey Re (London) Ltd (formerly Sphere Drake Insurance plc) v OIC Run Off Ltd (formerly Orion Insurance Co plc)*[608] when this point was taken. As Nourse LJ explained, "the acts of the natural person should be identified as the acts of the company" for this purpose.[609] The perceived lack of corporate criminal liability for perjury is, therefore, no answer to a denial of a corporate right to assert the privilege.

7.6 CONCLUSION

In summary, the Australian, Canadian, and American cases failed to consider the multiple interests illuminated by the application of a value-based analysis to the recognition of a corporate right which acknowledges the assertion of the privilege against self-incrimination. Whereas the cases supporting a corporate right to assert the privilege can be assimilated into a value-based analysis for the recognition of corporate rights, the Australian, Canadian, and American cases stand apart. In many respects, these decisions represent no more than echoes of a historical approach towards the recognition of the corporate form as a body which has no clothes. Apart from anything else, denial of a company's right to assert the privilege does not sit happily with the rights of a company to defend itself. To repeat what Justice Rehnquist said in *First National Bank of Boston v Bellotti,*[610] it is incumbent on the law to respect "the constitutional protections which are 'incidental to its very existence'".[611] In a case where a company's interests are attacked by a demand to disclose self-incriminating information relating to the company, its officers or employees, the right to assert the privilege against self-incrimination is a constitutional protection in point.

Relationships between companies, their stakeholders, and the State, are more complex than they were one hundred years ago, and today new tools are required to shed light on

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608 *Odyssey Re (London) Ltd (formerly Sphere Drake Insurance plc) v OIC Run Off Ltd (formerly Orion Insurance Co plc*) [2001] Lloyd's Rep IR 1.
609 ibid 11–13, 89. Buxton LJ dissented, holding that on the facts of the case the alleged perjurer's evidence could not be said to constitute the directing will and mind of the company.
610 *Bellotti* (n 378). Also discussed in Chapter 5.
611 ibid 824.

the incidents of these relationships and the bases on which they can be theoretically supported. Applying a value-based analysis to the determination of corporate rights is one such tool, and as demonstrated in this chapter there are compelling arguments which support the inclusion of a corporate right to assert the privilege against self-incrimination, as one of many rights contained in a company's basket of rights.

CHAPTER 8
ENGAGING THE PRIVILEGE

8.1 INTRODUCTION

Having established there are circumstances where the law recognises a company's entitlement to assert the privilege against self-incrimination, the extent to which a company should be permitted to shield itself from the mandatory requirement to self-report criminal conduct under section 330(1) of POCA 2002 comes into focus. This is the *fifth research question*. The potential application of the privilege to exempt a company from the statutory requirement to self-report criminal conduct is directly engaged. Necessarily, the self-incriminating information disclosed in a SAR relates to pre-existing material, often created long before an investigation into the suspected criminal conduct has been initiated. The issue, therefore, is whether the law should recognise the operation of the privilege against self-incrimination to relieve a company from an obligation to make a mandatory self-report in these circumstances?

As noted in chapter 4, neither the legislature nor the judiciary have addressed the question, and the potential engagement between the privilege against self-incrimination and mandatory self-reporting under the AML regime cannot be assumed. This chapter develops a sound case which supports this engagement. The complexities of the arguments are intensified when the maker of the self-report is a corporate entity since, as previously noted, the narrative in a SAR may incriminate both the company and its officers or employees.

The legal landscape in which the mandatory reporting obligation is situated requires careful study, especially in circumstances where the legislation is silent on the potential application of the privilege against self-incrimination. Whilst respecting the contours of the debate, this chapter argues that a corporate entity is entitled to assert the privilege in answer to the mandatory reporting requirement. If a judicial determination were delivered to the contrary, the reasoning would likely to be flawed, and it would make bad law.

As an initial step in the argument, the legislative purpose underlying the mandatory reporting requirement and its coercive elements are considered. Next, the chapter rehearses the incriminating nature of the reporting process, and how a corporate reporter becomes exposed to possible, and on occasions, inevitable, self-incrimination. The statutory framework for corporate self-reporting was comprehensively considered in chapter 2 of the thesis, and here it is recalled in short form. This review is followed by an examination of the factors militating strongly in favour of the law's recognition of the privilege against self-incrimination in answer to the reporting obligation set out in section 330(1) of POCA 2002. These factors demonstrate how, and why, the law recognises, and should recognise, an assertion of the privilege as a valid response to the mandatory reporting requirement. The counterarguments are reflected in a comprehensive discussion of the decision of the Supreme Court in *Beghal v DPP*,[612] and duly answered.

8.2 LEGISLATIVE PURPOSE

The legislative purpose underlying the mandatory reporting requirement is uncontroversial. Miriam Goldby explains that there are tripartite aims of the reporting requirement: first, to combat crime, in particular organised crime, by disrupting it and in this way reducing it; secondly, to detect, investigate and prosecute money launderers and those who have committed predicate crimes; and thirdly, to recover the proceeds of crime.[613]

To recap, as explained in chapter 2, the origin of the reporting requirement can be found in the FATF's publication of the Forty Recommendations to fight money laundering in May 1990.[614] Recommendation 15 required financial institutions to report suspicions of money laundering activity on a discretionary basis.[615] In 1996, the reporting requirement was elevated from discretionary guidance to a mandatory requirement.[616] In its new interpretive note to Recommendation 15 the FATF required a financial institution to comply with a reporting requirement when "the financial institution has reason to believe

[612] *Beghal* (n 3).
[613] Miriam Goldby, 'Anti-money laundering reporting requirements imposed by English law: measuring effectiveness and gauging the need for reform' [2013] JBL 367. See also Cabinet Office, A Performance and Innovation Report, *Recovering the Proceeds of Crime,* June 2002, 78 para 78.
[614] FATF, 'Annual Report 1990–91' (Paris 13 May 1991) 4.
[615] FATF, 'Annual Report 1995–96' (Paris 28 June 1996) where the May 1990 recommendations are reproduced as Annex 1, 21–26.
[616] ibid 7 para 21.

that the customer's account is being utilised in money laundering transactions".[617] Today, the mandatory reporting requirement is found in Recommendation 20, with the revised interpretative note.[618] This development completed the transition from a voluntary reporting system to a mandatory model which left behind the concerns articulated at the outset in 1990 regarding the harshness of a mandatory approach.[619]

The obvious advantage of a suspicion-based reporting system is that it enables the law enforcement authorities to focus on the activities of money launderers who would otherwise escape their attention. Since the money launderer's paramount objective is concealment of the proceeds of crime, the visibility of the law enforcement authorities is necessarily limited. Compounded by the absence of an identifiable victim, the imposition of a suspicion-based reporting threshold serves to redress this information deficit. As Guy Stressens explains:

> Reporting duties are intended to provide the competent authorities with information on suspicious or unusual transactions (or information which allows them to filter such transactions), thus allowing those authorities to reconstitute the paper trail towards the predicate offence and its perpetrators.[620]

8.2.1 Legal duty

In this context, the recognition of a legal duty to report suspicious information relating to money laundering, in addition to a moral obligation, is unexceptional.[621] Although historically the common law has been squeamish about recognising a citizen's duty to compel co-operation with the detection of criminal activity,[622] Lord Wilmot CJ said long ago that "it is the duty of every man to prosecute, appear against, and bring offenders of

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[617] ibid 33.
[618] FATF Recommendations, 'International Standards on Combating Money Laundering and The Financing of Terrorism & Proliferation' (February 2012, updated June 2019) interpretative note 20(4), 80.
[619] See Stressens (n 36) 97–98, 161; Scott Mortman, 'Putting Starch in European Efforts to Combat Money Laundering' [1992] 60 Fordham L. Rev S429, S437 fn 55.
[620] Stressens (n 36) 112.
[621] See Chris Dent, 'The Introduction of Duty into English Law and the Development of the Legal Subject' [2020] 40(1) OJLS 158.
[622] As Lord Widgery CJ explained in the seminal case of *Rice v Connolly* [1966] 2 QB 414, 419 'It seems to me quite clear that though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority, and to refuse to accompany those in authority to any particular place; short, of course, of arrest'.

this sort to justice".[623] The offence to which Lord Wilmot was referring was perjury, and today, if presented as a legal duty, such an obligation would appear startling at first blush. But, as Jeremy Horder explains in his article on the case for the recognition of an excusing defence to information-provision offences in the bureaucratic State,[624] current legislative thinking seeks to persuade, if not coerce, citizens into assisting law enforcement authorities in their efforts to achieve their regulatory goals. The AML reporting regime, with its focus on the reporting duty in section 330(1) of POCA 2002, is cited by Horder as a well-known illustration of this technique:

> The main interest is the establishment of an ongoing (unpaid) duty on businesses handling money not to miss an opportunity to blow the whistle on possible money launderers. This is considered to be the best means over time effectively to promote the public interest in an economy fuelled by clean money. The synchronic interest in identifying blameworthy wrongdoers in particular cases is very much a secondary concern.[625]

What is unusual here is not the establishment of a reporting duty to report criminal conduct, in this instance suspected money laundering, but rather the invocation of an obligation supported by criminal sanction which requires a person to disclose information about the commission of conduct in which they are criminally implicated.

8.3 MAKING A SUSPICIOUS ACTIVITY REPORT

Again, to recap,[626] pursuant to section 330(1) of POCA 2002, a person (human or corporate) commits a criminal offence if he fails to make a SAR when he knows or suspects, or has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering. The information on which knowledge or suspicion is based must come to the person during his business in the regulated sector. In addition, the obligation to make a report arises only where a person can identify the other person suspected to be engaged in money laundering[627] or locate the whereabouts of any of the

[623] *Collins v Blantern* [1767] 2 Wils KB 347, 349.
[624] Horder (n 158).
[625] ibid 201.
[626] The law governing the UK's AML regime is set out in chapter 2.
[627] POCA 2002, s 330(3A).

laundered property.[628] Under section 340(11), money laundering is defined as an act which:

> (a) constitutes an offence under sections 327, 328 or 329; (b) constitutes an attempt, conspiracy or incitement to commit an offence specified in paragraph (a); (c) constitutes aiding, abetting, counselling or procuring the commission of an offence specified in paragraph (a); or (d) would constitute an offence specified in paragraph (a), (b) or (c) if done in the United Kingdom.

