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# A COMPARATIVE ANALYSIS OF A CORPORATION'S RIGHT AGAINST SELF-INCRIMINATION

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## *INTRODUCTION*

Over fifty countries,[1] including common, civil, and religious law jurisdictions, currently recognize an individual's right against self-incrimination.[2] Although the scope and application of the right against self-incrimination vary in each jurisdiction,[3] the right, in its most basic form, accords an individual freedom from compulsory self-accusation in a criminal proceeding.[4] In

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1. *See* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 265 n.138 (1993) (listing 48 countries that have constitutionally codified right against self-incrimination). The right against self-incrimination is also recognized in Germany, the Netherlands, France, England, Canada, Israel, Norway, and the Shari'a, which is the Islamic sacred law. *See* Jeffrey K. Walker, *A Comparative Discussion of the Privilege Against Self-Incrimination*, 14 N.Y.L. SCH. J. INT'L & COMP. L. 1 (1993) (discussing application of right against self-incrimination in various foreign jurisdictions).

2. *See* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION vii (1968).

> Although the legal profession customarily refers to the right against self-incrimination as a 'privilege,' I call it a right because it is one. . . . Although the right against self-incrimination originated in England as a common-law privilege, the Fifth Amendment made it a constitutional right, clothing it with the same status as other rights, like freedom of religion, that we would never denigrate by describing as mere privileges.

*Id.*

3. *See* Walker, *supra* note 1, at 19-27 (discussing slightly differing applications of right against self-incrimination in France, Germany, Netherlands, Norway, and Japan). For example, in France the suspect may be held and interrogated for 48 hours without even being advised of his right against self-incrimination. *See* BARTON L. INGRAHAM, THE STRUCTURE OF CRIMINAL PROCEDURE: LAWS AND PRACTICE OF FRANCE, THE SOVIET UNION, CHINA, AND THE UNITED STATES 62, 79 (1987) (describing rights of French authorities to not inform suspect of right against self-incrimination until brought before judge and to hold suspect for up to 48 hours without bringing suspect before judge). In contrast, in the Netherlands there is no requirement that a suspect even be told of this right. Manfred Pieck, *The Accused's Privilege Against Self-Incrimination in the Civil Law*, 11 AM. J. COMP. L. 585, 597 (1962).

4. *See* U.S CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."); *see also* International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, art. 14(3)(g), S. TREATY DOC. NO. 95-2, at 28, 999 U.N.T.S. 171, 177 (entered into force Mar. 23, 1976, adopted by the United States Sept. 8, 1992) [hereinafter ICCPR] ("In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guaran-

light of such widespread acceptance, which transcends religious, ethnic, and political boundaries, the principle that no one should be compelled to give evidence against himself in a criminal proceeding can be characterized as a fundamental human right.[5]

The widespread availability of a natural person's right against self-incrimination[6] is not as certain[7] when the right is applied to juristic, or legal, persons.[8] Several jurisdictions have held that because the right developed specifically to protect natural persons,[9] it is unavailable to entities like corporations,[10]

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tees, in full equality . . . Not to be compelled to testify against himself or to confess guilt.").

5. *See* ICCPR, *supra* note 4, pmbl., S. TREATY DOC. No. 95-2 at 23, 999 U.N.T.S. at 173 (stating that ICCPR was, in part, concerned with "the promotion of universal respect for and observance of human rights and fundamental freedoms"). More than one-third of the world's states are party to the ICCPR. THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 1 (Louis Henkin ed., 1981).

6. *See supra* note 1 and accompanying text (discussing ubiquity of right against self-incrimination).

7. *See* Environment Protection Authority v. Caltex Refining Co., 118 A.L.R. 392, 398-403 (1993) (Austl.) (comparing differing treatment of corporation's right against self-incrimination among U.S., British, Canadian, and New Zealand courts).

8. *See* Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641, 1641 n.1 (1982) (defining juristic person as "a being who can be a bearer of a right and consequently claim standing in a court"). The three traditional models of the corporate personality are the fiction theory, the contract theory, and the realism theory. *Id.* at 1645-52. The fiction, or concession, theory states that a corporation's identity is based entirely on the state's grant of legal status to the corporation. *Id.* at 1645-47. The contract view holds that a corporation is simply a summarizing device for the rights and duties of the parties who contracted to form the corporation. *Id.* at 1647-49. The realism theory views corporations as an intricate system of productive organization with a logic of its own. *Id.* at 1649-51. These models are important because the basic rights granted to a corporation will very often depend on which theory of corporate personality a court or promulgating body presumes. *See id.* at 1657 (discussing "inconsistent patchwork of constitutional law" that results from applying different theories of corporate personality); *see also* MEIR DAN-COHEN, RIGHTS, PERSONS AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 13-119 (1986) (offering comprehensive discussion of interaction between ontological definition of corporation and basic rights granted pursuant to that definition).

9. *See* MARK BERGER, TAKING THE FIFTH 57 (1980) (discussing development of law to protect "people . . . and their liberties").

10. *See* Hale v. Henkel, 201 U.S. 43, 69-70 (1906). In this case the Supreme Court held, as one of three separate rationales for denying the right against self-incrimination to a corporation, that the Fifth Amendment "is purely a personal privilege." Thus, because corporations, as fictional legal persons, can testify or act only through agents, the Fifth Amendment is unavailable to such fictional constructs. *Id.*; *see Caltex*, 118 A.L.R. at 405 ("[T]he modern and international treatment of the privilege as a human right which protects personal freedom, privacy and human dignity is a less than convincing argument for holding that corporations should enjoy the privilege.").

which exist only as legal persons.[11] In contrast, other jurisdictions have found that, for the purpose of the right against self-incrimination, there is no principled difference between a legal and natural person, and, therefore, the right should be available to corporations as well as natural persons.[12]

This Note provides a comparison of the treatment of a corporation's right against self-incrimination in Australia, the United States, and the European Union and argues that the European Union's approach is superior because it better maintains an equitable balance of power between the state and the corporation. Part I examines the historical framework of the corporate right against self-incrimination, including the recent revisions to the traditional theory of the right's historical development and changes in the relationship between the state and the corporate entity. Part II explores the current treatment of a corporation's right against self-incrimination in the United States, the European Union, and Australia. Part III analyzes the continued viability of each jurisdiction's policy justifications for its current treatment of a corporation's right against self-incrimination, judging the European Union's approach to be the most legitimate because it maintains an equitable balance of power between the corporation and the state. Finally, this Note concludes that the United States and Australia should allow corporations to claim the right against self-incrimination any time the state attempts to compel incriminatory information from the corporation, whether by written answer or through its principal executives.

## I. *THE HISTORICAL FRAMEWORK OF A CORPORATE RIGHT AGAINST SELF-INCRIMINATION*

The lengthy development of the right against self-incrimination[13] is critical to determining the underlying historical reasons

11. *See supra* note 8 (discussing characteristics of legal person).

12. *See, e.g.*, New Zealand Apple and Pear Marketing Board v. Master & Sons Ltd., [1986] 1 N.Z.L.R. 191, 196 (stating that "[t]here seems no policy reason why a corporation should not avail itself of the rule" granting right against self-incrimination); Triplex Safety Glass Co. Ltd. v. Lancegaye Safety Glass Ltd., [1939] 2 K.B. 395, 409 (Ct.App.) (asserting that court could "see no ground for depriving a juristic person of those safeguards which the law of England accords even the least deserving of natural person").

13. *See* Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955, 956 (1988) (comparing U.S.

for the right's existence,[14] which in turn help elucidate the proper boundaries of the right.[15] The right's history and the reasons for its development are similarly important to determining the proper application to corporations.[16] The traditional view of the right's early development, which has been used to justify the denial of the right against self-incrimination to corporations,[17] maintains that the right developed as a result of resistance to the mistreatment of English political and religious minorities.[18] Recent scholarship challenges this traditional view,[19]

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right against self-incrimination with similar Talmudic rule); *see also* BERGER, *supra* note 9, at 1 n.1 (specifying various sections of Bible that express disapproval of oath-taking, including *Matthew* 5:33-37, *Exodus* 20:7 and *Deuteronomy* 5:11); LEVY, *supra* note 2, at viii (pointing out that right against self-incrimination predates freedoms of speech, press, and religion, benefit of counsel, immunity against bills of attainder, and prohibitions of ex post facto laws and unreasonable searches and seizures).

14. *See* Ullman v. United States, 350 U.S. 422, 438 (1956). As Justice Frankfurter wrote, "The privilege against self-incrimination is a specific provision of which it is peculiarly true that 'a page of history is worth a volume of logic.' " *Id.* (quoting New York Trust Co. v. Eisner. 256 U.S. 345, 349 (1921) (Holmes, J.)); *see also* Quinn v. United States, 349 U.S. 155, 161 (1955) ("The privilege against self-incrimination is a right that was hard-earned by our forefathers. The reasons for its inclusion in the Constitution — and the necessities for its preservation — are to be found in the lessons of history."); *Caltex*, 118 A.L.R. at 405 ("In light of these conflicting approaches, it is necessary now to examine the historical basis of the privilege"); CHARLES MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 114, at 279 (3d ed. 1987). McCormick asserts that the origin and development of the right has been of "special interest to legal scholars" because of reservations concerning the propriety of the right as a whole. *Id.*

15. *See* 8 JOHN H. WIGMORE, TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2250, at 277 (3d ed. 1959) [hereinafter 8 WIGMORE, EVIDENCE]. "So much of [the right] lies in its interpretation that its scope will be greatly affected by the spirit in which that interpretation is approached. Much law can be settled by consideration of its historic scope, before the constitutions were made." *Id.*

16. *See* First National Bank v. Bellotti, 435 U.S. 765, 779 n.14 (1978). "Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history and purpose of the particular constitutional provision." *Id.*; *see Caltex*, 118 A.L.R. at 404 (discussing importance of right's history).

17. *See Bellotti*, 435 U.S. at 779 n.14 ("Certain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals." (citing to United States v. White, 322 U.S. 694, 698-701 (1944)); *see also Caltex*, 118 A.L.R. at 404 (discussing Australian High Court's partial reliance on historical development of right against self-incrimination as human right in denying right to corporations).

18. *See* 8 WIGMORE, EVIDENCE, *supra* note 15, § 2250, at 277 (discussing opposition to oath *ex officio* as one basis for development of right against self-incrimination).

19. *See* Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1087 (1994) ("Recent scholarship has done much to cast doubt on the correctness of the received wisdom concern-

finding both that the right actually appeared first in the *ius commune*[20] and that the right was finally accepted only because of structural changes to eighteenth century criminal procedure.[21] Similarly, changes in the relationship between the state and the corporate entity, such as the rejection of the concession theory of corporate existence and increased regulatory supervision by the state, are also highly relevant to determining the proper application of the right against self-incrimination to corporations.[22]

### A. *The Traditional Historical Theory of the Development of the Right Against Self-Incrimination*

The traditional view of the development of the right against self-incrimination (or "traditional view") traces the right back to the constitutional struggles in seventeenth century England.[23] This view characterizes the right's development as a result of the resistance of the accusatorially-based[24] English common law courts and England's religious minorities to the inquisitorial methods[25] of the English prerogative and ecclesiastical courts.[26]

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ing the history of the common law privilege."); *see also* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1047, 1047 (1994) (arguing that right against self-incrimination resulted from rise of adversarial criminal procedure).

20. R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962, 964 (1990) (discussing original source of privilege). The *ius commune* is the legal system which resulted from the merging of Roman civil law and the Catholic Church's ecclesiastical law. *Id.*

21. Langbein, *supra* note 19, at 1047.

22. *See, e.g.*, Gregory A. Mark, *The Personification of the Business Corporation on American Law*, 54 U. CHI. L. REV. 1441, 1483 (1987) (discussing corporation as quintessential economic man).

23. LEVY, *supra* note 2, at 42 (discussing development of right against self-incrimination).

24. *See* BERGER, *supra* note 9, at 3-5 (discussing origin of accusatorial system in pre-Norman Anglo-Saxon England). Distinguishing features of the early English accusatorial system include public accusation by an identified accuser and a court that does not ultimately determine the accused's guilt or innocence. *Id.* at 4.

25. *See* Charles H. Randall, Jr., *Sir Edward Coke and the Privilege Against Self-Incrimination*, 8 S.C. L.Q. 417, 420-21 (1956) (describing early spread of inquisitorial procedures). The inquisitorial method became standard procedure on the European continent and eventually served as the foundation for the modern continental civil law systems. *Id.* Early inquisitorial procedures included, for example, examining the accused in secret and requiring him to swear on his oath. LEVY, *supra* note 2, at 29. Additionally, the judge in the early inquisitorial system had nearly unlimited powers, acting as accuser, prosecutor and judge. *Id.*

26. *See* Harold W. Wolfram, *John Lilburne: Democracy's Pillar of Fire*, 3 SYRACUSE L. REV. 213, 218 (1952) (discussing role of common law lawyers and Puritans in develop-

The principal cause of such resistance was the use of the oath *ex officio*,[27] an inquisitorial oath administered by a court at the outset of an inquiry whereby the accused swore to answer any and all questions the court might ask him.[28] Because the accused swore the oath without knowing the subject of the interrogation, he was essentially swearing to give evidence against himself.[29] Further, to decline to swear the oath was to admit guilt.[30] Individuals subjected to the oath, in an attempt to shield themselves from this prejudicial oath,[31] began to assert the principle *nemo tenetur seipsum prodere*,[32] or "no one is obliged to accuse himself."[33] Eventually, this principle would develop into a fundamental principle of common law, the right against self-incrimination.[34]

### 1. The Early Use of the Oath *Ex Officio*

The oath *ex officio* originated in Pope Innocent III's late

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ment of right against self-incrimination); *see also* LEVY, *supra* note 2, at 42 (setting forth religious, social and political factors that contributed to development of right against self-incrimination). The prerogative courts were founded by royal commission and had criminal jurisdiction, but unlike the common law courts, these courts employed inquisitorial procedures. *Id.* at 41-42. The ecclesiastical courts were church courts, governed by inquisitorial canonical law, which originally claimed jurisdiction over all matters relating to the clergy, sexual conduct, marriages, wills, the correction of sinners, and church properties. *Id.* at 43.

27. *See* MCCORMICK, *supra* note 14, § 114, at 279 (asserting that right had its roots in opposition to *ex officio* oath); *see also* Helen Silving, *The Oath: I*, 68 YALE L.J. 1329, 1366 (1959) (stating that "the introduction of the oath *de veritae dicenda* [ ] seems to have created the controversy from which our privilege against self-incrimination arose."). The oath *de veritae dicenda* came to be known as the oath *ex officio* in England. BERGER, *supra* note 9, at 6.

28. Langbein, *supra* note 19, at 1073.

29. *See* Helmholz, *supra* note 20, at 965 (characterizing oath as allowing "fishing expeditions for evidence of immorality or religious heterodoxy").

30. *See* Edward S. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 6 (1930) ("[A] refusal to take the oath or to answer under it was taken as a confession of the offense charged.").

31. *See* BERGER, *supra* note 9, at 6 (listing unpleasant options available to defendant confronted with oath and calling it "nearly foolproof in securing the conviction of those against whom [the oath was] directed").

