

**THE PROTECTION OF FREE CHOICE AND THE RIGHT
TO PASSIVITY: APPLYING THE PRIVILEGE AGAINST
SELF-INCRIMINATION TO PHYSICAL EXAMINATIONS
AND DOCUMENTS' SUBMISSION**

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ABSTRACT

This Article addresses the question of whether the privilege against self-incrimination should cover physical examinations as well as the obligation to submit documents. This question requires a serious examination of the justifications underlying the privilege against self-incrimination and is of particular relevance in the current age of technological progress that expands the powers assigned to law enforcement agencies to access knowledge and thoughts stored in individuals' minds. After addressing the comparative law regarding the applicability of the privilege against self-incrimination to physical examinations and to the obligation to submit documents and discussing key justifications for the privilege against self-incrimination, dividing them into epistemic and non-epistemic, and examining in that light whether there is a valid distinction between compelled speech and compelled physical examinations and documents' submission, the Article concludes that extending the privilege against self-incrimination to physical examinations and to the obligation to submit documents is necessary to protect accused persons' free will to choose their defense strategy given the burden imposed on the state to prove guilt as a condition for securing convictions.

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INTRODUCTION

This Article addresses the question of whether the privilege against self-incrimination should cover physical examinations as well as the obligation to hand over documents. This question requires a serious examination of the justifications underlying the privilege against self-incrimination and is of particular relevance in the current age of technological transformations that expand the powers assigned to law enforcement agencies to access knowledge and thoughts stored in individuals' minds. Thus, it is not inconceivable that brain imaging techniques that examine mental activity could trace thoughts and memories of silent suspects or determine the reliability of their version of events.¹ In India, for example, several defendants have been convicted of murder based on brain imaging devices.²

¹ See Kiel Brennan-Marquez, *A Modest Defense of Mind Reading*, 15 YALE J.L. & TECH. 214, 216 (2013). For a description of existing brain imaging and information-extraction techniques, see Nita A. Farahany, *Incriminating Thoughts*, 64 STAN. L. REV. 351, 368–77 (2012); Erin B. Pulice, *The Right to Silence at Risk: Neuroscience-Based Lie Detection in the United Kingdom, India, and the United States*, 42 GEO. WASH. INT'L L. REV. 865, 869–76 (2010); Sarah E. Stoller & Paul Root Wolpe, *Emerging Neurotechnologies for Lie Detection and the Fifth Amendment*, 33 AM. J.L. & MED., 359, 360–64 (2007).

² Pulice, *supra* note 1, at 866, 876 (referring to a technique known as a Brain Electrical Oscillation Signature profiling).

The protection from searches of individuals' bodies, homes, and effects is a constitutional right stemming from the right to human dignity.³ Searches by law enforcement agencies might violate human needs for a safe place in the world.⁴ They can infringe on individuals' privacy, autonomy, and physical integrity.⁵ Searches can reveal intimate details⁶ and violate property rights.⁷ The fear of such results might inhibit individuals' work and impair their freedom of expression.⁸ It is no wonder, therefore, that searches might cause anxiety, humiliation, and anger.⁹ Their expected harms must restrict the state's power to search the bodies and the belongings of accused persons and to oblige the submission of documents.¹⁰

While some apply the privilege against self-incrimination to personal documents such as a diary and equate them with thoughts, the common perception is that seizing

³ See DAVID FELDMAN, *THE LAW RELATING TO ENTRY, SEARCH AND SEIZURE* 1 (1986).

⁴ *Id.* at 2.

⁵ See *Terry v. Ohio*, 392 U.S. 1, 24–25 (1968); *Katz v. United States*, 389 U.S. 347, 351–52 (1967); *Boyd v. United States*, 116 U.S. 616, 630 (1886); FELDMAN, *supra* note 3, § 1.01; William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1232–34 (1988).

⁶ Susan M. Easton, *Bodily Samples and the Privilege Against Self-Incrimination*, CRIM. L. REV. 18, 27 (1991) (discussing an example of biological paternity disclosed through DNA tests).

⁷ *Boyd*, 116 U.S. at 630.

⁸ *Fisher v. United States*, 425 U.S. 391, 420 (1976) (Brennan, J., concurring); Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States*, 95 HARV. L. REV. 683, 695–97 (1982).

⁹ See *Terry*, 392 U.S. at 24–25 (citing anxiety, embarrassment, and anger as logical reasons to refuse a search); FELDMAN, *supra* note 3, § 1.02 (referring to the invasion of a person's home); see also *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 344–45 (2012) (Breyer, J., dissenting) (referring to an external examination of the naked body). For a more artful take on this sense of what a search can do, see FYODOR DOSTOYEVSKY, *THE BROTHERS KARAMAZOV* 681 (Constance Garnett trans., Lerner Publishing Group 2015) (1880) (“It was a misery to him to take off his socks. They were very dirty, and so were his underclothes, and now everyone could see it. And what was worse, he disliked his feet. All his life he had thought both his big toes hideous. He particularly loathed the coarse, flat, crooked nail on the right one, and now they would all see it.”).

¹⁰ See *Doe v. United States*, 487 U.S. 201, 214 (1988) (acknowledging the existence of suspects' constitutional protections against compulsory cooperation in investigations, even without applying the privilege against self-incrimination); P.J. FITZGERALD, *CRIMINAL LAW AND PUNISHMENT* 177 (1962); Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 920 (1995) (stating that the Fourth and Fifth Amendments to the United States Constitution should protect suspects from unreasonable body searches and from requirements to hand over documents); James A. McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 53 IND. L.J. 55, 70 (1977) (stating that the Fourth Amendment should offer special protection of private documents). In England, the Police and Criminal Evidence Act (1984) distinguishes between a non-intimate search, which allows the use of force, and an intimate search, which does not. See generally *Police and Criminal Evidence Act 1984*, c. 60 (Eng.) (describing many separate privileges that individuals under arrest have across multiple sections); see also SUSAN EASTON, *THE CASE FOR THE RIGHT TO SILENCE* 213–16 (1998).

documents during a lawful search violates values such as privacy, but not self-incrimination.¹¹ This Article does not deal with a seizure of documents during lawful searches, but rather explores whether the privilege against self-incrimination should offer accused persons protection against the obligation to endure physical examinations and to hand over documents to law enforcement agencies.

The justifications for the privilege against self-incrimination and the requirement to make voluntary confessions are crudely divided into epistemic justifications, which concern the reliability of evidence, and non-epistemic justifications, which aim at the promotion of values other than the pursuit of truth, chiefly the right to autonomy and the need to deter police from employing oppressive techniques of investigation.¹² Non-epistemic justifications serve as reasons for excluding involuntary yet trustworthy confessions, such as confessions obtained through torture, in the wake of which suspects point to the location of the victim's body or the proceeds of the robbery.¹³

A central justification for the privilege against self-incrimination, which is based on both epistemic and non-epistemic reasons, addresses the burden imposed on the state to prove guilt.¹⁴ The state creates rivalry with suspects and defendants during the investigatory and trial phases, accusing them of undermining the possibility to establish a partnership within a regime of a state. In a rivalry, the state cannot turn suspects and defendants into accusers. It must find the evidence of guilt through its own independent efforts. Accused persons need to prove nothing and may rely on weaknesses in the prosecution's case in their defense. This justification, combined with the inhibition of accused persons' free choice and with the right of individuals to maintain their autonomy in the face of the governmental power, should lead to applying the privilege against self-incrimination to physical examinations and documents' submission. In fact, the privilege against self-incrimination does not protect the content of the information stored in our minds per se. Thus, voluntary statements and confessions as well as verbal exchanges obtained by lawful eavesdropping are admissible evidence at trial. The privilege against self-incrimination does, however, protect the integrity of accused persons' free will to avoid cooperating with law enforcement agencies regarding the blame attributed to them.

Part I addresses the comparative law regarding the applicability of the privilege against self-incrimination to physical examinations and to the obligation to submit

¹¹ See, e.g., Constantine Theophilopoulos, *Self-Incrimination, Private Records, and Required Reporting in Regulatory Statutes*, 131 S. AFR. L.J. 604, 610 (2014). However, various courts in the United States have reached different conclusions on this issue. Farahany, *supra* note 1, at 387.

¹² ANDREW L-T CHOO, *THE PRIVILEGE AGAINST SELF-INCRIMINATION AND CRIMINAL JUSTICE* 3–10 (2013); D.J. Galligan, *The Right to Silence Reconsidered*, 41 CURRENT LEGAL PROBS. 69, 71–73, 84 (1988).

¹³ See Ian Dennis, *The Human Rights Act and the Law of Criminal Evidence: Ten Years On*, 33 SYDNEY L. REV. 333, 350–51 (2011); see also PETER MIRFIELD, *SILENCE, CONFESSIONS AND IMPROPERLY OBTAINED EVIDENCE* 13 (1997).

¹⁴ E.g., *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

documents.¹⁵ The lack of consensus on the applicability of the privilege to physical examinations and submission of documents demonstrates the current lack of clarity regarding the predominant justifications underlying the privilege. Part II discusses key justifications for the privilege against self-incrimination, dividing them into epistemic and non-epistemic, and examines whether there is a distinction between compelled speech, compelled physical examinations, and a compulsion to submit documents.¹⁶ The Article concludes that extending the privilege against self-incrimination to physical examinations and to the obligation to submit documents is necessary to protect accused persons' free will to choose their defense strategy given the burden imposed on the state to prove their guilt as a condition for securing convictions.

I. COMPARATIVE LAW REGARDING THE APPLICABILITY OF THE PRIVILEGE AGAINST SELF-INCRIMINATION TO PHYSICAL EXAMINATIONS AND DOCUMENTS' SUBMISSION

A. *United States*

In *Schmerber v. California*, the United States Supreme Court ruled in a 5–4 decision that the privilege against self-incrimination applies only to testimonial evidence and does not protect suspects from physical examinations and searches.¹⁷ The Supreme Court held that the privilege against self-incrimination does not preclude the introducing of the lab results of a blood sample taken from a defendant while hospitalized in an unconscious state following a traffic accident into evidence of a DUI offence at trial.¹⁸

In its narrow construction of the privilege against self-incrimination, the Supreme Court relied on the traditional version of the historical development of the privilege, which views it as a protection against unreliable evidence.¹⁹ The dissenters in the *Schmerber* case, however, held that a broad application of the privilege to searches of a person's body is necessary to prevent the abuse of governmental power, to protect the sanctity of a mental freedom, and to compel the state to find evidence against a person through its own efforts, based on the presumption of innocence.²⁰

In this regard, it should also be noted that the Supreme Court upheld the constitutionality of comparing a DNA sample taken from serious felony detainees with the DNA samples in the police database in such a way that a random comparison could

¹⁵ See *infra* Part I.

¹⁶ See *infra* Part II.

¹⁷ 384 U.S. 757, 761, 763–64 (1966).

¹⁸ *Id.* at 758, 761, 765.

¹⁹ See *id.* at 762–63.

²⁰ *Id.* at 775–78 (Black, J., dissenting); *id.* at 778–79 (Douglas, J., dissenting); *id.* at 779 (Fortas, J., dissenting).

tie detainees to the commission of additional offenses, other than that attributed to them in the first place.²¹

The Supreme Court reiterated that the word “witness” in the Fifth Amendment to the Constitution restricts the prohibition on coerced self-incrimination to communication, which directly or indirectly relates to fact or belief, and is expressed verbally in words or non-verbally in body language such as shaking the head, rather than in the presentation of physical characteristics which might incriminate the individual, such as wearing a shirt or providing samples of blood, handwriting or voice.²²

The Court further clarified that the privilege against self-incrimination does not protect accused persons from being compelled to actively cooperate with law enforcement agencies by, for example, providing written exemplars or participating in a lineup.²³ Thus, for example, the Court held that compelling a suspect to participate in a line up, to put strips of tape on his face, and to utter certain words does not infringe on the privilege against self-incrimination because it constitutes a compulsion to exhibit his physical characteristics and not to disclose information in his possession.²⁴

However, some states in the United States provide a broader protection against compelled self-incrimination than the Federal Constitution, and their constitutions explicitly prohibit the compulsion of a person to provide evidence against himself.²⁵ Courts in these states have distinguished between actions that require active cooperation on the part of accused persons and actions that can be performed without cooperation on their part and require them only to avoid resisting it.²⁶ Actions such as taking fingerprints or hair samples from suspects are not included in the ambit of the privilege because they do not require active cooperation.²⁷ Moreover, the privilege does not protect accused persons from extreme intrusions of their body, such as surgery to remove a bullet, which involves penetrating the skin.²⁸ Thus, for example, the Georgia Supreme Court has allowed a compelled surgery involving local anesthesia to remove a bullet from a defendant who was charged with double homicide for its comparison

²¹ *Maryland v. King*, 569 U.S. 435, 465–66 (2013).

²² *Schmerber*, 384 U.S. at 764; *accord* *United States v. Hubbell*, 530 U.S. 27, 34–35 (2000); *Doe v. United States*, 487 U.S. 201, 210, 215 (1988).

²³ *See, e.g.*, *United States v. Dionisio*, 410 U.S. 1, 5–7 (1973); *United States v. Mara*, 410 U.S. 19, 22 (1973); *Gilbert v. California*, 388 U.S. 263, 266–67 (1967).

²⁴ *United States v. Wade*, 388 U.S. 218, 220–23 (1967).

²⁵ *See, e.g.*, GA. CONST. art. I, § 1, para. 16 (“No person shall be compelled to give testimony tending in any manner to be self-incriminating.”); UTAH CONST. art. I, § 12 (“The accused shall not be compelled to give evidence against himself.”).

²⁶ *See, e.g.*, *State v. Armstead*, 262 S.E.2d 233, 234 (Ga. Ct. App. 1979).

²⁷ *Id.* (stating that “[t]he distinction is between forcing an accused to *do* an act against his will and requiring an accused to *submit* to an act”); *Creamer v. State*, 192 S.E.2d 350, 354 (Ga. 1972); *Weaver v. State*, 288 S.E.2d 687, 688 (Ga. Ct. App. 1982); *State v. Van Dam*, 554 P.2d 1324, 1325 (Utah 1976).

²⁸ *See, e.g.*, *Creamer*, 192 S.E.2d at 353.

with a bullet allegedly fired by the victim.²⁹ The court asserted that the surgery did not infringe on the suspect's privilege against self-incrimination since it did not require the suspect to actively cooperate by removing the bullet from his body on his own.³⁰ In *Winston v. Lee*, the United States Supreme Court did not permit a surgery for removing a bullet from the chest area of a suspect in an attempted robbery in order to compare the bullet to a bullet fired by the victim at the perpetrator.³¹ The Supreme Court held that a surgery that involved general anesthesia, the risks of which were disputed but apparently not extremely severe, was an unreasonable search.³² Going along with the logic outlined in the *Schmerber* case, the Supreme Court analyzed the reasonability of the search without addressing the privilege against self-incrimination.³³

In an early ruling regarding the applicability of the privilege against self-incrimination to the obligation to submit documents, the Supreme Court in *Boyd v. United States* considered the privilege as also protecting from the mere seizure of documents.³⁴ In *Boyd*, the defendants were given permission to import custom-free plate glass in the amount required to execute their construction contract with the state.³⁵ The state's suspicion regarding the defendants arose when they imported a second shipment of custom-free plate glass, claiming that the glass was broken during the first shipment.³⁶ At the state's request, a federal court compelled the defendants to furnish the invoice for the first shipment, assuming that this invoice would prove or disprove the credibility of the defendants' claim regarding the damage that occurred to the glass.³⁷ The Supreme Court reversed this order, asserting that there is no distinction between submitted documents and documents seized through a legal search.³⁸ Such a search is protected by the Fourth Amendment to the Constitution as being unreasonable in light of the defendants' proprietary rights in the invoice.³⁹ The Court added that the seizure of documents also violates the Fifth Amendment because it turns a person into a witness against himself.⁴⁰

On another occasion, the Supreme Court reiterated the notion that the privilege against self-incrimination as well as the constitutional right against unreasonable

²⁹ *Id.* at 351–52, 355.

³⁰ *Id.* at 354.

³¹ 470 U.S. 753 (1985). Winston was convicted at his trial based on the rest of the evidence against him. Ronald J. Bacigal, *Dodging a Bullet, but Opening Old Wounds in Fourth Amendment Jurisprudence*, 16 SETON HALL L. REV. 597, 624 n.188 (1986).

³² *Winston*, 470 U.S. at 766.

³³ *Id.* at 758–60.

³⁴ *Boyd v. United States*, 116 U.S. 616, 622–23 (1886).

³⁵ *Id.* at 618.

³⁶ *Id.* at 617–18.

³⁷ *Id.* at 618–19.

³⁸ *Id.* at 621–22.

³⁹ *Id.* at 624–25, 627–28.

⁴⁰ *Id.* at 633–35.

searches protect persons from introducing documents seized through a search warrant or during arrest, in which they have lawful proprietary rights, as evidence against them at trial.⁴¹ This ruling, which hindered the gathering of documents in the possession of accused persons for evidentiary purposes during criminal investigations, severely handicapped law enforcement.⁴² It is no wonder, then, that it could not have survived for long.⁴³ Initially, the Supreme Court clarified that the rule does not apply to items used for committing offenses and to items that are the proceeds of offenses committed.⁴⁴ Later, the Court ruled that items such as clothes could be seized through a lawful search for evidentiary purposes⁴⁵ because their seizure lacks any communicative nature and therefore does not compel persons to testify against themselves.⁴⁶ In addition, such searches and seizures are not unreasonable since the main purpose of the Fourth Amendment is to protect privacy rather than property.⁴⁷ In another case, the Supreme Court asserted that a search during which private, voluntarily made business records were taken from a suspect in fraudulent offenses does not violate the privilege against self-incrimination, because the suspect is required to say or to do nothing and is not obliged to aid in the disclosure, production, or validation of the documents.⁴⁸ The Supreme Court further made it clear that when the incriminating documents are taken from a third party in a manner that the documents' owner is required to do nothing, the privilege against self-incrimination cannot be invoked.⁴⁹

Documents that are records required by law are generally not protected by the privilege against self-incrimination.⁵⁰ The law may instruct a recordkeeping for regulatory purposes.⁵¹ Such customarily produced documents are akin to public records.⁵² Thus, for example, some have argued that, given the states' taxing power, Boyd could have been required to keep the receipt of the glass shipment.⁵³ However,

⁴¹ *Gouled v. United States*, 255 U.S. 298, 309–11 (1921).

⁴² James M. Shellow, *The Continuing Vitality of the Gouled Rule: The Search for and Seizure of Evidence*, 48 MARQ. L. REV. 172, 175 (1964); see Craig M. Bradley, *Constitutional Protection for Private Papers*, 16 HARV. C.R.-C.L. L. REV. 461, 466–68 (1981).

