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Compelled Self-Reporting and the Principle Against Compelled Self-Incrimination: Some Comparative Perspectives

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Canada; Comparative law; Compulsory disclosure; Privilege against self-incrimination; Right to fair trial; United States

The article examines the tension between mandatory self-reporting and identification statutes and the right to be free of compelled self-incrimination. The author reviews decisions addressing this issue taken by the European Court of Human Rights ("ECtHR"), the Privy Council, and the Supreme Courts of Canada and the United States. He then analyses applicable public polices and assesses the alternative approaches available to accommodate these conflicting interests.

The modern twenty-first century state is characterised by a wide array of regulatory requirements that cover both criminal and non-criminal public policy concerns. In order to make certain that the regulatory process functions properly, public officials have an obvious need to obtain information that covers both the identity and activities of those being regulated. However, despite the state's legitimate interest in securing identification and regulatory information, some techniques for achieving this objective may infringe equally legitimate individual interests.

One method frequently employed to obtain needed identification and regulatory data is to require that the individual affected by the state's civil or criminal regulatory system submit the information himself. Indeed, compelled self-reporting has become a common technique that is widely used due to its simplicity and efficiency. But while compelled self-reporting may not involve the physical intrusiveness of a seizure to obtain a bodily sample for DNA identification analysis, the essential character of the procedure presents a very real risk that it will conflict with the right to silence and the right to be free of compelled self-incrimination.

The potential conflict between compelled self-reporting and the principle that an individual should not be forced by the state to contribute to his own conviction has in fact arisen in a number of traffic enforcement cases decided by courts in differing

[1] The author gratefully acknowledges the assistance he received from personnel at the ECtHR during his stay at the Court as a Visiting Scholar in March 2005. Financial assistance for the research conducted at the Court was provided by the University of Missouri Research Board.

jurisdictions. The setting, in one form or another, has involved the imposition of an obligation to report involvement in a traffic offence or road accident in circumstances where the reporting individual may well have committed a traffic law violation. There are also examples of statutes that require self-reporting to aid authorities in general criminal investigations. Unquestionably, the self-reporting requirement is a useful device to obtain information and thereby further important regulatory interests, but the obligation to self-report also represents the exercise of state power to force the production of information from an individual who may be incriminated by both the submission and contents of his report.

To date, no single solution has emerged to resolve the tension between compelled self-reporting statutes and the interests represented by the right to silence and self-incrimination privilege. This is not surprising given the differing characteristics of the multitude of legal systems in which compelled self-reporting systems are used. However, the court decisions that have thus far addressed the problem illustrate some of the ways the conflict can be analysed along with the policy implications of the alternative approaches.

Compelled self-reporting at the European Court of Human Rights

Although the European Convention on Human Rights ("ECHR") does not include explicit language creating a right to silence or self-incrimination privilege, the European Court of Human Rights ("ECtHR") has found that these principles are implicit in the right to a "fair and public hearing" contained in Art.6(1) ECHR. The European Court has described them as "recognised international standards which lie at the heart of the notion of a fair procedure under Article 6",[2] and has observed that the right to be free of compelled self-incrimination "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".[3] Nevertheless, in the development of the principle against compelled self-incrimination, the Court has not clearly explained how it would apply to the core conflict between mandatory self-reporting requirements and the right to be free from state compulsion to provide self-incriminatory evidence.

Legislation incorporating a compelled self-reporting system was recently at issue before the ECtHR in *Weh v Austria*.[4] The setting was an Austrian statute that required the registered owner of a vehicle to identify the person who had driven or parked the car at an identified date and time. For domestic law purposes, the statute concluded with a statement that the "authority's right to require such information shall take precedence over the right to refuse to give information".[5]

Weh was directed to identify the driver of his car at a time when it was alleged to have exceeded the speed limit. He responded by providing the name of an individual whose

[2] *Murray v United Kingdom* (1996) 22 E.H.R.R. 29 at [45].

[3] *Saunders v United Kingdom* (1996) 23 E.H.R.R. 313 at [68].

[4] (2004) 40 E.H.R.R. 37.

[5] Austrian Motor Vehicles Act, s.103(2), as amended in 1986, cited in *Weh, ibid.*, at [24]. This provision was inserted to save the statute from the claim that its application could have the effect of impermissibly compelling self-incrimination.

address he identified as "USA/University of Texas".[6] The Austrian courts concluded that this response did not comply with the statutory requirements and imposed a penal order and fine. However, there was no prosecution for any speeding offence connected with Weh's vehicle. A comparable set of facts was presented in *Reig v Austria*,[7] with the Austrian courts similarly imposing punishment for what it concluded was an inadequate response to the demand for driver identification information, and with Reig also not being subjected to prosecution for the underlying traffic offence.

