



MacDermott Lecture 2001: Wringing out the fault: self-incrimination in the twenty-first century[†]

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For at the common law . . . his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men. (Blackstone, *Commentaries*, IV, 296.)

If you were sitting down today to set out the principles of a good system of criminal justice, with a blank sheet of paper and all the wisdom of hindsight at your disposal, you would probably start, as I would, with the principle that nobody is to be convicted of anything unless the court is sure of their guilt. You would probably go on, as I would, to say that it is for the prosecutor to prove the case for conviction and not for the accused to prove his or her innocence. You might be surprised in passing to learn that this particular heritage of the freeborn Briton is barely two centuries old; but the European Court of Human Rights has made it clear that the presumption of innocence is today as much a part of inquisitorial systems as it is of accusatorial systems like ours.¹

At this point you might pause. What is to be allowed to contribute to the proof of guilt?

Previous convictions, for example? Few things can point more tellingly to the likelihood of guilt than the fact that the accused has committed a similar crime half a dozen times before. The reason why we exclude such evidence is not that it is irrelevant: it is that it is so relevant that it is likely to eclipse everything else in the case. But because of the real possibility that it is only the defendant's record that has caused him or her to be singled out for suspicion and prosecution, or to eliminate mistake on the prosecutor's part by showing method on the defendant's,² we do from time to time let such evidence in, and we might want to adopt both the rule and the exceptions in our criminal justice code. A rigid inclusionary or exclusionary rule would inevitably create injustices.

Then how about the accused person's silence, whether at interview or in court? The law now allows this too to contribute to the proof of

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1 *Funke v France* (1993) 16 EHRR 297.

2 The rationale of admission is, however, strange. It is supposed to go to credit, not to propensity: *R v Jenkins* (1945) 31 Cr App R 1. If so, convictions based on a plea of guilty should have little or no weight.

guilt, provided juries are given strict warnings about first eliminating any innocent explanation for the silence and then ensuring that there is other credible evidence of guilt.³ The development has been intelligibly contested by advocates of civil liberties, but its best justification is that it probably does no more than corral within safe bounds something which the common sense of juries has always led them to do.

Meanwhile, still writing on the blank sheet, one would have to turn to things the accused himself has said which point to his guilt. (Both for convenience of syntax and in recognition of reality, my paradigmatic defendant is a man.) An admission of guilt is about as significant as evidence gets. But, like a string of previous convictions, it can mislead. It may have been made in fear or distress in order to put an end to an ordeal; it may come from a compulsive confessor; it may have been made in the hope of securing bail or facing a reduced charge. Well within the lifetimes of many of us in the United Kingdom, it may have been extracted by brutality or simply fabricated. So we would certainly put into our system the safeguards now spelt out in the PACE codes⁴ for ensuring that police interviews are conducted without oppression or improper inducement, that live recordings of them are made and that courts have power to exclude admissions improperly obtained.

But why only a power? Why not a duty to exclude such evidence? A duty of exclusion seems to follow straightforwardly enough, not least because it will deprive police misconduct of any reward. The problem is the unauthorised phone tap or raid or random search, perhaps undertaken mistakenly rather than maliciously, which turns up damning evidence of serious crime. What principle forbids a society to use such evidence to prosecute wrongdoers? The easy answer – the rule of law – turns back on itself once it is accepted that the detection and prosecution of crime are part of the rule of law. The answer arrived at not only by appellate courts throughout the common law world but by the European Court of Human Rights⁵ is that there is no principled answer. If you want a principle, it has to be either the common law's historic view that evidence is evidence no matter how it is obtained – a licence and an encouragement to the authorities to break the law – or the bald exclusionary principle adopted in 1961 by the United States Supreme Court⁶ and since then under almost constant siege.⁷ Both the United Kingdom and the European Court of Human Rights have settled into an uneasy position between the two poles, recognising that while in some cases the breach of legality will be so marginal as not to matter

3 See n 56 below.

4 Police and Criminal Evidence Act 1984, ss 66–67.

5 *Khan v UK* (2000) 8 BHRC 310.

6 *Mapp v Ohio* 367 US 643 (1961); *Miranda v Arizona* 384 US 436 (1966).

7 See *US v Dickerson* 120 S Ct 2326 (2000).

or so serious that it cannot decently be overlooked, in others it has to be painfully weighed against the importance of the evidence it has produced.⁸ The persisting difficulty is that there is no legal calibration of the scales.

But the common law itself always made one crucial exception: the rule that it did not matter how evidence had been obtained did not apply to confessions. Here, for reasons which are relevant to my topic, judges historically have taken it on themselves to exclude unfairly obtained admissions of guilt;⁹ and this self-conferred power has in our generation been raised to a higher-order principle by a statutory requirement¹⁰ to exclude confession evidence which the Crown cannot prove to have been obtained in circumstances casting no serious doubt on its reliability. I doubt, in the light of the bitter judicial experiences of recent decades, whether we would want our model system to retreat an inch from this position.

So we have reached a position in relation to routine police interviewing where self-incrimination is acceptable because – and only because – it cannot be used unless it has demonstrably occurred in risk-free conditions. While those conditions include voluntariness, the suspect may nowadays be volunteering an explanation because he has been warned that an adverse inference may be drawn from unexplained silence: and to that measured extent there is pressure to speak. For my part I do not find this morally or ethically repugnant, and as a trial judge I encountered no evidence (apart from the still unresolved problem¹¹ of suspects whose solicitors advise them without good reason to remain silent) that it worked injustice.

With self-incrimination now strictly monitored where it matters most, in the police station, you might wonder what is left to worry about. The answer is quite a lot. So let us go back for a moment to the ideal system. We can agree that nobody should have to account for themselves simply to satisfy an inquisitive official, and therefore that nobody's refusal to do so should be taken to connote that they have been up to no good. This much we can ascribe to the fundamental right to be let alone;¹² but that is a right which has nothing directly to do with self-incrimination: it is the larger and different right of silence. We may also be able to agree that, where officialdom has good grounds for suspecting you of an offence and tells you what the grounds are, not

8 Police and Criminal Evidence Act 1984, s 78.

9 See *R v Sang* [1980] AC 402, 437, per Lord Diplock.

10 Police and Criminal Evidence Act 1984, s76(2) ; Terrorism Act 2000, s76.

11 *R v Moshaid* [1998] Crim L R 420.

12 The phrase originates in S D Warren and L D Brandeis, 'The right to privacy' (1890) 4 Harvard Law Review 193. See now art 8 ECHR and *R v Director, Serious Fraud Office, ex p Smith* [1993] AC 1, 31, per Lord Mustill.

only what you say but what you don't say in response may be relevant at trial.