⁴³ See *Fisher v. United States*, 425 U.S. 391, 409 (1976). Justice O'Connor even went so far as to state that "our decision in *Fisher v. United States*, 425 U.S. 391 (1976), sounded the death knell for *Boyd*." *United States v. Doe*, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring).

⁴⁴ *Marron v. United States*, 275 U.S. 192, 199 (1927).

⁴⁵ *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 300–01, 306–07, 310 (1967).

⁴⁶ *Id.* at 302–03.

⁴⁷ *Id.* at 304.

⁴⁸ *Andresen v. Maryland*, 427 U.S. 463, 473–74 (1976).

⁴⁹ *Couch v. United States*, 409 U.S. 322, 325, 335–36 (1973); *Johnson v. United States*, 228 U.S. 457, 459 (1913).

⁵⁰ See *Shapiro v. United States*, 335 U.S. 1, 15 (1948).

⁵¹ See *Grosso v. United States*, 390 U.S. 62, 74 (1968).

⁵² See *id.* at 68.

⁵³ E.g., Richard A. Epstein, *Entick v. Carrington and Boyd v. United States: Keeping the Fourth and Fifth Amendment on Track*, 82 U. CHI. L. REV. 27, 45–46 (2015).

the state has no unfettered power to require its citizens to keep records that violate their privacy.⁵⁴ Also, the law cannot order the keeping of incriminating records per se so that the very compliance with the order constitutes proof of guilt.⁵⁵ In general, the Supreme Court ruled out the categorization of people inherently suspect of illegal activities for the purpose of keeping records.⁵⁶ Accordingly, the Court held that a law requiring members of the Communist Party to notify the authorities of their membership violates the privilege against self-incrimination because it refers to members of a predefined group that is inherently suspect of criminal activities.⁵⁷ Similarly, defendants may assert the privilege against self-incrimination when they fail to comply with a law that requires them to pay taxes for gambling and engaging in the business of accepting wagers and to be registering as dealing in gambling,⁵⁸ or as firearm traders.⁵⁹ The Court also held that persons involved in a trade of legal marijuana should not be subject to a specific tax ordinance related to dealing in marijuana because that might reveal criminal offenses committed before the said persons obtained a legal license to deal in marijuana.⁶⁰ Hence, the Supreme Court examined whether the purpose served by the law is intrinsically regulatory, while the generality of the law directed at the public at large is an indication of its regulatory purpose, whereas its confining to a specific group inherently suspect of criminal activities casts doubt on its purpose.⁶¹

In addition, the Supreme Court held that the privilege against self-incrimination does not protect persons from the obligation to submit voluntarily prepared private documents.⁶² Although the Court protected the admission involved in the very submission of the documents, it abandoned the idea that the privilege against self-incrimination precludes the submission of documents that contain incriminating material.⁶³ The Court asserted that the mere submission of the requested documents conveys a testimonial message according to which the documents exist, are in the possession or control of the accused, and are indeed the documents requested.⁶⁴ Under certain circumstances, where the very submission of documents is of independent evidentiary value, a person required to hand over a document cannot assert

⁵⁴ Robert B. McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 217.

⁵⁵ See *Haynes v. United States*, 390 U.S. 85, 97 n.11 (1968).

⁵⁶ See *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 79 (1965).

⁵⁷ *Id.* at 78–79.

⁵⁸ *Marchetti v. United States*, 390 U.S. 39, 41–42, 44 (1968); *Grosso v. United States*, 390 U.S. 62, 63–64 (1968).

⁵⁹ *Haynes*, 390 U.S. at 87, 98–99.

⁶⁰ *Leary v. United States*, 395 U.S. 6, 26 (1969).

⁶¹ See *California v. Byers*, 402 U.S. 424, 430–31 (1970).

⁶² *United States v. Doe*, 465 U.S. 605, 610–12 (1984); *Fisher v. United States*, 425 U.S. 391, 423 (1976).

⁶³ *Fisher*, 425 U.S. at 399–400.

⁶⁴ *Id.* at 410.

the privilege against self-incrimination in relation to the content of the documents but may invoke it regarding the very act of submission.⁶⁵ In such cases, persons cannot be required to hand over documents without a grant of immunity against the incriminating meanings flowing from the submission.⁶⁶ Thus, officials in corporations enjoy the protection of the privilege as to the fact that they are the ones who submit the documents on behalf of the corporation and thus demonstrate knowledge regarding the existence and location of the requested documents.⁶⁷

As noted above, however, the Supreme Court declined to apply the protection of the privilege against self-incrimination to the requirement to hand over voluntarily prepared documents.⁶⁸ In the case of *Fisher*, whose attorneys were required to furnish documents to the tax authorities prepared by accountants and provided to the attorneys by *Fisher*, the Court emphasized that the privilege against self-incrimination did not apply because the taxpayer was not required to verify the authenticity of the documents, and the existence and location of the documents were already known to the authorities, so that the mere handing over of the documents disclosed no new information.⁶⁹ In another case, the Supreme Court held that a suspect may be required to sign consent forms that allow the relevant bank to disclose information on bank accounts controlled by the suspect.⁷⁰

United States v. Hubbell expanded the applicability of the privilege against self-incrimination to some aspects of the requirement of submission of documents.⁷¹ Webster Hubbell was indicted for wire and tax fraud.⁷² He pleaded guilty as part of a plea bargain and was sentenced to a period of imprisonment.⁷³ Under the plea bargain, Hubbell undertook to cooperate in a particular investigation.⁷⁴ While in prison, Hubbell received a summons to appear before the grand jury in Little Rock, Arkansas, and to submit documents according to eleven specific categories.⁷⁵ After Hubbell argued that the mere submission might imply that the documents were in his possession or control and consequently might incriminate him, the prosecution granted him production immunity.⁷⁶ After receiving the immunity, Hubbell handed over more than 13,000 pages, stating that these documents correspond to the description of the documents contained in the warrant, and that he provided all the documents in his possession or control, except for documents protected by attorney-client privilege

⁶⁵ *Doe*, 465 U.S. at 612.

⁶⁶ *Id.* at 617.

⁶⁷ MCCORMICK, ON EVIDENCE 190 (John W. Strong ed., 4th ed. 1992).

⁶⁸ *Fisher*, 425 U.S. at 423.

⁶⁹ *Id.* at 411–13.

⁷⁰ *Doe v. United States*, 487 U.S. 201, 206 (1988).

⁷¹ 530 U.S. 27, 33–34 (2000).

⁷² *Id.* at 31.

⁷³ *Id.* at 30.

⁷⁴ *Id.*

⁷⁵ *Id.* at 31.

⁷⁶ *Id.*

and documents that had been prepared for trial.⁷⁷ Based on the contents of the documents furnished, Hubbell was indicted on another wire and tax fraud charge.⁷⁸ The special prosecutor admitted he did not suspect Hubbell's offenses when he first requested the documents.⁷⁹ Hubbell pleaded guilty, subject to judicial determination concerning his claim of the applicability of the privilege against self-incrimination to the documents he submitted.⁸⁰

The Supreme Court held that using the documents against their provider is unacceptable under the circumstances of the case.⁸¹ It asserted that the catalog of documents for each of the eleven categories reached the prosecutor through the defendant's mental efforts, and that furnishing such a catalog is more akin to the submission of a code to a safe than just giving its key.⁸² The testimonial value of furnishing a catalog of existing documents, regardless of their contents, is protected by the privilege against self-incrimination.⁸³ In this case, the first evidence in the evidentiary chain that led to the conviction was provided by the defendant, and the documents did not just appear in the prosecutor's office as "manna from heaven."⁸⁴ While in the *Fisher* case, the prosecution already knew about the existence of the documents and their being in the lawyers' possession, and was able to independently confirm their authenticity through the accountants who created them,⁸⁵ in the *Hubbell* case, the prosecution failed to establish that it had prior knowledge of the existence or whereabouts of more than 13,000 document pages submitted by the defendant.⁸⁶ The prosecution cannot remedy this deficiency by claiming that it stands to reason that businessmen like the defendant customarily keep business and tax records that fall under the broad categories described in the warrant.⁸⁷ In fact, without possessing knowledge about specific documents, the absence of which can be discerned from the fact that the prosecution pointed to categories of documents rather than to specific documents, the submission of the documents does carry testimonial value.⁸⁸ Persons should not therefore be forced to hand over such documents without a grant of immunity.⁸⁹

⁷⁷ *Id.*

⁷⁸ *Id.* at 30–31.

⁷⁹ *Id.* at 32.

⁸⁰ *Id.* at 34.

⁸¹ *Id.* at 43.

⁸² *Id.*

⁸³ *Id.* at 42–43.

⁸⁴ *Id.* at 42.

⁸⁵ See generally *Fisher v. United States*, 425 U.S. 391 (1976).

⁸⁶ *Id.* at 44–45.

⁸⁷ *Id.* at 45.

⁸⁸ Lance Cole, *The Fifth Amendment and Compelled Production of Personal Documents After United States v. Hubbell—New Protection for Private Papers?*, 29 AM. J. CRIM. L. 123, 184–85 (2002).

⁸⁹ See *Hubbell*, 530 U.S. at 45.

B. Israel

In Israel, the privilege against self-incrimination does not apply to physical examinations and to placing suspects in a lineup.⁹⁰ In the *Khoury* case, the Israeli Supreme Court discussed a defendant's refusal to dip his hands in a chemical that reveals traces of drugs and affirmed the possibility of drawing adverse inferences from his refusal.⁹¹ The Court held that the privilege against self-incrimination protects only the compelled submission of evidence in a manner akin to the transmission of testimony but not the right against physical examinations.⁹²

In the *Yefet* case, the Supreme Court distinguished between documents presented to a governmental inquiry committee that were created especially for the committee and existing documents made independently of the committee's work, holding that the prosecution is disallowed to introduce as evidence at trial only the first type of documents.⁹³

The *Lagziel* case presented a rather comical situation.⁹⁴ The prosecution had lost its trial file and asked the defense counsel to provide his copy of the file that the prosecution gave him before the trial as part of its duty of disclosure.⁹⁵ The defense counsel declined the prosecution's request, asserting that handing over the file to the prosecution in order to pursue the case against his client violated his privilege against self-incrimination.⁹⁶ The Supreme Court, however, compelled the defense counsel to submit the file to the prosecution, stating that the file actually contains material that basically belongs to the prosecution, not to the defendant.⁹⁷ Justice Strasberg-Cohen distinguished between private documents, which are the product of the individual's mind and creation, and public documents.⁹⁸ In fact, in the *Lagziel* case, there was indeed no attempt by the prosecution to compel the defendant to furnish evidence that it could not have obtained through its independent efforts, since the prosecution itself had given the file to the defendant.⁹⁹

As to records kept by citizens according to the law, the Israeli Supreme Court held they are not protected by the privilege against self-incrimination.¹⁰⁰ Documents

⁹⁰ CrimA 663/81 *Khoury v. State of Israel*, 85(2) PD 85, 92 (1982) (Isr.); CrimA 648/77 *Carib v. State of Israel*, PM 5768(2) 729, 744 (1978) (Isr.) (regarding a lineup).

⁹¹ *Khoury*, 85(2) PD at 89.

⁹² *Id.* at 90–91.

⁹³ CrimA 2910/94 *Yefet v. State of Israel*, 50(2) PD 221, 274, 280 (1996) (Isr.).

⁹⁴ See generally CrimA 4574/99 *State of Israel v. Lagziel*, 54(2) PD 289 (2000) (Isr.) (describing how a prosecutor, after losing trial files, asked the defense counsel to turn over his notes).

⁹⁵ *Id.* at 291–92.

⁹⁶ *Id.* at 292.

⁹⁷ *Id.*

⁹⁸ *Id.* at 294 (Strasberg-Cohen, J., concurring).

⁹⁹ See *id.* at 294–95.

¹⁰⁰ CrimA 242/63 *Kiryati v. Att'y Gen.*, 18(3) PD 477, 492–93 (1964) (Isr.).

that are required to be submitted by statutes are not private, and the public interest to use them overcomes the private interests of the documents' owners to avoid disclosing them.¹⁰¹

Thus, the Israeli Supreme Court rejected the invocation of the privilege against self-incrimination by milk producers, who declined to submit documents regarding the quotas of milk production and marketing to the Agricultural Supervisory Authority (ASA) as required by the Agricultural Supervisory Authority Law of 1988.¹⁰² The Court held that specific laws override the privilege, and that ASA may claim such documents because the producers have a statutory obligation to file them for inspection.¹⁰³ In that case, although the ASA undertook to refrain from using the documents in criminal proceedings, the Court did not base its decision on this commitment and rejected the argument according to which ASA could use the documents so obtained only to impose administrative sanctions but not as evidence at trial.¹⁰⁴

The question of whether suspects may be required to furnish to law enforcement agencies documents that the law does not instruct them to file was decided in the Gilad Sharon case.¹⁰⁵ Sharon was suspected of bribery and violation of the Political Parties Financing Law.¹⁰⁶ It should be noted at this point that the investigation ended with a decision not to bring him to justice due to insufficient evidence.¹⁰⁷ At any rate, Sharon asserted the right to silence during his interrogation.¹⁰⁸ The police refrained from searching Sharon's home because at the time, he resided on the premises of his father, Ariel Sharon, who served then as Israel's prime minister.¹⁰⁹ Instead of asking the court to lift the prime minister's immunity from searches,¹¹⁰ the police asked the Magistrate's Court to order Gilad Sharon to furnish documents related to the investigation based on Article 43 of the Criminal Procedure (Detention and Search) Ordinance [New Version], which states that if judges think that an item is necessary or useful for investigation or trial, they may instruct persons who possess that item to present or furnish it at the time and place specified in the order.¹¹¹ The police requested

¹⁰¹ *Id.*

¹⁰² CrimA 725/97 Calcuda v. Agric. Dev. Auth., 52(1) PD 749, 758, 767–68 (1998) (Isr.).

¹⁰³ *Id.* at 754, 764, 766–68.

¹⁰⁴ *Id.* at 768.

¹⁰⁵ CrimA 8600/03 State of Israel v. Gilad Sharon, 58(1) PD 748, 752 (2003) (Isr.).

¹⁰⁶ *See id.*; see also Greg Myre, *Sharon Bribery Case is Dropped, Setting Path to Woo Labor Party*, N.Y. TIMES (June 16, 2004), <http://www.nytimes.com/2004/06/16/us/sharon-bribery-case-is-dropped-setting-path-to-woo-labor-party.html> (noting that he faced charges for violating a campaign finance law).

¹⁰⁷ Greg Myre, *Israel Won't Charge Sharon in a Campaign Finance Case*, N.Y. TIMES (Feb. 18, 2005), <http://www.nytimes.com/2005/02/18/world/middleeast/israel-wont-charge-sharon-in-a-campaign-finance-case.html> (noting that Sharon was suspected of violating a campaign finance law).

¹⁰⁸ *Sharon*, 58(1) PD at 752.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 749, 752.

the submission of business-related documents that included records of transfers of money to and from Sharon's bank accounts, correspondence between Sharon and others regarding those transfers, his company's documents of incorporation, details of its income, and its list of clients and contracts with customers.¹¹²

Article 43 of the Israeli Detention and Search Ordinance is seemingly quite expansive.¹¹³ While in previous cases, the Israeli Supreme Court refrained from deciding whether the privilege against self-incrimination protects accused persons from an obligation to submit documents,¹¹⁴ there was no escape from such a decision in the *Sharon* case.¹¹⁵

Article 47(a) of the Evidence Ordinance extends the protection of the privilege beyond the right to silence.¹¹⁶ It grants accused persons a right to not provide evidence if it constitutes an admission of guilt.¹¹⁷ Section 52 of this Ordinance applies this provision to investigative proceedings.¹¹⁸ On the face of this Ordinance, it also protects accused individuals from the obligation to disclose real evidence.¹¹⁹ The Magistrate's Court issued a warrant requiring Gilad Sharon to submit the documents set forth therein to the police and rejected his request to cancel the warrant.¹²⁰ The District Court accepted Sharon's appeal and overturned the Magistrate's Court decision, holding that Section 43 of the Detention and Search Ordinance can only be directed at third parties and not at suspects.¹²¹

The Supreme Court, however, reversed the District Court's decision and held that suspects may not assert the right to remain silent in the face of a warrant requiring the submission of documents but are only protected from self-incrimination.¹²² Hence, suspects are under an obligation to submit documents regarding themselves; they have no claim of self-incrimination protecting them from being required to provide these documents.¹²³

¹¹² *Id.* at 752, 764.

¹¹³ *See* § 43, Criminal Law Procedure Ordinance (Detention and Search) [New Version], 5729-1969 (Isr.) ("If a judge concludes that the presentation of any object is necessary or desirable for purposes of an investigation or trial, then it may summon any person who is assumed to have the object in his possession or under his control to appear and to present the object, or to deliver it at the time and place stated in the summons.").

¹¹⁴ *See Sharon*, 58(1) PD at 763-64, 766 (discussing relevant Israeli cases), 767-68.

¹¹⁵ *Id.* at 767-68.

¹¹⁶ *See* Evidence Ordinance, 5731-1971, § 47(a), LSI 2 198 (1971) (Isr.) ("A person is not bound to give evidence involving the admission of a fact constituting an element of an offense with which he is, or is likely to be, charged.").

¹¹⁷ *See id.*; *see also Sharon*, 58 (1) PD at 753-54.

¹¹⁸ *Sharon*, 58(1) PD at 748, 754.

¹¹⁹ *Id.* at 753, 765.

¹²⁰ *Id.* at 749.

¹²¹ *Id.* at 753.

¹²² *Id.* at 767.

¹²³ *Id.*

Moreover, according to the Supreme Court's ruling, suspects are not allowed to ignore a judicial warrant to hand over documents even when such documents might incriminate them, but suspects can ask the court to discharge them from the obligation to submit the required documents.¹²⁴ In such a case, the court should hold an *ex parte* hearing of the suspects' request to exempt them from the obligation to submit documents and should examine each document for its potential for self-incrimination.¹²⁵ If the document does carry such a potential, the court may nevertheless order its submission to the police under a grant of immunity.¹²⁶

At any rate, the Israeli Supreme Court did not stop at drawing a line between documents that might expose suspects to criminal liability and documents that might incriminate third parties.¹²⁷ It significantly eroded the protection of the privilege against self-incrimination by asserting that it solely applies to private documents, which are created by suspects and bear similarities to testimonies, such as personal diaries, private letters, appointment books, or documents prepared for the purpose of the suspects' defense, but not to public documents.¹²⁸ The Court broadly defined public documents not only as those required by law, but as documents created by an objective body such as a bank.¹²⁹

The distinction between public and private documents found no support in Sections 47 and 52 of the Evidence Ordinance, which provides accused persons with protection from the duty to submit documents if they imply an admission of guilt.¹³⁰ That distinction is unjustifiable as well. If the privilege against self-incrimination does extend to documents, then the incriminating potential embedded in the document, rather than the nature of the document, must be the decisive factor as to the applicability of the privilege.