Reference was made in chapter 2 to four exemptions from liability which are narrowly configured. First, under section 330(6)(a), a person will be exempt from liability where he has a reasonable excuse for not making the report. Secondly, if the communication of the suspicious information by legal privilege, the information must not be disclosed pursuant section 330(6)(b), 330(7B), 330(10) and 330(11). Thirdly, an employee is exempted from liability under section 330(6)(c) and 330(7) where he has not been provided with professional training by his employer. Fourthly, pursuant to section 330(7A), in a small number of designated cases, the criminal offence is not committed where the money laundering takes place outside the UK and the money laundering is not unlawful under the criminal law applying in that country or territory.

8.3.1 Self-incriminating narrative

When submitting a mandatory report, an extensive narrative is anticipated by the law enforcement agencies, with a focus on identifying persons suspected of committing criminal conduct. In Guidance published in May 2019, the NCA provides for a narrative of up to 1,500 words which addresses the following questions - Who is involved? How are they involved? What is the criminal property? What is the value of the criminal property (estimated as necessary)? Where is the criminal property? When did the circumstances arise? When are the circumstances planned to happen? How did the circumstances arise? Why you are suspicious or have knowledge?[629]

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[628] POCA 2002, s 330(5).

[629] NCA, 'Guidance on submitting better quality Suspicious Activity Reports (SARs)' (May 2019) <www.nationalcrimeagency.gov.uk/who-we-are/publications/42-guidance-on-submitting-better-quality-sars/file> accessed on 10 April 2020.

In a case where a mandatory report involves criminal conduct committed by the reporting company through the acts or omissions of a company officer or employee, the incriminating nature of the narrative will become clear. The company officers and employees must be identified, together with a description of the criminal conduct which has been committed and the consequential benefit which has been received.

8.3.2 Self-reporting

There is no suggestion in the international texts or the UK pre-legislative materials whether the mandatory reporting requirement was intended to apply, or should apply, to the self-reporting of suspected money laundering by a person, whether individual or corporate. Certainly, the mandatory reporting obligation is sufficiently wide to embrace self-reporting, and compulsory self-reporting of individual or corporate involvement of suspected criminal conduct is a common feature of contemporary legal practice.

Further, the practice of voluntary self-reporting has developed to the point where it has become a cultural norm in the professional and commercial sectors. Voluntary self-reporting is actively encouraged by several law enforcement agencies, and in certain instances it is incentivised as one of many factors to be considered when an agency decides whether to initiate criminal proceedings. In the context of corporate financial crime, a combination of statutory provisions and prosecutorial guidance has operated to incentivise the voluntary self-reporting of corporate criminal conduct and declared the practice to fall firmly within the boundaries of the public interest.

When DPAs were introduced by Parliament in Schedule 17 of the Crime and Courts Act 2013 for application in serious corporate offences, paragraph 7(1)(a) made clear that after agreeing terms for a DPA an application would need to be made to the Crown Court for a declaration that entering into the agreement was "likely to be in the interests of justice". The court would also be asked to declare that the proposed terms were "fair, reasonable and proportionate". Guidance issued by the Crown Prosecution Service ("CPS") on Corporate Prosecutions contains the following indication:

> Additional Public Interest Factors Against Prosecution:
>
> A genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice, involving self-reporting and remedial actions, including the compensation of victims:
>
> In applying this factor, the prosecutor needs to establish whether sufficient information about the operation of the company in its entirety has been supplied in order to assess whether the company has been proactively compliant. This will include making witnesses available and disclosure of the details of any internal investigation.[630]

Another example may be referenced in connection with the twin corporate facilitation of tax evasion offences contrary to sections 45 and 46 of the Criminal Finances Act 2017. HMRC has issued guidance encouraging companies and partnerships to self-report their failure to prevent the facilitation of tax evasion.[631] The guidance states that a corporate self-report may be considered by prosecutors when deciding whether to initiate a criminal prosecution or resolve the case in another way.[632]

The key difference between a corporate self-report pursuant to the guidance issued by the CPS and HMRC and a self-report made under section 330(1) of POCA 2002 is that the former is voluntary whereas the latter is mandatory, and failure to make the mandatory report is punishable by a maximum of five years imprisonment and/or an unlimited fine. It is one thing for a company to voluntarily confess to criminal wrongdoing with, or without, identifying its officers and employees; it is quite another for a company to be compelled to do so, in circumstances where the wrongdoing of company officers and employees are exposed as collateral damage.

8.4 ENGAGING THE PRIVILEGE

It is against this background that the application of the privilege against self-incrimination to the mandatory reporting requirement in section 330(1) of POCA 2002 falls to be

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630 CPS, 'Guidance on corporate prosecutions' <www.cps.gov.uk/legal-guidance/corporate-prosecutions> accessed, 11 April 2020.

631 HMRC, 'Guidance: Tell HMRC your organisation failed to prevent the facilitation of tax evasion' <www.gov.uk/guidance/tell-hmrc-your-organisation-failed-to-prevent-the-facilitation-of-tax-evasion> accessed, 11 April 2020.

632 ibid.

considered. There are powerful arguments which militate in favour of recognising a claim to privilege in circumstances where a person, individual or legal, is required to make a report of suspicious criminal activity which discloses that they, or in the case of a company, company officers and employees, have been involved. There are three determining issues. First, the maker of a self-report of criminal conduct must be exposed to a real risk of criminal prosecution. Secondly, the requirement to make a self-report needs to be coercive, in the sense that it is legally compelled. Thirdly, the rationales underlying the recognition of privilege must inure to its application, and the public interest is served.

8.4.1 Risk of criminal prosecution

In its early conception, the privilege against self-incrimination was invoked in cases where there was direct association between the use of incriminating answers and their admission in legal proceedings which were already taking place or were about to take place. The circumstances in which the privilege could be engaged slowly widened, and the courts began to recognise the application of the privilege where legal proceedings were not extant, but where there was a real or appreciable danger to the potential self-incriminator that an incriminating statement might be used against interest, in any future criminal or regulatory proceedings which may be brought.[633] In the mid-nineteenth century the Court of Kings Bench held in *R v Boyes*[634] that the privilege was available to be claimed where "there is reasonable ground to apprehend danger to the witness from his being compelled to answer". As Lord Cockburn CJ explained:

> [W]e are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party,

[633] *R (CPS) v Bolton Magistrates Court* [2003] EWHC 2697 (Admin).
[634] *R v Boyes* (1861) 1 Best and Smith 311.

> called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law.[635]

In the case of mandatory reporting, although it is neither inevitable nor probable that the self-incriminator will face criminal prosecution, there is a real risk that criminal prosecution may be the ultimate outcome.

The substance of the mandatory disclosure will need to be investigated, and at the end of an investigation a law enforcement authority may decide to take no further action. Alternatively, the case could be referred to the Crown Prosecution Service for review. In this event, a criminal prosecution will ensue where the Crown Prosecution Service is satisfied that there is enough evidence to prove guilt to the criminal standard of proof, beyond reasonable doubt. Also, the Crown Prosecution Service must be satisfied that the public interest favours the institution of a prosecution. As the Code for Crown Prosecutors states, "there has never been the rule that a prosecution will automatically take place once the evidential stage is met … In some cases, the prosecutor may be satisfied that the public interest can be properly served by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal rather than bringing a prosecution".[636]

When a SAR is made, it is entered onto the NCA's database called Elmer. Over two million SARS are held on Elmer and can be interrogated by the NCA and other law enforcement authorities using search programmes known as Arena and Discover. The NCA regards SARs as "a critical intelligence resource" which can be instrumental in identifying serious crime. After a SAR is submitted to the NCA, the person making the report loses control of the information set out in the report. "A single SAR may be used several times by several different users for different purposes e.g., the information within the same SAR may inform a) HMRC about taxation, b) local police about fraud or theft, and c) a government department about a regulatory issue or a weakness in a financial product". The NCA adds that information provided through SARs "can lead to the

[635] ibid 330.
[636] CPS, 'Code for Crown Prosecutors' (March 2018) para 4.10 <www.cps.gov.uk/publication/code-crown-prosecutors> accessed on 14 April 2020.

instigation of new investigations or enhance ongoing operations" (NCA, SARs In Action, Issue 2, August 2019, pages 8 and 9).

Notwithstanding the evidential and public interest gateways through which a case must pass before criminal process is initiated, the fact remains that at the time when the mandatory duty to disclose suspected money laundering arises, the risk of prosecution is real and appreciable. As the Court of Appeal recently affirmed in connection with a claim to legal professional privilege, criminal prosecution can be reasonably contemplated before a law enforcement authority has decided to subject the matter to formal criminal investigation, let alone criminal prosecution.[637]

8.4.2 Risk in minor cases

Next, it falls to be considered whether the law should recognise that a real and appreciable risk of criminal prosecution will arise in every case. Cases will be fact-specific, and level of risk will be variable, depending on the subject-matter of the report and the extent of independently corroborative evidence available to prove the suspected criminal conduct in question. In some cases, where the narrative discloses suspicious criminal conduct which is serious and can be supported by reference to documents, the risk of criminal prosecution is significant. In other cases, where the narrative of the mandatory report reveals suspected criminal conduct of a relatively minor nature, the risk of criminal prosecution will be much lower. But the threat cannot be entirely discounted; a residual risk remains.

