University of Missouri-Kansas City School of Law

UMKC School of Law Institutional Repository

Faculty Works

Faculty Scholarship

Spring 2006

Europeanizing Self-Incrimination: The Right to Remain Silent in The European Court of Human Rights

Mark Berger

University of Missouri - Kansas City, School of Law

Follow this and additional works at: https://irlaw.umkc.edu/faculty_works

Part of the Law Commons

Recommended Citation

Mark Berger, *Europeanizing Self-Incrimination: The Right to Remain Silent in The European Court of Human Rights*, 12 Colombia Journal of European Law 339 (2006).

Available at: https://irlaw.umkc.edu/faculty_works/32

This Article is brought to you for free and open access by the Faculty Scholarship at UMKC School of Law Institutional Repository. It has been accepted for inclusion in Faculty Works by an authorized administrator of UMKC School of Law Institutional Repository.

ARTICLES

EUROPEANIZING SELF-INCRIMINATION: THE RIGHT TO REMAIN SILENT IN THE EUROPEAN COURT OF HUMAN RIGHTS

*Mark Berger**

Since it came into force in September, 1953, the European Convention on Human Rights has served as a reflection of Europe's movement toward the establishment of common standards of individual human rights and freedoms. The forty-five countries that are currently signatories to the Convention are subject to the jurisdiction of the European Court of Human Rights (ECHR) which was established in 1959 as a mechanism to interpret and enforce the obligations created by the Convention. Although the Convention contains no explicit reference to a right to remain silent, and despite the differing legal systems of the contracting states, the Court has been steadily developing a jurisprudence of self-incrimination from the Convention's Article 6 right to a fair hearing. This Article traces the progress of the Court in creating meaningful protections for the right to silence in the face of state efforts to compel the production of incriminating evidence from individuals charged with criminal offenses. The Court's decisions have produced a carefully balanced doctrinal framework that respects the individual's choice to remain silent without creating an absolute self-incrimination privilege.

I. INTRODUCTION 340
II. INCORPORATING THE RIGHT TO SILENCE IN THE EUROPEAN CONVENTION 342
III. THE CRIMINAL CHARGE REQUIREMENT 346
IV. CRIMINALIZING SILENCE IN POLICE CRIMINAL INVESTIGATIONS 351

---

* Oliver H. Dean Peer Professor of Law, University of Missouri-Kansas City School of Law. J.D., Yale Law School, 1969; B.A., Columbia University, 1966. Preparation for this Article was supported by a grant from the University of Missouri Research Board. The assistance of the European Court of Human Rights, where the author was a Research Visitor in March, 2005, is gratefully acknowledged. Portions of this Article were prepared at the Rockefeller Foundation Conference Center in Bellagio, Italy, where the author was privileged to work as a Visiting Scholar in April 2005.

V. COMPELLING ADMISSIONS IN NON-CRIMINAL CASES 359
VI. NON-CRIMINAL USES OF INCRIMINATING INFORMATION 362
VII. IDENTITY DISCLOSURE REQUIREMENTS 367
VIII. GREAT BRITAIN'S ADVERSE INFERENCE LEGISLATION 373
IX. CONCLUSION 380

I. INTRODUCTION

The principle that an individual may not be compelled to incriminate himself is a concept that has become part of American popular culture. Police dramas regularly portray the administration of Miranda warnings to criminal suspects[1] and televised trials frequently highlight the debate over whether the defendant will take the witness stand.[2] The ban against compelled self-incrimination also has firm roots in the United States' foundational legal documents, including the Fifth Amendment to the U.S. Constitution[3] and comparable provisions in state constitutions.[4]

American courts have also had an extensive opportunity to craft important details of the self-incrimination privilege in numerous cases extending back over two hundred years. Core issues such as the right not to testify at trial[5] and the obligation to refrain from coercive interrogation methods during the pretrial period[6] have been the subject of frequent litigation and court decisions. But the courts have also dealt with self-incrimination challenges in less obvious settings such as whether public employees who fail to answer questions about their own misconduct may be terminated[7] and whether criminal defendants are subject to criminal procedure rules requiring pretrial discovery and disclosure.[8] While cases raising important self-

---

[1] The warnings are required prior to the initiation of police custodial interrogation. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966). A virtual *Miranda* jurisprudence has developed since the ruling was issued covering such issues as what constitutes a custodial interrogation and whether a purported waiver of Miranda rights is valid. *See* 2 WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE 506–629 (2d ed. 1999 and 2005 Supplement).

[2] In recent high profile criminal trials, neither O.J. Simpson nor Michael Jackson chose to testify. *See* David Margolick, *Simpson Tells Why He Declined To Testify as Two Sides Rest Case,* N.Y. TIMES, Sept. 23, 1995, at 1; John M. Broder, *Jackson's Defense Rests Without Putting Him on Stand,* N.Y. TIMES, May 26, 2005, at A18.

[3] U.S. CONST. amend. V.

[4] *See, e.g.*, MINN. CONST. art. 1, § 7; TEX. CONST. art. 1, § 10; WASH. CONST. art. 1, § 9.

[5] The Supreme Court affirmed the defendant's right not to testify at trial, explaining that the defendant's "[e]xcessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him." Wilson v. U.S., 149 U.S. 60, 66 (1893).

[6] Confession admissibility is governed by the test of voluntariness, although some police overreaching is also required. *See* Colorado v. Connelly, 479 U.S. 157 (1986). In addition, the warning and waiver requirements of *Miranda v. Arizona* must also be satisfied. *See generally Miranda*, 384 U.S. 436.

[7] Garrity v. New Jersey, 385 U.S. 493 (1967); Spevack v. Klein, 385 U.S. 511 (1967).

[8] Williams v. Florida, 399 U.S. 78 (1970).

incrimination issues continue to arise,[9] much about the self-incrimination privilege has already been addressed by federal and state legal systems.

Although courts in the United States have given extensive attention to the privilege against self-incrimination, the doctrine is not exclusively a U.S. concept. International documents such as the United Nations International Covenant on Civil and Political Rights (ICCPR)[10] include protection against compelled self-incrimination as do the constitutions of a number of countries.[11] In a very real sense, the privilege against self-incrimination has become an international human right with nations around the world increasingly agreeing that their laws must protect a criminal defendant from being compelled to be a witness against himself.

As part of the internationalization of the right to remain silent, a European jurisprudence of self-incrimination has been developing under the European Convention on Human Rights.[12] The Convention represents a major effort by its signatory countries, now forty-five in number, to establish a common legal standard for the protection of individual rights. Some issues are dealt with by the Convention in specific terms such as the Protocol 13 ban against capital punishment.[13] Elsewhere the Convention drafters opted for more generalized standards. This is illustrated by Article 6 which broadly protects the right to a fair hearing while at the same time identifying only a limited number of particularized standards within the broader fair hearing guarantee.[14]

The language creating the right to a fair hearing provides that "[i]n 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."[15] Minimum standards also contained within Article 6 include the right to be promptly informed of the charge,[16]

---

[9] In Hiibel v. Sixth Judicial District Court of Nevada, 542 U.S. 177 (2004), for example, the Supreme Court upheld the validity of a compelled identification requirement in the context of a lawful stop and frisk.

[10] *See* International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 14(3)(g), 999 U.N.T.S. 171, 6 I.L.M. 368 ("[E]veryone shall be entitled . . . [n]ot to be compelled to testify against himself or to confess guilt.").

[11] *See, e.g.*, INDIA CONST. art. 20, § 3 (providing that no person accused of any offense shall be compelled to be a witness against himself); CAN. CONST. pt. I (Canadian Charter of Rights and Freedoms), § 11(c) (conferring on individuals "charged with an offence" the right "not to be compelled to be a witness in proceedings . . . in respect of the offence"); *see also* New Zealand Bill of Rights Act 1990, § 25(d) (granting individuals charged with an offense the right not to be compelled to be a witness or to confess guilt).

[12] The Convention for the Protection of Human Rights and Fundamental Freedoms, *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ EnglishAnglais.pdf, [hereinafter the European Convention or the Human Rights Convention], was drawn up by the Council of Europe, opened for signature in 1950, and entered into force in September 1953. Currently forty-five countries have signed the Convention. The European Court of Human Rights (the European Court or the ECHR) was established in 1959 as part of the effort to provide a mechanism to enforce the obligations created by the Convention. *See* The European Court of Human Rights, Historical Background, Organization and Procedure, ¶¶ 1–2 (Sept. 2003), *available at* http://www.echr.coe.int/NR/ rdonlyres/981B9082-45A4-44C6-829A-202A51B94A85/0/ENG_Infodoc.pdf.

[13] "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." European Convention, *supra* note 12, Protocol No. 13, art. 1.

[14] *Id.* art. 6(1). The relevant language grants a right to a "fair and public hearing."

[15] *Id.*

[16] *Id.* art. 6(3)(a).

have adequate time and facilities to prepare a defense,[17] be represented personally or by counsel, be represented by counsel provided without charge if the interests of justice so require,[18] have legal process to compel the attendance and examination of witnesses,[19] and have the services of an interpreter if needed.[20] Significantly, there is no specific language creating a right to remain silent in Article 6 or in any of the Convention's other provisions. Nevertheless, the European Court of Human Rights (ECHR or European Court) has interpreted Article 6 to include a right to remain silent as part of the fair hearing standard, and in a series of cases has been crafting a set of principles to define how much of a right to silence the Convention will protect.

This Article is an effort to explore the continuing development of a jurisprudence of self-incrimination by the European Court. The Article explores the incorporation of the right to silence as a protected interest under Article 6 of the European Convention, the assumption by the Court of a "criminal charge" requirement, and the application of the right in criminal and non-criminal settings that include compelled identification requirements and the utilization of adverse inferences from silence.

In the process of developing a self-incrimination privilege, the European Court has attempted to create a doctrine that accords with the diverse legal systems of its member nations. The Court's rulings thus reflect a blending of varied European legal systems and cultures that is instructive both for what it says about the universality of the right to remain silent as well as what it demonstrates about the commitment of Convention signatories to the creation of a meaningful European human rights agenda.

II. INCORPORATING THE RIGHT TO SILENCE IN THE EUROPEAN CONVENTION

As its language clearly demonstrates, Article 6 of the Convention is, at its core, a procedurally-oriented fair hearing right. It contains a limited number of standards that relate to how proceedings should be conducted, but since these do not include a right to remain silent, the European Court was not constrained by any specific Convention language when it was presented with complaints raising self-incrimination issues. The Court was free to decline to incorporate right to silence principles as part of its developing Convention jurisprudence, leaving the issue to be resolved by the domestic law of its signatory nations.

The doctrine that an individual should be free to decline to provide the authorities with relevant information about a crime that he or she may have committed is itself a controversial principle that has frequently been criticized.[21]

---

[17] *Id.* art. 6(3)(b).

[18] *Id.* art. 6(3)(c).

[19] *Id.* art. 6(3)(d).

[20] *Id.* art. 6(3)(e). There is some debate as to whether the European Court has gone beyond the intent of the framers of the European Convention by "imposing upon Europe a US-style Bill of Rights wholly unintended by the ECHR founding fathers . . . [which] treats the ECHR as a living instrument, the interpretation of which [the Court] can update in response to changing social conditions." Danny Nicol, *Original Intent and the European Convention on Human Rights*, 2005 PUB. LAW 152 (2005).

[21] *See, e.g.*, JEREMY BENTHAM, 7 THE WORKS OF JEREMY BENTHAM 445 (Bowring ed., 1843); CRIMINAL LAW REVISION COMMITTEE, EVIDENCE (GENERAL) ¶ 30 (1972 Cmnd. 4991); *see generally*,

The public has a substantial interest in identifying, prosecuting, and convicting individuals who have been involved in the commission of criminal offenses, and these concerns have been deemed sufficient to require witnesses to testify despite their unwillingness.[22] Why then should a suspect who may incriminate himself by answering official questions have any greater rights? The answer to this question is far from self-evident, and an explanation of why the Convention should be interpreted to include a right to silence would seem to be appropriate.

However, when the European Court was confronted with claims that compelled self-incrimination violated the Article 6(1) fair hearing right, it did not offer an explanation of why it chose to incorporate the self-incrimination privilege as a Convention right. Instead the Court based its acceptance of the right to remain silent on its view of generally accepted European jurisprudential principles. This can be seen from the Court's seminal 1993 decision in *Funke v. France*[23] in which a French customs investigation that included a demand for the production of individual bank, stock and real estate records was challenged. The complainant failed to produce the material demanded of him and was fined for his noncompliance.

In its opinion, the Court noted Funke's claim that the direction to produce the documents "violated the right not to give evidence against oneself, a general principle enshrined both in the legal orders of the Contracting States and in the European Convention and the International Covenant on Civil and Political Rights."[24] The Court tersely accepted the claim, despite the absence of a self-incrimination privilege in the Convention, stating that:

> [B]eing unable or unwilling to procure [the documents] by some other means, [the government] attempted to compel the applicant himself to provide the evidence of 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", within the autonomous meaning of this expression in Article 6 . . . to remain silent and not to contribute to incriminating himself.[25]

Neither an explanation of why the right to silence was deemed important nor a demonstration of the principal's wide acceptance was offered by the Court.

In *Murray v. United Kingdom*,[26] decided in 1996, the European Court reviewed the application of British legislation that permitted the drawing of adverse inferences in a criminal case where the defendant did not inform the police of evidence later offered at trial, failed to take the witness stand at trial, or did not answer police questions calling for him to account for his presence at a suspicious location or possession of some item or mark related to the offense.[27] The Court confirmed the

David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 U.C.L.A. L. REV. 1063 (1986).

[22] A witness has the right to invoke the self-incrimination privilege with respect to incriminatory questions, but must testify about other matters. *See generally* United States v. Mandujano, 425 U.S. 564 (1976). The self-incrimination privilege stands as an "option of refusal and not a prohibition of inquiry." *See* O'Connell v. United States, 40 F.2d 201 (2d Cir. 1930).

[23] Funke v. France, App. No. 10828/84, 16 Eur. H.R. Rep. 297 (1993).

[24] *Id.* ¶ 41.

[25] *Id.* ¶ 44.

[26] Murray v. United Kingdom, App. No. 14310/88, 22 Eur. H.R. Rep. 29 (1996).

[27] *Murray* was concerned with the adverse inference provisions of legislation applicable only to Northern Ireland. Criminal Evidence (Northern Ireland) Order 1988, §§ 3–6. Subsequently Great Britain enacted comparable legislation applicable to England and Wales. Criminal Justice and Public Order Act

applicability of the right to silence, but once again did so without extended analysis. The relevant language of the Court's opinion observed:

> 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 recognised 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 to securing the aims of Article 6.[28]

The European Court was also presented with a self-incrimination claim in *Saunders v. United Kingdom.*[29] There it reviewed the conviction of a corporate official who had been questioned by British investigators from the Department of Trade and Industry (DTI) in connection with a stock scheme used to finance a corporate takeover. Facing possible criminal sanctions for refusing to respond, Saunders chose to answer the DTI's self-incriminatory questions, and his responses were subsequently used against him at his criminal trial.[30] Limiting itself to the self-incrimination implications of the use of the compelled testimony,[31] the Court found a violation of Article 6.