32. *See* LEVY, *supra* note 2, at 3 (discussing 1537 trial of John Lambert as early example attempting to use right against self-incrimination).

33. Langbein, *supra* note 19, at 1072.

34. *See* BERGER, *supra* note 9, at 19 (describing 1649 trial of John Lilburne, where right against self-incrimination was first articulated as accepted principle by high level English court).

twelfth and early thirteenth century reforms[35] of the canonical law.[36] These reforms were approved by the Fourth Lateran Council in 1215, and by 1236 the oath had been introduced to the English ecclesiastical courts by Cardinal Otho.[37] The oath was utilized in England for the first time in 1246 by the bishop of Lincoln in conducting an investigation into local immorality.[38]

Because the oath's inquisitorial nature was an anathema to the existing English criminal legal system,[39] which was accusatorial in nature,[40] English citizens brought before the ecclesiastical courts immediately challenged the oath's use.[41] Unlike the early English common law criminal system, which offered the defendant a public accusation by an identified accuser,[42] the oath *ex officio* brought the accused within the power of the court before the accused knew the charges against him, essentially permitting the court to question the accused until some violation was uncovered.[43] Consequently, in response to the early use of the oath, Henry III issued writs ordering that his sheriffs prevent English subjects from answering any questions under oath.[44] Eventually, Henry III was forced to bring contempt proceedings

35. 8 WIGMORE, EVIDENCE, *supra* note 15, § 2250, at 281. *See* BERGER, *supra* note 9, at 5 (citing Pope Innocent III's zealousness in rooting out heretics as driving force behind rise of inquisitional procedure). By the end of the thirteenth century, the inquisitional form of procedure, and especially the oath *ex officio*, had become the Church's primary weapon in the ruthless Holy Inquisition. *See* LEVY, *supra* note 2, at 25-29 (tracing role of inquisitional procedure and oath in origination of Holy Inquisition and subsequent atrocities).

36. *See* BLACK'S LAW DICTIONARY 206 (6th ed. 1990). Canon law, the Roman ecclesiastical jurisprudence, consists of the decrees or ecclesiastical constitutions and the decretal or canonical epistles written by the pope, or the pope and cardinals. *Id.*

37. John Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 72 (1892). Cardinal Otho, who was legate to Pope Gregory IX, was one of a number of church officials who came to England upon the marriage of Henry III to his French wife. BERGER, *supra* note 9, at 6.

38. E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 1-2 (1949).

39. *See* LEVY, *supra* note 2, at 47 (explaining that Henry III called oath "derogatory to his crown because it was 'repugnant to the ancient Customs of his Realm' ").

40. *See supra* note 24 and accompanying text (discussing accusatorial nature of early English criminal legal system).

41. *See id.* (describing complaints concerning initial use of inquisitorial oath).

42. *See supra* note 24 (discussing early features of England's accusatorial system).

43. *See supra* notes 14-31 and accompanying text (explaining dangers of oath *ex officio*).

44. Morgan, *supra* note 38, at 2 (discussing Henry III's issuance of writs against various bishops as result of English citizens complaints concerning inquisitorial procedures).

against the offending clergymen.[45] In the face of the Church's obstinacy, these measures failed and the use of the oath continued.[46]

Henry III's resistance to the Church's encroachments on his sovereignty epitomizes the type of opposition that eventually gave rise to the right against self-incrimination.[47] Additional early resistance to the use of the oath was encountered from the common law courts, which, in an effort to halt the expansion of the ecclesiastical courts' power, issued writs prohibiting Church officials from conducting certain legal proceedings.[48] Finally, in the early fourteenth century, several laws were passed limiting the ecclesiastical courts' jurisdiction and the use of the oath *ex officio*.[49]

The oath, however, was too effective in securing convictions,[50] and in the early fourteenth century, the Crown began to make use of the oath as well.[51] By the early fourteenth century, the Privy, or King's, Council, which consisted of England's most powerful clergy and nobles, was developing into the country's most formidable political body.[52] Among its several functions,[53] the Council administered a prerogative court[54] whose proce-

45. LEVY, *supra* note 2, at 47.

46. *See* Morgan, *supra* note 38, at 3 (discussing use of oath *ex officio* in 1252).

47. *See supra* notes 24-26 and accompanying text (discussing role that resistance to inquisitorial criminal procedures played in development of right against self-incrimination).

48. BERGER, *supra* note 9, at 7.

49. Morgan, *supra* note 38, at 3-4 (discussing *De Articuli Cleric*, 9 Edw. 2, 1315-1316 (Eng.), and *Prohibitio Formata de Statuto Articuli Cleri*. 1 STAT. AT LG. 403 (Eng.) (Danby Pickering ed., 1762)). These statutes set forth some clear jurisdictional boundaries for the ecclesiastical courts and forbid the use of the oath *ex officio* except in matrimonial or testamentary matters. *See* Morgan, *supra* note 38, at 3-4.

50. *See* BERGER, *supra* note 9, at 7 (discussing obvious effectiveness of oath); *see also supra* notes 27-31 and accompanying text (describing nature of oath *ex officio*).

51. Morgan, *supra* note 38, at 4. Inquisitorial procedures were "creeping into secular practice, in the courts of the king's bench and common pleas, as early as the reign of Edward I." *Id.* (quoting 35 SELECT CASES BEFORE THE KING'S COUNCIL (1243-1482) xlii (I.S. Leadman & J.F. Baldwin eds., 1918)).

52. LEVY, *supra* note 2, at 49. This body included officials of the king's household and the realm's preeminent judges and lawyers. *Id.*

53. *See id.* These functions included legislative, executive, and judicial duties that, over time, slowly became differentiated. *Id.* This differentiation produced offshoots or committees of the Council that eventually became the House of Lords, the central courts of the common law, the Court of Common Pleas, and the Court of King's Bench. *Id.*

54. *See supra* notes 26-27 and accompanying text (defining nature of prerogative courts and discussing their role in development of right against self-incrimination).

dures and jurisdiction were highly discretionary.[55] These procedures included, by the King's permission, the right to employ the oath *ex officio*.[56]

Parliament attempted to combat this new use of the oath, passing condemnations of the oath, petitioning the crown to end the practice, and eventually enacting statutes outlawing the entire oath procedure.[57] Although the oath was the primary target of these actions, all aspects of the inquisitorial process were challenged.[58] Significantly, in their various condemnations and petitions, the Parliament consistently alluded to the Magna Carta as the ultimate authority for condemning the use of the inquisitorial process by the Council and the ecclesiastical courts.[59]

The common law courts were resisting the use of the oath *ex officio* by the ecclesiastical courts because it encroached on their jurisdiction,[60] while Parliament was disputing the Privy Council's use of the oath because such inquisitorial procedures were contrary to the law of the land.[61] Before the resistance could coalesce into an articulated right against self-incrimination, the battle against heresy finally reached England.[62]

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55. LEVY, *supra* note 2, at 49.

56. *Id.* at 51.

57. *See* Morgan, *supra* note 38, at 4-5 (discussing "protests from the Commons" and mid-thirteenth century statutes prohibiting inquisitorial procedures). These statutes included Statute of Purveyors, 24 Edw. 3, ch. 4 (Eng.), and 42 Edw. 3, ch. 4 (Eng.), which proscribed the use of the oath *ex officio* without formal presentment of the defendant. *Id.*; *see* MCCORMICK, *supra* note 14, § 114, at 280 (discussing petitions urging King to prohibit use of oath in Council proceedings as evidence that there was opposition to use of inquisitorial procedures in common law courts).

58. LEVY, *supra* note 2, at 53.

59. *See* Morgan, *supra* note 38, at 4-5 (discussing various statues mentioning Magna Carta); *id.* at 52-53 (reviewing various statutes and petitions citing to Magna Carta as support); *see* BERGER, *supra* note 9, at 7. For example, Parliament opposed the oath by charging that it violated the Magna Carta's law-of-the-land provision, which guaranteed that no man would be convicted except by judgment of his peers or by the law of the land. *Id.*

60. *See* BERGER, *supra* note 9, at 8 (arguing that early resistance resulted mostly from power struggle between established common law courts and ecclesiastical courts); *see also supra* notes 48-49 and accompanying text (discussing resistance by common law courts to oath *ex officio*); Morgan, *supra* note 38, at 5 (concluding that early opposition to inquisitorial procedures was result of both jurisdictional conflicts and hatred of "forced subjection to inquisitional procedure").

61. *See supra* notes 57-59 and accompanying text (describing Parliament's resistance to inquisitorial system).

62. *See* LEVY, *supra* note 2, at 53-54 (discussing how England had for most part avoided religious persecution that had plagued Continent).

### 2. Religious Persecution and the Right Against Self-Incrimination

The English version of the Inquisition began around 1400.[63] In response to the rise of a allegedly heretical sect called the Lollards,[64] the Church began a determined and brutal campaign to eliminate all deviant religious practices and beliefs.[65] More importantly, at a time when resistance to the use of the oath *ex officio* and other inquisitorial procedures was growing,[66] the Church, by emphasizing that the possible spread of these heresies threatened the souls of all the faithful,[67] was able to coerce Parliament and the Crown into cooperating with the oppression of the Lollards.[68] Parliament went so far as to pass the *De Haeretico Comburendo*, a statute that allowed the burning of heretics.[69] The state's official support of the Inquisition[70] legitimized the procedures used in attempting to eliminate heresy, including

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63. *See* Lawrence Herman, *The Unexplained Relationship Between the Privilege Against Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 OHIO ST. L.J. 101, 112 (1992) (discussing passing of *De Haeretico Comburendo* in 1401 as beginning of English Inquisition). *See also* LEVY, *supra* note 2, at 55-56 (identifying beginning of English Inquisition as 1382, when several leaders of Lollards were accused of and tried for heresy).

64. Randall, *supra* note 25, at 425 ("During the rise of Lollardry, the ecclesiastical forces were able to induce the enactment of the famous statute *De Haeretico Comburendo*.").

65. *See* BERGER, *supra* note 9, at 8 (discussing Catholic Church's reaction to rise of Lollardry); *see also supra* note 64 and accompanying text (discussing reaction of ecclesiastical authorities to rise of Lollardry).

66. *See supra* notes 39-62 and accompanying text (discussing early increase in resistance to oath *ex officio* and inquisitorial system).

67. *See* LEVY, *supra* note 2, at 54 (offering comprehensive explanation of perceived danger of religious dissent). The theoretical justification for this position was that heresy was contagious and could be passed between individuals, threatening their souls with eternal damnation. *See id.* (describing heresy as contagion). Further, because there was one body of revealed knowledge, any deviation questioned the purity of the faith and the convictions of the true believers. *Id.* From the Crown's more practical view, the sovereign was subject to excommunication for allowing the threat to the faithful or permitting doubt to exist. *Id.* Finally, where there was doubt concerning the Church's teachings, a schism would likely occur, resulting in social disorder. *Id.*

68. *See* BERGER, *supra* note 9, at 8 (relating that in 1401 Parliament passed *De Haeretico Comburendo*, which provided that heretics could be burned); *see also* LEVY, *supra* note 2, at 57-58 (discussing Henry IV's issuance of writ allowing burning of "convicted" heretic).

69. 2 Hen. 4, ch. 15 (Eng.).

70. *See* LEVY, *supra* note 2, at 60 (estimating that between 1401 and 1534 fifty people were burned and thousands were persecuted for their religious beliefs).

the oath *ex officio* and torture.[71] As a result, until the early sixteenth century, the resistance to the oath virtually disappeared.[72]

By the 1530's, however, resistance to inquisitorial procedures had reappeared in the form of influential writings by, among others, William Tyndale and Christopher St. Germain.[73] These two men, especially St. Germain, fashioned devastating legal and moral attacks on inquisitorial procedures in general and the oath *ex officio* in particular.[74] In 1532, Parliament expressed its agreement by submitting a petition to King Henry VIII listing the many grievances against the oath.[75] After offering the petition to Church officials for comment, Henry VIII approved the petition, and in 1534 the *De Haeretico Comburendo* was repealed.[76]

Although Henry VIII supported the repeal of the *De Haeretico Comburendo*, he did so only as a means to further his scheme to become the head of the Church of England.[77] Once he achieved this position by formally breaking with Rome, he began to use the same inquisitorial procedures he had recently op-

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71. *See* Morgan, *supra* note 38, at 6 (discussing cooperation of government and church in persecuting heretics); BERGER, *supra* note 9, at 8 (depicting Inquisition as "the utilization of the state's power to support ecclesiastical efforts to control heresy," which resulted in "the emergence of the oath interrogation as an important, if not dominant, procedural technique"); *see also* LEVY, *supra* note 2, at 34-35 (discussing use of torture by English prerogative courts).

72. *See* Morgan, *supra* note 38, at 6. Morgan notes that "for a century and a third" the lay authorities and courts cooperated with the ecclesiastical courts in the prosecution of heretics and that "opposition to the oath *ex officio again* became vocal" during Henry VIII's reign. *Id.* (emphasis added).

73. *See* LEVY, *supra* note 2, at 63-67 (outlining basic writings of Tyndale and St. Germain). Tyndale was the first man to translate the New Testament from Greek to English, and he authored *The Obedience of a Christian Man*, published in 1528, a work that was possibly the first to liken self-incrimination to self-infamy and that foreshadowed the language of the Fifth Amendment by asserting that it was wrong to compel men to testify against themselves. *Id.* at 63-64. St. Germain, on the other hand, was one of the first to champion the common law over the canon law and to specifically criticize the oath *ex officio*. *Id.* at 64.

74. *See supra* note 73 and accompanying text (discussing Tyndale and St. Germain's writings).

75. *See* LEVY, *supra* note 2, at 66-67 (describing Parliament's 1532 petition).

76. A Repeal of the Statute of 2 H. 4, c. 15 and a Confirmation of the Statutes of 3 R. 2, St. 2, c. 5 and 2 H. 5, St. 1, c. 7, Touching the Punishment of Hereticks, 25 Hen. 8, ch. 14 (Eng.). This statute did not outlaw the use of the oath; rather, it limited such use by requiring a formal charge before the oath could be used in ecclesiastical courts. Herman, *supra* note 63, at 114.

77. BERGER, *supra* note 9, at 9-10.

posed, including the oath *ex officio*,[78] to persecute those who would not recognize him as the ultimate head of the Church of England.[79]

### 3. The High Commission and the Right Against Self-Incrimination

The development of the right against self-incrimination proceeded as a result of the creation, evolution, and, finally, the demise of the High Commission.[80] An early version of the High Commission was created by Queen Mary[81] to further a vicious campaign of persecution[82] during the restoration the Catholic Church to England.[83] During this period of persecution, known as the Marian Inquisition, Queen Mary created a prerogative[84] commission whose mandate was to punish heretics as efficiently and severely as possible.[85] In order to fulfill its mandate, Queen Mary's commission was given total discretion to determine its procedure, was commanded to use the oath *ex officio*, and was given wide latitude as to what crimes it would prosecute.[86] The breadth of the commission's powers and jurisdiction established a precedent that would later prove valuable to Elizabeth I,

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78. Neill H. Alford, *The Right to Silence*, 79 YALE L.J. 1618, 1623 (1970) (reviewing LAWRENCE W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968)).

79. *See* LEVY, *supra* note 2, at 69 (noting that between repeal of *De Haeretico Comburendo* and Henry VIII's death in 1547, fifty-one people were burned for heresy).