When a person confesses the commission of a criminal offence to a law enforcement authority, the confessor loses control of the information, and it may be used by the authority as it chooses. The Crown Prosecution Service has a wide discretion when deciding whether to initiate a criminal prosecution, including in situations where the criminal conduct was relatively minor but for policy reasons criminal prosecution was nonetheless justified. The CPS Legal Guidance on Minor Offences states that:

[637] *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited* [2018] EWCA Civ 2006, [86]–[101] (Sir Brian Leveson).

> Whether a minor offence merits prosecution will depend on the circumstances of the case, such as the nature of the offence and the way in which it was committed, the loss or harm caused, the likely sentence, the views of the victim, and any previous relevant offending by the suspect.[638]

Notwithstanding the possibility of an alternative disposal, a real and appreciable risk of criminal prosecution for the commission of a minor offence remains extant. A trial Judge has no power to stop a criminal prosecution where he considers that as a matter of policy the prosecution ought not to have been brought.[639] Moreover, the High Court will not interfere with a decision to initiate criminal proceedings unless the decision is irrational or perverse.[640] Once a confession to the commission of criminal conduct is at large, whether the conduct is serious or minor, the risk of criminal prosecution is neither imaginary nor barely possible. In these circumstances, the argument for the engagement of the privilege against self-incrimination is compelling.

In many instances, as Andrew Choo points out, determining whether the requisite degree of likelihood of criminal prosecution has been reached may be difficult and quite speculative.[641] For example, in *Weh v Austria*,[642] the ECtHR was divided in a case where a driver had been prosecuted for giving incorrect information in response to a statutory request which it was compulsory to answer. The Court noted that at the time when the incorrect information was given, there was no criminal prosecution for speeding either pending or contemplated, and so the link between the driver's obligation to disclose and the institution of criminal proceedings was hypothetical and remote.[643] Three dissenting judges took a different view. In their opinion, it was clear that the institution of criminal proceedings must have been contemplated against the driver for the commission of a traffic offence, and the requirement to provide information was no more than a preliminary step in the commencement of prosecution process.[644] The minority reasoning is preferred, since it accords with the practical reality of the situation.

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638 CPS, Legal Guidance: Minor Offences <www.cps.gov.uk/legal-guidance/minor-offences> accessed 14 April 2020.
639 *DPP v Humphreys* [1977] AC 1, 23–25 (Viscount Dilhorne), 46 (Lord Salmon) and 53 (Lord Edmund-Davies).
640 *R v Inland Revenue Commissioners, ex p Mead and Cook* [1992] STC 482, 492 (Stuart-Smith LJ).
641 Choo (n 227) 29.
642 *Weh v Austria* [2004] 40 EHRR 37.
643 ibid [42], [52]– [53], [56]– [57].
644 ibid [O-I1].

8.4.3 Derivative evidence

As noted, it is axiomatic that a mandatory report contains incriminating information, and in the case of a corporate self-reporter, there will be occasions when the narrative contains an admission which incriminates the reporting company as well as its officers and employees. In addition to an admission in the narrative, the information contained in the corporate self-report may provide the NCA or relevant law enforcement authority with the basis for seeking to obtain underlying material of evidential value, such as documentary material which can be used to prove the commission of criminal conduct which has been brought to its attention. In the context of confessions, English law has long recognised that evidence of facts discovered as a result of an inadmissible confession ("the fruits of the poisoned tree") can be adduced in evidence as proof of the confessor's guilt.[645]

It is no answer to concerns about corporate vulnerability to indicate that mandatory reports are documents impressed with public interest immunity and not subject to disclosure. Since the rule against non-disclosure is not absolute, the risk to a company from producing self-incriminating information remains. Article 39(2) of the EC Fourth Directive on Money Laundering recognises that the obligation to conceal the existence of a mandatory report on public policy grounds does not apply to disclosure for law enforcement purposes.[646] In similar vein, judges in England and Wales have ruled that circumstances may arise where disclosure of a mandatory report is necessary for the fair and just resolution of litigation.[647] But ultimately, it is the ability of a law enforcement authority to adduce derivative evidence which presents the most significant threat to a company in terms of exposure to criminal prosecution.

The NCA explains in its literature that a mandatory report detailing investment activity and identifying bank accounts can lead to the instigation of new investigations or enhance on-going operations.[648] The NCA makes no secret of the fact that mandatory reports are

[645] *R v Warwickshall* [1783] 1 Leach 298; *Lam Chi-Ming v R* [1991] 2 AC 212; PACE 1984, s 74(4)–(6).
[646] Directive (EU) 2015/849 (n 45).
[647] See Jonathan Fisher, 'Financial Disclosures - Their Use in Criminal and Civil Proceedings' Money Laundering Bulletin, Informa, 28 January 2014.
[648] NCA, 'Suspicious activity reports' <www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/money-laundering-and-terrorist-financing/suspicious-activity-reports> accessed 24 April 2020.

made available to other law enforcement authorities for investigation.[649] In its Consultation Document on Anti-Money Laundering, the Law Commission confirmed that mandatory reports are disseminated in order to assist with an investigation which may lead to prosecution. According to the Law Commission, there are over 4,800 trained officers from 77 agencies with direct access to the NCA's database. The mandatory reports "are routinely used in general criminal investigations, not just in money laundering or terrorism financing investigations".[650]

8.4.4 A coercive measure

The coercive aspect of section 330(1) is plain to see. The aspect of coercion stems from the fact that the requirement to make the disclosure is legally compelled. In some instances, a coerced outcome may result from voluntary action,[651] as where a person is cajoled but not forced into a course of action. However, under section 330(1) of POCA 2002, the issue of voluntariness does not arise.[652] There is nothing consensual about the statutory imposition of a mandatory reporting requirement. Failure to report knowledge, suspicion, or reasonable grounds for suspecting that another person is engaged in money laundering constitutes a criminal offence and is punishable by a maximum sentence of five years imprisonment. In the case of a company which fails to report, the maximum sentence is an unlimited fine.

In *R v Duff,*[653] where a solicitor was sentenced to a period of six months imprisonment for failing to report reasonable grounds for suspecting another person was engaged in money laundering, the Court of Appeal upheld the sentence, noting that money laundering was "a very serious matter and breaches of the legislation by professional people cannot be overlooked".[654] A similar approach was taken by the Court of Appeal

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649 ibid.
650 Law Commission, *Anti-Money Laundering: the SARS Regime Consultation Paper* (Law Com CP No 236 20 July 2018) para 4.8.
651 See Alan Wertheimer, *Coercion* (Princeton University Press 1987) for an interesting contribution to the development of a theory of coercion.
652 In *R v White* [1999] 2 SCR 417, the Canadian Supreme Court upheld a trial judge's decision to exclude evidence of conversations between a driver and a police officer immediately after the driver had reported an accident. The driver's statements fell to treated as compelled information since the driver honestly and reasonably considered she was obliged to answer the police officer's questions.
653 *R v Duff* [2002] EWCA Crim 2117.
654 ibid [22] (McCombe J).

in *R v Griffiths*[655] where, again, a solicitor was convicted of failing to make a mandatory disclosure. The Court of Appeal reduced his sentence from eighteen months imprisonment to six months imprisonment, whilst taking the opportunity to affirm that "society demands a high degree of professionalism from solicitors. They are one of the door keepers of financial probity in connection with this legislation and it is one of the obligations to which each one will be required to measure up to the hilt".[656] The Court concluded its judgment with a warning: "We do not leave the case without underlining to all professional people involved in the handling of money and with an involvement in financial transactions the absolute obligation to observe scrupulously the terms of this legislation and the inevitable penalty that will follow failure so to do".[657]

Unquestionably, the mandatory obligation in section 330(1) is coercive.

As explained in chapter 2, the mandatory reporting obligation applies to a company as well as an individual. In 2013, Parliament confirmed a company's vulnerability to criminal prosecution under section 330(1) when it included the offence in the list of offences in respect of which a DPA can be made.[658] A DPA can be made between a relevant law enforcement authority and a company, but not an individual.[659]

8.4.5 Underlying rationales

Reviewing the development of the privilege against self-incrimination from its Biblical origin to contemporary times, chapter 4 demonstrated there were multiple rationales underpinning the privilege which were not mutually exclusive. Chapter 4 explored how in its Tudor and Stuart formulations the application of the privilege rested on the need to ensure evidential reliability, so that a court could be confident that the testifier was not motivated by impure motives or compelled by threat or use of force to make an admission that was untrue. More recently, conceptions of privacy, autonomy and dignity have supported the privilege's existence, in accordance with values which foster the rule of law in a fair and just society. In so far as interaction between section 330(1) of POCA 2002

655 *R v Griffiths* [2006] EWCA Crim 2155.
656 ibid [12] (Leveson J).
657 ibid [17].
658 Crime and Courts Act 2013, sch 17, para 23.
659 ibid para 4(1).

and the privilege is concerned, historic and contemporary rationales are conjoined. As chapter 4 demonstrates, it is the inherent values associated with rights of privacy, autonomy, and dignity, which, in the context of its engagement with section 330(1) of POCA 2002, underpin the application of the privilege today.

In so far as a company is concerned, there are sound reasons for the legal protection of these rights, as developed in the corporate chapters of this thesis. There is a sound theoretical justification for the recognition of a company's right to assert the privilege against self-incrimination when it arises, and it is unnecessary to repeat the contentions rehearsed in chapter 7. This is not to say that the theoretical foundation for the privilege's engagement in the case of a company with the mandatory reporting requirement in section 330(1) is exclusively based on considerations privacy, autonomy, and individual dignity. The rationale for the privilege is not a binary choice. In modern times, physical threats and deprivations have made way for more subtle and sophisticated pressures which may undermine the reliability of a statement made to the law enforcement authorities where coercive measures such as risks of criminal prosecution, imprisonment and loss of reputation are at large.

