The Right to Silence in the Jurisprudence of the European Court of Human Rights and the Supreme Court of the United States of America

Author: Ivóna Bieber

Central European University - Legal Studies Department
Supervisor: Károly Bárd
Budapest, Hungary
2012.

I. Executive summary

In my thesis I will compare the jurisprudence of the European Court of Human Rights (ECHR) and the Supreme Court of the United States of America (Supreme Court) on the right to silence.

After a short introductory part I will examine the legal basis of the right in both legal systems, the European Convention on Human Rights (Convention) and the Constitution of the Supreme Court of the United States of America. I will analyze the jurisprudence of both the ECHR and the Supreme Court in detail to determine the content of the right and examine its relation to other fundamental rights connected to criminal justice. I will draw particular attention to compulsion defined as a negative element of the right.

I will show that despite the fact that the course of development of the jurisprudence unquestionably differs under the two systems examined, the underlying principles and values evoked by both courts for the support of the right – fair trial and human dignity in particular – are very similar. Moreover, both judicial bodies unequivocally distance themselves from the inquisitorial criminal procedure.

However, the views of the ECHR and the Supreme Court are significantly different on the scope and limits of the right. Through analyzing the procedures, evidence and statements covered by the right to silence I will demonstrate that the American system offers special protection only to testimonial evidence, while the ECHR extended the right to silence to handing over self-incriminating documents as well.

As regards the crucial question of limitation, I will demonstrate that the ECHR allows adverse inferences to be drawn from the defendant's silence in criminal procedures, although only

under very narrowly interpreted circumstances. This would be unimaginable in the United States under the no comment rule established as early as 1878. However, the implied waiver doctrine of the Supreme Court has been recently extended to the right to silence which should make defense counsels deeply concerned, as I will argue in the last part of my thesis.

I would like to thank my supervisor, professor Károly Bárd for his encouragement and advice, and my family for their patience and support.

II. Table of Contents

III. Introduction

Nemo tenetur prodere seipsum. No man is bound to accuse himself.

The principle that the individual has a right to remain silent in a criminal procedure is a right deeply rooted in the modern criminal law in both the United States of America and the member states to the Council of Europe. Accordingly, both the ECHR and the Supreme Court offers a wide protection thereto. Obviously, these two institutions are different by nature, one of them being the supreme judicial body of a federal state with strong powers and the other an international court established by sovereign states. However, both adjudicate individual human rights cases and deliver binding judgments which makes their case-law comparable. However, when reading judgments one should always bear in mind the inherent differences.

The right not to incriminate oneself has a longer history in the United States, as the principle was incorporated to the federal Constitution in 1791 along with the freedom of expression, the right to assembly and other fundamental rights. The keystones cases of the jurisprudence of the Supreme Court are also old enough. They were decided fifty years ago. Since then the Justices re-examined and re-interpreted the Fifth Amendment several times but always upheld the core finding, namely, that the right to silence in criminal procedures is an unalienable fundamental right and no adverse inferences may be constitutionally drawn from exercising this privilege. The Supreme Court found the right so deeply embedded in democracy that it stated that its roots of the right to silence "*go to the nature of a free man and to his relationship to the state.*"[1]

The ECHR was established in 1959. Accordingly, it is significantly younger institution than the supreme judicial body of the United States of America. Its first decision pertaining to the

[1] United States v. Wade, 388 U.S. 218,261 (1967) – Justice Fortas in his dissenting opinion

right to silence was delivered in 1993, only twenty years ago and the interpretation of the right, its content and limits are still evolving. However, just like the Supreme Court the ECHR is also firmly convinced that the right to silence deserves strong protection. It famously held in its leading case *Murray v. The United Kingdom* that

> *…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.*[2]

When mentioning generally recognized international standards, the ECHR probably had in mind the International Covenant on Civil and Political Rights (ICCPR), according to which, "*[i]n the determination of any criminal charge against him, everyone shall be entitled …not to be compelled to testify against himself or to confess guilt…*"[3]

Indeed, the Covenant is a generally recognized international human rights document: 167 states are parties thereof in 2012.[4]

Additionally, it is not only legal experts who are aware of this precious right. The principle had become part both of the American and European popular knowledge thanks to American television series and movies regularly depicting the administration of the Miranda warnings. Laymen would even cite the warnings by heart.

On the other hand, the program for the abolition of the right to silence is not new at all. As Jeremy Bentham (1748-1832) famously remarked: "*Innocence claims the right of speaking, as guilt invokes the privilege of silence.*" Accordingly, the "*highest interest and… most ardent wish*" of an innocently accused person will be to speak in order to "*dissipate the cloud which*

[2] John Murray v. The United Kingdom, Application no. 18731/91, Judgment of 8 February 1996, para. 45
[3] Article 14(3) g) of ICCPR
[4] See the homepage of the United Nations Treaty Collection: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last accessed 18.11.2012. 22:14)

surrounds his conduct and give every explanation which may set it in its true light."[5] The innocent, obviously, does not want to be ashamed of and punished for a deed he did not commit and therefore would speak up to vehemently deny the charges. At the same time, a rational *guilty* defendant would want to avoid punishment and the harm caused by it and would seek to grab every opportunity to conceal the truth.[6] Accordingly, as Bentham wittily observes, criminals –but only criminals – would entrench the right to silence to the Magna Carta, if they were the ones to draft it.[7]

If this convincing argument is indeed true, why then is this right so highly praised by both the ECHR and the Supreme Court of the United States? I will examine, analyze and compare the case-law of both institutions to find out the answer.

[5] Jeremy Bentham: A Treatise on Judicial Evidence cited by Daniel J. Seidmann and Alex Stein: *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 Harvard Law Review 2000, 440.

[6] Daniel J. Seidmann and Alex Stein: *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 Harvard Law Review 2000, 456.

[7] Jeremy Bentham: A Treatise on Judicial Evidence cited by Daniel J. Seidmann and Alex Stein: *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 Harvard Law Review 2000, 456.

IV. Legal Basis and its Historical Perspective

After reading the laudation of the right to silence in *Murray*– namely, that the right to remain silent lies "*at the heart of the notion of a fair procedure under Article 6*"[8] – one would think that the right to silence secured itself a prominent place in the European Convention on Human Rights (Convention). On the contrary, the right to remain silent was left out from this document when it was drafted back in 1950. Accordingly, it was not "preordained" that the Convention would be interpreted in a manner to include the right to silence.[9] Moreover, the Council of Europe missed its opportunity to incorporate the right in Protocol No. 7 a quarter century later.[10] Then it recognized the right to appeal in criminal matters (Article 2), compensation for wrongful conviction (Article 3), right not to be tried or punished twice (Article 4), but not the privilege against self-incrimination. Though this action of the Council might seem strange at first glance, it might have a convincing rational explanation. If the right to silence had been guaranteed among other safeguards of fair trial in the provisions of Protocol No. 7, it would have not been binding for those opting not to ratify the document. The member states parties to the Convention would certainly have the right to make a decision like that. The Council not only evaded this outcome but also gave the ECHR an opportunity to argue that the right to silence was already protected by the Convention and to impose this binding interpretation to all parties of the Convention regardless of their ratification of the protocol, which it indeed did in 1993.[11] After the two missed opportunities of the Member States it was finally the ECHR that deduced the right to silence from the right to fair hearing guaranteed by Article 6 (1), according to which,

[8] Murray, para. 45
[9] Mark Berger: *Self-Incrimination and the European Court of Human Rights: Procedural Issues in the Enforcement of the Right to Silence*, 5 European Human Rights Law Review, 2007, 515.
[10] Protocol No. 7 was adopted in 1984.
[11] Stefan Trechsel: *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005, 361.

> *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*

Given the fact that Protocol No. 7 entered into force only five years later in 1998, this path proved to be more efficient, though probably not the neatest solution from the perspective of sovereignty of state parties. [12]

In the United States of America the privilege against self-incrimination is expressly guaranteed by the most basic legal document, the Constitution. According to the Fifth Amendment "*[n]o person…shall be compelled in any criminal case to be a witness against himself.*" The amendment, being part of the Bill of Rights – the first ten amendments to the Constitution – was adopted as early as 1789 and ratified two year later in 1791. However, these dates are a little bit misleading, as for more than fifty years the right was interpreted in a way to disqualify the testimony of the defendant due to conflict of interests.[13] This ban was finally abolished only in the second half of the 19th century and triggered fierce disputes.[14] Those in favor of the change argued that by disqualifying the accused from testifying the state presumes that every accused is guilty and would commit perjury if allowed to take the stand.[15] Those opposing the reform argued that the abolishment would in practice deprive defendants from their right not to speak guaranteed by the Fifth Amendment, as defendants not testifying would be seen by jurors and courts as perpetrators caught red-handed. [16] To evade this unfavorable consequence, they added, rational individuals would at least contemplate committing perjury to deceive the jury and the judge.[17] To find a compromise between the conflicting views, a federal statute was enacted in 1878 that secured the right to testify for the

[12] Not to mention the fact that some state may not have even ratified it or ratified it only at a later point.
[13] Lissa Griffin: *Is Silence Sacred? The Vulnerability of Griffin v. California in a Terrorist World*, 15 William & Mary Bill of Rights, 2007.
[14] Albert W. Alschuler: *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent,* 94 Michigan Law Review, 1996, 2661.
[15] ibid.
[16] ibid.
[17] ibid.

accused but, at the same time, prohibited any comments from the prosecutor's side regarding the silence of the accused and presumption of guilt if the individual failed to take the stand.[18] Only five years later the Supreme Court examined the constitutionality of this federal act in *Wilson v. United States*.[19] In that judgment, the district attorney said turning to jurors:

> *I want to say to you, gentlemen of the jury, that if I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven, and testify to my innocence of the crime.*[20]

The Supreme Court reversed a federal conviction that was partly based on this comment suggesting that the silence of the accused is evidence of his guilt. That is how the famous no comment rule was established and confirmed.

As this was a federal act, it did not, however, mean that the privilege against self-incrimination was ensured in all criminal procedures throughout the 51 states. Up until 1964 it was applicable only in federal criminal cases. It was finally then that the Supreme Court expanded the scope of applicability of the right to silence to state level in criminal cases. It held in *Malloy v. Hogan*[21] that the individual enjoys the protection of the right to silence in state procedures as well by incorporating it through the Due Process Clause of the Fourteenth Amendment according to which "*…nor shall any State deprive any person of life, liberty, or property, without due process of law.*"[22]

The Supreme Court argued:

> *It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was*

[18] Lissa Griffin: *Is Silence Sacred? The Vulnerability of Griffin v. California in a Terrorist World*, 15 William & Mary Bill of Rights, 2007, 934-935.
[19] Wilson v. United States, 149 U.S. 60 (1893).
[20] Wilson v. Unites States, 149 U.S. 60,61 (1893).
[21] Malloy v. Hogan, 378 U.S. 1 (1964).
[22] Lissa Griffin: *Is Silence Sacred? The Vulnerability of Griffin v. California in a Terrorist World*, 15 William & Mary Bill of Rights, 2007, 936-937.

> *asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.*[23]

Consequently, *Malloy* was a true turning point in the American history of the right to silence. Since then all American citizens have been included in the protection from compulsion to testify in all criminal procedures. Accordingly, the difference in time of recognizing the right to silence in the ECHR system and the United States, at least in practical and procedural sense, is not as great as it appears at first. Nevertheless, it should not be forgotten that the doctrine and its supporting arguments existed and evolved since *Wilson*.

[23] Malloy v. Hogan 378 U.S. 1,11 (1964).

V. Content

The content of the right to silence and its relation to other fundamental rights is hard to read out from either jurisprudence, though significantly harder in case of the Council of Europe system due to, first of all, lack of textual support in the Convention. However, even when the ECHR finally recognized it in *Funke v. France,*[24] it did not provide much assistance regarding its content and only by reading the subsequent decision in *Murray v. The United Kingdom*[25] and *Saunders v. United Kingdom*[26] do we get closer to solving the mystery.

On the other hand, in the United States of America the right not to incriminate oneself was included in the Constitution. Accordingly, it was without doubt that the core content of the protection offered by the Fifth Amendment is the prohibition of compelling a defendant to be a witness against himself in his own criminal case before a court. It was originally not meant to protect the accused at the investigation phase.[27] However, the Supreme Court extended the content and scope of the right step by step. Accordingly, it is true for both systems that an inclusive assessment of the right is possible only through a case-law analysis.

A. The evolution of right to silence in the ECHR case-law

Deriving the right to silence from the right to fair hearing was not a self-evident path to take for recognizing it. Initially, the European Commission of Human Rights[28] in *K. v. Austria*[29] - a drug trafficking case – in 1992 connected it to freedom of expression guaranteed in Article 10 of the Convention arguing that the right to remain silent is a negative aspect of the right to

[24] Funke v. France, Application no. 10828/84, Judgment of 25 February 1993.
[25] John Murray v. The United Kingdom, Application no. 18731/91, Judgment of 8 February 1996.
[26] Saunders v. The United Kingdom, Application no. 19187/91, Judgment of 17 December 1996.
[27] David S. Romantz: *'You Have the Right to Remain Silent' – A Case for the Use of Silence as Substantive Proof of a Criminal Defendant's Guilt*, 38 Indiana Law Review, 2005, 1.
[28] The K. case never reached the Court, as it ended with a friendly settlement between the applicant and Austria.
[29] K. v. Austria, Application no. 16002/90, Judgment of 13 October 1992.

free speech. The applicant was formally interrogated as a witness, but by providing incriminatory testimony against the dealers, he would have admitted that he purchased drugs from them and thus committed a crime. For this reason, K. refused to answer to interrogating police officers and was fined and subsequently deprived of liberty for this action. He turned to the ECHR and alleged violation of his rights guaranteed under articles 6 and 10 of the Convention.

The Commission interestingly began with examining the case with a view to freedom of expression protected by Article 10 and then finding a violation concluded that it was not necessary to examine fair trial concerns separately. The reason for the Commission's reluctance to engage itself in a deeper analysis might be that the applicant was formally not charged, while Article 6 protects those charged with a criminal offence.[30] However, the Commission stepped over this formalistic approach and found a violation of article 6 in 1997 despite the fact that the applicant was not a person formally charged.[31]

As noted earlier, it was finally in *Funke*, a cornerstone case, where the ECHR named and placed the right not to incriminate oneself to its current position in its system of human rights. The case concerned a custom administration procedure, in which the applicant was fined for failing to provide self-incriminating bank statements about his foreign bank accounts. The ECHR held that

> *The special features of customs law (...) cannot justify such an infringement of the right of anyone "charged with a criminal offence", within the autonomous meaning of this expression in Article 6 (art. 6), to remain silent and not to contribute to incriminating himself.*[32]

[30] Károly Bárd: *Fairness in Criminal Proceedings – Article Six of the European Human Rights Convention in a Comparative Perspective*, Budapest, Hungarian Official Journal Publisher, 2008, 276. (Hereinafter: Bárd)
[31] See: Serves v. France, Application no. 20225/92, Judgment of 20 October 1997.
[32] Funke, para. 44.

This development was something many agreed with, though some did not see it coming. As Emmerson noted,

> *[t]he Court's reading of a guarantee of freedom from self-incrimination into Article 6, seemingly through the requirement of a fair hearing, is welcome, if unexpected, as filling a gap in the Convention right to a fair trial that was not closed when the Seventh Protocol was drafted.*[33]

Moreover, the ECHR immediately recognized this right as a strong one, which clearly contradicted the Commission's view according that the protection of the country's financial interests, a public interest, prevails over the privilege against self-incrimination of the applicant.[34]

However, when "discovering" the right to remain silent, the ECHR was undeniably laconic, the core passage of the decision being wittily referred to as "brief and Delphic."[35] Indeed, the operative part of the decision on the right is just one paragraph. As Bárd remarks, "*the Court merely proclaimed the right without specifying its content or its scope, or without introducing any argument for its justification.*"[36]

The first question that emerges is the relation between the right to silence and the privilege not to incriminate oneself, as both are referred to in the judgment. Do these terms mean the same? Are they interchangeable or does one of the notions include the other?