The Court excluded items such as a stolen property or a gun that had allegedly been used for the commission of a murder from the duty of submission, asserting that the mere submission of such items might incriminate their holders.¹³¹ However, since those items are not "private," according to the Court's definition, this exclusion, though obvious, demonstrates the problem of drawing a line between private and public documents for the purpose of applying the privilege.¹³²

To conclude, the privilege against self-incrimination in Israel does not apply to physical examinations. It applies to the obligation to submit documents only when they are private and have incriminating potential. It does not protect suspects from

¹²⁴ *Id.* at 749.

¹²⁵ *Id.* at 750.

¹²⁶ *Id.* at 760–61.

¹²⁷ *Id.* at 755–56.

¹²⁸ *See id.* at 764.

¹²⁹ *Id.*

¹³⁰ *Id.* at 766–67.

¹³¹ *See id.* at 764.

¹³² *See id.*

the obligation to submit public documents, but it does protect defendants from potentially handing over potentially criminal items, such as the weapon used to commit an offense.

C. Canada

In Canada, there is an obligation to provide documents when they concern offenses that are not mala in se and the essential purpose of the submission is regulatory. The government needs to regulate trade and economic life, even if regulation carries criminal sanctions such as imprisonment.¹³³ Generally, persons who made a conscious and uncoerced choice to participate in regulatory activities that require turning over documents are not entitled to rely on the privilege against self-incrimination for their failure to comply with that obligation.¹³⁴ Such persons are perceived as consenting to the terms of the regulatory activity.¹³⁵ Thus, the Canadian Supreme Court upheld the validity of an obligation to provide documents that shed light on price fixing in the framework of antitrust law,¹³⁶ and of an obligation imposed on fishermen to submit documents relating to the amount and places of fishing, even though exceeding the fishing quota might lead to imprisonment, since the need to maintain fisheries' survival and the need for fair distribution of fishermen's profits justify supervision.¹³⁷

At the same time, the Canadian Supreme Court held that people are protected from bodily searches and the seizure of findings related to a person's body, such as head hair, oral specimens, blood tests, and tooth bites, by the privilege against self-incrimination.¹³⁸ The Canadian Parliament nonetheless authorized courts to allow police to seize hair, buccal swabs, and blood samples for DNA testing, if there is probable cause for the commission of a serious crime, particularly serious violent and sex offenses, and DNA tests could confirm or deny a match between the suspect's DNA and the DNA found at the scene of the crime.¹³⁹ The Canadian Supreme Court asserted that this statute passes constitutional muster and that it is a reasonable search under Section 8 of the Canadian Charter given, inter alia, the limited harm to health suspects face and the public interest in law enforcement of serious offenses.¹⁴⁰

¹³³ See *Thomson Newspapers Ltd. v. Canada*, [1990] 1 S.C.R. 425, 433 (Can.).

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See *id.* at 596.

¹³⁷ See *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, 171, 173–77 (Can.).

¹³⁸ *Pohoretsky v. The Queen*, [1987] 1 S.C.R. 945, 948 (Can.); see also *R. v. Stillman*, [1997] 1 S.C.R. 607, 656–57, para. 84 (Can.). The Court held that it supports the dissenting opinion of the United States Supreme Court in *Schmerber*. See *id.* at 657.

¹³⁹ See *Canada Criminal Code*, R.S.C. 1985, c C-46, § 487.06(1)(a)–(c).

¹⁴⁰ *R. v. S.A.B.*, [2003] 2 S.C.R. 678, 698–701, para. 43–52 (Can.); see also Kent Roach, *Canada*, in *CRIMINAL PROCEDURE A WORLDWIDE STUDY* 62 (Craig M. Bradley ed., 2d ed. 2007) (reiterating the kinds of public safety interests served by the statute).

The Court highlighted two justifications that underpin the privilege against self-incrimination: protecting the reliability of the evidence and protecting accused persons from abuse of power by the state.¹⁴¹ Justifications centered on the fear of unreliable evidence are rarely relevant given the great reliability of DNA evidence.¹⁴² As for the fear of abuse of power by the state, even though there are adversarial relations between the state and accused individuals, the law sets forth protections against abuse of power such as the issuance of a warrant, the evidentiary requirements for its issuance, the severity of the offenses at bar, and the scope of the hazard to suspects' health.¹⁴³ The Canadian Supreme Court emphasized that the privilege against self-incrimination requires that the state present prima facie evidence without the individuals' coercive participation¹⁴⁴ but, as noted, held constitutional the taking of DNA samples under certain circumstances.

D. The European Court of Human Rights

The European Court of Human Rights (ECHR) drew a distinction between searches and submission of documents. Addressing the obligation to hand over documents to law enforcement agencies, the ECHR has given the privilege against self-incrimination broad scope.¹⁴⁵ Thus, in the *Funke* case, the ECHR held that compelling a person to submit documents violates both the right to silence and the privilege against self-incrimination.¹⁴⁶

Jean-Gustave Funke appealed to the ECHR complaining that France had violated the European Convention when it ordered him to furnish documents and imposed fines on him for refusing to do so.¹⁴⁷ After he passed in 1987, his wife Ruth continued the prosecution on his behalf.¹⁴⁸

According to the facts of the case, in 1980, Funke's home was searched by customs officers who were investigating tax evasion offenses following financial transactions conducted with foreign countries.¹⁴⁹ After a few hours of search, the officers seized some documents and checks from foreign banks, a car repair bill from Germany, and two cameras.¹⁵⁰ Failing to find evidence of tax offenses, the customs authorities asked Funke to provide them with documents for the years 1977 through 1979 of his

¹⁴¹ *S.A.B.*, 2 S.C.R. at 657, para. 57.

¹⁴² *Id.* at 703–04, para. 58.

¹⁴³ *Id.* at 702–03, para. 57.

¹⁴⁴ *Id.* at 703 (stating that “the principle against self-incrimination rests on the fundamental notion that the Crown has the burden of establishing a ‘case to meet’ and must do so without the compelled participation of the accused”).

¹⁴⁵ *See Funke v. France*, 256 Eur. Ct. H.R. (ser. A) 8, 21 (1993).

¹⁴⁶ *Id.* at 22.

¹⁴⁷ *Id.* at 12–13.

¹⁴⁸ *Id.* at 15.

¹⁴⁹ *Id.* at 10–11.

¹⁵⁰ *Id.* at 11.

accounts with foreign banks, and a receipt for a house he had purchased in Germany.¹⁵¹ Initially, Funke expressed his willingness to produce the requested documents, but later changed his mind.¹⁵² During various legal proceedings in France, Funke was obliged by an order issued under the authority of the French Customs Code to furnish the requested documents or pay a fine for each day of violation.¹⁵³

The ECHR held that compelling Funke to hand over documents that the customs authorities believed, yet were not certain, existed and did not try to pursue by other means clearly contravened the right to silence and the privilege against self-incrimination, adding that the unique characteristics of tax offenses do not justify such violations.¹⁵⁴

The ECHR continued to include compelled submission of documents within the ambit of the privilege against self-incrimination.¹⁵⁵ In the *Saunders* case, it held that introducing into evidence at trial statements and documents gathered pursuant to the Companies Act, which requires the provision of statements and documents to inspectors who investigated commercial and financial affairs of a company on pain of imprisonment, violated the privilege against self-incrimination.¹⁵⁶

Another case concerned J.B., a Swiss citizen who was suspected of not reporting earnings from investments in some companies to the tax authorities.¹⁵⁷ J.B. admitted that he did not properly report his income but declined to comply with the tax authorities' demand to hand over documents relating to his investments in those companies even after he was repeatedly slapped with administrative fines for his refusal.¹⁵⁸ Finally, J.B. and the tax authorities reached an agreement, and the administrative fines were canceled with the understanding that the agreement would not prejudice J.B.¹⁵⁹ in his application to the ECHR against the legality of the fine imposed on him for failing to comply with the requirement to hand over documents.¹⁶⁰

The ECHR held that the privilege against self-incrimination was violated in J.B.'s case since the privilege implies that law enforcement agencies must prove their case through their own independent efforts without resorting to evidence obtained in defiance of the accused person's will.¹⁶¹

At the same time, the ECHR did not recognize the applicability of the privilege against self-incrimination to physical examinations, with the exception detailed

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 22.

¹⁵⁵ *See id.*

¹⁵⁶ *Saunders v. United Kingdom*, 1996-VI Eur. Ct. H.R. 2044, 2066–67.

¹⁵⁷ *J.B. v. Switzerland*, 2001-III Eur. Ct. H.R. 437, 440.

¹⁵⁸ *Id.* at 440–41.

¹⁵⁹ *Id.* at 441.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 450–52.

below.¹⁶² It stated that the privilege does not extend to evidence that exist independently of accused persons' will, such as documents acquired pursuant to a warrant, blood and urine samples, and body samples taken for DNA tests.¹⁶³ The Court did not explain the distinction between documents that also have existence independent of accused persons' will and physical examinations.¹⁶⁴

In the case of *Jalloh v. Germany*, an exception was made to the rule such that the privilege against self-incrimination is unavailable in situations of search.¹⁶⁵ In general, German law draws a line between accused persons' compelled active cooperation, protected by the privilege against self-incrimination, and examinations necessary for the discovery of the truth, which do not require accused persons' active cooperation but only endurance (*Duldungspflichten*).¹⁶⁶ Section 81A of the German Code of Criminal Procedure allows taking samples from suspects' bodies through intrusive action without their consent, provided that there is no risk to their health.¹⁶⁷

In the *Jalloh* case, vomit-inducing drugs were forcibly administered to obtain evidence of a suspect's drug trafficking offense.¹⁶⁸ Police officers saw the defendant removing a small plastic bag from his mouth and handing it over to another person on two occasions.¹⁶⁹ The police arrested the defendant on the ground that the bags contained drugs, and the defendant swallowed another bag upon arrest.¹⁷⁰ The police took the defendant to the hospital, where a physician forcibly gave him a vomiting drug, using a tube he had inserted into the defendant's stomach through his nose.¹⁷¹ As a result, the defendant regurgitated a bag that contained just over 0.2 grams of cocaine.¹⁷²

The Court held that even though certain physical examinations are legitimate,¹⁷³ and though the privilege against self-incrimination does not rule them out,¹⁷⁴ forced medical intervention for the purpose of extracting evidence should be convincingly justified under the circumstances.¹⁷⁵ In view of *Jalloh's* feelings of humiliation and

¹⁶² *Saunders v. United Kingdom*, 1996-VI Eur. Ct. H.R. 2044, 2064–65.

¹⁶³ *Id.*

¹⁶⁴ See also Andrew Ashworth, *Article 6 and the Fairness of Trials*, CRIM. L. REV. 261, 265 (1999).

¹⁶⁵ *Jalloh v. Germany*, 2006-IX Eur. Ct. H.R. 283, 318–19.

¹⁶⁶ DANIELA KLEINHEISTERKAMP, *KREDITWESENGESETZ UND STRAFVERFAHREN* 260 (2010); HANS-ULLRICH PAEFFGEN, *VORBERLEGUNGEN ZU EINER DOGMATIK DES UNTERSUCHUNGSHAFT—RECHTS* 89–90 (1986); Klaus Rogall, *The Accused as Evidence Against Himself*, in 49 WRITINGS ON PROCEDURAL L. 54–58 (Duncker & Humblot 1977).

¹⁶⁷ *Jalloh*, 2006-IX Eur. Ct. H.R. at 293.

¹⁶⁸ *Id.* at 291.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 307.

¹⁷⁴ *Id.* at 316.

¹⁷⁵ *Id.* at 307–08.

anxiety, and the potentially adverse health effects his examination entailed,¹⁷⁶ the accused was subjected to humiliating and inhumane treatment in contravention of Article 3 of the European Convention.¹⁷⁷ Under these circumstances, the admission of the drugs as evidence at trial rendered the procedure unfair as a whole.¹⁷⁸

As for the applicability of the privilege against self-incrimination, the Court acknowledged that the evidence concealed in the defendant's body and which has been forcibly obtained through the use of a vomiting drug does fall into the category of evidence that exists independently of the accused's will.¹⁷⁹ However, some characteristics distinguish this case from other cases.¹⁸⁰ In this case, the vomiting drugs were administered to extract real evidence against the will of the suspect and not to merely gather material for forensic examinations.¹⁸¹ Also, the degree of force used to extract the evidence was significantly greater than the coercion applied in other cases.¹⁸² While in other cases, accused persons had to passively endure minor interferences with their bodies or were required to take some active action that involved substances produced by the normal function of the body, such as breathing, urine, and sound, in this case, the forced insertion of a nasal tube and of a substance were meant to elicit a pathological response of the body.¹⁸³ This examination also involved hazards to health.¹⁸⁴ In addition, the evidence was obtained, as stated, by degrading means in violation of Article 3 of the European Convention.¹⁸⁵ Thus, the gathering of evidence undermined the privilege against self-incrimination as well.¹⁸⁶

The ECHR did not explain why the degree of force exerted, the potential hazards the defendant faced, and the fact that the elicited evidence did not involve normal body functions are relevant for the privilege's application.¹⁸⁷

In another case, the European Court of Human Rights accepted the petition of *R.S. v Hungary*, asserting that Hungary breached the petitioner's right under Article 3 of the European Convention, which outlaws inhuman or degrading treatment.¹⁸⁸ In the case of *R.S.*, a physician inserted a catheter for urine examination, the aim of which was to find evidence of a DUI offense, without genuine consent from R.S.

¹⁷⁶ *Id.* at 311.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 317.

¹⁷⁹ *Id.* at 318.

¹⁸⁰ *See id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 318–19.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 319.

¹⁸⁶ *See id.*

¹⁸⁷ *See id.* at 309 (noting only that “drug trafficking is a serious offense” with regard to how a “forcible medical intervention was necessary to obtain the evidence”).

¹⁸⁸ *R.S. v. Hungary*, App. No. 65290/14, ¶ 72 (July 2, 2019), <http://hudoc.echr.coe.int/eng/?i=001-194233> [<http://perma.cc/WN9T-FPNX>].

and despite his explicit objection when the physician started the insertion.¹⁸⁹ The question of the violation of the privilege against self-incrimination did not arise in that case.¹⁹⁰ The Court held that Article 3 of the European Convention does not preclude the use of medical measures in defiance of the will of accused persons to obtain evidence of a criminal offense.¹⁹¹ However, any compulsory medical intervention designed to obtain evidence of a crime should be convincingly justified under the circumstances of the case.¹⁹² This especially proves true for invasive treatment, which requires careful examination of the circumstances of the case while paying attention to the severity of the offense at hand.¹⁹³ Furthermore, the state should show that it had considered other means of pursuing the evidence.¹⁹⁴ The decisive factors for considering the legality of an examination are the degree of necessity of the compulsory medical intervention to obtain evidence, its potential and actual adverse health effects, its manner of performance, the physical and mental suffering it caused, and the degree of medical supervision available.¹⁹⁵ In that case, the right of the suspect not to be subjected to humiliating and degrading treatment was violated for several reasons. The catheter insertion was not necessary because the suspect had already been taken for a blood test for the detection of drugs and alcohol and the effectiveness of a urine test for the detection of substances is questionable.¹⁹⁶ Also, given the controversy among medical experts, there is no certainty that the examination did not entail hazards to the suspect's health.¹⁹⁷ The examination was carried out in a way that was liable to provoke feelings of insecurity, anger, stress, and humiliation and also actually led to physical pain and mental suffering.¹⁹⁸

Although the ECHR did not address the case of R.S. through the lens of the privilege against self-incrimination, it is easy to discern the analogy between this case and Jalloh's case, where the invasion of the body, which was disproportionate to the gravity of the crime attributed to the accused person, was protected by the privilege.¹⁹⁹

To complete the picture regarding the rulings of the European Court of Human Rights, it is interesting to consider its construing by the Privy Council.²⁰⁰ The Privy Council asserted that the Tax Commissioner in Jersey may comply with a request of the Norwegian tax authorities to provide information about a company operating

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* ¶ 57.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* ¶ 58.

¹⁹⁶ *Id.* ¶ 70.

¹⁹⁷ *Id.* ¶ 71.

¹⁹⁸ *Id.*

¹⁹⁹ *See* Jalloh v. Germany, 2006-IX Eur. Ct. H.R. 283, 310–11.

²⁰⁰ *See, e.g.,* Vorlaw Tr. & Corp. Servs. v. Off. of the Comptroller of Taxes [2019] UKPC 29, [15]–[17] (appeal taken from Eng.).

in Georgia, requiring that the company hand over documents testifying to the status of its assets and customers, even though Norway refused to guarantee in advance that incriminating documents would not be used against their providers.²⁰¹ The Privy Council held that the ECHR has not categorically precluded the exercise of coercive powers to seize documents during an investigation,²⁰² and that such a prohibition was not in line with the *Saunders* case.²⁰³ According to the Privy Council, the European Court had taken into account the nature and extent of the compulsion used to obtain the evidence.²⁰⁴ The case at bar, however, did not concern an indictment for refusing to provide evidence.²⁰⁵ The sanction that the said company could expect due to its failure to hand over the documents was a fine, and officials were not personally obliged to hand over documents.²⁰⁶

The Privy Council additionally held that there is a public interest in international cooperation regarding investigations of potential tax offenses,²⁰⁷ and in maintaining the integrity of registered financial service providers.²⁰⁸ The question of the admissibility of the documents as evidence at trial is a separate issue that did not arise in that case.²⁰⁹ Norway is committed to the European Convention and Jersey does not have to deal with hypothetical issues about the way Norway would like to use the documents.²¹⁰ According to the Privy Council's interpretation, therefore, under certain circumstances, suspects may be required to hand over documents to law enforcement agencies, although the said documents may not necessarily be introduced into evidence at trial.

E. A Brief Summary of the Comparative Law

A review of the comparative law demonstrates that there is no consensus on the applicability of the privilege against self-incrimination to physical examinations and to the obligation to hand over documents.

The United States and Israel do not include physical examinations in the ambit of the privilege and provide limited protection to documents. Unlike in Israel, law enforcement agencies in the United States may not require suspects to hand over documents subject to certain categories and thus be aided by their intellectual efforts.²¹¹ Canada applies the privilege to physical examinations but not to documents.²¹² The

²⁰¹ *Id.* at [67].

²⁰² *Id.* at [58]–[59].

²⁰³ *Id.* at [59].

²⁰⁴ *Id.*

²⁰⁵ *Id.* at [60].

²⁰⁶ *Id.* at [62].

²⁰⁷ *Id.* at [64].

²⁰⁸ *Id.* at [65]–[66].