8.4.6 Unreliability

It would be a mistake to assume that the narrative contained in a mandatory report filed under section 330(1) is entirely reliable. In the case of a self-report, the mandatory report dons the character of a document prepared in the hope that it will be perceived by the law enforcement authorities as neutrally and dispassionately written, when in fact, the maker has his own interests to advance. An individual self-reporter is not pressured to respond to the asking of hostile questions, and provided he acts relatively swiftly after discovering suspected money laundering,[660] there is no prescribed constraint on the length of time an individual may take before filing a mandatory report. In consequence, it is possible for an individual to reflect carefully on the content of the narrative before the mandatory report is submitted. Legal advice can be obtained where necessary, with a view to minimising the reporter's acceptance of criminal involvement in a way which is not misleading and purports to discharge the letter, if not the spirit, of the reporting

[660] Section 340(4) of POCA 2002 provides that a mandatory disclosure must be made 'as soon as is practicable' after information giving rise to reasonable grounds for suspicion has been received.

requirement. Guidance issued by the NCA invites a reporter to consider carefully exactly what information is reported. The Guidance urges a reporter not to report too much information but instead to focus on transactions that directly relate to suspicious activity, "and explain why you think the transaction supports your reason for suspicion".[661]

Where a mandatory report is made by a company, there is greater opportunity for a narrative which minimises the company's criminal exposure at the expense of its officers or employees. In this situation, the reliability of incriminating statements cannot be warranted. In *Serious Fraud Office v Standard Bank plc*,[662] where the company made admissions in a DPA which implicated the criminal culpability of its employees, the purity of the company's motives was subsequently challenged.

Approximately three months after the DPA had been finalised, one of the former employees of Standard Bank's subsidiary company implicated in the payment of bribes launched a claim in the High Court of Tanzania against Standard Bank.[663] In particular, the claimant alleged that the parent bank offloaded its responsibility for the bribery onto the employees of its subsidiary company, in circumstances when it knew about the payment of the bribes. The claimant alleged that Standard Bank entered into the deferred prosecution agreement for the sole purpose of saving its international business interests at the expense of its employees' reputation and the subsidiary company. The civil claim in Tanzania was settled. As a measure of the concern generated by the DPA, a public petition launched by a Tanzanian living in The Netherlands sought to persuade the SFO to re-open the case on the ground[664] that it was misled by the false information which Standard Bank had given.

The potential unreliability of self-incriminating information set out in a SAR is an insufficiently strong argument to support the disregarding of self-incriminating

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[661] NCA, 'SARs Regime Good Practice Frequently Asked Questions Suspicious Activity Reports' (v2.0 July 2020) 6 <www.nationalcrimeagency.gov.uk/who-we-are/publications/462-sars-faq-july-2020/file> accessed 31 March 2021.

[662] *Serious Fraud Office v Standard Bank plc* (Southwark Crown Court, 30th November 2015) approved judgment, Levison LJ.

[663] 'Shose Sinare goes to Court over Standard Bank Group allegations' *Business Times* (Tanzania, 10 March 2016).

[664] 'Tanzania: Campaign to Reopen Probe on Standard Bank over $600 (million) Bribery heats up' *Tanzania Daily News* (Tanzania, 17 March 2016) <https://allafrica.com/stories/201603170163.html> accessed 13 April 2021.

information without engaging the privilege against self-incrimination. Self-incriminating information set out in a SAR may be truthfully stated, even where the information has been presented in a manner which minimises the extent of corporate offending. To this extent, the self-incriminating information is not unreliable, and therefore the potential for unreliability is insufficient to protect a company from the dangers which flow from the compelled disclosure of self-incriminating information. It is for this reason that it becomes necessary for the privilege against self-incrimination to be engaged. In the final analysis, the mandatory reporting requirement in section 330(1) is a coercive measure, and by virtue of its compulsory element it undermines a company's right to maintain its privacy, dignity, and autonomy.

8.5 BEGHAL v DPP

Having established the foundation for the application of the privilege against self-incrimination for failing to make a mandatory disclosure under section 330(1), discussion would be incomplete without a comprehensive critique of the Supreme Court's decision in *Beghal v DPP*.[665] The decision is important because, although the facts of the case involved an individual and not a company, the nature of the statutory powers exercised in *Beghal v DPP* comes closest to the AML reporting regime in its consideration of the privilege against self-incrimination where there is a statutorily obligation to disclose information.

In its application of key provisions of the ECHR, the Supreme Court was divided by a majority of four to one, and subsequently, the ECtHR reached a different conclusion.[666] The privilege against self-incrimination featured in the case as an auxiliary argument; nonetheless, the judicial observations in both courts merit full consideration, even though they are not determinative. Lord Kerr's dissenting judgment is the most pertinent, in so far as consideration of the privilege against self-incrimination is concerned. However, ultimately the decision adds little to the interaction between section 330(1) of POCA 2002 and the privilege against self-incrimination since the application of the privilege is necessarily case-specific, with an outcome dependant on the degree of coercive pressure brough to bear on the individual, the degree of risk to criminal prosecution, the language

[665] *Beghal* v DPP [2015] UKSC 49.
[666] *Beghal v United Kingdom* [2019] 69 EHRR 28.

used by the legislature in the enactment of the reporting obligation, and the competing public policy interests which arise.

8.5.1 The facts

The facts in *Beghal v DPP* concerned paragraph 2 of Schedule 7 of the Terrorism Act 2000, by which Parliament had introduced a power which allowed police officers, immigration officers and customs officers at a port or border to require an individual to answer questions for the purpose of determining whether a person was associated with terrorist activity. Under paragraph 2(4), the power to ask questions for this purpose may be exercised irrespective of whether the examining officer has grounds for suspecting that the person has been associated with terrorist activity. The examining officer has additional powers to require production of documents in a person's possession, and to search and detain the person. There is little guidance on how persons are selected for questioning. The Home Office Code of Practice issued in 2014 instructed officers to avoid discrimination and arbitrary action, and not to select individuals solely upon their religion or ethnic background. Rather, the decision to stop "must be informed by considerations relating to the threat of terrorism".[667] This suggests that, generally, the decision to stop an individual would be intelligence-led.[668] Failure to comply with an examining officer's requirements constitutes a criminal offence and is punishable by a maximum of three months' imprisonment.[669]

In this case, Mrs Beghal had been stopped and questioned by police at East Midlands Airport about, amongst other things, the details of her travel itinerary, and her relationship with her husband who had been convicted of terrorist offences. She refused to answer questions and was prosecuted. After an attempt to stay the prosecution for abuse of process failed, Mrs Beghal pleaded guilty, and the Magistrates Court imposed a conditional discharge.

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[667] *Beghal* (n 666) [17] (Lord Hughes and Lord Hodge).

[668] Following the ECtHR decision, the Home Office has given more extensive guidance on the circumstances in which an individual may be stopped. See Home Office, 'Code of Practice: Examining Officers and Review Officers under Schedule 7 to the Terrorism Act 2000 paras 18 and 19' (25 September 2019).

[669] Terrorism Act 2000, sch 7 para 18.

8.5.2 The decision

Challenging the failed abuse of process ruling in the Supreme Court, Mrs Beghal argued that the Schedule 7 powers constituted a disproportionate invasion of her privacy rights protected by Article 8 of the ECHR. The majority of the Supreme Court disagreed, regarding the level of intrusion into privacy to be "comparatively light and not beyond the reasonable expectations of those who travel across the UK's international borders".[670] The Court considered that "…it is not an unreasonable burden to expect citizens to bear in the interests of improving the prospects of preventing or detecting terrorist outrages".[671] The majority judges explained that the value of Schedule 7 powers to the law enforcement authorities eclipsed the level of intrusion into privacy of the individual which was viewed as comparatively light, thereby rendering the interference with privacy rights to be proportionate.[672]

Lord Kerr disagreed, expressing concern about the potential reach of the Schedule 7 powers:[673]

> A person stopped under this provision is required to answer questions even though they may not have had the benefit of legal advice. Individuals may have many reasons why they do not want to answer questions as to their movements and activities. These reasons are not necessarily or invariably discreditable. Some may be apprehensive about answering questions without a lawyer being present or may lack a full understanding of the significance of refusing to answer. The fact that they are open to criminal sanction, which could include imprisonment, for failing to answer questions, renders the exercise of these powers a significant interference with Article 8 rights, in my opinion. [674]

The ECtHR preferred Lord Kerr's approach, holding that the Schedule 7 power offended the principle of legality because there were insufficient safeguards against arbitrary abuse to counterbalance the interference with Mrs Beghal's privacy.[675] In the light of this

[670] *Beghal* (n 666) [51] (Lord Hughes and Lord Hodge).
[671] ibid [51].
[672] ibid [48], [51].
[673] ibid [126] (Lord Kerr).
[674] ibid [127] (Lord Kerr).
[675] *Beghal v United Kingdom* (n 667).

determination, the ECtHR concluded that it did not need to consider Mrs Beghal's second argument that Schedule 7 infringed her right to liberty which was safeguarded under Article 5 of the ECHR. The majority judges in the Supreme Court were not impressed with the argument since, in the Court's view, the length of detention for asking questions was proportionate and no longer than necessary for the completion of the questioning process.[676]

In so far as Mrs Beghal's reliance on the privilege against self-incrimination was concerned, neither the majority judges in the Supreme Court nor the ECtHR found this aspect of the argument persuasive. Mrs Beghal contended that, in response to the questions she was asked, she was entitled to assert the privilege against self-incrimination at common law, and further, her right to remain silent was protected by Article 6 of the ECHR. For Lords Hughes and Hodge, with whom Lords Neuberger and Dyson agreed,[677] however, it could not be said that the exercise of the Schedule 7 powers subjected Mrs Beghal or her husband to a real or appreciable risk of prosecution in circumstances where the power was not directed at the obtaining of evidence for use in a prosecution.[678] The point was fortified by the fact that Parliament had omitted to mention the privilege against self-incrimination in Schedule 7. This suggested that Parliament had not considered the privilege to be engaged and there was no common law right which needed to be overridden.[679] This had to be correct, the Supreme Court reasoned, because if the privilege had applied, the Schedule 7 powers would be rendered largely nugatory.[680]