80. *See* Langbein, *supra* note 19, at 1047 ("Prior historical scholarship has located the origins of the common law privilege in the second half of the seventeenth century, as part of the aftermath of the constitutional struggles that resulted in the abolition of the courts of Star Chamber and High Commission.").

81. *See* LEVY, *supra* note 2, at 76-77 (discussing Queen Mary's commission as precursor to Elizabeth I's infamous High Commission). The earliest antecedent of the High Commission can be traced back to a commission granted to Cromwell by Henry VIII, but these commissions did not "undertake judicial task as a matter of routine until 1557 under a Marian Commission." Alford, *supra* note 78, at 1624.

82. *See* LEVY, *supra* note 2, at 75 (noting that in last four years of Queen Mary's reign, approximately 273 alleged heretics were burned). Mary, popularly known as "Bloody Mary," ruled for only five years, from 1553 until 1558. *Id.* at 75, 77.

83. *See* Herman, *supra* note 63, at 116 ("The throne returned to Catholicism when Mary succeeded Edward.").

84. *See supra* note 26 and accompanying text (describing characteristics of prerogative court).

85. LEVY, *supra* note 2, at 76.

86. *See id.* at 76-77 (describing powers that Queen Mary's prerogative letters granted to new commission).

Mary's successor, in establishing the High Commission.[87]

Another noteworthy consequence of the Marian Inquisition was the first widespread attempt by accused heretics to claim a right against self-incrimination.[88] At this time, claims to a right against self-incrimination usually consisted of a refusal to give the oath *ex officio* or to answer any questions[89] and were a direct result of the brutality and effectiveness of this new commission.[90] Despite the lack of standard language, these claims became fairly common[91] and would be echoed in later struggles against the oath.[92]

Upon ascending to the throne in 1558, Elizabeth I immediately re-established Protestantism as the state religion and attempted to strengthen the Crown's control of the church.[93] Her first concern was to pacify her Catholic subjects, who were in nearly open rebellion over the supplanting of Queen Mary's brief restoration of the Catholic Church.[94] As an initial measure,

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87. *See* Herman, *supra* note 63, at 116 (stating that Queen Mary's commission "eventually became the Court of High Commission").

88. *See* LEVY, *supra* note 2, at 75-77 (recounting attempts by accused heretics to assert yet unformed right against self-incrimination and avoid oath *ex officio*).

89. *See* Herman, *supra* note 63, at 116 (discussing early attempts to avoid self-incrimination by non-Catholics brought before Queen Mary's commission).

90. *See* LEVY, *supra* note 2, at 76-77 (relating atrocities of Marian Inquisition and claiming that Inquisition "provoked the first widespread attempt by criminal defendants — suspected heretics all — to refuse to answer for fear of self-incrimination").

91. *Id.* at 79. The attempts to claim this right were documented in the *Book of Martyrs*, which was written and published by John Foxe in 1563. *Id.* at 79-81. The *Book of Martyrs* described the trials of famous heretics during the Marian Inquisition, depicting the resultant executions in garish woodcuttings. *Id* at 79-80. Although the book is primarily anti-Catholic propaganda, the descriptions of the trials are essentially accurate and each trial contains specific examples of the abuse of the common law rights of the accused by the oath *ex officio* and the inquisitorial process in general. *Id.* at 80-82. The book was incredibly influential, effectively enlightening the many who read it to the rights and privileges which private citizens should be afforded by their government. *Id.* at 79. In fact, the book is described as "for a century and more the most popular and most influential book in the English-speaking world, second only to the Bible." *Id.*

92. *See id.* at 166-67 (relating 1590 trial of Robert Udall, who claimed there was no law that required him to accuse himself).

93. *See* Randall, *supra* note 25, at 426 (discussing Elizabeth I's efforts to give Crown jurisdiction over all spiritual matters). Elizabeth I's most important action in solidifying the Crown's control of religious matters was signing the Act of Supremacy. 1 Eliz., c. 1 (Eng.); *see* Randall, *supra* note 25, at 426 (discussing Elizabeth's attempt to "firmly establish the national church"). This statute restored the Crown's jurisdiction over "all manner of errors, heresies, schisms, abusers, offenses and enormities." 1 Eliz., c. 1 (Eng.).

94. *See* Herman, *supra* note 63, at 116-17. Between 1569 and 1572, Elizabeth defeated a rebellion by her pro-Catholic earls, was excommunicated from the Catholic

Elizabeth created an ecclesiastical commission to search out allegedly disloyal Catholics.[95] This commission, aided by repressive legislation,[96] was extremely effective in silencing Catholic opposition.[97]

By the early 1580's, Elizabeth I and various high officials of the Anglican Church had concluded that the Puritans were becoming as dangerous to the Crown and the Anglican Church as the Catholics.[98] In order to force the Ecclesiastical Commission, the direct descendant of Queen Mary's commission, to turn its attention to the Puritans,[99] Elizabeth appointed John Whitgift, who was personally loyal to her,[100] as Archbishop of Canterbury and head of the Ecclesiastical Commission.[101] By the end of 1583, Elizabeth had authorized the reorganization of the Ecclesiastical Commission under Whitgift, and the reconstituted body became known as the High Commission.[102]

This new entity's jurisdiction was so broad as to effectively be limited only by the commissioners' discretion.[103] Its powers included the right to employ the oath *ex officio* and the right to

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Church, and discovered a Catholic plot to overthrow her government. *Id.* Additionally, Pope Pius V released her subjects "from allegiance to her." *Id.* Finally, in 1580, Pope Gregory XIII stated that it would not be a sin to kill Elizabeth. *Id.* at 117.

95. *See* Randall, *supra* note 25, at 438 (discussing creation of commission). This commission was created pursuant to the Act of Supremacy, which specifically authorized the Queen to create such commissions and articulate their powers and jurisdiction. *Id.*; *see supra* note 93 and accompanying text (discussing Act of Supremacy).

96. *See* LEVY, *supra* note 2, at 108. For example, by 1585 all Catholic priests were, by law, guilty of high treason. *Id.*

97. *See id.* at 87, 92. After 1570, when Elizabeth I was excommunicated, over a hundred priests were executed for various political crimes. *Id.*

98. *See id.* at 117 (discussing perceived similarities between Catholic and Puritan dissenters); *see also id.* at 119 (stating that Puritan movement gained strength because authorities were preoccupied with suppression of Catholics).

99. *See id.* at 120 (asserting that, because of sympathy for Puritan movement at highest levels of government, Commission had thus far been fairly lenient on Puritans).

100. *See id.* (discussing Whitgift's character and devotion to queen).

101. *See* BERGER, *supra* note 9, at 11 (portraying appointment of Whitgift as important event in development of right against self-incrimination).

102. *See* Wigmore, *supra* note 37, at 76-77 (discussing origins of Commission over which Whitgift presided). Under Whitgift, "a man of stern Christian zeal, determined to crush heresy wherever its head was raised," the High Commission became a potent political force. *Id.*

103. *See* LEVY, *supra* note 2, at 126-27 (delineating jurisdiction of High Commission). The High Commission's jurisdiction extended to: all offenses normally punishable by ecclesiastical courts; violations of any statute passed for the maintenance of religion; heretical opinions; seditious writings, contempts, and conspiracies; false rumors; slanderous words; religious errors, schisms, and recusancy; and doctrinal regula-

impose immediate fines or imprisonment.[104] Moreover, the Commission had the choice to operate with or without a jury, as well as the power to summon witnesses and punish anyone not obeying its orders.[105]

By the late sixteenth century, then, the Puritans were perceived to be the primary threat to the established order.[106] Furthermore, the general population, by way of *The Book of Martyrs*, had some conception of their common law rights.[107] The High Commission was fully operative and employing the oath *ex officio* on a regular basis,[108] and resistance to the High Commission and its use of the oath was increasing.[109]

### 4. The Appearance of the Modern Right Against Self-Incrimination

The appearance of the articulated right against self-incrimination in the mid-seventeenth century resulted from the fall of the Star Chamber[110] and the High Commission.[111] The attack on these institutions escalated in the late sixteenth century, led by Robert Beale, a gifted lawyer and member of Parliament who

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tion of the Anglican ministry. *Id.* The Commission's jurisdiction also had no geographical boundaries. Helmholz, *supra* note 20, at 965.

104. Helmholz, *supra* note 20, at 965. Older ecclesiastical courts were limited to imposing excommunication and public penance. *Id.* In contrast, "[a]ny procedure which the High Commission might wish to follow was prescripted." *Id.*

105. *See* LEVY, *supra* note 2, at 127 (discussing powers allowed High Commission by Queen Elizabeth).

106. *See* BERGER, *supra* note 9, at 12 (characterizing perceived threat from Catholic Church as "reduced" as result of England's defeat of Spanish Armada in 1588).

107. *See supra* note 91 and accompanying text (discussing *The Book of Martyrs*).

108. *See* BERGER, *supra* note 9, at 12 (discussing 1590 High Commission proceedings against John Udall); *see also* LEVY, *supra* note 2, at 141 (describing disciplinary actions taken by High Commission against over 200 ministers by 1584).

109. *See* BERGER, *supra* note 9, at 13 (noting that "[b]y the early seventeenth century common law prohibitions were increasingly used against the oath to the consternation of church officials").

110. *See* MCCORMICK, *supra* note 14, § 114, at 280 (discussing formation and purposes of Star Chamber). The Star Chamber, also a prerogative court, had its source in the judicial branch of the Privy Council. LEVY, *supra* note 2, at 49; *see supra* notes 51-56 and accompanying text (describing Privy Council's development into several differentiated functions). The Star Chamber's procedures were determined entirely at its discretion, but it was more inquisitorial than accusatorial, making regular use of the oath *ex officio*. *See* LEVY, *supra* note 2, at 100-01 (analyzing procedural rules of Star Chamber).

111. *See supra* note 80 (discussing abolition of Star Chamber and High Commission).

worked as the Clerk of the Privy Council.[112] Beale, through his writings and Parliamentary speeches, was the foremost lay critic of the High Commission.[113] His attacks on the High Commission revived the argument that the oath *ex officio* was contrary to the Magna Carta.[114] Although this argument was not historically accurate,[115] his quotation of the Magna Carta had the important effect of turning a document that originally guaranteed the rights of the great landowners into a charter that ensured the basic rights of all.[116] Building on Beale's argument, attacks on the High Commission and the Star Chamber based on the Magna Carta became commonplace.[117]

The assault on the oath continued in the early seventeenth century under the direction of another exceptional lawyer, Nicholas Fuller,[118] and the Chief Justice of the Court of Common Pleas, Sir Edward Coke.[119] Fuller fought the oath at every turn, defending Puritans, speaking at Commons against the royal prerogative, sponsoring bills to reaffirm the Magna Carta or disable the High Commission, and even refusing to take the oath when he became a defendant himself.[120] He also published an extremely influential and persuasive pamphlet arguing against the use of the oath *ex officio* and for the elimination of

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112. *See* LEVY, *supra* note 2, at 170 (referring to Beale as "the most prolific critic" of High Commission's oath procedure).

113. *Id.* at 170-71.

114. *See* LEVY, *supra* note 2, at 171-72 (discussing Beale's use of Magna Carta as support for his argument that oath *ex officio* was illegal). The first use of this argument was Parliament's fourteenth century attempt to cite Magna Carta as legal basis for opposition to Privy Council's use of oath *ex officio*. *See supra* note 58 and accompanying text (discussing Privy Council's use of oath *ex officio*). Additionally, Beale argued that prohibitions issued by the thirteenth century English civil courts against proceedings by the ecclesiastical courts supported his argument that the oath was illegal. BERGER, *supra* note 9, at 12. *See supra* notes 48-49 and accompanying text (discussing early resistance by English civil courts to expanding jurisdiction of ecclesiastical courts).

115. *See* R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 764 (1938). As Pittman points out, the privilege against self-incrimination was never a part of the Magna Carta. *Id.*

116. LEVY, *supra* note 2, at 171-72.

117. *See id.* at 246-47 (discussing citation to Magna Carta by William Coke and by various Puritan pamphleteers).

118. *See id.* at 232 (describing Fuller as active defense attorney for Puritan dissenters).

119. *See* BERGER, *supra* note 9, at 13 ("The appointment of Sir Edward Coke as chief justice of the Court of Common Pleas in 1606 led to even more resistance to the compulsory self-incrimination procedures of the ecclesiastical courts.").

120. LEVY, *supra* note 2, at 232.

the High Commission.[121]

Sir Edward Coke used his position as Chief Justice of the Court of Common Pleas to oppose, on an official level, the power of the High Commission.[122] For example, Coke issued numerous writs of prohibition,[123] which enjoined the ecclesiastical courts from hearing or deciding a specific suit based on the illegality of the oath *ex officio*.[124] Furthermore, Coke, answering a question from the House of Commons, declared that the oath was illegal except in cases affecting wills and marriages,[125] and later, in two of his King's Bench opinions,[126] even asserted the principle that no man would be forced to accuse himself.[127]

As recognition of the oath *ex officio*'s inherent immorality increased,[128] the use of the oath declined until it was, for a short period of time, not a major issue.[129] The theoretical underpinnings of the resistance to the oath had matured as well.[130] No longer was the oath viewed as simply unfair or even illegal on the

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121. *Id.* at 234-35.

122. *See* Randall, *supra* note 25, at 446 ("Wigmore and Mary Hume Maguire agree that the prohibitions which Coke issued against the Church courts on the ground that their procedure was illegal dealt the crucial blow to the oath *ex officio* and to the High Commission."); *see also* BERGER, *supra* note 9, at 13-14 (quoting opinion by Coke that took position that High Commission did not have power to imprison without action by Parliament).

123. *See id.* at 437 (describing a writ of prohibition). A writ of prohibition was issued by a common law judge upon application by a defendant in an ecclesiastical court to the ecclesiastical court. *Id.* at 437-438. This writ prohibited the ecclesiastical judge from proceeding with the case on the ground that it contained temporal matters. *Id.* at 438. The common law judge then held a hearing and if it was determined that the case concerned a temporal matter, the writ stood. *Id.*

124. *See* Wolfram, *supra* note 26, at 219 (discussing Coke's leadership in use of writs of prohibition); *see also* LEVY, *supra* note 2, at 251, 253 (noting specific uses of prohibitions by Coke).

125. Corwin, *supra* note 30, at 7-8 (discussing opinion issued by Coke and Popham, chief justice of King's Bench, in 1607).

126. *See* Randall, *supra* note 25, at 450 (discussing Coke's appointment to Chief Justice of King's Bench, England's highest criminal court). In an effort to mitigate the damage Coke was doing from his position on the Court of Common Pleas, King James attempted to co-opt Coke by making him Chief Justice of England's highest criminal court. LEVY, *supra* note 2, at 252.

127. *See* LEVY, *supra* note 2, at 253, 255 (discussing two King's Bench cases in which Coke cited, as rule of law, principle that no man should be compelled to accuse himself).

128. *See id.* at 263 (relating that resistance to oath had been partially successful).

129. *See* Alford, *supra* note 78, at 1626 (discussing "temporary end to major controversy concerning the *ex officio* oath"); *see also* LEVY, *supra* note 2, at 262-63 (discussing disappearance of oath as important issue between 1616 and 1633).