²⁰⁹ *Id.* at [66].

²¹⁰ *Id.* at [67].

²¹¹ *See, e.g., Doe v. United States*, 487 U.S. 201, 206 (1988).

²¹² *See, e.g., Thomson Newspapers Ltd. v. Canada*, [1990] 1 S.C.R. 425, 429–31 (Can.).

European Court of Human Rights applies the privilege to the obligation to hand over documents and probably also to invasive and unconventional physical examinations.²¹³ The privilege against self-incrimination, however, could not be asserted regarding non-invasive searches and examinations.²¹⁴ At any rate, it appears that the protection accorded to accused persons by the privilege against compulsory physical examinations and the obligation to submit documents is limited.

In the next Part, the Article addresses the distinctions between compelled speech on the one hand and compelled physical examinations and obligation of handing over documents on the other hand. It examines whether the justifications underlying the prohibition on compelled speech dictate different outcomes as compared with the obligation to submit documents and to endure physical examinations.

II. DISTINCTIONS BETWEEN COMPELLED SPEECH, COMPELLED PHYSICAL EXAMINATIONS, AND OBLIGATIONS TO HAND OVER DOCUMENTS

A. Epistemic Justifications for the Privilege Against Self-Incrimination

1. Protecting the Innocent

Protecting the innocent is one of the central justifications for the privilege against self-incrimination.²¹⁵ Innocent suspects may make a false confession under investigative pressure, stress, and anxiety, coupled by the belief that confession could benefit them while denial might not help them in light of the incriminating evidence,²¹⁶ true or false.²¹⁷ Since innocent suspects are subject to oppressive investigative techniques and may lie or confess because of the confusion, pressure, and distress they feel in a situation that is threatening by nature, silence might protect them from wrongful convictions.²¹⁸

Yet, there is a distinction between speaking and handing over documents and enduring physical examinations in terms of protecting innocent suspects.²¹⁹

Innocent suspects may, of course, wish to refrain from physical examinations or handing over documents not because of their willingness to conceal the truth, but

²¹³ See generally *Funke v. France*, 256 Eur. Ct. H.R. (ser. A) 8 (1993).

²¹⁴ See, e.g., *Saunders v. United Kingdom*, 1996-VI Eur. Ct. H.R. 2044, 2064–65.

²¹⁵ Cf. Rinat Kitai-Sangero & Yuval Merin, *Probing into Salinas's Silence: Back to the "Accused Speaks" Model?*, 15 NEV. L.J. 77, 195 (2014) ("The primary goal of the Fifth Amendment should be the protection of the innocent rather than providing shelter to the guilty.").

²¹⁶ *Id.* at 92–94.

²¹⁷ Thus, in the United States, Canada, and Israel, interrogators may lie to suspects about the existence of incriminating evidence against them. Rinat Kitai-Sangero, *Extending Miranda: Prohibition on Police Lies Regarding the Incriminating Evidence*, 54 SAN DIEGO L. REV. 611, 619–20 (2017).

²¹⁸ See Kitai-Sangero & Merin, *supra* note 215, at 92–93.

²¹⁹ *R. v. S.A.B.*, [2003] 2 S.C.R. 678, 703–04, para. 58 (Can.).

because of their fear of the violation of values protected by the right against unreasonable searches.²²⁰ Yet, compelled physical examinations and documents' submission cannot produce unreliable evidence. Documents are tangible things. The origin and reliability of public documents can easily be traced. Similarly, drugs found in a person's body during an invasive examination constitute reliable evidence.²²¹

Indeed, as mentioned, innocent suspects may fear the violation of their privacy and other values involved in intrusive searches and examinations of documents. Furthermore, the concern of reliability also applies to physical examinations such as DNA tests, which might be mistakenly interpreted, and are prone to errors in collecting and analyzing their findings.²²² Innocent suspects, therefore, may also be concerned about the conduct and accuracy of scientific tests.²²³ Thus, even regarding the Canadian case in which the Canadian Supreme Court upheld the constitutionality of the power to carry out unconsented DNA tests under certain conditions and in serious offenses, controversy arose over the results of the test.²²⁴ The reliability concern also applies to documents, which might implicate innocent suspects.²²⁵ Since suspects are not only required to hand over documents but also to classify them, misclassification or inadvertent submission of wrong documents may be detrimental.²²⁶ The fear of unreliability might be further exacerbated if the results of polygraph tests or brain imaging are introduced into evidence at trial.²²⁷

However, real evidence is less prone to manipulation through physical or psychological coercion.²²⁸ The crucial point that distinguishes between compelled speech and compulsion aiming at finding existing real evidence is the lack of linkage between

²²⁰ See Easton, *supra* note 6, at 27; see also FELDMAN, *supra* note 3, § 1.01.

²²¹ See *R.S. v. Hungary*, App. No. 65290/14, ¶ 48 (July 2, 2019), <http://hudoc.echr.coe.int/eng?i=001-194233> [<https://perma.cc/G3KX-8UFS>].

²²² Easton, *supra* note 6, at 25. For more about this concern see, e.g., Dan L. Burk, *DNA Identification Testing: Assessing the Threat to Privacy*, 24 U. TOL. L. REV. 87, 88 (1992); Erin Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 HARV. L. REV. 161, 192–93 (2013); Boaz Sangero & Mordechai Halpert, *Why a Conviction Should Not Be Based on a Single Piece of Evidence: A Proposal for Reform*, 48 JURIMETRICS 43, 72–80 (2007); Constantine Theophilopoulos, *The Privilege Against Self-Incrimination and the Distinction Between Testimonial and Non-Testimonial Evidence*, 127 S. AFR. L.J. 107, 137 (2010).

²²³ E.g., Easton, *supra* note 6, at 27; EASTON, *supra* note 10, at 225–26; Theophilopoulos, *supra* note 222, at 136–37.

²²⁴ *S.A.B.*, [2003] 2 S.C.R. at 690, para. 24.

²²⁵ See Michael Lewis Rothman, *Life After Doe? Self-Incrimination and Business Documents*, 56 U. CIN. L. REV. 387, 439 (1987) (arguing that “deceit is much more likely in documents cases”).

²²⁶ CHOO, *supra* note 12, at 53.

²²⁷ See LOLA ROMANUCCI-ROSS & LAURENCE R. TANCREDI, *WHEN LAW AND MEDICINE MEET: A CULTURAL VIEW* 65–67 (2006).

²²⁸ FENELLA M.W. BILLING, *THE RIGHT TO SILENCE IN TRANSNATIONAL CRIMINAL PROCEEDINGS: COMPARATIVE LAW PERSPECTIVES* 11–12 (2016).

the pressures exerted when gathering the evidence and their reliability.²²⁹ Greater harm to human dignity, which may be manifested in the use of force or the invasion of privacy, does not impair the reliability of the evidence. There is no connection between the reliability of evidence obtained by physical examinations and submission of documents and the accused persons' mental state and ability to defend themselves.

Some scholars posit that the justification that underpins the privilege against self-incrimination does relate to the reliability of coercive evidence. Thus, Amar and Lettow famously proposed that courts compel suspects to make statements during a court-supervised investigation, while prohibiting the statements from being admitted at trial but permitting admittance of their fruits.²³⁰ According to Amar and Lettow, this suggestion removes the fear of the unreliability of compelled testimony.²³¹ Undoubtedly, it accentuates the two main groups of justifications that underlie the privilege against self-incrimination: epistemological justifications versus non-epistemological justifications. As we demonstrate below, the central justification for the privilege against self-incrimination is the prohibition on bending the will of accused individuals. This prohibition is closely related to the burden placed upon the state to prove guilt.

2. The Pooling Effect and the Theory of Excuse

The pooling effect theory provides an epistemic justification for the privilege against self-incrimination. According to Alex Stein and Daniel Seidmann, the right to silence can help the innocent on the assumption that almost only guilty people exercise it, and that innocent suspects invoke it only in unusual cases.²³²

Stein and Seidmann assume that silence is normally invoked to disguise guilt.²³³ Innocent suspects wish to clear their names as soon as possible by refuting the suspicions against them.²³⁴ The innocents have an interest in revealing the truth because the truth works in their favor and undermines the incriminating evidence against them.²³⁵ The possibility that innocent suspects might implicate themselves while telling the truth is unlikely and certainly does not reflect the rule.²³⁶ By contrast, criminals often prefer to remain silent rather than to tell the truth or to lie, because lies can be positively refuted and consequently remove doubt regarding their guilt, while silence could lead to acquittal based on the existence of a reasonable doubt.²³⁷

²²⁹ See, e.g., *Vorlaw Tr. & Corp. Servs. v. Off. of the Comptroller of Taxes* [2019] UKPC 29, [45] (appeal taken from Eng.); Note, *Required Information and the Privilege Against Self Incrimination*, 65 COLUM. L. REV. 681, 682–83 (1965); MIRFIELD, *supra* note 13, at 8.

²³⁰ Amar & Lettow, *supra* note 10, at 858–59.

²³¹ *Id.* at 859.

²³² See generally Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430 (2000).

²³³ See *id.* at 433.

²³⁴ *Id.* at 452.

²³⁵ *Id.* at 466.

²³⁶ *Id.*

²³⁷ *Id.* at 467.

Contrary to the opinion that opposes the right to silence because it shelters only the guilty, Stein and Seidmann assert that precisely from the point of guilt it is wrong to exert indirect pressures on criminals to lie instead of remaining silent, as such pressures might militate against the innocents.²³⁸

Since criminals are motivated to invoke their right to silence, it is easier to distinguish between guilty suspects who exercise it and the innocents who do not.²³⁹ If the right to silence is deprived, criminals would choose to lie.²⁴⁰

Criminals' lies inflict negative externalities on innocent suspects. Since investigators are aware of the motivation of criminals to lie, innocent suspects, who cannot corroborate their statements with external exculpatory evidence, might be harmed because multiplied false statements erode the reliability of their statements and consequently increase the risk of their wrongful convictions.

According to the pooling effect theory, the protection accorded by the privilege against self-incrimination should be applied to evidence only when there is a risk of entering the pool through lies that impose external costs on the innocents.²⁴¹ Therefore, the privilege should apply to documents and physical examinations only to the extent that individuals can affect their contents.²⁴² Thus, the privilege should not extend to the obligation to participate in a lineup or to submit samples.²⁴³ Existing handwritten documents constitute physical and non-testimonial evidence.²⁴⁴ However, handwriting or voice samples obtained through coercion should be classified as testimonial evidence because suspects can alter their handwriting or voice.²⁴⁵ Relying on the accused to tell the truth draws the line between acts protected by the privilege against self-incrimination, such as the handing over of documents in the *Hubbell* case, and acts that are not.²⁴⁶ According to this theory, suspects may not be protected from having their thoughts read if they cannot control them.²⁴⁷

The pooling effect theory also fits Stuntz's theory of excuse in terms of the application of the privilege to documents' submission and physical examinations.²⁴⁸ According to this theory, suspects and defendants who lie during investigation and

²³⁸ *Id.* at 438–39.

²³⁹ *Id.* at 433.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 476.

²⁴² Alex Stein, *The Right to Silence Helps the Innocent: A Response to Critics*, 30 CARDOZO L. REV. 1115, 1135–36 (2008); see also CHOO, *supra* note 12, at 56 (explaining that the epistemic rationale should protect suspects in situations where they can affect the content of the evidence).

²⁴³ Seidmann & Stein, *supra* note 232, at 480.

²⁴⁴ *Id.* at 476.

²⁴⁵ *Id.* at 476–77; see also CHOO, *supra* note 12, at 56 (mentioning voice samples).

²⁴⁶ Seidmann & Stein, *supra* note 232, at 479–80; see also Theophilopoulos, *supra* note 11, at 615.

²⁴⁷ Brennan-Marquez, *supra* note 1, at 268.

²⁴⁸ Stuntz, *supra* note 5, at 1247.

trial may be exempt from criminal liability given the human tendency to tell lies in order to escape conviction.²⁴⁹ The right to remain silent is accorded to suspects and defendants on the assumption that silence is preferable to lies, because giving implicit permission to lie can cause mistrust of the testimony of accused persons, encourage them to lie, and impair the integrity of the criminal justice system.²⁵⁰ However, because it is impossible to lie about physical evidence such as blood samples, there is no justification to allow silence as a substitute for exemption from criminal liability for perjury.²⁵¹ Since people can lie and change their voice or handwriting in voice or handwriting samples, as mentioned above, such samples could be included in the ambit of the privilege.²⁵² Stuntz, however, argues that such a lie is very difficult, and therefore, excluding such evidence from the ambit of the privilege may be justified.²⁵³ By contrast, the privilege should cover the obligation to hand over documents whose whereabouts are unknown to the police and cannot be accessed through lawful searches, because accused persons who are required to hand over documents can practically choose the possibility of falsehood and dishonesty.²⁵⁴

Another opinion that aligns with the theories of the pooling effect and excuse holds that only when accused persons are forced to produce evidence from their memory should they be given the option of silence as an alternative to lying.²⁵⁵ Therefore, on the assumption that under certain situations where truth-seeking devices are employed, such as a polygraph or brain imaging, persons have no control over their physiological reactions or brain-transmitted signals and therefore cannot manipulate the evidence,²⁵⁶ the rationale of reliability will negate the applicability of the privilege against self-incrimination to such situations.²⁵⁷ If the reliability of those devices is proven, and if the reliability is the rationale underlying the privilege against self-incrimination, accused persons should not be protected against employing those devices.²⁵⁸ Thus, because accused persons cannot opt to lie, the pooling effect theory and the excuse theory do not offer them protection against the intrusion of their thoughts²⁵⁹ and lead, therefore, to the non-applicability of the privilege against self-incrimination to situations where persons have no control over their reactions.²⁶⁰

²⁴⁹ *Id.* at 1228–29.

²⁵⁰ *Id.* at 1256.

²⁵¹ *Id.* at 1276.

²⁵² *Id.* at 1276–77.

²⁵³ *Id.* at 1276.

²⁵⁴ *Id.* at 1278–79.

²⁵⁵ *E.g.*, Farahany, *supra* note 1, at 399–401.

²⁵⁶ Stoller & Wolpe, *supra* note 1, at 368.

²⁵⁷ *Id.*; *see also* Theophilopoulos, *supra* note 222, at 125.

²⁵⁸ Stoller & Wolpe, *supra* note 1, at 369.

²⁵⁹ Brennan-Marquez, *supra* note 1, at 267.

²⁶⁰ Michael S. Pardo, *Neuroscience Evidence, Legal Culture, and Criminal Procedure*, 33 AM. J. CRIM. L. 301, 335 (2006). Indeed, if the privilege against self-incrimination protects persons only in situations where they have control over the giving of testimony,

Such situations do not incentivize people to lie, since lies are impractical and would soon be revealed.

The Article will now address non-epistemic justifications for the privilege against self-incrimination.

B. Non-Epistemic Justifications for the Privilege Against Self-Incrimination

1. Protecting Privacy and Dignity

The privilege against self-incrimination was also justified as protecting the privacy of accused persons.²⁶¹ Protecting privacy is important because privacy is necessary to autonomy and personal identity.²⁶² Privacy allows persons to control information that relates to them when it is transmitted to others.²⁶³ Some have noted that because accused persons know whether or not they are associated with the offense attributed to them, this knowledge is private and thus protected by the privilege.²⁶⁴

As for the invasion of privacy, it is argued that a requirement to hand over documents impairs the privacy of suspects less than a search does, because a requirement to hand over documents does not involve searching the individual's belongings and allows suspects to defend themselves by appealing to the court.²⁶⁵ While searches can reveal personal documents, persons who submit documents give only the requested documents and prevent the widespread infringement of their privacy beyond the harm involved in scrutinizing the contents of those documents. Also, there are documents that do not impair or only slightly impair the privacy of suspects, such as a receipt for a vehicle's repair.²⁶⁶

The Canadian Supreme Court held that persons' expectation of privacy in relation to documents required by regulatory laws is minimal because these documents were meant to be perused and trusted by the relevant state authorities.²⁶⁷ Such documents reveal nothing about the personality, thoughts, and opinions of the individuals who created them, and the information they provide is limited to the purpose for

certain brain imaging techniques will not be protected by the privilege. Stoller & Wolpe, *supra* note 1, at 369.

²⁶¹ See, e.g., *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964); see also Ruth Gavison, *Privacy & the Limits of Law*, 89 *YALE L.J.* 421, 435 (1980).

²⁶² Galligan, *supra* note 12, at 88.

²⁶³ Gavison, *supra* note 261, at 423.

²⁶⁴ Leonard G. Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 *U. CHI. L. REV.* 472, 489 (1957).

²⁶⁵ Andrew S. Butler, *Funke v. France and the Right Against Self-Incrimination: A Critical Analysis*, 11 *CRIM. L.F.* 461, 472 (2000) (discussing *Thomson Newspapers Ltd. v. Canada*, [1990] 1 *S.C.R.* 425, 520 (Can.)).

²⁶⁶ Robert Heidt, *The Fifth Amendment Privilege and Documents—Cutting Fisher's Tangled Line*, 49 *MO. L. REV.* 439, 459 (1984).

²⁶⁷ *R. v. Fitzpatrick*, [1995] 4 *S.C.R.* 154, 181–82, para. 49 (Can.).

which they were created.²⁶⁸ As for searches and examinations, the United States Supreme Court ruled that providing a handwriting sample does not normally violate persons' privacy since their handwriting is inherently exposed to the public.²⁶⁹ By the same token, this rule applies to persons' voices.²⁷⁰

Some posit that a requirement to submit documents and to endure physical examinations is not protected by the privilege against self-incrimination because it does not invade individuals' mental processes, such as their knowledge, memories, hopes, beliefs, desires, and thoughts.²⁷¹ Because pursuit of an existing document does not depend on individuals' will, such information belongs less to individuals than the information contained in their minds.

However, if the privilege against self-incrimination aims to protect privacy and the cognitive products of individuals, accused persons are protected from invasions of their brains, as that might reveal their selfhood.²⁷²

In addition, because people reveal personal and private information when they write a personal diary, which may be viewed as an extension of the human mind, some posit that obliging persons to submit their diary is analogous to coercing them to speak.²⁷³ Like speech, a personal diary raises problems of reliability because people write down their fantasies, dreams, and stories that do not necessarily reflect actual reality.²⁷⁴ Writing down thoughts is part of peoples' thinking and memory-preserving process, and the fear of seizure of their personal documents could inhibit their intellectual development.²⁷⁵ Documents that physically manifest thinking processes should therefore be accorded more protection.²⁷⁶ Thus, as Bradley put it, a personal diary deserves more protection than a "diary" entitled "Robberies I Have Performed."²⁷⁷ When the invasion takes place not only in one's belongings but also in one's mental processes, the psychological harm caused is greater.²⁷⁸ The United States Supreme Court has left open the question of whether private documents such as a personal

²⁶⁸ *Id.* at 183, para. 51.