Protection under Article 6 of the ECHR was not triggered because, at the time when she was questioned, Mrs Beghal was not a person "charged" with a criminal offence, within the meaning of ECtHR jurisprudence, and there was no ongoing criminal investigation. As the Supreme Court concluded in *Ambrose v Harris*,[681] a person is to be treated as "charged" when there is suspicion against him, and his case is subject to investigation. The change in status occurs at the point when a person is no longer treated as a potential witness but a possible suspect. This was the only point on which the ECtHR agreed with the majority of the Supreme Court. As the ECtHR noted, "the mere fact of [Mrs Beghal's]

[676] *Beghal* (n 666) [56] (Lord Hughes and Lord Hodge).
[677] ibid [72] (Lord Neuberger and Lord Dyson).
[678] ibid [64] (Lord Hughes and Lord Hodge).
[679] ibid [63]–[64] (Lord Hughes and Lord Hodge).
[680] ibid [64] (Lord Hughes and Lord Hodge).
[681] *Ambrose v Harris* [2011] UKSC 43, [44] (Lord Hope).

selection for examination could not be understood as an indication that she herself was suspected of involvement in any criminal offence".[682]

8.5.3 Lord Kerr's dissent

Lord Kerr saw matters differently. To begin with, for the privilege against self-incrimination to be engaged, Lord Kerr's articulation of the test for engagement was more nuanced. Citing Roskill LJ's dicta in *Rio Tinto Zinc v Westinghouse Electric Corporation*,[683] the privilege arises unless the risk of prosecution is "so far beyond the bounds of reason as to be no more than a fanciful possibility". Applied in this case, the risk of prosecution was not fanciful. Lord Kerr explained that he could not understand how it could be said that the power in Schedule 7 to require answers was not aimed at obtaining information for the purpose of prosecution. "The purpose of questioning … is to determine whether the person questioned appears to be a terrorist … If [the answer is yes] … why should those answers not form the basis of a prosecution? It seems to me inescapable that there is a real and appreciable risk of prosecution if the answers to the questions posed prove to be self-incriminating".[684] Lord Kerr also disagreed with the majority judgment over the application of section 78 of PACE 1984. Lord Kerr considered that "it is by no means clear that evidence of those answers will automatically be excluded if there is other evidence which directly implicates the person responding".[685]

Lord Kerr referenced discussion in the lower court when the Director of Public Prosecutions declined to undertake never to adduce evidence in a criminal prosecution against an interviewee of answers to questions which the interviewee had given pursuant to the Schedule 7 requirement. It followed, as Lord Kerr explained, that "[t]he plain fact is … that self-incriminating answers given in response to questions posed under Schedule 7 can form the basis of a prosecution."[686] The majority of their Lordships considered that Lord Kerr overstated the vulnerability to criminal prosecution. Lords Hughes and Hodge explained that in their view the risk of an admission obtained in questioning being used against the interviewee in prosecution was significantly reduced by the application of the

[682] ibid [121].
[683] *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547 (HL), 579H (CA).
[684] *Beghal* (n 666) [115] (Lord Kerr).
[685] ibid [117] (Lord Kerr).
[686] ibid [116]– [118] (Lord Kerr).

test for exclusion of evidence in section 78 of PACE 1984.[687] This provides that a court may exclude prosecution evidence where it would impact adversely on the fairness of the proceedings. When making this determination, the court considers the circumstances in which the evidence was obtained. If it is inevitable that the evidence would be excluded, a risk of self-incrimination does not arise.[688] Their Lordships added that if Mrs Beghal and her husband had been prosecuted, the possibility that Mr Beghal would adduce his wife's incriminating answers in his defence is "largely theoretical", and in any event it is subject to severance of the indictment into separate trials.[689] But as Lords Hughes and Hodge acknowledged, reliance on the exercise of judicial discretion is not to be equated with the exercise of a right to remain silent in the face of questioning.[690]

This hardly provides a safe basis for the articulation of legal principle in a situation where the exercise of a fundamental right has been brought into play. Additionally, the majority approach rests heavily on the possible adduction of self-incriminating evidence in a criminal prosecution of the interviewee. However, the risk to the interviewee is more nuanced. As Lord Kerr point out, the greater risk to the interviewee is not that self-incriminating answers will be adduced as prosecution evidence, but rather that the answers prompt enquiries which lead to the obtaining of new evidence.[691] In Lord Kerr's view, it is the risk that a person will be prosecuted on evidence obtained as a result of a self-incriminating answer which engages the privilege against self-incrimination at common law. Also, this risk exposes the individual to criminal charge and is incompatible with due process protections in Article 6 of the ECHR.[692] It is inevitable that the interaction between the privilege against self-incrimination and the obtaining of derivative evidence will return to the courts on a future date. Lords Hughes and Hodge recognised that there remains a real risk that derivative evidence could be used in the prosecution of a Schedule 7 interviewee.[693]

[687] ibid [66] (Lord Hughes and Lord Hodge).
[688] ibid.
[689] ibid [67] (Lord Hughes and Lord Hodge).
[690] ibid [66] (Lord Hughes and Lord Hodge).
[691] ibid [117]–[118] (Lord Kerr).
[692] ibid [118] (Lord Kerr).
[693] ibid [64] (Lord Hughes and Lord Hodge).

8.5.4 Distinguishing Beghal v DPP

At first blush, the arguments put forward by the majority judges in *Beghal v DPP* might be taken to undermine the contention in this thesis that the privilege against self-incrimination is engaged by section 330(1) of POCA 2002. Certainly, some parallel considerations come to mind. Both requirements in section 330(1) and Schedule 7 require disclosure of information to the law enforcement authorities which may be self-incriminating and concern involvement in serious criminal misconduct. Similarly, the requirement to disclose information is coercive, with failure to disclose information constituting a criminal offence contrary to section 330(1) and paragraph 18 of Schedule 7. Both offences are punishable by imprisonment. In many instances under section 330(1) and Schedule 7, there will not be an ongoing criminal investigation into the affairs of the person disclosing the information, although this does not necessarily follow in every case.

Here, the similarities end. The engagement between the privilege against self-incrimination and the mandatory self-reporting requirement pursuant to section 330(1) of POCA 2002 is distinguishable in form and substance from the circumstances in *Beghal v DPP*.

8.5.4.1 Greater level of coercion

First, the degree of coercion present in the obligation to disclose suspicious information relating to money laundering eclipses the coercive element which is present in the Schedule 7 requirement to answer questions. Under section 330(1), a person is subjected to a maximum sentence of five years imprisonment and/or an unlimited fine. Under Schedule 7, a person is subject to three months imprisonment maximum.

8.5.4.2 Higher risk of self-incrimination

Secondly, the risk of criminal prosecution is qualitatively greater in the case of a mandatory disclosure under section 330(1) than answers to questions asked under Schedule 7. The information contained in a section 330(1) disclosure is specific and focused on the commission of specific criminal conduct or a type of conduct as well as the identity of the person(s) committing it. Schedule 7 is generic, with the topic of the

questions led by the interviewing officer. Also, knowledge, suspicion, or reasonable grounds for suspecting the commission of money laundering need to be present before a mandatory report is made. There is no precedential requirement which needs to be satisfied before a law enforcement officer stops a person at a port or border and asks questions.

8.5.4.3 Enhanced privacy infringement

Thirdly, in the balancing of competing public interests between an obligation to disclose on the one hand, and the engagement of the privilege against self-incrimination on the other, different considerations arise.

Most obviously, where the mandatory reporting obligation under section 330(1) is engaged, there is no prior knowledge of suspected criminality on the part of the State; yet nonetheless, a person (individual or corporate) is required to take the initiative and inform the State about matters of which the State may know nothing. This is not necessarily the case under Schedule 7. Although the law enforcement authorities may exercise their power to stop and question on a random basis without any prior information, the Code of Practice offers guidance on the type of factors which should be considered. These factors suggest that the State may have some prior knowledge of the detainee's background. In *Beghal v DPP*, it is not without significance that Mr Beghal had been convicted of offences associated with terrorism.

Also, public policy in favour of eroding privacy rights under Article 8 of the ECHR is stronger under Schedule 7 since it involves risk to life. The mandatory reporting requirement in section 330(1) involves the disclosure of information relating to the handling of property which represents the benefit of criminal conduct. Whilst it is true that the predicate criminal offence producing the benefit may not be confined to financial crime, (such as, for example, profits from drug-trafficking and paedophilia rings), the focus of the disclosure fixes upon the handling of property, which is secondary to, and parasitical on, the commission of the predicate offence.

Finally, whilst the recognition of the privilege against self-incrimination may neuter the requirement to answer questions under Schedule 7, this is not the case under section 330.

The mandatory reporting requirement continues to have significant application in cases where the reporter stands at arm's length with, in the language of section 330(2), "another person engaged in money laundering".

8.5.4.4 Companies are included

The mandatory reporting obligation in section 330(1) applies to a company whereas the requirement to answer questions under Schedule 7 does not. It follows that issues relating to the importance of maintaining corporate privacy arise under section 330(1) which are of no concern under Schedule 7.

In these circumstances, the relevance of the views expressed by the majority in *Beghal v DPP* is limited and sheds little light on the considerations which apply to the engagement of the privilege against self-incrimination with the mandatory reporting requirement in section 330(1) of POCA 2002. In any event, Lord Kerr's analysis of the principles underlying the application of the privilege against self-incrimination is much to be preferred. The analysis put forward by Lord Kerr accords with the proper basis for invoking the privilege against self-incrimination and supports the argument that it should be capable of invocation where the self-reporting of criminal conduct by individuals and companies, with their officers and employees, are concerned.