130. LEVY, *supra* note 2, at 263.

grounds that it compelled a man to convict himself with his own testimony; rather, the entire idea of forcing a man to testify against himself, under oath or not, came to be viewed as a violation of a basic human right.[131] Despite this change in the conception of the right, however, the use of the oath reemerged as an issue when Archbishop William Laud took over the High Commission in 1633.[132] Laud's use of the oath was even more aggressive than the infamous John Whitgift, which revitalized the opposition that Beale, Fuller, Coke, and others had earlier championed.[133]

In 1637, John Lilburne, a religious and political radical, was arrested for sending seditious material into England.[134] Lilburne, who made civil disobedience a way of life,[135] refused to take the oath *ex officio* at a preliminary examination.[136] At trial, Lilburne continued to refuse the oath, and as a result, was convicted of contempt and subjected to five hundred lashes.[137] At his punishment, Lilburne gave an impassioned and persuasive speech against his harsh and unjust treatment and the illegality of the oath *ex officio*.[138] In response to his speech, the court ordered him imprisoned in one of England's worst prisons.[139] Lilburne was able to get pamphlets describing his unjust trial and treatment out of the prison[140] and in 1641, Parliament,[141] galvanized by public opinion concerning the blatant unfairness

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131. *Id.*

132. *See* Alford, *supra* note 78, at 1627 ("Laud revived the controversy concerning the oath.").

133. *See* BERGER, *supra* note 9, at 15 (discussing Laud's aggressiveness and resulting increase in public resistance to all aspects of High Commission).

134. Wolfram, *supra* note 26, at 216.

135. *Id.* at 215 (discussing Lilburne's lifelong inability to cease his political agitation).

136. *See* BERGER, *supra* note 9, at 16-17 (describing Lilburne's refusal to cooperate with pretrial procedures).

137. Wolfram, *supra* note 26, at 217.

138. *See* LEVY, *supra* note 2, at 276-77 (relating significant portions of Lilburne's speech).

139. Wolfram, *supra* note 26, at 218 n.21.

140. LEVY, *supra* note 2, at 277-78.

141. *See* Wolfram, *supra* note 26, at 220. Parliament was called primarily because Charles I needed funds to compensate the Scots for his unsuccessful attempt to impose the Anglican Church on Scotland. *Id.* Additionally, however, Charles was in need of funds to finance his faction in the imminent civil war. LEVY, *supra* note 2, at 278. With the Scottish bloc's support, Parliament was immune from dissolution. Wolfram, *supra* note 26, at 220.

of Lilburne's trial and sentence, invalidated the Star Chamber and the High Commission and specifically barred the use of oaths by the ecclesiastical courts.[142]

It was not until Lilburne's subsequent trial for high treason in 1649, however, that a high English court explicitly recognized the right against self-incrimination.[143] By 1700, English courts generally accepted the principle that compelling an answer in a criminal matter was improper.[144] After over four hundred years of development, the right against self-incrimination was established as a fundamental principle.[145]

In summary, the traditional view holds that the centuries long battle against the oath *ex officio* and the power of the prerogative and inquisitorial courts was the motivation for the development of the right against self-incrimination.[146] The right against self-incrimination began as a nebulous defense[147] to the hated oath *ex officio,* simple resistance to an unjust procedure.[148] Over time, the right was asserted in increasingly sophisticated forms by various interest groups subjected to and injured by the use the oath, including, for example, the Crown in its attempt to protect its sovereignty,[149] the common law courts in their attempt to protect their jurisdiction,[150] the Catholics in their at-

142. Wolfram, *supra* note 26, at 220-221.

143. *See* Wolfram, *supra* note 26, at 241 (quoting transcript from Lilburne's 1649 trial). Lilburne stated, "[B]y the Laws of England, I am not to answer to questions against or concerning myself," to which Lord Keble replied, "You shall not be compelled." *Id.*

144. 8 WIGMORE, EVIDENCE, *supra* note 15, § 2250, at 298-300; *see* LEVY, *supra* note 2, at 325 ("By the early eighteenth century, the right prevailed supreme in all proceedings with one vital exception, the preliminary examination of the suspect.").

145. *See supra* notes 24-144 and accompanying text (discussing development of right against self-incrimination from first utilization of oath *ex officio* in 1246 until right's general acceptance in 1700).

146. *See supra* notes 24-26 and accompanying text (discussing basic roots of right against self-incrimination).

147. *See* Helmholz, *supra* note 20, at 966 (describing "the first efforts to combat the oath" as combining "Biblical literalism, abstract appeals to the rights of conscience, and invocation of what Levy calls the 'initially vague [Latin] maxim' that no one should be obliged to convict him or herself") (quoting LEVY, *supra* note 2, at 330).

148. *See supra* notes 14-34 and accompanying text (locating ultimate root of right against self-incrimination in resistance to oath *ex officio*).

149. *See supra* notes 39-47 (describing early resistance by Henry III to Church's attempt to implement what amounted to criminal courts).

150. *See supra* notes 48-49 and accompanying text (describing common law courts' early struggles against encroachments on their jurisdiction by ecclesiastical courts); *see also supra* note 124 and accompanying text (offering example of common law courts'

tempt to escape extermination,[151] the Puritans in their attempt to secure religious freedom,[152] and various political activists and Parliament in their fight to limit prerogative rule and implement rule-based government.[153] Finally, the High Commission and the Star Chamber, with their numerous abuses and brutalities, served as a focus for all the resistance to the oath *ex officio* that had been building since 1246.[154] From their inevitable demise, the right against self-incrimination was born.[155]

### B. *Recent Modifications to the Traditional Historical Model of the Development of the Right Against Self-Incrimination*

In contrast to the traditional view, the more recent theory of the development of the right against self-incrimination (or "new view") places the right's earliest roots firmly in the *ius commune*.[156] This new view also argues that the modern form of the right did not come into being until the late eighteenth century.[157] Further, the right's appearance then was only as a result of the rise of the adversarial criminal procedure and the efforts of defense counsel.[158]

#### 1. The Earliest Origin of the Right Against Self-Incrimination

The first discrepancy between the two conceptions of the development of the right concerns the earliest origin of the

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resistance to inquisitional procedures of prerogative courts in period just prior to abolition of High Commission).

151. *See supra* notes 88-92 and accompanying text (discussing claim of right against self-incrimination by accused heretics).

152. *See supra* notes 98-105 and accompanying text (discussing formation of powerful new body, High Commission, to deal with Puritan threat to Crown).

153. *See supra* notes 112-44 and accompanying text (specifying several individuals whose resistance to High Commission and oath *ex officio* were central to appearance of articulated right against self-incrimination).

154. *See supra* notes 80-142 and accompanying text (describing role of High Commission in development of right against self-incrimination).

155. *See supra* notes 146-54 and accompanying text (summarizing traditional view of development of right against self-incrimination).

156. *See* Helmholz, *supra* note 20, at 964 (defining ius commune as merger of Roman and canon laws). "[T]he *ius commune* itself contained a rule against forced self-incrimination, and the earliest clear statement of the privilege in the legal life of England sprang from this continental source rather than from the immemorial usages of the common law." *Id.*

157. Langbein, *supra* note 19, at 1047.

158. *Id.*

right.[159] The traditional view holds that the right was conceived as an indistinct objection to the oath *ex officio*[160] and that only as a result of the struggle against the religious and political persecution of the High Commission and the Star Chamber did the right become an accepted aspect of common law criminal procedure.[161] Further, this view maintains that the sixteenth century citation[162] of the maxim *nemo tenetur seipsum prodere*, which translates as "no man is obliged to accuse himself,"[163] was simply an articulation of the resistance to the inquisitorial courts responsible for persecuting religious minorities in early sixteenth century England.[164] While acknowledging that the maxim was originally a canon law principle,[165] the traditional view gives the origin of this maxim little or no weight in considering the evolution of the right against self-incrimination.[166]

Recent evidence,[167] however, demonstrates that the *nemo*

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159. *See* Helmholz, *supra* note 20, at 963-64 ("[F]ocusing . . . exclusively on the opinions of the seventeenth-century common law judges and reading them against the backdrop of subsequent developments has resulted in a narrow and misleading account of the origin of the privilege.").

160. *See supra* note 147 (describing first indistinct attempts by conscientious dissenters to resist use of oath).

161. *See supra* note 80 (describing prior historical scholarship concerning right against self-incrimination).

162. *See* LEVY, *supra* note 2, at 1-2 (relating 1532 use of maxim by John Lambert in trial for heresy). Lambert may have been reciting the writings of William Tyndale. *Id.* at 64; *see supra* note 73 (discussing significance of Tyndale to development of right against self-incrimination).

163. *See supra* note 33 and accompanying text (defining maxim of *nemo tenetur*).

164. *See* LEVY, *supra* note 2, at 1-2 (describing 1532 heresy trial of John Lambert and characterizing Lambert's citation of *nemo tenetur* maxim as afterthought).

165. *See* Mark Macnair, *The Early Development of the Privilege Against Self-Incrimination*, 10 OXFORD J. LEGAL STUD. 66, 67 (1990) (describing Wigmore's argument that *nemo tenetur* maxim was canon law maxim used out of context in struggle against High Commission).

166. *See* 8 WIGMORE, EVIDENCE, *supra* note 15, at 296-301 (characterizing early use of *nemo tenetur* as mistaken reliance on what was actually a canon law procedural rule); *see also* Macnair, *supra* note 165, at 70 (summarizing Wigmore's position concerning mistaken use of maxim); LEVY, *supra* note 2, at 329-30.

> The *nemo tenetur* maxim had come a long way from its mysterious origins. Reputedly a canon-law maxim, it had never existed in any canon-law text. At best there was the general principle in Gratian, wiped out by Innocent III, Aquinas and the Inquisition, that no man had to come forward voluntarily to confess a crime for which he was not even suspected.

*Id.*

167. *See* Langbein, *supra* note 19, at 1072 (criticizing traditional view of origins of right against self-incrimination). Langbein characterizes Helmholz's article, *supra* note 20, as a "devastating refutation of Leonard Levy's efforts to portray the privilege against

*tenetur* maxim was an often utilized principle of the *ius commune.*[168] Further, this maxim expressed the right against self-incrimination long before the right appeared in the common law.[169] As early as the thirteenth century, the maxim is discussed in works by influential commentators on medieval canon law.[170] By the 1590's arguments were being made in the English ecclesiastical courts against the legality of the oath *ex officio* that relied on a fully developed canonical right against self-incrimination.[171] In other words, individuals targeted by the English ecclesiastical and prerogative courts were using thirteenth century canonically-based legal arguments to oppose the use of the oath *ex officio.*[172]

The traditional view's contention that the maxim *nemo tenetur* was adopted solely as the articulation of an idea that had developed in the common law is contradicted by the new view.[173]

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self-incrimination as an English invention intended to protect the indigenous adversarial criminal procedure against incursions of European inquisitorial procedure." *Id.*

168. *See* Helmholz, *supra* note 20, at 967 (asserting that maxim was "a commonplace[ ] taken from the traditions of the European ius commune").

169. *See* Langbein, *supra* note 19, at 1072. "The concept that underlies the English privilege against self-incrimination originated within the European tradition, as a subprinciple of inquisitorial procedure centuries before" the right actually appeared in the common law. *Id.*; *see* Macnair, *supra* note 165, at 68 (pointing out problems with idea that "the basis of th[e] opposition [to inquisitorial procedure and the self-incriminatory oath] was a generalization from common-law procedure"). Specifically, Macnair argues that there was contemporary opposition to the oath *ex officio* on the European continent and that the sources for this opposition were probably not influenced by the English common law. *Id.* at 68-69.

170. Helmholz, *supra* note 20, at 967. The maxim appeared in "the most basic of medieval guides to canon law, the glossa ordinaria to the Decretals (1234) of Pope Gregory IX" and was later endorsed by Innocent IV and Panormitanus, who were "probably the two most influential writers on the medieval canon law." *Id.*

171. *See id.* at 969 ("[I]n litigation before the ecclesiastical courts, strong arguments were being made against the oath that were based upon sources from within the ius commune, not the English common law."). There were objections to the oath *ex officio* based on Roman canon law treatises in cases in the English ecclesiastical courts and in sixteenth and seventeenth century treatises concerning the procedure of English ecclesiastical courts. *Id.* at 969-72. Further, the arguments used in these cases and treatises were actually based almost exclusively on arguments from the *ius commune. Id.* at 972-87.

172. *See id.* at 969 (discussing evidence of use of Roman canon law in struggle against oath *ex officio*). "[E]vidence . . . shows clearly that objections were being taken regularly against the oath's validity under the law of the Church." *Id.* Further, the parties in several late sixteenth century cases "contended that they were not compelled to answer incriminating questions and relied upon the *ius commune* in articulating this argument." *Id.* at 973.

173. *See* Langbein, *supra* note 19, at 1072 (describing new view as "devastating refu-

The new view argues that, in resisting an abusive inquisitorial practice that originated in the *ius commune*, English lawyers and common law courts relied on principles of the *ius commune*.[174] Therefore, the development of the right against self-incrimination is more directly related to the canonical maxim *nemo tenetur seipsum prodere*, and the roman-canon law in general, than the traditional view acknowledges.[175] Despite the likelihood that the right originated in the *ius commune* and was only later adopted in England,[176] much of the traditional view of the later events remains valid,[177] particularly the argument that the struggle against the oath *ex officio* was directly responsible for the expansion of the right as a result of the English constitutional struggles in the mid-seventeenth century.[178]

### 2. The Rise of the Adversarial Criminal System and the Role of Defense Counsel

Another objection to the traditional view is that the right could not possibly have gained wide acceptance by 1700[179] because the procedural framework of the time simply did not allow

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tation" of traditional view). The evidence "shows clearly that objections to the . . . use of the *ex officio* oath were taken initially on the ground that the *ex officio* oath was contrary to the letter of the Roman canon law, not on the basis of supposed rights of conscience or as derived from Magna Carta or as a common law invention, as Levy's account suggests." Helmholz, *supra* note 20, at 969.

174. *See* Langbein, *supra* note 19, at 1072 (stating that Helmholz's article, *supra* note 20, "established that the *nemo tenatur* [sic] maxim influenced practice in English ecclesiastical courts long before anybody in England started complaining about Star Chamber or the Court of High Commission").

175. *See supra* note 169 (discussing origin of right against self-incrimination in *ius commune*).

176. *See* Helmholz, *supra* note 20, at 988 ("The oft-repeated maxim *nemo tenetur prodere seipsum* clearly came from canonical sources.").

177. *See id.* at 989-90 (acknowledging that, despite his argument concerning the greater role of the *ius commune* in the development of the right against self-incrimination, "[n]one of the evidence presented here means that we owe the modern privilege against self-incrimination directly to the Roman and canon laws. The privilege became a part of our law because the common lawyers took up its cause, embraced and expanded it"); *see also id.* at 967. "The broad outlines of Levy's account are compelling and correct." *Id.*; *see* Langbein, *supra* note 19, at 1083 ("The *nemo tenatur* [sic] slogan did indeed gain currency during the Tudor-Stuart constitutional struggles.").

178. *See supra* note 14 and accompanying text (describing struggle against oath *ex officio* as main reason for development of right against self-incrimination).