In reaching its decision, the European Court largely relied on its prior adoption of the concept of the right to silence under Article 6(1) of the Convention without further substantive analysis.[32] But the *Saunders* opinion also included mention of the relationship of the right to silence to the provisions of Article 6(2) of the Convention which places the burden of proof in criminal cases on the prosecution,[33] observing:

> The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention.[34]

Whether the Convention's presumption of innocence would have been sufficient to support a broad self-incrimination privilege, however, has not been tested in subsequent European Court rulings. Where the Article 6(2) claim has been made,

---

1994, §§ 34–39. *See generally* Mark Berger, *Reforming Confession Law British Style: A Decade of Experience with Adverse Inferences from Silence,* 31 COLUM. HUM. RTS. L. REV. 243 (2000) [hereinafter Berger, *Reforming Confession Law*]; Mark Berger, *Of Policy, Politics, and Parliament: The Legislative Rewriting of the British Right to Silence,* 22 AM. J. CRIM. L. 391 (1995) [hereinafter Berger, *Of Policy, Politics, and Parliament*].

[28] Murray v. United Kingdom, App. No. 14310/88, 22 Eur. H.R. Rep. 29, ¶ 45 (1996).

[29] Saunders v. United Kingdom, App. No. 19187/91, 23 Eur. H.R. Rep. 313 (1996).

[30] However, the British courts refused to permit the use at trial of Saunders' responses to questions he was asked after he had been formally charged on the theory that "it could not be said to be fair to use material obtained by compulsory interrogation after the commencement of the accusatorial process." *Id.* ¶ 29.

[31] *Id.* ¶ 32.

[32] *Id.* ¶ 68 (quoting Murray v. United Kingdom, App. No. 14310/88, 22 Eur. H.R. Rep. 29, ¶ 45 (1996)).

[33] The Convention language of Article 6(2) provides: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty by law." European Convention, *supra* note 12, art. 6(2).

[34] Saunders v. United Kingdom, App. No. 19187/91, 23 Eur. H.R. Rep. 313, ¶ 68 (1996).

the Court has chosen not to rule on it, preferring instead to develop its right to silence jurisprudence under the fair hearing provision of Article 6(1).[35]

It would appear, both from the arguments of the parties in right to silence cases presented to the European Court and from the language the Court has used in its opinions that including a privilege against compelled self-incrimination as part of the Convention's fair hearing right has not proven to be a controversial conclusion. The cases simply do not reveal any significant challenge to the basic principle that there should be a right to silence included within the Convention's human rights protections.

In fact, the concept that European law should include a prohibition against compelled self-incrimination had already been incorporated as part of European Union (EU) law by the ECJ. In *Orkem SA v Commission of the European Communities*, the Court of Justice had observed that "an analysis of national laws has indeed shown that there is a common principle enshrining the right not to give evidence against oneself."[36] After briefly explaining national approaches to this issue, the Court of Justice added:

> The laws in each country protect, to a greater or lesser extent, persons being questioned in criminal proceedings in the strict sense. Admittedly, there are significant differences. In some cases the right not to give evidence against oneself is available at every stage of the procedure whereas in others it is available only at the stage of preliminary inquiries. In some cases protection is available both for witnesses and for persons who have been formally charged, and in others only the latter are protected. But in no case is that right denied to a person who has been formally charged in judicial proceedings stricto sensu.[37]

The fact that there is a consensus among Convention signatories that some right to silence protections are a necessary part of their domestic legal systems is relevant to determining what general duties are included within the Article 6(1) fair hearing standard. However, consensus alone is not a sufficient foundation to permit the European Court to define how far the Convention's self-incrimination privilege should extend.

Since the right to remain silent can arise in a variety of different contexts, there is less likely to be agreement on how the principle should apply as the circumstances depart from the core right not to be compelled to admit guilt in a criminal trial. Depending on the environment in which compelled self-incrimination is sought, the interplay of policies at work in balancing state and individual interests is likely to

---

[35] The Court's view has been that the argument under the Article 6(2) presumption of innocence clause is duplicative of the argument under the Article 6(1) fair hearing provision. *See, e.g.*, Condron v. United Kingdom, App. No. 35718/97, 31 Eur. H.R. Rep. 1, ¶ 72 (2001); Averill v. United Kingdom, App. No. 36408/97, 31 Eur. H.R. Rep. 839, ¶ 54 (2001).

[36] Orkem SA, formerly CDF Chimie SA v. Commission of the European Communities, 1989 E.C.R. 3283, ¶ 98. The Court then reviewed how the right to silence applied among the members of the European Union at that time, but its focus was mostly on the applicability of the privilege in administrative contexts. *Id.* ¶¶ 99–110. EU law includes a self-incrimination privilege for companies. *Id. See also* Case T-112/98, Mannesmannrohren-Werke AG v. Commission of the European Communities, 2001 E.C.R. II-00729, (Court of First Instance). However, the privilege under EU law does not authorize companies to withhold documents sought by the European Commission. Anna Tissot-Favre, *The Investigative Powers of the European Commission*, 2003 INT'L CO. & COM. L. REV. 319, 323–24 (2003).

[37] Orkem SA, formerly CDF Chimie SA v. Commission of the European Communities, 1989 E.C.R. 3283, ¶ 111.

vary as the settings change. The European Court's failure to articulate the rationale behind its decision to enforce the self-incrimination privilege as a Convention right makes resolution of right to silence claims in such cases problematic. Clarity in the application of the Convention's Article 6 right to silence will remain difficult to achieve until the European Court explains why it has interpreted the right to a fair hearing to include protection from compelled self-incrimination.

III. THE CRIMINAL CHARGE REQUIREMENT

Traditionally, the right to silence has been understood as creating a privilege to refuse to answer potentially incriminatory questions. To emphasize the connection between the right to silence and the risk of a criminal conviction, the Fifth Amendment of the U.S. Constitution was drafted to limit its applicability to "criminal" cases. Rather than apply the constitutional language literally, the U.S. Supreme Court has substituted an analytical framework that focuses upon whether the information compelled could incriminate the defendant in a later criminal proceeding. Accordingly, the right to remain silent is not limited to criminal cases as long as what is compelled presents a sufficient incrimination risk.[38]

The absence of a specific provision establishing a right to silence under the Human Rights Convention offered the European Court the opportunity to create virtually any set of parameters to define the doctrine's reach. The open-ended language of Article 6(1), providing for the right to a "fair and public hearing" in the context of the "determination of [an individual's] civil rights and obligations or of any criminal charge against him," suggests no specific restrictions on the rights covered by the provision. This contrasts with the qualifying language of the remainder of Article 6 whose rights apply to those who are "charged with a criminal offence."[39] Nevertheless, the need to balance important competing interests has led the European Court to limit the role of the Convention's Article 6 right to silence to criminal risks and to attempt to develop standards for determining when the setting in which compelled information is sought is sufficiently criminal to warrant its application.

In a 1984 case, *Öztürk v. Federal Republic of Germany*,[40] the Court considered a complaint that a defendant charged with careless driving had been forced to cover the cost of an interpreter in direct violation of the Convention's Article 6(3)(e) requirement that an individual covered by the provision must have the "free assistance of an interpreter if he cannot understand or speak the language used in court." The Federal Republic of Germany, however, had decriminalized its driving offenses, converting them to regulatory infractions, and argued that the procedural requirements of Article 6(3) were inapplicable because Öztürk had not been charged with a criminal offense.

---

[38] Counselman v. Hitchcock, 142 U.S. 547 (1892); *see also* MARK BERGER, TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION 49–53 (1980).

[39] The presumption of innocence under Article 6(2) and the various criminal procedure protections established under Article 6(3), including the right to be informed of the charge, have assistance of counsel, and be free to examine and cross-examine witnesses, are all subject to the requirement that the individual affected be "charged with a criminal offence."

[40] Öztürk v. Federal Republic of Germany, App. No. 8544/79, 6 Eur. H.R. Rep. 409 (1984).

The European Court, however, was not prepared to rely on a simple act of reclassification as the basis for removing Convention protections that were otherwise applicable.[41] Instead, it employed a three-part test that has become the standard measurement for determining the applicability of Article 6 rights. Under the Court's test, the analysis of whether the proceedings amount to a criminal charge initially requires a determination of "whether or not the text defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law."[42] Thereafter, the nature of the offense and the nature and severity of the penalty must be evaluated, with the entire assessment subject to the "object and purpose of Article 6 (art. 6), to the ordinary meaning of the terms of that Article (art. 6) and to the laws of the Contracting States."[43]

Along with developing a standard for determining what constitutes a criminal charge under Article 6 of the Convention, *Öztürk* also illustrates how the European Court intended to apply its test. The Court recognized that the Federal Republic of Germany had implemented an extensive program of decriminalizing petty offenses in legislation adopted in 1968 and 1975, including the formal step of removing the driving offense in question from those classified as criminal under German law.[44] This was part of the country's broader policy judgment that regulatory offenses "did not involve a degree of ethical unworthiness such as to merit for its perpetrator the moral value-judgment of reproach (Unwerturteil) that characterised penal punishment (Strafe)."[45] Punishment was therefore limited to monetary fines, could not include imprisonment, and no conviction was entered in judicial criminal records.[46]

However, these characteristics were not sufficient to persuade the European Court that the protections of Article 6 should be inapplicable. According to the Court, criminal offenses are commonly understood to incorporate sanctions such as fines and incarceration that have a deterrent component, and "the vast majority of the Contracting States" viewed the misconduct committed by the applicant as criminal.[47] The Court concluded that the driving offenses at issue were criminal for purposes of Article 6, and that the relatively minor character of the penalty, the third factor under the Court's test, could not alter the "inherently criminal character" of the offense.[48]

Separately, the European Court noted that relevant German legislation did not include formal steps amounting to filing a charge against the accused. However, the Court responded that this was not sufficient to make the applicant any less a person "charged with an offence" for purposes of Article 6. Instead of relying on rigid formalities, the Court defined a "charge" under Article 6 as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence," although "it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise

[41] *Id.* ¶ 49.
[42] *Id.* ¶ 50.
[43] *Id.*
[44] *Id.* ¶ 51.
[45] *Id.* ¶ 52.
[46] *Id.*
[47] *Id.* ¶ 53.
[48] *Id.* ¶ 54.

substantially affect the situation of the suspect."[49] Neither the formal decriminalization of otherwise prohibited conduct nor the creation of procedures that differ from those used in the processing of criminal cases suffice to warrant exclusion from the protections of the Convention's Article 6 fair hearing requirement.

While *Öztürk* establishes that the application of right to silence principles under the Convention will not be governed by labels, it does not provide clear guidance to enable litigants to distinguish criminal offenses from non-criminal prohibitions. The Federal Republic of Germany made a persuasive case, supported by several dissenting opinions,[50] that the decriminalization of petty offenses took the applicant's road traffic infraction out of the criminal case category. The Court rejected this argument, emphasizing the fact that the prohibition was connected to a sanction and that the general practice among Convention signatories was to consider such conduct criminal.[51]

Beyond that, the European Court suggested that Article 6 protections apply unless the Government was prepared to sever all connections between the petty offense category and traditional criminal procedure rules, something not undertaken as part of the German decriminalization process.[52] The general objective of handling such cases in an administrative setting could still be achieved, but review by a panel offering Article 6 protections would be required.[53] The outcome of *Öztürk* was thus to read the criminal charge requirement of Article 6 broadly, thereby insuring wide applicability of the fair hearing protections it affords, including the right to remain silent.

The European Court has continued to utilize a three-part test to determine whether to categorize proceedings as criminal for Article 6 purposes. In one such case, *A.P., M.P. and T.P. v. Switzerland*,[54] the Court held that a Swiss law requiring the heirs of an estate to pay the deceased's delinquent taxes and fines for his tax evasion required the application of Article 6 protections.[55] The Swiss legislation created joint liability among the heirs up to their share in the estate, applicable "[i]rrespective of personal guilt."[56] To the extent that the tax evasion fine was divorced from compensatory interest, it had been viewed by the Swiss Federal Court as penal, but nevertheless permissible on the theory that the legislation contemplated

[49] *Id.* ¶ 55 (citing Foti and Others v. Italy, App. Nos. 7604/76;7719/76;7781/77, 5 Eur. H.R. Rep. 313, ¶ 52 (1983), and Corigliano v. Italy, App. No. 8304/78, 5 Eur. H.R. Rep. 335, ¶ 34 (1983)).

[50] Öztürk v. Federal Republic of Germany, App. No. 8544/79, 6 Eur. H.R. Rep. 409 (1984) (separate dissenting opinions of Judges Vilhjálmsson, Bindschedler-Robert, Liesch, Matscher and Bernhardt).

[51] Öztürk v. Federal Republic of Germany, App. No. 8544/79, 6 Eur. H.R. Rep. 409, ¶ 53 (1984).

[52] The Court noted that it had "not lost sight of the fact that no absolute partition separates German criminal law from the law on "regulatory offences," nor had it "overlooked that the provisions of the ordinary law governing criminal procedure apply by analogy to "regulatory" proceedings." *Id.* ¶ 51.
The German government had conceded that its decriminalization of petty offenses resulted in a system where the "general laws on criminal procedure [were] applicable by analogy, [although also] distinguishable in many respects from criminal procedure." *Id.* ¶ 52.

[53] *Id.* ¶ 56.

[54] A.P., M.P. and T.P. v. Switzerland, App. No. 19958/92, 26 Eur. H.R. Rep. 541 (1998).

[55] *Id.* ¶ 20 (citing Swiss Ordinance on Direct Federal Tax, art. 129, § 1).

[56] *Id.* ¶ 21 (citing Swiss Ordinance on Direct Federal Tax, art. 130, § 1).

that heirs would enter into the position of the deceased with respect to all tax liabilities relating to the estate.[57]

From the European Court's perspective, however, the fines applicable to the tax proceedings were considerable[58] and had both a deterrent and punitive character.[59] When added to the fact that the Swiss court had itself considered the fines as penal in character and dependent on the guilt of the taxpayer,[60] the Court concluded that the structure was criminal and subject to Article 6 protections.[61]

The European Court's broad definition of criminal offenses requiring Article 6 protections has enabled it to extend those protections to proceedings following an acquittal,[62] after the expiration of a statutory limitation period,[63] and following arrest and detention but before formal charge.[64] In contrast, the Court declined to rule that an investigation into corporate misconduct conducted by the British DTI amounted to a criminal charge within the meaning of Article 6(1).[65] Given that "the functions performed by the inspectors . . . were essentially investigative in nature and . . . did not adjudicate either in form or in substance,"[66] the Court saw the procedure as merely setting the stage for steps to be taken by others. The applicants' effort to have the proceedings considered as the functional equivalent of a criminal charge was rejected because:

> [A] requirement that such a preparatory investigation should be subject to the guarantees of a judicial procedure as set forth in Article 6 § 1 would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities.[67]

However, in a subsequent case, *J.B. v. Switzerland*,[68] the European Court reaffirmed that broader litigation including a criminal component would not be exempt from Article 6 protections. As the Court noted, the proceedings at issue in *J.B.* involved both a supplementary tax assessment and a potential fine for tax evasion.[69] In the Court's view, the *Öztürk* standard required that the proceeding be subject to Article 6 of the Convention, even though a portion of the matter at issue was agreed to be non-criminal.[70]

Based on the approach used in *J.B.*, there is some inconsistency in the Court's earlier application of the right to silence in its 1993 ruling in *Funke v. France*.[71] In that case, Funke was fined when he failed to produce records demanded in a

---

[57] *Id.* ¶ 19.

[58] *Id.* ¶ 40.

[59] *Id.* ¶ 41.

[60] *Id.* ¶ 19.

[61] *Id.* ¶ 43.