But a moment's reflection tells one that there is more to life in a developed democracy than this. A large number of private activities regulated by the state, albeit with the backup of criminal sanctions, depend on the honesty and self-discipline of those concerned. They may be financiers handling large sums of other people's money or drivers who like a drink. Such people from time to time may be required to account for themselves either to public officials or to opponents in litigation.¹³ What is to happen when such a person, compulsorily answering entirely legitimate inquiries from someone who up to that point had no particular reason to suspect them of crimes, or whose suspicions lacked proof, makes an incriminating admission? In bare principle, you could take one of three attitudes. You could say that both the question and the answer are writ in water because there is a fundamental principle that people cannot be required to incriminate themselves. Or you could recognise that the regulatory regime has a legitimate need for answers to such questions but prohibit the use of the answers in court. Or you could decide not only that there is a legitimate need for answers but that if the answers afford proof of criminality they should be able to be put before a jury like any other evidence.

The first of these approaches, the total exclusion of incriminating questions, has the virtue of universality and of apparent simplicity (I say apparent because in practice there are few questions to which an incriminating answer is not possible, and it is frequently only the person being questioned who knows whether the answer will in fact incriminate him). It also has the vice – to which I am going to devote a substantial part of this paper – that, an old and never very watertight vessel, it is today leagues adrift from its anchorage and listing badly. The third approach, total admissibility, dovetails with the central purpose of particular legal regimes backed by criminal sanctions, which is to be able to prosecute people who abuse a privileged position. Its downside, at least where the equivalent of PACE procedures is not in place, is the risk of oppression and malpractice in pursuit of admissions. But the second approach – that you can ask the question but can't use the answer – has the vices of both and the virtues of neither. It does nothing to protect the innocent from oppression or therefore from unjust administrative sanctions: to do that, strong procedural controls

13 Lord Templeman in *Istel Ltd v Tully* [1993] AC 45, 53–55, instanced the Theft Act 1968, s 31 (dealings with property and execution of trusts); Supreme Court Act 1981, s 72 (intellectual property rights and passing off); Companies Act 1985, s 434 (inspectors' powers); Insolvency Act 1986, s 291 (official receiver's powers); Criminal Justice Act 1987, s 2 (powers of Director of Serious Fraud Office).

are needed. Instead, by shutting out every forensic use of incriminating answers obtained under legal compulsion, however careful and controlled the procedure by which they have been obtained, it protects the guilty from conviction. I shall have, even so, to return to it because, remarkably, it is the impasse into which the modern law of human rights in Europe has been driven.

To see how this has come about it is necessary to unravel a long skein of history. As often happens, a significant part of the history consists of participants' own beliefs about it. Blackstone, from whom my title is taken, held that the privilege against self-incrimination was an inalienable part of the Englishman's heritage: 'No man is to be examined to prove his own infamy.'¹⁴ It is found as a judicial maxim as early as 1568, stated plainly by Dyer CJ on behalf of the Court of Common Pleas.¹⁵ The redoubtable John Lilburne at his trial for high treason in 1649 said to the court: 'By the laws of England I am not to answer questions against or concerning my selfe', and Keble J reassured him: 'You shall not be compelled'.¹⁶ Dalton's *Countrey Justice* in 1618 claimed it as a maxim of the common law, and Barlow's *Justice of the Peace* in 1745 asserted that, by keeping the accused out of the witness box, the maxim showed the law of England to be a law of mercy. In fact there was nothing peculiarly English about it: it was a widespread legacy of the mediaeval *jus commune* with roots deep in the law of the early church in Europe and the near East. In today's world it has become a shield which protects corporations from having to divulge their own wrongdoing to the state by whose licence they exist and an elephant trap for public agencies trying to combat crime. How has this happened?

It was in 1898 that English juries became able for the first time to hear an accused person's sworn testimony in his own defence. Until that date the common law had considered anyone accused of felony incompetent as a witness on his own behalf.¹⁷ He could speak from the

14 *Commentaries*, III, 370

15 *Of Oaths Before an Ecclesiastical Judge ex officio* (1568) 77 ER 1308, 1309, cited by Leonard Levy, 'Origins of the Fifth Amendment and its critics' 19 *Cardozo Law Review* 821, in reply to scholars cited below.

16 *The Triall of Lieut Collonell John Lilburne* (1649), 26. The right of a suspect not to incriminate himself or those close to him was a constant demand of the Levellers in the Civil War: D Veall, *The Popular Movement for Law Reform, 1640–1660*, 152–154, cites numerous sources including the 1649 Agreement of the People.

17 It was one of the much-remarked anomalies of the system that a defendant in misdemeanour, like a civil party, had the right to counsel.

dock in order to question the Crown's witnesses, call his own,¹⁸ make an unsworn statement and argue his case to the jury. Many defendants had made brave and effective use of these limited rights, though many more had watched their fate unfold in frightened silence. But until the eighteenth century defendants in criminal trials, however wealthy, were on their own: not even the great men whose downfall is recorded in the early State Trials volumes had lawyers with them, although they might be allowed to consult counsel if points of law arose.¹⁹ Since if they did not speak nobody spoke for them, a right of silence meant little or nothing in court; and with this came the pressure to speak and make admissions, as often as not under direct questioning from the court.²⁰ Indeed, until the development during the eighteenth century of the modern concept of the burden of proof, criminal procedure was essentially a dialogue between the accused, albeit unsworn, and the court.²¹

Defence counsel were first allowed into felony trials by the Treason Act of 1696, a measure which followed more than three decades first of judicial revanchism for the regicide of 1649 and then of the anti-Popish show trials and Jeffreys' Bloody Assize. It applied in treason cases only; but in a preamble that anticipates article 6(3) of the European Convention on Human Rights the 1696 Act spelt out the need for the accused to have 'just and equal means of defence of their innocencies'. It is likely to have been the same notion that from the 1730s began to

18 It was the Hale Commission which introduced this right during the Commonwealth: Veall (n 16 above) 154.

19 See *The Trial of Lieut Collonell John Lilburne* (1649), 30: Keble J: 'If matter of law does arise upon the proof of the fact, you shall know it, and then shall have Counsell assigned to you.'

20 There are many recorded instances. John Bunyan, *A Relation of the Imprisonment of Mr John Bunyan, written by Himself*, recounts in detail how in 1661 the justices at the Bedford quarter sessions interrogated him about the apostasy with which he was charged. J H Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (1977) at n 4, mentions *Throckmorton's Case* (1554) 1 St Tr 869, 872: 'How say you, Throckmorton, did you not send Winter to Wyat into Kent, and did devise that the Tower of London should be taken. ...?'