Special features of *Weh* and *Reig* make it difficult to describe clearly the ECtHR's view of compelled self-reporting statutes. As the Court observed in both cases, prosecution was instituted by Austrian authorities for failing to provide complete information in response to the statutory demand rather than for refusing to respond at all. Even though the Court labelled this issue as not being a "decisive element in itself",[8] it could be viewed as an outcome determinative factor. One can easily conceive of a system that permits an individual to claim that a reporting obligation compels self-incrimination while denying him the option of responding with a false or incomplete statement.[9]

Beyond that, no claim of personal compelled self-incrimination was ever made in either *Weh* or *Reig*. To the contrary, in each case the registered owner of the vehicle asserted, whether truthfully or not, that the car had been driven by someone else at the time the traffic offence was committed. The claim that they were being forced to provide the state with evidence that could be used to convict them of a criminal offence was thus an abstract argument directed toward the legitimacy of the statute as a whole, not an individual assertion that the interests and objectives behind the right to silence were directly implicated in the information production demands presented to them.

Nevertheless, there is much in the ECtHR's treatment of the self-incrimination issue to suggest that it did not view the Austrian statute as inconsistent with Art.6(1) ECHR. Initially, the opinion reaffirmed that "the right to silence and the right not to incriminate oneself are not absolute".[10] Then, in determining whether those rights were violated in the proceedings under the Austrian statute, the Court emphasised that no speeding charges were filed against the complainants, nor were any anticipated, nor was the compelled information used to secure a conviction based upon what the information disclosed. From the Court's perspective, the applicants were not "substantially affected"

[6] *Weh*, *ibid*., at [13].

[7] (App. No.63207/00), judgment of March 24, 2005.

[8] *Weh*, fn.4 above, at [55].

[9] Even if an inquiry is conducted by impermissibly compelling self-incrimination, the state nevertheless has an interest in barring perjury because lying is morally unacceptable and because it may mislead investigators. It has thus been argued that the state may limit the individual's response in cases of compulsion seeking self-incriminatory information to claiming the right to silence or moving to bar the use of any information obtained as a result of the compulsion. There is also arguable justification for limiting the exclusive response to claiming the right to silence since the exclusion of compelled evidence may ultimately make it difficult for the state to secure a conviction. Peter Westen and Stewart Mandell, "To Talk, to Balk, or to Lie: The Emerging Fifth Amendment Doctrine of the 'Preferred Response'" (1982) 19 *American Criminal Law Review* 521, pp.528–533.

[10] *Weh*, fn.4 above, at [46]. *Heaney and McGuinness v Ireland* (2001) 33 E.H.R.R. 12 at [47], and *Murray*, fn.2 above, at [47], were cited in support of this observation.

so as to be considered charged with an offence for purposes of Art.6(1),[11] and the obligation to name the driver of the car was a simple fact that the Court did not believe was in itself incriminating.[12]

Compelled self-reporting was also involved in the ECtHR's ruling in *Vasileva v Denmark*.[13] That case concerned the detention of a bus passenger who was alleged to have travelled on a bus without purchasing a valid ticket. She refused to identify herself and was held by the authorities under a Danish law providing 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."[14] The Court's judgment assessed the validity of the detention under Art.5 ECHR by balancing the state interest in securing the immediate fulfilment of the disclosure obligation against the individual interest in the right to liberty. However, the legitimacy of the obligation to self-identify did not trouble the Court. It clearly implied that the obligation was a valid requirement, 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".[15]

The Privy Council and the balancing of interests

In *Brown v Stott*,[16] the Judicial Committee of the Privy Council considered a Scottish statute that required that the keeper of a motor vehicle identify its driver when that driver was alleged to have committed a covered offence. The statute made it a crime to fail to provide the identification information, thereby establishing the compulsion necessary under the self-incrimination privilege. Additionally, the statute was applied to a suspect who was asked to identify the driver of her car under circumstances clearly suggesting that she was intoxicated and would incriminate herself if she stated that she was the vehicle's operator. Nevertheless, the suspect answered the question and admitted to having driven the vehicle. She was ultimately charged with driving a car after consuming excessive alcohol, and the trial court ruled that the prosecutor could rely on her admission in making his case.