179. *See supra* notes 143-44 and accompanying text (discussing general acceptance of right against self-incrimination after second trial of John Lilburne in 1649); *see also* LEWIS MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 15 (1959) (describing process of slow acceptance and expansion of right after Lilburne trial).

a defendant to assert the right with any hope of proving his innocence.[180] More specifically, not until the defendant could rely on counsel to speak for him could he risk asserting his right against self-incrimination.[181] Thus, the modern version of the right did not appear until the late eighteenth century, when the reformation of the criminal trial procedure was essentially complete.[182]

The specific procedural facets of the seventeenth century criminal system that prevented a defendant from claiming the right against self-incrimination included the denial of access to defense counsel,[183] the restrictions on defense witnesses,[184] the unarticulated state of any prosecutorial standard of proof,[185] the frustration of defensive trial preparation,[186] the harsh pretrial procedure,[187] and the sentencing purposes of the trial.[188] These

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180. *See* Langbein, *supra* note 19, at 1048 (stating that several characteristics of early modern criminal procedure combined to prevent right against self-incrimination from developing until early eighteenth century).

181. *See id.* at 1048-49 (discussing need for defense-by-proxy for right against self-incrimination to function). Langbein asserts that "[t]he privilege against self-incrimination at common law was the work of defense counsel." *Id.* at 1047.

182. *Id.* "[T]he true origins of the common law privilege [against self-incrimination] are to be found not in the high politics of the English revolution, but in the rise of adversary criminal procedure at the end of the eighteenth century."

183. *See id.* at 1054. If the accused did not speak, no one would, and he would undoubtedly be found guilty. *Id.* "The right to remain silent when no one else can speak for you is simply the right to slit your throat . . . ." *Id.*

184. *Id.* at 1055-56. The restriction on defense witnesses, one of the first limitations to be corrected, held that, if allowed at all, defense witnesses could not testify upon oath. *Id.* Thus, if the defendant could not call anyone to testify on his behalf or if his witnesses were testifying unsworn, the defendant was much more likely to testify himself. *Id.*

185. *Id.* at 1056-57. Because the "beyond a reasonable doubt" standard of proof did not yet exist, a prisoner could not expect the jury to probe the prosecution's case and was therefore forced to do it himself. *Id.*

186. *Id.* at 1057-58. The defendant was detained prior to trial, denied assistance of counsel, refused contact with defense witnesses and prohibited from acquiring a copy of the charges against him. *Id.* at 1058-59.

187. *Id.* at 1059-62. The pretrial procedure, which in any legal system is the most important aspect of a criminal case, was tilted heavily against the defendant until well into the eighteenth century. *Id.* at 1059-61. In other words, the accused was forced to incriminate himself as a regular pre-trial practice. *Id.* at 1061. "If he refused to testify at trial, . . . the pretrial statement would be used against him." *Id.*

188. *Id.* at 1062-65. An accused's only hope of influencing a jury and thus obtaining a lesser sentence was to favorably impress the jury by pleading his case well, a possibility which was greatly diminished by the other procedural factors working against him. *Id.* at 1062-64.

procedures combined to force the defendant to speak.[189] As the role of the defense counsel increased and the adversarial system matured, however, these procedures were slowly replaced or became irrelevant, and the right against self-incrimination became available to a criminal defendant.[190]

These changes in procedure are aspects of a more significant change in the basic philosophy of criminal prosecution.[191] The criminal trial evolved from requiring the accused to prove, through affirmative efforts, that he is innocent, to a procedure where the prosecution must prove the defendant guilty and the defendant is responsible only for challenging the prosecution's case.[192] The right against self-incrimination, in its modern form, resulted from this change in procedure.[193]

### C. *The Changing Relationship Between the Corporation and the State*

The corporation[194] was originally viewed as existing solely by permission of the state, a view that entailed a clear relationship between the state and the corporate entity.[195] As the corporation became more common in economic life, this conception of the corporation fell into disfavor and new theories of corporate personality gained currency, redefining the corporate/state rela-

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189. *See id.* at 1066 (asserting that procedural hurdles "left the typical defendant with little alternative but to conduct his own defense").

190. *See id.* at 1069. "Across these decades, defense counsel broke up the 'accused speaks' trial. In these developments we find not only the beginnings of a new theory of trial, but also the real origins of the privilege against self incrimination." *Id.*

191. *See id.* at 1069 (discussing change in criminal trial philosophy).

192. *See id.* at 1047-48 (discussing change in criminal trial procedure).

193. *See id.* at 1065-66 (stating that there are many reasons for doubting traditional view of development of right against self-incrimination).

> The key insight, however, is that the slogan [*nemo tenetur*] did not make the privilege; it was the privilege, which developed much later, that absorbed and perpetuated the slogan. The ancestry of the privilege has been mistakenly projected backwards upon the slogan, whereas the privilege against self-incrimination in common law criminal procedure was, in truth, the achievement of defense counsel in the late eighteenth and early nineteenth centuries.

*Id.* at 1083.

194. *See* LEWIS D. SOLOMON ET AL., CORPORATIONS: LAW AND POLICY, MATERIALS AND PROBLEMS 1 (1982) (defining corporation as "an association of individuals, organized to further a common purpose, and possessing a combination of attributes (e.g., continuity of existence, limited liability, separate legal entity, centralized management and transferability of interests) which distinguishes the corporation from other associations").

195. Mark, *supra* note 22, at 1441.

tionship.[196] This redefinition resulted in the corporation being increasingly perceived as an independent actor in modern society.[197] As the corporation has continued to grow in importance, government regulation, especially regulation that may result in monetary or criminal penalty, has increased exponentially.[198]

Originally, a corporation could be created only by a sovereign's grant.[199] This grant, termed a charter, created the corporation and completely defined and limited its powers.[200] Because all corporate powers flowed from the charter granted by the sovereign, the relationship between the state and the corporation was clear: the state had considerable control over the corporation.[201] By the early nineteenth century, this view had evolved slightly, with legal scholars beginning to perceive the creation of a corporation as a contract between the corporation and the state.[202] Such a conception of the corporate entity was important because the corporation was beginning to be recognized as separate from the state.[203]

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196. *See id.* at 1441-42 (discussing modifications to theory of corporate personality).

197. *See id.* at 1470 (stating that "corporations obtained their political and thus legal status independently from the state" as a result of realist theory).

198. *See* Dan K. Webb et al., *Understanding and Avoiding Corporate and Executive Criminal Liability*, 49 BUS. LAW. 617, 618 (1994) (noting recent increase in criminal convictions of corporations).

199. *See* William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1484 (1989) ("Corporate doctrine, as received from Great Britain, held that the corporate form was instituted by the sovereign's grant of a charter."); *see also* Case of Sutton's Hosp., 5 Co. Rep. 253, 305 (K.B. 1613) (Eng.) ("None but the King alone can create or make a corporation.").

200. *See* Bratton, *supra* note 199, at 1504-05 (discussing concession or fiction theory); *see also* Mark, *supra* note 22, at 1444-45 (discussing state's limitation of U.S. corporations before 1880). This section concentrates on the history of corporate legal theory in the United States because "[e]arly American corporate law was more extensive and more highly developed than any in contemporary Europe." Bratton, *supra* note 199, at 1485.

201. *See* Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819) (Marshall, C.J.) (finding that private corporation "possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence"); *see also* Mark, *supra* note 22, at 1450 (discussing limitations in charters as means of protection for public).

202. *See Dartmouth College*, 17 U.S. at 637-38 (discussing contractual nature of incorporation).

203. *See* Mark, *supra* note 22, at 1452 ("The contract theory of incorporation developed in Dartmouth College was clearly designed to limit the state's ability to interfere with the operations of the corporation."). The corporation, however, was still viewed as deriving its power from the state. *See Dartmouth College*, 17 U.S. at 685-86 (discussing sovereign as originator of corporations) (Story, J.).

By the late nineteenth century, the corporate form was much more common.[204] This proliferation was the result of general incorporation laws, which changed incorporation from a legislative matter to an administrative and procedural one, thereby undercutting the concession theory.[205] As the concession theory lost its viability, the contractual, or partnership, conception of the corporate entity came into currency.[206] This theory held that a corporation was based entirely on the agreement of the parties who formed the corporation, a view that further emphasized the independence of corporations from the state.[207]

Finally, with the rise of the managerial corporation, the inadequacy of the partnership theory became apparent.[208] The partnership theory failed to accurately reflect the contemporary corporate entity because it ignored the inherent value of the immortality of the corporate entity and the rapidly decreasing role of the incorporators whose agreement to incorporate was supposedly so central.[209] As a result, this theory declined in importance, prompting the corporate bar to enter into a long and spirited debate regarding the proper theory of the corporate entity.[210] From this debate emerged the realism theory of the corporate entity, which defined the corporation as an intricate system of productive organization.[211]

Finally, around 1930, the theory of corporate realism was discredited as well.[212] From approximately 1930 until recently, the corporate form has been regarded as a bundle of interests in

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204. Bratton, *supra* note 199, at 1485.

205. Mark, *supra* note 22, at 1454-55 (discussing change in incorporation process); *see* Bratton, *supra* note 199, at 1485 (discussing general corporation laws).

206. *See* Mark, *supra* note 22, at 1457 (discussing rise of partnership view after 1880).

207. *See id.* at 1455 (noting that growing corporate autonomy was partly result of failure of concession theory); *see also id.* at 1459 (stating that, after rise of contract theory, it was "clear that individuals, not the state, empowered corporations").

208. *See id.* at 1464-65 (discussing problems with partnership theory).

209. *Id.* By the early twentieth century, a class of professional managers was making all important decisions, a circumstance for which the partnership theory simply could not account. *See* Bratton, *supra* note 199, at 1475-76 (discussing rise of managerialism).

210. *See* Mark, *supra* note 22, at 1465-68 (discussing debate that eventually gave rise to realism theory). This debate was based on both Continental and Anglo-American sources. *Id.* at 1465-66.

211. *See supra* note 8 and accompanying text (defining realism theory of corporate personality).

212. Bratton, *supra* note 199, at 1491.

a unique business structure.[213] This new theory did not discredit the concept that a corporation was an independent, autonomous entity, however, and this view survives today.[214]

As the corporation gained independence from the state, the state substituted legislative regulation for the charter limitations of an earlier era.[215] Eventually this independence, and the misconduct it sometimes engendered, created a social movement against criminal corporate conduct.[216] This movement has in turn resulted in a marked increased in the prosecution and punishment of corporations in numerous fields.[217]

## II. *A CORPORATION'S RIGHT AGAINST SELF-INCRIMINATION UNDER U.S., AUSTRALIAN, AND EUROPEAN UNION LAW*

In *Hale v. Henkel*,[218] the U.S. Supreme Court decided the issue of whether the right against self-incrimination is available to a corporation.[219] The U.S. Supreme Court found that the right did not develop to protect corporations, which were enti-

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213. *See* Mark, *supra* note 22, at 1481 (discussing conceptual view of corporate form after decline of realism theory); *see also* Bratton, *supra* note 199, at 1491 (discussing disappearance of debate of nature of firm in traditional legal terms).

214. *See* Mark, *supra* note 22, at 1483.

> The corporation, once the derivative tool of the state, had become its rival, and the successes of autonomous corporate management turned the basis for belief in an individualist conception of property on its head. The protests of modern legists notwithstanding, the business corporation had become the quintessential economic man.

*Id.*; *see id.* at 1442 (discussing continued existence of convention that corporation is legal person).

215. *See id.* at 1442 (stating that after concession theory was discredited, "[t]he states chose to abandon their attempts to regulate corporations through their charters and sought instead to regulate harmful activities, regardless of the form of the economic enterprise").

216. *See* Steven C. Bennett, *Developments in the Movement Against Corporate Crime*, 65 N.Y.U. L. REV. 871, 873-75 (1990) (reviewing FRANCIS T. CULLEN ET AL., CORPORATE CRIME UNDER ATTACK: THE FORD PINTO CASE AND BEYOND (1987)) (discussing social movement against criminal corporation).

217. *See id.* at 879 (discussing increased prosecution for workplace safety violations since 1980, particularly in California); *see also* Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990*, 71 B.U. L. REV. 247, 274 (1991) (displaying statistics showing large increase in number of antitrust prosecutions and increase in criminal fines for antitrust violations); Sidney M. Wolf, *Finding An Environmental Felon Under the Corporate Veil: The Responsible Corporate Officer Doctrine and RCRA*, 9 J. LAND USE & ENVTL. L. 1, 1 (1993) (discussing increased criminalization of environmental offenses).

218. 201 U.S. 43 (1906).

219. *See id.* at 74 (finding that "there is a clear distinction . . . between an individ-

ties existing solely as the result of state power,[220] and that allowing this right to corporations would make enforcement of certain governmental regulations infeasible.[221] In contrast, Australia's High Court only recently determined that the right was unavailable to a corporation.[222] The High Court based its decision on a broad survey of the existing common law and the historical and modern reasons for the development and existence of the right.[223] Lastly, the European Union decided in 1989 that a corporation does have the right to refuse to give answers which would incriminate itself.[224] The right was held to be one of several basic "rights of defence" (hereinafter "rights of defence") and consequently considered more important than the government's need to obtain information.[225]

### A. *The U.S. Treatment of a Corporation's Right Against Self-Incrimination*

In the United States, the issue of whether a corporation can successfully claim a right against self-incrimination was settled nearly ninety years ago by *Hale v. Henkel*.[226] *Henkel*'s basic holding, that the Fifth Amendment is a personal right that is unavailable to a corporation,[227] has since undergone some modification, including a reworking of its policy justifications[228] and an

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ual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the state").

220. *See id.* at 74-75 (discussing corporation as "a creature of the state").

221. *See id.* (discussing difficulty in enforcing anti-trust laws if corporation was allowed to claim right against self-incrimination).

222. *See* Environment Protection Agency v. Caltex Refining Co., 118 A.L.R. 392, 412 (1993) (Austl.) (holding that right against self-incrimination is not available at common-law in Australia).

223. *See id.* at 397-404 (examining treatment of right against self-incrimination in United States, England, Canada, and New Zealand and modern justifications).

224. *See* Orkem SA v Commission, Case 374/87, [1989] E.C.R. 3283, 3351, ¶ 35 [1991] 4 C.M.L.R. 502, 556 (holding that Commission investigation cannot undermine rights of defence and therefore corporation cannot be compelled to provide information which would incriminate it).

225. *Id.* at 3351, ¶¶ 33-34, [1991] 4 C.M.L.R. at 556.

226. 201 U.S. 43 (1906).

227. *Henkel*, 201 U.S. at 69, 74. Initially, the Court held that the Fifth Amendment right against self-incrimination was personal and that the subpoenaed corporate officer could therefore not assert the corporation's right against self-incrimination. *Id.* at 69. The Court went on to say that there was "a clear distinction between an individual and a corporation" and that the corporation itself had no Fifth Amendment rights. *Id.* at 74.