21 For example, the Gunpowder Plotters, after Attorney-General Coke's long and angry accusation, were allowed 'to make their defence. Since their deed was evident, they used very few words to defend themselves, but they denied ... many of the circumstances indicated in the indictment. They confessed to the plot, but showed no regret ...' (Oswald Tesimond's narrative, Stonyhurst MS, tr from the Italian, Folio Society, 1973). Coke famously met his match in Sir Walter Raleigh: 'Your words cannot condemn me; my innocency is my defence. Prove against me any one thing that you have broken [ie breached], and I will confess all the indictment ...' Coke's successor as Attorney-General came off still worse with Lilburne: 'Do not interrupt me Mr Lilburn.' 'I pray you then do not urge that which is not right nor true, but notoriously false; for if you persevere in't, I will interrupt you' (ibid 142)

persuade judges, prompted perhaps by the increasing use of counsel to conduct prosecutions, to allow defendants too to have counsel. By the end of the eighteenth century, it has been estimated, counsel was appearing for the defence in about one trial in three at the Old Bailey²² and the first celebrity defence advocates were emerging.²³

It was the continued infiltration of lawyers from the civil into the criminal justice system as the nineteenth century unrolled which produced the extraordinary paradox of accused persons who were still not permitted by the common law to give evidence but whose remaining role in the proceedings – questioning witnesses, arguing law, addressing the jury – was now assumed entirely by their advocates. A French observer remarked as early as 1820 that in consequence

in England, the defendant acts no kind of part: his hat stuck on a pole might without inconvenience be his substitute at the trial.²⁴

In fact for many decades judges continued to make the accused himself rather than his counsel address the jury until, under pressure from the Bar, Parliament legislated in 1836 to give defence counsel this right. And it was when, as the nineteenth century closed, the accused was first permitted to testify in his own defence, that Parliament by the same measure decreed that if he did so his privilege against self-incrimination went: if he entered the witness box he could be made to say on oath whether or not he was guilty – but not, except in special situations, be asked about his previous convictions: that, as I have said, would have been over-incriminating.²⁵ This, of course, is still the law; and it has been joined during the late twentieth century by a series of other situations in which Parliament has made it clear – or thought it had – that the public interest in the exposure of incriminating facts overrides the personal privilege of withholding them.²⁶

While at trial the prosecution was by the nineteenth century expected – as it still is – to prove guilt without the accused's help, in the pre-trial phase, when accused persons were held in appalling prison conditions from which few could reach out to secure evidence in their own defence, the law afforded the accused no privilege whatever against

22 J M Beattie, *Crime and the Courts in England, 1660-1800* (cited Langbein (n 20 above) n 96).

23 William Garrow was the George Carman of the last two decades of the eighteenth century.

24 M Cottu, *De l'Administration de la Justice Criminelle en Angleterre* (Paris 1820) (tr anon, London, 1822; cited Langbein (n 20 above) at nn 81, 97).

25 Criminal Evidence Act 1898, s 1, proviso (e) and (f), now immaterially amended by the Youth Justice and Criminal Evidence Act 1999, sch 4, para 1. Although most American states had anticipated this measure, it was not adopted in the state of Georgia until 1962.

26 See n 13 above and n 60 below.

self-incrimination. By an Act of 1555 known as the Marian Statute, anyone arrested for felony was to be taken promptly before a justice of the peace, whose duty was to take down in writing anything, including things said by the accused, which was ‘material to prove the felony’. In cases of treason and other high felonies, the same task was carried out by the law officers of the crown or the Privy Council. This was not the inquisitorial *juge d’instruction* system in which all evidence, pro and con, has to be investigated, but a search for incriminating evidence from accusers and accused. Voluntary confession was naturally encouraged,²⁷ but there was no formal inhibition on the threats or inducements to confess which might be held out to the defendant. The common law courts did not themselves use torture but in state cases, until its virtual banning by statute in 1641,²⁸ the Crown’s prerogative was used to authorise torture in order to secure confessions.²⁹ The entire record of accusation and interrogation was sent up to the assize court and – for the better part of two centuries – read out to the jury. It was against this that the accused had to do the best he or she could without legal assistance.³⁰

27 The clerk of the peace’s vivid record of the trial of the Lancaster ‘witches’ in 1612 (*The Wonderfull Discoverie of Witches in the County of Lancaster* (1613)) illustrates the importance attached to unforced confessions: Elizabeth Device ‘made a very liberall and voluntarie Confession, as hereafter shall be given in evidence against her, upon her Arraignment and Triall’; and Bromley J, passing sentence, said: ‘very few or none of you, but stand convicted upon your own voluntarie confessions and Examinations ... What persons of your nature and condition ever ... had more liberty given to plead or answer to every particular point of Evidence against you?’

28 Langbein (n 20 above) traces records of 81 such cases between 1540 and 1640; but there will necessarily have been more. The 1641 Act, known as the Body of Liberties, by s 45 forbade torture for information save after conviction in a capital case, for the purpose of discovering co-conspirators, and then ‘not with such Tortures as be Barbarous and inhumane’. The provision was reproduced almost *verbatim* in the 1648 *Laws and Liberties of Massachusetts*. But as late as Blackstone’s time the use of the *peine forte et dure* to compel persons charged with felony or petty treason to plead rather than stand mute of malice (and so save their estates from forfeiture) was regarded as lawful (*Commentaries* IV, 320–322), and it was still in use earlier in the eighteenth century: see E S Turner, *May It Please Your Lordship*, 68.

29 Sir John Fortescue, *De Laudibus Legum Angliae* (1546), ch 22, denounces the use of torture in France; but his editor Amos (1825) points out that the products of torture were accepted in evidence by the English courts, and that such signatures as those of Coke, Bacon and (post-Restoration) King William of Orange are found on warrants authorising its use.

30 Lord Mustill in *R v Director, Serious Fraud Office, ex parte Smith* [1993] AC 1, 40, pointed out that there has been legislative provision since the sixteenth century for the potentially incriminating investigation of bankrupts.

It was during the eighteenth century that judges began to insist on oral testimony from those Crown witnesses who were available; but it was not until Jervis' Act of 1848,³¹ by when defence counsel had become a dominant feature of the trial process, that it became a requirement of the law that every accused person must be told at the start of his pre-trial examination that he was under no obligation to answer questions and warned that any answers he gave might be used against him at trial.³²

Jervis' Act marks the final transformation of a resonant aphorism, historically much honoured in the breach, into a sanctified principle of English law. It had by then been incorporated not only in the fifth of the amendments made in 1791 to the Constitution of the United States but (in discrepant forms) in many of the antecedent American state constitutions, treated in each case, as it still is, as a self-evident civil right.³³ Like the separation of powers which first Montesquieu and then Madison found it useful to discern in the British system of government, it was less a fact than an idea whose time had come. But to say this is not to say that the idea had come from nowhere. It was an idea with a very long, though not an entirely pure, pedigree.

The leading mid-twentieth century scholar of the Fifth Amendment, Professor Leonard Levy, considered³⁴ that the privilege against self-incrimination was an Anglo-Saxon legal device designed to stem the oppressive effects of the continental church's inquisitorial processes which disfigure the history of the later middle ages. Writing as he was in the long evening of the McCarthy era, in which the American Supreme Court had let the Fifth Amendment be drained of much of its content, as had happened in previous decades to the First, and supported as he was by Wigmore's great work on the law of evidence, Levy's approach, chiming closely with Maitland's and Holdsworth's account of English legal history, is perfectly comprehensible. It is the

31 11 & 12 Vic 42.

32 This account relates only to official prosecutions. Until the formation of police forces after the first quarter of the nineteenth century a high proportion of prosecutions were private. There is an important body of work on the development of adversarial procedures at common law and its relationship to the development of policing and official prosecutions. See D J A Cairns, *Advocacy and the Making of the Adversarial Criminal Trial 1800–1865* (Oxford University Press 1998); S Landsman, 'The rise of the contentious spirit: adversary procedure in eighteenth-century England' (1990) 75 Cornell Law Review 497.