The Scottish High Court of Justiciary reached the conclusion that the use of the suspect's admission obtained pursuant to the compelled production statute violated Art.6(1) ECHR.[17] As Lord Bingham noted in his Privy Council judgment, the Scottish Court had viewed the right to resist compelled self-incrimination as applicable

[11] *Weh*, fn.4 above, at [54]. The right to silence and privilege against self-incrimination are limited to criminal proceedings and investigations, including those who are charged with a criminal offence as well as those considered "substantially affected" by the actions of the authorities within the meaning of the Convention. *Serves v France* (1999) 26 E.H.R.R. 265 at [42].

[12] *Weh*, fn.4 above, at [54].

[13] (2005) 40 E.H.R.R. 27.

[14] *ibid*., at [20].

[15] *ibid*., at [39]. *Vasileva* was cited by the Court in *Weh* as illustrating the fact that reporting obligations are a "common feature" of the legal systems of Convention signatories. *Weh*, fn.4 above, at [45].

[16] [2003] 1 A.C. 681.

[17] *Brown v Stott* [2000] S.L.T. 379.

to any communication that would contribute to proving an offence, whether the statements were made at trial or out of court. It had also found nothing in the nature of the traffic offence or in the difficulty of proving a violation that justified an exception to the principle assuring individuals freedom from compelled self-incrimination.

In contrast, Lord Bingham viewed the ECHR as establishing a more fluid human rights environment for purposes of the Art.6(1) fair hearing requirement. Since the provision creating the fair hearing duty does not explicitly include protection against compelled self-incrimination, it need not be treated as an unyielding right as long as the overall proceedings satisfy the fair hearing standard. Lord Bingham found support for this position in rulings of the ECtHR that had rejected the argument that protection against compelled self-incrimination under the Convention was absolute.[18] Opinions of the European Commission on Human Rights were also cited as proof of the flexible character of the Convention's self-incrimination principle.[19]

In determining whether the Scottish statute offended Art.6(1), Lord Bingham found it appropriate to weigh the individual's interest in freedom from compelled self-incrimination against the state's interest in securing compelled admissions and using them to obtain a criminal conviction. In that balancing process, emphasis was placed on the need to regulate the use of motor vehicles because of the high incidence of death and injury they produce. Pursuing that interest through a compelled disclosure requirement was viewed as a proportionate response to the problem, and the use of the compelled admission at trial did not undermine the right to a fair hearing. Lord Bingham appeared satisfied by the fact that the only disclosure called for was the identity of the vehicle operator, and noted that the penalty for non-compliance was a moderate fine without any custodial confinement. The state was thus pursuing a legitimate aim, and doing so in a reasonable manner.

North American approaches

The Supreme Courts of both Canada and the United States have addressed compelled self-identification statutes against the background of their unique legal environments. In *R. v White*,[20] the Canadian Supreme Court considered a self-incrimination challenge to legislation creating a statutory obligation to stop and report involvement in a vehicular accident. The defendant claimed that admission at trial of any statement made pursuant to the statute would constitute a violation of s.7 of the Canadian Charter which prohibits any deprivation of the "right to life, liberty and security of the person ... except in accordance with the principles of fundamental justice".[21]

[18] Reference was made both to *Murray*, fn.2 above, and *Condron v United Kingdom* (2001) 31 E.H.R.R. 1.

[19] The European Commission rulings cited were *DN v Netherlands* (App. No. 6170/73) 1975; *JP, KR and GH v Austria* (App. Nos 15135/89, 15136/89 and 15137/89) decision of September 5, 1989; and *Tora Tolmos v Spain* (App. No.23816/94) 1995. In each, claims that reporting requirements violated the ECHR were rejected.

[20] [1999] 2 S.C.R. 417.

[21] Canadian Charter of Rights and Freedoms, s.7.

The American Supreme Court has dealt with compelled self-identification legislation on two occasions. In *California v Byers*,[22] the Court considered a Fifth Amendment self-incrimination challenge to a statute similar to the Canadian vehicular stop and report legislation. More recently, in *Hiibel v Sixth Judicial District Court of Nevada*,[23] a Nevada law requiring that anyone lawfully stopped by the police identify himself when requested to do so was attacked on Fifth Amendment self-incrimination grounds. The decisions of the Canadian and American Supreme Courts adopted differing approaches in applying the right to freedom from compelled self-incrimination to the challenged legislation.