²⁶⁹ *United States v. Mara*, 410 U.S. 19, 21–22 (1973).

²⁷⁰ McKenna, *supra* note 10, at 89.

²⁷¹ *E.g.*, Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 *YALE L.J.* 2281, 2305 (1998) (book review); McKenna, *supra* note 10, at 89.

²⁷² *See* Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 *OHIO ST. L.J.* 101, 182 (1992); Stoller & Wolpe, *supra* note 1, at 371.

²⁷³ *E.g.*, Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 *U. PITT. L. REV.* 27, 35–36 (1986).

²⁷⁴ Amar & Lettow, *supra* note 10, at 921.

²⁷⁵ Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 *VA. L. REV.* 869, 926 (1985).

²⁷⁶ Bradley, *supra* note 42, at 463.

²⁷⁷ *Id.* at 479.

²⁷⁸ *Id.* at 483 (relating to content of a search warrant).

diary are protected from search and seizure.²⁷⁹ In Germany, however, the Supreme Court held that, while seizing a personal diary apparently constitutes an encroachment of the core right to privacy, diary authors release their thoughts from their control.²⁸⁰ Still, although diary authors put their thoughts on paper voluntarily, they choose to keep their thoughts in a private document rather than to share them with others.²⁸¹ Similarly, when persons sit at home and browse through internet sites according to their interests, without sharing the content of the search with anyone, it is hard to argue that they have released their thoughts from their control due to the inevitable submission of digital information to third parties.

The protection of privacy will, therefore, lead to the applicability of the privilege against self-incrimination to personal documents and to the penetration of thoughts. Indeed, some argue that the privilege against self-incrimination protects individuals' minds, while the right against unreasonable search protects real evidence.²⁸²

At the same time, however, existing and emerging technologies seem to blur the distinction between physical evidence, such as codes, fingerprints, or facial recognition with which computers or mobile phones can be accessed, and mental knowledge.²⁸³ Questions may arise such as whether it is possible to oblige accused persons to decode their documents for the interrogators or to provide them with access codes to their mobile phones, computer hard disks, or documents stored in the cloud. Some opine that document discovery warrants also oblige accused persons to provide password-protected documents, and that there is no relevant distinction in terms of the ambit of the privilege against self-incrimination between cell phone access through facial recognition or fingerprints and providing passwords that have no testimonial aspects.²⁸⁴ If the code is registered somewhere, accused persons may be obliged to hand over the document on which the code is registered, just as they may be obliged to hand over other existing documents which have been voluntarily made.²⁸⁵ Yet,

²⁷⁹ *Fisher v. United States*, 425 U.S. 391, 408–09 (1976).

²⁸⁰ Claus Roxin, *Involuntary Self-Incrimination and the Right to Privacy in Criminal Proceedings*, 31 *ISR. L. REV.* 74, 88–90 (1997).

²⁸¹ See Bradley, *supra* note 42, at 480–81.

²⁸² E.g., H. Richard Uviller, *Foreword: Fisher Goes on the Quintessential Fishing Expedition and Hubbell Is Off the Hook*, 91 *J. CRIM. L. & CRIMINOLOGY* 311, 329–30 (2001); see also Brennan-Marquez, *supra* note 1, at 257.

²⁸³ See Vivek Mohan & John Villasenor, *Decrypting the Fifth Amendment: The Limits of Self-Incrimination in the Digital Era*, 15 *U. PA. J. CONST. L. HEIGHTENED SCRUTINY* 11, 24 (2012); see also Bryan H. Choi, *For Whom the Data Tolls: A Reunified Theory of Fourth and Fifth Amendment Jurisprudence*, 37 *CARDOZO L. REV.* 185, 192 (2015).

²⁸⁴ John E.D. Larkin, *Compelled Production of Encrypted Data*, 14 *VAND. J. ENT. & TECH. L.* 253, 262 (2012); Dan Terzian, *The Fifth Amendment, Encryption, and the Forgotten State Interest*, 61 *UCLA L. REV. DISCOURSE* 298, 305 (2014); Constantine Theophilopoulos, *Electronic Documents, Encryption, Cloud Storage and the Privilege against Self-Incrimination*, 132 *S. AFR. L.J.* 596, 605 (2015).

²⁸⁵ Theophilopoulos, *supra* note 284, at 609.

while a key to a safe exists in the physical world, the code to the safe, or any other code for that matter, (provided the individual had not written it down somewhere) exists only in individuals' minds.²⁸⁶ Some posit that if the access code to documents is stored in individuals' minds, it should be shielded from disclosure by the privilege against self-incrimination because obligating individuals to hand it over implies their compulsion to speak.²⁸⁷

Courts in the United States have reached different conclusions on the issue of the obligation to hand over passwords.²⁸⁸ In England, the Court of Appeal held that suspects were obligated to furnish their interrogators with the codes for documents stored on their computers, stressing that the documents have independent existence that is separate from suspects' will and that a code is neutral evidence, while remaining open to the possibility of excluding incriminating evidence resulting from such searches.²⁸⁹ Some emphasize that at the time the documents were created, no adversarial relationships between the suspect and law enforcement agencies existed.²⁹⁰ Scholars have asserted that accused persons should be obligated to provide a password to their computers or mobile phones as part of an appropriate balance of interests between individuals' rights and the necessities of law enforcement.²⁹¹ While it is possible to break into a safe without knowing its code, police investigators often have no way to access computer files or cell phones without their passwords.²⁹² Some posit, however, that the fact that police investigators cannot access information does not accord them the right to employ improper investigative techniques while violating fundamental human rights.²⁹³

Smartphones are currently an integral part of our life to the extent that, as the United States Supreme Court put it, a stranger coming from another planet would see it as an important part of human anatomy.²⁹⁴ We live in a world where much of

²⁸⁶ Terzian, *supra* note 284, at 305; Theophilopoulos, *supra* note 284, at 611 (if a code consists of random letters and marks, however, it stands to reason that it is written down somewhere, and not just kept in the suspect's mind).

²⁸⁷ *E.g.*, Theophilopoulos, *supra* note 284, at 610.

²⁸⁸ Mohan & Villasenor, *supra* note 283, at 18–19; Nicholas Soares, Note, *The Right to Remain Encrypted: The Self-Incrimination Doctrine in the Digital Age*, 49 AM. CRIM. L. REV. 2001, 2001 (2012).

²⁸⁹ *R v. S(F)* [2009] EWCA (Crim) 2177 [21]–[23], 1 WLR 1489 [1497] (Eng.).

²⁹⁰ *E.g.*, Steven Penney & Dylan Gibbs, *Law Enforcement Access to Encrypted Data: Legislative Responses and the Charter*, 63 MCGILL L.J. 201, 236 (2017).

²⁹¹ Terzian, *supra* note 284, at 309; Penney & Gibbs, *supra* note 290, at 205.

²⁹² Terzian, *supra* note 284, at 310; Theophilopoulos, *supra* note 284, at 600; Penney & Gibbs, *supra* note 290, at 203; *see also* Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 546–47 (2005) (stating the task of detecting the code for computer files can take weeks and sometimes even fail).

²⁹³ *See also* *R. v. Stillman*, [1997] 1 S.C.R. 607, 674, para. 125 (Can.).

²⁹⁴ *Riley v. California*, 573 U.S. 373, 385 (2014) (concluding that a search warrant is needed to search for digital information found on a detainee's mobile phone).

the information about our lives is recorded and stored forever on our computers.²⁹⁵ We provide private information to third parties on which we depend for the proper management of our lives in the digital age.²⁹⁶ Our devices store our hopes, desires, and thoughts, hence the search for information in them severely erodes our privacy.²⁹⁷

Considering violations of privacy, human dignity, and the right of individuals to maintain their autonomous sphere, it is hard to distinguish between the obligation to make statements and subjecting our bodies and personal documents to intrusive inspections. Obliging suspects to make statements regarding the accusations against them does not violate their dignity and personal autonomy more than an obligation to endure a gynecological examination or forced surgery or to provide a personal diary that contains their most inner thoughts.²⁹⁸ The Canadian Supreme Court perceived the intrusion of the body as a serious violation of human dignity and privacy.²⁹⁹ Indeed, the less personal the document, the lower the violation of privacy. Still, not all personal knowledge exposed is an infringement of privacy.³⁰⁰ It cannot be argued that an obligation to hand over documents or to decipher them severely violates the privacy of a person more or less when weighed against an obligation to speak or the seizure of documents through lawful search. The degree of the violation of privacy involved in these situations varies.

Intrusion of the mind through thought-reading threatens our privacy in a new and profound way.³⁰¹ It threatens to reveal the individual's selfhood.³⁰² Naturally, it is viewed as a nightmarish characteristic of totalitarian regimes.³⁰³ Penetrating the mind is more detrimental to human dignity and privacy than body intrusion.³⁰⁴ Individuals

²⁹⁵ Kerr, *supra* note 292, at 569.

²⁹⁶ Laura K. Donohue, *The Fourth Amendment in a Digital World*, 71 N.Y.U. ANN. SURV. AM. L. 553, 678 (2016).

²⁹⁷ E.g., Riley, 573 U.S. at 393–96 (“[I]t is no exaggeration to say that many of the more than 90% of American adults who own a cell phone hold a digital record of almost every aspect of their lives—from the mundane to the intimate.”); Steven Penney, *Mere Evidence: Why Customs Searches of Digital Devices Violate Section 8 of the Charter*, 49 U.B.C. L. REV. 485, 505–06 (2016).

²⁹⁸ Easton, *supra* note 6, at 27 (stating that such examinations impair human dignity and privacy even more than forcing people to speak because of the nature of the examination and the fact that their results are retained); IAN H. DENNIS, *THE LAW OF EVIDENCE* 135 (1999) (relating to the protection of privacy); Ian Dennis, *Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-Incrimination*, 54 CAMBRIDGE L.J. 342, 357 (1995); Anne Marie DeMarco & Elisa Scott, *Confusion Among the Courts: Should the Contents of Personal Papers Be Privileged by the Fifth Amendment's Self-Incrimination Clause?*, 9 ST. JOHN'S J. LEGAL COMMENT. 219, 226–27 (1993); Stuntz, *supra* note 5, at 1277.

²⁹⁹ R. v. Stillman, [1997] 1 S.C.R. 607, 658, para. 87 (Can.).

³⁰⁰ Theophilopoulos, *supra* note 222, at 119.

³⁰¹ Stoller & Wolpe, *supra* note 1, at 372.

³⁰² *Id.* at 372.

³⁰³ Brennan-Marquez, *supra* note 1, at 219.

³⁰⁴ See also Theophilopoulos, *supra* note 222, at 112–13.

cannot develop a self-concept as an autonomous person without having some space others cannot access.³⁰⁵ Indeed, individuals have no absolute right to be protected from search of their homes and personal effects, despite the violation of privacy. Yet, while the information contained in documents or obtained from physical examinations is limited, the information existing in the human mind is infinite and unfocused.³⁰⁶ Technological means capable of penetrating individuals' brains are more likely to impair their dignity and privacy than traditional methods of tracing individuals' thoughts.³⁰⁷ Searching the brain with technological means can absorb many thoughts that are unrelated to the suspicions against the person. Even if the brain search results in the acquittal of the innocent individual, the concomitant violation of the individual's privacy will be enormous.³⁰⁸

However, separate from the violation of privacy and dignity, it may be argued that the privilege against self-incrimination protects knowledge possessed by accused persons. Thus, as stated above, the United States Supreme Court held that an obligation imposed on a suspect to participate in a lineup, put strips of tape on his face, and utter a sentence compelled him to display physical features rather than his knowledge.³⁰⁹ In another case, the United States Supreme Court ruled that questioning a DUI suspect to gauge his speech does not compel him to provide testimonial evidence, and that the speech test was only used to ascertain the suspect's inability to clearly pronounce words due to the lack of coordination between the muscles of his tongue and mouth.³¹⁰ By contrast, the Court determined that the suspect's "I don't know" answer to the question, "When was your sixth birthday?" was protected by the privilege against self-incrimination, since it indicated his confused mental state.³¹¹ If the privilege does protect individuals' minds, which include their thoughts, feelings, memories, and constitution of their selfhood, people should be protected from mind mapping and techniques that penetrate their thoughts against their will.³¹²

³⁰⁵ Robert S. Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 UCLA L. REV. 343, 366–67 (1979).

³⁰⁶ See generally Wilder Penfield & Edwin Boldrey, *Somatic Motor and Sensory Representation in the Cerebral Cortex of Man as Studied by Electrical Stimulation*, 60 BRAIN 389 (1937) (finding that electronic stimulation of the brain caused "video-like" playback of random memories).

³⁰⁷ Erin Murphy, *DNA and the Fifth Amendment* 10 (N.Y.U., Working Paper No. 11-28, 2011).

³⁰⁸ See Pulice, *supra* note 1, at 887–88.

³⁰⁹ *United States v. Wade*, 388 U.S. 218, 221–23 (1967).

³¹⁰ *Pennsylvania v. Muniz*, 496 U.S. 590, 592 (1990).

³¹¹ *Id.*

³¹² Stoller & Wolpe, *supra* note 1, at 371–72; George M. Dery, *Lying Eyes: Constitutional Implications of New Thermal Imaging Lie Detection Technology*, 31 AM. J. CRIM. L. 217, 247 (2004); Brennan-Marquez, *supra* note 1, at 216, 218 (holding that because the privilege against self-incrimination protects individuals only when they can control their testimony, certain brain-imaging devices do not undermine the privilege).

However, the protection of privacy is a concomitant consequence of the right to silence and not its purpose or cause.³¹³ Suspects are not protected from the invasion of their privacy while other, permissible investigatory techniques to discover the truth are employed, such as asking people about themselves, eavesdropping on their conversations, or searching their homes and effects.³¹⁴ The United States Supreme Court explicitly clarified that privacy is not the protected value underpinning the privilege against self-incrimination, and that the privilege only protects compelled self-incrimination and not the disclosure of private information.³¹⁵ It should also be recalled that under a grant of immunity, accused persons must disclose private information.³¹⁶ Allegedly, if accused persons are accorded immunity for their brain products, law enforcement agencies may be allowed to trace the information contained in their brains, although the violation of privacy of persons who are accorded immunity and persons who do not is similar.³¹⁷ It seems, therefore, that the privilege against self-incrimination cannot provide protection against physical examinations, including searches of the mind.³¹⁸ Clearly, however, intrusive searches can be protected by other values.

2. Concern About the Abuse of Power by the State and the Maintenance of Individuals' Autonomy

While under criminal investigation, suspects face the threatening and hostile environment of a police interrogation. The right to silence provides them with a refuge in the face of what they may perceive as tyranny and abuse of power by law enforcement agencies.³¹⁹ Furthermore, it actually helps to prevent the tyranny of law enforcement agencies, which might follow from their sense of unlimited power. The right to silence clarifies to law enforcement agencies that their ability to control the

³¹³ Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 990 (1977).

³¹⁴ JOSEPH D. GRANO, *CONFESSIONS, TRUTH AND THE LAW* 53 (1993); DENNIS, *supra* note 298, at 135; Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 262 (2004); David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1107–14 (1986); Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 376 (1998); Stuntz, *supra* note 5, at 1232–33; Dennis, *supra* note 298, at 357.

³¹⁵ *Fisher v. United States*, 425 U.S. 391, 401 (1976); *Andresen v. Maryland*, 427 U.S. 463, 477 (1976).

³¹⁶ *Fisher*, 425 U.S. at 433–34 (Marshall, J., concurring).

³¹⁷ *Stoller & Wolpe*, *supra* note 1, at 372; *see also* *Grosso v. United States*, 390 U.S. 62, 73 (1968) (Brennan, J., concurring).

³¹⁸ *Stoller & Wolpe*, *supra* note 1, at 372; *see also* *Grosso*, 390 U.S. at 73.

³¹⁹ *See* Donald P. Judges & Stephen J. Cribari, *Speaking of Silence: A Reply to Making Defendants Speak*, 94 MINN. L. REV. 800, 825 (2010).

suspects and to trace their actions and thoughts is limited. As such, the right to silence forces interrogators to regard suspects as persons who have an independent will which deserves respect, and not as a tool subject to their authority.³²⁰ Abrogating the right to silence might oblige suspects to respond to any questions posed to them under interrogation, thus rendering them helpless against the state's power.³²¹ Forcing suspects to speak might make interrogations oppressive and intrusive.³²² Interrogators who have a legal right to receive answers might harass and brainwash suspects.³²³ Obliging suspects to respond to questions under interrogation is greatly humiliating, particularly when they are posed in an insulting and derisive manner, are irrelevant to the offenses at hand, recurring, or just a reflection of the interrogators' disbelief of the suspect's version of events. The right to silence, therefore, provides a way to escape from the psychological pressures exerted during interrogations and protects innocent suspects from being driven into making false confessions.³²⁴

Prima facie, the concern for suspects is much less relevant as to the requirement to submit documents or endure physical examinations because such actions do not entail penetrating the suspects' minds with oppressive techniques.

Still, the importance of the suspects' sense of certainty that the interrogators may not invade their bodies, effects, and thoughts and the necessity of preventing interrogators from perceiving suspects as tools subject to their control also proves true regarding physical examinations and the obligation to submit documents. Indeed, the need to establish a linkage between the required examinations and the requested documents on the one hand and the evidence expected to be obtained on the other hand restricts the interrogators' ability to exercise arbitrary powers and improper compulsion against accused persons. However, physical examinations and requirements to submit documents might also serve as a weapon against suspects who decline cooperation.³²⁵

The Israeli case of Gilad Sharon exemplifies the ability of interrogators to oppress suspects when they are empowered, even by the court, to oblige suspects to cooperate

³²⁰ Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 670, 678 (1996).

³²¹ MARK BERGER, *TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION* 40–41 (1980).

³²² *See id.*

³²³ *See* John T. McNaughton, *The Privilege Against Self-Incrimination: Its Constitutional Affection, Raison d'Être, and Miscellaneous Applications*, 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 138, 147 (1960).

³²⁴ *See generally* Dorsey D. Ellis, Jr., *Vox Populi v. Suprema Lex: A Comment on the Testimonial Privilege of the Fifth Amendment*, 55 IOWA L. REV. 829 (1970).