228. *See White*, 322 U.S. at 700-01 (abandoning state's visitorial powers as justification for denying right against self-incrimination to corporations); *see also Bellis*, 417 U.S.

expansion of its application to encompass unions,[229] political organizations,[230] and partnerships.[231] Additionally, the Supreme Court has used the holding as the basis for significantly limiting the application of the right against self-incrimination for anyone employed by a corporation.[232] Through all of this, however, the Court has left the conclusion that a corporation has no right against self-incrimination unchanged.[233]

*Henkel* involved a subpoena issued for some of a corporation's books and documents at the grand jury stage of an antitrust investigation.[234] The subpoena was issued to a corporate officer who was himself protected by a statutory grant of immunity.[235] The officer argued that this immunity was not enough to protect the corporation, and attempted to resist the subpoena based on the corporation's right against self-incrimination under the Fifth Amendment.[236]

The Court in *Henkel* disagreed with this contention, holding that it was improper for three reasons.[237] First, the Court held that under the Fifth Amendment the right against self-incrimination was a personal one and thus the officer could not claim the

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at 91-92 (citing protection of natural person's privacy as important justification for applying right and finding that this rationale did not apply to corporations).

229. *See* United States v. White, 322 U.S. 694, 701 (1944). The Court in *White* based this denial of the right against self-incrimination entirely on the personal nature of the right, *id.* at 698-99, and the detrimental effect on the state's power to regulate organizations. *Id.* at 700.

230. *See* Rogers v. United States, 340 U.S. 367, 371-72 (1951) (denying right against self-incrimination to Communist Party of Denver).

231. *See* Bellis v. United States, 417 U.S. 85, 93 (1974) (denying right against self-incrimination to former partner of dissolved law partnership). Once again, the Court based its decision on the personal nature of the right against self-incrimination, *id.* at 89-90, but noted that the right is also important in protecting an individual's privacy. *Id.* at 91-92. The Court went on to find that a partnership shared enough of the characteristics of a collective entity as to preclude the application of the right against self-incrimination. *Id.* at 93-94.

232. *See* Braswell v. United States, 487 U.S. 99, 104 (1987). The Court denied the right against self-incrimination to the sole shareholder and president of a close corporation simply because he incorporated his business, despite recognizing that if the shareholder had operated his business as a sole proprietorship, he would have been protected by the Fifth Amendment. *Id.*

233. *Bellis*, 417 U.S. at 90.

234. *Henkel*, 201 U.S. at 44-45.

235. *Id.* at 46.

236. *See id.* at 69 (discussing defendant's argument that "while the immunity statute may protect the individual witnesses, it would not protect the corporation of which appellant was the agent and representative").

237. *See id.* at 69-74 (detailing Court's reasoning).

corporation's right for it.[238] Second, it cited the difficulty in enforcing the Sherman Act if a corporation could claim the right against self-incrimination.[239] Finally, the Court found that the corporation owed its entire existence to the state, and that its rights and privileges were a function of the state's grant.[240] Therefore, according to the Court, to allow a corporation to use the Fifth Amendment to shield its actions from the state, which had granted it the right to perform any actions at all, would be an anomaly.[241]

The central holding in *Henkel* has subsequently been expanded to include unincorporated organizations.[242] Now known as the collective entity doctrine,[243] the rule has been the basis for limiting the scope of the right against self-incrimination, including, for example, denying the right to anyone holding a corporation's documents in a representative capacity.[244]

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238. *Id.* at 69. This objection is particularly important because a corporation, as a juristic person, must act through agents, and thus would never be able to assert its right against self-incrimination for any court room testimony. *See* BERGER, *supra* note 9, at 58 (discussing *Henkel* Court's assertion that agents can not claim privilege for corporation).

239. *See Henkel*, 201 U.S. at 74.

> If, whenever an officer or employee of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers.

*Id.*

240. *Id.* at 74-75.

241. *Id.* at 75. The Court went on to cite the Congress' right to regulate commerce as the grounds for allowing the federal government to stand in the shoes of New Jersey's government for purposes of inspection of the New Jersey corporation's books and records. *Id.* The Court did state that the federal government did not have a "general visitatorial power over the state corporations." *Id.*

242. *See supra* notes 229-31 and accompanying text (listing various collective entities that have been denied right against self-incrimination, including unions, political organizations, and partnerships).

243. *See Braswell*, 487 U.S. at 104 ("[W]e have long recognized that, for the purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals. This doctrine — known as the collective entity rule — has a lengthy and distinguished pedigree."). The rule, although derived directly from *Hale v. Henkel*, 201 U.S. 43, 74 (1906), was first enunciated in *White v. United States*, 322 U.S. 694, 699 (1944).

244. *See* Bellis v. United States, 417 U.S. 85, 88 ("[A]n individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally."); *see also* Wilson v. United States, 221 U.S. 361, 384-85 (1911) (denying right

The Supreme Court has held that to allow an individual who possesses a collective entity's documents in a representative capacity to successfully assert the right against self-incrimination would be tantamount to allowing the right to the collective entity, which, pursuant to *Henkel*, does not possess such a right.[245]

The Supreme Court's reasoning for denying the right against self-incrimination to corporations has changed over time, including abandoning the corporate personality justification originally cited in *Henkel*.[246] The Court has also placed increased reliance on the adverse effect that allowing a corporate right against self-incrimination would have on the state's police powers.[247] Finally, the Court has recognized the role of privacy in the determination of whether the right against self-incrimination is applicable and found that this concern is not implicated in collective entity cases.[248]

### B. *Australia's Treatment of a Corporation's Right Against Self-Incrimination*

In contrast to its long, rather complicated history in the

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against self-incrimination to corporate officer despite argument that corporate papers actually incriminated corporate officer); *supra* note 232 and accompanying text (describing Court's denial of right to sole shareholder in corporation based on original holding in *Henkel*).

245. *See Braswell*, 487 U.S. at 110 (discussing application of Fifth Amendment to corporate record holders). Compare, for example, *Braswell*, 487 U.S. at 104, where the sole shareholder of a corporation was denied the right against self-incrimination based on his representative capacity, with *United States v. Doe*, 465 U.S. 605, 606, 617 (1984), where a sole proprietor was allowed to claim the right.

246. *See White*, 322 U.S. at 700. The Court in *White* stated that the state's visitorial rights over an incorporated entity were simply a "convenient vehicle for justification of governmental investigation of corporate books and records" and that incorporation was not required to deny an organization the right against self-incrimination. *Id.* In contrast, one of the Court's main justifications for its decision in *Henkel* was the nature of corporate entities and the fact that they existed only at the whim of the state. *Henkel*, 201 U.S. at 74-75; *see supra* notes 240-41 and accompanying text (discussing corporation as creature of state justification).

247. *See Braswell*, 487 U.S. at 115-16.

> The greater portion of the evidence of wrongdoing by an organization or its representatives is usually found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible.

*Id.* at 115 (quoting *White*, 322 U.S. at 700).

248. *See* Bellis v. United States, 417 U.S. 85, 91-92 (discussing importance of privacy to application of Fifth Amendment).

United States,[249] the issue of whether the right against self-incrimination is available to a corporation was decided in Australia in 1993 by *Environment Protection Agency v. Caltex Refining Co.*.[250] The Australian High Court, because it was confronted with an issue of first impression in Australia, performed an in-depth survey and analysis of the state of the law concerning a corporation's right against self-incrimination.[251] The Court reviewed the common law precedents on the issue,[252] examined the U.S. approach,[253] evaluated the historical development of the right against self-incrimination,[254] and analyzed the modern rationale for the privilege,[255] finally determining that the right is not available to corporations.[256]

Caltex Refining held a license that allowed it to discharge a certain amount of pollutants a year into the ocean.[257] In March 1990 Caltex was accused of violating certain conditions of this license and the Environmental Protection Authority, pursuant to its statutory powers, served the company with a notice to produce.[258] Caltex then moved to have the notice to produce declared invalid as a violation of its privilege against self-incrimination.[259] The lower court rejected this contention, but on appeal, the Court of Criminal Appeal invalidated the production order, holding that corporations have a legitimate right against self-in-

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249. *See supra* notes 226-48 and accompanying text (discussing application of right to corporations by U.S. Supreme Court between *Henkel* in 1906 and *Braswell* in 1988).

250. 118 A.L.R. 392, 405 (1993) (Austl.).

251. *See id.* at 398.

> As there is no Australian authority determinative of the issue, it is appropriate to examine the rationales for the privilege (both historical and modern) and also to review the judicial decisions in other common law jurisdictions with a view to determining whether, in Australia, the privilege should apply to corporations, at least in relation to production of documents.

*Id.*

252. *See id.* at 400-03 (reviewing state of law concerning corporation's right against self-incrimination in England, Canada, and New Zealand).

253. *See id.* at 398-400 (discussing U.S. approach to corporation's right against self-incrimination).

254. *See id.* at 403-04 (examining history of right against self-incrimination).

255. *See id.* at 404-10 (discussing modern rationales for right against self-incrimination).

256. *See id.* at 411. The Court concluded that "if it ever was the common law of Australia that corporations could claim the privilege against self-incrimination in relation to production of documents, it is no longer the common law." *Id.* at 412.

257. *Id.* at 397.

258. *Id.*

259. *Id.*

crimination.[260] The High Court then granted review.[261]

In rejecting the extension of the right against self-incrimination to corporate entities, the High Court found that the privilege was, at its most essential, a human right, protecting the accused from treatment that could only be suffered by a human being.[262] Additionally, the Court recognized the importance of the right in maintaining a correct balance between the state and the accused, but concluded that, because a corporation is in an inherently better position than an individual in terms of maintaining this balance, the right was unnecessary for corporations.[263] Particularly indicative of the corporation's better position *vis-a-vis* the state, according to the Court, was the difficulty the state had in discovering and proving a criminal violation by the corporation.[264] Finally, the High Court repudiated the argument that the right against self-incrimination is so fundamental that the denial of the right to corporations would undermine the foundations of the accusatorial system of criminal justice.[265] The Court maintained that, in light of the legislature's frequent interference with the common law right against self-incrimination, especially as applied to corporations, this argument was misplaced.[266] The Court found that such interference only confirms that a corporation's right against self-incrimination is not basic to the accusatorial system.[267]

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260. Caltex Refining Co. v. State Pollution Control Commission, [1991] 25 N.S.W.L.R. 118 (Ct.Crim.App.) (Austl.).

261. Environment Protection Authority v. Caltex Refining Co., 118 A.L.R. 392, 392 (1993) (Austl.).

262. *See id.* at 404. The High Court stated that the right against self-incrimination is " 'a human right, based on the desire to protect personal freedom and human dignity.' " *Id.* (quoting Rochfort v. Trade Practices Commission, (1982) 153 C.L.R. 134, 150 (Austl.)). Further, the Court cites to the ICCPR, *supra* note 4, S. TREATY DOC. No. 95-2, 999 U.N.T.S. 171, as further proof that the right is viewed as a strictly human right. *Id.* at 405.

263. *See id.* at 406 (discussing fair balance between state and corporation).

264. *Id.* (citing complex structure and greater resources of corporations as reasons for better position).

265. *Id.* at 407-08 (discussing argument concerning fundamental nature of right against self-incrimination).

266. *Id.* at 408 (stating, without giving specific examples, that "legislatures have from time to time in different fields abrogated or interfered with the privilege in many of its aspects, including its application to the productions of documents").

267. *Id.* at 409. "Indeed, the extent to which statute has interfered with the privilege in relation to corporations indicates that the privilege, at least in so far as it relates to production of corporate documents, is not a fundamental aspect of the accusatorial criminal justice system." *Id.*

### C. *The European Union's Treatment of a Corporation's Right Against Self-Incrimination*

The European Union's approach to a corporation's right against self-incrimination is unique among the three jurisdictions.[268] The seminal European Union case, *Orkem SA v. Commission*, explicitly recognizes a corporation's right against self-incrimination.[269] The right is based on the European Union's rights of defence rather than in the civil or common law or in the historical development of the right against self-incrimination.[270] These rights of defence, which the European Court of Justice[271] has recognized as a collective fundamental principle of Community law,[272] have developed as a result of the European Union's competition policy.[273]

The European Union's competition policy is implemented pursuant to Articles 85 and 86 of the EC Treaty.[274] These articles, which regulate agreements and concerted actions by corpo-

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268. *See supra* notes 226-67 and accompanying text (discussing U.S. and Australian approach to corporation's right against self-incrimination). The U.S. and Australian approaches, because they are both common-law based legal systems, delve deeper into the history of the right or depend more on previously decided cases. *See supra* notes 252-55 and accompanying text (describing process used by Australian High Court to decide issue of whether right against self-incrimination should apply to corporation); *see also* Braswell v. United States, 487 U.S. 99, 105-08 (1988) (tracing lineage of collective entity rule from Hale v. Henkel, 201 U.S. 43 (1906)).

269. Orkem SA v. Commission, Case 374/87, [1989] E.C.R. 3283, [1991] 4 C.M.L.R. 502.

270. *See Orkem*, [1989] E.C.R. at 3351, ¶¶ 32-35, [1991] 4 C.M.L.R. at 556 (discussing corporation's rights of defence).

271. *See* GEORGE A. BERMANN, ROGER J. GOEBEL, WILLIAM J. DAVEY, ELEANOR M. FOX, CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 69-72 (1993) (discussing Court of Justice as institution). The Court of Justice decides issues concerning the legality of actions by both European Community institutions and the Member States of the European Community. *Id.* at 69.

272. NV Nederlandsche Banden-Industrie Michelin v. Commission, Case 322/81, [1983] E.C.R. 3461, 3498, ¶ 7, [1985] 1 C.M.L.R. 282, 318.

273. *See* BERMANN ET AL., *supra* note 271, at 698 ("[M]uch of the Community law on procedural rights is to be found in competition cases.").

274. Treaty Establishing the European Community, Feb. 7, 1992, arts. 85, 86, [1992] 1 C.M.L.R. 573, 626-28, [hereinafter EC Treaty], *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], *in* TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off., 1987).

rations and prohibit abuse of dominant market position,[275] are enforced according to Regulation 17,[276] which gives the Commission[277] broad investigatory and enforcement powers.[278] Much of the Union law on procedural rights has evolved out of disputes concerning the limits of these broad investigative powers.[279] These procedural rights include, for example, the right to a fair hearing[280] and the right to be apprised of all documents

275. EC Treaty, *supra* note 274, arts. 85(1) and 86. Article 85 prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member-States and which have as their object or effect the prevention, restriction or distortion of competition within the common market." *Id.* art. 85(1). Article 86 states that "[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between member-States." *Id.* art. 86.

276. Council Regulation No. 17/62, 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-1962, at 87 [hereinafter Regulation 17].

277. *See* EC Treaty, *supra* note 274, art. 155. The Commission of the European Communities enforces the provisions of the European Community Treaty according to Article 155, which states:

> In order to ensure the proper functioning and development of the common market, the Commission shall:
> - ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;
> - formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary;
> - have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty;
> - exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.