The Canadian ruling grew out of a car accident that resulted in a fatality. The driver who caused the death left the scene, but later called the authorities to report her involvement. In her subsequent prosecution for leaving the scene of an accident, the trial judge found that the driver made the report under compulsion,[24] but the prosecution proposed to prove the offence by relying in part upon the driver's compelled admission of involvement. This, however, was viewed as inconsistent with the principle against self-incrimination recognised in numerous Canadian decisions as a tenet of fundamental justice. But while the tension between admitting the compelled report at trial and the right to be free from compelled self-incrimination was evident, Canadian law had not previously treated the self-incrimination principle as an absolute right. The Court instead described the protection as "contextually-sensitive",[25] and noted that it was obligated under the Charter to balance any principle of fundamental justice, such as the self-incrimination privilege, against other individual and societal interests.[26]

Applying that analysis, the Court recognised that the compelled report contained relevant information that would be of assistance to the trier of fact in any prosecution for leaving the scene of an accident. However, from the perspective of the driver involved in a car accident, the act of engaging in the regulated activity of driving is not entirely voluntary given the realities of contemporary life. The Court further considered the relationship between the driver and public authorities at the time of the filing of the report to be adversarial in nature, and recognised that the setting was one that involved both an incentive for the driver to provide false information and for the police to abuse their authority in obtaining the driver's statement. These considerations led the Court to conclude that despite the evidentiary value of the compelled self-identification report, its use in a criminal prosecution would constitute a violation of the Charter.

As a solution to the problem the Canadian Supreme Court ruled that the statute would have to be interpreted to provide immunity against the use of the compelled report in any criminal prosecution. The state's interest in immediately obtaining information

[22] 402 U.S. 424 (1971).

[23] 124 S. Ct. 2451 (2004).

[24] The Canadian Supreme Court accepted the conclusion that the driver's report had been compelled: [1999] 2 S.C.R. 417, at [10], [90], [93]. However, the dissent observed that the finding of the trial judge that the report was compelled by the statute was inconsistent with the further observation that the statements made by the driver in the report were free and voluntary: *ibid.*, at [110] (L'Heureux-Dube J., dissenting). The analysis in the majority opinion, however, rested on the determination that a finding that the report was compelled was sufficient to raise the self-incrimination issue.

[25] *ibid.*, at [45].

[26] *ibid.*, at [47].

relevant to the enforcement of non-criminal vehicular regulations would thereby be accommodated, while at the same time the individual interest in not being compelled to provide the state with information for use in a criminal prosecution would be respected.[27] Prosecution of the individual providing the report would still be possible, but information compelled from the accused could not be used in that process.

In *Byers*, the US Supreme Court reached a conclusion on the self-incrimination consequences of a mandatory stop and report statute opposite from that of the Canadian Supreme Court in *White*. In an opinion by Chief Justice Burger for four members of the Court, the self-identification obligation was measured against the American Fifth Amendment prohibition that "no person . . . shall be compelled in any criminal case to be a witness against himself". Despite the very specific and apparently absolutist character of the American self-incrimination privilege, in contrast to the generalised Canadian fundamental justice and ECHR fair hearing standards, the Court's plurality opinion concluded that the tension between the competing state and individual interests had to be resolved through a balancing process.[28] This, in turn, produced the conclusion for the plurality that the stop and identify statute was not inconsistent with Fifth Amendment requirements.

Chief Justice Burger's opinion emphasised that the stop and identify statute was primarily aimed at the satisfaction of civil liability claims arising from motor vehicle accidents, not at providing a method to facilitate criminal convictions. This served to distinguish the legislation from prior American cases in which laws requiring self-reporting by gamblers[29] and gun owners,[30] as well as statutes mandating the registration of members of Communist organisations,[31] were held to violate the privilege against self-incrimination. Those were seen as reporting obligations applied to a "highly selective group inherently suspect of criminal activities" where the background was "an area permeated with criminal statutes", rather than being part of an environment that was "an essentially noncriminal and regulatory area of inquiry".[32]

Supplementing its balancing analysis, the plurality also concluded that the act of stopping after a traffic accident was not a testimonial communication of the sort barred by the American self-incrimination privilege. To the contrary, it was characterised as more akin to requiring an individual to appear in a police line-up or give a blood sample, both of which the Court had held to be outside the scope of the Fifth Amendment.[33] Even the obligation for the driver to disclose his name and address did not implicate self-incrimination concerns, the Court characterising this duty as "an essentially neutral act".[34] Neither the fact that compliance with the statute might lead to a prosecution that would not have occurred had the driver fled the scene, nor the possibility that the trier of fact might infer that the individual who stopped was the driver of a vehicle