[62] Sekanina v. Austria, App. No. 13126/87, 17 Eur. H.R. Rep. 221 (1994).

[63] Minelli v. Switzerland, App. No. 8660/79, 5 Eur. H.R. Rep. 554 (1983).

[64] Allenet de Ribemont v. France, App. No. 15175/89, 20 Eur. H.R. Rep. 557 (1995).

[65] I.J.L., G.M.R. and A.K.P. v. United Kingdom, App. Nos. 29522/95; 30056/96; 30574/96, 33 Eur. H.R. Rep. 225 (2000).

[66] *Id.* ¶ 100 (citing Fayed v. United Kingdom, App. No. 17101/90, 18 Eur. H.R. Rep. 393 (1994)).

[67] *Id.*

[68] J.B. v. Switzerland, App. No. 31827/96, 30 Eur. H.R. Rep. CD 328 (2001).

[69] *Id.* ¶ 47.

[70] As part of a settlement, the applicant was subject to a fine that had both punitive and deterrent objectives. *Id.* ¶ 48. The Court therefore concluded that "whatever other purposes [were] served by the proceedings, by allowing the imposition of such a fine on the applicant, the proceedings amounted in the light of the Court's case-law to the determination of a criminal charge." *Id.* ¶ 49.

[71] Funke v. France, App. No. 10828/84, 16 Eur. H.R. Rep. 297 (1993).

Customs investigation into assets he allegedly held abroad.[72] At the time of the demand, there were no criminal proceedings pending against the taxpayer, nor did the authorities use any information supplied by the taxpayer against him in a subsequent criminal case.

It was true that the proceedings against Funke for not producing the subpoenaed documents were criminal under applicable law, but it was not apparent that the proceedings in which the production demand was made were also criminal. It is the latter setting, however, that should be determinative in the application of Article 6 protections, but the European Court's decision was to the contrary. While the Government argued that no criminal proceedings had been instituted against Funke for violating French financial or customs regulations and that his death precluded any future criminal charges, the Court dismissed this objection by focusing on the fact that the applicant's complaint "relate[d] to quite different proceedings, those concerning the production of documents,"[73] which the Court noted were criminal.

The distinction between the proceeding in which potentially incriminatory information is sought and the subsequent criminal proceeding designed to enforce the production demand was recognized in the European Court's decision in *Abas v. Netherlands*.[74] There, tax authorities were investigating whether the taxpayer had taken up residence outside of the country which would have entitled him to a wage tax exemption. Abas had authorized a written submission that he resided outside of the Netherlands, but he was ultimately convicted of tax-related fraud for falsely claiming non-residency.[75]

The European Commission rejected Abas' complaint that his right to silence was infringed by the failure to inform him that he had the right under the Netherlands Code of Criminal Procedure not to provide the information subpoenaed. The Court reasoned that the underlying purpose of the tax investigation was to "ascertain and record facts for fiscal purposes and not for a legal determination as to the applicant's criminal liability."[76] Abas had not been officially notified of a criminal charge, nor was he subject to other measures that would have substantially affected his situation. The nature of the proceedings, therefore, did not require Article 6 right to silence protections.[77] The Court added that a contrary result "would in practice unduly hamper the effective functioning in the public interest of the activities of fiscal authorities."[78]

A similar result was reached in *Allen v. United Kingdom*[79] where the taxpayer/applicant was obliged to submit a statement of assets to the British Inland Revenue. During the investigation he was given a Hansard Warning informing him of the British Government's policy of exercising discretion in tax cases to accept a money settlement in lieu of prosecution, with full taxpayer cooperation a

---

[72] *Id.* ¶¶ 11–12.

[73] *Id.* ¶ 40.

[74] Abas v. Netherlands, App. No. 27943/95 (1997) (European Commission on Human Rights ruling on admissibility), *available at* http://cmiskp.echr.coe.int/tkp197/default.htm.

[75] *Id.* The Facts, § A.

[76] *Id.* The Law.

[77] However, the Commission found that the situation changed once his family home was searched in the context of the initiation of a preliminary judicial investigation against him. *Id.*

[78] *Id.*

[79] Allen v. United Kingdom, App. No. 76574/01, 35 Eur. H.R. Rep. CD 289 (2002) (decision as to admissibility).

consideration in this determination.[80] The Court concluded that even with a penalty for nondisclosure, the obligation did not present an Article 6 issue since there was no use of compelled information to incriminate the taxpayer for any prior acts or omissions, nor was he penalized for non-disclosure with respect to any pending or anticipated criminal case.[81] *Funke* was cited as a case in which a criminal prosecution was pending or anticipated, and thus the circumstances facing Allen were distinguishable.[82]

If it is legitimate to conduct investigatory proceedings outside of the context of a criminal case, and if the coercive power of the law can be used to assist in such investigations, criminal punishment for nondisclosure or for an inadequate or inaccurate disclosure is permissible. As long as the *Öztürk* standards are satisfied, such proceedings are not covered by the fair hearing requirement of Article 6(1). What should be determinative for purposes of applying Article 6 protections is the nature of the proceedings for which compulsory production is sought, not the fact that criminal authority is used to force production. This is true as long as the content of the information demanded is not used for criminal law enforcement purposes. Pending or anticipated criminal proceedings should not be determinative as long as the compelled information is not used in the criminal case.

IV. CRIMINALIZING SILENCE IN POLICE CRIMINAL INVESTIGATIONS

Police investigations are typically initiated after a crime has occurred and are directed toward identifying the suspect or suspects who may be responsible. Questioning individuals who may have information about the offense, or who may themselves be suspects, is an important part of the investigation process. However, police must rely on voluntary cooperation despite how important a response may be to their investigative responsibilities. This is a core feature of the right to remain silent which the European Court affirmed in two Irish cases.

The first opportunity to address the problem was presented to the Court in *Heaney and McGuinness v. Ireland*.[83] The incident began with an early morning explosion at a checkpoint that killed five British soldiers and one civilian, and seriously injured other British military personnel. Approximately three hours later a warrant to search a nearby house was obtained and executed, resulting in the discovery of a number of items and the arrest of seven men found in the house under a provision of the Offences Against the State Act of 1939. The arrestees were

[80] The Hansard procedure has been formalized and is now contained in HM Revenue and Customs Code of Practice 9 (2005), *available at* http://www.hmrc.gov.uk/leaflets/cop9-2005.htm.

[81] Allen v. United Kingdom, App. No. 76574/01, 35 Eur. H.R. Rep. CD 289, The Law, § 1 (2002). Recognizing that the use of truthful and complete information obtained following a Hansard Warning in a criminal trial could be considered a breach of the right against self-incrimination either because such use was intended or because such use is barred regardless of intent (Jonathan Hilliard, *The Hansard Procedure and the Right Against Self-Incrimination: Recent Developments*, 2003 BRIT. TAX REV. 6, 8 (2003)) one commentator had expressed the view that mere use of such compelled information should suffice for an Article 6 violation. Jonathan Hilliard, *Article 6 and the Scope of the Right Not To Incriminate Oneself in the Tax Field*, 2002 BRIT. TAX REV. 470, 480–82 (2002).

[82] Allen v. United Kingdom, App. No. 76574/01, 35 Eur. H.R. Rep. CD 289, The Law, § 1 (2002).

[83] Heaney and McGuinness v. Ireland, App. No. 34720/97, 33 Eur. H.R. Rep. 12 (2001).

suspected members of the I.R.A. which was believed to be responsible for the bombing.[84]

Consistent with general practice, the police cautioned the arrestees that they had no obligation to say anything, but that anything they chose to say would be taken down in writing and could be used as evidence against them.[85] Both Heaney and McGuinness were asked about the bombing and their presence at the house where they were arrested, but both refused to respond to police questions. Up until this point, nothing in the interactions between the police and the suspects was inconsistent with the generally accepted view of the right to silence as encompassing the freedom to decline to answer police inquiries.

However, following the refusal of Heaney and McGuinness to account for their actions before and after the bombing, both suspects were read a warning informing them that they were required to answer police questions related to the commission of any offense under the Offences Against the State Act of 1939.[86] That requirement was contained in section 52 of the statute and provided:

> 1. Whenever a person is detained in custody under [specific provisions of the Act], any member of the [police] may demand of such person, at any time while he is so detained, a full account of such person's movements and actions during any specified period and all information in his possession in relation to the commission or intended commission by another person of any offence under any section or sub-section of this Act or any scheduled offence.
> 2. If any person, of whom any such account or information as is mentioned in the foregoing sub-section of this section is demanded under that sub-section by a member of the [police], fails or refuses to give to such member such account or any such information or gives to such member any account or information which is false or misleading, he shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding six months.[87]

Unlike the general warning the suspects had first received, the impact of the section 52 notice was to firmly convey that providing the information demanded of them was a legal obligation, and that responding with false information or refusing to respond at all would be a criminal offense under the Act.

The suspects maintained their silence and were charged and convicted with failing to provide the information requested of them under section 52 of the 1939 Act.[88] In rejecting their appeals, the Irish Supreme Court concluded that any restriction on the right to silence arising out of the legislation was "proportionate to the State's entitlement to protect itself."[89] The assumption underlying the ruling was that the criminalization of a refusal to answer questions under the applicable statute would not render any statements that were made inadmissible as evidence against the accused.[90]

---

[84] *Id.* ¶ 9.

[85] *Id.* ¶ 10.

[86] *Id.*

[87] *Id.* ¶ 24 (reproducing the language of the section).

[88] *Id.* ¶ 11.

[89] *Id.* ¶ 16.

[90] The Court cited prior Irish case law establishing the admissibility of section 52 statements. *Id.* ¶¶ 26–27. However, it recognized that the qualification provided by a 1999 Irish Supreme Court decision

The position of the Irish Government was that the structure of the statute properly balanced individual and state interests due to special security problems. The Government argued that:

> [A]s it is legitimate to impose sanctions in civil matters (such as, for example, taxation matters) when a citizen does not divulge information, the power to obtain information under threat of sanction is all the more necessary in criminal matters where the information sought could be essential for the investigation of serious and subversive crime.[91]

Moreover, the obligation created by section 52 only applied "as long as it was considered warranted by a subsisting terrorist and security threat,"[92] and the level of violence in Ireland coupled with the public threat by the Continuity IRA to continue its armed campaign established the continuing need for the challenged legislation.[93]

Although the Irish Government questioned the applicability of Article 6 of the Convention on the grounds that the applicants had not yet been charged at the time that they were presented with a demand for information under section 52 of the statute,[94] the main issue addressed by the European Court was the substantive question of whether the Irish procedure violated the right to silence. Having previously recognized that the right to silence was not absolute,[95] the Court was in the position of having to assess the totality of the circumstances to determine whether a section 52 demand to provide the police with information was an impermissible intrusion on the recipient's ability to choose to remain silent. If so, the Irish statute would violate the fair hearing requirement of Article 6 of the Convention.

The European Court was not persuaded that the demand for information under section 52 coupled with the threat of a prison sentence for failure to comply could be sustained on the grounds that there were other statutory protections that minimized the risk of unreliable confessions or of the abuse of the powers conferred by the statute.[96] Given that the statutory structure was designed to force the relinquishment

---

that use of the statement and any further evidence obtained would be dependent on the trial judge's determination that admission would be "just and fair." *Id.* ¶ 28.

[91] *Id.* ¶ 33.

[92] *Id.*

[93] *Id.*

[94] Relying on prior case law, the Court concluded that the applicants were "substantially affected" at the time that the demand for information was made, and that they were therefore "charged" in the sense required by Article 6 of the Convention. *Id.* ¶ 42. The fact that they were acquitted of the charge of membership in a terrorist organization did not alter this result. *Id.* ¶¶ 45–46.

[95] Murray v. United Kingdom, App. No. 14310/88, 22 Eur. H.R. Rep. 29, ¶ 47 (1996).

[96] Earlier in its opinion the Court had identified the protections relied upon by the Irish High Court as including:

> [T]he requirement that a police officer must have a *bona fide* suspicion prior to arrest; the obligation to inform the suspect of the offences under the 1939 Act and/or of the scheduled offences of which he is suspected; the right to legal assistance when reasonably requested; the right to medical assistance; the right of access to a court; the right to remain silent and to be told of that right; the obligations to provide appropriate cautions to detainees and to abstain from cross-examining a person in detention under section 30 of the 1939 Act and from unfair and oppressive questioning of such detainees; and the conditions attaching to any extension of the length of detention under section 30 of the 1939 Act.

Heaney and McGuinness v. Ireland, App. No. 34720/97, 33 Eur. H.R. Rep. 12, ¶ 15 (2001).

of the right to silence additional statutory protections were inadequate. In the words of the Court:

> [S]uch protections could only be relevant to the present complaints if they could effectively and sufficiently reduce the degree of compulsion imposed by section 52 of the 1939 Act to the extent that the essence of the rights at issue would not be impaired by that domestic provision. However, it is considered that the protections listed by the High Court, and subsequently raised by the Government before this Court, could not have had this effect. The application of section 52 of the 1939 Act in an entirely lawful manner and in circumstances which conformed with all of the safeguards referred to above could not change the choice presented by section 52 of the 1939 Act: either the information requested was provided by the applicants or they faced potentially six months imprisonment.[97]

From the European Court's perspective, section 52 amounted to compelled self-incrimination pure and simple. The statute created a system in which the police sought to secure potentially self-incriminatory information by using the threat of criminal punishment if the information was not provided or if the suspect lied. The conclusion that the Irish procedure violated the right to silence was inescapable, and the Court was not prepared to justify the violation by relying upon the Irish Government's claim of necessity.

Some uncertainty did exist under the law at the time Heaney and McGuinness were arrested as to whether any statement compelled from them under section 52 could be used as evidence in a later criminal trial.[98] Subsequently, the Irish Supreme Court ruled that no such use of a section 52 compelled statement was permissible unless found by the trial judge to be fair and just.[99] However, at the time the applicants were warned there were no assurances as to the consequences of responding to a section 52 demand. They had initially been given a caution that they had the right to remain silent and that anything they said could be used against them, after which they were presented with a demand to account for their actions around the time the offense occurred with the threat of a criminal penalty if they failed to comply. For the European Court, the setting was one in which:

> [T]he "degree of compulsion" imposed on the applicants by the application of section 52 of the 1939 Act with a view to compelling them to provide information relating to charges against them under that Act in effect destroyed the very essence of their privilege against self-incrimination and their right to remain silent.[100]

Having reached that result, one logically compelled by the structure of section 52, the Court next considered whether the scheme was nevertheless warranted as a

---

[97] *Id.* ¶ 51.

[98] This was the result of an Irish Court of Appeal ruling, The People (Director of Public Prosecutions) v. McGowan, 1979 Irish Rep. 45, which suggested that statements obtained pursuant to section 52 of the 1939 Act would be admissible in a later criminal prosecution. However, no such statement was actually obtained in that case, and the Irish Supreme Court reserved judgment on the issue in affirming the convictions of Heaney and McGuinness. Heaney and McGuinness v. Ireland, App. No. 34720/97, 33 Eur. H.R. Rep. 12, ¶ 16 (2001).

[99] In a case decided after the applicants' convictions were affirmed, the Irish Supreme Court ruled that such statements were inadmissible in a subsequent criminal prosecution unless the admissions were found by the trial judge to be just and fair. Heaney and McGuinness v. Ireland, App. No. 34720/97, 33 Eur. H.R. Rep. 12, ¶ 28 (2001) (citing In the matter of National Irish Bank Ltd and the Companies Act 1990, 1999 1 Irish L. Rep. Monthly 343).