*Id.*

278. *See* BERMANN ET AL., *supra* note 271, at 632 ("Regulation 17 also authorizes broad investigative procedures."). For example, Article 11(1) of Regulation 17 states that "the Commission may obtain all necessary information from the governments and competent authorities of the Member States and from undertakings and associations of undertakings." Council Regulation 17/62, *supra* note 276, art. 11(1), O.J. Eng. Spec. Ed. 1959-1962, at 90. Similarly, Article 14 of Regulation 17 provides that "the Commission may undertake all necessary investigations into undertakings and associations of undertakings." *Id.* art. 14(1), O.J. Eng. Spec. Ed. 1959-1962, at 91. Article 14(1) specifically provides that "to examine the books and other business records; to take copies of or extracts from the books and business records; to ask for oral explanations on the spot; to enter any premises, land and means of transport of undertakings." *Id.*

279. *See, e.g.*, Hoechst AG v. Commission, Joined Cases 46/87, 227/88, [1989] E.C.R. 2859, 2928, ¶ 36, [1991] 1 C.E.C (CCH) 280, 296 (allowing warrantless search of business because it "did not exceed [the Commission's] powers under Article 14 of Regulation No. 17."); AM&S Europe Ltd. v. Commission, Case 155/79, [1982] E.C.R. 1575, 1610-11, ¶¶ 18-21, [1982] 2 C.M.L.R. 264, 322-23 (finding that right to legal counsel and confidentiality of attorney/client communications were basic rights).

280. *See* Musique Diffusion Francaise SA v. Commission, Joined Cases 100-03/80,

and facts upon which a Commission decision relies.[281] Collectively, these rights constitute the rights of defence,[282] and they have been held to apply to all administrative procedures before the Commission.[283]

In *Orkem*,[284] the Commission was investigating suspected polyethylene and PVC cartels.[285] Although Article 11 of Regulation 17 gives the Commission the right to request information concerning such investigations,[286] Orkem resisted,[287] claiming that to supply the requested information would be to incriminate itself by essentially confessing to violations of the competi-

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[1983] E.C.R. 1825, 1880-81, ¶¶ 8-10, [1983] 3 C.M.L.R. 221, 315 (stating that there is "fundamental principle of Community law which requires the right to a fair hearing to be observed in all proceedings, even those of an administrative nature"). The Court also found the right to notification to be part of the right to a fair hearing. *Id.* at 1880-81, ¶¶ 9-10, [1983] 3 C.M.L.R. 315.

281. *See* Hoffmann-La Roche v. Commission, Case 85/76, [1979] E.C.R. 461, 512-513, ¶¶ 11-14, [1979] 3 C.M.L.R. 211, 268-69. This right dictates that if the Commission cannot disclose such supporting documents or facts because they are confidential business secrets of third parties, then the Commission may not rely on the documents or facts in its prosecution of any alleged violations. BERMANN ET AL., *supra* note 271, at 699.

282. *See* BERMANN ET AL., *supra* note 271, at 699 (discussing procedural rights that comprise rights of defence). The Court of Justice has also held that, so long as the communications "emanate from independent lawyers" and are "in the interest of the client's rights of defence," the right to legal representation and the confidentiality of lawyer/client communications are rights of defence. *AM&S*, [1982] E.C.R. at 1611, [1982] 2 C.M.L.R. at 323. *AM&S* was particularly important to the *Orkem* decision because it recognized that the Commission's broad investigative powers under Regulation 17 "do not exclude the possibility of recognizing, subject to certain conditions, that certain business records are of a confidential nature." *AM&S*, [1982] E.C.R. at 1610, [1982] 2 C.M.L.R. at 322; *see supra* notes 276-78 and accompanying text (discussing Commission's investigative powers under Regulation 17). In other words, the investigative powers of the Commission can be limited by the rights of defence. *AM&S*, [1982] E.C.R. at 1610, [1982] 2 C.M.L.R. at 322.

283. *Musique*, [1983] E.C.R. at 1880, ¶ 8, [1983] 3 C.M.L.R. at 315.

284. Orkem v. Commission, Case 374/87, [1989] E.C.R. 3283, [1991] 4 C.M.L.R. 502.

285. William Snyder, *Due Process in the European Economic Community: Rights of Businesses During Commission Inspections*, 22 U. TOL. L. REV. 955, 961 (1991).

286. *See* Council Regulation No. 17/62, *supra* note 276, art. 11(1), O.J. Eng. Spec. Ed. 1959-1962, at 90. Article 11 states, in part, that "the Commission may obtain all necessary information from . . . undertakings." *See supra* note 278 (describing procedures allowed by Article 11).

287. *Orkem*, [1989] E.C.R. at 3285, [1991] 4 C.M.L.R. at 506. The Commission requested information concerning meetings of polyethylene producers, including where and when, and any evidence of agreements to fix prices or establish quotas. Snyder, *supra* note 285, at 961.

tion regulations.[288] The Court agreed, finding that limitations on the Commission's investigatory powers are implied by the need to maintain the rights of defence as a fundamental principle of the Community legal order.[289] The Court of Justice did recognize that the power to investigate was vital to the Commission's role in regulating competition in the European Union and held that, in this case, this power was not limited by Regulation 17, by any European Union agreements, or by the law of the Member States.[290] The Court went on to find, however, that a corporation's right against self-incrimination is a right of defence and thus a fundamental principle of law in the European Union.[291] Therefore, the importance of the Commission's interests notwithstanding, the right could not be infringed upon.[292]

## III. *A COMPARATIVE ANALYSIS OF THE CURRENT SCOPE OF A CORPORATION'S RIGHT AGAINST SELF-INCRIMINATION IN THE UNITED STATES, AUSTRALIA, AND THE EUROPEAN UNION*

The revisions to the history of the development of the right against self-incrimination make it clear that the right did not develop simply as protection for the individual.[293] In light of this conclusion, the most tenable justification for the modern application of the right is the right's importance in maintaining an equitable balance of power between the state and its citizens. In the past, however, the corporation was in a better position than a natural person in terms of maintaining such a balance,[294] and

288. *Orkem*, [1989] E.C.R. at 3348, ¶ 18, [1991] 4 C.M.L.R. at 553-54.

289. *See id.* at 3351, ¶¶ 32-35, [1991] 4 C.M.L.R. at 556 (setting forth reasoning employed by Court in balancing Commission's right to compel necessary information against Orkem's rights of defence).

290. *See id.* at 3350-51, ¶¶ 26-31, [1991] 4 C.M.L.R. at 555-56 (discussing Commission's investigation).

291. *Id.* at 3351, ¶¶ 32-35, [1991] 4 C.M.L.R. at 556.

292. *Id.*

293. *See supra* notes 156-93 and accompanying text (discussing recent modification to theory of historical development of right against self-incrimination).

294. *See* Case of Sutton's Hosp., 5 Co. Rep. 253, 303 (K.B. 1613) (holding that corporations cannot be outlawed because they "rest only in the intendment and consideration of the law"); *see also* United States v. White, 322 U.S. 694, 700 (1944) (discussing difficulty in obtaining evidence against corporation). Additionally, corporations have greater resources as well as advantages flowing from incorporation. Environment Protection Authority v. Caltex Refining Co., 118 A.L.R. 392, 406 (1993) (Austl.). *But see* HESSEN, *supra* note 293, at 15-22 (critiquing view that corporation receives special benefits from state). Hessen argues that entity status and perpetual duration, two of the

this justification was therefore used to support the denial of the right to corporations.[295] This balance of power has recently been altered by the introduction and proliferation of criminal and regulatory codes that may result in criminal liability for the corporation and its officers.[296] The increased ability of the state to successfully punish corporate misbehavior has skewed a previously equitable balance of power in the state's favor,[297] requiring a reexamination of the U.S. and Australian approaches, which fail to reflect this change in the balance of power.[298] In contrast, the European Union's approach successfully maintains an equitable balance between the state's need to protect itself and its citizens and the corporation's rights, and should serve as a model for remedying the other jurisdictions' treatment of the issue.[299]

### A. *The Policy Justifications for Applying or Denying the Right Against Self-Incrimination to Corporations*

The various policy justifications that the U.S., Australian and European Union courts relied on in applying or denying the right against self-incrimination to corporations are based either on the right's alleged status as a strictly human right or on the courts' concern with maintaining an equitable balance of

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three main benefits of incorporation, are available to other business forms as well. *Id.* at 16-17. The third benefit, limited liability, is simply an implied contractual clause of the articles of incorporation. *Id.* at 18-21.

295. *See Caltex*, 118 A.L.R. at 406 ("[W]e reject without hesitation the suggestion that the availability of the privilege to corporations achieves or would achieve a correct balance of power between State and corporation.").

296. *See, e.g.*, UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (1993); Wolf, *supra* note 217, at 2-3 (discussing expanded criminalization of environmental violations, including increased penalties).

297. *See* Webb, *supra* note 198, at 618. Over the past twenty years, federal criminal convictions of corporations have gone from a few dozen a year to over 300. *Id.*; *see id.* at 617-19 (discussing increase in criminal and regulatory investigations and prosecutions). This increase in prosecution of corporations has been termed "staggering." *Id.* at 618.

298. *See Caltex*, 118 A.L.R. at 406. The Australian High Court relied on the supposed difficulty in policing corporations as a reason for denying the right against self-incrimination to corporations. *Id.*; *see* Braswell v. United States, 487 U.S. 99, 115 (1988) (stating that allowing corporations right against self-incrimination "would have a detrimental impact on the Government's efforts to prosecute 'white-collar crime,' one of the most serious problems confronting law enforcement authorities").

299. *See* Orkem SA v. Commission, Case 374/87, [1989] E.C.R. 3283, 3350-51, ¶¶ 26-35, [1989] 4 C.M.L.R. 502, 555-56 (discussing balancing of state's interest and corporation's rights of defence).

power.[300] The humanity-based arguments contend that the right against self-incrimination developed as a result of the historical abuses suffered by human beings, and that the only reason for allowing the right to continue to thwart the state's legitimate interest in having all available information is to avoid these abuses.[301] The equitable balance-of-power arguments, on the other hand, maintain that the right against self-incrimination is simply a mechanism for preventing the state from using its nearly unlimited power to abuse its citizens in the name of the majority's well-being.[302]

The humanity-based justifications, including the "cruel trilemma" argument,[303] the prevention of mental and physical torture,[304] and the respect of the accused's privacy,[305] should no longer be seen as justification for the denial of the right against self-incrimination to corporations.[306] Although both the Austra-

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300. *See supra* notes 237-248 and accompanying text (discussing Supreme Court's justifications for denying corporate right against self-incrimination); *supra* notes 262-267 and accompanying text (discussing Australian High Court's justifications for denying right to corporations); *supra* notes 286-292 and accompanying text (discussing European Union Court of Justice's justification for allowing corporations right against self-incrimination).

301. *See Caltex*, 118 A.L.R. at 404-05 (discussing development of right as human right to protect human dignity); *see also* David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1066 (1986) (discussing various individual rationales for right against self-incrimination, including avoiding invasion of privacy and protecting personal dignity).

302. *See* Caltex Refining Co. Pty. Ltd. v. State Pollution Control Commission, 25 N.S.W.L.R. 118, 127 (Ct.Crim.App. 1991) (Austl.) ("[The right] assists to hold a proper balance between the powers of the State and the rights and interests of citizens. In that term I include what are commonly described as 'corporate citizens.' "); *see also* 8 WIGMORE, EVIDENCE, *supra* note 15, § 2251, at 315 (describing right as a "barrier between the individual whose self-incriminatory testimony is sought and the power of government").

303. *See* Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 55 (1964). The "cruel trilemma" is the choice that, absent a right against self-incrimination, the accused must make between the three options available to him: 1) accusing himself; 2) lying and thereby committing perjury; or 3) refusing to answer and being cited for contempt. *Id.*; *see also Caltex*, 118 A.L.R. at 404 (citing to cruel trilemma as rationale for modern privilege).

304. *Id.*; *see* 8 WIGMORE, EVIDENCE, *supra* note 15, § 2251, at 309 (discussing avoidance of torture as justification of right against self-incrimination); United States v. White, 322 U.S. 694, 698 (1944) (discussing role of right against self-incrimination in avoiding physical torture).

305. *See* Bellis v. United States 417 U.S. 85, 91 (1974). The Court states that the Fifth Amendment protects an individual's " 'private enclave where he may lead a private life.' " *Id.* (quoting *Murphy*, 378 U.S. at 55).

306. *See supra* notes 156-93 and accompanying text (discussing changes in theory

lian High Court and the U.S. Supreme Court utilized these justification to deny a corporation the right against self-incrimination, finding that a corporation is not subject to these abuses and indignities,[307] the historical basis for asserting these justifications has been repudiated by the recent revisions to the history of the right against self-incrimination.[308] Furthermore, these justifications can easily be characterized as alternative forms of the balance-of-power argument.[309]

The contention that underlies the humanity-based justifications, that the right developed simply as a response to the physical or mental torture of individual human beings,[310] is belied by the recent revisions to the history of the development of the right's development.[311] The right first appeared as a canonical rule that balanced the state's desire to obtain information to convict known criminals and heretics with protecting against the overly intrusive powers of the state.[312] More importantly, the

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of right's historical development). The latest scholarship points out that the right did not develop exclusively as a means to protect the individual from abuse. *Id.*; *see also* Caltex Refining Co. Pty. Ltd. v. State Pollution Control Commission, 25 N.S.W.L.R. 118, 127 (Ct.Crim.App. 1991) (Austl.) (discussing change in conception of historical development of right against self-incrimination).

307. *See Caltex*, 118 A.L.R. at 405 (discussing inapplicability of torture to corporation as justification for denying right against self-incrimination to corporation); *see also Bellis*, 417 U.S. at 91-92 (discussing corporation's lack of right to privacy as justification for denying right against self-incrimination to corporations).

308. *See supra* notes 156-93 and accompanying text (discussing changes in theory of right's historical development).

309. *See* Lisa Tarallo, *The Fifth Amendment Privilege Against Self-Incrimination: The Time Has Come for the United States Supreme Court to End its Silence on the Rationale Behind the Contemporary Application of the Privilege*, 27 NEW ENG. L. REV. 137, 163 (1992). "The traditional policy reason supporting the privilege against self-incrimination was to prevent the tyrannical abuse of power by those in charge of the criminal justice system." *Id.* This abuse of power included physical and psychological torture. *Id.* at 163. This policy resembles the balance of power justification enunciated in Caltex Refining Co. v. State Pollution Control Commission, 25 N.S.W.L.R. 118, 127 (Ct.Crim.App. 1991) (Austl.), where the court stated that one justification of the right against self-incrimination is "that it assists to hold a proper balance between the powers of the State and the rights and interests of citizens." *Id.* The court went on to find that, pursuant to this balance of power justification, a corporation is entitled to the right against self-incrimination. *Id.* at 127-28.

310. *See Caltex*, 118 A.L.R. at 405 (discussing torture and right against self-incrimination).

311. *See supra* notes 156-93 and accompanying text (discussing new views of development of right against self-incrimination).

312. *See* Helmholz, *supra* note 20, at 984.

> Civilians did not regard a defendant's refusal to answer incriminating questions as the exercise of a fundamental personal right, never to be abridged.

right did not take on its modern form and become a widely applied principle of law until the criminal justice system changed from favoring the state's interest in conviction to requiring the state to prove its case.[313] Although the right against self-incrimination did mature as a result of its use in resisting the oath *ex officio*,[314] both its earliest appearance and its final evolution resulted from attempts to maintain an equitable balance of power between the state and the accused.[315]

Additionally, all of the humanity-based arguments, which are based on the contention that the right against self-incrimination developed to combat abuses committed against natural persons,[316] can be characterized as versions of the balance-of-power arguments. Specifically, these abuses were always inflicted by an institution of the state, either the church or the Crown, on the individual.[317] In order to achieve its goals, the state was using illegal and immoral methods to force information from the individual, a clear example of a state abusing an inequitable balance of power.[318] Justifications such as avoiding the use of torture or respecting an individual's privacy are thus actually arguments for maintaining the balance of power between the state and the in-

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They regarded it instead as a protection against the exercise of overly intrusive powers by public official seeking to pry into the private lives of ordinary men and women.