33 L Levy, *Original Intent and the Framers' Constitution* (1988), ch 12. This privilege is also found in the Hawaiian constitution of 1852 and the Tongan Bill of Rights of 1875: A B W Simpson, *Human Rights and the End of Empire* (2001).

34 L Levy, *The Origins of the Fifth Amendment: The Right against Self-Incrimination* (1968).

account adopted in modern common law judgments.³⁵ But recent American scholarship, with fuller access to early sources, has called this account in question.³⁶ The revised account is itself contested, not least because of its unaccountably benign view of the inquisitorial proceedings of the mediaeval church, but it does shed fresh light on the source and diffusion of the notion that nobody should be required to incriminate himself.

The maxim *nemo tenetur prodere seipsum* – literally, nobody is required to betray himself – was taken by mediaeval scholars to have its origin in the writings of the fourth-century ecclesiast St John Chrysostom.³⁷ What St John wrote, in fact, according to Gratian (the only surviving source) was:

I do not say to you that you should betray yourself in public nor accuse yourself before others, but that you obey the prophet when he said 'Reveal your ways unto the Lord'.³⁸

This is some way from saying that nobody should be made to confess, but like much other sanctified text it did service as the source of a succession of mediaeval assertions of a privilege against self-incrimination.³⁹

But mediaeval church practice mocked the principle.⁴⁰ Le Roy Ladurie's celebrated study of the church annals of Montaignou between 1318 and 1325 found the future Pope Benedict XII of Avignon, Jacques Fournier, presiding as bishop of Pamiers over an inquisition court which interrogated on oath anyone denounced for Albigenian heresy, using

35 For example, that of the Australian High Court in *Sorby v The Commonwealth* (1983) 152 CLR 281, and the English cases cited in n 64 below.

36 R H Helmholz, C M Gray, J H Langbein, E Moglen, H E Smith, A W Alschuler, *The Privilege against Self-Incrimination: Its Origins and Development* (1997); and R H Helmholz, 'The historical origins of the privilege against self-incrimination at common law' (1995) 92 Michigan Law Review 1047.

37 C 347–407, Archbishop of Constantinople 398–403, but originally trained as an advocate: hence the soubriquet Chrysostom – golden-mouthed.

38 Helmholz et al (n 36 above) p 26.

39 Levy, in his recent article (n 15 above), accepts that he was wrong to doubt the presence of the maxim in the canon law texts: indeed he cites his own work identifying it in Augustine, Aquinas and Gratian. But he is adamant that 'the right was not a canon law invention because the canon law merely protected the revelation of an unsuspected crime but required a suspected person to incriminate himself' (ibid 846). It is certainly arguable that there is not much daylight between the acknowledged exceptions to the privilege and Levy's proposition about its meaning.

40 The principle is not even mentioned, for example, in the Byzantinist Walter Ullman's essay 'Some mediaeval principles of criminal procedure', LIX Juridical Review (1947), reprinted in his *Jurisprudence in the Middle Ages* (Variorum 1980).

as much physical torment as was needed to produce a confession.⁴¹ For his victims, including the five who were in consequence burnt at the stake, as for the thousands of others who were tortured in the course of the mediaeval church's inquisitions, the maxim *nemo debet prodere seipsum* did not have a great deal of significance.⁴² It was held by ecclesiastical lawyers not to apply to charges of heresy, nor to other charges of grave criminality, nor to accusations based on reputed criminality (*fama*) rather than proven acts, nor to cases where the proof was considered strong. In point of law it is nevertheless apparent that it was into the church's own doctrines that the maxim against self-incrimination was first introduced.⁴³ Although these proceedings were in origin accusatorial,⁴⁴ manuscript records show that the privilege was not infrequently invoked on examination of suspected recusants under the *ex officio* oath, despite the mass of exceptions.⁴⁵ And importantly, the maxim survived in the popular mind.

In sixteenth-century England the ecclesiastical courts, from the time of the Reformation a limb of the Crown, and the specially created Court of High Commission,⁴⁶ made use of the *ex officio* oath, accompanied sometimes by torture, to expose apostasy and heresy

41 E Le Roy Ladurie, *Montaillou: Cathars and Catholics in a French Village 1294–1324* (1975), introduction to the English edition (1978), xiii–xvii. In addition to being held in fetters in a tiny cell and fed on black bread and water, the modes of pressure to confess included excommunication, which would have had the effect of closing off recourse to confessional privilege, and – in state-promoted cases – torture.

42 The record of Joan of Arc's interrogation under oath by the Bishop of Beauvais shows her protesting: 'By my faith, you might ask me such things as I will not tell you' (Orleans MS, third session, 24 February 1431; Folio Society, 1956, 70); but the interrogation went on for another 13 sessions, and at her trial she was formally admonished 'that she must answer and tell the truth about such things as touch her trial; and that it was essential that she should do so, since the doctors [ie lawyers] were of this opinion' (ibid 131). Interestingly, she was offered counsel and refused.

43 See the multiple early sources cited in Helmholtz et al (n 36 above) ch 2, 17–18.

44 Ullman (n 40 above) 10.

45 To the exceptions mentioned above one can add, what came to be constantly asserted in the English spiritual courts, that the privilege did not apply where the purpose of the proceedings was reform and not punishment: Helmholtz (n 36 above) 30. I am not convinced that Helmholtz is justified in treating the torture of suspected heretics as having been marginal in England: it seems to have been routine, for example, in Thomas More's Lord Chancellorship.

46 The court of Star Chamber had been set up (or at least confirmed in its powers) by statute in 1487. The papal jurisdiction was abolished in England as from Easter 1534 and replaced by a high court of delegates. From 1559, under 1 Eliz 1, c 1, s 8, courts of high commission were set up with 'wide and often indeterminate jurisdiction in ecclesiastical causes' (G Bray, *The Anglican Canons 1529–1947* xcv–xcvi).

(not always distinguishable from sedition and treason). No privilege against self-incrimination was known to them. It is a commonplace of legal history that the courts of common law, despite their own dubious practices, responded with writs of prohibition to limit the power and effectiveness of the ecclesiastical courts; and it is probably in this process that the common law first claimed and in due course was accorded the credit for devising what was in fact a much older privilege. But it is a matter of debate whether the courts of common law, which until the eve of the Civil War themselves tolerated the use of torture when occasion required, regarded the privilege against self-incrimination as the *reason* for interfering with the ecclesiastical courts. The major recorded challenge to the High Commission's use of the *ex officio* oath, the case of *Maunsell and Ladd*⁴⁷, heard by the King's Bench in 1607, failed to secure the issue of a writ of *habeas corpus*. The argument from principle of Nicholas Fuller, one of the radical lawyers of his day, not only failed to convince a majority of the five judges that there was an overriding privilege against self-incrimination but resulted in his being prosecuted and gaoled for his arguments by the High Commission itself.⁴⁸ Popular belief came in the early seventeenth century to ascribe the privilege to Magna Carta and the Petition of Right, but it was not until well after 1640 that the privilege began to be articulated with a note of reverence by the secular courts,⁴⁹ and then in a system in which it meant little at trial, and nothing at the investigatory stage where it was most relevant. Even so, the reasons repeatedly given for it are relevant to my present purpose.