³²⁵ *See, e.g.*, PETER J. HERZOG, *JAPAN'S PSEUDO-DEMOCRACY* 53–54 (1993) (describing an extremely humiliating and intrusive physical search of a woman in Japan by male investigators in 1988, which was meant to break her spirit and had nothing to do with the crime she was suspected of (fraud), when eventually no evidence was found against her); *see also, e.g., id.* at 53 (describing a urine test of a woman who was caught driving without a license).

with them.³²⁶ Following the Israeli Supreme Court's decision, according to which the privilege against self-incrimination did not apply to public documents, Sharon handed over some of the documents mentioned in the court's order to the police.³²⁷ In a hearing conducted at the Tel Aviv Magistrate's Court upon the state's request, Sharon declared that he had handed over all the documents in his possession.³²⁸ The state insisted that additional documents included in the order were still in Sharon's possession and control.³²⁹ The Magistrate's Court asserted that the state did present evidence that the suspect possessed additional documents, while possession should be construed broadly as the capability to obtain said items or documents.³³⁰ Since such a capability existed regarding bank accounts and agreements to which a company controlled by the suspect was allegedly a party, the suspect had to give the court a detailed explanation of the reasons for his failure to comply with the order.³³¹

The Tel Aviv District Court rejected Sharon's appeal.³³² It held that suspects who claim that they do not physically or constructively possess all documents mentioned in the order should ask the court to exempt them from complying with the order and should additionally explain why they cannot hand over the requested documents and where they are located.³³³ The District Court rejected Sharon's argument that he was only obliged to submit documents under his physical control that the police could have seized under a search warrant if they had taken that path.³³⁴

In a verdict concerning Gilad Sharon's appeal of the decision requiring him to hand over documents that were not in his physical possession, the Israeli Supreme Court upheld the District Court's interpretation of the term "possession" as applying to items over which suspects have control.³³⁵ Otherwise, suspects shall be exempt from submitting documents that they gave others in order to conceal or that can be easily obtained by logging onto their computer.³³⁶ The Court added that there is an assumption that certain types of documents, such as the details of transactions in bank accounts or signed contracts, are in the accused person's possession or control.³³⁷ Regarding documents that are not in the suspect's possession, courts should issue an order requiring the suspect to hand them over only if that is the

³²⁶ CrimC (MC TA) 3390/03 Sharon v. State of Israel, Nevo Legal Database (July 14, 2004) (Isr.).

³²⁷ *Id.* § 11.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² CrimA (DC TA) 70002/04 State of Israel v. Sharon, PM 5763(2) 577, 579 (2004) (Isr.).

³³³ *Id.* at 580.

³³⁴ *Id.* at 581.

³³⁵ CrimA 1761/04 Gilad Sharon v. State of Israel, 16–17 Nevo Legal Database (Mar. 29, 2004) (Isr.).

³³⁶ *Id.* at 17–18.

³³⁷ *Id.* at 21.

reasonable option to obtain them, taking into account the time and financial resources required from the suspect compared to the ability of law enforcement agencies to obtain those documents.³³⁸

The Court clarified that suspects who allege that various documents listed in the order are not in their possession must apply to the court that issued the order and ask to be exempt from complying with the order while supplying explanations as to the whereabouts of the requested documents and their ability to meet the order's requirements.³³⁹ Moreover, though the order must be clear enough for its recipients to understand what they are obliged to submit, the prosecution does not have to name specific documents whose submissions are requested and can be sufficiently clear just by pointing to *categories* of documents.³⁴⁰

Demanding that suspects who are unable to hand over documents mentioned in the court order appeal to the court and be exposed to a cross-examination regarding the whereabouts of the documents related to their interrogation is a gross violation of their right to silence, to be left alone, and to act passively during the interrogation. It forces suspects to initiate legal proceedings, which involve a considerable amount of money, and to provide valuable information to the prosecution. It is hard not to notice the potential for oppressive behavior by interrogators that is created by their empowerment to oblige suspects to provide documents and to endure physical examinations.

The Article turns now to the next justification which underpins the privilege against self-incrimination: imposing the burden of proof on the prosecution. This justification, which combines epistemic and non-epistemic aspects, advocates the extension of the privilege against self-incrimination to physical examinations and to document submission.

C. Combined Epistemic and Non-Epistemic Justifications: The Privilege Against Self-Incrimination as Corollary of Imposing the Burden of Proof on the State

1. Non-Criminal Proceedings

In civil litigations and in non-criminal proceedings, the state does not function as an accuser even to the extent that it is party to the litigation. Rather, the state is accorded a regulatory role. Thus, in some situations, the state may impose supervision as a condition for licensing a business.³⁴¹ Persons who engage in an activity that justifies regulation and is subject to regulation should allow it as long as they know in advance what documents they are obliged to prepare and maintain and as long as these documents are rationally connected to the purpose of the regulation.³⁴² Persons

³³⁸ *Id.* at 14.

³³⁹ *Id.* at 19–20, 26.

³⁴⁰ *Id.*

³⁴¹ See, e.g., Stephen A. Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6, 26 (1986).

³⁴² See *id.* at 24–25.

who enjoy the benefits of regulated activities such as driving, forming a corporation, or trading on the stock exchange are under a moral obligation to follow the rules governing the activity, which they could choose to avoid.³⁴³ In such situations, there is no significant adversarial relationship between individuals and the state. In fact, the regulation intends to direct the individuals' initial behaviors and not to gather evidence against them for a criminal offense.³⁴⁴

Hence, it appears that records that the law requires to be filed in order for the state to regulate certain activities, such as the supervision of agricultural production quotas or fisheries, should be excluded from the ambit of the privilege.³⁴⁵ However, a situation in which clear criminal penalties are imposed for violating the rules of regulation, most notably imprisonment, without use restriction on evidence gathered through the compelled cooperation of regulated individuals is unacceptable.³⁴⁶ The sanctions for violating regulatory conditions should be essentially administrative: revocation of the license to engage in a particular activity and imposition of administrative fines (although a fine may be imposed in criminal proceedings, it is not as stigmatic as imprisonment).

Similarly, it is legitimate to oblige persons to submit documents attesting to their income to the relevant tax authorities³⁴⁷ and to prohibit them from concealing information from the authorities while pleading the privilege against self-incrimination.³⁴⁸ It is argued that the duty to pay taxes is incumbent on persons by their very residence in a particular country and can be regarded as arising from the existence of a contract between the individual and the state.³⁴⁹ The obligation to provide information is intended to help the relevant tax authorities ascertain a person's true income, based on an acknowledgment of the state's need to collect taxes. Only the taxpayers know the income tax information, and contacting them with the requirement to provide information and to submit documents does not create an adversarial relationship with the state, nor does it attribute any blame to them.

On the normative level, compelling the submission of documents to the tax authorities should be limited to the purpose of tax collection. The disclosure of fiscal offenses should be pursued by other means. Thus, the United States Supreme Court

³⁴³ Mark Redmayne, *Rethinking the Privilege Against Self-Incrimination*, 27 OXFORD J. LEGAL STUD. 209, 229–30 (2007).

³⁴⁴ Lawrence Rosenthal, *Compulsion*, 19 U. PA. J. CONST. L. 889, 911–12 (2017).

³⁴⁵ See Butler, *supra* note 265, at 473–74.

³⁴⁶ Richard A. Nagareda, *Compulsion “To Be a Witness” and the Resurrection of Boyd*, 74 N.Y.U. L. REV. 1575, 1645 (1999).

³⁴⁷ See also *Allen v. United Kingdom*, 35 Eur. Ct. H.R. 289 (2002) (holding that no privilege against self-incrimination prevents evidence from being admissible when incriminating financial documents are forcibly turned over to the tax authorities).

³⁴⁸ PETER ALLDRIDGE, CRIMINAL JUSTICE AND TAXATION 95 (Andrew Ashworth ed., 1st ed. 2017). On the problem of evading payment of taxes, see Limor Riza, *The Intrinsic Flaw in Taxation Impeding Tax Compliance*, 18 U. PA. J. BUS. L. 887, 890–91 (2016).

³⁴⁹ ALLDRIDGE, *supra* note 348, at 95.

held that persons may not refrain from filing the required income tax documents based on the privilege against self-incrimination. They may, however, invoke a claim of self-incrimination in response to a specific question regarding the document.³⁵⁰ This rule should also hold true with regard to other documents required for the examination of compliance with regulatory conditions. Even when the initial purpose of the obligation to hand over documents is regulatory, the introduction of such documents into evidence at trial compels persons to be their own accusers.³⁵¹ A barrier must therefore be placed between the use of documents whose submission was obliged for regulatory purposes and those used in criminal proceedings.

The American *Baltimore City Department of Social Services v. Bouknight* case is another example of the non-applicability of the privilege against self-incrimination to non-criminal proceedings.³⁵² This case involved a mother who abused her toddler son.³⁵³ The Juvenile Court declared the toddler a minor in need and allowed the mother to remain her son's guardian under the supervision and guidance of the Baltimore City Department of Social Services (BCDSS).³⁵⁴ BCDSS concluded that the mother violated the terms of the protective order and asked the court to remove the minor from her custody.³⁵⁵ The mother refused to disclose her son's whereabouts and did not obey the court's order to bring the child in.³⁵⁶ The court ordered her imprisonment until the child was brought to court or until his whereabouts were disclosed, while there was no assurance that the child was still alive.³⁵⁷ The Maryland State Court of Appeals overturned the order, contending that the mother had reason to fear that complying with the order might lead to her conviction.³⁵⁸ However, the United States Supreme Court held that the mother could not avoid complying with the order by invoking the privilege against self-incrimination.³⁵⁹ That privilege applies only to the coercion of communicative evidence.³⁶⁰ Even if bringing the child has a testimonial component, implying that the child's whereabouts are known to the mother and that the child is under her control, she cannot be aided by the privilege. The inability to utilize the privilege occurs because she has assumed duties as a guardian and because bringing the child is required in a non-criminal regulatory process, which is carried out following the declaration of the child as a minor in need, and conditioning

³⁵⁰ *United States v. Sullivan*, 274 U.S. 259, 263–64 (1927).

³⁵¹ See also Christopher Sherrin, *Distinguishing Charter Rights in Criminal and Regulatory Investigations: What's the Purpose of Analyzing Purpose?*, 48 ALTA. L. REV. 93, 109, 115 (2010).

³⁵² *Balt. City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 560–61 (1990).

³⁵³ *Id.* at 551–52.

³⁵⁴ *Id.* at 552.

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 552–53.

³⁵⁷ *Id.* at 553.

³⁵⁸ *Id.* at 553–54.

³⁵⁹ *Id.* at 554–55.

³⁶⁰ *Id.* at 555.

the guardianship of the mother on fulfilling certain stipulations.³⁶¹ Here, the mother was obliged to bring the child out of concern for his safety and not for the conduct of criminal proceedings against her.³⁶² The Court left open, however, the possibility of use restriction on the testimonial aspect of complying with the court's order.³⁶³

The dissenters in that case asserted that, under the circumstances of the case, no line between the civil and criminal proceedings could be drawn, and that a requirement to bring the child or to provide details of his whereabouts should be accompanied by a grant of immunity.³⁶⁴

Some posit that it should have been simply stated that the privilege against self-incrimination has been compromised, but that this compromise is justified in light of the state's duty to care for the safety of minors.³⁶⁵ However, such a view can eviscerate the privilege against self-incrimination from its purpose, given the general duty imposed on law enforcement agencies to protect public safety. Another article viewed the mother's consent to cooperate with the social services as a waiver of the privilege against self-incrimination, similar to defendants who plead guilty under a plea bargain.³⁶⁶ It is argued, however, that due to the conduct of a criminal investigation on suspicion of the child's murder by his mother, it is difficult to treat the requirement to bring the child as a mere compliance with a regulatory order.³⁶⁷ It seems that the very nature of parenthood implicitly contains a commitment to care for the well-being of children and to obey other rules concerning their welfare, such as sending them to educational institutions at the appropriate age. Parents cannot invoke the privilege against self-incrimination to avoid sending their children to kindergarten or school as required by law, where teachers can see signs of bruising on the child's body. The conclusion would have been different had parents been required to self-reporting employing physical violence against their children.

2. Criminal Proceedings

A requirement that accused persons hand over documents to law enforcement agencies curtails the burden of proof imposed on the state. According to the prevailing moral theory of the Western world, the state bears the burden to prove the defendant's guilt to a high degree of certainty in order to secure a conviction.

³⁶¹ *Id.* at 555–56, 559.

³⁶² *Id.* at 560–61.

³⁶³ *Id.* at 561.

³⁶⁴ *Id.* at 569–70 (Marshall, J., dissenting).

³⁶⁵ See H. Bruce Dorsey, Note, *Baltimore City Department of Social Services v. Bouknight: The Required Records Doctrine—Logic and Beyond*, 50 MD. L. REV. 446, 460–62 (1991).

³⁶⁶ Nagareda, *supra* note 346, at 1658.

³⁶⁷ Lisa Tarallo, Note, *The Fifth Amendment Privilege Against Self-Incrimination: The Time Has Come for the United States Supreme Court to End Its Silence on the Rationale Behind the Contemporary Application of the Privilege*, 27 NEW ENG. L. REV. 137, 180–81 (1992).

Indeed, the privilege against self-incrimination is commonly associated with the presumption of innocence. The central argument for that link relates to the prosecution's obligation to prove guilt through its independent efforts without the aid of accused persons and without requiring them to participate in the criminal proceedings against them.³⁶⁸ When accused persons are required to actively help their accusers, they make it easier for the prosecution to discharge the burden of proof.³⁶⁹

In relation to the exclusion of evidence obtained by illegal means, the United States Supreme Court has rhetorically asked whether there is a distinction between evidence extracted from persons' minds and evidence extracted from their bodies.³⁷⁰ However, in the context of the burden of proof imposed on the state, some draw a line between a person's duty to speak and the requirement that a person endure physical examinations and produce documents and real evidence.³⁷¹

One possible distinction relates to the hazard of incrimination that accused persons face. Handing over a gun or document with clearly incriminating content directly connects accused persons to offenses and should be protected by the privilege against self-incrimination, in contrast with providing voice or written exemplars for which an expert witness is required.³⁷² Thus, when the United States Supreme Court upheld the constitutionality of a law requiring a driver involved in an automobile accident to furnish his or her name and address, the Court stressed that the required details were neutral and insufficient in themselves to lead to the individual's conviction.³⁷³ The Court of Appeal in England asserted in a decision, according to which suspects may be obliged to provide a computer code, that the code is neutral evidence.³⁷⁴ Similarly, the European Court of Human Rights distinguished between extracting incriminating evidence such as drugs and taking substances used for forensic examinations from a suspect's body.³⁷⁵ However, evidence is still considered incriminating if it is a link in a chain leading to other incriminating evidence.³⁷⁶ Moreover, according to the line

³⁶⁸ *Miranda v. Arizona*, 384 U.S. 436, 460 (1966); *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 415 (1966); BILLING, *supra* note 228, at 12; D.J. Harvey, *The Right to Silence and the Presumption of Innocence*, N.Z. L.J. 181, 181 (1995) ("Essential to the presumption of innocence and the burden of proof is the concept that the prosecution should not resort to the accused for its proof."); Gregory W. O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402, 420 (1994).

³⁶⁹ Charles Gardner Geyh, *The Testimonial Component of the Right Against Self-Incrimination*, 36 CATH. U. L. REV. 611, 618 (1987).

³⁷⁰ *Rochin v. California*, 342 U.S. 165, 173 (1952).

³⁷¹ *See California v. Byers*, 402 U.S. 424, 431–32 (1971) (distinguishing testimonial evidence from physical examinations).

³⁷² *Id.* at 427–33.

³⁷³ *Id.* at 431–32.

³⁷⁴ *R v. S(F)* [2009] EWCA (Crim) 2177 [20], [2009] 1 WLR 1489, [1496]–[97] (Eng.).

³⁷⁵ *Jalloh v. Germany*, 2006-IX Eur. Ct. H.R. 283, 318–19.

³⁷⁶ *E.g.*, *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972); *Marchetti v. United States*, 390 U.S. 39, 48–49 (1968). *Contra* Peter Arenella, *Schmerber and the Privilege Against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31, 55 (1982).

of thought that requires a direct connection between the act and the hazard of incrimination, it may be argued that accused persons should not enjoy an unimpeded right to silence but only a right to silence in relation to incriminating statements. Nevertheless, given the autonomy of accused persons to shape their defenses, and in view of the concern for wrongful convictions due to careless and damaging statements, such a distinction would make no sense. And, indeed, the right to silence applies to statements of any kind.³⁷⁷

The key distinction between compelled speech and compelled physical examinations and submission of documents relates to the creation of evidence versus the disclosure and submission of existing evidence. Compelled speech might produce statements that would not have been available otherwise. Similarly, an obligation to create documents is equivalent to an obligation to make statements and to generate new evidence.

By contrast, by enduring physical examinations or handing over documents, accused persons are not required to create the evidence but to hand over existing documents that they had in their possession³⁷⁸ and were voluntarily made.³⁷⁹ Documents are independent items that speak for themselves.³⁸⁰ The evidence already exists in the real world, the accused persons have not produced it for the prosecution, and the search, examination, or submission merely revealed it.³⁸¹ With regard to forcing people to give voice or written exemplars, some have argued that as long as people play the role of “actors” rather than “creators” and have to say or write a text that was chosen for them, there is no difference between the use of their voice or handwriting and the use of their facial features for identification.³⁸²

In Sharon’s case, the Israeli Supreme Court equated the obligation to hand over documents with their seizure through a search warrant.³⁸³ Law enforcement agencies can independently seize documents if they have sufficient information concerning their whereabouts.³⁸⁴ Suspects are “not required to say anything while handing over [the] documents” and may do it in silence.³⁸⁵ According to this view, the lack of knowledge by law enforcement agencies about the location of the documents or their inability to access them does not diminish the burden of proof imposed on the state given the right of law enforcement agencies to search and seize. Nevertheless, an order to

³⁷⁷ Arenella, *supra* note 376, at 36, 39, 44.

³⁷⁸ See CrimA 8600/03 State of Israel v. Sharon, 58(1) PD 748, 760 (2003) (Isr.).

³⁷⁹ See *Andresen v. Maryland*, 427 U.S. 463, 477 (1976).

³⁸⁰ See CrimA 725/97 Calcuda v. Agric. Dev. Auth., 250–52 Nevo Legal Database (Mar. 15, 1998) (Isr.).

³⁸¹ DENNIS, *supra* note 298, at 133–34 (stating, however, that a presumption of innocence does not provide a basis for this distinction); see also *id.* at 355.

³⁸² See, e.g., Theophilopoulos, *supra* note 222, at 125–26.

³⁸³ Sharon, 58(1) PD at 760; see also Cole, *supra* note 88, at 188–89 (discussing warrants as an alternative to subpoenas for pre-produced documents).

³⁸⁴ Cole, *supra* note 88, at 188–89.

³⁸⁵ Sharon, 58(1) PD at 760–61.

hand over documents requires a mental effort by accused persons to connect the documents requested in the order with the documents in their possession or control.³⁸⁶ By the very submission of the documents, accused persons implicitly state that the documents they provide are the documents described in the order.³⁸⁷ Therefore, there is no analogy between seizing documents by lawful search and obliging accused persons to hand over documents to law enforcement agencies in terms of the assistance required from accused persons to law enforcement agencies.