[100] Heaney and McGuinness v. Ireland, App. No. 34720/97, 33 Eur. H.R. Rep. 12, ¶ 55 (2001).

"proportionate" response to the threat to public order presented by the Irish terrorism and security problems.[101] These concerns had been identified by the Irish Government and were judicially noticed by the Court.[102] In other settings the Court rejected arguments that special public interests warranted varying from the requirements of the Convention.[103] That was sufficient precedent for the Court to conclude that "the security and public order concerns relied on by 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."[104]

The Court considered section 52 again in *Quinn v. Ireland*.[105] I.R.A. members were suspected of murdering one police officer and wounding another. Quinn was among those arrested and questioned about the offense. He received the same general caution and section 52 warning as had Heaney and McGuinness, but unlike both previous suspects, he was able to consult with his solicitor.[106] Quinn denied involvement in the incident, asserting that he was elsewhere at the time, but he refused to account for his movements, claiming on one occasion to have been advised by his solicitor not to answer police questions.[107] He received a six-month prison sentence for refusing to provide information pursuant to the section 52 demand.[108]

The most significant difference in the *Quinn* case was that the applicant had consulted his solicitor. Regardless, the Court found the basic choice presented to Quinn, between remaining silent and facing a possible six-month prison sentence or forfeiting the right to silence, remained.[109] This represented compulsion which "in effect, destroyed the very essence of [the applicant's] privilege against self-incrimination and his right to remain silent."[110]

An earlier ruling by the European Court, *Serves v. France*,[111] produced results consistent with the Irish cases even though the case presented no threat of imprisonment for exercising the right to silence in response to official questioning. The proceedings began with an initial application by the prosecutor to conduct a military investigation and resulted in a murder charge against Serves.[112] Due to an irregularity, the application and subsequent procedures were declared void.[113]

---

[101] *Id.* ¶ 56.

[102] *Id.* ¶ 57.

[103] In Saunders v. United Kingdom, App. No. 19187/91, 23 Eur. H.R. Rep. 313 (1996), the complexity of corporate fraud and the public interest in investigating such offenses and punishing those responsible was held not to warrant allowing the use in a criminal proceeding of compelled statements obtained in a non-judicial investigation. The Court had also previously found that the Northern Ireland terrorism problem did not warrant the extended periods of detention provided under British law. Brogan and Others v. United Kingdom, App. Nos. 11209/84; 11234/84; 11266/84, 11 Eur. H.R. Rep. 117 (1989).

[104] Heaney and McGuinness v. Ireland, App. No. 34720/97, 33 Eur. H.R. Rep. 12, ¶ 58 (2001).

[105] Quinn v. Ireland, App. No. 36887/97 (2001), *available at* http://cmiskp.echr.coe.int/tkp197/default.htm.

[106] *Id.* ¶ 11.

[107] *Id.* ¶ 13.

[108] *Id.* ¶ 14.

[109] *Id.* ¶ 54.

[110] *Id.* ¶ 56.

[111] Serves v. France, App. No. 20225/92, 28 Eur. H.R. Rep. 265 (1997).

[112] *Id.* ¶ 17.

[113] *Id.* ¶ 18.

A second application by the prosecutor, based in part on the earlier evidence, led to a second murder investigation focusing on two other military officers. Relying on the French Military Criminal Code which granted the investigating judge the authority to summon witnesses to give evidence, Serves was called and directed to take an oath and answer questions. He refused on three occasions and was ordered to pay fines for each refusal.[114] Serves based his refusal on a provision of the French Code of Criminal Procedure providing that an investigating judge "may not, with the aim of frustrating the rights of the defence, examine as witnesses persons against whom there is substantial, consistent evidence of guilt."[115] Subsequently, he was charged with murder again, convicted, and sentenced to prison.[116]

Initially, the European Court rejected the Government's argument that Serves had not been "charged" with an offense, thus rendering Article 6 of the Convention inapplicable.[117] It then considered the applicant's argument that by calling him as a witness in the second investigation, rather than charging him with murder, the investigating judge "had sought to subject him to unbearable pressure so that he would incriminate himself."[118] Since witnesses under the applicable procedure were obligated to take an oath and tell the truth, Serves claimed he had no choice but to refuse or risk self-incrimination.

The European Court did not believe that the circumstances presented a self-incrimination risk that violated the Convention. The question for the Court was not whether the investigating judge should have concluded that there was enough evidence to charge the applicant, thus barring him from being called as a witness. Instead, the issue was whether Serves was presented with pressure that "amounted to coercion such as to render his right not to incriminate himself ineffective."[119] Serves' position was that he had no obligation to take the oath and answer questions at all given his right to be free of compelled self-incrimination.

The European Court rejected Sevres' argument, concluding that the risk to his right to remain silent could have been dealt with if Serves simply refused to answer questions presenting a self-incrimination problem. The Court observed:

> It is understandable that the applicant should fear that some of the evidence he might have been called upon to give before the investigating judge would have been self-incriminating. It would thus have been admissible for him to have refused to answer any questions from the judge that were likely to steer him in that direction.[120]

The Court did not find the oath objectionable because it was "designed to ensure that any statements made to the judge are truthful, not to force the witnesses to give evidence."[121] Fining Sevres for refusing to take the oath, therefore, did not violate his right to silence under Article 6 of the Convention.

---

[114] *Id.* ¶¶ 21–22.

[115] *Id.* ¶ 32 (citing Article 105 of the French Code of Criminal Procedure made applicable to military proceedings by Article 103 of the French Military Criminal Code).

[116] *Id.* ¶ 29.

[117] *Id.* ¶ 42. The Court noted that although Serves was not a named subject in the second proceeding, he was among those involved in the preliminary inquiry and the evidence earlier collected against him had not been removed from the case file.

[118] *Id.* ¶ 43.

[119] *Id.* ¶ 47.

[120] *Id.*

[121] *Id.*

In contrast to the majority view, a dissenting opinion joined by three judges found that the procedure applied to Serves violated his Article 6 rights. As the dissenters saw it, "[h]ad [Serves] taken the oath, he would have committed himself to telling the whole truth and nothing but the truth."[122] The dissent believed that "the applicant must in fact have felt that he would be forced to give evidence once he took the oath."[123] It "was not so much 'a degree of coercion' . . . as 'definite coercion,'"[124] and therefore the option suggested by the majority of subscribing to the oath and then asserting the right to refuse to answer incriminating questions was not an adequate alternative. It was sufficient to constitute a violation of Sevres' Article 6 right to remain silent that he was being required to assume an obligation to answer questions that could incriminate him, a conclusion supported by the fact that the oath did not include a notice of the right to refuse to answer individual incriminatory questions.

The European Court's more recent decision in *Shannon v. United Kingdom*[125] undercuts the clarity of the *Sevres* standard. In *Shannon*, an inquiry was being conducted by a financial investigator appointed under the Proceeds of Crime (Northern Ireland) Order of 1996. Pursuant to the investigator's direction, Shannon appeared and answered questions, but he refused to do so a second time.[126] The initial charges of false accounting and conspiracy to defraud that were filed against him following his first appearance were ultimately dropped due to delay.[127] However, Shannon was charged and convicted for failing to comply with the financial investigator's second demand that he appear and answer questions.[128]

After the issuance of the financial investigator's second summons, Shannon's solicitors sought written guarantees against the use of any information the applicant might provide in any criminal proceedings.[129] The official response, however, did no more than to note the protections provided by the Northern Ireland Order. These limited the use of any statements made to the financial investigator to prosecutions for perjury or failing to comply with the requirements of the Order, or where the prosecution was for another offense and the defendant relied on evidence inconsistent with the answers or information he provided pursuant to the Order.[130] Separately, the financial investigator was prohibited from disclosing information he obtained under the provisions of the Order except to a constable, any Northern Ireland Department or competent body, or the foreign equivalents of such entities.[131]

[122] Serves v. France, App. No. 20225/92, 28 Eur. H.R. Rep. 265 (1997) (joint dissenting opinion of Judges Pekkanen, Wildhaber and Makarczyk).

[123] *Id.*

[124] *Id.*

[125] Shannon v. United Kingdom, App. No. 6563/03 (2005), *available at* http://www.echr.coe.int/echr.

[126] *Id.* ¶¶ 9, 16.

[127] *Id.* ¶¶ 10, 22.

[128] *Id.* ¶ 17.

[129] *Id.* ¶ 12.

[130] *Id.* ¶ 24 (citing Proceeds of Crime (Northern Ireland) Order 1996, sched. 2, ¶ 6). The Court noted that the Order had been amended to limit the use of statements obtained by the financial investigator in cases where inconsistent evidence was relied on by the defense to situations where the statements were adduced by or were the subject of questions at trial that were presented by the defense. *Id.* (citing Proceeds of Crime (Northern Ireland) Order 1996, sched. 2, ¶ 6(b)). However, the amendment occurred after the applicant's conviction.

[131] *Id.* ¶ 25 (citing Proceeds of Crime (Northern Ireland) Order 1996, sched. 2, ¶ 7).

The position of the British government was that a violation of Article 6 could only occur if a compelled statement was actually used.[132] The British Government also asserted that the Order's purpose of permitting authorities to trace the proceeds of criminal activity justified any compulsive pressure the system might generate to respond to the financial investigator's questions.[133] If, instead, the potential that statements obtained pursuant to the Order might be incriminatory warranted a refusal to cooperate, the British Government maintained that the investigatory process the Order created "would be rendered largely ineffective."[134]

In its decision, the European Court rejected both of the British Government's positions. The opinion reaffirmed that "there is no requirement that allegedly incriminating evidence obtained by coercion actually be used in criminal proceedings before the right not to incriminate oneself applies."[135] Nor would security concerns be deemed a justification for the intrusion on the applicant's Article 6 rights given the likelihood that any information he provided would be relevant to the offenses with which he had been charged.[136] In this case, the Northern Ireland Order authorized the financial investigator to transmit any information he obtained to the police and permitted the applicant's statements to be used if he later relied on inconsistent evidence.

While the Court explained why it considered the Article 6 right not to incriminate oneself to be applicable to Shannon's predicament, it provided no justification for the conclusion that he was free to refuse to attend the interview entirely rather than merely decline to answer potentially incriminating questions.[137] In this respect, *Shannon* provides broader self-incrimination protection then the Court was prepared to offer the applicant in *Sevres.* While the judge in Shannon's Belfast County Court appeal had concluded that the distinction between refusing to attend the interview and refusing to answer specific questions was merely "technical,"[138] the European Court had previously found a critical difference between the two alternatives and had ruled that the applicant in *Sevres* had to appear and take the official oath subject to the right to refuse to answer questions that infringed his Article 6 prerogatives. Since *Shannon* is the more recent decision, it may be that the Court is now prepared to support non-appearance in all such cases. It is more likely, however, that the Court will be forced to return to this issue if future applicants take advantage of the broader Article 6 protection *Shannon* appears to provide.

Heaney and McGuinness, *Quinn*, *Sevres*, and *Shannon*, taken together, confirm that under Article 6 of the Convention individuals may not be compelled by the threat of criminal sanction to answer incriminatory questions, although it is unclear whether there is a broader right to refuse to appear before a potentially incriminatory official inquiry. The cases make clear that the European Court is not likely to accept

---

[132] *Id.* ¶¶ 27, 28.

[133] *Id.* ¶ 29.

[134] *Id.*

[135] *Id.* ¶ 34 (citing Heaney and McGuinness v. Ireland, App. No. 34720/97, 33 Eur. H.R. Rep. 12 (2001) (defendants acquitted of underlying offense), and Funke v. France, App. No. 10828/84, 16 Eur. H.R. Rep. 297 (1993) (underlying proceedings not possible due to passage of time)).

[136] *Id.* ¶ 38.

[137] *Id.* ¶ 41.

[138] *Id.* ¶ 19.

the argument that enforcement of the right to silence is subject to a balancing process that weighs individual interests against the state's interest in protecting public safety, a position that would permit compelling self-incriminatory information where special circumstances are present. The Court's rulings have been highly protective of the right to silence and offer little to suggest that public need or procedures to insure the reliability of statements obtained under threat of criminal sanction would be sufficient to supplant the right.

V. COMPELLING ADMISSIONS IN NON-CRIMINAL CASES

Laws and regulations that demand the production of information are a common feature of the modern regulatory state. Typically, failure to comply with a demand for information or the submission of false information can result in the imposition of penalties. These may be labelled non-criminal, particularly if they are limited to fines, but in some settings failure to comply can result in incarceration, or incarceration may be imposed if the fine is not paid. The European signatories to the Convention and the United States have made use of such compelled disclosure systems and issues of compelled self-incrimination are common to each.

The use of state power to force an individual to answer questions in an official, but non-criminal inquiry, and thereby risk self-incrimination was dramatically illustrated in *Saunders v. United Kingdom*,[139] a British case involving an investigation into corporate misconduct. As chief executive of Guinness PLC, Saunders directed the company's effort to acquire the Distillers Company PLC in the face of a competing takeover bid. Guinness was successful, but its offer included a share exchange which depended upon the company's share price at the time the sale closed. In order to keep Guinness share prices high, an illegal share support scheme was employed involving purchases of Guinness stock by third parties who received undisclosed guarantees against loss as well as fees for participating in the scheme if it succeeded.[140] Following the successful bid the Guinness share price fell significantly,[141] rumors of misconduct surfaced, and the Secretary of the British DTI launched an investigation under the Companies Act of 1985.[142]

The DTI investigation produced evidence of criminal misconduct. The Department made contact with the Director of Public Prosecutions and transcripts of oral evidence obtained by DTI investigators were passed on to the police.[143] Efforts were made by one of Guinness' co-defendants to have the transcripts of the DTI interrogations declared inadmissible, but the trial judge found that the governing legislation authorized the inspectors to ask incriminating questions, witnesses were under a legal duty to answer them, and their answers were admissible in subsequent criminal proceedings even though no self-incrimination warning had been given.[144] However, the trial judge excluded interviews conducted after formal charges had been filed because answers obtained at that point could not be said to be voluntary and using the results of a compulsory interrogation after the commencement of the

[139] Saunders v. United Kingdom, App. No. 19187/91, 23 Eur. H.R. Rep. 313 (1996).
[140] *Id.* ¶ 16.
[141] *Id.* ¶ 15.
[142] *Id.* ¶ 18.
[143] *Id.* ¶ 26.
[144] *Id.* ¶ 28.

accusatory process could not be said to be fair.[145] The transcripts of the remaining interviews were read to the jury in Saunders' trial in order to establish his state of mind and to rebut his testimony that he knew nothing of the scheme.[146]

Following the trial, Saunders was convicted and appealed. The British courts rejected his challenge to the use of the DTI interrogation transcripts. The British Court of Appeal read the applicable legislation as specifically authorizing the use of the transcripts "even though such admittance might override the privilege against self-incrimination."[147] The appeals court recognized the complexity of detecting violations of legislation such as the Companies Act and emphasized that the structure of the regulatory investigation process differed from the typical criminal investigation.[148]

From the European Court's perspective, the relevant issue was the use of the transcripts of the DTI interrogations at Saunders' criminal trial, a stage that satisfies the criminal charge requirement of Article 6(1) of the Convention.[149] It was beyond dispute that Saunders had been compelled to answer the investigators' questions since he faced the threat of contempt had he refused, and could not resist on the grounds that the answers would be self-incriminatory.[150] The Court observed, "the transcripts of the applicant's answers, whether directly self-incriminating or not, were used in the course of the proceedings in a manner which sought to incriminate the applicant."[151] For the European Court, this was sufficient to render the circumstances of the trial a violation of Article 6(1) because the Government used Saunders' compelled statements in a criminal proceeding.[152] Neither the public interest argument nor the claim that the Companies Act of 1985 had sufficient protections to avoid injustice warranted a different conclusion.[153]

Although the critical issue for the majority was the actual use of the compelled statements in Saunders' criminal trial, a concurring opinion criticized the fact that Saunders was under "statutory compulsion to contribute actively to the preparation of the case which was subsequently brought against him."[154] This compulsion made it unnecessary to examine "either the weight to be attached to the incriminating material so furnished or the use made of it at the trial."[155] The wrong was in compelling Saunders to choose between providing incriminatory admissions and

---

[145] *Id.* ¶ 29.