First, it was reasoned by the canonists, we are all sinners: nobody would be safe if the secular state could demand as of right that individuals own up to crimes of which there was no other evidence. There remains, it seems to me, an important truth in this. It is why I have already suggested that in the ideal system there can be no question of a roving right of inquiry on the part of the state, which would turn the rule of law into something closer to a reign of terror. The problem is answered, however, not by a blanket prohibition on incriminating questions but by a strong precondition that such questions may be asked only in situations prescribed by law and legitimately calling for an answer. I will come back to the important question of what situations these might be.

Secondly, the mediaeval schoolmen reasoned, there was an important divide between the private confession of sins in church and the public excommunication of crime before the ecclesiastical courts. It is

47 (1607) Harl MS 1631, fo 353v and 358v.

48 See C M Gray in Helmholz (n 36 above) 70–77.

49 I have omitted the contested issue of Coke's attitude: see eg Gray (n 36 above) 77–81.

intelligible that such a distinction should be adopted by a theocracy which demanded, as it still does, the unstinting confession of sins, criminal or not, and the doing of penance for them as a condition of spiritual salvation; and the legal insularity of penitential admissions continues to be both a reality and a real problem. It may well be, in fact, that the primary meaning of the maxim was that the confession of sins was not to amount without more to the confession of crimes.

Thirdly, however, it was considered invidious to place suspects in what a modern American judge has called the cruel trilemma of perjury (if they lied), contempt (if they stayed silent) and conviction (if they owned up),⁵⁰ especially in legal systems in which perjury was a common and serious charge. Whether the avoidance of psychological pressure really was a consideration in the cruel systems of inquiry, prosecution and punishment which the mediaeval church operated when its authority was threatened, or whether it was a rationalisation of systems which deprived the accused of an equal voice with his accusers, is less important to my present purpose than the moral problem it presents today and to which I will return.

What also matters, of course, is the received axiom itself, endowed with classical and theological respectability, which in our era has acquired independent life and vigour. To the historical evidence that the roots of the axiom are both longer and older than the Anglo-Saxon legal tradition one can add the striking contemporary fact that in two of the leading cases in the European Court of Human Rights judges from a total of twenty-four countries concurred in reading the right of silence and the privilege against self-incrimination into the guarantee of a fair hearing contained in article 6(1) of the Convention.⁵¹ They described these as 'generally recognised international standards which lie at the heart of the notion of a fair procedure'.⁵² Such striking testimony to the ubiquity of the principle in legal cultures as removed from each other as those of Finland, Turkey, Poland, Spain, Slovakia, Switzerland and the United Kingdom seems to speak convincingly in favour of at least this much of the revisionist thesis. But what has given the principle an iconic modern status which historically it never enjoyed?

50 Per Goldberg J, *Murphy v Waterfront Commission* 378 US 52, 55 (1964).

51 *Funke v France* (1993) 16 EHRR 297; *Saunders v UK* (1996) 23 EHRR 313. I have included the dissenters, since they dissent not from the general proposition but in relation to its ambit. I understand from European colleagues that the former Soviet states recognise the principle and that Soviet law did so too. Once again, however, autocracy honoured it in the breach: see M Šlingova, *Truth Will Prevail* (Merlin 1968) for an account of how Beria's police, without any physical force, broke down the Czech leader Otto Sling and made him confess in open court a series of imaginary crimes, for which he was executed.

52 Ibid para 68.

The privilege against self-incrimination was not going to become, as it did become, the boast of Georgian England without attracting the caustic eye of Jeremy Bentham. Bentham as usual gave no quarter in his assault, and his beady-eyed advocacy of enforced confession as an engine of truth overlooked the many ways in which it might be an engine of cruelty and falsehood. But there is a real sting, even if his vocabulary is no longer acceptable, in his characterisation of the suspect's moral dilemma as 'an old woman's reason' and of the notion that the accuser should not look to the accused for evidence as 'a foxhunter's reason'.⁵³ Those whose interests are served by the exclusion of self-incriminating evidence, Bentham asserted, are 'evildoers of all sorts' and 'lawyers of all sorts'. At least he was prepared to distinguish between the two. But he was presciently right about the lawyers. The development of defence advocacy, as Georgian and Regency barristers made their lucrative way into the criminal process, and the accompanying enunciation of formal rules of presumed innocence, strict proof and – another novelty – silent defendants made the nineteenth century a criminal lawyers' heyday.⁵⁴ When, in the late Victorian era of penal reform, the accused was at last given a voice equal to that of his accusers, the price he was required to pay – an entirely logical one – was the qualified forfeiture of his common law right not to incriminate himself. It has since become an axiom of criminal practice that the defence case stands at its highest at the moment when the Crown closes its case, for since 1898 the accused has faced a new and equally cruel dilemma: to give evidence and risk being cross-examined to perdition, or to stay silent and risk the inference⁵⁵ that he is hiding something. In criminal investigations the privilege still holds good – but with the important rider, since 1994,⁵⁶ that declining to answer may legitimately lead to the drawing of adverse inferences in court. The privilege is not, however, confined to criminal investigations: well before Jervis' Act it had become applied to

53 J Bentham, *Rationale of Judicial Evidence* (1828 edn) V229 ff.

54 In *Procurator Fiscal, Dunfermline v Brown* [2000] SLT 379, 385, Lord Rodger, the Lord Justice General, noted that in Scotland too the right of silence and the right against self-incrimination had been known since at least the beginning of the nineteenth century.

55 The risk of the inference was always there, however clearly the judge told the jury that it was impermissible.

56 Criminal Justice and Public Order Act 1994, s 34. The principle has been sanctioned by the European Court of Human Rights in trials by judge alone (*Murray v UK* (1996) 22 EHRR 29), and the Court's subsequent decisions (esp *Condron v UK* [2001] EHRR 1) show that the same will apply to a properly directed jury. Recent Home Office research indicates that the proportion of suspects refusing to answer questions has fallen since the 1994 enactment from 23% to 16%, but that the proportion making incriminating admissions has remained the same: T Bucke, R Street and D Brown, *The Right of Silence: The Impact of the CJPOA 1994* (Home Office 2000).

disclosure of documents and facts in civil proceedings and to answers capable of leading not to prosecution but to forfeiture.

So I come back to a present in which two legal imperatives confront each other. One is the need of regulatory and legal systems to be able in specified situations to insist on answers to awkward questions and, if the answers warrant it, to use them to prosecute their authors. The other is a European Human Rights Convention, binding on the United Kingdom as a treaty since 1950 and now patriated as a governing element of our domestic law, which has been held by the European Court of Human Rights in Strasbourg to forbid, as contrary to the guarantee of a fair trial, any use of exacted answers to convict the person giving them.