Silence is a defense strategy. Accused persons may remain silent so as not to unduly respond under the pressure of police interrogation or cross-examination at trial. As mentioned, this concern is irrelevant as to documents or physical examinations whose reliability does not depend on the mental states of accused persons, the tension or pressure exerted on them, or the ability of accused persons to deal with the questions posed to them.

Accused persons, however, may also remain silent because of their insistence that the prosecution meet the burden of proof, and they may build their defense on weaknesses and flaws in the prosecution's case.³⁸⁸ They may fear that documents might be misinterpreted and that the results of physical examinations, which, for example, ascertain their presence at the scene of the crime, might militate against them despite their innocence. Hence, insistence that the prosecution meet the burden of proof rests on epistemic grounds as well.

In fact, the justification for the privilege against self-incrimination is primarily based on respecting the autonomy of accused persons to decide the nature and extent of their cooperation with law enforcement agencies in relation to the accusations leveled against them.³⁸⁹ That autonomy to choose the best legitimate defense and to avoid helping the prosecution build its narrative should be respected.

Accused persons could not practically decline cooperation if the burden of proof of their innocence had been imposed on them. The ability of accused persons to refrain from cooperating with law enforcement agencies is the result of imposing the burden of proof on the state.

3. The Prevention of Trilemma: Between Passive and Active Cooperation

The trilemma argument supplements the previous subsection and may even qualify parts of it. The trilemma argument, whereby accused persons should be protected against the need to choose one of the following three evils—self-incrimination (if they choose to tell the truth); perjury (if they choose to lie); or contempt of court (if they choose to violate the law by remaining silent)—provides a central justification for the privilege against self-incrimination.³⁹⁰ An obligation imposed on persons to

³⁸⁶ Uviller, *supra* note 282, at 319–20.

³⁸⁷ Theophilopoulos, *supra* note 284, at 606–07.

³⁸⁸ Kitai-Sangero & Merin, *supra* note 215, at 102–03.

³⁸⁹ See O'Reilly, *supra* note 368, at 422.

³⁹⁰ *Pennsylvania v. Muniz*, 496 U.S. 582, 596–98 (1990); *South Dakota v. Neville*, 459

implicate themselves and the violation of their autonomy to decide whether to participate in pursuing their guilt involve humiliation.³⁹¹ The right to silence saves accused persons from the trilemma they face by giving them an option to choose a path that does not directly harm them.³⁹²

The trilemma argument negates the analogy between seizing documents through a search warrant and obliging accused persons to hand over documents and endure certain physical examinations. Through the lens of the trilemma argument, there is a distinction between passive and active cooperation. Searches of individuals' homes, effects, and bodies do not require active cooperation on their part. The United States Supreme Court has emphasized that searches do not violate the privilege against self-incrimination because the creators of the documents play only a passive role during their conduct.³⁹³ They are not required to do anything while police perform the search.³⁹⁴ When it comes to actions that can be done by another person, such as seizing documents during a search, there is no trilemma since the actions are not under suspects' control.³⁹⁵ Brain searches by mind-simulation devices or the interpretation of physiological responses, which do not depend on the subjects' cooperation, do not create a trilemma either.³⁹⁶ A lie detector forcibly attached to individuals' bodies that measures their responses and a brain-resonance device coercively attached to a suspect's head that reads their thoughts both extract information from the mind without obliging persons to speak or take action. Brain imaging that examines blood flow patterns or brain activity allows the state to extract information from the minds of accused persons while rendering them unable to control the transmission of information.³⁹⁷ Data technology that could be accessed through cyber-intermediaries can also trace persons' intimate actions without cooperation on their part.³⁹⁸

Some scholars allege that testimonial communication stems from the deliberate action of persons to disclose information about mental states.³⁹⁹ Certain thought-reading devices do not involve a conscious product of disclosure, as their purpose

U.S. 553, 563 (1983); JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 33–34 (2005); Arenella, *supra* note 376, at 50–51.

³⁹¹ O'Reilly, *supra* note 368, at 421–22.

³⁹² Erwin N. Griswold, *The Right to Be Let Alone*, 55 NW. U. L. REV. 216, 221–22 (1960).

³⁹³ *E.g.*, *Andresen v. Maryland*, 427 U.S. 463, 473–74 (1976).

³⁹⁴ *Id.*

³⁹⁵ *Id.* at 475–77; B. Michael Dann, *The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence from a Suspect*, 43 S. CAL. L. REV. 597, 598, 625 (1970).

³⁹⁶ Stoller & Wolpe, *supra* note 1, at 374; Brennan-Marquez, *supra* note 1, at 267.

³⁹⁷ Dov Fox, *The Right to Silence as Protecting Mental Control*, 42 AKRON L. REV. 763, 763–65, 772–74 (2009).

³⁹⁸ *See* Choi, *supra* note 283, at 216–19 (discussing lack of expectation of privacy with new technology).

³⁹⁹ Brennan-Marquez, *supra* note 1, at 218, 245–46. There is no need of a linkage between intention and communication, and deliberate action, such as document discovery, in which persons reveal information about their mental state, is sufficient. *See id.* at 247–48.

is to circumvent accused persons' intent.⁴⁰⁰ In addition, scientific progress may make it possible to employ measures that can compel suspects to act against their will and to speak truthfully about their involvement in the offense attributed to them.⁴⁰¹ In such cases, it would be clear that the events occurred in isolation from the willingness of the accused to admit guilt.

However, accused persons who are forced to cooperate actively, e.g., through submitting voice or handwriting samples or documents whose location is unknown to the interrogators, face the same trilemma as do suspects who are required to make statements.⁴⁰² In these cases, they face what is perceived as a "cruel choice": to yield to the order and submit the documents or the samples; "to lie" by attempting to distort their voice or handwriting, destroying the relevant document, or denying they have it in their possession; or to breach the law by declining cooperation.⁴⁰³ The results of this trilemma could be more difficult for law enforcement agencies if accused persons choose the illegal option of document destruction.⁴⁰⁴ Forcing accused persons to cooperate augments the violation of their dignity and privacy.⁴⁰⁵ It makes sense to talk about the sacrifice and self-betrayal required from accused persons only in a state of active action on their part.⁴⁰⁶ Obliging accused persons to cooperate infringes on their ability to remain passive during the criminal justice process. By demanding their active cooperation, the state violates the moral autonomy of accused persons to decide whether or not to actively participate in establishing their guilt and cooperate with law enforcement agencies.⁴⁰⁷ Some emphasize that it is cruel to use individuals' bodies or personal documents to incriminate them.⁴⁰⁸ In the context of the obligation to submit documents, the United States Supreme Court held that the violation of the sense of justice follows from the extraction of evidence from the accused persons themselves.⁴⁰⁹ A demand of active cooperation

⁴⁰⁰ *Id.* at 250–52.

⁴⁰¹ Suspects in the United States and Canada received scopolamine, a truth serum. Gilbert Geis, *In Scopolamine Veritas: The Early History of Drug-Induced Statements*, 50 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347, 350–52, 354, 356 (1959). For a discussion on the use of drugs by the CIA, see Robert Bejesky, *The Utilitarian Rational Choice of Interrogation from a Historical Perspective*, 58 WAYNE L. REV. 327, 369–83 (2012).

⁴⁰² Robert Bonvouloir Foster, Comment, *The Right Against Self-Incrimination by Producing Documents: Rethinking the Representative Capacity Doctrine*, 80 NW. U. L. REV. 1605, 1641 (1986); Stuntz, *supra* note 5, at 1257–59.

⁴⁰³ Dann, *supra* note 395, at 621–23; Gerstein, *supra* note 305, at 389; Stuntz, *supra* note 5, at 1257–58; Theophilopoulos, *supra* note 222, at 138.

⁴⁰⁴ Stuntz, *supra* note 5, at 1257–59.

⁴⁰⁵ Rogall, *supra* note 166, at 168; see also Georganne R. Higgins, Note, *Business Records and the Fifth Amendment Right Against Self-Incrimination*, 38 OHIO ST. L.J. 351, 370 (1977).

⁴⁰⁶ Redmayne, *supra* note 343, at 225.

⁴⁰⁷ Gerstein, *supra* note 305, at 361, 389–92.

⁴⁰⁸ E.g., Stuntz, *supra* note 5, at 1234–36.

⁴⁰⁹ *Couch v. United States*, 409 U.S. 322, 327–28 (1973).

overrides accused persons' free will.⁴¹⁰ The trilemma argument should, therefore, lead to the extension of the privilege against self-incrimination to all cases of compelled cooperation.⁴¹¹

Indeed, there are scholars who support the distinction between passive and active cooperation as defining the ambit of the privilege against self-incrimination.⁴¹² According to this distinction, law enforcement agencies can take documents or real evidence unilaterally but cannot require accused persons to provide them (unless they prefer to do so as an alternative to lawful search).⁴¹³ Whilst a person's right against unreasonable search imposes restrictions on the unilateral taking of evidence through search and seizure, the privilege against self-incrimination protects accused persons from being obliged to actively furnish evidence such as written exemplars.⁴¹⁴

The distinction between active and passive cooperation for the application of the privilege against self-incrimination protects accused persons from being compelled to actively cooperate with law enforcement agencies but leaves them to passively endure actions that *prima facie* can be carried out without their consent.

According to a view that excludes passive cooperation from the shield of the privilege, accused persons may be viewed as a means of proving guilt.⁴¹⁵ This view was justified by an adage whereby persons' bodies may be bent, but not their wills.⁴¹⁶ Cartesian dualism, which views the body and the mind as two different objects,⁴¹⁷ certainly allows this distinction.

According to this line of thought, just as the state may not force accused persons to admit their guilt but may "obtain" such a confession by, for example, eavesdropping on their conversations,⁴¹⁸ the state may seize documents, but it may not oblige accused persons to hand them over.⁴¹⁹

Some observe that a distinction that diverts the emphasis from the invasion of the body and privacy to the extent of the cooperation required from accused persons does not adequately preserve human dignity, the integrity of the body, and the appropriate

⁴¹⁰ MIRFIELD, *supra* note 13, at 16.

⁴¹¹ See Stein, *supra* note 242, at 1134–35.

⁴¹² E.g., Nagareda, *supra* note 346, at 1581, 1629.

⁴¹³ *Id.* at 1581, 1603, 1629–31, 1640.

⁴¹⁴ *Id.* at 1629.

⁴¹⁵ PAEFFGEN, *supra* note 166, at 89.

⁴¹⁶ *Id.* at 90; see also LOUIS MICHAEL SEIDMAN, SILENCE AND FREEDOM 55 (2007) (stating in regard to a convicted defendant who refused to proceed in his testimony that "[t]he government managed to get his body, but it will never have his soul").

⁴¹⁷ See generally RENÉ DESCARTES, MEDITATIONS ON FIRST PHILOSOPHY (Jon Cottingham trans., Cambridge Univ. Press 2013) (1641) (discussing the provable nature of reality); RENÉ DESCARTES, PASSIONS OF THE SOUL (1649), reprinted in DESCARTES: SELECTED PHILOSOPHICAL WRITINGS 218 (John Cottingham et al. trans., Cambridge Univ. Press 1988) (discussing the separation between one's soul and one's body).

⁴¹⁸ See *Hoffa v. United States*, 385 U.S. 293, 295, 299, 300, 302–03 (1966).

⁴¹⁹ Nagareda, *supra* note 346, at 1581.

balance between individual rights and the power of the state.⁴²⁰ This distinction results in a person's right not to be required to submit his or her handwriting or voice exemplars (actions that require active cooperation and cannot be performed through physical force), but not the person's right to refuse to undergo surgery against their will. This distinction allegedly exempts persons from handing over documents that the law requires filing on the one hand, but allows chaining them to mind-reading devices on the other hand.⁴²¹ Removing any action that is technically feasible to perform by force from the ambit of the privilege against self-incrimination might cause serious harm to human dignity and the integrity of the body and, under certain circumstances, might even border on torture.

There are, however, other values that safeguard privacy, human dignity, and the physical integrity of the body.⁴²² Regardless, various conclusions may be reached about the reasonableness of a search involving an intrusion into a person's thoughts. Thus, while some contend that such a search is unreasonable and unconstitutional,⁴²³ others insist it would not necessarily be when weighing the gravity of the charges attributed to accused persons and the danger they pose to public safety.⁴²⁴

Still, as mentioned above, the privilege against self-incrimination and the burden of proof imposed on the state are intertwined. The rulings of the European Court of Human Rights, which protect accused persons from prosecution or sanctions for refusal to hand over documents to law enforcement agencies, express the ban on defeating the will of accused persons to avoid cooperation with their accusers.⁴²⁵

Nevertheless, the contention that the distinction between passive and active cooperation (stemming from the trilemma argument) should govern the ambit of the privilege against self-incrimination presents significant difficulties. Sometimes, there is a thin line between situations that require active cooperation on the accused persons' part and situations that do not.

It is clear that if people refuse to be subject to physical examinations that do not involve active cooperation on their part, law enforcement agencies must use force to perform them. However, the physical inability to resist a search, as in the *Breithaupt* case, where the suspect was unconscious, does not negate the existence of coercion,

⁴²⁰ See, e.g., *United States v. Wade*, 388 U.S. 218, 261–62 (1967) (Fortas, J., concurring in part and dissenting in part) (discussing the balance between freedom, dignity, and the rights of the state).

⁴²¹ See Michael S. Pardo, *Disentangling the Fourth Amendment and the Self-Incrimination Clause*, 90 IOWA L. REV. 1857, 1877–78 (2005).

⁴²² See, e.g., Steven Penney, *What's Wrong with Self-Incrimination—The Wayward Path of Self-Incrimination Law in the Post-Charter Era—Part III: Justifications for Rules Preventing Self-Incrimination*, 48 CRIM. L.Q. 474, 505–08 (2004) (discussing objections to compelled taking of bodily samples on grounds alternative to self-incrimination concerns and the state's interests weighed against suspects' privacy and dignity interests).

⁴²³ See, e.g., Pardo, *supra* note 421, at 1879; Fox, *supra* note 397, at 766.

⁴²⁴ Gerald F. Uelman, *1991: A Fourth Amendment Odyssey*, 70 A.B.A. J. 86, 88 (1984).

⁴²⁵ See discussion *supra* Section I.D.

just as sexual intercourse with an unconscious person is considered rape.⁴²⁶ The decisive test for coercion is the knowledge of law enforcement agencies about the suspect's objection or failure to give a conscious consent to conduct the examination.⁴²⁷ There is a distinction between freedom of will and freedom of action.⁴²⁸ The possibility of exerting physical power on helpless suspects while searching or examining them despite their opposition or without their consent, for example, by attaching a brain imaging device, does not eliminate the element of coercive cooperation on their part.⁴²⁹ The Canadian Supreme Court has explicitly stated that the question of conscriptive evidence does not depend on the nature of the evidence but on whether suspects were forced to make a statement or furnish a samples from their bodies in violation of the Canadian Charter.⁴³⁰ In *Winston v. Lee*, though the United States Supreme Court examined coercive surgery through the lens of the Fourth Amendment, the Court addressed the humiliation involved in the performance of surgery against an individual's will, which is absent when consent is given.⁴³¹

The fact that documents and real evidence do exist in the world does not change the nature of the cooperation required from accused persons. By the same token, it can be argued that a statement is also evidence since suspects are "only" required to speak truthfully about past events that occurred in the objective reality independently of their statements. However, since the burden of proof is put on the prosecution, accused persons have a right to merely watch the prosecution make its case while choosing a passive path of defense.

The right to passivity should also exist with respect to physical examinations, which can be performed while exercising force and without the accused persons' cooperation. The European Court of Human Rights viewed the insertion of a vomiting

⁴²⁶ See *Breithaupt v. Abram*, 352 U.S. 432, 443–44 (1957) (Douglas, J., dissenting) (discussing the fact that a search of an unconscious person is coercive).

⁴²⁷ *Rochin v. California*, 342 U.S. 165, 179 (1952) (Douglas, J., concurring) ("I think that words taken from his lips, capsules taken from his stomach, blood taken from his veins are all inadmissible provided they are taken from him without his consent. They are inadmissible because of the command of the Fifth Amendment.") In *Rochin*, the Court refused to admit a drug that was seized after the suspect was confined, transported to a hospital, and had a tube shoved down his throat, causing him to vomit and ejaculate the drugs he swallowed. *Id.* at 166. The Court held that such an act shocks the conscience. *Id.* at 172. Justice Brennan, dissenting in *Andresen v. Maryland*, argued that the privilege against self-incrimination precluded the seizure of personal documents during a search. 427 U.S. 463, 486 (1976) (Brennan, J., dissenting). In his opinion, the possibility of putting hands on private documents without the suspect's assistance or even presence does not eliminate the element of coercion. *Id.* at 486–87. This element exists by the very knowledge of their refusal to be subjected to search. *Id.* at 487–88. Persons are entitled to an area of physical liberty for the conduct of their affairs. *Id.*

⁴²⁸ JOEL FEINBERG, HARM TO SELF 208 (1986); HARRY G. FRANKFURT, THE IMPORTANCE OF WHAT WE CARE ABOUT 1–2 (1998).

⁴²⁹ See Pardo, *supra* note 260, at 328.

⁴³⁰ *R. v. Stillman*, [1997] 1 S.C.R. 607, para. 77 (Can.).

⁴³¹ *Winston v. Lee*, 470 U.S. 753, 765 (1985).

drug into a suspect's stomach through a nasal tube as a violation of the privilege against self-incrimination.⁴³² Referring to an individual's right not to be subjected to torture, Cesare Beccaria asserted that, in the relationship between the state and the individual, it is not appropriate to require the individual to be both the accused and the accuser.⁴³³ Although a person suffers passively when tortured, there is no dispute that the torture victim's free will is overborne. Indeed, a person's will is overborne in any situation of compelled physical examination and compelled submission of documents. When the evidence is obtained while threatening accused persons with criminal sanctions or the exercise of force, it is elicited out of defiance of their will.

Some argue that when the Founders introduced the Fifth Amendment to the United States Constitution, sanctifying the privilege against self-incrimination, their intention was to shield individuals against the obligation to provide law enforcement agencies with information, whether by making statements or handing over documents.⁴³⁴ Beyond historical tracing and linguistic interpretation of the word "witness," it should be examined whether limiting the privilege to testimonial evidence makes sense.