[27] *ibid.*, at [71].
[28] *Byers*, fn.22 above, p.427.
[29] *Marchetti v United States* 390 U.S. 39 (1968); *Grosso v United States*, 390 U.S. 62 (1968).
[30] *Haynes v United States* 390 U.S. 85 (1968).
[31] *Albertson v SACB* 382 U.S. 70 (1965).
[32] *Byers*, fn.22 above, p.430, citing *Marchetti*, fn.29 above, p.47 and *Albertson*, fn.31 above, p.79.
[33] *United States v Wade* 388 U.S. 218 (1967); *Schmerber v California* 384 U.S. 757 (1966).
[34] *Byers*, fn.22 above, p.432.

involved in an accident was sufficient to convert the statute into a system compelling the production of testimonially communicative evidence.[35]

The US Supreme Court's most recent self-reporting decision extended the principle that such statutes do not offend the self-incrimination privilege to a general duty of self-identification. In *Hiibel*, the Court confronted a self-incrimination challenge to a Nevada statute requiring that anyone lawfully stopped by the police on reasonable suspicion must identify themselves to the authorities on request. As in *Byers*, the Supreme Court found no Fifth Amendment violation.[36]

Unlike the plurality in *Byers*, the *Hiibel* majority declined to rule on the claim that the statutory disclosures were not testimonial. Instead, the majority concluded that the defendant had not demonstrated a reasonable danger of incrimination arising out of the statutory self-identification requirement. The opinion expressed the belief that Hiibel's refusal to identify himself was not based on a fear of self-incrimination, but rather was due to his claim that "his name was none of the officer's business".[37] Beyond that, the Court noted that in criminal cases, "it is known and must be known who has been arrested and who is being tried".[38] However, if it could be shown in a particular case that the furnishing of identity information would provide the police with "a link in the chain of evidence needed to convict",[39] the Court indicated that it would then address the self-incrimination challenge and consider what remedy would be necessary if a Fifth Amendment violation was found.

Common themes and relevant policies

That governments need identification and activity information to enforce criminal and civil regulatory requirements is a self-evident truism. Acquiring such information by imposing compelled self-reporting obligations is, of course, a quick and efficient method to fulfil this need. However, as at least some legal precedents demonstrate, the right to silence and the privilege against compelled self-incrimination may limit the ability of the state to rely on mandatory self-reporting to provide regulatory data. The extent of that limitation is related to the nature of the setting in which self-reporting is sought, the scope of the official inquiry, and the extent of the government's use of the information submitted in response to the compelled reporting requirement.

[35] Harlan J., who provided the fifth vote for upholding the validity of the statute against the self-incrimination challenge, found that the circumstances presented a real risk of testimonial incrimination. *Byers*, fn.22 above, pp.438–439 (Harlan J., dissenting). His opinion, instead, was premised on his assessment of the history and purposes of the self-incrimination privilege along with an evaluation of the nature and significance of the other competing public interests involved in the statute: *ibid.*, p.449. Evaluated against this background, Harlan J. found that the state's regulatory scheme for motor vehicle accidents, including the application of criminal sanctions, did not offend the Fifth Amendment self-incrimination privilege. A contrary conclusion, in his judgment, would have threatened "the capacity of the government to respond to societal needs with a realistic mixture of criminal sanctions and other regulatory devices": *ibid.*, p.452.

[36] There was a separate Fourth Amendment search and seizure challenge to the statute which the Court also rejected. *Hiibel*, fn.23 above, pp.2457–2460.

[37] *ibid.*, p.2461.

[38] *ibid.*

[39] *ibid.*

Even though there are substantial differences between national legal systems, there is also widespread consensus on the importance of respecting both the right to silence and the privilege against self-incrimination, as well as general agreement on the importance of the values these doctrines serve. As expressed by the ECtHR in *Murray v United Kingdom*:

> "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."[40]

In *Funke v France*,[41] the Court had earlier pointed to the fact that the principle had already been adopted by the European Court of Justice as part of the law of the European Union.[42] Nevertheless, such general statements do not reveal whether specific self-reporting schemes are consistent with the right to be free of compelled self-incrimination. That task requires a more precise assessment of each reporting system and its impact.

