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## SELF-INCRIMINATION IN EUROPEAN HUMAN RIGHTS LAW—A PREGNANT PRAGMATISM?

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By comparison with many subsequent international or constitutional declarations of rights, the European Convention on Human Rights of 1950 is a relatively brief document. The general right to a fair trial is dealt with in Article 6,<sup>1</sup> which also contains a short list of additional rights that are applicable only in criminal cases.<sup>2</sup> That short list does not include the privilege against self-incrimination or the right of silence. As we shall see below, those rights have been implied into Article 6 by the European Court of Human Rights in various judgments on the fairness of criminal trials.

The European Convention on Human Rights (hereinafter, the Convention) is the product of the Council of Europe, a legal and cultural alliance of European nations that was born after the Second World War and whose membership has increased to 47 states in recent years, including many states from Eastern Europe.<sup>3</sup> Acceptance of the Convention is a precondition of membership in the Council of Europe. It is an entirely different organization from the European Union, which is an economic and political alliance of some 27 states.<sup>4</sup> All members of the European Union belong to the Council of Europe, but not vice versa.

This article will focus on the Convention and, particularly, on the

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<sup>1</sup> The essence of Article 6 is that “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” Council of Europe, The European Convention on Human Rights, Nov. 4, 1950, *available at* <http://www.hri.org/docs/ECHRSO.html>.

<sup>2</sup> In brief: the presumption of innocence, the right to be informed promptly of the nature of any accusation; the right to adequate facilities for defense; the right to legal assistance; the right to confrontation of witnesses; and the right to a free interpreter. *Id.*

<sup>3</sup> For a brief account of the origins of the Convention, see CLARE OVEY & ROBIN C.A. WHITE, JACOBS AND WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1-17 (4th ed., 2006). For a full history, see generally A.W.B. SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION (2001).

<sup>4</sup> For brief discussions of the EU in this context, see LAMMY BETTEN AND NICHOLAS GRIEF, EU LAW AND HUMAN RIGHTS 1-4 (1998). EU Law now has its own “Charter of Fundamental Rights” (2000), which also forms part of the Constitution for Europe that is currently under debate. A discussion of that Charter is beyond the scope of this article.

jurisprudence of the Strasbourg Court.<sup>5</sup> Individuals can make an application to the Court, alleging a violation of one or more Convention rights by a particular member state. A high proportion of applications are declared inadmissible because of their failure to meet the necessary requirements.<sup>6</sup> However, the number of cases reaching the court has grown tremendously each year. Each member state has a judge sitting on the Court. The Court operates through five Sections, usually sitting with 7 judges, and a very small number of cases are referred to the Grand Chamber of 17 judges. The Court does not have a strict doctrine of precedent, but generally tends to follow a line of previous decisions (in the continental style). However, the Court has shown its willingness to make bold and controversial judgments on some issues; and, as already noted, has had the confidence to imply various rights into the general right to fair trial declared by Article 6.

The purpose of this article is to trace the recognition and the refinement of the privilege against self-incrimination by the Strasbourg Court, to identify some of the questions left open by the Court's judgments to date, and to explore the theoretical underpinnings of the Court's approach.

## I. PLANTING THE SEED

The privilege against self-incrimination made an unexpected and faltering entry into European human rights law. In 1993 the Court heard the case of *Funke v. France*.<sup>7</sup> French customs officers searched Funke's house under a warrant. They found evidence that he held foreign bank accounts, and so issued an order requiring him to produce bank statements from those accounts. He declined, and he was then prosecuted for and convicted of the offence of failing to produce the documents. The sentence was a fine that increased for each day that he continued to refuse to supply the details. His application to the Court alleged that his right to a fair trial had been breached because he was being compelled to provide evidence that might incriminate him. In view of the limited scope of the rights in Article 6 this was a novel claim,<sup>8</sup> but it was held admissible and, moreover, the Court found that

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<sup>5</sup> This is a convenient shorthand term for the European Court of Human Rights, which sits in Strasbourg, France.

<sup>6</sup> For discussion and critique, see STEVEN GREER, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS* 136-92 (2006); *see also* MARIE-BÉNÉDICTE DEMBOUR, *WHO BELIEVES IN HUMAN RIGHTS? REFLECTIONS ON THE EUROPEAN CONVENTION* 19-29 (2006).

<sup>7</sup> 256 Eur. Ct. H.R. (ser. A) (1993).

<sup>8</sup> However, the privilege had been discussed and applied to European Community competition law by the European Court of Justice. *See* Case 374/87, *Orkem v. Comm'n of the*

the French authorities had violated the right to a fair trial:

Being unable or unwilling to procure [the bank statements] by some other means, they attempted to compel the applicant himself to provide the evidence of the offences he had allegedly committed. The special features of customs law . . . cannot justify such an infringement of the right of anyone “charged with a criminal offence” . . . to remain silent and not to contribute to incriminating himself. There has accordingly been a breach of Article 6 § 1.<sup>9</sup>

With this “brief and Delphic” statement,<sup>10</sup> the Court introduced the privilege against self-incrimination into its jurisprudence. Nothing was said about the scope of the privilege, or about its origins and rationale. However, two points may be said to emerge from this first recognition of the privilege. First, it applies to the delivery of documents by an individual: if it had been confined to speech, it would not have been applied—let alone, created—in a case such as this. The other point is that the Court took the view that the privilege could not simply be balanced against the public interest in order to determine whether there had been a violation. This proposition emerges from the fact that the Court differed from the opinion of the European Commission on Human Rights in the same case,<sup>11</sup> which had also shown a willingness to recognize the privilege but which had held that coercive measures of this kind were necessary “to protect the country’s vital economic interests” and were “a *quid pro quo* for the trust reposed by the State in every citizen, which enables it to forego the adoption of more restrictive measures of control and supervision.”<sup>12</sup> Thus, whereas the Commission had found that the privilege was outweighed by these public interest considerations, the Court took the view that those considerations could not justify this kind of infringement of the privilege.

## II. SETTING OUT THE STALL

Some three years passed, during which the implications of the *Funke* judgment were unclear, before the topic again attracted the attention of the Strasbourg Court. The issue in *John Murray v. United Kingdom*<sup>13</sup> was the right of silence, and the extent to which it was

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European Communities, 1989 E.C.R. 3283.

<sup>9</sup> *Funke*, 256 Eur. Ct. H.R. (ser. A) at 22.

<sup>10</sup> Sir Nicolas Bratza, *The Implications of the Human Rights Act 1998 for Commercial Practice*, 1 EUR. HUM. RTS. L. REV. 10 (2000). Sir Nicolas is the British judge on the court.

<sup>11</sup> The European Commission operated as a filter for applications until 1998, when it was abolished. The question whether an application is admissible is now decided by a committee of three judges of the court.

<sup>12</sup> *Funke*, 256 Eur. Ct. H.R. (ser. A) at 22.

<sup>13</sup> 1996-I Eur. Ct. H.R. 30.

compatible with this right for a court to draw adverse inferences from the accused's failure to answer questions put by the police during the investigation.