8.5.4.5 Criticism

Recognition of the right to assert the privilege against self-incrimination in response to the mandatory reporting obligation in section 330(1) does not need to precipitate an argument that the case of *Beghal v DPP* was wrongly decided. But, on any view, the majority reasoning in *Beghal v DPP* is scarred by a striking internal contradiction.

In the judgment delivered by Lords Hughes and Hodge, the judges referenced the view of the UK's Independent Reviewer on Terrorist Powers (then David Anderson QC) on the value of the Schedule 7 power to the law enforcement authorities. The judges noted that the Reviewer had concluded Schedule 7 assisted in the gathering of valuable intelligence:

> Sometimes this may trigger a train of inquiry which leads directly to a prosecution; on far more occasions it is the accumulation of individually small pieces of intelligence which, combined, may inform both particular and general responses to the terrorist threats confronting this country. It is a commonplace of detective or security work that a 'jigsaw' approach can yield vital results beyond the significance initially apparent from any single piece of information.[694]

It is surprising that the Court proceeded to hold that the risk of prosecution was neither real nor appreciable when in previous cases the Schedule 7 power had been used to elicit a vital piece of incriminating information from a detained person. Moreover, the prospect of a criminal prosecution flowing from the exercise of Schedule 7 powers is directly referenced. In these circumstances, the reasoning of the majority judges is not sustainable, and it can be explained only by differing judicial perceptions over the balancing of competing public interests.

8.6 STATUTORY CONSTRUCTION

Finally, and fundamentally, on its true construction that statutory wording of the mandatory obligation in section 330(1) of POCA 2002 suggests that the reporting requirement was directed at the disclosure of information concerning the activities of a third party and not the person making the report. The statutory focus on the criminal activities of a third party suggests that the legislator did not have the potential criminal exposure of the report-maker in mind, and recognition of the privilege against self-incrimination is consistent with this understanding.

Section 330(2) of POCA 2002 makes clear that the reporter's knowledge or suspicion relates not to the reporter, but to "another" person who is engaged in money laundering. Under section 330(3) the information must have come to the person "in the course of a business" which the reporter is carrying out. The requirement that the information must have come to the reporter in this way suggests that it is not information which is already in his possession as a participant in crime. In 2005, Parliament added an additional requirement which had to be satisfied before a mandatory report was required to be made.

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[694] *Beghal* (n 666) [22].

Section 330(3A) stipulated that a report should not be made unless the report can identify the suspected money launderer, or at least disclose information which assists in identifying the suspected money launderer.[695] Section 330(3A) aligns with section 330(5) which makes clear from the outset that the disclosure must reveal the identity of the suspected money launderer, the whereabouts of the laundered property if known, and the information giving rise to knowledge or suspicion.

8.6.1 Individual self-incrimination

In the case of an individual, a question arises as to whether the wording of section 330(1) captures a failure to report where the person engaged in money laundering is the same person as the person who is obliged to make a mandatory disclosure. In its plain meaning, where section 330(2) uses the pronoun "he" to designate the person obliged to make a report in order to avoid committing an offence of failure to disclose, this person is clearly distinguishable from "another person" engaged in money laundering. There are two persons contemplated in section 330(2), not one. On this analysis, if an obliged individual is the sole criminal participant engaged in money laundering, no issue of self-incrimination would arise since the mandatory obligation to make a disclosure would not be triggered.[696] In this situation, there is no "other" person in respect of whom the report would be made.[697]

In practice, this situation rarely occurs. Typically, more than one criminal participant is involved in money laundering activity. If a person working in the regulated sector handles proceeds of criminal conduct along with another person, the requirement to make a mandatory disclosure is engaged. There are two people involved in this scenario – the obliged individual, and another person with whom he has acted – and both are engaged in money laundering. When the person working in the regulated sector articulates the

[695] Serious Organised Crime and Police Act 2005, s 104(3).
[696] A contrary argument can be founded on the wording of Art 33(1) of the EC Fourth Directive on Money Laundering which omits to reference that another person is engaged in money laundering. Rather, the reporting obligation requires a person working in the regulated sector to '[file] a report, on their own initiative, where the [person] … knows, suspects, or has reasonable grounds to suspect that funds, regardless of the amount involved, are the proceeds of criminal activity or are related to terrorist financing'. Reference below.
[697] In Ashworth (n 10) 154–55, the authors questioned whether, in connection with the parallel mandatory reporting requirement under s 38B of the Terrorism Act 2000, this outcome was objectionable where, for example, the other person was the report-maker's sibling.

money laundering narrative, inevitably the reporter incriminates himself. As discussed in chapter 2, the factual circumstances arising in *R v Jiaxin Finance Limited*[698] is a case in point.[699] In this instance, the scope for the reporter's potential criminal liability as a secondary participant is wide and can include responsibility for aiding and abetting money laundering, or encouraging or assisting money laundering contrary to sections 44 to 46 of the Serious Crime Act 2007.

8.6.2 Corporate self-incrimination

In any event, the prospect of self-incrimination in response to the reporting requirement in section 330(1) is placed beyond peradventure in the corporate context, where a company becomes obliged to make a disclosure. Here, as previously noted, the possibility of a company self-incriminating by reference to the acts or omissions of its officers and employees, and incriminating the same officers and employees simultaneously, remains extant. In this situation, the ability of the obliged person, individual or corporate, to assert the privilege against self-incrimination as an exemption to the mandatory reporting obligation is consistent with the tenor of the statutory requirement, with its emphasis on third party involvement. In this way, the mandatory reporting obligation is enabled to function in a manner which respects fundamental rights, such as the ability to assert the privilege against self-incrimination.

8.6.3 Respecting fundamental rights

This analysis gives effect to the Parliamentary intention endorsed on the front page of the POCA 2002 that the statutory provisions are compatible with the provisions of the ECHR.[700] It also coheres with Recital 65 of the EC Fourth Directive on Money Laundering[701] which represents that the terms of the Directive, to include the mandatory reporting obligation, respect the fundamental rights and observes the principles

[698] *R v Jiaxin Finance Limited* [2020] NZHC 366.
[699] The factual circumstances of the case are set out in chapter 2 of the thesis at para 2.4.4.
[700] Pursuant to s 3 of the Human Rights Act 1998, a court is required 'so far as it is possible to do so', to apply s 330(1) of POCA 2002 in a manner which is consistent with the provisions of the European Convention.
[701] Directive (EU) 2015/849 (n 45).

recognised by the Charter of Fundamental Rights of the European Union which include the right to respect for private and family life, the right to the protection of personal data, and the presumption of innocence. Tangentially, Article 32(6) provides that law enforcement authorities can request access to information contained in a mandatory report, but there is no requirement for this information to be provided "where disclosure of the information would be clearly disproportionate to the legitimate interests of a natural or legal person".

The earlier legislative and pre-legislative materials do not shed any light on the content of a natural or legal person's "legitimate interests", although some assistance can be derived from the wording in Article 46(6) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, agreed on 16 May 2005. With a similar objective, Article 46(6) stipulated that a request to provide information could be refused where it was not "in accordance with fundamental principles of national law of the requested party". The concordance between a human and corporate person's legitimate interests, fundamental principles of national law, and rights involving the protection of privacy, autonomy, and human dignity, which includes the privilege against self-incrimination, is duly noted.

8.7 GIVING EFFECT TO THE PRIVILEGE

Having established that the privilege against self-incrimination can be raised in response to the mandatory reporting requirement, the mechanism by which the law gives effect to this claim remains to be identified.

8.7.1 Entitlement at common law

The privilege at common law operates as an entitlement, and typically, when successfully claimed in legal proceedings by a witness while giving evidence or in answer to an order to answer questions or produce documents, the obligation to respond falls away.[702] The position at common law was codified by Parliament in section 14(1) of the Civil Evidence Act 1968 which refers to the privilege as a right.

Applying this analysis, a court would be obliged to recognise the privilege where a corporate defendant raises the risk of criminal prosecution as a shield to criminal liability in answer to a prosecution for failing to disclose a money laundering suspicion under section 330(1). As Lord Hoffmann explained in *R v Herts CC, ex p Green Industries Ltd*, "the expression 'privilege against self-incrimination' or 'right to silence' is used to refer to several loose rules or principles of immunity, differing in scope and rationale".[703] Noting that the privilege tended to be raised in cases where a person was giving evidence or responding to a compulsory questioning or production of documents order, Lord Hoffmann added that "[T]here is also a general privilege not to be compelled to answer questions from people in authority, based … upon the common view that one person should so far as possible be entitled to tell another person to mind his own business".[704]

In giving judgment, Lord Hoffmann drew heavily on Lord Mustill's analysis of the privilege in *R v Director of Serious Fraud Office, ex p Smith* which had been decided seven years earlier,[705] where Lord Mustill referred to the privilege as giving rise to "a general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions."[706] In the case of mandatory reporting, the exercise of the privilege would give rise to a general immunity, which in this instance operates as a protection from prosecution. In *R v King*,[707] where a defendant had been acquitted of misprision after concealing his involvement in a robbery, the Court of Criminal Appeal

[702] Hodge Malek (ed), *Phipson on Evidence* (19th edn, Sweet & Maxwell 2017) paras 24–41.
[703] *R v Herts CC, ex p Green Environmental Industries Ltd* [2000] 2 AC 412, 419A.
[704] ibid 419D.
[705] *R v Director of Serious Fraud Office, ex p Smith* [1993] AC 1, 30–31.
[706] ibid. Lord Mustill's view that immunity is possessed 'by all persons and bodies' is noted, with regard to the corporate form.
[707] *R v King* [1965] 1 WLR 706. This decision is discussed in chapter 2 in the context of the offence of misprision.

treated the privilege against self-incrimination as operating as if it was a substantive defence to the charge.