[146] *Id.* ¶ 31.

[147] *Id.* ¶ 40.

[148] *Id.* ¶¶ 41–42.

[149] *Id.* ¶ 67. Not at issue was whether the DTI interrogation proceedings were themselves covered by the criminal charge triggering language of the Article 6 fair procedure requirement.

[150] *Id.* ¶ 70.

[151] *Id.* ¶ 72.

[152] Although British courts had viewed statements intended to be exculpatory as outside of the normal rules governing the admissibility of confessions, *Saunders* led to a revision. Under the new approach, "a court must look to the purpose to which the Crown puts a statement rather than to the intent with which that statement was originally made." Roderick Munday, *Adverse Denial and Purposive Confession*, 2003 CRIM. L. REV. 850, 853 (2003).

[153] Saunders v. United Kingdom, App. No. 19187/91, 23 Eur. H.R. Rep. 313, ¶¶ 74–75 (1996). The Court reached an identical result in a parallel case involving co-defendants in the prosecution. Case of IJL, GMR and AKP v. United Kingdom, App. No. 29522/95; 30056/96; 30574/96, 33 Eur. H.R. Rep. 225 (2000).

[154] Saunders v. United Kingdom, App. No. 19187/91, 23 Eur. H.R. Rep. 313 (1996) (concurring opinion of Judge Morenilla).

[155] *Id.*

being punished for silence, not merely the fact that the authorities later used the statements in his criminal trial.

A dissenting opinion found no violation in the British procedure, expressing the view that "a proper sense of proportion" in defining the scope of the right to silence required that the European Court recognize the risk that "society [not be] left completely defenceless in the face of ever more complex activities in a commercial and financial world that has reached an unprecedented level of sophistication."[156] A separate dissent echoed this position, noting the public interest in the detection of corporate fraud as well as the protective scheme established by the Companies Act of 1985. This dissent reasoned:

> [W]here there are serious rumours of fraudulent management, the public interest of protecting society against such fraud demands that the truth comes out and that this justifies the system of inquiry as set up under the 1985 Act, a system under which officers and agents of the investigated company are obliged to cooperate with the DTI inspectors as laid down in section 434 of that Act, without enjoying the immunities under discussion.[157]

Both dissents took issue with the broad statement of the majority that the "public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings."[158] Instead they reflected the view that a contrary result was warranted for corporate offenses requiring a general investigation to discover whether a crime was committed, as opposed to traditional crimes where the offense is generally known and the objective of the investigation is to discover the perpetrator.[159]

Bankruptcy is another area where compelled disclosures are often required. The self-incrimination aspects of examining bankruptcy applicants on threat of contempt for refusing to answer was presented to the European Court in *Kansal v. United Kingdom*.[160] As in *Saunders*, Kansal was subjected to a compulsory interrogation and later convicted in part based on the answers he gave to the bankruptcy receiver's questions.[161] The case was conceded by the Government to be indistinguishable from *Saunders*, but the conviction had been sustained by the House of Lords on non-retroactivity grounds.[162] Having ruled in *Saunders* that using compelled admissions obtained in a DTI investigation in a subsequent criminal case violated Article 6(1) of the Convention, the European Court found that a similar result was called for with respect to an identical procedure employed as part of the British bankruptcy process.[163]

---

[156] Saunders v. United Kingdom, App. No. 19187/91, 23 Eur. H.R. Rep. 313 (1996) (dissenting opinion of Judge Valticos, joined by Judge Gölcüklü).

[157] Saunders v. United Kingdom, App. No. 19187/91, 23 Eur. H.R. Rep. 313, ¶ 20 (1996) (dissenting opinion of Judge Martens, joined by Judge Kuris).

[158] *Id.* ¶ 22 (disagreeing with the quoted statement of the majority in its opinion stated in paragraph 74).

[159] Saunders v. United Kingdom, App. No. 19187/91, 23 Eur. H.R. Rep. 313, ¶ 25 (1996) (dissenting opinion of Judge Martens).

[160] Kansal v. United Kingdom, App. No. 21413/02, 39 Eur. H.R. Rep. 645 (2004).

[161] *Id.* ¶¶ 12–13. This occurred before the passage of legislation barring the use of statements secured under the Insolvency Act 1986. *Id.* ¶ 25.

[162] *Id.* ¶ 17.

[163] *Id.* ¶ 29.

Saunders and *Kansal* represent logical extensions of the core right to silence. They establish that freedom from compelled self-incrimination is not limited to state efforts to compel information in a criminal proceeding for the purpose of helping to secure a criminal conviction of the individual from whom the information is sought. It also encompasses state efforts to compel incriminatory information in non-criminal proceedings where that information is later used in a criminal case against the individual who has been forced to answer official questions. If the state desires to use the threat of imposing criminal sanctions to secure information, it may not later use that information to obtain a criminal conviction.

Any alternative would have invited abuse. The securing of compelled self-incriminatory statements, even if only in civil proceedings, would have allowed states to initiate civil investigations for the purpose of obtaining evidence for a criminal trial. Left unresolved by *Saunders* and *Kansal*, however, is whether legal compulsion can be used to obtain information in non-criminal proceedings for non-criminal purposes, even where that information poses a self-incrimination risk. This issue has been separately resolved by the European Court in cases involving other civil regulatory systems.

VI. NON-CRIMINAL USES OF INCRIMINATING INFORMATION

The British corporate and bankruptcy investigation procedures at issue in *Saunders* and *Kansal* were triggered by specific events that led to demands that the parties involved submit to oral questioning. Neither case concerned a regularized reporting system calling upon individuals to provide the Government with information related to the state's regulatory interests. Such systems are an important feature of contemporary life, but they can also raise self-incrimination risks since reporting is typically mandated by law with sanctions available for non-compliance. European Court case law has generally been supportive of regulatory reporting requirements, but the relevant decisions leave some uncertainties in identifying when such reporting requirements will run afoul of Article 6 right to silence principles.

The problems with regulatory reporting requirements were initially addressed in one of the earliest European Court right to silence cases, *Funke v. France*.[164] Funke was the object of a Customs investigation into suspected unreported foreign assets. Part of the investigation included a demand for statements from his foreign bank and share accounts. Funke's failure to comply without good cause led to a court judgment against him coupled with a daily fine until the requested items were produced. The proceedings amounted to the imposition of criminal sanctions for failure to provide the subpoeaned documents even though Funke was not prosecuted for illegal foreign dealings.[165] According to the French Government, this was a reflection of the "declaratory nature of the French customs and exchange-control regime, which saved taxpayers having their affairs systematically investigated but imposed duties in return, such as the duty to keep papers concerning their income and property for a certain length of time and to make them available to the authorities on request."[166]

[164] Funke v. France, App. No. 10828/84, 16 Eur. H.R. Rep. 297 (1993).
[165] *Id.* ¶ 41.
[166] *Id.* ¶ 42.

The French production demand directed at Funke did not call for any oral or written testimony; Funke was called upon to produce financial statements already in existence. The European Commission on Human Rights found no violation in this procedure due to the "special features of investigation procedures in business and financial matters."[167] The European Court, however, disagreed in a terse paragraph that gave no explanation for its conclusion, stating:

> The Court notes that the customs secured Mr Funke's conviction in order to obtain certain documents which they believed must exist, although they were not certain of the fact. Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide the evidence of 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," within the autonomous meaning of this expression in Article 6 (art. 6), to remain silent and not to contribute to incriminating himself.[168]

The applicant had been compelled to turn over evidence against himself that could ultimately be used to his disadvantage in latter criminal proceedings, and that violated his Article 6 right to silence.

J.B. v. Switzerland[169] represents a second situation in which pre-existing financial documents were not produced in response to otherwise lawful orders. The case arose out of a demand by tax authorities for the production of documents in the context of an investigation of suspected undeclared income.[170] The taxpayer did not comply even though he admitted failing to properly report his income.[171] This led to a supplementary tax assessment.[172] Although it was later withdrawn, the taxpayer's failure to explain the source of his invested income resulted in the imposition of a disciplinary fine which the applicant paid.[173] However, his continued refusal to provide the requested information resulted in further fines.[174] These were upheld by the Swiss Tax Appeals Commission which noted that the applicable decree of the Federal Council obligated persons to "submit accounts, documents and other receipts in their possession which could be of relevance when determining the taxes."[175]

As the European Court recognized, "the authorities were attempting to compel the applicant to submit documents which would have provided information as to his income with a view to the assessment of his taxes."[176] As such, the Swiss system reflected a pattern typical of both tax and other regulatory environments. In the applicant's case, however, disclosure could have revealed unreported income which might have resulted in criminal charges. The Court recognized that disclosure obligations covering such areas as blood or urine testing also reflect the compelled production of potentially self-incriminatory evidence, but imposing a duty to comply in such cases is permissible because they involve "material of [a] nature which . . .

---

[167] *Id.* ¶ 41.
[168] *Id.* ¶ 44.
[169] J.B. v. Switzerland, App. No. 31827/96, 30 Eur. H.R. Rep. CD 328 (2001).
[170] *Id.* ¶ 10.
[171] *Id.* ¶ 11.
[172] *Id.* ¶ 14.
[173] *Id.* ¶ 15.
[174] *Id.* ¶¶ 18–19.
[175] *Id.* ¶ 21.
[176] *Id.* ¶ 66.

has an existence independent of the person concerned and is not, therefore, obtained by means of coercion and in defiance of the will of that person."[177]

The European Court was not persuaded by the Government's claim in *J.B.* that the disclosure would not involve compelled self-incrimination since authorities were already aware of the information sought in the production demand. The Court described itself as "unconvinced by this argument in view of the persistence with which the domestic tax authorities attempted to achieve their aim."[178] In the final analysis, the Government could not avoid the conclusion that the imposition of penalties for the taxpayer's failure to provide information on unreported income violated the Article 6(1) Convention right not to be forced to incriminate oneself.[179]

The negative implications of the *J.B.* case for tax reporting systems were subsequently qualified by the European Court in *Allen v. United Kingdom.*[180] Here, too, tax officials had utilized their legal authority to demand production of relevant financial information, in this case, a statement of the applicant's assets and liabilities. Following his failure to comply, Allen was presented with a Hansard Warning informing him of the British Inland Revenue practice of considering the acceptance of a financial settlement of the individual's tax liability in lieu of instituting criminal proceedings.[181] The warning specifically informs the taxpayer that the decision on the filing of criminal charges would be influenced by whether or not the taxpayer provided full disclosure of relevant financial information.

In response to the notice he received, Allen submitted a schedule of his assets to the Inland Revenue. Allen was later prosecuted and convicted because the information he provided intentionally omitted listing assets in which he had a beneficial interest.[182] Allen argued that this violated his Convention-protected privilege against self-incrimination. He was presented with both a threat of prosecution if he did not comply with the production demand and the inducement of a promise of non-prosecution in connection with the Hansard procedure if he cooperated. In the end the information he provided to the Inland Revenue became the basis for his prosecution.

In both *J.B.* and *Allen,* the taxpayer faced the threat of criminal sanctions for failure to provide relevant tax data. In *J.B.*, the taxpayer persisted in his refusal to provide the subpoenaed information and was prosecuted for that refusal, while in *Allen,* the complainant provided misinformation "in order to prevent the Inland Revenue uncovering conduct which might possibly be criminal and lead to a prosecution."[183] The Court noted the distinction, and went on to conclude that "the

---

[177] *Id.* ¶ 68.

[178] *Id.* ¶ 69.

[179] *Id.* ¶ 71.

[180] Allen v. United Kingdom, App. No. 76574/01, 35 Eur. H.R. Rep. CD 289 (2002) (decision on admissibility).

[181] The current version of the Hansard Warning is included in the U.K. Inland Revenue website, *available at* http://www.hmrc.gov.uk/hansard/changes.htm.

[182] The offense description stated:

> [The applicant] on or about 3 April 1992 with intent to defraud . . . cheated Her Majesty the Queen and the Commissioners of Inland Revenue of public revenue, namely, income tax, by delivering . . . to an Inspector of Taxes a schedule of assets . . . which was false, misleading and deceptive in that it omitted to disclose divers assets which were owned by him.

Allen v. United Kingdom, App. No. 76574/01, 35 Eur. H.R. Rep. CD 289 (2002), The Facts, § A.

[183] *Id.* The Law, ¶ 1.

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."[184] Even if the taxpayer in *J.B.* had the right to resist the production of self-incriminatory information, the logic of Article 6 of the Convention did not afford protection to those who instead chose to commit perjury.

Significantly, the Court's opinions in *J.B.* and *Allen* assured Convention signatories that Article 6 would not be interpreted in a way that would interfere with all disclosure requirements, recognizing that they are "a common feature" of taxation systems, and that "it would be difficult to envisage them functioning effectively without it."[185] Supporting this position, the *Allen* Court stated:

> The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent in the context of criminal proceedings and the use made of compulsorily obtained information in criminal prosecutions. It does not per se prohibit the use of compulsory powers to require persons to provide information about their financial or company affairs.[186]

Article 6 would not be violated by a system of compelled disclosures that avoided or did not make criminal use of self-incriminatory information, nor would the right to silence protect the production of false or misleading information. However, to the extent information production requirements were designed to further criminal prosecutions, Article 6 would remain an obstacle.

The European Court suggested a distinction based upon the degree of pressure to disclose created by the regulatory system. In *Saunders* the applicant had faced the risk of a two-year prison sentence for non-disclosure, but the Court noted that Allen was subjected to a mere fine of £300.[187] The Court also did not believe that the Hansard Warning administered in *Allen* reflected any improper inducement since it simply informed the applicant that cooperation would be considered by the Inland Revenue in determining whether to prosecute.[188] The Court did not attempt to develop any guidelines to define permissible pressure. The result is continuing uncertainty as to how far Article 6 permits Convention signatories to go in backing up their information disclosure requirements with a system of sanctions.

Subsequently, in *King v. United Kingdom*,[189] the European Court found that the taxpayer's claim of compelled self-incrimination lacked merit. Here, as in *Allen*, the taxpayer had received a Hansard Warning, had been ordered to provide information to the Inland Revenue relevant to his tax liability, and had been found to have submitted misinformation.[190] In the British courts, the proceedings against King were found to be criminal for purposes of the Convention in light of the substantial fine imposed, its dependence on the culpability of the taxpayer, and its overall

---

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.* One commentator has supported permitting the use in a subsequent criminal case of information compelled through "a small financial penalty" in order to insure a "properly functioning system of tax administration." Jonathan Hilliard, *The Hansard Procedure and the Right Against Self-Incrimination: Recent Developments*, 2003 BRIT. TAX REV. 6, 10 (2003).

[188] Allen v. United Kingdom, App. No. 76574/01, 35 Eur. H.R. Rep. CD 289 (2002), The Law, ¶ 1.