The right of silence is closely related to the privilege against self-incrimination—the latter concerns the threat of coercion in order to make an accused yield certain information, whereas the former concerns the drawing of adverse inferences when an accused fails to testify or to answer questions—and neither of them appears on the face of the European Convention. Their close relationship to the right to a fair trial under the Convention was confirmed in the Court's judgment, citing the U.N.'s International Covenant on Civil and Political Rights (1966), which declares the privilege in Article 14(3)(g), and continuing:

Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6 . . . . By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and securing the aim of Article 6.<sup>14</sup>

The Court went on to state that the right of silence is not absolute, in the sense that there may be circumstances in which it is consistent with the right to a fair trial for a court to draw inferences from a defendant's silence. Thus:

On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.<sup>15</sup>

The second proposition opens up the possibility that inferences from silence might be justified "in situations which clearly call for an explanation from him," such as where a person has apparently incriminating marks on his body or clothing or where a person is known to have been at the scene of the crime.<sup>16</sup> It should be noted that the possibility of thus drawing inferences arises from the nature of the circumstances and not from the type or seriousness of the offense. Inferences may only be drawn if the prosecution has discharged its burden of proving a convincing case against the defendant.<sup>17</sup> Moreover

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<sup>14</sup> *Id.* at 49.

<sup>15</sup> *Id.*

<sup>16</sup> *See, e.g.,* *Averill v. United Kingdom*, 2001-VI Eur. Ct. H.R. 230.

<sup>17</sup> *See Telfner v. Austria*, 34 Eur. H.R. Rep. 207 (2002) (holding that the trial court had failed

the first stipulation, typical in European human rights law, restricts the significance of the second. Thus, inferences drawn from the accused's silence are not absolutely prohibited, but should only be drawn where "the only commonsense [explanation of] the accused's silence is that he had no answer to the case against him," and even then they cannot provide the main reason for convicting an accused. In two further leading cases, in both of which the applicants had remained silent in reliance on legal advice, the Court found a violation because the trial judge had failed to tell the jury that in order to draw an adverse inference they must be sure that the silence was consistent only with guilt.<sup>18</sup>

Although the *John Murray* judgment confirmed the place of the right to silence in European human rights law, the privilege against self-incrimination (though recognized as an implied right) still awaited a detailed examination by the Strasbourg Court. This was not long in coming, in the controversial case of *Saunders v. United Kingdom*.<sup>19</sup> It had been alleged that the takeover of another drinks company by Guinness had been facilitated by unlawful dealings and incentives, and an investigation under the Companies Act 1985 (U.K.) was launched. The inspectors used their power to compel persons (including the applicant, a director of Guinness) to attend and to answer questions, and it was a contempt of court, punishable with up to two years' imprisonment, to refuse. The prosecution then used the applicant's answers to questions in a subsequent criminal case which led to his conviction.

The Strasbourg Court held that this use of information acquired from the applicant under compulsion amounted to a breach of the privilege against self-incrimination and thus to a breach of Article 6, the privilege applying even though the applicant's statements under compulsion were not actually incriminating.<sup>20</sup> So long as the statements were made under compulsion, they should not be capable of use by the prosecution in subsequent criminal proceedings. The Court repeated the passage from the *John Murray* judgment cited above,<sup>21</sup> and added:

The right not to incriminate oneself . . . presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of

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to insist that the prosecution case be strong enough to "call for an explanation").

<sup>18</sup> *Condon and Condon v. United Kingdom*, 2001-V Eur. Ct. H.R. 1; *Beckles v. United Kingdom*, 36 Eur. H.R. Rep. 162 (2002). For further analysis of the Strasbourg approach to inferences from silence, see Mark Berger, *Europeanizing Self-Incrimination: The Right to Remain Silent in the European Court of Human Rights*, 12 COLUM. J. EUR. L. 339 (2006).

<sup>19</sup> 1996-VI Eur. Ct. H.R. 2044.

<sup>20</sup> *Id.* at 2065 (rejecting the government's argument that the privilege did not apply because the statements were not incriminating, and holding that if any testimony under compulsion is subsequently used by the prosecution, that use is what the privilege should guard against).

<sup>21</sup> 1996-I Eur. Ct. H.R. 30.

coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 § 2 of the Convention.<sup>22</sup>

The robustness of this rationale will be discussed below. Here, three aspects of the *Saunders* judgment call for further analysis—the proceedings to which the privilege applies, the ambit of the privilege, and the defeasibility of the privilege.

A. *To What Type(s) of Proceedings Does the Privilege Apply?*

It appears from *Saunders* that the privilege relates only to the admission of the evidence in criminal proceedings. It does not prohibit the use of compulsory questioning powers in the course of a purely administrative investigation. The Court emphasized that the role of the investigation under the Companies Act was essentially regulatory, and was thus distinct from that of the investigation or prosecution of crime. The role of the inspectors was “to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities—prosecuting, regulatory, disciplinary or even legislative.”<sup>23</sup>

The Strasbourg Court considered this point in *IJL, GMR and AKP v. United Kingdom*,<sup>24</sup> an application by other defendants in the first Guinness trial (at which *Saunders*, too, had been convicted). They argued that the questioning by the inspectors should be treated as part of the prosecution process because of collusion between the inspectors and the prosecuting authorities, and that therefore they should have been accorded the rights of persons “charged with a criminal offense” during that questioning. The Court rejected this argument, and with it the view that “a legal requirement for an individual to give information demanded by an administrative body necessarily infringes Article 6 of the Convention.”<sup>25</sup> The use of the evidence in the subsequent criminal trial infringed Article 6, but the compulsory questioning by the inspectors did not.

Where the investigation is criminal rather than administrative, however, the privilege against self-incrimination applies even at the early stages. Thus in *Heaney and McGuinness v. Ireland*<sup>26</sup> the two applicants had been arrested on suspicion of terrorist acts and had been questioned by the police, under compulsory powers, as to their

<sup>22</sup> *Saunders*, 1996-VI Eur. Ct. H.R. at 2064.

<sup>23</sup> *Id.*; see also *Abas v. Netherlands*, 1997 EUR. H.R. L. REV. 418 (European Commission on Human Rights discussion of the compulsory powers of taxation authorities).

<sup>24</sup> 2000-IX Eur. Ct. H.R. 323.

<sup>25</sup> Compare *id.* at 350, with *Orkem v. Comm'n of the European Communities*, 1989 E.C.R. 3283.

<sup>26</sup> 2000-XII Eur. Ct. H.R. 419.

whereabouts at the time. On refusing to answer, they were prosecuted for withholding information, convicted, and sentenced to the maximum term of six months' imprisonment. The Court held that the privilege against self-incrimination implied into Article 6 had been breached. In its judgment the Court referred to and indeed relied upon the early decision in *Funke v. France*,<sup>27</sup> stating that "both cases concerned the threat and imposition of a criminal sanction on the applicants in question because they failed to supply information to authorities investigating the alleged commission of criminal offences by them."<sup>28</sup> In other words, these were cases in which the failure to give requested information (either orally, as in *Heaney and McGuinness*, or by the delivery of documents, as in *Funke*) was itself a criminal offence, and it was liability for that offence that violated the privilege against self-incrimination. In both cases, of course, as in *Saunders*, the information was wanted to form the basis of prosecution for a more serious offence.