It has to be observed first how far we have come from the *jus commune* and the concerns which gave rise to the axiom. We are not looking at a threat to give the authorities a roving commission of inquiry into people's private lives, though the axiom remains a needed barrier to that possibility. We are not considering invading the secrecy of the confessional. We are, it is perfectly true, looking at regimes which pose the 'cruel trilemma' of perjury, contempt or conviction – but they are specific regimes to which nobody has to sign up unless they are prepared to accept the regulatory system that goes with them. It is this which, I would argue, is the critical difference between such regimes and the uninvited inquisitor.

Judge Martens in his powerful dissent in the *Saunders Case*⁵⁷ in Strasbourg spelt this out very clearly; but not persuasively enough for the majority for whom the maxim *nemo tenetur prodere seipsum* appears to have possessed a talismanic quality. They accepted that it was permissible for answers to be demanded to incriminating questions put by DTI inspectors who were inquiring under statutory powers into illicit practices in the Guinness takeover bid for Distillers, and for the answers to be used for both administrative and prosecutorial purposes. They accepted, too, that the privilege against self-incrimination did not extend to materials taken by compulsion from the suspect – documents, blood samples and so forth – because, they said, this was how the privilege was 'commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere' (a curious echo of the mediaeval body of exceptions which swamped much of the principle). But, said the majority, the principle remained intact where the compulsion was to give evidence against oneself. They would not, they said, decide whether the privilege was absolute or whether it could

57 (1996) 23 EHRR 313, 350.

properly be infringed in particular circumstances – but they went on, in a brief passage which gives little indication of the depth of issues below its surface, to say:

It [the court] does not accept the Government's argument that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could justify such a marked departure as that which occurred in the present case from one of the basic principles of a fair procedure. ... The public interest cannot be invoked to justify the use of answers obtained in a non-judicial investigation to incriminate the accused during the trial proceedings.

That, with all respect, sounds very much like the enunciation of an absolute right, yet by judges whose own jurisdictions, it appears, all recognise a welter of exceptions to the principle. It also perhaps reflects the fact that the UK's first line of defence had not been one of legal principle but an endeavour to distinguish the damaging but purportedly self-exculpating answers given by Mr Saunders to the DTI inspectors from truly self-incriminating answers. For entirely comprehensible reasons, since the Strasbourg approach is heavily fact-oriented, the question of principle was argued only as a fallback.

Having recognised the legitimacy of regulatory regimes which can insist on having answers to relevant questions, the court took what I have picked out as the second, compromising, course and decided that although it was legitimate to ask an incriminating question it was illegitimate to use the answer in court. That, it seems to me with respect, is the worst of all possible worlds – a world in which the best possible proof of criminality is on the record and cannot be used because it has not been more circuitously and less reliably obtained.⁵⁸

How serious is the problem? How many areas of public administration and personal activity does it affect? A good impression can be obtained by looking at the mopping up operation conducted by the United Kingdom in the wake of its defeat in the *Saunders* case. The Youth Justice and Criminal Evidence Act 1999 amends eleven important pieces of primary legislation passed between 1982 and 1992, together with their Northern Ireland counterparts, most of them designed to detect financial malpractice before innocent people lose their savings or investments. The amendment in each case takes the broad form of forbidding the use of the information obtained by

58 It echoes – whether consciously or not I do not know – one of the answers given in past centuries to those who argued that obligatory answers to church inquisitions were an inducement to commit perjury: the canon law forbade the use of such answers to prove perjury in court: Helmholz (n 36) 30, citing Julius Clarus (d 1575), *Practica Criminalis*, Q 45 no 10. But the answers could be used to prove heresy, for which the penalties were even worse.

statutory investigation in any subsequent criminal proceedings except on a charge of giving false information to the inquiry.⁵⁹ One has only to look at the purposes of the amended provisions to see what a swathe this has cut through the financial regulatory system: general investigations into insurance companies; documents obtained from insurance companies; documents and evidence produced to inspectors conducting investigations into companies; insolvents' statements of affairs; statements made by directors facing disqualification; answers given to inspectors investigating building societies' affairs; investigations of persons carrying on investment businesses; investigations into insider dealing; information required from and investigations into banking institutions; statements required by the Director of the Serious Fraud Office; powers for assisting overseas regulatory authorities; inspections required by the Friendly Societies Commission; statements required in Scotland by a nominated officer.⁶⁰

Recent post-*Saunders* legislation has likewise been tailored to fit. The Financial Services and Markets Act 2000 gives the Financial Services Authority major powers of investigation and – if the investigation warrants it – powers to impose conditions on providers' conduct, to take administrative or civil proceedings to obtain redress for people who have lost money because of providers' misconduct, to censure and impose financial penalties on them, to withdraw their authorisation or approvals, and lastly and importantly to prosecute for crimes such as money laundering. The Act gives the FSA four objectives in the deployment of these powers:⁶¹ to maintain market confidence, to promote public awareness, to protect consumers and to reduce financial crime. But in deference to *Saunders* it forbids the FSA to rely on statements obtained under its statutory powers of investigation, and at a stroke obstructs one of Parliament's own explicit objectives, the reduction of financial crime. What sense does this make?

59 Youth Justice and Criminal Evidence Act 1999, sch 3. Such provisions are not entirely consequential on *Saunders*: of the measures mentioned in n 13 above, s 72 of the Supreme Court Act 1981 and s 2 of the Criminal Justice Act 1987 contained similar inhibitions.

60 Respectively the Insurance Companies Act 1982, s 43A and 44; Companies Act 1985, ss 434 and 447; Insolvency Act 1986, s 433; Company Directors Disqualification Act 1986, s 20; Building Societies Act 1986, s 57; Financial Services Act 1986, ss 105 and 177; Banking Act 1987, ss 39, 41 and 42; Criminal Justice Act 1987, s 2; Companies Act 1989, s 83; Friendly Societies Act 1992, s 67; Criminal Law (Consolidation) (Scotland) Act 1995, s 28. Among other NI Orders in Council, the Proceeds of Crime (NI) Order 1996 is similarly amended. It is necessary to add, however, that the coupling of authority to demand answers with a prohibition on their use in criminal proceedings (other than proceedings for giving false answers) is not new: see Theft Act 1968, s31(1), Supreme Court Act 1981, s 72, Children Act 1989, s 98, Criminal Justice Act 1987, s 2.