[189] King v. United Kingdom, App. No. 13881/02, 37 Eur. H.R. Rep. CD 1 (2003) (partial decision on admissibility).

[190] *Id.* The Facts, § A.

deterrent and punitive purpose.[191] Based on this assessment, the applicant claimed that Article 6(1) of the Convention was violated because the system required that he incriminate himself in order to fully comply. Citing *J.B.* and *Allen*, the European Court found no basis to sustain the applicant's claim that his self-incrimination rights had been infringed.[192]

Identifying the basis for the European Court's conclusion in *King* presents difficulties comparable to those encountered in *Allen*. In both cases the taxpayers were prosecuted for the misinformation they provided. Neither case involved the use of compelled information to help convict the taxpayers for prior conduct, nor for their refusal to provide information. Yet the Court did not limit its reasoning to these factors alone, considering, as in *Allen*, that the charges carried fines as penalties rather than imprisonment as was the case in *Saunders*.[193] It was not clear from the Court's decision, however, how much pressure would be sufficient to constitute impermissible coercion and whether the conclusion that the pressure of the fine and Hansard Warning was not excessive was critical to the Court's ruling.

The European Court has also stated that the Convention's right to silence protections are inapplicable to demands for:

> [M]aterial 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.[194]

The exclusion applies to physically identifying matter, and is reminiscent of the U.S. Supreme Court's distinction between testimonial and non-testimonial evidence.[195] Both Article 6 of the Convention and the Fifth Amendment to the U.S. Constitution would bar the application of the self-incrimination privilege when evidence is sought for its physical characteristics rather than for what it communicates.

Under the U.S. Fifth Amendment, however, there is no general protection for the contents of documents the state may wish to obtain. Instead, the U.S. Supreme Court has held that the right to silence applies only when producing the items would be self-incriminatory, not simply when self-incrimination exists in the contents of the document.[196] The ruling in *J.B.*, which found a violation of the right to silence in compelling the production of existing documents,[197] does not incorporate the

---

[191] *Id.* The Facts, § A(2).

[192] *Id.* The Law, § 2.

[193] *Id.*

[194] Saunders v. United Kingdom, App. No. 19187/91, 23 Eur. H.R. Rep. 313, ¶ 69 (1996).

[195] Schmerber v. U.S., 384 U.S. 757 (1966); Holt v. U.S., 218 U.S. 245 (1910).

[196] United States v. Doe, 465 U.S. 605 (1984); Fisher v. U.S., 425 U.S. 391 (1976).

[197] The European Court has not been clear on the applicability of the self-incrimination privilege to documents that are sought by subpoena or some other form of production demand rather than by warrant. *Saunders v. United Kingdom* does not mention subpoenaed documents as outside the scope of the right against self-incrimination and *Funke v. France* found a violation of Article 6 in the effort by French authorities to demand the production of documents relevant to a customs investigation. Two commentators have questioned whether such items should be protected by the right to silence on the grounds that such a right "would come dangerously close to a right to withhold any potentially incriminating material." Tim Ward & Piers Gardner, *The Privilege Against Self-Incrimination: In Search of Legal Certainty*, 2003 EUR. HUM. RTS. L. REV. 388, 391 (2003).

analysis used by U.S. courts.[198] The European Court appears prepared to read Article 6 as affording full self-incrimination protection to demands for the production of documents because of their incriminatory content. The only qualification is that the individual remains subject to criminal sanction if he or she responds with inaccurate or incomplete information in lieu of claiming the right to withhold production entirely.

VII. IDENTITY DISCLOSURE REQUIREMENTS

As part of the police investigatory process it is essential that authorities be able to properly identify those with whom they interact, particularly where criminal charges may follow. This can involve asking for the individual's name and/or requesting some form of documentary identification. In some situations the law requires that an individual self-identify when a triggering event occurs. However, the fact that identification information is conveyed, even if it is only a person's name, can present a viable self-incrimination claim if it forms part of a chain of evidence that leads to a criminal conviction.

Austria's driver disclosure law, considered by the European Court in *Weh v. Austria*[199] and *Rieg v. Austria*,[200] is illustrative of the potential self-incrimination problem identification statutes can raise. The legislation involved in both cases authorized the authorities to demand that the registered owner of a vehicle provide the name and address of the individual who had driven or parked the suspect car at the time when a traffic or parking offense took place.[201] If the owner was unable to identify that individual, he was required to provide the name of someone who could comply with the demand.

As the European Court noted, previous versions of the statute had been given a limited construction by the Austrian Constitutional Court based on its interpretation of the Austrian Federal Constitution as "prohibit[ing] *inter alia* that a suspect be obliged on pain of a fine to incriminate himself."[202] Thereafter, a sentence was added to the statute—the "right to require such information shall take precedence over the right to refuse to give information."[203] As a result, the Austrian Constitutional Court concluded that the obligations of the statute were "saved" from claims that they impermissibly compelled self-incrimination.[204]

Weh had been asked for information about the driver of his car because it had been identified as having exceeded the speed limit. Weh responded by naming an

---

[198] The view that the decisions of the European Court are inapplicable to all efforts to compel the production of documents, whether by subpoena or warrant, as long as they contain no compelled statements of the accused, is reflected in R. v. Attorney General's Reference No. 7 of 2000, 2 Cr. App. R. 19 (2001). *See*, Rebecca Mitchell and Michael Stockdale, *Your Answers May Not Be Used In Evidence Against You*, 23(8) COMP. LAW. 232, 240 (2002); Andrew Ashworth, *The Human Rights Act 1998: Part 2: Article 6 and the Fairness of Trials*, 1999 CRIM. L. REV. 261, 264–65 (1999).

[199] Weh v. Austria, App. No. 38544/97, 40 Eur. H.R. Rep. 37 (2004).

[200] Rieg v. Austria, App. No. 63207/00 (2005), *available at* http://www.echr.coe.int/echr.

[201] Weh v. Austria, App. No. 38544/97, 40 Eur. H.R. Rep. 37, ¶ 24 (citing Section 103, § 2 of the Austrian Motor Vehicles Act, as amended 1986).

[202] *Id.* ¶ 25.

[203] *Id.* ¶ 24.

[204] *Id.* ¶ 26.

individual who he stated was living in "USA/University of Texas."[205] The result was a penal order and fine, with a default sentence of twenty-four hours of imprisonment for supplying inaccurate information,[206] but there was no prosecution for the underlying speeding offense.[207] The facts of *Reig* were similar: The applicant was fined for an incomplete disclosure pursuant to the same statutory provision,[208] but was not prosecuted for the underlying speeding violation.[209]

The European Court recognized that the Austrian Constitutional Court had previously found that the relevant provision of the Motor Vehicles Act violated the right against self-incrimination. But the Austrian court had also found similar legislation acceptable; those statutes gave the disclosure obligation statute constitutional status.[210] Before the European Court, therefore, the Austrian Government argued that the re-enacted legislation did not violate the Convention.

The Austrian court found that the disclosure requirement represented a fair balance between the public interest in traffic law enforcement and the individual interests represented by the right to remain silent.[211] The self-incrimination claim in both *Weh* and *Reig* was questionable because the applicants said they were not the drivers of the vehicles at the relevant time.[212] In addition, the information provided was the basis of a prosecution for conveying inaccurate or incomplete data, not for remaining silent.[213] Finally, the applicants were not limited to the choice of remaining silent or being punished since an additional alternative involving the disclosure of the individual driving the car or using it without consent was also available as an option.

In reviewing the Austrian legislation, the European Court identified two areas where Convention principles protecting the right to silence could be violated. One concerned "cases relating to the use of compulsion for the purpose of obtaining information which might incriminate the person concerned in pending or anticipated criminal proceedings against him."[214] These involve settings in which a person would be considered "charged" for purposes of Article 6 of the Convention. Separately, the Court identified "cases concerning the use of incriminating information compulsorily obtained outside the context of criminal proceedings in a subsequent criminal prosecution;"[215] the existence of a criminal charge or its functional equivalent is irrelevant in these situations.

The Court defined the second category by referring to its earlier rulings in *Saunders* and *Allen*. In *Saunders*, the European Court found a self-incrimination violation under the Convention because the authorities made use of information compelled from Saunders in proving the criminal charges against him. The Court maintained, however, that it had not suggested that the British procedure involving a legal requirement to answer questions relating to corporate misconduct, subject to a

---

[205] *Id.* ¶ 13.
[206] *Id.* ¶ 16. A contribution to the costs of the proceeding was also required.
[207] *Id.* ¶ 23.
[208] Rieg v. Austria, App. No. 63207/00, ¶ 12 (2005), *available at* http://www.echr.coe.int/echr.
[209] *Id.* ¶ 18.
[210] Weh v. Austria, App. No. 38544/97, 40 Eur. H.R. Rep. 37, ¶ 33 (2004).
[211] *Id.*¶ 38.
[212] *Id.*¶ 35.
[213] *Id.*¶ 14.
[214] *Id.*¶ 42.
[215] *Id.*¶ 43.

potential penalty of two years' imprisonment, itself raised an issue under Article 6(1).[216] In *Allen*, the application of a tax reporting obligation was found to comply with the Convention because:

> [T]here were no pending or anticipated criminal proceedings against the applicant and the fact that he may have lied in order to prevent the revenue authorities from uncovering conduct which might possibly lead to a prosecution did not suffice to bring the privilege against self-incrimination into play.[217]

These cases were considered part of the legal background establishing that the Convention's right to silence and right against self-incrimination are not absolute.[218]

Although the applicant in *Weh* complained that he was punished for failing to provide potentially self-incriminatory information to the authorities, the Court emphasized that no proceedings were ever instituted against him for the speeding violation.[219] As a result, the case did not involve the use of compelled admissions in a subsequent criminal prosecution.[220] Nor was this a case in which "criminal proceedings were pending or were at least anticipated."[221] This setting was significant for the Court since it meant that Weh was not "substantially affected" or "charged" as required by Article 6(1) of the Convention.[222]

The European Court also commented on the fact that the legislation only required that the driver of the car at the relevant time be named, something which the Court stated "is not in itself incriminating."[223] And if those grounds were not sufficient to justify rejecting the applicant's claim, the Court added that the prosecution was for providing incomplete information, not for refusing to provide any information at all.[224] The link between the obligation imposed by the Motor Vehicles Act and a possible criminal charge of speeding was "remote and hypothetical,"[225] and therefore insufficient to infringe the applicant's self-incrimination rights.[226]

Quoting extensively from *Weh*, a European Court panel reached the same result in *Rieg*. However, the four judge majority opinion in *Weh* generated a dissent joined by three members of the European Court panel. The dissent believed that there was some probability of a criminal prosecution against the applicant for speeding. Had Weh admitted being the one who was operating the car when it was speeding, he would have been the object of a traffic charge and would have furnished the prosecution with significant self-incriminatory evidence. In this sense, he was a victim of compelled self-incrimination.[227] The choice he faced was to either

---

[216] *Id.* ¶ 45 (citing Saunders v. United Kingdom, App.No. 19187/91, 23 Eur. H.R. Rep. 313 (1996), and Case of IJL, GMR and AKP v. United Kingdom, App.No. 29522/95, 30056/96, 30574/96, 33 Eur. H.R. Rep. 225 (2000)).

[217] *Id.*

[218] *Id.* ¶ 46.

[219] *Id.* ¶ 50.

[220] *Id.* ¶ 51.

[221] *Id.* ¶ 52.

[222] *Id.* ¶ 54.

[223] *Id.*

[224] *Id.* ¶ 55.

[225] *Id.* ¶ 56.

[226] *Id.*

[227] Weh v. Austria, App. No. 38544/97, 40 Eur. H.R. Rep. 37, ¶ 1 (2004) (joint dissenting opinion of Judges Lorenzen, Levits and Hajiyev).

incriminate himself or face a penalty for maintaining his silence. The dissent did not think it significant that the applicant was prosecuted for giving incomplete information.

The dissent focused on the choice that the applicant confronted, seeing "no reason to distinguish between situations where the owner of the car has refused to give any information and where he has given wrong or insufficient information."[228] Only where it was clear that the object of the disclosure order was not the driver could it be said that there was no self-incrimination risk and no violation of the right to silence under the Convention.[229] Where this was not the case, compelled disclosures could not be justified as a "proportionate response" to the public interest in prosecuting speeding offenses.[230] A similar position was taken by the dissenters in *Rieg*[231] who argued that "the degree of compulsion imposed on the applicant was . . . at a level that actually destroyed the very essence of the right to remain silent and the privilege against self-incrimination,"[232] and concluded with a recommendation that the case be referred to the Grand Chamber of the Court.[233]

If a compelled reporting system similar to the Austrian Motor Vehicles Act is in place, it may be effective in pressuring car owners to report the names of anyone who uses their car and commits a vehicle offense. But neither *Weh* nor *Reig* presented the most direct self-incrimination problem which occurs when the registered car owner is the offender, faces actual or anticipated charges, and responds to the statute by remaining silent rather than by providing inaccurate or incomplete information to the authorities. The Court was careful to note that neither *Weh* nor *Reig* raised this issue,[234] although similar cases had found right to silence violations on the theory that the procedure amounted to the criminalization of silence.[235]

In *Telfner v. Austria*,[236] the authorities learned of a car accident that had resulted in an injury, but while the victim identified the type and registration number of the car, he could not identify the driver.[237] The registered owner of the car was Telfner's mother who, when visited by the police the morning of the accident, stated that she had not been driving the vehicle, several family members regularly used it, and that her son had not been home that night, a fact confirmed by the police observation that his bed was untouched. Summarizing this evidence, the police report listed the applicant as the suspect in the hit and run accident.[238] He was charged with causing

---

[228] *Id.* ¶ 2.

[229] *Id.*

[230] *Id.* ¶ 4.

[231] Rieg v. Austria, App. No. 63207/00 (2005) (joint dissenting opinion of Judges Hajiyev and Jebens), *available at* http://www.echr.coe.int/echr.

[232] *Id.* ¶ 3.

[233] *Id.* ¶ 5.

[234] Weh v. Austria, App. No. 38544/97, 40 Eur. H.R. Rep. 37, ¶ 52 (2004); Rieg v. Austria, App. No. 63207/00, ¶ 31 (2005), *available at* http://www.echr.coe.int/echr (citing *Weh*).

[235] In *Weh* and *Rieg*, the Court cited as examples: J.B. v. Switzerland, App. No. 31827/96, 30 Eur. H.R. Rep. CD 328 (2001); Funke v. France, App. No. 10828/84, 16 Eur. H.R. Rep. 297 (1993); and Heaney and McGuinness v. Ireland, App. No. 34720/97, 33 Eur. H.R. Rep. 12 (2001).

[236] Telfner v. Austria, App. No. 33501/96, 34 Eur. H.R. Rep. 207 (2002).

[237] *Id.* ¶ 7.