At one extreme the state could structure its compelled self-reporting procedure to require that criminal suspects give truthful and complete answers to all relevant questions posed by criminal investigators, despite the self-incriminatory potential of their responses. However, this would strike at the heart of the self-incrimination principle and would therefore be the most difficult reporting system to justify. The most that could be said in support of such a requirement is that it would further the societal interest in the investigation of criminal offences, particularly where they are of a serious nature. But in reviewing homicide prosecutions arising out of the activities of the Irish Republican Army, the ECtHR rejected the argument that such "security and public concerns" were sufficient to supplant the right to silence.[43] Not surprisingly, the claim that self-incrimination infringements were necessary in the investigation of less serious crimes has also been rejected by the Court.[44]

Separately it is difficult to conceive of a self-reporting requirement that is incorporated as part of a criminal regulatory scheme being effective in producing useful information. To the contrary, it is more likely that the subject of the investigation would not truthfully respond to mandatory questioning, if he in fact chose to respond at all. Instead, the most likely result of such a system is to create an extra penalty for perjury or silence

[40] Fn.2 above, at [45].

[41] (1993) 16 E.H.R.R. 297 at [42].

[42] *Orkem SA (formerly CDF Chimie SA) v European Commission* [1989] E.C.R. 3283. That opinion included an extended review of the status of the self-incrimination privilege in various European jurisdictions: *ibid.*, at [99]–[110].

[43] *Heaney and McGuinness*, fn.10 above, at [58]. The Court reached the same conclusion in another IRA homicide case, *Quinn v Ireland* (App. No.36887/97), judgment of December 21, 2001, at [59].

[44] *Funke*, fn.41 above, at [44] (interest in the enforcement of customs laws) and *Saunders*, fn.3 above, at [74] (interest in the investigation of corporate fraud).

that could be added to the punishment for the underlying offence or imposed in lieu of such punishment if the authorities were unable to obtain sufficient evidence to sustain a conviction. This is hardly a worthwhile justification for a mandatory self-reporting obligation when weighed against the principle barring compelled self-incrimination.

Short of requiring the suspect to respond to the criminal investigator's questions, a self-identification obligation, perhaps coupled with a tax or fee, could be imposed on individuals engaged in categories of criminal activity. American legislation requiring the registration of gamblers, gun owners, and members of Communist organisations are illustrative of this approach. The registrant would not necessarily be required to provide details of his activities, but the fact remains that the mere filing of the registration document and payment of any tax imposed would alert the authorities to the individual's illegal conduct. Beyond that, compliance with the reporting requirement might itself warrant an inference of illegal activity if the prosecutor is allowed to produce the report in court and identify the defendant as the individual who submitted it.

Although a statute imposing a registration and tax obligation on illegal activities does not have to include a broad inquiry into the details of those activities, it still strikes at the core of the interests protected by the right to silence and self-incrimination privilege. Instead of furthering a true regulatory objective, a system requiring the self-reporting of past and potential criminal activity is itself part of the criminal law system. It would serve the purpose of alerting authorities to illegal activity and would achieve that goal by compelling individuals to incriminate themselves if they chose to comply. If the societal interest in crime control is not sufficient to outweigh the individual interest in freedom from compelled self-incrimination when criminal investigators are asking direct questions about the commission of a crime, the same balancing outcome should occur when the state is demanding the registration of individuals planning or engaged in criminal activities.

Arguably, criminally-oriented registration requirements could be saved by imposing a use immunity limitation. The state would then have the regulatory information, but would be prohibited from taking evidentiary advantage of that information in any subsequent criminal prosecution. However, if such systems are truly designed to assist in the criminal prosecution of those engaged in the illegal activities, it is likely that a use immunity restriction would severely undercut the value to the state of the self-reporting requirement. Moreover, it is not clear that use immunity would provide adequate protection for the interests furthered by the self-incrimination privilege. The immunity might prevent evidentiary use of the report and its contents in the suspect's prosecution, but it would still leave the authorities aware of the illegal activities learned through the report. Unless the immunity extended to both evidentiary and non-evidentiary uses of the information compelled from the suspect, it could not provide adequate protection for those forced into self-incrimination by the mandatory reporting requirement.

Because of these considerations, the principle against compelled self-incrimination should have the effect of invalidating reporting requirements whose primary objects are individuals planning or engaged in criminal activities. The self-incrimination intrusions such obligations present are direct, and they are balanced against regulatory motives that are likely to be secondary along with a potential for success that is doubtful at best. The conclusion of the ECtHR in *Heaney and McGuinness* that a statute requiring that suspects account for their movements and actions "in effect destroyed the very

essence of their privilege against self-incrimination and their right to remain silent",[45] is equally applicable to criminally-oriented registration statutes and should produce the same result. This would also be consistent with the US Supreme Court's invalidation on Fifth Amendment self-incrimination grounds of registration statutes that are focused on any "highly selective group, inherently suspect of criminal activities".[46]

A slightly different issue is raised where the government seeks an individual's identity in a criminal investigation as part of an otherwise legitimate encounter, rather than imposing a self-identification requirement as part of a criminally-oriented regulatory reporting system. If the encounter is not otherwise illegal, the authorities are not learning anything new as a result of the compelled self-identification other than the name of the individual. In contrast, where self-identification is required as part of a criminally-oriented regulatory system, the state will learn of the individual's involvement in the illegal activity from the report he files, a fact not likely to be previously known.