Any attempt to prosecute a person for failing to self-incriminate would be halted by the court for abuse of process. As the learned editors of Archbold explain, albeit with reference to entrapment, the doctrine of abuse of process will apply "when the proceedings result from executive action that threatens basic human rights or the rule of law".[708] A court would not be acting in accordance with its obligations under the ECHR if it proceeded to try a defendant for failing to make a disclosure in circumstances where the privilege against self-incrimination had been engaged. Section 6(1) of the Human Rights Act 1998 stipulates that "[I]t is unlawful for a public authority to act in a way which is incompatible with a Convention right". Section 6(3) defines a public authority to include a court.

8.7.2 Reasonable excuse

Section 330(6)(a) of POCA 2002 does not provide a suitable alternative route for giving effect to the privilege against self-incrimination. This sub-section recognises reasonable excuse as a valid reason which can justify a person's failure to make a disclosure in accordance with the terms of the mandatory requirement. Although the provision is expressed as an exemption from criminal liability and not as a defence to criminal liability, reasonable excuse operates as a justification for a person's failure to make a disclosure which would otherwise have constituted the commission of a criminal offence.

Section 330(6)(a) is silent as to the factual circumstances which may amount to a reasonable excuse, and it falls to magistrates in the Magistrates Court or a jury in the Crown Court to determine what constitutes an excuse which is reasonable in all the circumstances. The defendant bears an evidential burden to raise the issue of reasonable excuse,[709] and the prosecution must disprove the existence of the reasonable excuse to the criminal standard of proof.[710] The Law Society Anti-Money Laundering Guidance published in March 2018 notes that there is no guidance as to what constitutes a

[708] Archbold, Criminal Pleading Evidence and Practice (Sweet & Maxwell 2021) 403, para 4-96. See *R v Looseley (AG Reference of 2000)* [2001] 1 WLR 2060.
[709] *Rowland v Thorpe* [1970] 3 All ER 195.
[710] *R v Harling* [1970] RTR 441.

reasonable excuse, and although it gives some examples of potential excuses, asserting the privilege against self-incrimination is not mentioned.[711] To date, there is no reported case or anecdotal information on the application of section 330(6) in the courts.

Whilst a person may put forward the existence of facts which may be excusatory in his mind, the requirement of the excuse to be reasonable injects an element of objectivity which must be present before the exemption from criminal liability is operative. If a person bases an excuse on a trivial matter which lacks reasonableness, the imposition of criminal liability will not be avoided. This is because there is an inextricable connection between the subjectivity of an excuse and the objective nature of justification for which Parliament has legislated. As John Gardner explained in Offences and Defences, [t]he structure of excuse derives … from the structure of justification, and this shares in its combination of subjective (explanatory) and objective (guiding) rationality".[712] The concomitant impact is that the objective element invites the court to make its own assessment which calibrates the reasonableness of an excuse in terms of the balance to be struck between the competing interests of protecting individual rights and the interest of the State in discovering information to assist in the fight against economic crime.

In performing this task, previous cases involving the use of compulsory investigation powers tend to suggest that the courts will construe the reasonableness of an excuse narrowly.[713] In *Marlwood Commercial Inc v Kozeny,*[714] the Court of Appeal held that the recipient of a production notice did not have a reasonable excuse to support his failure to produce documents where confidential documents had been brought to England for use in civil proceedings pursuant to a court order, and their use in the course of a criminal investigation had not been contemplated. The Commercial Court had reached the same conclusion at first instance, where the Court added that the police interest in investigating serious fraud took "priority over … almost all private rights of confidentiality, [including] the right against self-incrimination".[715]

[711] Law Society, 'Anti-Money Laundering Guidance for the Legal Sector' (2021) para 16.4.3.
[712] Gardner (n 453) ch 5 'Justifications and Reasons' 109.
[713] See *R v Director of SFO, ex p Saunders* [1988] Crim LR 837; *Bank of England v Riley* [1992] Ch 475; *Re Arrows Ltd (No 1)* [1992] Ch 545; *Re Arrows Ltd (No 4)* [1995] 2 AC 75.
[714] *Marlwood Commercial Inc v Kozeny* [2004] EWCA Civ 798.
[715] ibid [27] (Moore-Bick J).

The fundamental nature of the privilege against self-incrimination will be compromised if it is located within the "reasonable excuse" exemption. Since in every case involving "reasonable excuse", the issue is fact-specific and decided on a case-by-case basis,[716] a court would be drawn into a repeated consideration of where the balance of competing public interests should lie. In each case a court would be required to assess a myriad of variant factors which were apparent at the time when the privilege was exercised. In balancing the competing interests, these factors would include a consideration of the seriousness of criminal conduct, the period over which the conduct took place, the extent to which the undisclosed self-incriminating information would have assisted the law enforcement authorities, the likelihood of prosecution for commission of the underlying predicate offence(s), and the value to be placed on a person's entitlement to privacy and autonomy, whether an individual or a limited company. It is also unclear how a court would be provided with sufficient evidence, especially on behalf of the State, to make such a determination. The retrospective undertaking of this exercise in each case in which the privilege is raised would provide a recipe for uncertainty, with an absence of clarity over when a court would recognise a person's refusal to make a mandatory report as reasonable within the statutory framework. The courts have long recognised in the context of administrative law that different decisions may rank as reasonable decisions, where in the exercise of discretion the decision-maker had acted rationally and taken the correct factors into account.

The legal route for giving effect to the privilege against self-incrimination by operation of law should not be conflated with the notion of "reasonable excuse" written into the legislation as an excusatory ground. It does not matter whether a claim to exercise the privilege against self-incrimination is reasonable or not. Once recognised, the privilege operates as a matter of right. It is not an excuse which may or may not be objectively justified, depending on the particular facts of the case.

8.7.3 Evidential exclusion

There are instances where Parliament has chosen to limit the application of the privilege against self-incrimination, whilst stopping short of abrogating the privilege entirely. A

[716] For a discussion of the width of the discretion, see *Garry v CPS* [2019] EWHC 636 and *DPP v Paterson* [2004] EWHC 2744.

paradigm example is to be found in section 2(2) of the Criminal Justice Act 1987 as amended, which provides that the Director of the SFO may serve a notice on a person under investigation requiring him to answer questions and provide documents. The requirement is coercive, and by section 2(15), failure to comply is punishable by a maximum of two years imprisonment. In an effort to balance the protection of suspect's rights against the public interest in detecting serious fraud, section 2(8) stipulates that any statement made by a suspect may be used in evidence against him where he makes a statement which he knows to be false, or is reckless as to its falsity, or where on a prosecution for some other offence he gives evidence which is inconsistent with his earlier statement. The interests of the individual are protected by the inability of the SFO to adduce the incriminating statement as evidence against the suspect in any other case.

Legislative intervention along these lines to reduce the jeopardy for an individual or company self-reporting criminal conduct pursuant to the mandatory reporting requirement would be manifestly inadequate. First, the effect of this exclusionary provision is not to preserve a suspect's right to assert the privilege against self-incrimination at all. The statutory provisions require the suspect to answer questions and produce documents, irrespective of whether they are self-incriminating or not. Rather, it is only the evidential use of the incriminating statement which is restricted. Secondly, the statutory provisions do not address the danger to the self-incriminator which flows from evidence which the SFO has been able to derive from the incriminating answers or documents. Thirdly, the balance between the competing interests of an individual and those of the State are quite different. In the case of a compulsory interview and production of documents, a criminal investigation will have been initiated and remains extant. In the case of mandatory reporting, the coercive requirement to disclose self-incriminating information invariably arises *ex nihilo*, in so far as the State is concerned.

8.8 CONCLUSION

In conclusion, there are strong arguments supporting the contention that a person working in the regulated sector is entitled to rely on the privilege against self-incrimination where the narrative of the report would admit his involvement in criminal activity or

implicate a spouse.[717] More particularly, a company is similarly entitled where the narrative would incriminate the company, and/or one of its officers and employees. If the law did not treat a person as relieved from the mandatory reporting obligation in this situation, criminal jeopardy would follow. As such, this outcome would be wholly inconsistent with the statutory language in section 330(2) which requires a report to be made where the person making the report knows, suspects, or has reasonable grounds for knowing or suspecting, "that another person is engaged in money laundering". When the privilege against self-incrimination is raised, the law permits the privilege to stand as a defence.

[717] The privilege extends to include information incriminating a person's spouse. See *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 and *Beghal v DPP* [2015] UKSC 49.

CHAPTER 9
CONCLUSION

9.1 INTRODUCTION

This research addressed the challenges which arise where a company operating in the UK's regulated sector comes into possession of information giving rise to knowledge, suspicion, or reasonable grounds to suspect that one or more of its officers or employees is engaged in money laundering. As explained in chapter 2, the definition of money laundering is sufficiently wide to include the possession of property representing the benefit of criminal conduct. If a company makes a mandatory report pursuant to the coercive obligation contained in section 330(1) of POCA 2002, the narrative may reveal the criminal wrongdoing of the company's officers or employees, and also, inextricably in some cases, the wrongdoing in respect of which the company is criminally responsible. The prospect of self-reporting incriminating information is inevitable, unless the company is relieved of its obligation to disclose by exercising the privilege against self-incrimination as a shield, if it should choose to do so. The thesis comprehensively establishes that the law should recognise a company has a clear choice, whether to assert the privilege or make a self-incriminating disclosure.

9.1.1 Mandatory disclosure

The extent of a company's exposure to making a mandatory report which is self-incriminating has been demonstrated in chapter 2. Whether the legislature intended to establish a mandatory reporting requirement in the UK's AML regime is doubted, since the focus of attention in section 330(1) rests on the fact that the reporting requirement applies only where a person knows, suspects, or has reasonable ground for knowing or suspecting, that "*another person* is engaged in money laundering".[718] But whatever the legislative intention, in the case of a company an obligation to self-report criminal conduct clearly arises.