[238] *Id.* ¶ 8.

injury by negligence, but pleaded not guilty. He denied driving the car at the relevant time, but declined to make any further statements.[239]

Following trial, the applicant was convicted and fined. The evidence against him consisted of his denial of responsibility and the testimony of the victim who stated that he could not determine who the driver of the vehicle was. Telfner's mother and sister were called as witnesses, but exercised their right under Austrian law not to testify against a close relative.[240] The only other evidence, as noted by the trial court, was the local police observation that the car was mainly driven by the accused as well as the fact that he was not at home after the accident and did not return until that evening.[241] For the trial court, however, "the sole, unequivocal conclusion [was] that only the accused could have committed the offense."[242] This finding was confirmed on appeal, with the Regional Court observing that:

> It would have been open to the accused to give a contrary version of events which conflicted with the charges and to put in relevant evidence without thereby at the same time having to name another person as the driver.[243]

The applicant challenged his conviction as violating the Article 6(2) requirement of the Convention that "[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law." His claim was that the court's assessment of the evidence and ultimate conclusion that he had been the driver involved in the accident had improperly placed the burden of proof on him to disprove his guilt. Of concern, in particular, was the drawing of an adverse inference from the defendant's silence. In a practical sense, this was the only basis for directly inferring that the defendant was responsible for the accident.

Although Telfner was not subject to criminal penalties for refusing to give evidence, his argument questioned whether the Convention's presumption of innocence had the effect of preventing the state from taking advantage of his exercise of the right to silence. The European Court, however, was not prepared to go that far. Instead, it opted for a case-by-case approach in which adverse inferences from silence could be drawn, but only where "the evidence adduced is such that the only common-sense inference to be drawn from the accused's silence is that he had no answer to the case against him."[244] This standard was not met in *Telfner* because of the absence of any significant evidence against the accused. Other than the silence of the accused, the prosecution was only able to produce a local police report that the applicant was the main user of the car and that he had not been home on the night of the accident.[245] Moreover, the victim was unable to identify the driver, and later evidence established that the car in question was also used by the applicant's sister.

From the European Court's perspective, the consequence of using the applicant's silence without establishing a "convincing prima facie case"[246] was that

---

[239] *Id.* ¶ 9.

[240] *Id.*

[241] *Id.* ¶ 10.

[242] *Id.*

[243] *Id.* ¶ 11.

[244] *Id.* ¶ 17.

[245] The Court noted that both points were not corroborated by any evidence presented at trial that was subject to adversary testing. *Id.* ¶ 18.

[246] *Id.*

the burden of proof was effectively shifted from the prosecution to the defense in violation of the Convention. Telfner may not have been subject to a legal obligation to provide information to the prosecution, as was the case in *Weh* and *Rieg*, but he was put in a similar position by virtue of the fact that his silence was used against him. Given the weakness of the prosecution's case, the use of Telfner's refusal to testify had burden shifting consequences that the European Court found inconsistent with Convention standards.

Telfner goes beyond compelled self-identification by forcing rebuttal testimony from an individual who may prefer to exercise his right not to give evidence. However, even more limited rules that go no further than to require self-identification, subject to a criminal penalty for non-compliance, may have the effect of compelling the individual to assist the state in his or her ultimate prosecution. In the United States, the Supreme Court has rejected a Fifth Amendment challenge to such a requirement in the context of a stop and frisk, albeit by a narrow 5-4 vote.[247] The very same self-incrimination issues are raised by mandatory identification requirements under the European Convention.

The general duty of self-identification underlays the European Court's ruling in *Vasileva v. Denmark*.[248] There a bus passenger, who refused to disclose her identity when accused of traveling on a bus without a valid ticket, was detained overnight. The detention occurred pursuant to section 750 of Denmark's Administration of Justice Act, which provided that "[e]very person has a duty to disclose his name, address, and date of birth to the police upon request. Failure to do so is punishable with a fine."[249] The case was litigated on the theory that the circumstances of the detention violated the Article 5 Convention right to be free of unlawful detention. No question was raised as to the legitimacy of the identification requirement itself, the Court observing that "it is a fundamental condition for the police in order to carry out their tasks, and thus ensure law enforcement, that they can establish the identity of citizens."[250]

While it is true, as recognized by the European Court, that police need to be able to confirm the identity of those they confront, where the provision of identity information forms part of a link to evidence of criminal activity, a tension between the police interest and the right to silence will arise, and how that tension would best be resolved is not self-evident. The confrontation between the competing public law enforcement interest and the individual interest in the freedom to remain silent is a far more complex problem than the European Court's treatment of the issue in the *Vasileva* decision would suggest. The U.S. Supreme Court has left open the possibility that individual right to silence claims may be raised where an identity disclosure requirement would produce self-incriminatory information.[251] The

[247] *See* Hiibel v. Sixth Judicial District Court of Nevada, 542 U.S. 177 (2004).

[248] Vasileva v. Denmark, App. No. 52792/99, 40 Eur. H.R. Rep. 27 (2005).

[249] *Id.* ¶ 20.

[250] *Id.* ¶ 39.

[251] In *Hiibel,* the U.S. Supreme Court rejected the argument that the disclosure of one's identity is not testimonial and therefore excluded from the reach of the Fifth Amendment. Instead, it concluded that Hiibel's situation "presented no reasonable danger of incrimination," *Hiibel,* 542 U.S. at 189 (leaving open the possibility that a demonstration of an incrimination risk would generate Fifth Amendment protection).

European Court, in contrast, did not suggest that it would treat the problem in a similar fashion.

VIII. GREAT BRITAIN'S ADVERSE INFERENCE LEGISLATION

Although decisions of the European Court establish that criminal sanctions may not be used to acquire evidence from an individual for later use against him at trial, not all forms of pressure can necessarily be equated with the coercive power of the threat of criminal prosecution.[252] The Convention's right to silence, based on the Article 6 fair procedure principle, is not an absolute guarantee against any and all government efforts to secure information from an accused during investigation or from a criminal defendant at trial. The question is whether state pressure to acquire evidence for use in a criminal proceeding inappropriately undermines the free will of the individual from whom information is sought.[253] This issue has been presented to the European Court in a series of cases challenging British legislation that permits drawing adverse inferences against criminal suspects who maintain their silence during investigation and criminal defendants who do not take the witness stand at trial.

The movement toward that legislation began in 1972 with the issuance of a report by the Criminal Law Revision Committee criticizing the right to silence for protecting the guilty by withholding probative evidence at the defendant's criminal trial.[254] The Committee's proposal to permit adverse inferences from silence was thereafter rejected by two Royal Commissions.[255] Nevertheless, in 1988 a Criminal Evidence Order for Northern Ireland[256] implemented a system of adverse inferences from silence which was later expanded to cover prosecutions in England and Wales by the Criminal Justice and Public Order Act 1994.[257]

The structure adopted by the British legislation focused on both refusals by suspects to answer questions during police interrogations and criminal defendants who declined to testify at trial. In all such cases, warnings are given that adverse inferences may be drawn from the exercise of the right to silence. In the context of police interrogations, this may occur if an individual failed to account for an object, substance, or mark on his person, clothing, footwear, or in his possession; did not

---

[252] The criminalization of silence is part of the historical background leading to the development of the self-incrimination privilege. *See* BERGER, *supra* note 38, at 1–23; *see generally* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968). There is some dispute, however, about what influences in the development of the right to silence were most important. *Compare* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH L. REV. 1047 (1994), *with* Leonard W. Levy, *Origins of the Fifth Amendment and Its Critics*, 19 CARDOZO L. REV. 821 (1997).

[253] One author has suggested that the distinction relied on by the European Court is between direct compulsion in the form of the criminalization of silence, which is barred by the Convention, and indirect compulsion, illustrated by adverse inferences from silence, which is not per se prohibited. Anthony F. Jennings, *Silence and Safety: The Impact of Human Rights Law*, 2000 CRIM. L. REV. 879, 885 (2000).

[254] CRIMINAL LAW REVISION COMMITTEE, ELEVENTH REPORT, EVIDENCE (GENERAL) ¶ 30, CMND. 4991 (1972).

[255] ROYAL COMM'N ON CRIMINAL PROCEDURE, 1981 REPORT ¶ 4.53, COMND. 8092 (1981); ROYAL COMM'N ON CRIMINAL JUSTICE, 1993 REPORT, ch. 4, ¶¶ 1–25 (1993).

[256] The Criminal Justice (Evidence) (Northern Ireland) Order, SI 1988/1847 (1988).

[257] Criminal Justice and Public Order Act of 1994, c. 33 (Eng.). *See generally* Mark Berger, *Reforming Confession Law*, *supra* note 27, at 243; Mark Berger, *Of Policy, Politics, and Parliament*, *supra* note 27, at 391.

explain his presence at the scene where a crime had been committed at or about the time of his arrest; or failed to mention any fact later relied upon at trial that he could reasonably have been expected to disclose at the time of his questioning by police.[258] Adverse inferences could also be drawn against a criminal defendant who declined to take the witness stand at trial following a warning of the potential consequences of that decision.[259] Where the Act applied, the fact finder was permitted to draw any "proper" inference from the individual's silence,[260] although the adverse inference could not be the sole basis for a finding of guilt.[261]

With the European Court having incorporated the right to silence and privilege against self-incrimination into Article 6 of the Human Rights Convention as an aspect of the fair procedure requirement, it was inevitable that the British system of adverse inferences would be presented to the Court for review. That opportunity first occurred in *Murray v. United Kingdom*,[262] a case arising under the Northern Ireland Evidence Order. Murray was charged with conspiracy to commit murder and unlawful imprisonment. Following his arrest, Murray received a warning that included a caution that silence could be used against him in court. Nevertheless, he refused to answer police questions both during and after a forty-eight hour period when he was denied access to a solicitor under special Northern Ireland legislation.[263] Both his silence during police interrogation and his failure to take the witness stand at trial led the judge trying the case to draw "very strong inferences"[264] against him following the presentation by the prosecution of a "formidable case."[265]

The European Court was presented with arguments that adverse inferences from silence amounted to compulsion because of the stark choice faced by the accused between testifying against himself or having his silence serve the same purpose.[266] The Court, however, saw the question somewhat differently, observing:

> What is at stake in the present case is whether these immunities are absolute in the sense that the exercise by an accused of the right to silence cannot under any circumstances be used against him at trial or, alternatively, whether informing him in advance that, under certain conditions, his silence may be so used, is always to be regarded as "improper compulsion."[267]

Rejecting the absolutist position, the Court concluded that basing a conviction solely or mainly on silence would offend the right to silence under the Convention, but that adverse inferences where the other prosecution evidence called for an explanation would not.[268] Evaluation of a self-incrimination claim in such a case would require an assessment of the totality of the circumstances, "having particular regard to the situations where inferences may be drawn, the weight attached to them

---

[258] Criminal Justice and Public Order Act of 1994, c. 33 (Eng.), §§ 34, 36–37.

[259] *Id.* § 35.

[260] *Id.* §§ 34(2), 35(3), 36(2), 37(2).

[261] *Id.* § 38(3) (providing that no one may be "convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in [the Act]").

[262] Murray v. United Kingdom, App. No. 14310/88, 22 Eur. H.R. Rep. 29 (1996).

[263] *Id.* ¶ 12.

[264] *Id.* ¶ 25.

[265] *Id.* ¶ 26.

[266] Such arguments were presented by Amnesty International and Liberty. Another organization, Justice, pointed to the risk of miscarriages of justice arising out of adverse inferences. *Id.* ¶ 42.

[267] *Id.* ¶ 46.

[268] *Id.* ¶ 47.

by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation."[269]

In the context of Murray's prosecution, it was clear to the Court that he was not compelled to incriminate himself because he in fact maintained his silence in the face of the threat of adverse inferences. Those inferences were not in and of themselves improper because the trial was before an experienced judge[270] and the adverse inferences were subject to legislative safeguards, including the requirement of a warning, the establishment of a prima facie case by the prosecutor, the limitation to cases calling for an explanation, and the ultimate discretion vested in the trial judge to determine whether or not to draw the adverse inference.[271] The fact that Murray was denied access to a solicitor for forty-eight hours did not change the right to silence analysis.[272] The argument of the dissent that the system amounted to an impermissible penalty for exercising a right guaranteed by the Convention was rejected.[273]

Separately, however, the European Court found that forcing Murray to answer police questions or risk an adverse inference at trial was a difficult choice that required the assistance of counsel.[274] This became the basis of the Court's finding of an Article 6 violation in *Averill v. United Kingdom*.[275] There the suspect was denied access to legal advice, refused to answer police questions, and later faced an adverse inference instruction at trial. The Court found that "the rights of the defense may well be irretrievably prejudiced."[276] In a similar fashion, the Court found a violation of Article 6 in *Magee v. United Kingdom*.[277] The Court held that a forty-eight hour delay in granting access to a solicitor violated the applicant's Article 6 rights, and that "as a matter of procedural fairness, [the applicant] should have been given access to a solicitor at the initial stages of the interrogation as a counter weight to the intimidating atmosphere specifically devised to sap his will and make him confess to his interrogators."[278]

In order for adverse inference instructions to meet Article 6 standards, the circumstances of silence must warrant the adverse inference and the fact finder must be properly instructed. In *Averill*, the applicant had given a brief account of his alibi when initially apprehended by the police, but refused to answer any questions during

---

[269] *Id.*

[270] *Id.* ¶ 51.

[271] *Id.*

[272] *Id.* ¶ 56. Although the denial of access to a solicitor for forty-eight hours, under the circumstances of the case, did not invalidate the adverse inferences that were drawn, the Court found it independently a violation of the fair procedure requirement of Article 6. The nature of the Northern Ireland Order was deemed such as to require access to a lawyer at the initial states of police interrogation. *Id.* ¶ 66.

[273] *Id.* (dissenting opinion of Judge Walsh (citing Griffin v. California, 380 U.S. 609 (1965))).

[274] Once the adverse inference warning was administered, the Court concluded that "the concept of fairness enshrined in Article 6" demanded that the accused have the right of access to an attorney even at "the initial states of the police interrogation." Murray v. United Kingdom, App. No. 14310/88, 22 Eur. H.R. Rep. 29, ¶ 66 (1996).

[275] Averill v. United Kingdom, App. No. 36408/97, 31 Eur. H.R. Rep. 839 (2001).

[276] *Id.* ¶ 60.

[277] Magee v. United Kingdom, App. No. 28135/95, 31 Eur. H.R. Rep. 822 (2001).

[278] *Id.* ¶ 43. The adverse inference warning that Magee received "was an element which heightened his vulnerability to the relentless rounds of interrogation on the first days of his detention." *Id.*

a series of interrogation sessions that followed.[279] This led to adverse inferences being drawn against him both for offering a defense at trial that he did not raise during the interrogation sessions and for not accounting for certain relevant fibers found on his person.