In *Saunders* the ECHR tried to clarify its point of view on these two terms. Indeed, the Delphic mist that fell in *Funke* partially lifted. The rights were not only stipulated but some crutches regarding their relationship and content were also provided.

[33] David Harris, Michael O'Boyle and Chris Warbrick: *Law of the European Convention on Human Rights*, London, Dublin, Edinburgh, Butterworts, 1995, 214(footnotes omitted)

34 Ben Emmerson, Andrew Ashworth and Alison Macdonald: *Human Rights and Criminal Justice*, London, Sweet & Maxwell, 2007, 15-72. (Hereinafter: Emmerson)

[35] Sir Nicolas Bratza: *The Implications of the Human Rights Act 1998 for Commercial Practice*, 1 E.H.R.L.R., 2000, 10 cited by Ben Emmerson 15-73.

[36] Bárd, 281.

> *The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent.*[37]

Even employing merely a textual interpretation it becomes clear that the right not to incriminate oneself and the right to silence are not identical. Though the right not to incriminate oneself does *primarily* concern the right to silence, it encompasses other components of fair trial too. In my interpretation it would logically follow, that the right not to incriminate oneself is the broader concept and includes the right to silence. This is the interpretation Judge Martens advanced in his dissenting opinion attached to the *Saunders* decision as well:

> *From a conceptual point of view it would, however, seem obvious that the privilege against self-incrimination (= roughly speaking, the right not to be obliged to produce evidence against oneself) is the broader right, which encompasses the right to silence (= roughly speaking, the right not to answer questions).*[38]

Emmerson adopted a significantly different interpretation of the nexus between the two notions. According to him, the privilege against self-incrimination is at stake when the accused is punished for not providing incriminating evidence – be it testimonial or other type of evidence – while the right to silence relates to cases where adverse inferences were drawn from remaining silent.[39]

Bárd also supports the broader-narrower relation theory on the connection of these rights[40] and the Supreme Court also seems to side with the interpretation of Judge Martens as it stated:

> *The privilege against self-incrimination, which has had a long and expansive historical development, is the essential mainstay of our adversary system and guarantees to the individual the "right to remain silent unless he chooses to speak in the unfettered exercise of his own will," during a period of custodial interrogation.*[41]

[37] Saunders, para 69.
[38] Saunders, dissenting opinion of Judge Martens joined by Judge Kuris, para. 4
[39] Emmerson, 15-101.
[40] Bárd, 284.
[41] Miranda v. Arizona, 384 U.S. 436,436 (1966)

Though the content of the right might not be totally clarified, one thing is clear: the right to silence and the right not to incriminate oneself are today interpreted as tools that guarantee procedural fairness in criminal procedures.

B. The jurisprudence of the Supreme Court

Unlike in the Council of Europe setting, this was obvious from the very first moment in the United States. As it was included in the Constitution, the Supreme Court did not have the additional task of deducing it from a text not even mentioning the right. It is connected to due process of law through the Fifth and Fourteenth Amendment. There were no sidetracks. The Justices put the essential core of the right very simply stating that it enables the accused "*not to answer questions put to him.*"[42]

However, the recognition of the privilege as a standard applicable before state courts, not only federal ones, was not a self-evident development in the American history of the right and neither was its content. As Cochran explains, "*under the Fifth Amendment, defendants had nothing like the right to silence that criminal defendants have today.*"[43] It was not even meant as a reform of the criminal procedure, but as a defensive tool of and for the then existing procedure from the whims of the distant monarch.[44] Despite the Amendment, defendants were still expected to speak at the interrogation and subsequently at trial, and adverse inferences were drawn if the accused remained silent.[45] What the Amendment was originally meant to guarantee was probably the prohibition of torture, incriminating interrogation under oath and

[42] Lefkowitz v. Turley, 414 U.S. 70,77 (1973)
[43] Robert F. Cochran: *How Do You Plead, Guilty or Not Guilty? Does the Plea Inquiry Violate the Defendant's Right to Silence?*, 26 Cardozo Law Review, No. 4, 2005, 1406.
[44] Richard H. Helmholz et al: *The Privilege Against Self-Incrimination. Its Origins and Development*, University of Chicago Press, 1997, 129-133 cited in
Lissa Griffin: *Is Silence Sacred? The Vulnerability of Griffin v. California in a Terrorist World*, 15 William & Mary Bill of Rights, 2007, 933.
[45] Albert W. Alschuler: *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Michigan Law Review, 1996, 2631.

"*other forms of coercive interrogation such as threats of future punishment and promises of leniency.*"[46]

It was much later, in the twentieth century, that the right to silence was gradually extended through constitutional interpretation by the Supreme Court.[47] Firstly, in the ground-breaking decision of *Malloy v. Hogan*[48] it was extended from being applicable only in federal criminal procedures to criminal procedures conducted under state law through the due process clause of the Fourteenth Amendment. In that decision the Supreme Court confirmed, that

> *In sum, the privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will.*[49]

Subsequently, the no comment rule mentioned earlier bounding the prosecution and the judges regarding the silence of the accused was constitutionalized in *Griffin v. California*.[50] A few years later the Supreme Court established in its leading case, *Miranda v. Arizona* that a suspect taken into custody must be informed prior to his interrogation that he has a right to remain silent.[51] It is not overstatement to claim that the latter decision is one of the most significant judgments of the Supreme Court pertaining to the criminal justice system with major impact on the course of the criminal procedures in the United States.

The Fifth and the Sixth Amendment on the right to silence and the right to an attorney constitute the source for the groundbreaking decision in *Miranda* from 1966 that remains the core judgment regarding the right to silence even today. Interestingly, the reasoning was delivered by Chief Justice Earl Warren, a former prosecutor.

[46] Albert W. Alschuler: *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Michigan Law Review, 1996, 2651.
[47] Robert F. Cochran: *How Do You Plead, Guilty or Not Guilty? Does the Plea Inquiry Violate the Defendant's Right to Silence?*, 26 Cardozo Law Review, No. 4, 2005, 1417.
[48] Malloy v. Hogan, 378 U.S. 1(1964).
[49] Malloy v. Hogan, 378 U.S. 1, 8 (1964).
[50] Griffin v. California, 380 U.S. 609 (1965)
[51] Miranda v. Arizona, 384 U.S. 436 (1966)

In *Miranda* the Supreme Court ruled that confessions of custodial suspects are admissible as evidence before the trial court only if the defendant was warned of his relevant constitutional rights during the interrogation. According to the decision, the suspect can validly waive these rights only subsequent to this warning having been given by the authorities.

The Supreme Court held:

> *The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court.*[52]

And added:

> *If the individual indicates, prior to or during questioning, that he wishes to remain silent, the interrogation must cease;*[53]

Accordingly, the warning should be administered prior to the interrogation, before the suspect could make any incriminating statement. It is also clear that a decision to talk and answer any questions of the interrogating policemen can be altered at any time during the questioning. It is equally important, that the wish to remain silent may be indicated in any manner. There are no magic words that need to be spoken and there are no cases that need to be invoked to stop the interrogation. What is more, the suspect does not even have to say anything wishing to remain passive. It is enough to simply refuse to answer the questions. However, despite the warning suspects may not necessarily be aware of their opportunities and the possible consequences of their choices. To make the Miranda rights unequivocal and to provide the suspects with a realistic opportunity to make an informed decision without hypothetical fears there had been many proposals for the modernized, more accurate text of the warning.[54]

[52] Miranda v. Arizona, 384 U.S. 436, 467-473. (1966)
[53] Miranda v. Arizona, 384 U.S. 436, 473-474. (1966)
[54] See for example: Mark Godsey: *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 Minnesota Law Review, 2006, 813

If the individual, accordingly, expresses his wish to exercise his right to remain silent, the authorities have to stop the interrogation. Therefore, they cannot continue with questioning, nor decide to stay in the room with the suspect in the same position putting psychological pressure on him. The interrogation must cease.

Obviously, the aim of the Miranda warning is to protect the rights of the suspect by allowing him to make an informed choice between talking and silence. Both rights, namely, the right to speak and the right to remain silent unquestionably existed before *Miranda*, but suspects were not necessarily aware of them. The decision of the Court also acknowledges that police officers were sometimes putting illegal pressure on suspect to extract confessions. This decision – as mentioned earlier – changed criminal procedure significantly and the administration of the warning became the sine qua non element of every interrogation.

At first sight these rules seem to be unambiguous guidance, but recent case-law discussed at a later point in this thesis casts some shadow on them. Some even state that the Miranda rights do not provide real protection to suspects anymore because interrogating officers are taught how to circumvent these safeguards and extract admissions, and at least some courts seem to agree with these tactics.[55] As Weisselberg argued:

> *I no longer believe that a system of standardized warnings can empower suspects to assert their rights. Moreover, while I believe that police training has undermined the effectiveness of a system of warnings and waivers, such trainings appears to be largely consistent with the views of the Supreme Court justices and lower court rulings.*[56]

Nevertheless, the Supreme Court in 1999 in *Mitchell* expanded the no-comment rule stemming from the right to silence to sentencing.[57]

[55] Charles D. Weisselberg: *Mourning Miranda*, 96 California Law Review, 2008
[56] Charles D. Weisselberg: *Mourning Miranda*, 96 California Law Review, 2008, 1524.
[57] Mitchell v. United States, 526 U.S. 314 (1999)

The content of the right was further clarified when the Supreme Court established that the privilege against self-incrimination has two primary facets: the first, directly stemming from the Constitution, being that the government may not employ compulsion to obtain incriminatory evidence; and the second, a direct consequence of the first, being that self-incriminatory testimonies obtained by compulsion are inadmissible as evidence in criminal trials.[58]

Nevertheless, some commentators suggest that the case-law of the US. Supreme Court is "tyrannized by slogans."[59] Robert B. McKay remarked on the reasoning of the Court that

> *[l]anguage like this [that the privilege is a linchpin of an accusatorial system] no matter how often repeated, no matter how eloquently intoned, is merely restatement of the privilege itself.*[60]

However, even if this criticism is valid, the Supreme Court still provides closer information on how it views the content of the right than the ECHR, which is understandable given the difference in nature of these bodies.

C. A negative element: Compulsion

When analyzing the protection the right offers there is one key element in both the American and European case-law, namely the notion of compulsion that is prohibited by both jurisdictions.

On the one hand, the very word is included in the Fifth Amendment, according to which no person shall be compelled to be a witness against himself in a criminal case. The ECHR, on

[58] See: *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964)
[59] Lissa Griffin: *Is Silence Sacred? The Vulnerability of Griffin v. California in a Terrorist World*, 15 William & Mary Bill of Rights, 2007, 927.
[60] Robert B. McKay: *Self-Incrimination and the New Privacy*, 1967 Supreme Court Review 209 cited in Lissa Griffin: *Is Silence Sacred? The Vulnerability of Griffin v. California in a Terrorist World*, 15 William & Mary Bill of Rights,2007, 927

the other hand, as expressed in *Saunders*, as a means to secure avoidance of miscarriages of justice wishes to protect the accused "*against improper compulsion by the authorities.*"[61]

It was already clear in the *Funke* case that the ECHR does not exclusively mean physical and direct coercion by compulsion against the individual to do or not to do something. In the laconic reasoning in *Funke* the ECHR held the domestic authorities employed compulsion against the applicant to produce incriminating evidence referring to the fact that Mr. Funke was fined for not handing over documents that would have established his guilt.[62]

In the *Saunders* case the ECHR interpreted the meaning of compulsion more broadly. As noted by DJ Harris and noted above, here, unlike in *Funke*, it was only the mere threat of a punishment (conviction) that qualified as coercion in the context of the right not to incriminate oneself, as the applicant was cooperative in this case.[63] The ECHR qualifies this as a legal compulsion.[64] It should also be highlighted that the severity or the form of the punishment does not seem to be a factor to be considered: a fine imposed or threaten with is also a breach of the right to remain silent, not only imprisonment or threat with thereof.

However, a decision from 2003 cast some doubt on the foreseeability of the ECHR case-law. In *King v. The United Kingdom* the ECHR declared the application inadmissible, arguing that the legal obligation to answer questions to the interrogation of the police did not violate the applicant's right to remain silent, as he was not prosecuted for the offence he was originally charged with, but for failing to respect another legal obligation.[65]

It is important to underline, that only *improper* compulsion is prohibited in the ECHR jurisprudence which triggers the question where do the boundaries of justified compulsion lie.

[61] Saunders, para. 68
[62] Funke, para 44.
[63] David Harris, Michael O'Boyle and Chris Warbrick: *Law of the European Convention on Human Rights*, London, Dublin, Edinburgh, Butterworts, 1995, 214.
[64] Saunders, para. 70.
[65] For criticism of the decision see Emmerson, 15-80.

Obviously, as the ECHR stated it in *Jalloh v. Germany*[66] the physical or legal compulsion applied to force the defendant to incriminate himself can never reach the level of torture, inhuman or degrading treatment prohibited by Article 3 of the Convention.

In that case it was found that forcible administration of emetics to the defendant in order to obtain evidence violated Article 3 and 6 rights of the applicant. However, the ECHR very carefully distinguished this case from the Saunders decision. The grounds of the distinction were the following.[67]

Firstly, the police officers forced Mr. Jalloh to administer emetics and thus produce evidence "in defiance of his will." Clearly, this is a more direct form of coercion than fining somebody or threatening with conviction. Accordingly, legal compulsion and physical compulsion do not differ only dogmatically, but in severity as well, at least in my reading of these ECHR judgments. Though legal provisions with negative consequences on defendants who choose not to comply with legal obligations prescribing an obligation to answer questions were sufficient to find a violation of the right to remain silent *(Saunders)*, actively forcing somebody to do something against his expressed will is an even more severe breach of rights guaranteed under Article 6 of the Convention.

Secondly, the "*degree of force used in the present case differs significantly from the degree of compulsion normally required to obtain the types of material referred to in the Saunders case.*" [68] Usually, obtaining such evidence needs only the passive cooperation of the defendant, as he is asked only to endure the procedure.

[66] Jalloh v. Germany, Application no. 54810/00, Judgment of 11 July 2006
[67] Emmerson, 1582.
[68] Jalloh, para 104.

> *Even if the defendant's active participation is required, it can be seen from Saunders, that this concerns material produced by the normal functioning of the body (such as, for example, breath, urine, or voice samples).*[69]

Consequently, obtaining materials referred to in *Saunders* by use of force is permissible, if the degree of force used in a particular case exceeds the degree that is "normally required."

Thirdly, and most importantly, the ECHR held that the procedure by which evidence was obtained was such as to violate Article 3 of the Convention, namely the prohibition of torture, or inhumane or degrading treatment or punishment. The relevance of this argument is, of course, that the right not to be tortured is an unqualified right and under no circumstances can a Contracting State disregard this requirement, as no action of the defendant justifies torture.

In my reading, the ECHR suggests, that, as stated in the *Saunders* case, materials that have an independent existence, may be obtained from the accused through the use of compulsory powers in criminal proceedings, as far as the procedure of collection of evidence does not infringe Article 3 of the Convention. Consequently, the only deducible limit on the use of force during hearings is that posed by the prohibition of torture. Naturally, other articles may limit the choices of the investigating authorities as well. Article 8 can offer protection against disproportional intrusion into private life through searching one's house.[70]

However, though the *Jalloh* decision clarified the connection between Article 3 and 6, we might find a controversial factor as well in the reasoning. The ECHR took it into account when adjudicating whether the right to fair trial was infringed, the public interest of the investigation and punishment of the offence at issue. The ECHR deemed it important to note that the challenged measure, qualifying as torture, targeted a street dealer who was selling only small amounts of drugs and was consequently sentenced only to a suspended

[69] Saunders, para 104.
[70] Niemietz v. Germany, Application no. 13710/88, Judgment of 16 December 1992.

imprisonment.[71] Accordingly, the ECHR suggests that the infringement was beyond doubt disproportionate compared to the importance of the public interest for prosecuting this particular offence. This inevitably raises the question: is there a wider area for infringing the right to silence legally, when a more severe offence has been committed? This might be an especially acute question in the era of new threats like terrorism. But then, does the scope of right to silence depend on the crime involved? This approach would certainly open new fields for critics suggesting that the jurisdiction of the ECHR is unpredictable, as it unquestionably contradicts *Funke*.