In *Shannon v. United Kingdom*<sup>29</sup> the applicant, who had been charged with false accounting and conspiracy to defraud, was summoned to a further interview with financial investigators. His lawyers sought an assurance that his answers would not be used in the criminal proceedings. No such assurance was forthcoming, so the applicant did not attend the interview. He was then convicted of the offence of failing to comply with the financial investigator's request, and fined. The Court held unanimously "that the requirement for the applicant to attend an interview with financial investigators and to be compelled to answer questions in connection with events in respect of which he had already been charged with offences was not compatible with his right not to incriminate himself."<sup>30</sup> The clear difference between this case and that of *IJL, GMR and AKP v. United Kingdom*<sup>31</sup> is that here the applicant had already been charged with offences when called to the inspector's interview, whereas in the latter case no criminal prosecution had been commenced at the time.

A more difficult case is *King v. United Kingdom*,<sup>32</sup> in which the applicant's statements under compulsory questioning by tax inspectors were used as a basis for calculating the penalty for underpayment of tax. The Court declared his application inadmissible, seeking to distinguish it from the earlier cases on several grounds. First, the applicant was

<sup>27</sup> 256 Eur. Ct. H.R. (ser. A) (1993); see *supra* note 7 and accompanying text.

<sup>28</sup> *Heaney and McGuinness*, 2000-XII Eur. Ct. H.R. 419.

<sup>29</sup> 42 Eur. H.R. Rep. 660 (2006). For analysis with a comparative element, see Mark Berger, *Self-Incrimination and the European Court of Human Rights: Procedural Issues in the Enforcement of the Right to Silence*, 5 EUR. HUM. RTS. L. REV. 514, 519-25 (2007).

<sup>30</sup> *Shannon*, 42 Eur. H.R. Rep. at 662 (2006). In an American context, the grant of an immunity would have been crucial: if granted, no incriminating use of the answers could be made; if not granted, any use would violate the privilege.

<sup>31</sup> 2000-IX Eur. Ct. H.R. 323.

<sup>32</sup> 37 Eur. H.R. Rep. 1 (2003).

penalized for making an inadequate tax return, and not for “the commission of an offence due to acts or omissions in which he had been involved prior to that moment,” as in *Saunders*.<sup>33</sup> Secondly, he was not prosecuted for failure to provide information that would have incriminated him in anticipated criminal proceedings; he was simply “penalized for his failure to make an adequate tax return.”<sup>34</sup> The Court added that “the privilege against self-incrimination cannot be interpreted as giving a general immunity to actions motivated by the desire to evade investigation by the revenue authorities.”<sup>35</sup> On this point the court followed its previous decision in *Allen v. United Kingdom*,<sup>36</sup> declaring inadmissible an application by a taxpayer who responded to a notice requiring him to declare his assets (on pain of a fine of up to £300) by submitting a false statement. The Court held that compulsory powers are necessary for the proper operation of taxation systems, and that the compulsion did not force him to divulge information in respect of any pre-existing offence (apart from non-payment of tax). It therefore seems that the court is distinguishing these decisions from *Heaney and McGuinness*<sup>37</sup> and *Shannon*<sup>38</sup> on the ground that those cases involved compulsion to disclose an earlier offence, whereas *King* and *Allen* involved compulsion relating directly to what is being investigated, i.e., liability to tax. The conduct in *King* and in *Allen* constituted the offense, rather than incriminating them in another offense. But if that is the rationale, cannot the same be said of *Heaney and McGuinness*, where the refusal to give the information constituted the offense?

#### B. *What Is the Scope of the Privilege?*

After stating that the right not to incriminate oneself is closely linked to the presumption of innocence, forming part of fair procedure and contributing to the avoidance of miscarriages of justice, the Court in *Saunders* went on to draw a distinction between the provision of “real” evidence and the provision of oral or testimonial evidence:

The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in

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<sup>33</sup> *Id.* at 4.

<sup>34</sup> *Id.* A similar distinction was central to the judgment of the Court in the road traffic case of *Weh v. Austria*, 40 Eur. H.R. Rep. 890 (2004), discussed *infra*.

<sup>35</sup> *King*, 37 Eur. H.R. Rep. at 6.

<sup>36</sup> 2002-VIII Eur. Ct. H.R. 364.

<sup>37</sup> 2000-XII Eur. Ct. H.R. 419.

<sup>38</sup> 42 Eur. H.R. Rep. 660 (2006).

criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.<sup>39</sup>

Is this distinction one of substance, or merely a pragmatic attempt to rein in the possible implications of the privilege against self-incrimination? It is true that the laws of many member states contain provisions for the compulsory taking of blood samples and other samples, in motoring cases and for other crimes. In terms of practical law enforcement, it is difficult to resist the pressure to allow some such procedures.

The reference to materials that have an existence “independent of the will of the suspect” might suggest, at face value, that *Funke v. France*<sup>40</sup> was wrongly decided. However, as Professor Redmayne suggests,<sup>41</sup> one could read the passage from *Saunders* charitably so as to support the *Funke* decision on the ground that the key issue in that case was that the applicant was being forced to deliver up the documents. This is consistent with his proposal that the privilege against self-incrimination should be seen as applying to “a certain means of obtaining information, a means that requires co-operation, and not to a particular type of information—answers to questions as opposed to physical material.”<sup>42</sup> On this view, since bodily samples can be obtained without the cooperation of the individual, i.e., by using force to take them, they can therefore be differentiated from attempts to force someone to speak or to hand over documents.<sup>43</sup>

The above passage from the *Saunders* judgment starts from the proposition that an accused person’s will to remain silent must be respected. That may be seen as linking the privilege against self-incrimination to the right not to be subjected to inhuman or degrading treatment (protected by Article 3 of the Convention), and perhaps also to the right to respect for private life (protected by Article 8) and the right to freedom of expression (Article 10). But this need to protect a suspect’s will from coercion still raises questions about the Court’s concept of materials having “an existence independent of the will.” It might be thought that the documents in *Funke* had an existence independent of the will of the accused. Yet the ruling in *Funke* was

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<sup>39</sup> 1996-VI Eur. Ct. H.R. 2044, 2064.

<sup>40</sup> 256 Eur. Ct. H.R. 7 (1996). *See supra* note 7 above and accompanying text.

<sup>41</sup> Mike Redmayne, *Rethinking the Privilege Against Self-Incrimination*, 27 OXFORD J.L.S. 209, 214-15 (2007).