*Id.*

313. *See supra* note 315 (discussing development of right as aspect of maturation of criminal justice system).

314. *See supra* note 27 and accompanying text (discussing development of right against self-incrimination in England as result of resistance to oath *ex officio*).

315. *See supra* notes 159-93 and accompanying text (discussing change in right resulting from change in criminal procedure). The last stage of the right's development was an aspect of the change from a criminal justice system which brought the state's power to bear solely to obtain a confession or conviction to a criminal legal system where the accused was procedurally protected from the immense power of the state. *See* Langbein, *supra* note 19, at 1047.

316. *See* United States v. White, 322 U.S. 694, 700-01 (1944) ("[T]he power to compel the production of the records of any organization . . . arises out of the inherent and necessary power of the federal and state governments to enforce their laws, with the privilege against self-incrimination being limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.").

317. *See supra* notes 63-68 and accompanying text (discussing use of oath *ex officio* and inquisitorial procedures in general by English Crown and Catholic Church during English Inquisition).

318. *See supra* note 309 (discussing resemblance between avoidance of torture justification and balance of power justification).

dividual by limiting the procedures the state can use to achieve its goals.[319] These humanity-based justifications therefore ultimately support the argument that a corporation should also be afforded the right against self-incrimination because, although a corporation cannot be subjected to physical or psychological pain, it can be harassed, even have its existence threatened, by a state using illegal or immoral methods to obtain information that the state desires.[320]

Unlike the humanity-based justifications for the application of the right against self-incrimination to corporations, the balance of power justifications continue to be viable and valid.[321] For example, the balance of power argument was explicitly relied on by the Australian High Court in *Caltex*,[322] while the U.S. Supreme Court and the European Union Court of Justice have cited versions of the balance of power argument.[323] This continued legitimacy,[324] and the problems inherent in the humanity based justifications,[325] compel a conclusion that the only justification that is valid in determining if the right against self-incrimination should be available to corporations is whether the use of the right by a corporation would promote or inhibit a more eq-

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319. *See supra* note 309 (discussing resemblance between avoidance of torture justification and balance of power justification).

320. *See* Triplex Safety Glass Co., Ltd. v. Lancegaye Safety Glass (1934), Ltd. [1939] 2 K.B. 395, 409.

> 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 consequences 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 to even the least deserving of natural persons.

*Id.*

321. *See* Environment Protection Authority v. Caltex Refining Co., 118 A.L.R. 392, 406 (1993) (Austl.) (citing to balance of power justification as recently as 1993). Additionally, the historical development of the right does not undermine the balance of power justification. *See supra* notes 311-13 and accompanying text (discussing recent revisions to theory of development of right against self-incrimination as proof that balance of power justification is only valid justification).

322. *Caltex*, 118 A.L.R. at 406.

323. *See* Hale v. Henkel, 201 U.S. 43, 74 (1906) (discussing detrimental effect on state's police power if corporations allowed right against self-incrimination); Orkem SA v. Commission, Case 374/87, [1989] E.C.R. 3283, 3350-51, ¶¶ 26-35, [1991] 4 C.M.L.R. 502, 555-56 (discussing balancing of state's interest and corporation's rights of defence).

324. *See supra* note 321-23 and accompanying text (discussing continued legitimacy of balance of power justifications of right against self-incrimination).

325. *See supra* notes 303-15 and accompanying text (discussing problems with humanity based justifications of right against self-incrimination).

uitable balance of power between corporations and the state.[326]

### B. *The Shifting Balance of Power Between the State and the Corporation*

In comparing the U.S., Australian, and European Union approaches to a corporation's right against self-incrimination, the decisive factor in determining which approach is superior is whether a particular treatment will lead to a more or less equitable balance of power between the state and corporations.[327] The corporation, because of various characteristics of its basic structure, has always been viewed as being in a better position than an individual in any balance of power analysis.[328] As a result, the balance of power justification has been advanced as a rationale for denying the right against self-incrimination to corporations.[329] Recently, as the state's ability and desire to charge and punish corporate misconduct has increased, the balance of power between the state and the corporation has shifted in favor of the state.[330]

The view that the balance of power between a corporation and the state was relatively equal was based on the corporation's extensive resources and the state's difficulty in successfully regulating corporate action and prosecuting corporate crime.[331] A state faces various barriers in attempting to prosecute a corporation for criminal misconduct, including difficulty in determining

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326. *See supra* notes 324-25 and accompanying text (discussing reasons why balance of power should be only justification examined in determining whether corporation would be allowed right against self-incrimination).

327. *See supra* notes 324-25 and accompanying text (discussing reasons why balance of power should be only justification examined in determining whether corporation would be allowed right against self-incrimination).

328. *See supra* note 294 and accompanying text (discussing past view that corporations were in better position than individuals vis-a-vis the state).

329. *See* Environment Protection Authority v. Caltex Refining Co., 118 A.L.R. 392, 406 (1993) (Austl.) (rejecting "without hesitation the suggestion that the availability of the privilege to corporations achieves or would achieve a correct balance between the Sate and corporation."). The Australian High Court based this rejection on the difficulties the corporate structure presents to the state's attempts to regulate the corporation. *Id.*

330. *See* Webb, *supra* note 198, at 618-19 (discussing increased criminalization of regulatory offenses and predicting that average fine will top US$1 million under Organizational Federal Sentencing Guidelines).

331. *See* United States v. White, 322 U.S. 694, 700 (1944). The Court states that "many federal and state laws would be impossible" to enforce if a corporation could shield its internal documents with the right against self-incrimination. *Id.*

corporate wrongdoings that are provable only by examining corporate documents, problems in discovering if a crime was even committed, difficulty in determining the culpable party, and the state's inability to punish effectively and thereby deter corporate misconduct.[332] To add to these difficulties by allowing a corporation to limit further the state's access to relevant information through the use of the right against self-incrimination was viewed as implausible.[333]

In the last half-century, however, corporate misconduct has become a major societal concern.[334] This concern has resulted in increased criminal and non-criminal regulation of corporate entities.[335] This increased regulation, and the resulting increased prosecution of corporations and their managers,[336] serves to answer many of the concerns expressed regarding the inherent difficulty in prosecuting corporations for the wrongs.[337] For example, the new treatment of corporate crime avoids any difficulty in determining who the culpable party was by subject-

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332. *See Caltex*, 118 A.L.R. at 406 (discussing characteristics of corporations that make corporations more difficult to regulate).

333. *See supra* note 329 and accompanying text (discussing Australian High Court's rejection without hesitation of argument that right against self-incrimination will aid in achieving equitable balance of power between state and corporation).

334. *See* Wolf, *supra* note 217, at 1 (discussing increase in prosecutions over last two decades); *see also* Francis T. Cullen et al., *The Ford Pinto Case and Beyond: Corporate Crime, Moral Boundaries, and the Criminal Sanction*, *in* CORPORATIONS AS CRIMINALS 107, 108 (Ellen Hochstedler ed., 1984).

> [P]ublic awareness of white-collar and corporate crime has reached the point where the concept has become part of the common vernacular. Further, survey data indicate that the public judges such criminality to be more serious than ever before, is quite prepared to sanction white-collar offenders, and is far more cognizant of the costs of upperworld crime than had been previously imagined.

*Id.*

335. *See* Wolf, *supra* note 217, at 3 ("Today, criminal provisions in major environmental statues are ubiquitous.").

336. *See supra* note 297 and accompanying text (discussing increased rate of conviction of corporate executives).

337. *See supra* note 332 and accompanying text (discussing some corporate characteristics that may make it difficult to regulate corporate entities). Prosecutors and law makers have adopted several strategies to increase the effectiveness of corporate regulation and prosecution, including increasing individual liability for corporate executives, requirements of corporate internal compliance programs, and an increased range of penalties. *See* Webb et al., *supra* note 198, at 617-18 (discussing expanding corporate criminal liability); *see also* Bennett, *supra* note 216, at 881-82 (1990) ("A final trend . . . is the increasing use of criminal sanctions against corporate executives rather than, or in addition to, the corporation itself.").

ing high ranking executives and the corporation itself to increased liability.[338] Likewise, increased criminalization of regulatory violations and more drastic penalties for criminal violations increase the punishment and deterrence factors.[339]

States are increasingly allowed to charge a corporation, subpoena its records, and then subject the corporation and its executives to a penalty based on the information contained in the subpoenaed records.[340] Thus, although corporations are still in a better position vis-a-vis the state than is the individual,[341] the balance of power has shifted to the extent that corporations need protection from the misuse of state conduct.[342] Allowing corporations to claim the right against self-incrimination would serve to restore an equitable balance of power between the state and the corporation.[343]

### C. *Finding an Appropriate Treatment of the Corporate Right Against Self-Incrimination*

The U.S. and Australian courts base their conclusion that a corporation has no right against self-incrimination on outmoded policy justifications, especially the belief that the right developed strictly as right protecting natural persons from possible abuse by the state.[344] This view ignores recent scholarship concerning the

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338. *See supra* notes 336-37 and accompanying text (discussing increased prosecution of corporate executives).

339. *See supra* note 330 (discussing increase in average fines to which corporation is subject); *see also* Mark Muro, *What Punishment Fits A Corporate Crime?*, *Boston Globe*, May 7, 1989, at A1 (estimating that since 1982, 375 prosecutions of corporate officers has resulted in 75 years of jail time).

340. *See* Braswell v. United States, 487 U.S. 99, 101-02 (1988) (discussing use of collective entity doctrine to enforce subpoena issued to sole shareholder of corporation that required him to turn over records that were self-incriminatory).

341. *See supra* notes 331-32 and accompanying text (setting forth characteristics which normally give corporation advantage over individual in balance of power with state).

342. *See supra* notes 334-39 and accompanying text (discussing reasons for changing balance of power between state and corporation).

343. *See* Caltex Refining Co. v. State Pollution Control Commission, 25 N.S.W.L.R. 118, 127 (Ct.Crim.App. 1991) (Austl.) (outlining role of right against self-incrimination in maintaining balance of power between state and corporation).

344. *See* Environment Protection Agency v. Caltex Refining Co., 118 A.L.R. 392, 404-05 (1993) (discussing development of right as protection for natural person from abuses of state as key justification for denying right against self-incrimination to corporations); *see* United States v. White, 322 U.S. 694, 698-99 (1944) (describing basis of right against self-incrimination as protection of humanity and dignity of individual and

historical development of the right.[345] More significantly, although recognizing that the maintenance of an equitable balance of power between the state and the corporation is one of the main justifications for applying the right against self-incrimination to a given situation, both the U.S. Supreme Court and the High Court of Australia ignore the changing relationship between the state and corporations, thereby mistakenly concluding that the balance of power justification supports the denial of the right against self-incrimination to corporations.[346]

In contrast, the European Union offers a prime example of applying a balance-of-power analysis that does not ignore the current relative strengths of the state and corporations to determine if a corporation should be able to claim the right against self-incrimination.[347] The utilization of the rights of defence concept, which offer a reasonable limit on the state's power to pursue its otherwise legitimate goals, imply a goal of maintaining an equitable balance of power between the state and the corporation.[348] The Court of Justice's approach takes into account fears that the state may not be able to effectively regulate corporations by allowing the corporation the right against self-incrimination but then determining in a strict manner that information is actually incriminatory.[349] This approach incorporates the con-

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citing this application to natural persons as justification for not applying to corporations).

345. *See supra* notes 156-93 and accompanying text (discussing recent revisions to theory of historical development of right against self-incrimination).

346. *See Caltex*, 118 A.L.R. at 406 (determining that the balance-of-power analysis weighs against allowing right to corporations); *White*, 322 U.S. at 700-01. Although the U.S. Supreme Court does not explicitly utilize a balance of power analysis, it does claim that the need to protect the state's ability to prosecute organizations requires the denial of the right against self-incrimination to corporations. *White*, 322 U.S. at 700-01; *see also Braswell*, 487 U.S. at 115 (calling white-collar crime "one of the most serious problems confronting law enforcement authorities"). The Australian High Court, in contrast, does an explicit balance of power analysis but determines that the right would hinder regulation of corporations and thus actually create an imbalance of power in favor of the corporation. *Caltex*, 118 A.L.R. at 406.

347. *See* Orkem SA v. Commission, Case 374/87, [1989] E.C.R. 3283, 3350-51, ¶¶ 26-35, [1991] 4 C.M.L.R. 502, 555-56 (discussing balancing of state's interest and corporation's rights of defence). The Court of Justice explicitly considers both the state's need to know and the corporations fundamental rights. *Id.*

348. *See* NV Nederlansche Banden-Industrie Michelin v. Commission, Case 322/81, [1983] E.C.R. 3461, 3498, ¶ 7, [1983] 1 C.M.L.R. 282, 318 (describing rights of defence as "fundamental principle of community law which the commission must observe in administrative procedures which may lead to the imposition of penalties").

349. *See* Snyder, *supra* note 285, at 965-66 (discussing *Orkem* court's allowance of

cerns regarding the expanding powers of the state in relation to the corporation while still allowing the state access to much of the information it requires to protect its citizenry and environment.[350] Although the rights of defence are not an available basis for deciding this issue in other jurisdictions, the underlying balance of power analysis would still result in the application of the right against self-incrimination to corporations.[351]

## *CONCLUSION*

The recent revisions to the theory of the development of the right against self-incrimination establish that the right did not develop solely as mechanism for the protection of natural persons against physical and psychological abuses and indignities. Thus, a corporation should not automatically be denied the right based on any argument that the right against self-incrimination developed solely as a human right. As a result, the balance-of-power justification is the most valid remaining justification for determining the application of the right against self-incrimination to corporations. If the increasing ability of the state to regulate, prosecute and sanction corporations is acknowledged, the balance of power analysis results in a conclusion that the corporation is at an increasing disadvantage, and like natural persons, deserves the right against self-incrimination in order to protect itself from state misconduct. More importantly, this conclusion compels reconsideration of any decisions denying the right to individuals based solely on their status as corporate employees. High ranking executives and officers who may be held individually liable for corporate crime must therefore be able to claim the corporation's right against self-incrimination as their own whenever subjected to possible punishment for the corporation's misdeeds.

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any questions that were purely factual and resulting significant reduction of importance of allowing right against self-incrimination to corporations); *see also Caltex*, 118 A.L.R. at 398 (discussing limited application of allowing right against self-incrimination to corporations because, as corporations cannot testify at trial, right would only apply to corporate documents).

350. *See supra* note 349 and accompanying text (discussing how interest of both state and corporations are protected).

351. *See e.g.*, Caltex Refining Co. Pty. Ltd. v. State Pollution Control Commission, 25 N.S.W.L.R. 118, 127 (Ct.Crim.App. 1991) (Austl.) (applying balance-of-power analysis and determining that corporations should have right against self-incrimination).