The Supreme Court dealt with the notion of compulsion most inclusively in *Miranda* as the judgment was precisely aimed at protecting individuals from compulsion at interrogations. As it explained:

> *Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.*[72]

Despite the cloak of secrecy, however, physical compulsion – police brutality or torture in the most extreme cases – often results in visible signs and thus is somewhat easier to prove. This might be one of the reasons why police interrogations in the modern era of criminal justice is "*psychologically rather than physically oriented.*"[73] However, the Supreme Court – just as the ECHR – firmly holds the position that psychological pressure is a form of compulsion as well:

> *Since Chambers v. Florida, 309 U.S. 227, this Court has recognized that coercion can be mental as well as physical.*[74]

[71] Jalloh, para 109.
[72] Miranda, 436, 448
[73] Miranda, 436, 448
[74] Blackburn v. Alabama, 361 U.S. 199, 206 (1960) cited in Miranda, 436,448

Obviously, psychological compulsion may result in false convictions, thus thwarting the most basic aim of criminal procedure. In the *Miranda* decision the Supreme Court referred to a case where the defendant, Mr. Whitmore – an African-American with "limited intelligence" – innocently confessed two brutal murders and a rape. When the miscarriage of justice was revealed, the prosecutor said:

> *Call it what you want – brain-washing, hypnosis, fright. They made him give an untrue confession. The only thing I don't believe is that Whitmore was beaten.*[75]

Accordingly, both the ECHR and the Supreme Court unequivocally condemns both mental and physical compulsion when interrogating suspects and deems it a negative element of the right to silence.

D. Point of Reference: Presumption of Innocence

Additionally, both courts help us with some information regarding their thoughts on the content of the right to silence when assessing the right's relation with other fundamental rights, particularly the presumption of innocence.

In *Funke* the ECHR noted, regarding the bank statements and other documents, that the custom officers

> *[b]eing unable or unwilling to produce them by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed.*[76]

In doing so the ECHR reminded us that the right to silence is closely connected with the presumption of innocence expressly guaranteed by Article 6. Though the link between the right to remain silent and the presumption of innocence, a right expressly mentioned in Article

[75] New York Times, Jan. 28, 1965, p. 1, col. 5. cited in Miranda v. Arizona 384 U.S. 436, 455 Footnote 24 (1966).
[76] Funke para. 44.

6(2) of the Convention is implied in the *Funke* case, it is not expressly mentioned. It is clear, however, that the ECHR treats separately these two rights, as, after finding that Mr. Funke's conviction violated the right to remain silent, it did not deem it necessary to ascertain whether it also infringed the presumption of innocence.[77] It was later, in the decision of the ECHR in *Saunders*, where this link appeared in the reasoning:[78]

> *The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention (art. 6-2).*[79]

The close connection between these two right has been reiterated and strengthened many times ever since.[80]

The link between the two rights is emphasized in the United States of America as well. It was established already in *Chambers* in 1940 that

> *…our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.*[81]

It is the basis of all modern adversarial criminal procedures that it is the state that has to prove that the defendant is guilty of the crime he is charged with. It is achingly true, that sometimes it might be very hard to find evidence against someone that is why the term "burden of proof" is so felicitous an expression. The success of the investigation depends on the creativity and professionalism of the investigating bodies to a great extent. However, they are not unequipped to undertake this task. They are authorized to use means that citizens do not possess: they may hear the defendant, they may search his house with a prior authorization by

[77] Funke, para 44-45.
[78] Saunders, para. 68
[79] Saunders, para 68.
[80] See for example: Marttinen v. Finnland, Application no. 19235/03, Judgment of 21 April 2009, para 60.
[81] Chambers v. Florida, 309 U.S. 227, 235-238 (1940).

a court and so on. If they are not able to produce evidence or, even worse, if they are unwilling to do so – as the ECHR suggested in *Funke* – it is not the fault of the defendant. They cannot save time and effort by compelling the defendant to do their job and produce evidence.

We cannot expect a rational man to be the source of his own misery and provide evidence against himself. He has the right to passivity.[82] He may refrain from doing something or saying anything at all. In some jurisdictions, he may even actively try to avoid being caught unpunished, except for committing a crime again. Naturally, it advances the goals of the criminal procedure to seek the cooperation of the defendant and ask him to deliver the incriminating documents voluntarily. There might be situations when it would be reasonable for the person concerned to agree - for example, a search in the house would reveal a more severe crime committed by the defendant, or perhaps he is certain that the officers would find the document they are looking for during the search and just wants to save some time and cleaning in the house. Of course, it is possible that some people would agree because of non-rational reasons when the conscious rings the bell. Anyway, it is up to the defendant to decide whether he wishes to accept the offer for cooperation or not, this follows directly from recognizing him as a subject of the proceedings.

[82] Bárd, 279.

VI. Underlying Principles and Values

One would expect that it would be the ECHR that would provide a more detailed interpretation of the right to silence when deducting it from the right to fair hearing, given that there is no textual basis of the right to silence in the Convention and the ECHR would use its opportunity to clarify its view in the judgments.

However, as already mentioned, when first recognizing the right to silence in *Funke* the ECHR was closer to merely stipulating it, rather than placing it in the existing framework and explaining the nexus between it and other human rights guaranteed by the Convention. It was later, in the *Murray* and *Saunders* when we could learn more about the ECHR's view on and interpretation of this right.

In contrast to that approach, the Supreme Court argued vehemently and at considerable length for the right not to incriminate oneself, most notably perhaps in the *Miranda* case.

There are two main reasons justifying the right to silence, according to the jurisprudence of the two judicial bodies examined, the (1) first being a historic one connected to ensuring procedural fairness primarily through protection from torture, inhumane and degrading treatment and (2) second being respect for human dignity, a most basic substantive right.

A. Ensuring fair trial

I should first of all make a disclaimer. The following reasoning adopted by both courts is correct and convincing only if we unconditionally condemn torture leaving no exception to the rules that "*[n]o one shall be subjected to torture or to inhuman or degrading treatment or*

punishment"[83] and that "*[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted*"[84] No excuses, no leeway, no valid justification in any situation. Though this might seem obvious, as the prohibition of torture is one of the rare absolute rights of the international human rights law,[85] new trends and views seem to emerge favoring its limitation, primarily with reference to the threats terrorism poses.[86]

The ECHR held, on the right to silence and not to incriminate oneself, that

> *Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfillment of the aims of Article 6 (art. 6)… The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.*[87]

Ensuring fair trial as the primary reason for protecting the right to silence under the system of the Convention is obvious if we take into consideration its established place among the human rights. The ECHR views the right to silence as an implied component to the right to fair hearing with an additional instrumental value. It is a tool which has the rationale to "*contribute to avoidance of miscarriages of justices*" and fulfillment of aims of Article 6 via protecting against *improper compulsion.* By this, I imagine, the ECHR primarily and at least means evading the output of false convictions by prohibition of torture. The reference to evidence extorted by "*methods of coercion or oppression*" certainly points to this direction. It is also important to note that even though the ECHR primarily focuses on the privilege and protection the right offers to the individual, it also implies the duty of the state to refrain itself

83 Article 3 of the Convention
84 Eight Amendment to the Constitution of the United States America
85 See article 5 of the Universal Declaration of Human Rights, article 7 of the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
86 See for example Alan M. Dershowitz: *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, New Haven, Yale University Press, 2002. The author is a professor at Harvard Law School.
87 Saunders, para. 68.

from employing illegal compulsion, as mentioned earlier as a negative component of the content of the right.

By incorporating the prohibition of compulsion to self-incrimination through the Due Process Clause of the Fourteenth Amendment the Supreme Court adopted the same view.

It is a recurring motive in the American case-law to distinguish between inquisitorial and adversary procedure on the basis of presence/absence of the right not to incriminate oneself. The Supreme Court held the right to silence to be "*the essential mainstay of our adversary system.*"[88] The inquisitorial – adversarial dichotomy was picked up by critics of the Northern Ireland Order 1988 and the subsequent Criminal Justice and Public Order Act of 1994 that was the subject of the *Murray* decision.[89]

To understand this ardent rejection of the inquisitorial system, let us turn the pages of the book on the history of mankind far back to the chapter of the dark centuries of the middle ages. In the medieval inquisitorial criminal procedures in the continental Europe, as Bárd notes, the defendant was rather the object and not the subject of the procedure.[90] As he writes, in this system of formal proofs, the confession of the accused was the "queen of evidence" that would assure his conviction and execution of the punishment. Precisely for this reason the investigating authorities did everything to ensure obtaining it in the course of the procedure. Extorting it by unimaginably cruel techniques of torture was an everyday practice in the criminal procedure. No wonder, that in the continental Europe

[88] Miranda v. Arizona, 384 U.S. 436, 436 (1966)
[89] Gregory W. O'Reilly: *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 Journal of Criminal Law and Criminology, 1994, 402-452.
[90] Bárd, 269.

> *In the age of Enlightenment, the idea that it is inhumane for anyone to be the cause of their own demise through self-incrimination arose in parallel to the demand for the abolition of torture.*[91]

Sadly, we are wrong to think that this era is far behind us, that extortion of confessions happened only in distant centuries. The most basic factor and reason when deciding *Miranda* in 1966 was police brutality applied in criminal interrogations in the America of the twentieth century.

The Supreme Court in the reasoning of the *Miranda* judgment examined interrogation techniques of the police and the atmosphere of the process in detail revealing something about the psychological factors in play during the interrogation. The Supreme Court quotes from manuals written for police officers:

> *If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support.*[92]

However, this is not the only practical advice the manual gives to policeman. It also states regarding the interrogating officer that

> *He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing for the subject's necessities in acknowledgement of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination.*[93]

[91] Bárd, 269.
[92] O'Hara: *Fundamentals of Criminal Investigation* (1956), 99 cited in Miranda v. Arizona, 384 U.S. 436 (1966).
[93] O'Hara: *Fundamentals of Criminal Investigation* (1956), 112 cited in Miranda v. Arizona, 384 U.S. 436 (1966).

In my opinion, interrogation in an atmosphere of domination for several hours, or exceptionally even for days, that pauses only for the "subjects necessities" with only the required interval for eating and sleeping is without a doubt a pressure hardly anyone can bear.

It is true – at least in democracies – that, as observed by the Supreme Court "*modern practice in-custody interrogation is psychologically rather than physically oriented*."[94] However, sadly enough, the happenings of recent years reminded us that physical torture is not an extinct beast. Accordingly, the statement of the Court that "*[t]he use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country*" is still adequate.[95] Moreover, modern practices of torture seem to be cruel to almost the same extent as the medieval ones, yet very clandestine and treacherous. To highlight the most obvious, the practices of the United States army in obtaining evidence in the fight against terrorism, the existence of secret detention facilities all around a world, and particularly waterboarding,[96] shocked the world.[97] It was admitted that this treatment was used by CIA personnel interrogating suspected members of Al-Qaeda in secret detention facilities all around the world in the *war on terror* launched by the USA after the attacks of 9/11.[98]

The fact that we can never be too vigilant in guarding human rights, and particularly the right to remain free from torture, reminds us precisely of one of the most important underlying reasons for protecting the right to silence: namely, that the right not to incriminate oneself has

[94] Miranda v. Arizona, 384 U.S. 436,448 (1966)
[95] Miranda v. Arizona, 384 U.S. 436,446 (1966)
[96] Water-boarding is "a technique of immobilization of the subject on their back with the head inclined downwards; water is then poured over the face into breathing passages, causing the captive to experience the sensations of drowning." Source: Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies, adopted by UN Voluntary Fund for Victims of Torture, para 14.
[97] The first report alleging CIA operated black sites was published on 5 November 2005 by Washington Post: http://www.washingtonpost.com/wp-dyn/content/article/2005/11/03/AR2005110300422.html (last visited 09.11.2012. 23:23). Two days later the Human Rights Watch issues a statement, available at http://www.hrw.org/news/2005/11/06/human-rights-watch-statement-us-secret-detention-facilities-europe (last visited 09.11.2012. 23:23).
[98] Then director of the CIA, General Michael Hayden, officially admitted it in 2008. See:http://www.amnesty.org/en/library/asset/AMR51/011/2008/en/9db93a13-d4c5-11dc-ae76-cd9a3dc63251/amr510112008eng.html

a strong double instrumental value. Firstly, it is a safeguard for the right to remain free from torture. Secondly, as a consequence of this safeguard it contributes to the fairness of criminal procedure. If defendants had the obligation to speak in the investigation phase of the criminal procedure, police officers in the privacy of interrogating rooms might be too zealous to obtain it at any cost. This would be particularly true if we remind ourselves that torture may be psychological as well, not only physical. As the Supreme Court put it "*the blood of the accused is not the only hallmark of an unconstitutional inquisition.*"[99]

The atmosphere of an interrogation is tense and oppressive by nature. The accused is in an unfamiliar and hostile situation. He or she has no one he trusts nearby. In fact, he is completely alone against a police officer impersonating the State with all its powers. In an atmosphere like that every accused is in a subordinated position, suffering from high mental pressure.

As the Supreme Court argued:

> *It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.*[100]

The last words of the quote bring us to the second underlying principle of the right to silence.

B. Human dignity

Firstly, it should be noted that the ECHR never refers expressly to human dignity in connection with the right to silence, and only exceptionally concerning other rights as well. Given the fact that this right is not guaranteed by the Convention – as it was primarily meant to be a document ensuring civil and political rights – this is hardly surprising. However, the

[99] Blackburn v. Alabama, 361 U.S. 199, 206 (1960).
[100] Miranda v. Arizona, 384 U.S. 436,457 (1966).

ECHR in Saunders mentions among the rationales of the right the avoidance of miscarriages of justice and fulfillment of the aims of Article 6.[101] The aim referred to is, I believe, the fairness of any criminal procedure which can only be secured if we respect the human dignity of the accused according to core principles of the adversarial system. I arrived to this conclusion when reading the next paragraph of the reasoning:

> *The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent.*[102]

By referring to the will of the accused as something that should be respected, the ECHR certainly suggests that the individual involved in the criminal procedure should be treated as a valuable participant of the process whose dignity can never be disregarded.

The Supreme Court does not leave any doubt regarding its views on the connection between the right not to incriminate oneself and human dignity. It stated:

> *the constitutional foundation underlying the privilege is the respect a government - state or federal - must accord to the dignity and integrity of its citizens.*[103]

I believe it can be deduced from the most basic characteristics of the adversarial procedure. According to Kant, human beings are not means but ends in themselves. In his opinion, men's free will and their ability to choose their own actions is the key to human dignity. Every man is master of his own life and should be let alone to choose however he wishes, as long as his decision affects only his own faith. In my interpretation this means, in the special setting of the criminal procedure, that the accused should be viewed as a subject of the procedure with fully free will and a possibility to shape the course of the proceedings. Of course, we should keep in mind that the goal of the criminal procedure is to find out the truth, at least if we view it from the state's perspective. Criminal proceedings are, after all, truth-seeking games of

[101] Saunders, para. 68.
[102] Saunders, para. 69.
[103] Miranda, 436,460.

several players with different roles. However, there are values independent from this goal that should be respected and protected under all circumstances. One of such values is the human dignity and the free will of the accused stemming from it. If the ultimate goal would be to find out who did the crime at hand then the right to silence, the right that one should be informed of the charges brought against one and the right to a defense council should be thrown out the window as these only make the proceedings slower and ineffective. However, as dignity is one of the key factors of a modern democratic legal system, provisions protecting this value should be present in all legal procedures, and particularly in those where the individual and the state are counterparties, as the protection against the almighty state is the core underlying principle of all human rights. The right to silence could be, of course, viewed from the perspective of freedom of expression, according to which the individual is free to express or withhold his opinion. But there is more than that. The accused's dilemma of whether to speak or not in a criminal procedure is a moral crossroad where one has to dig deep in his humanity. For an innocent accused it is, of course, an easy question. He can in most cases tell the truth at the interrogation or at trial without a conflict between his rational interest and moral compass.