<sup>42</sup> *Id.*

<sup>43</sup> Professor Trechsel advances a similar interpretation, stating that “the privilege only covers assistance from the suspect which could not be substituted by employing direct force.” STEFAN TRECHSEL, *HUMAN RIGHTS IN CRIMINAL PROCEEDINGS* 354 (2005).

approved by the Court in *Heaney and McGuinness v. Ireland*,<sup>44</sup> although without reference to the *Saunders* distinction. In *JB v. Switzerland*<sup>45</sup> the Court found a breach of Article 6 where the applicant was fined for failing to hand over financial records to the tax authorities: the Court distinguished such documents from the blood or urine samples referred to in *Saunders*, noting that the latter had “an existence independent of the person concerned and [were] not, therefore, obtained by means of coercion and in defiance of the will of that person.”<sup>46</sup> It is doubtful whether this particular distinction is convincing. The key question should not be whether the documents have an existence independent of the person concerned, but rather whether a requirement to produce evidence (oral or real) operates as coercion on the mind of the subject.

### C. *Is the Privilege Absolute or Defeasible?*

We have noted that the privilege against self-incrimination is an implied right that forms part of the right to a fair hearing embodied in Article 6. The scope of the right is in the course of development through decisions of the Court, and in its early *Saunders* judgment the Court did not “find it necessary . . . to decide whether the right not to incriminate oneself is absolute or whether infringements of it may be justified in particular circumstances.”<sup>47</sup> However, lest that statement be taken as a license for balancing the privilege against public interest considerations, the Court put down this bold marker:

It does not accept the Government’s argument that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could justify such a marked departure as that which occurred in the present case from one of the basic principles of a fair procedure.<sup>48</sup>

The government had argued strongly that these public interest considerations should be allowed, exceptionally, to outweigh the privilege in this case. Not only did the court reject this, but it went on to articulate the principle that both the fairness requirements of Article 6 generally and the privilege itself should “apply to criminal proceedings in respect of all types of criminal offences without distinction from the most simple to the most complex.”<sup>49</sup> Thus the Court’s earlier statement that the privilege should not be treated as absolute must be viewed in its

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<sup>44</sup> 2000-XII Eur. Ct. H.R. 419.

<sup>45</sup> (2001) Crim. L. R. 748.

<sup>46</sup> *Id.*

<sup>47</sup> *Saunders v. United Kingdom*, 1996-VI Eur. Ct. H.R. 2044, 2065.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

proper context, which makes it clear that departures from it will be rare and will call for a special justification, over and above the broader public interest.

This point is strongly underscored by the decision in *Heaney and McGuinness v. Ireland*,<sup>50</sup> where the Irish government had argued that the compulsion on suspected persons to answer questions on their whereabouts at a given time was a proportionate response to the threat to public security arising from terrorism. The Court expressed the view that “proportionality” reasoning of this kind was not the proper approach to the matter, holding instead that “the security and public order concerns of the Government cannot justify a provision which extinguishes the very essence of the applicants’ rights to silence and against self-incrimination guaranteed by Article 6(1) of the Convention.”<sup>51</sup>

Thus, in both *Saunders* and *Heaney and McGuinness* the Court was careful to state that the “public interest” argument for departures from the privilege was not persuasive, and in the latter judgment it added that no departure should be such as to extinguish “the very essence” of the right.<sup>52</sup>

The Court’s approach was developed in *Allan v. United Kingdom*,<sup>53</sup> where a police informant had been placed in a prison cell with the applicant for some weeks in order to elicit incriminating statements from the applicant. The Court began its consideration with the following statement of principle:

In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court will examine the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put.<sup>54</sup>

Applying this approach to the facts of the case, the Court held that the privilege against self-incrimination is not confined to cases of what it described as “duress.” It stated that the privilege:

serves in principle to protect the freedom of a suspected person to choose whether to speak or to remain silent under police questioning. Such freedom of choice is effectively undermined in a case in which, the suspect having elected to remain silent during questioning, the authorities use subterfuge to elicit from the suspect confessions or other statements of an incriminatory nature, which they were unable

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<sup>50</sup> 2000-XII Eur. Ct. H.R. 419.

<sup>51</sup> *Id.* at 421.

<sup>52</sup> *Id.*

<sup>53</sup> 2002-IX Eur. Ct. H.R. 41.

<sup>54</sup> *Id.* at 57. In the Strasbourg style, this part of the judgment is presented as a summary of the existing law. This sentence is footnoted to *Heaney and McGuinness v. Ireland* and to *JB v. Switzerland*, but the “summary” seems to go a little beyond those decisions.

to obtain during such questioning and where the confessions or statement thereby attained are adduced in evidence at trial.<sup>55</sup>

Nonetheless, it was still open to question whether the statements had been obtained “in defiance of the will” of the applicant. The Court eventually decided that they had, and therefore that the privilege (and Article 6) had been violated. The police informant had been instructed to “push him for what you can,” and the situation in the cell was such that the applicant would have been “susceptible to persuasion to take [the informant] into his confidence.” This part of the judgment is not entirely persuasive, and it might have been better to say only that the authorities had employed a subterfuge in order to undermine a choice that the applicant had freely and unambiguously made, i.e. not to answer police questions.<sup>56</sup>

### III. REFINEMENT, RETRENCHMENT OR RETREAT?

Until the last year or two, the main criticism of the Strasbourg jurisprudence on self-incrimination was that it was uncertain and under-developed.<sup>57</sup> The judgments in *Saunders* and in *Heaney and McGuinness* sounded a strong and clear note, but the other judgments (including the very first one in *Funke*) seemed to muddy the waters rather than to clarify the proper approach. The tax cases, in particular, did not seem to follow a consistent line or to relate well to the *Saunders* principles. In 2006 and 2007, however, two major judgments—both stemming from the Grand Chamber, the most authoritative formation of the Strasbourg Court—have resolved some issues but also created further doubts.

Although it is the more recent of the two judgments, we will first examine the Grand Chamber’s judgment in *O’Halloran and Francis v. United Kingdom*.<sup>58</sup> A car belonging to each applicant had been detected, on a speed camera, exceeding the speed limit. Each applicant was served with a notice requiring him to inform the police who was driving the car at the time, failure to give the information being an offense punishable by a fine and by penalty points on the driving license. Both applicants claimed that this was direct compulsion which violated their privilege against self-incrimination. The Grand Chamber,

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<sup>55</sup> *Id.* at 58.

<sup>56</sup> Under the *Miranda* jurisprudence in the United States, the case would probably be decided on the ground that the defendant was deprived of his right to counsel. See *Miranda v. Arizona*, 384 U.S. 436 (1966), and the extended discussion by MARK L. BERGER, TAKING THE FIFTH 99-160 (1980).

<sup>57</sup> See, e.g., Tim Ward & Piers Gardner, *The Privilege Against Self-Incrimination: In Search of Legal Certainty*, 4 EUR. HUM. RTS. L. REV. 388 (2003).