Justice Brennan opined that compelled polygraph examinations, which aim at obtaining physical evidence, are actually designed to extract evidence that is essentially testimonial, and stated that a different conclusion would undermine the spirit and history of the Fifth Amendment.⁴³⁵ Justice Black asserted that the distinction between physical and communicative testimony is unreasonable.⁴³⁶ In fact, the message that accompanies the very act of submitting documents is often marginal and uncontroversial, and what seems to trouble both accused persons and law enforcement agencies is the content of these documents.⁴³⁷

The distinction between physical and testimonial evidence, and consequently between active and passive cooperation, is challenged when physical measures are used to discover the truth, such as polygraph, truth serum, and devices that read and transmit thoughts.⁴³⁸ Neuroscientific evidence sometimes belongs to both

⁴³² *Jalloh v. Germany*, 2006-IX Eur. Ct. H.R. 283, 319–20.

⁴³³ CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 31 (Henry Paolucci trans., 1963) (1764) ("But I say more: it tends to confound all relations to require that a man be at the same time accuser and accused, that pain be made the crucible of truth, as if its criterion lay in the muscles and sinews of a miserable wretch.").

⁴³⁴ *See, e.g.*, Soares, *supra* note 288, at 2014–16 (discussing the original scope of the Fifth Amendment); Nagareda, *supra* note 346, at 1608–09 (discussing the history of the Fifth Amendment's introduction and contemporaneous definitions for the word "witness"); *see also* *Grosso v. United States*, 390 U.S. 62, 76 (1968) (Stewart, J., concurring) ("I am convinced that the Fifth Amendment's privilege against compulsory self-incrimination was originally meant to do no more than confer a testimonial privilege upon a witness in a judicial proceeding.").

⁴³⁵ *See* *Schmerber v. California*, 384 U.S. 757, 764 (1966).

⁴³⁶ *Id.* at 774, 778 (Black, J., dissenting).

⁴³⁷ *See, e.g.*, *supra* notes 347–48 and accompanying text.

⁴³⁸ *See* Schnapper, *supra* note 275, at 927 (discussing the Court's approach to passive

categories.⁴³⁹ Current data technology and certainly future technological progress blur the distinction between physical evidence and an individual's mental knowledge and consciousness.⁴⁴⁰ The polygraph demonstrates the fragile boundaries between speech and physical reactions. As stated, the United States Supreme Court views forced polygraph tests as protected under the privilege against self-incrimination because, even though polygraphs measure physical performance, they are used to extract testimonial responses.⁴⁴¹ One article offers a hypothetical example that demonstrates the polygraph's ability to extract uncontrollable reactions from suspects even in the face of their reluctance to cooperate.⁴⁴² In the article's example, while a murder suspect is chained, a polygraph device is attached to his body, and the investigator asks him about various places where the body of a murdered girl was suspected to be hidden.⁴⁴³ Observing the silent suspect's physiological reactions, the polygraph tester gradually narrows down the search areas and eventually leads the investigators to the location of the body.⁴⁴⁴ DNA too can reveal a person's most intimate details and in the future may help detect character tendencies, including a tendency toward violence or pedophilia.⁴⁴⁵ Scientific progress may allow, and perhaps already allows, penetrating persons' brains to read their thoughts.⁴⁴⁶ Thus, researchers are examining the ability to discover falsehoods using Functional Magnetic Resonance Imaging (fMRI) or other devices designed to extract the truth by examining the brains' physiological responses.⁴⁴⁷

Some scholars contend that the privilege against self-incrimination protects accused persons from extracting information from their minds.⁴⁴⁸ In the case of an obligation to hand over documents, there is no attempt to extract information from the mind. In *United States v. Hubbell*, the United States Supreme Court held that the privilege applies because the obligation imposed on the defendant to submit documents by categories exploited the content of his mind.⁴⁴⁹ It is argued that the privilege against self-incrimination should allow persons to keep charge of their thoughts, which make up their unique personality, and to exclude, for example, the use of brain resonance devices to trace persons' thoughts.⁴⁵⁰ Even if a reliable lie detector capable

cooperation); *see also* Theophilopoulos, *supra* note 222, at 120 (discussing new methods of evidence gathering and the implication of these technologies on cooperation).

⁴³⁹ MICHAEL S. PARDO & DENNIS PATTERSON, *MINDS, BRAINS, AND LAW* 161 (2013).

⁴⁴⁰ Choi, *supra* note 283, at 192.

⁴⁴¹ *Schmerber v. California*, 384 U.S. 757, 764 (1966).

⁴⁴² Allen & Mace, *supra* note 314, at 248–49.

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ Murphy, *supra* note 307, at 8.

⁴⁴⁶ *See id.*; Uelmen, *supra* note 424, at 86.

⁴⁴⁷ *See* PARDO & PATTERSON, *supra* note 439, at 86.

⁴⁴⁸ *See, e.g.,* Fox, *supra* note 397, at 763 (arguing for both a moral and constitutional right over one's own mind).

⁴⁴⁹ 530 U.S. 27, 43 (2000).

⁴⁵⁰ *See* Fox, *supra* note 397, at 763, 796–97; *see also* Choi, *supra* note 283, at 239

of reading thoughts is developed, the privilege against self-incrimination should protect accused persons from being forcibly subjected to it.⁴⁵¹ Blood is not part of our personality, but our thoughts definitely are.⁴⁵² Accused persons should not be denied control over their minds.⁴⁵³ Testimonies should be viewed as the substantial content of human cognition, and hence the privilege against self-incrimination should prevent coercive incrimination by means of a high degree of control over the suspect's mind.⁴⁵⁴ In fact, our personality is "infused" with data technology, which significantly improves our memory and analytical functions.⁴⁵⁵ Therefore, the word "mind" should be flexibly interpreted.⁴⁵⁶

Some define testimony as relying on the accused persons' epistemic authority over the contents of mental states such as beliefs, thoughts, hopes, concerns, and knowledge.⁴⁵⁷ It is alleged that a suspect such as Hubbell is an epistemic authority,⁴⁵⁸ but an accused person is not an epistemic authority as to the question of the correspondence between his or her handwriting and voice and the offender's handwriting and voice.⁴⁵⁹ It is, however, easy to see that this distinction is not simple, either, because a suspect is an epistemic authority on whether a particular sample is their handwriting or voice.⁴⁶⁰ Suspects are also epistemic authorities over the relationship between the requested documents and the documents they provide. Additionally, borderline cases can also arise under the epistemic test. Thus, the United States Supreme Court excluded a response of an intoxicated suspect ("I don't know") to the question of when his sixth birthday occurred.⁴⁶¹ The Court held that the suspect could have chosen between a true and a false answer indicating a certain date.⁴⁶² The dissenting opinion in this case stated that the suspect was not given a real choice, just as a person who is unable to read the letters during an eye examination does not

(discussing competing theories of the mind/body distinction). *But see* Pardo, *supra* note 260, at 305, 335.

⁴⁵¹ *See* Pardo, *supra* note 421, at 1863.

⁴⁵² Fox, *supra* note 397, at 796.

⁴⁵³ *See id.* at 765 (discussing the mind/body dualism and the implications of this theory on control over one's thoughts).

⁴⁵⁴ *See* Allen & Mace, *supra* note 314, at 266–67 (discussing the Self-Incrimination Clause's relevance in situations where defendant is forced to disclose his thoughts).

⁴⁵⁵ *See* Choi, *supra* note 283, at 244–45 (describing the mind as supported by modern technological advancements).

⁴⁵⁶ *See id.*

⁴⁵⁷ *See* Michael S. Pardo, *Self-Incrimination and the Epistemology of Testimony*, 30 *CARDOZO L. REV.* 1023, 1025 (2008); Pardo & Patterson, *supra* note 439, at 165–66 (discussing the epistemic authority of a subject's mental states).

⁴⁵⁸ *See* Pardo, *supra* note 457, at 1045 (discussing situations in which a defendant may be considered an epistemic authority).

⁴⁵⁹ *See id.* at 1040.

⁴⁶⁰ CHOO, *supra* note 12, at 56.

⁴⁶¹ *Pennsylvania v. Muniz*, 496 U.S. 582, 599 (1989).

⁴⁶² *Id.* at 597–99.

face a real possibility of offering a reasonable answer.⁴⁶³ In any case, there is no practical meaning to providing a false answer, which can improve the individual's situation.⁴⁶⁴ Indeed, some posit that the defendant's reply about his sixth birthday is not subject to change or manipulation and therefore should not enjoy the protection of the privilege against self-incrimination.⁴⁶⁵ According to another view, that statement should not have been protected by the privilege because it did not draw information from the cognition.⁴⁶⁶ It was also held that both the speech and the failure of memory had been affected by alcohol consumption.⁴⁶⁷

At any rate, those who are troubled by the situation in which the authorities view themselves empowered to access the content of our minds—which includes thoughts, beliefs, and emotions—seek to redefine the ambit of the privilege against self-incrimination⁴⁶⁸ or, at the very least, to set forth explicit rules for limiting the power of the government to enter our minds.⁴⁶⁹

It can simply be stated that an examination that purports to read our thoughts is protected by the privilege. The result of such an examination is testimonial because it reflects the accused person's thoughts, feelings, and beliefs in relation to the offense attributed to him or her.⁴⁷⁰

Still, we should remember that witnesses who are not suspected or charged with an offense have no right to control their thoughts when required to give evidence that may embarrass them but does not criminally implicate them or a person close to them in a crime.⁴⁷¹ In addition, eavesdropping or lawful searches of computers and mobile phones also force accused persons, without their knowledge and contrary to their will, to disclose their thoughts, beliefs, concerns, and other feelings to law enforcement agencies.

However, accused persons should be protected by the privilege against self-incrimination from their compulsion to accept the investigation and trial against them as if they are slaves of the state. As Professor Louis Seidman justifiably observes, persons can be punished, but cannot be forced to concede to their punishment.⁴⁷²

⁴⁶³ *Id.* at 606 (Rehnquist, J., dissenting).

⁴⁶⁴ *See id.* at 608.

⁴⁶⁵ *See* CHOO, *supra* note 12, at 56.

⁴⁶⁶ *See* Pardo, *supra* note 260, at 331 (discussing the difference between an answer whose content is incriminating and an answer that is incriminating for other reasons).

⁴⁶⁷ SEIDMAN, *supra* note 416, at 78.

⁴⁶⁸ *See, e.g.,* Farahany, *supra* note 1, at 353 (discussing the inadequacies of a testimonial and physical dichotomy).

⁴⁶⁹ *See id.* at 406.

⁴⁷⁰ Arenella, *supra* note 376, at 44; *see also* Pardo, *supra* note 260, at 330 (stating that evidence is testimonial when it refers to propositional attitudes that are internal mental states such as beliefs, thoughts, doubts, desires, and knowledge).

⁴⁷¹ PARDO & PATTERSON, *supra* note 439, at 163.

⁴⁷² Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 J. CONTEMP. LEGAL ISSUES 69, 131 (1996); SEIDMAN, *supra* note 416, at 73.

Indeed, the privilege against self-incrimination protects accused persons from the inhibition of their free choice. Reading of thoughts cannot therefore be equated with mere observation of accused persons, for example, for a psychiatric evaluation.⁴⁷³ Persons have control over their behavior. One can avoid speaking with another person about the offense he had committed and thus be protected from the gathering of incriminating evidence through eavesdropping. Persons can conceal weapons or proceeds of a crime and thus protect themselves from their seizure during a search. It is doubtful whether they have control over their thoughts, though it can be argued that control of thoughts is possible and can be learned. At any rate, on the assumption that mind control is impossible, it is argued that accused persons face no choice and hence no trilemma. They are clearly forced to furnish information.⁴⁷⁴ But this compulsion to provide evidence does infringe on their freedom of choice. It is their freedom of action that is violated, not their freedom of will.

If the privilege against self-incrimination is extended to protect accused persons from inhibiting their free choice, one may wonder whether law enforcement agencies may not be allowed to require suspects to lift their shirt sleeves to check the existence of wounds in their arms or to take off their clothes to check marks on their bodies. Even vehement proponents of due process would find it hard to justify such results.

Some assert that in striking the appropriate balance between the necessities of law enforcement and the preservation of individuals' rights, the state's interest is stronger regarding the requirement to submit documents than the requirement to make statements.⁴⁷⁵ Extension of the privilege against self-incrimination to cover physical examinations and submission of documents might intolerably frustrate the ability of law enforcement agencies to enforce the law.⁴⁷⁶ It is argued that denying law enforcement agencies the right to require cooperation from accused persons is impractical in terms of the necessities of law enforcement and the state's regulatory role to maintain public safety⁴⁷⁷ and that the freedom of choice cannot therefore be the dominant reason underlying the privilege against self-incrimination.⁴⁷⁸ The

⁴⁷³ See Brennan-Marquez, *supra* note 1, at 248 (believing that there is no difference between these two situations).

⁴⁷⁴ See *id.* at 254.

⁴⁷⁵ See, e.g., JOHN B. TAYLOR, RIGHT TO COUNSEL AND PRIVILEGE AGAINST SELF-INCRIMINATION 118 (2004) (stating that, if the privilege against self-incrimination were extended from statements that are non-testimonial evidence, it would severely curtail law enforcement interests).

⁴⁷⁶ See *id.* (discussing the prosecutorial benefits afforded the state by the inclusion of certain kinds of testimony); CHOO, *supra* note 12, at 118–19.

⁴⁷⁷ See Pardo, *supra* note 421, at 1877–78; Michael Steven Green, *The Paradox of Auxiliary Rights: The Privilege Against Self-Incrimination and the Right to Keep and Bear Arms*, 52 DUKE L.J. 113, 152–53 (2002) (discussing the societal cost of protecting testimonial evidence); see also Theophilopoulos, *supra* note 222, at 125.

⁴⁷⁸ See Penney, *supra* note 422, at 508 (arguing that a freedom of choice rationale would hinder the effectiveness of investigations).

testimonial component constitutes a “pragmatic compromise” between the justifications underpinning the privilege against self-incrimination and law enforcement agencies’ interest in gathering evidence and pursuing the truth.⁴⁷⁹

But even if practical reasons advocate allowing certain types of searches and examinations that can be performed without penetrating the body or gleaning information from the mind, the result is nonetheless a violation of the privilege to some extent. As this Article demonstrated, there is no valid distinction between active and passive cooperation in terms of the freedom of will.

Scholars opine that the refusal to speak conveys a message.⁴⁸⁰ In fact, any refusal to cooperate conveys a communicative message regarding the will of the accused to be left alone and to insist on the principle according to which the burden of proof lies with the prosecution.

CONCLUSION

The privilege against self-incrimination does not rest only on the concern for the reliability of the evidence. To the extent that non-epistemic justifications underpin the privilege against self-incrimination and that the central reason for the privilege rests on the state’s burden of proof and the autonomy and free will of an accused person to choose his or her defense, the privilege should also apply to compelled physical examinations and submission of documents.⁴⁸¹

Clearly the privilege against self-incrimination does not completely preclude using accused persons to establish guilt. Guilt is sometimes proven by lawful eavesdropping, physical evidence left at the scene of the crime, voluntary confessions, and failure to cope with cross-examination at trial.

The privilege against self-incrimination does not protect accused persons from the state’s unilateral gathering of incriminating evidence. It should, however, protect them from the obligation to cooperate with law enforcement agencies that inhibit

⁴⁷⁹ Geyh, *supra* note 369, at 613. *See generally* *Grosso v. United States*, 390 U.S. 62, 72 (1968) (Brennan, J., concurring) (“[I]t is clear that the scope of the privilege does not coincide with the complex of values it helps to protect.”). In the United States, the testimonial requirement is found in the Fifth Amendment, which states that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. The United States Supreme Court concluded that the requirement for testimonial evidence stems from the word “witness.” *See United States v. Hubbell*, 530 U.S. 27, 34 (2000). *But see Grosso*, 390 U.S. at 76 (Stevens, J., concurring) (“I am convinced that the Fifth Amendment’s privilege against compulsory self-incrimination was originally meant to do no more than confer a testimonial privilege upon a witness in a judicial proceeding.”).

⁴⁸⁰ *See, e.g.*, Andrew J.M. Bentz, Note, *The Original Public Meaning of the Fifth Amendment and Pre-Miranda Silence*, 98 VA. L. REV. 897, 931 (2012); Vanessa Willis, Comment, *The Government’s Use of Pre-Miranda Silence in its Case-in-Chief: An Alternative Approach Under Schmerber v. California*, 77 U. CIN. L. REV. 741, 753–55 (2008).

⁴⁸¹ *See* discussion *supra* Sections II.B, II.C.

their free choice, deny them the option of behaving passively, and turn them into tools under law enforcement agencies' control.

Associating the burden imposed on the state to prove guilt as a condition for securing convictions with the privilege against self-incrimination requires the extension of the privilege's ambit to include a ban on forcing accused persons to cooperate with law enforcement agencies.

Neuroscience negates the distinction between the body and the mind and unequivocally points to the reciprocity of body and mind.⁴⁸² Individuals' bodies and documents are part of their personalities.⁴⁸³ There is a close connection between bending persons' bodies and bending their wills. Obliging accused persons to hand over documents or expose their bodies to examinations impairs their autonomy to decide on the extent of their cooperation with law enforcement agencies.⁴⁸⁴

Accused persons have a right to be protected from having their will bent. They have a right to think or to say: "I am not playing this game. You believe I am guilty and may violate my rights through eavesdropping and detention, but you may not inhibit my free will and force me to cooperate with you."

Accused persons may shape their defense by controlling their physical reactions and their statements. Currently, the state cannot read our thoughts and extract memories to a degree of perfect accuracy.⁴⁸⁵ If an instrument capable of distinguishing between truth and falsehood is invented, resembling the biblical God,⁴⁸⁶ the rules of evidence would probably become irrelevant. It is likely that if the prospects of conviction and punishment become certain, people would almost completely stop committing crimes.⁴⁸⁷ Humanity is not there yet.

⁴⁸² Fox, *supra* note 397, at 794; SEIDMAN, *supra* note 416, at 78–79. *See generally* LAURENCE R. TANCREDI, *HARDWIRED BEHAVIOR: WHAT NEUROSCIENCE REVEALS ABOUT MORALITY* (2005) (discussing developments in neuroscience and their impact on the mind/body dichotomy).

⁴⁸³ The Canadian Supreme Court expressed this view by stating in *R. v. Stillman* that "Canadians think of their bodies as the outward manifestation of themselves. It is considered to be uniquely important and uniquely theirs. Any invasion of the body is an invasion of the particular person. Indeed, it is the ultimate invasion of personal dignity and privacy." [1997] 1 S.C.R. 607, para. 87 (Can.).

⁴⁸⁴ *See* Foster, *supra* note 402, at 1641.

⁴⁸⁵ Bradley, *supra* note 42, at 494; Fox, *supra* note 397, at 765–66.

⁴⁸⁶ *See, e.g.,* *Joshua* 7:10–21.

⁴⁸⁷ *See* Mirko Bagaric et al., *Introducing Disruptive Technology to Criminal Sanctions: Punishment by Computer Monitoring to Enhance Sentencing Fairness and Efficiency*, 84 *BROOK. L. REV.* 1227, 1277–78 (2018).