For the guilty – who is, obviously, human to the same extent and has a human dignity of the same value– the question is a heavy one. He will have three choices: (1) to remain silent despite the remorse (2) to try to avoid the punishment by lying (3) to be irrational and tell the truth contributing to his own conviction.

As Bárd notes, a hard choice like this is antithetical to the whole notion of fairness, which is the overall aim of Article 6 of the Convention.[104] This trilemma goes to the core of human conscious and the notion of fairness. The Supreme Court put it like this referring to the right to silence:

[104] Bárd, 286.

> *It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt…*[105]

The trilemma was regulated differently in the history of criminal procedure. Until the abolishment of the famously cruel Star Chamber and High Commission in England in 1641 the accused was obliged to speak under oath. Citizens were regularly summoned to ecclesiastical courts without any suspicion of committing a crime, with no evidence and no formal charges.[106] In front of the court they had to swear an oath and answer questions regarding their faith and religious practices.

> *The purpose of the oath was to find a basis for charging the defendant, that is, to get a confession to some* ecclesiastical wrong that could then serve as the basis for bringing criminal charges.[107]

As an answer to this concern, the earliest form of the nemo tenetur principle only guaranteed that the individual was not compelled to be the primary source of his own demise, meaning that the obligation to speak was triggered only after a reasonable suspicion was established that the accused was the perpetrator of the crime.[108] As time went by, the obligation to testify was transformed to its total negation in both the United Kingdom and the United States of America. As discussed earlier, the accused's testimony was disqualified as evidence and the ban was abolished only in the second half of the 19th century in the United States.[109] I see this as a victory for human dignity. It is true, that defendants not speaking have to bear the risk of being seen as guilty. It is also true that it is a rational move from the guilty accused to take the

[105] Tehan v. Shott, 382 U.S. 406,414 (1966)
[106] Richard H. Helmholz et al: *The Privilege against Self-Incrimination. Its Origins and Development*, University of Chicago Press, 1997, 101 cited by
Lissa Griffin: *Is Silence Sacred? The Vulnerability of Griffin v. California in a Terrorist World*, 15 William & Mary Bill of Rights Journal, 2007, 930.
[107] Lisa Griffin: *Is Silence Sacred? The Vulnerability of Griffin v. California in a Terrorist World*, 15 William & Mary Bill of Rights Journal, 2007, 930 referring to Richard H. Helmholz et al: *The Privilege Against Self-Incrimination. Its Origins and Development*, University of Chicago Press, 1997, 62
[108] Bárd, 266.
[109] Albert W. Alschuler: *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Michigan Law Review, 1996, 2661.

stand and lie – just to convince jurors about his innocence. It is true that a guilty suspect is faced with a hard moral and strategic trilemma. But allowing him to face this problem and to make a choice is the right approach. Letting him make the choice is treating him as a subject of the procedure, not as an object, as in the inquisitorial system. Letting him bear the risk is treating him as a human who has an inviolable right to human dignity. As established by the Supreme Court, whether the defendant wants to testify or not is exclusively his privilege.[110]

C. An additional argument in brief: Rationality

The argument of rationality did not appear in either of the reasoning of neither court. I will nonetheless refer to it briefly as argument newly discovered by legal researchers.

In 2000 an interesting article appeared in the Harvard Law Review contesting the traditional argument of Bentham stating that the right to silence is a shelter only to the guilty. The article suggested that a game theory approach to the right to silence proves that the privilege against self-incrimination protects the innocent.[111] The article triggered much criticism.[112]

The authors, Seidmann and Stein argued that the innocent would be worse off if the right to silence was abolished. In a situation like that guilty suspects would take the stand instead of remaining silent and – as self-interest dictates – they would lie to avoid punishment. This could impose externalities in the form of wrongful conviction of unfortunate innocents who may not be as convincing as the guilty person. The innocent would then in no vein try to give

[110] Harris v. N.Y., 401 U.S. 222,225 (1971)
[111] Daniel J. Seidmann and Alex Stein: *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 Harvard Law Review, 2000, 430.
[112] Legal researchers criticized and debated their findings in response articles. See for example: Stephanos Bibas: *The Right to Remain Silent Helps Only the Guilty*, 88 Iowa Law Review, 2002-2003

their exculpatory explanations. Therefore, as the authors argued, it would be better to keep the right so that some innocent individuals would escape false conviction.[113]

Despite these two strong arguments – protection from torture and respect for human dignity – and the supportive argument of rationality, the right to silence is under attack.[114] There are loud voices arguing for at least its limitation both among the member states of the Council of Europe and in the United States of America, coming even from the judiciary.

[113] Daniel J. Seidmann and Alex Stein: *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 Harvard Law Review, 2000, 503.
[114] Daniel J. Seidmann and Alex Stein: *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 Harvard Law Review, 2000, 430.

VII. Scope

In this chapter I will examine and compare the scope of the right to silence in the jurisprudence of the ECHR and the Supreme Court. I will focus on three questions: (1) in what types of procedures (2) and to which evidence is the right applicable and (3) what types of statements are covered by the protection.

A. Procedure

The text of the Fifth Amendment might be misleading. The language no one "*shall be compelled in any criminal case to be a witness against himself*" suggests that the protection applies only to criminal cases, while defendants might be compelled to provide incriminatory statements against themselves in civil or administrative procedures.

However, the Supreme Court did not follow this formalistic approach. In its early decision *McCarthy v. Arndstein*[115] of 1924 it made it clear that it is not the nature of the proceedings that bears primary importance but the possible consequences of an incriminating testimony. The petitioner was adjudged an involuntary bankrupt. He appeared before a special commissioner for examination as to his assets. As a sworn witness he answered some of the questions of the commissioner but refused to do so concerning some other questions arguing that the answers might tend to incriminate him. Subsequently, a judge formally ordered for him to answer but he persisted in refusal and was convicted for contempt of court. In the proceedings before the Supreme Court, the Government insisted that the constitutional right not to incriminate oneself applies only in criminal procedures it does not offer any protection in civil procedures. However, the Supreme Court held:

[115] McCarthy v. Arndstein, 266 U.S. 34 (1924)

> *The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.*[116]

The Court confirmed its views in *Garrity v. New Jersey*.[117] The case concerned fixing traffic tickets.[118] The defendant was summoned for inquiry before the Attorney General. He was warned that if he did not answer the questions, he would be removed from office. The questions were answered and the answers later used over their objections, in their prosecutions for conspiracy. The Supreme Court held that

> *the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.*[119]

It is apparent from both cases that the Supreme Court rejected a formalistic approach and interpreted the Constitution with a view to its purpose. If defendants could be compelled legally to be witnesses against themselves in non criminal proceedings but subsequently the testimony would be admissible as evidence in a criminal trial, the essence of the right would be completely undermined having the same effect as if compelling a defendant to testify in his criminal case. Accordingly, the decisive question is whether answers given by an individual in a procedure of non-criminal nature are admissible in criminal proceedings and may result in conviction. Two things logically follow from this statement. Firstly, the right to silence is neither applicable in civil cases,[120] nor in administrative procedures that threaten sanctions that are not penal in nature.[121] Secondly, if the defendant is offered immunity by the Government, the privilege does not protect him from taking the witness stand. If the

[116] McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).
[117] Garrity v. New Jersey, 385 U.S. 493 (1967).
[118] It is an illegal practice when a policeman or other public official destroys a pending traffic ticket as a favor to a relative or a friend.
[119] Garrity v. New Jersey, 385 U.S. 493,500 (1967).
[120] Baxter v. Palmigiano, 425 U.S. 308, 318 (1976).
[121] Kimm v. Rosenberg, 363 U.S. 405 (1960).

Government guarantees that neither the testimony given, nor other evidence derived therefrom, will be used in a criminal trial against the accused, it may compel him to provide answers. Accordingly, immunity does not necessarily mean he will not be prosecuted, it only guarantees that such testimony will not be used in future criminal proceedings. [122]

As for the ECHR, *Funke* did not clarify the scope of the right to remain silent. However, it was more or less evident that the right was meant to protect the individual not only in the judicial stage of a criminal procedure. The actions of the custom officers were by nature part of a procedure criminal and they were antecedent to the prosecution the custom officers intended to initiate.[123] As Nicolas Bratza notes,

> *the Court appears to have considered that the mere fact that a sanction is imposed for a refusal to produce potentially self-incriminating evidence constitutes a violation of the right to a fair hearing.*[124]

However, the question whether the right applies to purely administrative procedures that are not followed by a judicial stage was left open.

The ECHR took the opportunity in *Saunders* to nail its colors to the mast regarding the scope of applicability of article 6(1) guarantees. The decision – perhaps intentionally – does not state that compulsory questioning by inspectors of the Department of Trade and Industry violated the right to silence. What constituted a breach of Article 6 was the admission of the evidence obtained this way in the criminal procedure at the ECHR. It unequivocally declared that the right not to incriminate oneself does not protect the individual in a purely administrative procedures not followed by a judicial one, as a solution like that

> *would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities. (...) [t]he Court's sole concern in the*

[122] Kastigar v. United States, 406 U.S. 441 (1972)
[123] Emmerson, 15-73.
[124] Sir Nicolas Bratza: *The Implications of the Human Rights Act 1998 for Commercial Practice*, 11 E.H.R.L.R., 2000 cited by Emmerson, 15-73.

present case is with the use made of the relevant statements at the applicant's criminal trial.[125]

Accordingly, an obligation to answer the questions in a purely administrative procedure does not violate the privilege against self-incrimination, provided that the answers are not used as evidence later, at the judicial stage of the procedure.[126] This interpretation was confirmed in the subsequent case-law.

This approach is reiterated in some subsequent cases of the Court. In *Abas v. Netherlands*[127] the applicant provided information to tax authorities who later conducted a search at his home. The information given to the inspector was not used before court in criminal proceedings, only the evidence obtained during the search. The Commission declared the application inadmissible stating that the compulsory questioning in an administrative procedure does not violate the right to remain silent. The Court adopted the same view in *I.J.L., G.M.R. and A.K.P. v. The United Kingdom*.[128] On the contrary, if the investigation process is of criminal nature, the right to remain silent covers the whole procedure from the very beginning, because the evidences discovered during the procedure are intended to be used later before the court. In *Heaney and McGuinness*[129] the two applicants were sentenced to six months imprisonment for withholding information, because they refused to answer to interrogation of the police in a very early stage of the criminal procedure after being arrested on suspicion of terrorist acts.

Despite the concurring opinion of Judge Morenilla in the *Saunders* decision, arguing that statutory compulsion to answer questioning is per se objectionable regardless of whether it

[125] Saunders, para. 67.
[126] Emmerson, 15-79.
[127] Abas v. The Netherlands, Application no. 27943/95, Decision of 26 February 1997.
[128] I.J.L., G.M.R. and A.K.P. v. The United Kingdom, Application nos. 29522/95, 30056/96 and 30574/96, Judgment of 19 September 2000.
[129] Heaney and McGuinness v. Ireland, Application no. 34720/97, Judgment of 21 December 2000.

was subsequently used in a criminal procedure or not, the ECHR has been very careful that its jurisprudence does not undermine reporting requirements prescribed by law.[130]

Accordingly, the position of the Supreme Court and the ECHR are very similar in the sense that in deciding whether compelling testimony in an administrative procedure violates that privilege against self-incrimination they consider the possible subsequent use of the incriminating testimonial evidence in criminal procedures to be a crucial factor.

It is important to note, however, that according to the most recent developments of the jurisprudence of the ECHR a violation may be found to the right not to incriminate oneself even when no subsequent proceedings were brought or when the case ended with an acquittal.[131]

B. Evidence

The ECHR and the American system, however, differ regarding the types of evidence protected by the right to silence. The ECHR guarantees a special protection for testimonial evidence but also ensures that individuals cannot be compelled to turn over incriminating documents. The American system on the other hand recognizes the special protection for testimonial evidence only.

It was clear even from *Funke* that coercion (in the form of imposing fine in the case of non-compliance with the obligation) to provide testimony and to turn over incriminating documents is forbidden. However, the wording about custom officers – "*[b]eing unable or unwilling to produce*" evidence "*they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed*" – might have suggested that the ECHR is of

[130] Mark Berger: *Self-Incrimination and the European Court of Human Rights: Procedural Issues in the Enforcement of the Right to Silence*, 5 European Human Rights Law Review, 2007, 515.
[131] Ed Cape, Zaza Namoradze, Roger Smith and Taru Spronken: *Effective Criminal Defence in Europe*, Antwerp-Oxford-Portland, Intersentia, 2010, 30.

the view that the authorities are responsible for collecting all evidence on their own, without compelling the accused to anything. It would logically follow that by virtue of the right to silence it is prohibited to compel the accused to provide fingerprints or blood samples.[132] According to Bárd, if that were the case, there would be a real risk that such an obstacle would "*completely paralyze the work of law enforcement officials.*"[133]

Butler remarked that if the state is forbidden to compel its citizens to provide documents, house searches – that constitute a "continuous" and "brutal" infringement of the right to privacy – will be conducted more often.[134]

According to *Funke* the ECHR deems any action compelling the defendant to provide incriminating *documents* against himself incompatible with Article 6 of the Convention. The *Saunders* decision expanded this list of inadmissible evidences obtained by direct (physical) or indirect (legal) compulsion by adding testimonial evidence. However, it also excluded very important types of evidence:

> *The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of materials which may be obtained from the accused through the use of compulsory powers that have an existence independent of the will of the suspect, such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples, and bodily tissues for the purpose of DNA testing.*[135]

The ECHR acknowledged here the exceptional importance of testimony[136], but narrowed down the scope of applicability of the right not to incriminate oneself at the same time, excluding some coercive actions from the ambit of protection. This argument might answer

[132] Andrew S. Butler: *Funke v. France and the Right Against Self-Incrimination: a Critical Analysis*. 11 Criminal Law Forum, No 4, 2000, 476-477 cited by Bárd, p 281.
[133] Bárd, 281.
[134] Andrew S. Butler: *Funke v. France and the Right Against Self-Incrimination: a Critical Analysis*. 11 Criminal Law Forum, No 4, 2000, 471.
[135] Saunders, para. 69.
[136] Bárd, 285-289.

Butler's concerns that, under the broader definition of this right, it would be virtually impossible for investigating officers and prosecutors to capture criminals.

The ECHR backs this narrower interpretation of the right not to incriminate oneself by noting that this interpretation is more compatible with legal systems of the Contracting Parties and also *other* legal systems, perhaps referring to the United States of America. Indeed, virtually all contracting states allow compulsory taking of blood and other samples in their criminal procedures, especially in motoring crimes.[137]

The ECHR in its later decisions further extended the latter list with adding that neither does compulsory fitting a tachograph to a truck,[138] nor obtaining voice samples for comparison[139] violate the privilege against self-incrimination.

In the United States of American, the formula is much simpler: the special protection guaranteed by the Fifth Amendment is available only for testimonial evidence, both oral and written. I argue that this interpretation is supported by the text of the Fifth Amendment which reads: "*No person . . . shall be compelled in any criminal case to be a witness against himself.*" As only compulsion to be a witness is prohibited, it follows that only testimony – as evidence provided by a witness – may be excluded as evidence if compelled. The Supreme Court could not put it clearer:

> *It is also clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating.*[140]

Accordingly, the Supreme Court excludes certain acts from the ambit of the protection, even if obtained by compulsion. Just like in the case of the ECHR, a suspect might be compelled to

[137] Emmerson, 15-81.
[138] J.B. v. Switzerland, Application no. 31827/96, Judgment of 3 May 2001, para. 68.
[139] P.G. and J.H. v. The United Kingdom, Application no. 44787/98, 25 September 200,1 para. 80.
[140] Fisher v. United States, 425 U.S. 391,409 (1976)

provide blood sample,[141] a handwriting exemplar[142] and even a voice exemplar.[143] It is also allowed for authorities to compel the accused to stand in a lineup[144] or to wear particular clothing.[145] However, most notably – to point to the crucial difference compared to the ECHR – the Supreme Court does not deem it applicable for compulsion concerning handing over documents, as established in *Braswell v. United States*.[146] In *Braswell* the petitioner was delivered a subpoena requiring him as the president of two companies to produce some records of these companies. The subpoena provided that he need not testify and could deliver the records at stake to the agent serving the subpoena. The petitioner refused to comply and invoked his right not to incriminate himself. True, this situation is a special to some extent, as the petitioner was addressed in his capacity as a custodian of the company and not in his individual capacity.

