Just Look Into The Camera: A Look into the History of the Fifth Amendment in the Wake of Biometric Technology

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Introduction

Nemo tenetur seipsum accusare. No one is bound to incriminate oneself.[1] This maxim is deeply embedded into American jurisprudence.[2] Originating in common law England, this right to be free from self-incrimination can be traced back to the early sixteenth century. While the doctrine has evolved slightly over the centuries, it has historically been recognized as one of the accused's most essential rights.

The right to be free against self-incrimination arose from a long struggle between liberty and the collective power of the state.[3] From the conception of the Fifth Amendment's Self-Incrimination Clause, courts have been torn between two needs: (1) protecting the people from over-zealous government agents; and (2) obtaining evidence necessary for a conviction.[4] Early American courts understood that such a fundamental liberty requires a liberal interpretation, meaning that the literal text of the constitution should not constrain the Court's in protecting a defendant's Fifth Amendment rights.[5] However, modern courts have constrained the once expansive protection.[6]

For over a hundred years, legal minds understood the Self-Incrimination Clause to protect the defendant from producing books,

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1 Luis E. Chiesa, *Beyond Torture: The Nemo Tenetur Principle in Borderline Cases*, 30 B.C. Third World L.J. 35, 35 (2010).

2 *See id.* (citing Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 Cal. L. Rev. 465, 479 (2005)).

3 Brown v. Walker, 161 U.S. 591, 637 (1896).

4 Edmund Schaefer II, *Protection Against Invasion of Privacy in Communications: The Olmstead Case Sustained*, 3 Wash. & Lee L. Rev. 270, 270 (1942).

5 *See* Erin M. Sales, *The Biometric Revolution: An Erosion of the Fifth Amendment Privilege to Be Free from Self-Incrimination*, 69 U. Miami L. Rev. 193, 197–99 (2014).

6 *See id.* at 199.

papers, and other documents as evidence against himself.[7] Indeed, this was the understanding when the Founders drafted the Constitution and ratified the Fifth Amendment.[8] The government had the power to lawfully seize these documents from the defendant under the Fourth Amendment, but it could not require the defendant himself to produce them.[9] But in the mid-1970s, *Fisher v. United States* changed this by asserting defendants could not be protected from disclosing their documents should the government require them to do so.[10] Fast forward fifty years, and technological advances have thrown wrenches in current legal analysis, posing captivating legal questions.[11] Courts have strayed from the original understanding of fundamental rights.

The invention of the cell phone has challenged Fourth and Fifth Amendment jurisprudence. For example, the government cannot access the contents of a phone by compelling a defendant to give over their password.[12] But cell phone technology is rapidly changing due to the increase in use of biometric encryption methods. Because the use of a thumb, finger, or face is not "testimonial," the government can now compel defendants to open their phones with their fingerprints or faces, gaining access to large amounts of sensitive information faster than ever before.[13]

This Article will discuss a potential solution to this digital divide. Part I will discuss the origins of the Fifth Amendment's Self-Incrimination Clause, how it has evolved over time, and the test as modern courts apply it. Part II will discuss the biometric technology and the constitutional issues it poses. Finally, Part III will advocate for a potential solution providing the same protections to all defendants regardless of their chosen encryption methods. Courts should abandon the analysis in *Fisher* and instead readopt the test in *Boyd v. United States* to prohibit government compulsion of documents by defendants. Next, courts should adopt a historical analog analysis in biometric

7 *See generally* Boyd v. United States, 116 U.S. 616, 620 (1886).

8 *See* Fisher v. United States, 425 U.S. 391, 418 (1976) (Brennan, J., concurring) (citing King v. Worsenham, 91 Eng. Rep. 1370 (K.B. 1701)).

9 *See id.*; *see generally Boyd*, 116 U.S. at 641.

10 *See Fisher*, 425 U.S. at 402.

11 For example, is the flying of a drone over one's backyard an unlawful search? Can the government compel Google or Apple to divulge defendant's location date? *See* California v. Ciraolo, 476 U.S. 207, 207 (1986).

12 *See* United States v. Payne, 99 F.4th 495, 512–13 (2024).

13 *See id.*

technology cases. Because the contents of a cell phone are akin to the contents of a drawer or filing cabinet, the government should not compel a defendant to unlock their cell phone to gain access to its contents.

BACKGROUND

The Fifth Amendment's Self-Incrimination Clause, applied to the states through the Fourteenth Amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself."[14] The privilege against self-incrimination serves many purposes.[15] However, this Article is limited to only two purposes: (1) forcing the government to prove its case through its efforts; and (2) protecting human dignity.[16] Because of these purposes, voluntariness serves as the pivotal function of the clause.[17] In protecting the voluntariness function, the Supreme Court has repeatedly emphasized that the Fifth Amendment should be liberally construed because a "close and literal construction deprives [the Amendment] of half [its] efficacy, and leads to gradual depreciation of the right. . ."[18]

This Section will discuss the historical origins of the privilege against self-incrimination before its adoption into the U.S. Constitution, how early American jurisprudence interpreted the privilege, and legal scholars' changing positions on the scope of the privilege and its subsequent constraint through the creation of exceptions.