<sup>58</sup> 46 Eur. H.R. Rep. 407 (2008).

by fifteen votes to two, held that there was no violation of Article 6. Although all cases of direct compulsion had been held to violate the privilege in the past, the Court held that this is not a necessary conclusion, and that other factors may be relevant in deciding whether the essence of the privilege against self-incrimination has been violated. Thus, in addition to (a) the direct nature of the compulsion, account should be taken of (b) the fact that the compulsion is part of a regulatory scheme that fairly imposes obligations on drivers in order to promote safety on the roads, (c) the fact that the information required is the simple, specific and restricted fact of who was driving, rather than a general account of movements or answers to wide-ranging questions, (d) that the particular statutory offense contains a safeguard, in the form of a defense of due diligence. Taking these factors into account, particularly the special nature of the regulatory regime at issue and the limited nature of the information required, the Court held that the essence of the applicants' right of silence and privilege against self-incrimination had not been destroyed, and thus there was no violation of Article 6.

It is apparent that the Grand Chamber allowed the direct compulsion in this case to be outweighed by other factors. Now one could say that this case concerns a practical element in road traffic law which is common to all European (and many other) jurisdictions. Some countries approach the problem differently—by presuming the owner to have been the driver unless this is disproved, or by allowing an adverse inference to be drawn if the owner fails to identify who was driving—but these “solutions” also compromise human rights, such as the presumption of innocence and the right of silence. One could argue that there is a European consensus that the privilege against self-incrimination should not apply in this situation. This might be supported by argument (b) above, that anybody who chooses to own a car thereby takes on certain obligations, in order to preserve road safety, and that this is one such obligation.<sup>59</sup> This argument would point in the direction of a limited exception to the privilege.

Unfortunately, that is not the approach that the Grand Chamber adopted. Once it had established that the privilege against self-incrimination is not an “absolute” right—a point left open in the *Saunders* judgment earlier, as we have seen<sup>60</sup>—it held that the focus of the decision should be “on the nature and degree of compulsion used to obtain the evidence, the existence of any relevant safeguards in the

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<sup>59</sup> In his Concurring Opinion, Judge Borrego Borrego argued that this consideration was sufficient to dispose of the case, and criticized the majority judgment for taking 12 pages to state the obvious. *Id.*

<sup>60</sup> *Saunders v. United Kingdom*, 1996-VI Eur. Ct. H.R. 2044, 2065; *see supra* note 46 above and accompanying text.

procedure, and the use to which any material so obtained was put.”<sup>61</sup> In the process of applying these criteria, the Court refers at several points to the decision of the Privy Council of the United Kingdom in the similar case of *Brown v. Stott*,<sup>62</sup> and quotes a lengthy passage from that judgment which includes the following sentence:

If one asks whether section 172 [the relevant statutory provision] represents a disproportionate legislative response to the problem of maintaining road safety, whether the balance between the interests of the community at large and the interests of the individual is struck in a manner unduly prejudicial to the individual, whether (in short) the leading of this evidence would infringe a basic human right of the respondent, I would feel bound to give negative answers.<sup>63</sup>

This passage exemplifies the prevailing approach among the British judiciary: the whole issue in the case is gently and deftly translated into the language of proportionality and balance—and who would argue against this, in favor of disproportionality or imbalance? Yet what is happening is that a basic right is being “trumped” by the public interest. This is exactly what the court held to be impermissible in its judgments in *Saunders* and *Heaney and McGuinness*,<sup>64</sup> holding that it is not an appropriate course of reasoning when the essence of the privilege against self-incrimination is at issue.

The Grand Chamber did not explicitly adopt this British approach, since it did not speak of achieving proportionality or balance. But it did go some distance down this path, and away from the Strasbourg approach of the 1990s, by accepting that every instance of direct compulsion to answer one or more questions is not necessarily a violation of the privilege but is a matter to be considered along with the other factors set out above. Should this be a cause of concern, when the sacrifice of the privilege is relatively minor on the overall scale of things? It is, after all, merely a question of admitting to driving one’s car at a particular time; on the other hand, in most situations this piece of information will be one of only two items necessary for conviction (evidence from the speed camera being the other), and punishment will follow, both a fine and penalty points. It should be noted here that in *Weh v. Austria*<sup>65</sup> the Court held, by the narrow majority of four votes to three, that an Austrian law providing for a car owner to be fined for failing to give the name of the driver of the car at a given time did not violate the privilege against self-incrimination: the majority held that the key point was that no prosecution of the owner for speeding had been commenced or contemplated, and that “he was only required to

<sup>61</sup> *O’Halloran*, 46 Eur. H.R. Rep. at 410.

<sup>62</sup> (2003) 1 A.C. 681.

<sup>63</sup> *Id.* at 705-06, cited in *O’Halloran*, 46 Eur. H.R. Rep. at 410.

<sup>64</sup> 2000-XII Eur. Ct. H.R. 419.

<sup>65</sup> 40 Eur. H.R. Rep. 890 (2004).

state a simple fact—namely who had been the driver of his car—which is not in itself incriminating.”<sup>66</sup> However, both in *Weh* and in *O’Halloran and Francis*, it would surely have been more honest and more persuasive to describe this as a considered exception to the privilege, founded chiefly on the pragmatic need to use such a method to promote road safety and on the apparent European consensus on its acceptability, rather than to deny the *prima facie* violation of the privilege against self-incrimination. We will return to this question of justification in the concluding section.

Since the Grand Chamber in *O’Halloran and Francis* did not regard itself as creating an exception, but rather as exemplifying the application of its four criteria, listed above, does the judgment suggest any loosening of the privilege of self-incrimination in cases of serious fraud, drug-trafficking, organized crime, and so on? This possibility emerges more clearly when we consider the other recent judgment, in *Jalloh v. Germany*.<sup>67</sup> In this case four police officers held down the applicant while a doctor administered an emetic, which made him regurgitate a small plastic bag containing drugs. The principal questions for the Grand Chamber concerned the application of Article 3 (held, that this was inhuman and degrading treatment) and of Article 6 (held, that the evidence obtained through a breach of Article 3 should have been excluded at his trial), but the court also considered the application of the privilege against self-incrimination. The judgment recognizes that the vital piece of evidence in this case (the plastic bag obtained from within the applicant’s stomach) was “material having an existence independent of the will of the suspect, the use of which is generally not prohibited in criminal proceedings.”<sup>68</sup> The material would therefore fall within the exception recognized in *Saunders*, to which the privilege against self-incrimination is said not to apply.<sup>69</sup> However, the Court went on to distinguish this case on the ground that the force used to obtain the evidence, amounting itself to a violation of Article 3 of the Convention, went far beyond that required to take a sample of blood or hair.<sup>70</sup> In effect, therefore, the *Jalloh* judgment creates an exception to the exceptional category (matters having an independent existence) recognized in *Saunders*. In the context of Article 3, that is surely justifiable.<sup>71</sup> However, the judgment then deteriorates:

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<sup>66</sup> *Id.* at 892.

<sup>67</sup> 44 Eur. Ct. H.R. 32 (2007).

<sup>68</sup> *Id.* at 33.