> *However, representatives of a collective entity act as agents, and the official records of the organization that are held by them in a representative rather than a personal capacity cannot be the subject of their personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally.*[147]

It becomes clear from *Doe v. United States*[148] that this restriction on the right not to incriminate oneself equally applies in situations where the petitioner is addressed in his individual capacity. The facts of the case are comparable with *Funke,* yet, the Supreme Court reached the opposite conclusion to the ECHR. The petitioner was compelled to sign a consent directive that authorized foreign banks in the Cayman Islands and Bermuda to disclose records of all accounts over which he had a right of withdrawal to American authorities, without asking him to identify or acknowledge the existence of any accounts.

[141] Schmerberg v. California, 384 U.S. 757,765 (1966)
[142] Gilbert v. California, 388 U.S. 263,266-267 (1967)
[143] United States v. Dionisio, 410 U.S. 1,7 (1973)
[144] United States v. Wade, 388 U.S. 218, 221-222 (1967)
[145] Holt v. United States, 218 U.S. 245, 252-253 (1910)
[146] Braswell v. United States, 487 U.S. 99 (1988)
[147] Braswell v. United States, 487 U.S. 99, 99 (1988)
[148] Doe v. United States, 487 U.S. 201 (1988)

The Supreme Court held that the consent directive was not of testimonial nature as

> *[i]t is carefully drafted not to make reference to a specific account, but only speak in the hypothetical. Thus, the form does not acknowledge that an account in a foreign financial institution is in existence or that it is controlled by petitioner.*[149]

The Supreme Court in its reasoning referred to its established case-law, stating that

> *[i]t is the "extortion of information from the accused," Couch v. United States,* 409 U.S., at 328*, the attempt to force him "to disclose the contents of his own mind," Curcio v. United States,* 354 U.S. 118, 128 *(1957), that implicates the Self-Incrimination Clause.*[150]

Accordingly, both judicial bodies award the testimony of the accused a preeminent place among the evidences and a special protection.

1. Why testimony?

However, the ECHR missed the opportunity to explain in *Saunders*, what the underlying principle is for distinguishing between testimonial evidence as a primary component of the right not to incriminate oneself and all other types of evidence. The other, even more confusing statement is the establishment of the category of evidence that have "*an existence independent of the will of the suspect*" and not including the documents required by authorities without a warrant under this list.

a. Historic reasons

The first reason underlying this special position of testimonial evidence is historic. As I argued in the part on reasons for upholding the right to silence, the cruel, inhumane methods of torture in the inquisitorial criminal procedure of the Middle Ages is a memento for all to respect the dignity of the human being in the accused. As argued in *Escobedo*:

[149] Doe v. United States, 487 U.S. 201,215 (1988)
[150] Doe v. United States, 487 U.S. 201,211 (1988)

> *[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources.*[151]

Additionally, compelled testimonies – as suggested by Justice Goldberg – are not only dangerous because they pave the road to torture, inhumane or degrading treatment prohibited under both systems. They also make investigating authorities lazy to investigate. If they could, they would go for the easy way and just happily sit back stamping "*solved*" to the case file. If we accept, the basic function of the criminal procedure is to find out the truth about a certain crime, this attitude is a hazardous one for two reasons. First of all, if the police extorted the testimony from the wrong person, an innocent man will be punished and the guilty will go free – which is the number one disaster in a criminal justice system. Secondly, in the case of accusing the right person, police will stop searching for further evidence clarifying important details (from the victim's or his/her family's perspective or for crime prevention or criminal policy planning) compromising the goal of the whole procedure.

b. Weaker probative value

Evidence that have an independent existence of the will of the accused – or real evidence as Emmerson calls them[152] – cannot be manipulated, they are objective.[153] If the accused is tortured it is very likely that he would confess anything for the interrogation to stop. On the contrary, in case of real evidence the probative value is not affected if it was obtained by compulsion.[154] In addition, this probative value is very high – with the exception of contaminated samples – in the case of these evidences. The probability for a DNA match to be correct is almost one hundred percent. If other evidence support the case, a correct assessment is certain. On the contrary, no one would think that assessing a case on the sole

[151] Escobedo v. Illinois 378 U.S. 478, 489 (1964) citing Wigmore.
[152] Emmerson, 15-81.
[153] Bárd, 287.
[154] Bárd, 287.

basis of a testimony of the accused is acceptable. It is far from being as certain as objective evidence. The accused either told the truth or lied and sometimes it is very hard to assess, even for experts, which version is more probable. Accordingly, the greater probative value that can be secured by this objective evidence may justify more intrusion to the private sphere and bodily integrity of the accused. Weaker probative value testimonial evidence can offer may not. If we remind ourselves again that the declared purpose of the criminal procedure is to find out the truth, this reasoning is very convincing.

c. Prevention of wrongful convictions

The important principle of preventing the conviction of innocent persons also justifies the distinction between testimonial and other evidence. This function of the criminal procedure is "*most clearly embodied in the presumption of innocence.*"[155] In all the jurisdictions examined within the framework of this thesis the prosecutor should as a minimum prove beyond reasonable doubt that the accused committed the crime. The standard of on the balance of probabilities applied in civil cases in the United States obviously falls short of this requirement. It is not enough if it is more probable that the accused is guilty in the charges. This high standard is meant to secure that no innocent person is convicted. If authorities could compel the accused to testify by either physical or legal means there would be a "*real danger that innocent persons would be convicted.*"[156] As Bárd notes,

> *[t]here is, therefore, a powerful argument in support of the pre-eminent status of the voluntary nature of testimony: this is an important way of preventing innocent people from being punished.*[157]

[155] Bárd, 288.
[156] Bárd, 289.
[157] Bárd, 289.

2. But why documents?

Although the ECHR does not put documents expressly in the category of evidence that does not have an independent existence of the will of the accused, it logically follows from reading together *Saunders* and *Funke*. In *Funke* the ECHR held that legal compulsion to hand over documents without a warrant violated the right to silence. In *Saunders* it declares that there are types of evidence which have an independent existence of the will of the accused and therefore are not protected from being obtained by compulsion (DNA, hair sample, etc). Consequently, documents do not have an independent existence.

One would first think that it is possible that – as *Funke* was the first right to silence – the ECHR was still refining its approach and interpretation of the right to silence and not to incriminate oneself, and it found its opinion on the way deliberating *Saunders* and *Murray*. Is it possible, that the *Funke* decision was only a sidetrack, an approach that was not traceable in subsequent decisions? The answer is no. It was upheld and confirmed in 2001 in *J.B. v. Switzerland*, a decision that came after *Murray* and *Saunders*. In *J.B.* the ECHR found it incompatible with article 6 of the Convention to impose a fine for not submitting financial records that could incriminate the accused to the tax authorities.[158]

In my opinion, the distinction between evidence that has an existence independent from the will of the defendant and that which does not have such an existence seems defensible. However, I find no reasonable justification for positioning incriminating documents in the latter category.

Of course, the ECHR is free to interpret the Convention and derive from it exceptional protection against incriminating documents besides testimony, but then it would be reassuring to find more convincing reasoning for doing so, because with the current position it suggests

[158] J.B., para. 68.

that obtaining blood sample with coercive powers constitutes less interference to the right to silence than imposing a fine for not submitting incriminatory documents.

Summarizing *Funke* and *Saunders* from the perspective of different types of evidences, their independent existence, the level of interference allowed for obtaining them, and the link between these three factors, the following can be stated: testimony of the defendant deserves exceptional protection, and coercive measures may not be used to obtain such evidence, neither directly, nor indirectly; blood samples, hair and other material that have "*independent existence*" from the will of the accused deserve a less degree of protection and coercion to obtain such evidence is permissible. Obviously, prohibition of torture, inhumane and degrading treatment is always applicable establishing an upper threshold for coercion.

The position taken by the Supreme Court seems more coherent and logically absolutely defensible, though it is true that conclusion in *Doe* may be criticized. The Supreme Court offers the special status and protection of the Fifth Amendment to written or oral testimonies exclusively.[159] Any other evidence, including documents, is excluded.

C. Statements

Both the Supreme Court and the ECHR are unequivocal that the right to silence applies to all testimonies in criminal cases, regardless of their incriminating nature.

In the *Saunders* case the applicant was subjected to an administrative procedure conducted against him by inspectors of the Department of Trade and Industry. The case concerned a company takeover in which the applicant allegedly completed illegal transactions. During the interrogations Mr. Saunders was under an obligation to answer the questions and he did so. Had he failed to comply with this obligation, he could have been charged with a criminal

[159] Doe v. U.S. 487 U.S. 201,210 (1988)

offence. The information that he provided was used as evidence against him in a subsequent criminal trial, at which he was sentenced to imprisonment for commercial fraud.

In its submission the Government of the The United Kingdom tried to distinguish the case from *Funke* arguing that in the latter the applicant was fined because he refused to provide evidence that would incriminate him, while in the case at hand the applicant, Mr. Saunders cooperated with the inspectors and accordingly, no fine was imposed at all. According to the Government, only self-incriminating statements could fall within the protection offered by the privilege.[160] It argued that the privilege against self-incrimination could not have been violated, as the applicant said nothing during the interrogations that would be harmful to his interest, as he had only given exculpatory answers. Both the Commission and the ECHR rejected this argument. The ECHR held:

> *Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature – such as exculpatory remarks or mere information on questions of facts – may later be deployed in criminal proceedings in support of the prosecution case.*[161]

Referring and reminding about the concept of fairness, the ECHR stated that the right to silence cannot be reasonably be restricted to directly incriminating statements.[162] I think the ECHR was really right in pointing this out. Statements that seem to be neutral on their face might be used to undermine the credibility of the accused.

Indeed, the ECHR established that the prosecution used transcripts of the interrogation at the trial in a manner that supported the case of the prosecution, as some of the answers were in fact admission of knowledge of information which "tended to incriminate him." [163] Accordingly, as these indirectly incriminating transcripts were relied on at the trial violation

[160] Saunders, para 70.
[161] Saunders, para 71.
[162] Saunders, para 71.
[163] Saunders, para 71.

of Article 6 was established as they were obtained by compelling the accused to answer questions during the interrogation at the administrative procedure.

As concerning the jurisprudence of the Supreme Court of America, the *Miranda* decision distinguishes between three types of statements: directly incriminating, indirectly incriminating and exculpatory ones. However, the Supreme Court – just like the ECHR – made it clear that

> *[n]o distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination.*[164]

Regarding exculpatory statements, the Supreme Court noted that if statement argued to be exculpatory by the state would be truly exculpatory, they would never be invoked at trial by the prosecution.[165] In a reasoning similar to the one the *Saunders* case of ECHR, the Supreme Court noted that

> *In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication.*[166]

Accordingly, the argument provided by the ECHR in *Saunders* – that answers that might seem neutral at first glance might prove to be incriminatory – applies here as well. As the Supreme Court notes, these statements are "*incriminating in any meaningful sense of the word.*"[167] Accordingly, to guarantee the right to silence only regarding statements that seem to be exculpatory or neutral on their face is a formalistic approach inconsistent with the values protected by the right.

[164] Miranda, 436, 476-477
[165] Miranda, 436, 477
[166] Miranda, 436, 477
[167] Miranda, 436, 477

This conclusion is deducible from the principles of adversarial procedures as well. If treating the accused as a subject of the procedure is an honest purpose of the fair criminal trial, he should have the right to decide how actively he wants to participate in the proceedings, regardless of the possible costs of his choice, at least concerning testifying as it deserves a special protection. He has the right to conceal exculpatory circumstances of his guilt just as inculpatory ones.

VIII. Limits

No jurisprudence or legal researcher claims today that the right to silence should be abolished. It is generally accepted that it protects core values in the criminal procedure, as discussed in the part on underlying principles. However, neither does the ECHR, not the Supreme Court deem it an absolute right. As limitations to a declared right is a crucial aspect in determining how much a right is really worth and what protection does it offer to individuals, I will analyze both jurisprudence with strict scrutiny. I will deal with two questions, firstly the possibility to draw adverse inferences from silence and secondly the requirement of express invocation of the right.

A. Adverse inferences

I began my thesis citing the old Latin proverb: Nemo tenetur prodere seipsum. Now I am adding another one: Qui tacet consentire videtur. One who is silent seems to consent. Both maxims disclose an unquestionable truth and yet, they cause conflict and tension in the criminal procedure that are not easy to resolve. I will now examine what answers the courts gave to this challenge.

It was in the decision of *Murray v. The United Kingdom*[168] that the ECHR declared that however precious the right to silence is, it is not an absolute one under the Convention. It held that in certain circumstances a law permitting drawing adverse inferences from the fact that the accused remained silent did not violate Article 6.

In that case the applicant was suspected to be a member of the Irish Republican Army (IRA) which held captive Mr. L., a police informant. Mr. L. was rescued by the police who saw the

[168] John Murray v. The United Kingdom, Application no. 18731/91, Judgment of 8 February 1996

applicant coming down the stairs. Mr. L. testified at the criminal trial that when the police knocked, his blindfold was removed and he saw the applicant in the house who told him to go down and watch television. He also testified that he was forced to make a confession on being a police informant and the confession was recorded on a tape. When the police knocked, he saw the applicant destroying this evidence. The police found this tangled tape and the recorder in the house. At the criminal trial, the judge drew strong adverse inferences against the applicant on the basis of Article 6 of the Criminal Evidence Order 1988 because he did not provide an account of his presence in the house where L. has been held captive.

The ECHR left this question expressly open in *Saunders*. It stated that it did not find it necessary to answer the question "*whether the right not to incriminate oneself is absolute or whether infringements of it may be justified in particular circumstances.*"[169] It did not exclude the possibility of limiting the privilege not to incriminate oneself. However, it was also quick to add, that this does not mean that this right can easily be set aside.[170]

In *Murray*, the ECHR paves the road for limiting the right when stating that Article 6 protects only from "improper compulsion."[171] In my opinion, the wording already implies that the right to silence is not absolute, as it is protected only against improper compulsion, while proper compulsion is allowed. The question of the case, accordingly, was whether adverse inferences drawn from silence at interrogation and trial after a prior and proper warning qualifies as improper compulsion.[172]

The ECHR leaves no doubt about his position: "*the question whether the right to silence is absolute must be answered in the negative.*"[173]

[169] Saunders, para 74.
[170] Emmerson, 15-83.
[171] Murray, para. 46.
[172] Murray, para. 46.
[173] Murray, para. 47.

Nevertheless, the ECHR "adopts a rather strict attitude" when examining the justifications provided by the Governments for the limitation of the right.[174]

However, it should be noted that the ECHR was in a very convenient position when determining its position about the limitability of the right due to the fact that the right was left out from the Convention and the implicit rights have the basic characteristics that "*it is the Court itself that designates the scope and limits of these rights.*"[175]

The ECHR in its interpretation of the right sided with the Government of the United Kingdom stating that in certain circumstances the exercise of the right may have negative consequences for the accused.

It should be noted that both this judgment and the domestic legal framework – the Northern Ireland Order 1988 and the subsequent Criminal Justice and Public Order Act of 1994 – invoked heavy criticisms. According to paragraph (2) of Article 6 of the Criminal Evidence (Northern Ireland) Order 1988 in certain circumstances

1. the court, in determining whether to commit the accused for trial or whether there is a case to answer, and
2. the court or jury, in determining whether the accused is guilty of the offence charged, may
    a. draw such inferences from the failure or refusal as appear proper;
    b. on the basis of such inferences, treat the failure or refusal as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure or refusal is material.

[174] Ed Cape, Zaza Namoradze, Roger Smith and Taru Spronken: *Effective Criminal Defence in Europe*, Antwerp-Oxford-Portland, Intersentia, 2010, 29.
[175] Bárd, 299.