The nature of the analysis is illustrated by the reporting systems reviewed by the ECtHR in *Weh* and the US Supreme Court in *Hiibel*, both of which fall somewhat short of generating the same direct self-incrimination challenges as are present in mandatory criminal registration statutes. In *Weh* and *Hiibel*, reporting requirements were imposed on individuals because of circumstances that brought them to the attention of the police. The authorities were aware of their existence when the information demand was made, and neither the Austrian requirement that the owner identify the driver of his vehicle nor the Nevada statute requiring that an individual who has been lawfully stopped identify himself had the effect of bringing an otherwise unknown individual to the attention of the police.

It was also true that neither the Austrian nor the Nevada reporting statute was limited in its application to individuals who would risk incrimination by giving a truthful response, nor could the likelihood of those responses being self-incriminatory be calculated. Under the circumstances, it is understandable that both the ECtHR and the US Supreme Court refused to find the reporting systems at issue facially invalid. However, neither court ruled on the legitimacy of an individualised self-incrimination claim as a defence to a prosecution for failing to self-identify. That result was possible because in neither case had the defendant claimed that a truthful response to the identification demand would have been self-incriminatory.

Ultimately, however, where responding to the reporting demand in a criminal investigation would mean providing the state with evidence that could be used to secure a criminal conviction, the self-incrimination issue cannot be avoided. The argument could be made that since the principle against compelled self-incrimination under the ECHR is not absolute, the importance of the criminal investigation and the narrowness of the inquiry might well be deemed sufficient to counterbalance individual right to silence concerns. Thus far, however, the ECtHR has resisted allowing societal justifications to outweigh the self-incrimination principle when the intrusion involves a direct demand for self-incriminatory information in a criminal investigation.[47] In light of this background, any generalised claim that reporting demands associated with

[45] Fn.10 above, at [55].

[46] *Byers*, fn.22 above, p.430, citing *Marchetti*, fn.29 above, p.47 and *Albertson*, fn.31 above, p.79.

[47] See *Heaney and McGuinness*, fn.10 above and *Quinn*, fn.43 above.

criminal investigations further substantial public interests that are sufficient to override the right to silence would be difficult to sustain. Instead, each regulatory self-reporting obligation must be carefully assessed for its centrality to the regulatory system, the scope of the obligation it imposes, and the ability of the state to obtain the information in other ways, before a judgment can be made as to whether the interests furthered by the self-reporting requirement are of greater weight than the right to resist compelled self-incrimination.

Where a disclosure obligation is incorporated in reporting requirements that are part of a legitimate non-criminal regulatory scheme, the balance between societal and self-incrimination interests becomes more difficult. Reporting obligations are a critical component of the regulatory process, providing regulators with essential information while at the same time allowing the state to avoid employing more intrusive and expensive methods to achieve the same purpose. Such obligations are not aimed at criminal activities and normally do not raise self-incrimination concerns. As long as they remain entirely outside of the criminal justice process, no recognised right to silence or privilege against self-incrimination issue can be raised.

In contrast, if information submitted for legitimate regulatory purposes is subject to later use in a criminal prosecution against the individual who supplied the information, the self-incrimination interests of the defendant are directly affected. Legal systems have the choice of resolving the conflict by either allowing full use of the compelled information in both regulatory and criminal settings, enforcing the regulatory reporting requirement with a restriction barring the use of the compelled information in any criminal prosecution, or invalidating the reporting requirement entirely because of its potential self-incriminatory consequences.

To date, support for invalidating self-identification reporting requirements included in non-criminal regulatory systems has been limited to dissenting opinions. The approach they take is to adopt a broad view of the possibility of self-incrimination arising out of the compelled production even though no specific claim of self-incrimination is made.[48] The majority opinions, in contrast, look for an individualised claim of self-incrimination, and then judge whether to enforce it despite the legitimacy of the regulatory system of which the self-reporting requirement is a part. The Privy Council judgment in *Brown v Stott* and the Canadian Supreme Court decision in R. *v White* adopt this approach, although each reaches a different conclusion.