<sup>69</sup> For an examination of the rationale of this exception, and the privilege generally, see Mike Redmayne, *Rethinking the Privilege Against Self-Incrimination*, 27 OXFORD J.L.S. 209 (2007).

<sup>70</sup> *Jalloh*, 44 Eur. Ct. H.R. at 32 (2007). The Grand Chamber also referred to another “distinction,” in that this case involved the recovery of real evidence whereas the blood, hair or breath samples mentioned in the *Saunders* judgment are taken in order to determine some further issue, e.g., whether alcohol or drugs are present. It is not clear why this should be so significant.

<sup>71</sup> This is compatible with the interpretation of the *Saunders* judgment discussed *supra*,

In order to determine whether the applicant's right not to incriminate himself has been violated, the Court will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence at issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained was put.<sup>72</sup>

These are somewhat similar to the criteria in *O'Halloran and Francis*, except in one highly significant respect. The second factor, "the weight of public interest," was neither stated nor used in *O'Halloran and Francis*—in fact, it was ignored. Moreover, the application of this second factor in *Jalloh* is troubling:

As regards the weight of public interest in using the evidence to secure the applicant's conviction, the Court observes that . . . the impugned measure targeted a street dealer who was offering drugs for sale on a comparably small scale and was finally given a six months' suspended prison sentence and probation. In the circumstances of the instant case, the public interest in securing the applicant's conviction could not justify recourse to such a grave interference with his physical and mental integrity.<sup>73</sup>

What does this mean? Does it imply that "grave interference," of the kind used in this case, would be acceptable if the person were charged with large-scale drug trafficking, or a serious sexual offense, or organized crime? That ought not to be so, because the police methods were so severe as to amount to a violation of Article 3. But there does seem to be an implication that the privilege against self-incrimination protects individuals against compulsion in relation to non-serious crimes, but not serious crimes. If this were not true, why bring the issue of crime-seriousness into the equation?<sup>74</sup> Some will take comfort from the fact that the Court found a violation of the privilege against self-incrimination in this case. But it is disturbing that one of its reasons for reaching this conclusion was that the offence (small-scale drug dealing) was not sufficiently important to generate a strong public interest in abrogating the privilege against self-incrimination.

Another difficulty with the judgments in these two major cases is that they fail to analyze the earlier judgments in *Saunders* and in *Heaney and McGuinness*. Thus the decision in *Jalloh* to the effect that "the weight of the public interest in the investigation and punishment of the offence at issue" is a relevant factor flatly contradicts the statement in *Saunders* that the privilege applies "to criminal proceedings in respect of all types of criminal offences without distinction from the

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accompanying notes 44-45.

<sup>72</sup> *Jalloh*, 44 Eur. Ct. H.R. at 34.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 71 (Concurring Opinion of Judge Bratza).

most simple to the most complex.”<sup>75</sup> It reflects poorly on the Court that it failed to confront its own previous declaration on the subject. Insofar as the Court held that a minor drug-dealing case was not sufficiently weighty to justify overriding the privilege against self-incrimination, does this mean that the decisions in *Saunders* (on serious fraud) and in *Heaney and McGuinness* (on terrorism) are now open to doubt? If not, what does the reference in *Jalloh* to “the weight of public interest” really mean? On this point there is a significant difference between *Jalloh* and *O’Halloran and Francis*, since the latter judgment articulates more specific reasons for holding that the privilege does not apply (taking the benefits without the burdens, limited information required, no compulsion if reasonable excuse). These are good, if not incontestable, reasons for creating an exception to the privilege. The *Jalloh* judgment, on the other hand, opens up the application of the principle to a vague form of balancing without any evident principles or restraining considerations.

#### IV. THE SEARCH FOR A RATIONALE

Thus far this article has traced the development of the privilege against self-incrimination by the Strasbourg Court, charting the exceptions and qualifications that have been recognized in the course of the accumulating case law. It is now time to take stock of the Court’s jurisprudence, and to assess whether it can be presented as coherent.

The Court itself has connected the privilege to the presumption of innocence (declared by Article 6(2) of the Convention) and has indicated that one of its objectives is to avoid miscarriages of justice.<sup>76</sup> In terms of a motivating rationale, the clearest statement came when the Court in *Saunders* sought to spell out the link between the privilege and the presumption of innocence, which it did by arguing that “the prosecution in a criminal case [should] seek to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.”<sup>77</sup> Thus the defendant should be able to “put the prosecution to proof,” without having any obligation to assist in providing evidence against himself—if the defendant were under an obligation to supply evidence, then the duty of the prosecution to establish guilt beyond reasonable doubt would be watered down, hollowed out, and even contradicted, by the duty imposed on the

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<sup>75</sup> *Saunders v. United Kingdom*, 1996-VI Eur. Ct. H.R. 2044, 2066.

<sup>76</sup> *Murray v. United Kingdom*, 1996-I Eur. Ct. H.R. 30, 49; *Saunders*, 1996-VI Eur. Ct. H.R. 2044.

<sup>77</sup> *Saunders*, 1996-VI Eur. Ct. H.R. at 2064.

defendant.<sup>78</sup> This comes close to what Professor Redmayne re-interprets as the value of citizens being able to distance themselves from the state at the time when the state is exerting its power against them, i.e., by bringing a prosecution for a criminal offense.<sup>79</sup> On this view, one of the implications of due recognition of the autonomy of each citizen should be that there is no duty, backed by a sanction, to answer the questions of state officials in relation to criminal offenses. This is not to say that compulsory powers of obtaining evidence should not exist, but only that compelling the individual citizen to participate in supplying evidence (oral or real) for the purpose of prosecution is oppressive and is what the privilege against self-incrimination is designed to prevent.

All of this presupposes a particular relationship between the citizen and the state and its officials in the context of criminal justice. The state has an obligation—to all citizens, including victims and (suspected) offenders—to maintain a fair and effective criminal justice system. A rights-based account of criminal justice would start from the proposition that conviction of an offence involves public censure and may be followed by punishment, potentially taking away what are otherwise rights to liberty of the person and property. State officials have far greater powers and resources than the individual citizen, and so the presumption of innocence sets out to ensure a proper relationship between the two—ensuring that the state cannot exercise its powers unless it has discharged a burden of proof, not least because defendants should be protected against the fragility of fact-finding at trials.<sup>80</sup> Adherence to the presumption of innocence therefore indicates that it is wrong to require an individual to supply evidence against himself or herself when the officials (e.g., police or prosecutors) are in the process of building a case against him or her. This should be the practical meaning of the privilege against self-incrimination and the right of silence. Even when citizens are allowed to have a legal representative present throughout such questioning, the opportunities for undue pressure remain present; and it is the potential for such pressure, exerted by state officials with the panoply of police stations, police cells and prisons in the foreground or the background, that shows why the privilege against self-incrimination should be maintained. On this view the privilege against self-incrimination and the right of silence belong to a cluster of criminal justice rights, centering on the presumption of innocence and the principle of equality of arms, and reaching out to the

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<sup>78</sup> See also STEFAN TRECHSEL, *HUMAN RIGHTS IN CRIMINAL PROCEEDINGS* 348, 357 (2005) (permitting adverse inferences to be drawn from silence has the effect of defeating the purpose of placing the burden of proof on the prosecution).