Some even saw it as a step towards returning to the inquisitorial criminal procedure.[176] On the other hand, it was welcomed in other parts of the world as a decision taking into consideration the realities and threats of the present world, including most importantly terrorism. Some scholars in the United States referred to the English legal framework as an example to follow.[177] In Australia the Evidence Act was amended recently in 2012 to allow drawing adverse inferences from silence. This was commented in a well-known national newspaper "*[t]he right to silence will be watered down under changes announced.*"[178]

But if O'Reilly's criticism is true, many of the member states of the Council of Europe already employ an inquisitorial system or at least are close to doing so due to their system of free proof. As the Delegate of the Commission emphasized,

> *...the courts in a considerable number of countries where evidence is freely assessed may have regard to all relevant circumstances, including the manner in which the accused has behaved or has conducted his defence, when evaluating the evidence in the case.*[179]

In the continental criminal legal systems a solution like this is not uncommon. The code on criminal procedure often declares the principle of free assessment of evidence and the judges decide which circumstances of a given case are relevant.[180] Some argue that the Order in fact formalized the system of common-sense implications and allowed them to "*play an open role in the assessment of evidence*"[181] perhaps exactly for the reason of insuring legal certainty and foreseeability.

[176] Gregory W. O'Reilly: *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 Journal of Criminal Law and Criminology, 1994, 402-452.
[177] Lissa Griffin: *Is Silence Sacred? The Vulnerability of Griffin v. California in a Terrorist World*, 15 William & Mary Bill of Rights, 2007, 949-952.
[178] Anna Patty: *'Right to Silence' law changed*, The Sunday Morning Herald, August 14, 2012. Available at http://www.smh.com.au/nsw/right-to-silence-law-changed-20120814-2462p.html#ixzz2DK1Eygfz
[179] Murray, para. 54.
[180] See for example article 78 of Act XIX of 1998 on Criminal Procedure.
[181] Murray, para. 54.

What the delegate suggested was that judges (or the jury) have regard to the fact of remaining silent anyway, whether admittedly or not, so it is better to at least formalize this process making it more transparent and democratic.

1. Conditions for drawing adverse inferences from silence under ECHR

But how much limitation is allowed on the right to silence? Under what circumstances may the judge draw adverse inferences? What is the minimum level of probability of guilt where negative conclusions may be justified for refusing to answer questions of the police or prosecution?

The ECHR stated:

> *On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.*[182]

Accordingly, the ECHR sets two extreme points and positions the solution compatible with the Convention between them. It is obvious that, on one hand, mere silence cannot be the sole or main reason for a conviction. On the other hand, in "situations that clearly call for an explanation" the judge should not disregard the reluctance of the accused to speak. Whether drawing adverse inferences in a situation like that results in violation of Article 6 depends always on the particular circumstances of a given case. In determining this question the ECHR will have special regard for the following factors:[183] the degree of compulsion inherent in the situation and the weight attached to the inferences in the domestic criminal procedure when assessing the evidence of the case.

[182] Murray, para. 47.
[183] Murray, para. 47.

a. Degree of compulsion

Obviously, by determining the degree of the coercion as a crucial element of this assessment the ECHR implicitly declares that there is a certain threshold the compulsion employed to secure the testimony of the accused has to reach in order to qualify as not compatible with the Convention. Consequently, interrogating police officers or the prosecution may at least to some extent compel the individual to speak. This would, naturally, mean only legal compulsion and not direct, physical one. Nevertheless, realizing that the right to silence is not a cost-free immunity seems to be disturbing enough in the light of the classic Latin maxim that qui suo iure utitur neminem laedit.

As for the domestic phase of the *Murray* case, the ECHR noted that the applicant was not compelled to speak, despite the fact that he had been warned that if he does not provide testimonial evidence, this could lead to drawing adverse inferences. The judges concluded this after recalling that his refusal to speak did not qualify as a criminal offence, nor was he even fined. Though the ECHR recognized that a warning according to which silence may have negative effects "*involves a certain level indirect compulsion*" it did not find it to amount to a pressure incompatible with the Convention.[184]

This viewpoint is at least a bit surprising if we recall that the ECHR found a violation of Article 6 merely for fining Mr. Funke for not handing over incriminating documents or threatening with imprisonment in *Saunders*. In *Averill v. The United Kingdom*[185] the ECHR arrives at a similar conclusion when it does not find a violation to Article 6 despite admitting that the administration of the warning under the Order and the Act that adverse inferences may be drawn from remaining silent "*discloses a level of indirect compulsion.*"[186] In my reading, the present judgment leads to a logically inconsistent jurisprudence according to

[184] Murray, para. 50.
[185] Averill v. The United Kingdom, Application no. 36408/97, Judgment of 6 June 2000.
[186] Averill, para. 46. See also Emmerson, 15-110.

which threatening with imprisonment for not answering incriminating questions involves a higher degree of compulsion than sentencing someone to imprisonment partly on the basis of his silence.

b. Weight of silence

Regarding the second factor, namely the weight attached to silence when assessing evidence, the ECHR provided a more detailed reasoning that clarified that although it allows drawing adverse inferences, it does so only in exception situation. To be compatible with the Convention and not to violate the right to fair trial, these inferences must satisfy the following criteria.

Situation that calls for explanation

First of all, the situation must clearly call for an explanation. This is so when the prosecution has convincing direct evidences against the accused. Obviously, to determine whether a case meets this criterion the concrete circumstances of the crime must be assessed carefully through a factual analysis of the case. The ECHR recalled that in the case at hand when the police entered the house where Mr. L. was held captive they saw the applicant coming down the stairs. Mr. L. also confirmed that he saw him when his blindfold was removed and testified that it was the applicant who ordered him to go down and watch television. He also recalled observing him as trying to destroy evidence that was later found by the police. In the Averill case the applicant was arrested near the scene of a double murder with fibers on his clothes and hair that matched fibers found on the scene discarded by the murderer. The ECHR found these situations to clearly call for explanation satisfying the criterion established in *Murray* that these evidence adduced by the prosecution were so strong that common sense allows only one possible explanation of the silence of the accused: guilt.[187] To put it

[187] Murray, para. 51.

differently: according to the test of the ECHR remaining silent should be consistent only with guilt.[188]

However, the ECHR clarified its position and emphasized in the *Averill* decision that they may be acceptable explanations for remaining silent:[189]

> *While it may no doubt be expected in most cases that innocent persons would be willing to cooperate with the police in explaining that they were not involved in any suspected crime, there may be reasons why in a specific case an innocent person would not be prepared to do so.*[190]

One of such reasons may be the absence of a defense counsel at the interrogation. In both the jurisprudence of the Supreme Court and the ECHR, the right to counsel is of primary importance. It is a special safeguard that contributes to respecting other fairness rights of the defendants, the right to remain silent among them. Firstly, the mere presence of a lawyer most probably offers protection against active violation of defendant rights and secondly, by providing information on these rights the suspect might exercise them more consciously.

Though the ECHR did not find any violation with respect the right to silence in the *Murray* decision, it did find a violation concerning access to lawyer guaranteed by Article 6 of the Convention, as the applicant was denied access to a legal counsel in a critical stage of the trial, that is in the first 48 hours. As the right to a legal counsel is not the topic of this thesis, I will not examine the reasons put forward by the ECHR for finding a violation thereto. However, it is clear from a later decision that the ECHR attaches to it a special importance when examining the right to silence and not to incriminate oneself. It considered it a relevant factor in the assessment whether the accused had access to legal defense when deciding not to answer the questions put to him and what action the lawyer had advised him to take.

[188] Emmerson, 15-114.
[189] Emmerson, 15-114.
[190] Averill, para. 49.

When arguing in the *Averill* case that there might be an acceptable explanation for remaining silent, the ECHR expressly mentioned that "*[i]n particular, an innocent person may not wish to make any statement before he has had the opportunity to consult a lawyer.*"[191]

The lawyer factor was found decisive in the *Condron* case as well. In 2009 the ECHR made its position even clearer when stating:

> *Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination.*[192]

As I mentioned, in that case the applicants were advised by their defense council to remain silent as he deemed them unfit for being subjected to an interrogation. The ECHR argued that the right to access to legal advice requires that courts should have due regard to the content of such advice.[193]

For the ECHR, particular caution is required when a domestic court seeks to attach weight to the fact that a person who is arrested in connection with a criminal offence and who has not been given access to a lawyer does not provide detailed responses when confronted with questions, the answers to which may be incriminating.[194] At the same time, the very fact that an accused is advised by his lawyer to maintain his silence must also be given appropriate weight by the domestic court. There may be good reason why such advice may be given.[195]

The right to legal counsel is guaranteed by the Sixth Amendment of the Constitution of the United States of America. As the *Miranda* reasoning pointed out, the right to silence and the right to counsel are intertwined in many senses. The mere presence of a lawyer is a protective

[191] Averill, para. 49.
[192] Pishchalnikov v. Russia, Application no. 7025/04, Judgment of 24 September 2009, para. 69.
[193] Emmerson, 15-107.
[194] Murray, para. 66.
[195] Condron v. The United Kingdom, Application no. 35718/97, Judgment of 2 May 2000, para. 60.

device against the oppressive atmosphere of police interrogations.[196] On the contrary, if the access to attorney is denied – as in *Murray* case before the ECHR and the Escobedo case before the Supreme Court – it also undermines the ability to exercise the right to silence freely. Additionally, as hinted by the ECHR in Averill, the accused may want to consult a professional who has the relevant expertise before deciding whether to say anything at all. It seems to me a very rational choice to wait until the advice of a lawyer has been sought before deciding whether to answer any questions, because there is less risk than in talking first and then regretting it after receiving the advice of the lawyer.

Accordingly, as the ECHR suggest, if the accused remains silent, it should be first examined whether he had a lawyer at all and even if he did, the content of his or her advice should be taken into consideration. If the lawyer advised the accused to remain silent, the possible reason for the advice should be found out. The rationale behind this reasoning might be that it is very rational for a defendant in a complex situation both emotionally and legally to rely on an objective, legally experienced lawyer. Courts should not punish the accused for following a lawyer's instructions if there was a good reason for advising remaining silent. We should not expect a legally inexperienced person in an emotionally disturbing situation to disregard the advice of a defense counsel.

However, a situation might rise in which the counsel provides the defendant with an inappropriate advice not taking into account the best interest of his client. In such a case the question of professional responsibility of the counsel emerges. This might be even so in situations where the defense lawyer was appointed by the state and not chosen by the accused person. The ECHR has not faced this challenge so far, but it would be interesting to see how it would rule in a case of a state-appointed lawyer who would not had adduced good reason for

[196] Miranda 436, 465.

advising his client to remain silent and the accused then being convicted, partly on the basis of his following the advice of his counsel and refusing to testify.

In the United States the question of ineffective assistance of legal counsel was already touched upon. In *Strickland v. Washington* the Supreme Court held that a defendant may seek relief provided that he shows both that (1) the performance of the defense counsel fell below an objective standard of reasonableness (the performance prong) and (2) but for this inappropriate performance, there is a reasonable probability that the defendant would have acted differently and the result of the proceeding would have been different (the prejudice prong).[197]

The Supreme Court, specifying these criteria, held in *Hill v. Lockhart*[198] that to satisfy the prejudice prong established in *Strickland*, a defendant who pleaded guilty must demonstrate that it was the attorney's deficient legal advice that changed the course of his action before court and he would not have pleaded guilty but for counsel's deficient performance:

> *In order to satisfy the second, or "prejudice," requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty, and would have insisted on going to trial.*[199]

The Supreme Court logically links this test to the voluntariness of the testimony and underlines that

> *[w]here a defendant enters a guilty plea upon counsel's advice, the voluntariness of the plea depends on whether the advice was within the range of competence demanded of attorneys in criminal cases.*[200]

[197] Strickland v. Washington, 466 U.S. 668 (1984)
[198] Hill v. Lockhart, 474 U.S. 52 (1985)
[199] Hill v. Lockhart, 52, 56-60.
[200] Hill v. Lockhart, 52, 56-60.

It would follow than that a confession of guilt might in some cases be regarded as compelled – and thus inadmissible as evidence – if the accused was misinformed by his lawyer if he had not respected professional requirements.

To sum up the content of the right to silence as viewed by the ECHR and the Supreme Court, it is basically the right of a defendant not to answer questions throughout the whole criminal procedure. From a negative perspective it is an obligation of the state not to compel – either indirectly through legal provisions or directly by physical or mental coercion – the individual to make self-incriminating statement. It is closely related to the presumption of innocence and right to legal defense, and all three serve as basic safeguards of the right to fair trial.

Proper warning

The accused must be properly warned at the beginning of the interrogation that adverse inferences may be drawn from his silence in a language and manner he understands. The ECHR is citing here the position of the Court of Appeal from the domestic procedure which explained in its judgment that if the judge would have doubts about whether the accused understood the warning, it would had not activated the possibility of drawing adverse inferences from silence against him.[201]

Fortunately, the text of the law is clear in this regard. According to paragraph (3) of Article 6 of the Criminal Evidence (Northern Ireland) Order 1988 provisions allowing the drawing of negative consequences is not allowed unless "*the accused was told in ordinary language by the constable*" what the possible effect of silence might be.

As of today, no application reached the ECHR that would claim that a proper warning was not administered to the applicant.

[201] Murray, para. 51.

Respecting presumption of innocence

Thirdly, drawing adverse inferences from the silence of the defendant may never result in shifting the burden of proof to the accused from the investigating authorities – a rule reminding us that the right to silence is intertwined with the presumption of innocence, as stated in *Saunders* a few months later. The ECHR elaborated on this issue in *Telfner v. Austria*[202] establishing a violation of Article 6(2). In that case the applicant was convicted for causing an accident with his mother's car though the slightly injured victim could not identify him as a perpetrator. The conviction was based on the fact that it was generally the applicant who used the car. Additionally, he did not have an alibi and he did not made any substantial statement during interrogation or before the court. The difference between the employment of adverse inferences drawn from silence in *Telfner* and *Murray*, according to the ECHR, is that in the Austrian case silence was a factor substantiating the applicant's guilt, therefore shifting the burden of proof and violating the presumption of innocence.[203]

Though the conclusion in *Telfner* answers some of the concerns, the new direction of the ECHR's jurisprudence is not reassuring when measures against the requirement of fairness in criminal procedures. Unfortunately, it is clear that "*[w]hoever uses this right must be prepared to potentially pay the price for doing so…*"[204]

As a side-thread, the ECHR hinted about an interesting issue that is relevant in the case of the United States as well. It noted "*it is recalled that these were proceedings without a jury, the trier of fact being an experienced judge.*"[205]

In my opinion this is indeed a valid point raised first by Sir Nicolas Bratza, then the British member of the Commission, who explained that a judge sitting alone has higher chances of

[202] Telfner v. Austria, Application no. 33501/96, Judgment of 20 March 2001.
[203] Bárd, 312.
[204] Bárd, 312.
[205] Murray, para. 51.

drawing only inferences that are justified and compatible with the principle of fair trial, as he is equipped with special legal training and legal experience. Additionally, he gives a reasoned decision explaining the basis of his conclusion.[206]

In my opinion, it is a valid concern that laymen without the legal training and experience are not well-equipped to make a proper balance in a situation like this, respecting the guarantees of fair procedure, no matter how carefully the judge will formulate his instructions for the jury.[207]

This concerned manifested itself in a later case, in *Condron v. The United Kingdom*[208] where the two applicants were convicted in a jury trial. The applicants were heroin addict siblings who refused to answer the questions of the interrogating police officers as they were advised to do so by their lawyer who deemed them unfit to be interviewed. The ECHR found violation of Article 6 and opined that

> *the jury should have been directed, as a matter of fairness, that if there might be an innocent explanation for the applicants' silence at interview, no adverse inference should be drawn.*[209]

This conclusion is perfectly in line with the requirement that adverse inference may only be drawn from silence if there is no possible explanation for it other than guilt.

Accordingly, under the ECHR system, the right to silence is not absolute. However, adverse inferences may only be drawn from the fact that the defendant did not answer questions if

1) the defendant was properly warned about the possible negative consequences of remaining silent and he understood this warning
2) the degree of compulsion was justified

[206] Murray v. United Kingdom (1996) 22 E.H.R.R. 29, Commission at para. 37. cited by Emmerson,15-105.
[207] Murray v. United Kingdom (1996) 22 E.H.R.R. 29, Commission at para. 37. cited by Emmerson, 15-105.
[208] Condron v. The United Kingdom, Application no. 35718/97, Judgment of 2 May 2000.
[209] Emmerson, 15-106 summarizing Condron

3) the situation calls for explanation
4) the principle of presumption of innocence was respected in the sense that the burden of proof did not shift to the defendant
5) there is only one possible conclusion that can be reasonably drawn from silence and that is guilt.