61 Ss 3–6.

The tide has been stemmed in the United Kingdom, for the present at least, by the decision of the Privy Council as the final court of appeal on devolution issues.⁶² A visibly drunk woman who had told police officers in Dunfermline that a nearby car was hers, was required by them under s 172(2)(a) of the Road Traffic Act 1988 to say who had just been driving it. On the basis of her answer – ‘It was me’ – she was prosecuted for drunk driving. The sheriff was disposed to let in the evidence of her admission, but the High Court of Justiciary, driven principally by the decision in *Saunders*, held the answer to be inadmissible. The Privy Council took the opposite view. The five opinions deserve far fuller attention than I can give them here, but in essence the Judicial Committee considered *Saunders* either to be distinguishable or its reasoning to be too uncertain to be followed. They held that the section 172 power to demand an incriminating answer was a proportionate and therefore a legitimate response to a major social problem. The decision insists – as I would also wish to do – that the privilege⁶³ against self-incrimination is purposive, not doctrinal, and that its legitimate use is a question of the proportionality of means to ends, not of rigid rules.⁶⁴

62 *Sub nom Brown v Stott* [2001] 2WLR 817. Austria, interestingly, had followed the same trajectory but in reverse. By two decisions in 1984 and 1985 the Constitutional Court held that a requirement of the *Kraftfahrgesetz* (traffic law) requiring the owner in specified situations to name the driver was an impermissible invasion of the privilege against self-incrimination. In 1986 the Austrian parliament responded by adding a clause to the *Gesetz* expressly overriding the privilege. Neither this nor the decision in *Brown* has so far been contested in Strasbourg. But see n 76 below.

63 I hope it is clear why – *pace* Professor Levy, who is adamant (n 15 above) that it is a *right* not to answer – I use the word privilege. Everyone seems to accept that incriminating questions can be asked and therefore that they can be voluntarily answered. Fifth Amendment thinking, like that of the drafter of s 14(1) of the Civil Evidence Act 1968 (‘the right ... to refuse to answer any question or produce any document or thing’), holds there is a right not to answer. Strasbourg thinking accepts that, at least in a statutory regime, there is no right not to answer, but privileges the answer by making it inadmissible in criminal proceedings.

64 The House of Lords in recent years have expressed serious doubts about the meaning and validity of the privilege itself. The subject-matter of the two principal decisions (*R v Director of the Serious Fraud Office, ex p Smith* [1993] AC 1, *A&T Istel v Tully* [1993] AC 45) has now moved from the domestic to the European arena; but the speeches are a powerful critique of any notion of an absolute right in the modern world, and they deserve to be read in any fresh consideration of the *Saunders* case. See also, from a historical angle, A W Alschuler, ‘A peculiar privilege in historical perspective’ in Helmholz (n 36 above) ch 7; and from a criminal justice angle, A A S Zuckerman, ‘The right against self-incrimination: an obstacle to the supervision of interrogations’ (1986) 102 Law Quarterly Review 43.

Treating it as a rigid rule has not only given us the anomalous decision in *Saunders*. It has brought the principle into disrepute by disapplying it, without any explained rationale, to possessions and intimate samples which, because they do not consist of spoken or written words, somehow escape the doctrine altogether.⁶⁵ The Court of Justice of the European Communities, despite its policy of protecting recognised human rights, has declined to include the privilege in the rights it considers to be protected by Article 6.⁶⁶ And the privilege can be seen in almost parodic form in the consequential endeavours to give corporations the same protection as human beings from the consequences of self-incrimination.⁶⁷ While the United States,⁶⁸ Canada⁶⁹ and – marginally – Australia⁷⁰ have resisted this curious teleology, the courts of the United Kingdom have adopted it. An early and debatable Court of Appeal decision⁷¹ that corporations enjoyed in full the privilege against self-incrimination was adopted without argument four decades later in the House of Lords⁷² because of the historical accident that, both parties before the House being corporations, neither had an interest in disturbing a decision which accorded them a coveted privilege. Yet what answer is there to what the US Supreme Court said almost a century ago?:

The corporation is a creature of the state. ... It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not ... inquire whether they had been abused, and demand the production of the corporate books and papers for that purpose.⁷³

– or, it follows, if it could not then prosecute the company or its officers where their answers and their papers showed that they had committed crimes.

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- 65 The exception made in *Saunders* in favour of the exaction of documents appears to controvert the ECtHR's own decision in *Funke v France* (1993) 16 EHRR 297, as the dissenting judges in *Saunders* pointed out. The [DC/CACD] in England has accepted that such a demand breaches the privilege but was divided as to whether the breach was justifiable: *R v CCC, ex p the Guardian* [2000] UKHRR 796.
- 66 *Orkem v Commission* [1989] ECR 3283.
- 67 See D Feldman, 'Corporate rights and the privilege against self-incrimination' in *Corporate and Commercial Law: Modern Developments* (1996).
- 68 *Hale v Henkel* 201 US 43 (1906). And it has restricted the ability of corporate officials to claim privilege in their own right: *Braswell v US* 487 US 99 (1988).
- 69 *R v Amway Corp* (1989) DLR (4th) 309.
- 70 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 68 ALJR 127.
- 71 *Triplex Safety Glass Co v Lancegaye Safety Glass* [1939] 2 KB 395.
- 72 *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547.
- 73 *Hale v Henkel* 201 US 43 (1906), 74–75.

The jurisprudence of the European Court of Human Rights itself has become trapped in this thicket. Since it is only to criminal proceedings that Article 6, and therefore the right not to incriminate oneself, relates, much effort has been devoted to distinguishing criminal from civil and regulatory proceedings.⁷⁴ This, it seems to me, is an added misfortune. Many internal systems of regulation, both statutory and consensual, carry powers far more draconian than any court possesses – not infrequently including the power to deprive people of their livelihood. Why such systems, by being called regulatory or disciplinary, should not be expected to assure the fundamental procedural rights of those subject to their determinations I do not understand, and I do not believe that the common law, which gauges the needs of fairness substantively and not formally, understands it either. What the formal distinction has done is provide a limited but illogical escape from a generalised privilege against self-incrimination; but with it have gone the formal protections against oppression which are the genuine up-side of a legal privilege now accorded to a teenager charged with dropping a fast-food carton in the street but not (so far as the ECHR is concerned) to a person facing extradition on a charge carrying life imprisonment.⁷⁵ The substantive baby has gone out with the procedural bathwater.

One way of cutting through the present tangle is, no doubt, to regard the maxim as historically little more than humbug on the lips of torturers and bullies, and to forget it. To do so would be not only to ignore its potential restraint of worse abuses but to abandon as much of its moral content as remains a real force for good. We ought to be able to do better than our ancestors. A measured and proportionate approach, I want to suggest, can respectably form part of the good legal

74 Decisions which have held state action against individuals not to be criminal in character, and so to fall outside art 6, include: *Krone-Verlag v Austria* (1997) 23 EHRR CD 152 (power to fine for breach of injunction); App 12827/87, 4 July 1988 (imprisonment in aid of injunction); *X v UK* (1984) 37 DR 158 (extradition decisions); *X v UK* (1979) 20 DR 202 (security classification of prisoners, impacting on prospects of release); *Galloway v UK* [1999] EHRLR 119 (mandatory drug testing of prisoners); *X v UK* (1980) 21 DR 5 (regulatory restriction on insurance activities).

75 Cf the important decision of the House of Lords in *R v Hertfordshire CC, ex p Green Environmental Industries* [2000] 2 WLR 273, holding that the privilege could not be claimed against inspectors acting under s 71(2) of the Environmental Protection Act 1990, but that PACE s 78 afforded a control on the use of the answers at any subsequent trial. Once again, the question whether corporations can invoke the privilege at all was not debated. See H Davies and B Hopkins (2000) 'Environmental crime and the privilege against self-incrimination' 4 International Journal of Evidence and Proof 177.

system we began by considering, not least because it conforms well to the requirements of the European Convention on Human Rights.