<sup>79</sup> Redmayne, *supra* note 69, at 225.

<sup>80</sup> See also Andrew Ashworth, *Four Threats to the Presumption of Innocence*, 10 *INT'L J. EVIDENCE & PROOF* 241 (2006).

right of confidential access to a legal adviser, the right to disclosure of evidence held by the prosecution, the right of confrontation and other rights expressed in or implied into Article 6 of the Convention.

This view of a cluster of criminal justice rights is a bold extrapolation from the *Saunders* judgment, and that judgment no longer stands uncontested. So, if the scope of the privilege against self-incrimination were to be debated more widely, one key question would be the proper extent of the duties of cooperation that a state may place upon its citizens. Should there be a duty to give one's name and address when required, to answer questions about one's income and assets, to state who was driving a car that one owns, and more?

What Professor Berger has termed "the duty to self-identify"<sup>81</sup> is a duty frequently imposed by the British legislature, in a whole range of situations.<sup>82</sup> In principle such duties are inconsistent with the privilege against self-incrimination when they are imposed in the context of an ongoing or probable criminal prosecution. It is unpersuasive to argue that the degree of violation of the privilege against self-incrimination in such cases should be "balanced" against the public interest in road safety or in securing the conviction of those who breach the rules of the road. That was Lord Bingham's argument in the Privy Council in *Brown v. Stott*,<sup>83</sup> and also the argument of the majority of the Strasbourg Grand Chamber in *Jalloh v. Germany*.<sup>84</sup>

However, that argument allows an Article 6 right to be cast aside on grounds less demanding than those required by the qualified rights in Articles 8-11 of the Convention. Moreover it does so particularly in cases where the individual is likely to have the most to lose, since the highest public interest lies in ensuring convictions for the most grave offences. So the "balancing" approach is unsatisfactory, because it is incompatible with proper respect for those human rights that are not qualified on the face of the Convention.<sup>85</sup>

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<sup>81</sup> Mark Berger, *Compelled Self-Reporting and the Principle Against Compelled Self-Incrimination: Some Comparative Perspectives*, 2006 EUR. HUM. RTS. L. REV. 25, 28.

<sup>82</sup> See, e.g., Terrorism Act 2000, §§ 44, 116, sched. 7; see also Ben Bowling and Coretta Phillips, *Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search*, 70 MOD. L. REV. 936 (2007) (reviewing powers to which a duty to self-identify is usually attached).

<sup>83</sup> (2003) 1 A.C. 681 (referring to "the balance . . . struck between the interests of the community at large [in greater safety on the roads] and the protection of the fundamental rights of the individual" in not being required to self-incriminate).

<sup>84</sup> 44 Eur. Ct. H.R. 32 (2007). "[T]he weight of the public interest in the investigation and punishment of the offence at issue" is offered as one of three criteria for determining whether the privilege against self-incrimination has been violated in a given situation. *Id.* at 34.

<sup>85</sup> The precise point here is that some rights declared by the Convention are stated to be qualified—such as those declared in Article 8 (privacy), Article 9 (freedom of thought and religion), Article 10 (freedom of expression), and Article 11 (freedom of association)—whereas others, notably Article 6 on the right to fair trial, are not so qualified. For analysis of the structure of the rights in the Convention, see Andrew Ashworth, *Security, Terrorism and the Value of*

But the fact that a broad “balancing” approach is unacceptable does not mean that there is no alternative to full respect for the privilege against self-incrimination in all situations. A pragmatic yet more rights-sensitive approach would be to suggest that an exception to the privilege may be justifiable in circumstances where a) the citizen has relatively little at stake, b) the citizen could be said to have chosen to participate in a particular social enterprise, and c) there is provision for the citizen to be excused if without fault. These criteria are similar to those adopted by the majority in *O’Halloran and Francis v. United Kingdom*.<sup>86</sup>

The first consideration should be dominant, and should be invoked in order to ensure that a citizen who is convicted for failing to self-identify is not at risk of a significant penalty. Loss of liberty should be simply impermissible for this,<sup>87</sup> and in principle a moderate fine should be the limit. The significant point here is that, where interference with a right is being exceptionally permitted, the penalty should be scaled down in order to recognize the sacrifice of the right.<sup>88</sup> The second consideration has the effect of narrowing down the first, since it restricts the scope of the exception to cases where a particular social enterprise (such as driving on the roads) is heavily regulated, to the extent of requiring each citizen to pass a test in order to obtain a license to engage in that enterprise.<sup>89</sup> The argument is that those who wish to be involved in the enterprise must abide by the regulations and duties reasonably imposed, one of which is an owner’s duty to state who was driving the car on a given occasion.<sup>90</sup>

Redmayne warns that this argument, apposite as it may be for road traffic offences, is potentially unruly because it might then be claimed that citizens who take the benefits of a relatively peaceful state should submit to its burdens—thereby legitimating all kinds of demands, some self-incriminatory, that might be made in the name of public safety and

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*Human Rights*, in SECURITY AND HUMAN RIGHTS (Benjamin J. Goold and Liora Lazarus eds., 2007).

<sup>86</sup> 46 Eur. H.R. Rep. 407 (2008); see *supra* note 57 and accompanying text.

<sup>87</sup> See *Heaney and McGuinness v. Ireland*, 2000-XII Eur. Ct. H.R. 419.

<sup>88</sup> For a discussion of this general principle of European human rights law, see BEN EMMERSON, ANDREW ASHWORTH AND ALISON MACDONALD, *HUMAN RIGHTS AND CRIMINAL JUSTICE* 671-75 (2d ed. 2007).

<sup>89</sup> It is also worth noting that road traffic regulations require a certain degree of self-identification through the system of number-plates for vehicles; insofar as this interferes with the right of privacy (Article 8 of the Convention), it could presumably be justified as “necessary in a democratic society” in the interests of public safety.

<sup>90</sup> This is not a perfect fit, because a citizen does not require a license in order to own a vehicle, only to drive it on the public roads. However, there are also regulations relating, for example, to car hire companies that own vehicles so that others may drive them; beyond that, the number of individuals who own a vehicle without driving it themselves is likely to be too small to merit discussion.

security.<sup>91</sup> The reasoning here is different in two respects: first, that it is confined to a particular area of social activity that is regulated, and would therefore be inapplicable simply to citizenship of a given country; and secondly, that it appears as one of three mutually restricting considerations, the third of which insists that an excuse be allowed for no-fault cases. However, the idea that choosing to drive a car amounts to voluntary involvement in a social enterprise is contestable, since there are those who do not regard this as optional in country districts where there is inadequate public transport. With over 25 million vehicles on British roads, it may be said that not having a car is unusual. Whether these counter-arguments should win the day is open to debate.