If all these requirements are met, the ECHR will not find violation to Article 6 of the Convention. As the ECHR did not choose to make reference to the terrorist threat or the gravity of the crime, drawing negative inferences from silence is in theory possible in all crimes. However, it should be emphasized that these requirements established in the *Murray* case allow interpretation of silence in the detriment of the accused only in a very narrow field.

B. The no comment rule

In the United States of America a ruling similar to *Murray* is something unimaginable. The Supreme Court decided in *Griffin v. California* that no adverse inferences can be constitutionally drawn from silence.[210]

Just like *Miranda*, this decision dates back to the sixties. In 1961 a witness saw Mr. Griffin emerging from a big trash box early morning in an alley. He was zipping up his pants. The witness asked Mr. Griffin what he was doing. "Nothing" – said he and walked away. The witness then discovered a woman in the trash box. She was hardly beaten, barely conscious. She died the next day from head injuries. It was proved later that the woman had been raped.

Mr. Griffin, the defendant chose to exercise his right to remain silent and refused to answer questions at the interrogation or give testimony at the trial. At the end of the trial the judge instructed the jury that they might want to take the defendant's silence into consideration

[210] Griffin v. California, 380 U.S. 609 (1965)

> *as indicating that among the inferences that may be reasonably drawn there from those unfavorable to the defendant are the more probable.*[211]

Not only the trial judge, the prosecutor too commented on the defendant's silence. When arguing, he noted:

> *He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.*[212]

He concluded:

> *Essie Mae is dead, she can't tell you her side of the story. The defendant won't.*[213]

Mr. Griffin was convicted but the Supreme Court quashed the sentence ruling that the judge's instruction and the prosecutor's argument both violated the self-incrimination clause of the Fifth Amendment. The Supreme Court assessed adverse inferences and qualified them as an unconstitutional cost of exercising the right to silence guaranteed at a constitutional level. It recalled that a comment on the defendant not taking the stand as a witness is a remnant of the inquisitorial system[214] and continued:

> *It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down in the privilege by making its assertion costly.*[215]

Accordingly, the Supreme Court invoked a so-called "unconstitutional conditions" doctrine and argued that drawing adverse inferences from exercising the right to silence imposes a condition on the constitutional right concerned. [216]

[211] Griffin v. California, 380 U.S. 609,610 (1965)
[212] Griffin v. California, 380 U.S. 609,611 (1965)
[213] Griffin v. California, 380 U.S. 609,611 (1965)
[214] Griffin v. California, 380 U.S. 609,614 (1965) citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 55
[215] Griffin v. California, 380 U.S. 609,614 (1965)

It was immediately obvious from the concurring opinion of Justice Harlan that the no comment rule is not unanimously supported by the Justices of the Supreme Court. He argued that he only concurred because he had no other choice in the light of the incorporation of the right not to incriminate oneself to state law through the of Due Process Clause of the Fourteenth Amendment in the Malloy decision, and added:

> *I do so, however, with great reluctance, since for me the decision exemplifies the creeping paralysis with which this Court's recent adoption of the "incorporation" doctrine is infecting the operation of the federal system.*[217]

True, the no comment rule – manifesting itself as a prohibition of drawing adverse inferences – makes it harder for the investigating authorities and the prosecution to prove the guilt of the defendant, as it requires considerable additional efforts. It cannot be debated that in the vast majority of cases it does not advance the truth-seeking function of the criminal procedure – even the Supreme Court abandoned its previous position from *Tehan v. Shott*[218] that the right to silence was a protection of the innocent, and emphasized instead that it is based in complex values that exist independently of the truth-seeking function of the right.[219]

Finding the truth might prove to be a very hard mission indeed. Obviously, the more information we have the better are the chances for reconstructing the details of the case. The testimony of the defendant, as a source of information, is always a key question in this regard. Firstly, there are always subjective elements of a crime. The mens rea is best known by the defendant himself. It is true that some of these subjective elements are reflected in the outside world and much can be deduced from the conduct of the defendant. Still, some aspects of the crime might remain known only by the defendant. Secondly, in cases with no witnesses the

[216] Ted Sampsell-Jones: *Making Defendants Speak*, 93 Minnesota Law Review, 2009, 1340
[217] Griffin v. California, 380 U.S. 609,616 (1965)
[218] Tehan v. Shott, 382 U.S. 406 (1966)
[219] Lissa Griffin: *Is Silence Sacred? The Vulnerability of Griffin v. California in a Terrorist World*, 15 William & Mary Bill of Rights, 2007, 941.

testimony of the defendant is even more important. This is particularly true in homicide cases, like *Griffin*, because the victim cannot tell his or her side of the story.[220]

It follows logically that if the defendants take the stand, there is a higher probability of finding out what actually happened between the defendant and the victim. This remains true, or at least arguable, even if "*there is no way to prove empirically that more defendant testimony would lead to more accurate results*" because "*there is no good way to study the effect of a defendant's testimony in a real trial without conducting the trial twice, once with the defendant's testimony and once without.*"[221]

As I have already discussed, the defendant has three options in a criminal trial: to testify in his own defense and tell the truth; to take the stand and lie; or to remain silent.[222] When weighing these options, the defendant and his defense attorney probably take into consideration many circumstances, including the evidence available, the personality and appearance of the defendant, the composition of the jury and many more, to assess the possible consequences of all alternatives. We can assume that a rational defendant would certainly choose the solution that involves the least risk of a negative verdict. In my opinion, a criminal trial with a possible conviction is not a situation where people are likely to be brave; that would be irrational. The individual's interest is obvious and absolutely understandable: defendants usually want to avoid punishment, even if they are guilty of committing the crime they are accused of.

I will try to assess the possible costs of testifying in court in the United States of America. First of among them is being cross-examined by the prosecutor. Questioning by a professional prosecutor, the opponent who is convinced regarding the guilt of the defendant and has the sole task and purpose to have the accused convicted, can be a really risky thing not only for

[220] Ted Sampsell-Jones: *Making Defendants Speak*, 93 Minnesota Law Review, 2009, 1332.
[221] Ted Sampsell-Jones, *Making Defendants Speak*, 93 Minnesota Law Review, 2009, 1332
[222] Bárd, 286.

the guilty but also for the innocent, especially if he is uneducated and/or has no experience in criminal trials. As the Supreme Court noted in *Wilson* as early as 1893:

> *It is not every one who can safely venture on the witness stand, though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand.*[223]

Secondly, under the American system, if the defendant testifies and lies, the judge might impose perjury enhancements, that is imposing a more severe sentence.[224] Such a strict approach is atypical in Europe.[225] Nevertheless, the ECHR has not examined a case where it would have to decide whether the right to silence includes the right to lie.

On the other hand, the list of possible costs of exercising the right to remain silent, that is not answering questions at the interrogation and not taking the stand for witnesses at trial is rather short. I found only one. Not reveling exculpatory circumstances that are only known to the defendant is a real risk, especially if there is no material evidence supporting these circumstances. In a case like that, the defendant is the only source of the information and by choosing silence instead of speech this information favorable for him remains unknown to the authorities.

Accordingly, if I were a defendant, guilty of the crime accused of, I would probably remain silent, provided that there is not enough evidence to prove my guilt beyond reasonable doubt, simply because it seems to have less risk then speech.

However, there are other interests at stake in a criminal procedure that need to be considered. Procedural rules have surely not got the sole purpose of safeguarding the constitutional rights

[223] Wilson v. U S, 149 U.S. 60,66 (1893)
[224] Ted Sampsell-Jones, *Making Defendants Speak*, 93 Minnesota Law Review, 2009, 1346
[225] In Hungary, for example, a defendant may not be punished for even providing false documents or false material evidence according to paragraph (3) of article 238 of act IV of 1978 on the Criminal Code

and the dignity of the defendant. What is the interest of the state, the society and the victim? I believe the core aim of the criminal procedure is to discover the truth and, consequently, to convict the guilty and acquit the innocent. We can rephrase this goal into a more practical one: we should reduce the number of false positive (convicting an innocent) and false negative (acquitting a guilty) verdicts.

As the Supreme Court mentioned in *Miranda*, the recurrent argument that society's interest is in making the defendants speak in order to find out truth is not a new one. The Supreme Court also emphasized that it is „*not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances.*"[226] However, it drew attention to the fact that the testimony of the defendant is not the only evidence possibly available, law enforcement agencies have their traditional investigating means available.[227]

Some defendants will, of course, at least consider the option of taking the stand and lying. They might think about giving a false testimony, especially knowing that it is commonly held that only the guilty would remain silent. However, it is not that easy to deceive the jury, especially if there is other evidence available contradicting the statement of the defendant, not to mention the other party of the contradictory procedure, the prosecutor, who is a professional inquirer having experience in detecting lies by cross-examining the defendant. This notion might again direct towards remaining silent.

As Ted Sampsell-Jones convincingly argues, if the state wants rational defendants to opt for speech at criminal trials, it should encourage defendants to testify by adopting legal rules that would reward speech or at least make silence costly, naturally, under the condition that it respects constitutional rights all the times. He argues that the rule forbidding adverse

[226] Miranda, 436, 481
[227] Miranda, 436, 481

inferences from silence should be abandoned.[228] He supports his position by stating that, unlike suggested by the Supreme Court in *Griffin*, imposing costs on the individual for exercising a constitutional right is not at all unique. Sentencing enhancement for perjury, for instance, when the defendant is caught lying in court is also a cost that a defendant opting for testifying may have to bear and this rule was upheld as constitutional.

As it is clear by now, the no comment rule and the prohibition of adverse inferences is not a principle everybody supports with the same enthusiasm and it faces attacks from time to time. However, it always prevailed so far.

1. After Griffin

The jurisprudence of the Supreme Court on the right to silence in America after *Griffin* can be roughly summarized as refining its position on the no comment rule.

The first remarkable post-Griffin decision, *Doyle v. Ohio* of the Supreme Court was decided in 1976.[229] In that case Mr. Doyle and Mr. Wood were caught by the police together and charged with selling marijuana to a man who turned out to be an informant. At trial both testified that they agreed to buy illegal substances from the informant and not to sell to him but he framed them. The prosecutor pointed out that the defendants remained silent during the police interrogation and did not mention this circumstance until the trial. The defendants were subsequently convicted for selling marijuana. The trial court argued that Mr. Doyle and Mr. Wood undoubtedly have the right to remain silent and this cannot be held to be indication of guilt. However, silence at the police interrogation could be used for the purpose of impeachment, undermining the defendant's credibility.

[228] Ted Sampsell-Jones, *Making Defendants Speak*, 93 Minnesota Law Review, 2009, 1338-1355.
[229] Doyle v. Ohio, 426 U.S. 610 (1976)

The Supreme Court, however, disagreed. The Justices held that the use of silence even for the limited purpose of impeachment "*at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment.*"[230]

The Supreme Court based its reasoning on two separate principles.[231] As already established in *Hale*,[232] it argued that exculpatory statements advanced by a defendant only during the trial and not at police interrogation after receiving the *Miranda* warning are not inconsistent with his prior silence, as refusing to answer the questions of interrogators "*may be nothing more than [the]…exercise of these Miranda rights*."[233] The second argument of the Supreme Court for not allowing adverse inferences drawn from silence was that it would be "*fundamentally unfair*" as *Miranda* warnings implicitly assure defendants that their "*silence will carry no penalty.*"[234] Thus, the Supreme Court explicitly referred to fairness, a value underlying a modern democratic criminal procedure. It is important to note that the judgment held the drawing of adverse inferences from silent unconstitutional as prohibited by the Due Process Clause of the Fourteenth Amendment and not the right to silence protected by the Fifth one.[235] There is a major difference, however, between an entirely new allegation during a trial and a statement that contradicts a prior testimony. In the latter case testimony may constitutionally be employed as impeaching evidence. The Supreme Court distinguishes between substantive evidence which is for the purpose of proving a fact from impeachment

[230] Doyle, 610, 619
[231] Frank R. Herrmann and Brownlow M. Speer: *Standing Mute at Arrest as Evidence of Guilt: The 'Right to Silence' Under Attack*, 35 American Journal of Criminal Law, No.1, 2007, 13.
[232] United States v. Hale, 422 U.S. 171 (1975)
[233] Doyle, 426 U.S. 610, 617
[234] Frank R. Herrmann and Brownlow M. Speer: *Standing Mute at Arrest as Evidence of Guilt: The 'Right to Silence' Under Attack*, 35 American Journal of Criminal Law, No.1, 2007, 13.
[235] David S. Romantz: *'You Have the Right to Remain Silent' – A Case for the Use of Silence as Substantive Proof of a Criminal Defendant's Guilt*, 38 Indiana Law Review, 2005, 22

evidence which is for the limited purpose of undermining credibility of the defendant but guilt cannot be inferred from it – no matter how indicative it is of the defendant's guilt.[236]

Evidence of an impeaching nature was not a new concept in the American jurisprudence. It is well-established since *Harris v. New York* that any witness can be impeached by the prosecution with a prior statement, and the defendant is not an exception to this rule.[237] The Goverment argued that impeachment of a witness by his prior silence (not mentioning an exculpatory circumstance) is a sub-category of such an impeachment. [238] However, these two cases should be clearly distinguished. It is fair to draw negative conclusions if a defendant contradicts himself in two sepratate statement – it is a natural cost of taking the risk of cross-examination. However, it is totally different to draw adverse inferences from the fact of staying silent at the interrogation but taking the stand at trial. An approach like this would discourage defendants from telling their version of the story once they were silent after the arrest. Unfortunately, decisions of some federal Courts of Appeals disregard this consequence and allow adverse inferences from a situation where a defendant remained silent at the interrogation but spoke up at trial.[239] However, as Herrmann and Speer point out,

> *[t]hese cases compel defendants to proclaim their innocence at the moment they are taken into custody, or suffer an inference of guilt from their silence.*[240]

The difference between silence and inconsistency is, therefore, crucial – silence is not admissible as inconsistency.[241]

[236] Frank R. Herrmann and Brownlow M. Speer: *Standing Mute at Arrest as Evidence of Guilt: The 'Right to Silence' Under Attack*, 35 American Journal of Criminal Law, No.1, 2007, 14.
[237] Harris v. New York, 401 U.S. 222,225-226 (1971)
[238] Frank R. Herrmann and Brownlow M. Speer: *Standing Mute at Arrest as Evidence of Guilt: The 'Right to Silence' Under Attack*, 35 American Journal of Criminal Law, No.1, 2007, 15.
[239] See: United States v. Love, 767 F.2d 1052 (4th Cir. 1985) or United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991)
[240] Frank R. Herrmann and Brownlow M. Speer: *Standing Mute at Arrest as Evidence of Guilt: The 'Right to Silence' Under Attack*, 35 American Journal of Criminal Law, No.1, 2007, 21.
[241] Stephen Rushin: *Rethinking Miranda: The Post-Arrest Right to Silence*, 99 California Law Review, 2011, 159.