In *Stott*, the opinion of Lord Bingham upholding the Scottish reporting requirement emphasised the substantial public interest in dealing with the misuse of vehicles on the roadways balanced against the limited intrusion on the suspect's interests reflected in the single question asked of her, and the moderate and non-custodial penalty provided by the statute for refusing to respond. From Lord Bingham's perspective, despite the intrusion on the right to silence, the fairness of the overall proceedings was not impaired. What this analysis does not recognise, however, is that even if the intrusion is limited to a single question, it nevertheless attacks the "essence" of the right to silence and principle

[48] *Weh*, fn.4 above, Joint Dissenting Opinion of Judges Lorenzen, Levits and Hajiyevat, at [2;] *Reig*, fn.7 above, Joint Dissenting Opinion of Judges Hajiyevat and Jebens, at [3]; *Hiibel*, fn.23 above, pp.2461–2464 (Stevens J., dissenting).

against self-incrimination.[49] It represents the use of compulsion to obtain incriminatory information from a suspect, regardless of the setting in which the information demand is made. This attacks the core of the principle against compelled self-incrimination, and regulatory systems imposing such requirements should not be evaluated by applying a balancing process that lacks defined standards and is open to almost any interpretation.

This does not mean that the reporting obligation itself is invalidated. The self-incrimination problem only arises if the state seeks to use the contents of the report for both regulatory and criminal purposes. This is reflective of the approach employed by the ECtHR in *Saunders v United Kingdom* where it expressed disapproval of the use of the fruits of a compelled interrogation while accepting the legitimacy of an underlying regulatory system that obligated Saunders to respond to questions posed to him by regulatory officials.[50]

The Canadian Supreme Court in *White* adopted the same solution when confronted with a system compelling the reporting of accidents. It upheld the validity of the reporting requirement, but a grant of immunity made the contents of the report unusable in any criminal prosecution. The accident reporting system at issue may have had its home in the regulation of motor vehicles, but the Court did not consider the possibility of applying criminal sanctions to be remote.

Separately, it would be problematic to attempt to justify a balancing process that treated the public interest in avoiding car accidents as more substantial than the argument rejected in *Heaney and McGuinness* that IRA terrorism warranted overriding the principle against self-incrimination. Regulatory systems further important public health and safety interests, but measuring them against criminal statutes that protect individuals from personal violence and property loss is inherently subjective. That the self-reporting obligation called for by the regulatory system is itself a limited one does not serve to alter the fact that the core of the right to silence is breached whenever state compulsion is used directly to compel self-incrimination for use in a criminal prosecution.

This does not mean that every type of self-report will necessarily violate the principle against compelled self-incrimination. If all that is sought is basic identification data, as in *Vasileva* before the ECtHR and *Hiibel* before the US Supreme Court, or where a truthful response does not present an appreciable risk of self-incrimination, the claim of infringement of the right to be free of compelled self-incrimination is likely to be denied. Unless the real focus of the regulatory system is to compel self-incriminatory information from those who are likely to be engaged in criminal activities, facial attacks on the reporting requirement based on the principle against compelled self-incrimination should be rejected.

Admitting to being the driver of a car when the vehicle was believed to have been involved in a traffic violation, as in *Weh*, however, is another matter. The ECtHR was not faced in *Weh* with a refusal to respond based upon the principle against compelled

[49] In *Heaney and McGuinness*, fn.10 above, at [51], the Court rejected the argument that an infringement of the right to be free of compelled self-incrimination could be justified because of the presence of protections against abuse. The Court noted that the protections could not prevent impairment of the "essence" of the self-incrimination right at issue.

[50] *Saunders*, fn.3 above, at [67].

self-incrimination, nor did the US Supreme Court face such a claim in *Hiibel*. Where the facts support the assertion of the right to silence or privilege against self-incrimination, however, there is no principled way to avoid the conclusion that the self-incrimination claim must be respected.

Both the right to silence and the privilege against compelled self-incrimination relieve individuals of the obligation to provide the state with evidence that will be used to convict them of a criminal offence. Where the risk that the compelled reporting obligation will have that effect is present, courts should accept the legitimacy of the decision not to respond unless a guarantee against use of the information in any subsequent criminal proceeding can be given. It is true that this may not be the most efficient procedure for the collection of information since it limits the usability of whatever is learned. Nevertheless, the accommodation of a widely accepted human right requires this result.