The European Court cautioned that the denial of access to a solicitor obligated trial judges to exercise care in determining whether to draw an adverse inference from silence, even if access to legal advice was subsequently granted.[280] However, strong forensic evidence supporting the applicant's guilt, and the lack of credibility attributed to defense testimony supported an adverse inference.[281] Although Averill explained that he refused to answer police questions because "it was simply his policy not to speak to the police,"[282] this was not sufficient to bar the judge from drawing adverse inferences otherwise warranted by the evidence.[283]

Even if the circumstances warrant an adverse inference, the trial judge must nevertheless be careful to insure that the instructions given to the jury carefully circumscribe how silence may be used. In *Condron v. United Kingdom*,[284] the judge had given an instruction to the jury indicating that they had the discretionary authority to draw adverse inferences against the defendants for failure to mention certain facts to the police, but that silence alone cannot prove guilt.[285] The judge did not caution that the adverse inference should only be drawn if the defendant's silence could only be attributed to his or her inability to answer the prosecution's case.[286] The problem was heightened by the fact that the trial was before a jury unlike the *Murray* bench trial,[287] as well as by the lack of a specific reference to the prosecutor's duty to establish an independent prima facie case.[288]

The Court criticized the standard Judicial Studies Board jury direction for adverse inferences that was used in this case because the direction did not conform to the Court's *Murray* decision.[289] The Court concluded that "as a matter of fairness, the jury should have been directed that it could only draw an adverse inference if satisfied that the applicants' silence at the police interview could only sensibly be attributed to their having no answer or none that would stand up to cross-examination."[290] This was viewed as "more than merely 'desirable,'"[291] and its omission was "incompatible with the exercise by the applicants of their right to silence at the police station."[292] No particular formula is required for advising a jury that it may draw an adverse inference from silence as long as the core safeguards are present and the resulting direction is not overly confusing.[293]

---

279 Averill v. United Kingdom, App. No. 36408/97, 31 Eur. H.R. Rep. 839, ¶¶ 11, 14–15 (2001).
280 *Id.* ¶ 49.
281 *Id.* ¶ 50.
282 *Id.* ¶ 28.
283 *Id.* ¶ 51.
284 Condron v. United Kingdom, App. No. 35718/97, 31 Eur. H.R. Rep. 1 (2001).
285 *Id.* ¶ 22.
286 This had been suggested by Lord Taylor CJ in R. v. Cowan, [1996] Q.B. 373.
287 Condron v. United Kingdom, App. No. 35718/97, 31 Eur. H.R. Rep. 1, ¶ 46 (2001).
288 *Id.* ¶ 47.
289 *Id.* ¶ 61.
290 *Id.*
291 *Id.* ¶ 62.
292 *Id.*
293 In Wood v. United Kingdom, App. No. 23414/02 (2004) (decision as to admissibility), *available at* http://www.echr.coe.int/echr, the Court found that the judge's errors in his adverse inference direction

Given that access to counsel is an important factor in determining whether adverse inferences are permissible, the content of the solicitor's advice may also be considered. One reasonable explanation for an accused's silence may be that he was following the advice of counsel to remain silent. Whether such advice would preclude drawing an adverse inference from silence eventually made its way to the European Court for evaluation under the provisions of Article 6 of the Convention.

Condron, where the judge gave an adverse inference instruction to the jury, is illustrative of the problem. Because the applicants were under the influence of drugs, their solicitor "genuinely believed that they were unfit to be interviewed and might prejudice their defence through the incoherence of any answers they might volunteer to the police."[294] He therefore advised the applicants to remain silent. A doctor summoned by the police, however, concluded that the applicants were fit to be questioned.[295] Based on these facts, the trial judge found the circumstances sufficient to warrant giving the jury an instruction permitting it to draw adverse inferences from the defendants' silence.[296]

The European Court began with the premise that "appropriate weight" must be given by the trial court to the fact that the accused was advised to remain silent by his attorney,[297] and further recognized that the attorney for the applicants, who was physically present during the police interrogation, had testified in pretrial proceedings that his advice was based on his conclusion that the applicants were suffering from drug withdrawal symptoms.[298] It then addressed the complaint raised by the applicants that they were cross-examined on the content of the legal advice they received.[299] The Court found, however, that this did not constitute an Article 6 violation. From its perspective:

> [The applicants] were under no compulsion to disclose the advice given, other than the indirect compulsion to avoid the reason for their silence remaining at the level of a bare explanation. The applicants chose to make the content of their solicitor's advice a live issue as part of their defence. For that reason they cannot complain that the [British legislation] is such as to override the confidentiality of their discussions with their solicitor.[300]

Nevertheless, the explanation offered for silence, even if not in itself an automatic bar to the evidentiary use of silence against the accused, must be properly treated in the context of any adverse inference instruction ultimately given to the jury. In particular, the European Court was concerned that the instruction conveyed by the judge in *Condron* failed to meet this standard. While it did alert the jury to the fact that the defendants explained their silence as having been based on the legal advice they received, the Court's objection was that it did so "in terms which left the

---

did not violate the applicant's Article 6 rights even though the jury was never told of the applicant's right to remain silent and that guilt could not be assumed merely because he did not testify. For the Court, the overall content and tenor of the instruction would not have suggested that the jury was free to convict solely or mainly on the basis of an adverse inference from silence.

[294] Condron v. United Kingdom, App. No. 35718/97, 31 Eur. H.R. Rep. 1, ¶ 45 (2001).

[295] *Id.* ¶ 13.

[296] *Id.* ¶ 22.

[297] *Id.* ¶ 60.

[298] *Id.* ¶ 18.

[299] *Id.* ¶ 60.

[300] *Id.*

jury at liberty to draw an adverse inference notwithstanding that it may have been satisfied as to the plausibility of the explanation," rather than directing the jury that "it could only draw an adverse inference if satisfied that the applicants' silence at the police interview could only sensibly be attributed to their having no answer or none that would stand up to cross-examination."[301] While other safeguards were present in the British legislation such as the non-mandatory character of adverse inferences, these protections were not sufficient to dispel the obligation to further restrict the jury's discretion in order to comply with the Article 6 right to silence.[302]

The Court's most recent decision on the role of legal advice in shaping adverse inference instructions, *Beckles v. United Kingdom*,[303] conforms to the standards set by *Condron*. After Beckles' apprehension, his solicitor informed the police that he had advised his client to remain silent during the police interview "based on what [the solicitor] had been told about the allegations and his view that it would not be reasonable for the applicant to answer questions at that stage."[304] However, in his very initial contact with the police, prior to both the police interview and consultation with his solicitor, the defendant had stated that the victim, who claimed to have been pushed out of a window, had in fact jumped.[305] In response, the police advised him to wait until he was interviewed at the police station.[306]

After consultation with his solicitor, Beckles took his attorney's advice and refused to answer police questions.[307] Several months later, after again being interviewed by the police, Beckles responded to police questions and denied responsibility for the victim's injuries.[308] He later testified at trial and explained that his refusal to answer police questions during the first interrogation was the result of the advice he received from his solicitor.[309] When asked by the judge in the presence of the jury whether he was prepared to testify concerning what he had been told by his attorney prior to the initial police interrogation, both he and his attorney indicated no objection.[310] However, this matter was not later pursued by either the judge or the prosecutor.[311] Ultimately, the jury was given an adverse inference instruction in which the judge stated:

> If you thought that they were failing to answer certain awkward questions because, for example, they were keeping their powder dry, as it were, hoping against hope they would not be identified . . . or because they had not yet worked out what their defence was going to be, you could draw the [adverse] inference.[312]

---

[301] *Id.* ¶ 61. British courts have been moving from a standard that considers the genuineness of the individual's reliance on counsel's advice to one that focuses on the reason behind the advice to remain silent in judging whether an adverse inference is permissible. Andrew Ashworth & Michelle Strange, *Criminal Law and Human Rights*, 2004 EUR. HUM. RTS L. REV. 121, 134–36 (2004).

[302] Condron v. United Kingdom, App. No. 35718/97, 31 Eur. H.R. Rep. 1, ¶ 62 (2001).

[303] Beckles v. United Kingdom, App. No. 44652/98, 36 Eur. H.R. Rep. 162 (2003).

[304] *Id.* ¶ 16.

[305] *Id.* ¶ 14.

[306] *Id.* ¶ 15.

[307] *Id.* ¶ 17.

[308] *Id.* ¶ 20.

[309] *Id.* ¶ 22.

[310] *Id.* ¶ 23.

[311] *Id.*

[312] *Id.*

The core of Beckles' objection to the adverse inference instruction given to the jury was that it allowed the jury to use his silence against him if it found his explanation unreasonable without also finding that his silence "was only sensibly attributable to guilt," and even if it concluded that he "had stayed silent for innocent reasons."[313] In fact, the trial judge had commented to the jury that it was the responsibility of the defendant whether or not to accept his attorney's advice to remain silent and that "any attorney worthy of his or her name" should have included in the advice "the possibility, even the probability" that an adverse inference would be drawn.[314]

In evaluating the totality of the circumstances, the Court was satisfied that Beckles understood his legal rights and the possible implications of refusing to answer police questions.[315] Moreover, Beckles' solicitor was present during the questioning to continually advise him.[316] However, even though Beckles was prepared to waive his attorney-client privilege and had so indicated in open court, neither the prosecution nor the judge pursued his offer. Additionally, the judge had commented to the jury that there was no independent evidence of what the solicitor said at the police station even though the police record contained a notation that he had recommended silence.[317] Finally, the defendant's explanation that the victim fell from the window rather than being pushed was consistent at all times. In the European Court's view:

> These are all matters which go to the plausibility of the applicant's explanation and which, as a matter of fairness, should have been built into the direction in order to allow the jury to consider fully whether the applicant's reason for his silence was a genuine one, or whether, on the contrary, his silence was in effect consistent only with guilt and his reliance on legal advice to stay silent merely a convenient self-serving excuse.[318]

There were some protective warnings given to the jury, including that it should not hold the defendant's silence against him if his reason for not answering questions was a good one and that silence could not itself prove guilt. The European Court, however, was not satisfied. The applicant's explanation for silence was not given enough weight and the jury instruction left open the possibility that an adverse inference would be drawn even if the jury was satisfied as to the plausibility of Beckles' explanation. Asking the jury to consider whether his reason for silence was a good one was not the same as asking whether it was "consistent only with guilt."[319]

The *Beckles* ruling directed that judges remind the jury of "all of the relevant background considerations"[320] and that "if it was satisfied that the applicant's silence at the police interview could not sensibly be attributed to his having no answer or

---

[313] *Id.* ¶ 52.
[314] *Id.* ¶ 24.
[315] *Id.* ¶ 60.
[316] *Id.*
[317] The judge instructed the jury that "[the applicant] told you that his reason for not answering some of the questions was that he had received advice from his solicitor that he should make no comment . . . Of course, we have—you have—no independent evidence of what was said by the solicitor." *Id.* ¶ 24. The Court observed that there was an entry in the record of the interrogation to the effect that Beckles' solicitor had advised silence. *Id.* ¶ 60.
[318] *Id.* ¶ 62.
[319] *Id.* ¶ 64.
[320] *Id.*

none that would be stand up to police questioning it should not draw an adverse inference."[321] The failure of Beckles' trial judge to properly confine the jury's discretion in giving its adverse inference instruction led the Court to find an Article 6 violation.[322]

The European Court's rulings on adverse inferences from silence, including the *Telfner* case as well as the decisions reviewing the application of the British adverse inference legislation, present a more moderate view of the uses that can be made of silence as compared to the approach taken in the United States. The U.S. Supreme Court has firmly barred adverse inferences from the defendant's failure to take the witness stand,[323] and has ruled that in the face of a Miranda warning, holding the suspect's refusal to answer police questions against him would violate due process.[324] In contrast, the European Court would permit adverse inferences to be drawn from silence during police interrogation as well as from the defendant's refusal to testify, although its decisions reflect an effort to provide protection against any misuse of the doctrine.[325] In particular, the circumstances must warrant the adverse inference instruction and the jury's discretion to hold the accused's silence against him must be properly confined. While better than a standardless direction to allow the adverse use of silence, the Court's approach is a major inroad on the right to remain silent by authorizing a significant evidentiary penalty against anyone choosing to avail himself of the right.

IX. CONCLUSION

The European Court of Human Rights' effort to Europeanize the privilege against self-incrimination has moved substantially beyond its initial stages with certain principles now firmly established. The incorporation of the right to remain silent as an aspect of the fair hearing requirement of Article 6 of the Convention[326] is now accepted without challenge even though Article 6 does not include the right to silence as one of its enumerated protections. Additionally, the Court has adopted the traditional view that the right is associated with criminal proceedings, and that it may be asserted when the evidence that has been compelled from the accused is used in a criminal case even if its production was compelled in a non-criminal proceeding.[327] This allows member nations to enforce civil regulatory requirements as long as the evidence obtained through a subpoena or information demand is not used to convict the person from whom it was obtained of a criminal offense.

Partly because of the relatively limited number of right to silence cases the European Court has heard, much about the jurisprudence of self-incrimination under

---

[321] *Id.*

[322] *Id.* ¶ 65.

[323] *See* Griffin v. California, 380 U.S. 609 (1965). The ruling bars comment on the defendant's silence, and is not offended by a no-adverse inference instruction given over the defendant's objection. *See* Lakeside v. Oregon, 435 U.S. 333 (1978).

[324] *See* Doyle v. Ohio, 426 U.S. 610 (1976).

[325] It has been argued that European Court decisions, combined with rulings from British courts, have significantly limited the application of Great Britain's adverse inference legislation. *See generally* Ian Dennis, *Silence in the Police Station: The Marginalisation of Section 34*, 2002 CRIM. L. REV. 25 (2002).

[326] Murray v. United Kingdom, App. No. 14310/88, 22 Eur. H.R. Rep. 29, ¶ 45 (1996).

[327] Saunders v. United Kingdom, App. No. 19187/91, 23 Eur. H.R. Rep. 313, ¶ 67 (1996).

the Convention remains unclear. This stems from the Court's belief that the right to a fair hearing does not mean that the right to remain silent is absolute. This has led the Court to approve the use of adverse inferences from silence, whether as part of a structured legislative system, as is the case in the United Kingdom,[328] or simply as a mechanism employed by a trial judge in the process of evaluating the strength of the prosecution's case.[329] It also helps to explain the Court's broad hints that compelled self-identification duties would not be considered violations of Article 6 requirements.[330]

The pragmatic approach used by the European Court in developing a self-incrimination privilege under the European Convention leaves the door open for member nations to make more use of silence than is presently the case. The Court has a very flexible standard for determining what constitutes a criminal charge that would trigger Article 6 protections,[331] with no guarantee that the strict application of the standard in its early rulings will continue in effect. The Court has also shown no inclination to balance public and private interests in evaluating self-incrimination challenges presented under Article 6.[332] However, its explicit adoption of a non-absolutist view of the right to remain silent[333] leaves open the possibility that this approach will be reconsidered, particularly in the very difficult area of the prevention of terrorism.

Criminal procedure systems throughout Europe are being severely tested by the increasing ease of movement between European countries as well as by the specter of terrorism. Nevertheless, the European Convention on Human Rights reflects a European commitment to respect individual human rights in the law enforcement systems of its signatory nations. The tension between these two realities is inevitable and likely to generate future claims of intrusions on the right to silence in response to intensified criminal law enforcement efforts. Despite the challenges, the European Court has demonstrated its strong support for the core principle that state power should not be used to compel self-incrimination, and there are no signs that any major change in the right to silence under Article 6 of the Convention is in the offing.

---

[328] Murray v. United Kingdom, App. No. 14310/88, 22 Eur. H.R. Rep. 29 (1996).

[329] Telfner v. Austria, App. No. 33501/96, 34 Eur. H.R. Rep. 207 (2002).

[330] Vasileva v. Denmark, App. No. 52792/99, 40 Eur. H.R. Rep. 27, ¶ 39 (2005).

[331] Öztürk v. Federal Republic of Germany, App. No. 8544/79, 6 Eur. H.R. Rep. 409 (1984); A.P., M.P. and T.P. v. Switzerland, App. No. 19958/92, 26 Eur. H.R. Rep. 541 (1998).

[332] Heaney and McGuinness v. Ireland, App. No. 34720/97, 33 Eur. H.R. Rep. 12, ¶ 58 (2001); Saunders v. United Kingdom, App. No. 19187/91, 23 Eur. H.R. Rep. 313, ¶ 74 (1996).

[333] Condron v. United Kingdom, App. No. 35718/97, 31 Eur. H.R. Rep. 1, ¶ 56 (2001) (citing Murray v. United Kingdom, App. No. 14310/88, 22 Eur. H.R. Rep. 29, ¶ 47 (1996)).