The distinction became a central element of the decision in *Anderson*.[242] In this case the defendant was arrested for driving a stolen car that belonged to someone who had been murdered recently before the arrest. The driver was charged with murder. His statements about the place from which he had stolen the car made during the interrogation and trial contradicted each other. The prosecutor referred to this during the cross-examination and accused him of fabricating a new exculpatory story. The defendant was convicted for murder. The Supreme Court held the conviction to be constitutional distinguishing the present case from *Doyle*. It held:

> *Doyle bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But Doyle does not apply to cross-examination that merely inquiries into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent.*[243]

Accordingly, *Anderson* establishes a new and clear rule according to which silence at interrogation is not admissible as "impeaching evidence" but statements that were voluntarily made during the interrogation and are inconsistent with the testimony made at trial may constitutionally use as undermining the credibility of the defendant.[244]

The Supreme Court extended the right to silence to the plea colloquy in *Mitchell* in 1999.[245] The Government argued here that by pleading guilty the accused lost her right to remain silent. However, the Justices rejected this argument holding that the aim of the plea colloquy is primarily to protect the defendant from an involuntary plea and by depriving him of the

[242] Anderson v. Charles, 447 U.S. 404,404 (1980)
[243] Anderson v. Charles, 447 U.S. 404,408 (1980)
[244] Stephen Rushin: *Rethinking Miranda: The Post-Arrest Right to Silence*, 99 California Law Review, 2011, 160.
[245] Mitchell v. United States, 526 U.S. 314 (1999)

protection the right to silence offers against compelled testimony upon a guilty plea is turning a "constitutional shield into a prosecutorial sword."[246]

It also emphasized a core principle that helps us understand the basic characteristics of the adversarial criminal procedure and the underlying value of fairness:

> *[t]he rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights.*[247]

Accordingly, unlike in the ECHR system, it is not allowed to draw adverse inferences on guilt from the defendant's silence. This rule was established in *Griffin* regarding criminal trial and was expanded to sentencing in the *Mitchell* decision with. Additionally, silence may not even be used as undermining the credibility of the defendant.

2. The implied waiver doctrine

Nevertheless, it would not be correct to draw the conclusion that the American system offers an unlimited protection to the right not to incriminate oneself in the light of recent developments. According to the judgment in *Berghuis v. Thompkins* the defendant must expressly invoke his right to silence in order to be granted the right.[248] Some referred to this decision as the death of *Miranda*.[249]

The Supreme Court established the implied waiver doctrine in *Davis v. United States*. It held that the defendant may impliedly waive his right to counsel as long as he understands his rights and that his conduct establishes a waiver.[250] The Supreme Court in the *Berghuis*

[246] Mitchell v. United States, 526 U.S. 314, 322 (1999)
[247] Mitchell v. United States, 526 U.S. 314,330 (1999)
[248] Berghuis v. Thompkins, 130 S.Ct. 2250 (2010)
[249] Charles Weisselber:*Elena Kagan and the Death of Miranda*, Huffington Post, posted 06.01.2010. See: http://www.huffingtonpost.com/charles-weisselberg/elena-kagan-and-the-death_b_596447.html (last accessed 27.11.2012. 14:10)
[250] Davis v. United States, 512 U.S. 452, 459 (1994)

decision expanded the scope of the implied waiver doctrine from the right to counsel to the right to silence.

In that case the defendant, Van Chester Thompkins was read his Miranda rights prior the interrogation by a police officer. He orally confirmed that he understood the rights but refused to sign a form acknowledging that he was Mirandized. Thompkins was than interrogated for two hours and forty-five minutes but generally remained silent, answering only occasionally to some questions either nonverbally or verbally. At one point the interrogating detective asked the accused whether he believed in God. He answered in the affirmative his eyes welled up with tears and admitted that he prays to God to forgive him for the murder. Thompkins was then convicted partly on the basis of adverse inferences drawn from his statements. The Supreme Court in a 5:4 decision upheld the convicting arguing that the defendant impliedly waived his right to silence when he answered the interrogating officer's questions on his belief. The majority relied heavily on *Davis* where the Supreme Court held that the in order to make use of the right to counsel, the defendant has to invoke that right unambiguously, otherwise the Supreme Court will interpret it as an implied waiver. Accordingly,

> *[a]s a result of Berghuis, the suspect not only bears the burden to notify the police if she wishes to invoke the right to silence but also must invoke the right clearly and unequivocally.*[251]

Justice Sotomayor attached a dissenting opinion. She argued that the decision is a substantially undermining the protection *Miranda* has offered against compelled self-incrimination during police interrogations.[252] It seems indeed contradicting the underlying principles of *Miranda* and the whole notion of fairness in criminal procedures that an almost three hours of silence and constant refusal to answer questions was interpreted as an implied

[251] Stephen Rushin: *Rethinking Miranda: The Post-Arrest Right to Silence*, 99 California Law Review, 2011, 157.
[252] Berghuis, 2266

waiver of the right to silence. An interpretation like this would mean that an interrogation could last indefinitely as long as the defendant does not invoke his right to silence explicitly or does not answer a question at which point the police can argue that he impliedly waived his right not to incriminate himself. Ironically, what the Supreme Court is suggesting is that one may only exercise ones right to silence by speaking.[253]

I argue that this has an immensely detrimental effect on the fairness of criminal procedures in the United States of America. It seems to uphold the standing of *Miranda* but violates the core principles that judgment was intended to protect. Additionally, the Miranda warning, as it is administered today, is misleading as it reveals the rights of the accused partially. As Rushin argues, "*suspects are less aware than ever of the right they possess during interrogation.*"[254] How could a layman know that although he had been informed that he has the right to silence, he may exercise it only if he explicitly invokes this right during the interrogation? Miranda warnings only make sense and protect the rights of the defendants effectively if police officers would provide a comprehensive warning with adequate information on the practice of the right. Alternatively, the text of the *Miranda* warning should be amended to accurately disclose the rights and obligations of the defendant concerning the Fifth Amendment, taking into consideration the current interpretation of these rights by the Supreme Court.

In doing so, police officers, the prosecution and the state in general should always keep in mind that

> *[t]he privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in Ullmann a witness may have a reasonable*

[253] Stephen Rushin: *Rethinking Miranda: The Post-Arrest Right to Silence*, 99 California Law Review, 2011, 157.
[254] Stephen Rushin: *Rethinking Miranda: The Post-Arrest Right to Silence*, 99 California Law Review, 2011, 177.

fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.[255]

[255] Slochower v. Board of Higher Education of New York City, 350 U.S. 551, 557 (2001)

IX. Conclusion

After comparing the case-law of the ECHR and the Supreme Court on the right to silence, it should be concluded that both jurisprudences view the right as a special safeguard in the criminal justice system worthy of a special protection. However, although the conclusions of the two judicial bodies are similar in many aspects, there are significant differences as well.

Though the right to silence was left out from the Convention, the ECHR deducted it by judicial interpretation from the right to fair hearing ensured by Article 6 in the *Funke* case. Since then, the case-law on the prohibition of self-incrimination evolved to be a significant part of the ECHR jurisprudence.

The essence of the right to silence under the ECHR case-law is best described as part of prohibition of self-incrimination, with the aim of guaranteeing that the defendant is free not to answer questions in a criminal case against him. This objective is perfectly compatible with the basic values – ensuring fair trial and human dignity – the right is meant to protect according to the *Saunders* decision.

According to the interpretation of the ECHR, the right to silence primarily covers testimonial evidence, but it is also prohibited to compel the individual to provide self-incriminating documents. However, the right is far from being absolute. As made clear in the *Murray* decision, the right to silence has its limits. According the ECHR, drawing adverse inferences from remaining silent during the police interrogation or at trial is allowed, although only in very narrowly tailored situations and if certain basic rules guaranteeing fair trial had been respected: the degree of the compulsion employed was not violating the Convention, the incriminating situation clearly called for an explanation, the defendant was properly warned

on the possible negative consequences of remaining silent and the presumption of innocence was respected.

In the United States of America, the right to silence is guaranteed in the Constitution. However, it can be fully understand and correctly interpreted only if the Fifth Amendment is analyzed in the light of the relevant, extensive jurisprudence of the Supreme Court. When identifying the underlying principles of the right the Supreme Court emphasized that the right protects multiple values, due process and human dignity among them, just like in the case of the ECHR. As a constant motive, the Supreme Court is unequivocally distancing itself from the methods and principles of the inquisitorial procedure.

The right to silence in the United States was originally applicable only before federal criminal courts. This special protection was first extended to state criminal procedures in the *Malloy* decision. A few years later the Supreme Court held in *Miranda* – entirely reforming the criminal justice practice – that the right offers a very strong protection to the defendants during the police interrogations as well. As established in *Murphy*, the privilege against self-incrimination has two primary facets: the first, directly stemming from the Constitution, being that the government may not employ compulsion to obtain incriminatory evidence; and the second, a direct consequence of the first, being that self-incriminatory testimonies obtained by compulsion are inadmissible as evidence in criminal trials.

As far as the scope is concerned, the Supreme Court, just like the ECHR, recognizes the special status of testimonial evidence and awards it a wide-protection. However, the views of the two courts differ regarding the legal compulsion to hand over self-incriminating documents as the Supreme Court sees no constitutional obstacles to it. Regarding other aspects of scope, namely procedures and types of statements covered, there is no significant difference between the opinions of the two judicial bodies.

In contrast to the ECHR jurisprudence, under the no-comment rule established by the Supreme Court in the *Griffin* case drawing adverse inferences from silence is not possible constitutionally. Exculpatory statements advanced by a defendant only during the trial and not at police interrogation after receiving the *Miranda* warning are not inconsistent with his prior silence. This does not mean, however, that two contradicting statements may not be used to undermine the credibility of the defendants. As made clear in *Harris*, any witness can be impeached by the prosecution with a prior statement, and the defendant is not an exception to this rule. This does not necessarily mean, however, that defendants are better protected under the American criminal justice system. Expanding the implied waiver doctrine established in *Davis* to the right to silence in the judgment delivered in *Berghuis* the Supreme Court held that the defendant must expressly invoke his right to silence in order to be granted the right which is indeed a problematic interpretation of this basic safeguard from the perspective of human rights.

X. Bibliography

A. Books and Articles

1. Albert W. Alschuler: *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Michigan Law Review, 1996

2. Károly Bárd: *Fairness in Criminal Proceedings – Article Six of the European Human Rights Convention in a Comparative Perspective*, Budapest, Hungarian Official Journal Publisher, 2008

3. Mark Berger: *Self-Incrimination and the European Court of Human Rights: Procedural Issues in the Enforcement of the Right to Silence*, 5 European Human Rights Law Review, 2007

4. Stephanos Bibas: *The Right to Remain Silent Helps Only the Guilty*, 88 Iowa Law Review, 2002-2003

5. Sir Nicolas Bratza: *The Implications of the Human Rights Act 1998 for Commercial Practice*, 1 E.H.R.L.R., 2000

6. Andrew S. Butler: *Funke v. France and the Right Against Self-Incrimination: a Critical Analysis*. 11 Criminal Law Forum, No 4, 2000

7. Ed Cape, Zaza Namoradze, Roger Smith and Taru Spronken: *Effective Criminal Defence in Europe*, Antwerp-Oxford-Portland, Intersentia, 2010

8. Robert F. Cochran: *How Do You Plead, Guilty or Not Guilty? Does the Plea Inquiry Violate the Defendant's Right to Silence?*, 26 Cardozo Law Review, No. 4, 2005

9. Alan M. Dershowitz: *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, New Haven, Yale University Press, 2002

10. Ben Emmerson, Andrew Ashworth and Alison Macdonald: *Human Rights and Criminal Justice*, London, Sweet & Maxwell, 2007

11. Mark Godsey: *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 Minnesota Law Review, 2006

12. Lissa Griffin: *Is Silence Sacred? The Vulnerability of Griffin v. California in a Terrorist World*, 15 William & Mary Bill of Rights, 2007

13. David Harris, Michael O'Boyle and Chris Warbrick: *Law of the European Convention on Human Rights*, London, Dublin, Edinburgh, Butterworts, 1995

14. Richard H. Helmholz et al: *The Privilege Against Self-Incrimination. Its Origins and Development*, University of Chicago Press, 1997

15. Frank R. Herrmann and Brownlow M. Speer: *Standing Mute at Arrest as Evidence of Guilt: The 'Right to Silence' Under Attack,* 35 American Journal of Criminal Law, No.1, 2007

16. Robert B. McKay: *Self-Incrimination and the New Privacy*, 1967 Supreme Court Review 209

17. Gregory W. O'Reilly: *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 Journal of Criminal Law and Criminology, 1994

18. Anna Patty: *'Right to Silence' law changed*, The Sunday Morning Herald, August 14, 2012

19. David S. Romantz: *'You Have the Right to Remain Silent' – A Case for the Use of Silence as Substantive Proof of a Criminal Defendant's Guilt,* 38 Indiana Law Review, 2005

20. Stephen Rushin: *Rethinking Miranda: The Post-Arrest Right to Silence*, 99 California Law Review, 2011, 159.

21. Ted Sampsell-Jones: *Making Defendants Speak*, 93 Minnesota Law Review, 2009

22. Daniel J. Seidmann and Alex Stein: *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 Harvard Law Review 2000

23. Stefan Trechsel: *Human Rights in Criminal Proceedings*, Oxford, Oxford University Press, 2005

24. Charles D. Weisselberg: *Mourning Miranda*, 96 California Law Review, 2008.

B. List of Cases

Supreme Court of the United States of America

1. Anderson v. Charles, 447 U.S. 404 (1980)
2. Baxter v. Palmigiano, 425 U.S. 308 (1976)
3. Blackburn v. Alabama, 361 U.S. 199 (1960)
4. Braswell v. United States, 487 U.S. 99 (1988)
5. Chambers v. Florida, 309 U.S. 227 (1940)
6. Davis v. United States, 512 U.S. 452 (1994)
7. Doe v. United States, 487 U.S. 201 (1988)
8. Escobedo v. Illinois 378 U.S. 478 (1964)
9. Fisher v. United States, 425 U.S. 391 (1976)
10. Garrity v. New Jersey, 385 U.S. 493 (1967)
11. Gilbert v. California, 388 U.S. 263 (1967)
12. Griffin v. California, 380 U.S. 609 (1965)
13. Hill v. Lockhart, 474 U.S. 52 (1985)
14. Holt v. United States, 218 U.S. 245 (1910)
15. Kastigar v. United States, 406 U.S. 441 (1972)
16. Kimm v. Rosenberg, 363 U.S. 405 (1960)
17. Lefkowitz v. Turley, 414 U.S. 70 (1973)
18. Malloy v. Hogan, 378 U.S. 1 (1964)
19. McCarthy v. Arndstein, 266 U.S. 34 (1924)
20. Miranda v. Arizona, 384 U.S. 436 (1966)
21. Mitchell v. United States, 526 U.S. 314 (1999)
22. Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52 (1964)
23. Schmerberg v. California, 384 U.S. 757 (1966)
24. Slochower v. Board of Higher Education of New York City, 350 U.S. 551 (2001)
25. Strickland v. Washington, 466 U.S. 668 (1984)
26. Tehan v. Shott, 382 U.S. 406 (1966)
27. United States v. Dionisio, 410 U.S. 1(1973)
28. United States v. Hale, 422 U.S. 171 (1975)
29. United States v. Wade, 388 U.S. 218 (1967)
30. Wilson v. United States, 149 U.S. 60 (1893)

European Court of Human Rights

31. Abas v. The Netherlands, Application no. 27943/95, Decision of 26 February 1997
32. Averill v. The United Kingdom, Application no. 36408/97, Judgment of 6 June 2000
33. Condron v. The United Kingdom, Application no. 35718/97, Judgment of 2 May 2000
34. Funke v. France, Application no. 10828/84, Judgment of 25 February 1993

35. Heaney and McGuinness v. Ireland, Application no. 34720/97, Judgment of 21 December 2000
36. I.J.L., G.M.R. and A.K.P. v. The United Kingdom, Application nos. 29522/95, 30056/96 and 30574/96, Judgment of 19 September 2000
37. Jalloh v. Germany, Application no. 54810/00, Judgment of 11 July 2006
38. J.B. v. Switzerland, Application no. 31827/96, Judgment of 3 May 2001
39. John Murray v. The United Kingdom, Application no. 18731/91, Judgment of 8 February 1996
40. K. v. Austria, Application no. 16002/90, Judgment of 13 October 1992
41. Marttinen v. Finnland, Application no. 19235/03, Judgment of 21 April 2009
42. Niemietz v. Germany, Application no. 13710/88, Judgment of 16 December 1992
43. P.G. and J.H. v. The United Kingdom, Application no. 44787/98, 25 September 2001
44. Pishchalnikov v. Russia, Application no. 7025/04, Judgment of 24 September 2009
45. Serves v. France, Application no. 20225/92, Judgment of 20 October 1997
46. Telfner v. Austria, Application no. 33501/96, Judgment of 20 March 2001