[718] Section 330(2) of POCA 2002.

There is no suggestion in the pre-legislative materials that this consequence of the AML regime was considered either domestically or internationally, let alone identified as a possible complication. If Parliament had entertained any desire to treat the privilege as implicitly abrogated by the mandatory reporting requirement in section 330(1), it would not have been difficult for Part 7 of POCA 2002 to have expressly provided that self-incriminating information set out in a SAR could not be used in evidence against a company if it were prosecuted for criminal wrongdoing which had been disclosed.[719] The fact that the legislature made no provision to prevent the use of self-incriminating evidence suggests that application of a mandatory self-reporting requirement was not intended.

The most likely explanation for the absence of any reference to the privilege against self-incrimination is that the legislature simply overlooked the matter by failing to appreciate that, on the basis of section 330(1) as presently configured, a company in its capacity as an independent legal person had become duty-bound to make a SAR in circumstances where its officers or employees constituted "the other person" or "other persons" engaged in suspect money laundering which forms the substance of the disclosure report.

As individuals whose lives are associated with a company's activities, the idea that they may constitute "other persons", with identities separate from that of the company, may seem strange at first blush. But the law on corporate personhood is clear. Independent legal status and capacities are borne by a company, quite separately from those of its officers and employees. There is no doubt that section 330(1) mandated a company to make a self-report of its criminal wrongdoing, whether the legislature intended this outcome or not.

9.1.2 Theoretical perspectives

Chapter 3 established that the imposition of criminal liability for conduct by omission is a normative outcome and uncontroversial, and the mandatory reporting of suspected criminal conduct is easily assimilated into the contemporary norms of criminal law theory.

[719] POCA 2002, s 14(2). Under s 2(8) of the Criminal Justice Act 1987 as amended, self-incriminating answers given in a compulsory interrogation are not admissible in evidence unless exceptionally the case involves an allegation of making a false statement or the suspect has made a statement inconsistent with it. For the admissibility of evidence derived from an inadmissible confession, see s 76(5), (6) of PACE 1984.

The chapter also demonstrated that in so far as the mandatory reporting obligation in section 330(1) of POCA 2002 requires a company to report self-incriminating information, the legislative provision cannot be attacked as unprincipled or offensive to tenets of legality. The answer to a conflict between the mandatory reporting requirement and the disclosure of self-incriminating information lies in the ability of a company to assert the privilege against self-incrimination.

9.1.3 Privilege against self-incrimination

In chapter 4, the multiple rationales which support the privilege against self-incrimination were discussed. Concerns to prevent physical threats and ensure evidential reliability have been supported by an association between the right of silence and the importance of privacy, laced with considerations of human dignity and personal autonomy. Whilst threats of physical pressure have faded, the law has continued to evidence concern to constrain the State's sharp edges where elements of coercion are employed to procure self-incriminating information in legal proceedings, or during the course of an investigation. In recent times, the judicial support for the privilege against self-incrimination remains nuanced. When seeking to strike a balance between competing public interests involving the detection of criminal activity on the one hand, and considerations of human dignity, autonomy, and privacy on the other, it is clear that the privilege has a continuing role to play.

Based on these principles, the chapter demonstrated that there is no reason why the privilege should not have a wide application, beyond the production of self-incriminating information in legal proceedings, or during the course of an investigation. Whether or not the application of the privilege is sufficiently wide to engage the mandatory reporting requirement in section 330(1) of POCA 2002 was considered in chapter 8.

9.1.4 Corporate chapters

Before reviewing the conclusion reached in chapter 8, there were two important issues to address. First, it was necessary to consider the basis on which corporate rights are recognised. These matters were the subject of consideration in chapters 5 and 6. Secondly, it was necessary to consider whether the law should recognise the privilege against self-

incrimination as a right to which a company may lay claim. This was the subject of consideration in chapter 7. Collectively, these chapters form "the corporate chapters" in this thesis.

Chapter 5 began with an exploration of the notion of legal personhood, and how corporate personhood has been recognised by company law theorists in three different models, known respectively as "contract theory", "concession theory", and "real entity theory". The chapter established that whilst traditional approaches to corporate personhood have provided a sound structural footing for securing a theoretical framework for the creation and management of a company, they have been inadequate to support a holistic approach to the recognition of corporate rights beyond those which flow from (a) the contractual ontology of the company's existence, or (b) are integral to a company's business, or (c) serve to protect individual interests which would otherwise be exposed if a corporate right to take protective or remedial action was not acknowledged.

The chapter included a consideration of a school of thought which sought to determine the nature and extent of corporate personality by reference to the internal workings of a company's social organisation. The chapter demonstrated that although this approach emphasised the independent development of a company's character, ultimately organisational theory is unable to escape its dependency on the acts and omissions of individuals such as directors and senior employees who guide the company's conduct.

In chapter 6, the second of the corporate chapters, the thesis established an alternative narrative for the formulation of corporate rights which moved away from traditional notions of contract, concession, and real entity theories. The narrative, which the thesis termed "corporate value theory", delivered a coherent foundation for the recognition of corporate rights in a modern model which is fit for purpose. With this narrative, the thesis demonstrated a convincing basis for understanding why the law should extend its recognition of individual legal rights to a corporate person and enable a company to assert certain legal rights which facilitate the protection of its interests.

The core of the narrative lies in conceptions of value which flow from the functions which companies perform. As a participant in the corporate sector, a successful trading

company contributes to the strength of the economy. It is the vehicle through which economic growth is generated, and when the value of the beneficial contribution of each company is aggregated, the positive contribution of the corporate sector to the national economy is immense. Alongside aggregate value, each company has individual intrinsic value to its officers and employees, whose lives are shaped by their involvement in the company's activities. Therefore, in response to the question why the law should extend its recognition of individual rights to corporate persons, the answer is clear. The law should recognise a company's ability to assert rights in order to facilitate the protection of the company's interests and the value it delivers to the economy and individual interests.

Although a narrative of corporate rights based on value does not depend on the conception of a company as a moral agent, recognition that a company delivers benefits worthy of protection suggests that a company represents something more than an artificial legal construct through which business is conducted. The chapter critiqued recent academic literature which presents a company as a moral agent, with implications for an understanding of the basis on which corporate rights can be founded. If a company has moral agency as an incident of its corporate personality, corporate moralists claim that recognition of a basket of moral rights should follow as a logical consequence. The law must then determine whether legal recognition should be afforded to some, or all, of these rights. The chapter suggested that an analysis of corporate moral rights through the prism of value assists in this determination. As an incident of corporate moral agency, the chapter demonstrated how a moral right may be enlivened by an application of a value-based analysis which sustains the identification of a right deserving of protection in law. The narrative is consequentialist, and by virtue of the value they deliver, the State should treat companies with moral concern.

In chapter 7, several reasons were presented as to why the law should recognise a company's right to assert the privilege against self-incrimination by applying a value-based analysis. The value of the privilege lies in the prevention of harm which its assertion averts. The chapter demonstrated there is a sound basis for recognising that the privilege against self-incrimination falls into a basket of corporate rights which the law should acknowledge, within the terms of a modern morally based model which focuses on the value which the exercise of a corporate assertion of the privilege protects. A denial of a

company's ability to assert the privilege against self-incrimination prevents a company from acting to protect its interests and undermines its right to privacy. Also, a company's freedom to act in its best interests as determined by the directors would be substantially diminished.

The participants benefitting from an assertion of the privilege are the company, its officers, and employees. Wider beneficiaries are the company's other stakeholders such as its members and trading associates, and the State itself. The chapter concluded with a critique of conflicting judicial approaches and determined that arguments denying the corporate recognition of the privilege fail to withstand critical scrutiny.

9.1.5. Engaging the privilege

The final step in the thesis was established in chapter 8. In this chapter, the thesis demonstrated that the mandatory reporting requirement engages the privilege against self-incrimination where a company is statutorily obliged to disclose information which incriminates the company. The chapter has shown how a consideration of multiple factors militate strongly in favour of the law's recognition of the privilege against self-incrimination as a valid response to the mandatory reporting requirement.

There are two fundamental aspects which clinch the argument.

First, the statutory structure employed to establish the mandatory reporting requirement makes clear that the legislature was concerned to promote the filing of SARs where a third party was suspected of involvement in money laundering. It is implicit in the formulation of the legislation that the self-reporting of incriminating information was not contemplated.

Secondly, since in many cases the State is not be aware of the suspected criminal wrongdoing which forms the substance of a report before a SAR is made, the infringement of a company's right to protect its interest would be colossally compromised. If a company could not assert the privilege against self-incrimination, its right to privacy in the conduct of its affairs would be infringed. In addition, the company would lose the ability to determine the course of action which it perceives as serving its

best interests and those of its stakeholders. The company's right to determine its destiny by making choices would be fundamentally undermined.

9.2 CONCLUSION

In conclusion, the matter is clear. A corporate claim to the privilege can be recognised in law as operating as substantive justification in answer to a charge that an offence contrary to section 330(1) has been committed. This conclusion can be given effect in an uncomplicated and pragmatic way. To this extent, the engagement of the privilege against self-incrimination with the mandatory requirement in section 330(1) of POCA 2002 is a proposition which may be simply expressed.

In reaching this conclusion, difficult terrain has been traversed. The thesis has presented a coherent approach to the recognition of corporate rights by developing a corporate value theory which supports a company's ability to assert the privilege against self-incrimination when it should choose to do so.

Borrowing from the language of science, the thesis presents as a double helix since it consists of two strands that wind around each other like a twisted ladder. The engagement between the privilege against self-incrimination and corporate mandatory reporting pursuant to section 330(1) of POCA 2002 is one strand. The recognition of corporate rights, to include the privilege against self-incrimination, is a second strand. The two strands wind around each other, and a sustainable conclusion is the outcome.

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