Behind these rationalizations remains the pressing social need for an effective means of regulating those who drive on the roads. As suggested earlier, it can be said that there is a European consensus that the privilege against self-incrimination should not apply in relation to identifying who was driving at a given time. It would be preferable to recognise it as a discrete exception, supported on the grounds outlined in the previous paragraph. The judgment in *O'Halloran and Francis* comes close to that, whereas the judgment in *Jalloh* (admittedly on facts far removed from those under discussion) contemplates wider grounds of exception and, on the arguments presented here, should not be followed. There is one other unsatisfactory feature of the recent judgments, and that is the argument that, the shorter the response required by the law, the more we should be inclined towards an exception to the privilege against self-incrimination. The notion that putting a 'single, simple question' made the violation of the privilege against self-incrimination more acceptable was articulated by Lord Bingham in the Privy Council in *Brown v. Stott*<sup>92</sup> and adopted by the Strasbourg Court in *Weh v. Austria*<sup>93</sup> and in *O'Halloran and Francis v. United Kingdom*<sup>94</sup> ("markedly more restricted" information). In *Heaney and McGuinness v. Ireland*<sup>95</sup> the requirement was that the applicants should give a full account for their movements at a particular time; but if the enquiry had been much more restricted, asking them simply whether they were there, might that not come close to satisfying the *O'Halloran* test? In *Heaney and McGuinness*, however, such considerations were simply not considered relevant by the Court, and quite rightly so. The enquiry was related to terrorism, the potential punishments were great, and if the privilege against self-incrimination is

<sup>91</sup> Redmayne, *supra* note 69, at 229-30; *see also* *O'Halloran and Francis v. United Kingdom*, 46 Eur. H.R. Rep. 407, 416 (2008) (Pavlovski, J., dissenting).

<sup>92</sup> (2003) 1 A.C. 681.

<sup>93</sup> 40 Eur. H.R. Rep. 890 (2004).

<sup>94</sup> 46 Eur. H.R. Rep. 407 (2008).

<sup>95</sup> 2000-XII Eur. Ct. H.R. 419.

to have any meaning it must surely apply in such cases. It follows that the fact that the question asked was a restricted one should not be determinative.

Another pressing social need may be found in maintaining taxation systems and related regulatory frameworks. If it were impossible to compel citizens to furnish the authorities with financial details so that their tax liability can be calculated, the tax system would be unable to operate fairly and fully. As we saw in part 2(a) above, it has often been declared by the Strasbourg Court that the Convention, and in particular the privilege against self-incrimination, “does not *per se* prohibit the use of compulsory powers to require persons to provide information about their financial or company affairs . . . .”<sup>96</sup> It is the use in criminal proceedings of the answers to compulsory questions that is prohibited (as in *Saunders*)<sup>97</sup> and, by extension, the invocation of compulsory questioning powers when a criminal prosecution has already been commenced against the defendant (as in *Shannon*).<sup>98</sup> However, these principles have become somewhat ragged at the edges. Whereas the judgment in *King v. United Kingdom*<sup>99</sup> held that there is no violation if a person is convicted and fined for failing to declare his assets fully, since this is simply a consequence of the compulsory questioning regime and neither part of an enquiry into past offences nor a preliminary to a subsequent prosecution, the earlier judgment in *JB v. Switzerland*<sup>100</sup> seemed to suggest that imposing a significant fine for such an offence constituted coercion sufficient to invoke the privilege against self-incrimination.

To summarize, it has been argued that the privilege against self-incrimination is justified in principle as part of a rights-based approach to criminal justice. Two exceptions have been discussed, the first relating to relatively minor offences connected to voluntary social enterprises that a citizen decides to become involved in (such as driving a car), and the second relating to relatively minor offences connected to taxation and other regulatory systems which are necessary if modern government is to function efficiently and fairly. There are also strong arguments for one, perhaps two, further exceptions. One would be the requirement to identify oneself by giving name and address in response to a legitimate official enquiry.<sup>101</sup> A further possible exception, also

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<sup>96</sup> *Allen v. United Kingdom*, 2002-VIII Eur. Ct. H.R. 364; *see also* *IJR, GMR and AKP v. United Kingdom*, 2000-IX Eur. Ct. H.R. 323.

<sup>97</sup> 1996-VI Eur. Ct. H.R. 2044.

<sup>98</sup> 42 Eur. H.R. Rep. 660 (2006).

<sup>99</sup> 37 Eur. H.R. Rep. 1 (2003).

<sup>100</sup> (2001) Crim. L.R. 748.

<sup>101</sup> *See* Berger, *supra* note 81, and the argument developed by Trechsel on the basis of the Geneva Convention: STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 354-55 (2005).

controversial, is that pertaining to material “which has an existence independent of the will of the suspect,” the phrase from the *Saunders* judgment discussed in part 2(b) above. The controversy arises from the fact that the force that may be used to obtain blood and hair samples may be greater, or at least more humiliating and physically painful, than the more remote coercion of threatened penalties for speaking or handing over documents. However, largely because there appears to be a European consensus on the need for compulsory powers to take certain bodily samples, such cases remain outside the privilege against self-incrimination developed by the Strasbourg court. There is the suggestion that the exercise of those compulsory powers requires no cooperation from the suspect, whereas compulsion to speak or to hand over documents operates directly on the suspect’s mind. But this rationale, rather like those offered in support of the other two exceptions, seems to be little more than an exercise of ingenuity in order to defend a practice that can be justified only on pragmatic grounds.

What have been cast here as exceptions to the privilege against self-incrimination are not so regarded by the Strasbourg Court. The category of “material which has an existence independent of the will of the suspect” is treated as an exception, but the first (involvement in voluntary social activities) is regarded as a category of cases where the privilege is not violated, and the second (taxation and regulatory systems) is treated simply as being outside the purview of a right that is related to criminal proceedings. It would be better simply to recognize them as exceptions. The final question is whether, apart from these three “exceptions,” the privilege against self-incrimination should apply throughout the criminal law or not. In the majority judgment in *Jalloh v. Germany*,<sup>102</sup> the Grand Chamber contemplated that the privilege may be outweighed in cases where “the public interest in the investigation and punishment” of the particular type of offence is high. Government arguments to this effect in both *Saunders* and *Heaney and McGuinness* were ruled out as inappropriate by the Court. In *Jalloh* the Grand Chamber failed to mention and to discuss that aspect of the earlier judgments, and instead introduced a kind of “balancing” or proportionality test that should find no place in such a fundamental right as the right to a fair trial. To suggest that the privilege against self-incrimination should be maintained when the defendant is accused of small-time drug dealing but (by inference) lessened or abrogated when the defendant is accused of a more serious crime runs counter to the good reasons advanced above for ensuring that the privilege has a place within the cluster of criminal justice rights protected by the Convention. The future application of the privilege against self-incrimination is now pregnant with possibilities, as a result of the *Jalloh* judgment, and it is

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<sup>102</sup> 44 Eur. Ct. H.R. 32 (2007).

time for the significance of the privilege as part of the essential core of criminal justice rights to be reasserted.