There are two irreducible standards to which legal methods for obtaining evidence must conform. One is that the use of force or fear to obtain information is morally unacceptable. The other is that no intrinsically unreliable evidence should ever be used to secure a conviction. The two are linked in that it is oppression which characteristically renders confessions unreliable, as we know to our cost in the United Kingdom. But each also has its own rationale. I have explained why I entirely accept that it would be oppressive to allow the state to exact information from people at will. The question is whether it is necessarily oppressive to allow the state both to demand information from people undertaking particular activities and to use it in court if it incriminates them.

There are two possible exits from the anomalous approval by the European Court of Human Rights of only the first, not the second, part of this exercise. One is to go the logical next step and let the answers be used in court. But the other – the first of the responses I began by describing – is to conclude that, precisely because the use of enforced answers to secure convictions is the logical sequel of permission to obtain them, the ideal system should not allow incriminating questions to be asked in the first place. This, in fact, appears to be the position now taken by the European Court of Human Rights in relation to the Republic of Ireland's counter-terrorism legislation.⁷⁶ If, however, the detection and prosecution of crime is a worthwhile social purpose, it is necessary to ask why not? What both history and morality show to be serious answers to the question are that individual liberty ceases to have meaning if the state can demand answers at will, and that the use of violence or fear to obtain answers is both unacceptably degrading and evidentially counterproductive. But these answers leave significant space: they allow room in particular for a democratic polity to specify by legislation activities, notably those which the state has to regulate in the public interest, which not only are to be hedged by criminal sanctions but for which a controlled power to insist on truthful answers to awkward questions is a necessary and proportionate element of effective regulation. Where such a need for regulation backed by

76 *Heaney and Quinn v Ireland* (21 December 2000) appears to compound, without addressing, the conflict between *Funke* and *Saunders* by holding that a statutory obligation to answer questions directed to detecting terrorist activity on the part of the suspect was a separate violation of the privilege against self-incrimination, as well as of the right to silence and the presumption of innocence. This may be because the first position was not argued in *Saunders*. The *Heaney* decision may nevertheless signal a shift from the second to the first position – the rule of total exclusion – at least in a criminal as opposed to a regulatory context. Whether this will be sustainable in the post-11 September 2001 world remains to be seen.

investigative powers and by criminal sanctions is established, to make the resultant answers inadmissible in evidence has more in common with snakes and ladders than with a just legal system. It protects the guilty from conviction without meeting any of the historical or moral purposes of the privilege.

But precisely because obligatory answers necessarily involve an invasion of autonomy, there has to be a cogent case for each such measure. And because there is already an element of oppression in the mere compulsion to answer, strong protections (of a kind now familiar from Code C to the Police and Criminal Evidence Act 1984) are necessary to ensure that the dignity of the individual is not further compromised. Subject to such controls, however, as the European Court of Human Rights has already recognised, every society is entitled to penalise people who decline to cooperate with a regulatory system to which they have voluntarily subjected themselves. And it is this – the voluntariness of subjection to each regime – which seems to me the final element of the pattern in the good legal system. There will be many activities which, although theoretically voluntary (owning goods or homes, for example, or using public services) are in practice a condition of life. But there are others (running a public limited company, or handling large sums of other people's money, or – more marginally perhaps – driving a car) on which a society is entitled to impose a condition of cooperation with a regulatory regime, backed by criminal sanctions. People are free take it or leave it; but if they take the plums they take the duff. If you want to give it a legal name, it is waiver.⁷⁷ It is what already occurs in legal and social reality every time someone takes a job as a shop assistant or a bus conductor: they will be required to account for the money they handle, and they will face prosecution if their account reveals that they have been stealing it.

This seems to me to be both the logic of *Brown* and the illogicality of *Saunders*. In regulatory as opposed to contractual systems, the control which remains in place is not only the will of a democratic legislature, essential though that initially is. It is the United Kingdom's treaty obligation to observe the European Convention on Human Rights. Legislation which permits the use at trial of obligatory answers to incriminating questions must still pass the test of proportionality, a test fuller and subtler than the bare balance of interests or a broad

77 See *R v Institute of Chartered Accountants, ex p Nawaz* (CO/2577/95, 25 October 1996, Sedley J).

sense of fair play.⁷⁸ In the present context it has to start from the high historic and cultural premium placed upon the privilege; it needs to recognise that the privilege at its most basic remains a shield against kinds of oppression and risks of injustice which are absolutely unacceptable; and in this light it needs to ask whether nevertheless the particular incursion meets a legitimate and necessary objective by the least invasive means available. Such means will need to include clear procedural protections, though logically they cannot include a caution to the effect that the examinee need not answer. While some compulsory answers may be sufficiently used for regulatory purposes only, it will in my view be justifiable only in exceptional cases to exclude the use of incriminating answers for the very purpose their name suggests – incrimination. In our system there is the final filter of a judicial power to exclude evidence which, though admissible, will make the trial unfair. But because it is a power without clearer guidelines for its exercise than the sense of fair play – something that will inevitably vary from judge to judge – it is initially no substitute for measured legislative provision.

No civilised system of law can hand officials the power to demand answers at will or at large. But an unscrupulous financier can cause just as much human misery as a drunk driver, and a good legal system is entitled, I suggest, to offer both prospective drivers and prospective financiers a deal: this is a regulated activity; undertake it by all means, but be prepared to answer to the authorities for what you do, and to have your answers put before a jury if they show that you've broken the law.

Regulatory systems, of course, are only an aspect of the larger process of the detection and prosecution of crime. In the world of which we have been citizens since the events of 11 September 2001, the looming question is whether – in the absence of any prior regulatory bargain between the individual and the state – the prevention and detection of terrorism is by itself sufficient to justify the exaction of answers from suspects or from those believed to be concealing information; and if so, on pain of what sanctions. It is not very long since the Israeli high court, under its distinguished chief justice Aharon Barak, outlawed torture as a legitimate expedient in all circumstances. The European Court of Human Rights has now added lesser sanctions such as imprisonment to the prohibited expedients for extracting information.⁷⁹ But in

78 Thus Sir Sydney Kentridge QC in his Tanner Lectures, *Human Rights: A Sense of Proportion* (Oxford February 2001) argues that the UK's courts have still to fine-tune their application of the concept of proportionality to the constriction of fundamental rights. It is not enough, he points out, to say that a fair balance has been struck.

79 See n 76 and text above.

Europe, at least, there is a difference between the two: torture and inhuman treatment are unconditionally outlawed by Article 3 of the Convention; imprisonment is not. It may be that here too the question is going to become one of the proportionality of ends to means, a topic on which the jurisprudence developed in Strasbourg furnishes important guidance. For it is when you stand on the edge of an abyss that it becomes supremely important not to lose your balance.