I. SELF-INCRIMINATION AND ITS ORIGINS

In the late 1400s, defendants were forced to testify against themselves in open court.[19] At the close of the sixteenth century, courts began to require testimony under oath.[20] This is because citizens became concerned about the truthfulness of defendants; if a court forced a defendant to testify, there would be nothing to stop

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[14] U.S. CONST. amend. V; Malloy v. Hogan, 378 U.S. 1, 6 (1964).

[15] William M. Carter Jr., *The Second Founding and Self-Incrimination*, 118 NW. U. L. REV. 927, 933–34 (2024).

[16] *See id.* at 934–35.

[17] *See id.* at 934.

[18] *See, e.g.*, Counselman v. Hitchcock, 142 U.S. 547, 582 (1892).

[19] Edward S. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV 1, 5–6 (1930).

[20] *See id.* at 5–6.

a defendant from lying due to self-preservation.[21] However, courts interpreted a defendant's refusal to take an oath as a confession.[22] In the late 1500s, Sir Edward Coke, an attorney for an accused before the King's Bench, first argued that the oath should not be employed in criminal matters before the King.[23] His reasoning was *"[N]emo tenetur prodere seipsum,"* or "no one is bound to betray himself."[24] In 1607, the King's Bench formally ruled that the oath could only be administered in cases affecting wills and marriages, not in criminal trials.[25] "[I]t standeth not with the right order of justice nor good equity that any person should be convicted and put to the loss of his life, good name, or goods, unless it were by due accusation, and witness, or by presentment, verdict, confession, or process, of outlawry."[26]

In 1637, the Court of High Commission subpoenaed a man named Lilburne to testify against other individuals.[27] He refused to take an oath and testify because his testimony would render him "ensnared."[28] He was sentenced to death because he would not cooperate.[29] A few years after his sentencing, his attorney argued that it "was contrary to the laws of God, nature and this kingdom, for any man to be his own accuser."[30] Lilburn's sentence was vacated under the reasoning that such a sentence would be "illegal and most unjust, against the liberty of the subject, and law of the land . . . ."[31] This case infamously illustrates the purposes of the right against self-incrimination, specifically, the historic idea that to compel a man to testify against himself is *unjust*, regardless of the government's interests to secure a conviction.

After Lilburne's trial—and long before the establishment of the United States Constitution—the practice of questioning the accused

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21 *See id.*

22 *Id.*

23 *See id.* at 6–7.

24 Fun fact: This Latin phrase might have been Coke's own invention considering "Coke delighted in nothing more than to give his ideas a Latin phrasing for the purpose of investing them with the apparent sanction of antiquity." *See id.*

25 Corwin, *supra* note 19, at 7–8.

26 *Id.* (citing Sir Edward Coke, *The Twelfth Part of the Reports of Sir Edward Coke Kt.*, 12 COKE'S REP. 1, 26–29 (1738), https://lawlibrary.wm.edu/wythepedia/library/ReportsOfSirEdwardCoke1738Pt12.pdf).

27 *See id.* at 8–9.

28 *Id.*

29 *Id.*

30 *Id.*

31 Corwin, *supra* note 19, at 8–9.

ceased entirely.[32] The doctrine that emerged was "*nemo debet esse testis in propria causa*," or "a party is not a competent witness on account of interest."[33] This was the status of the self-incrimination doctrine as it passed to the American colonies.[34] The accused were protected, but along with that came a "corresponding disability;" they were not allowed to testify in defense of themselves.[35]

In the early 1700s, English courts expanded this protection to forbid the government from compelling the defendant to turn over "documentary evidence," such as books, papers, and other documents that tended to incriminate a defendant.[36] This shows that, for much of history, while the government has not been permitted to compel oral statements from the defendant's mouth, the government also could not compel the defendant to produce personal effects.[37]

A. *American Adoption and the Reconstruction Era Interpretation*

Early American adoption of the self-incrimination privilege is difficult to trace.[38] The diversity of the settlements paired with the obscurity of sources makes describing the exact legal system difficult.[39] However, legal scholars agree that, by-and-large, early American criminal procedure mirrored English common law.[40] Records regarding criminal procedure became more available around the late 1800s.[41]

In 1886, the Supreme Court released *Boyd v. United States*, a landmark decision regarding the self-incrimination clause.[42] Defendant Boyd was accused of attempting to import merchandise by fraudulent invoice.[43] The government compelled the defendant to produce an invoice for the twenty-nine cases of glass at issue, which the government

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32 *Id.* at 10.

33 *Id.* at 10–11.

34 *Id.*

35 *Id.* at 10–11.

36 Fisher v. United States, 425 U.S. 391, 418 (1976) (Brennan, J., concurring) (citing King v. Worsenham, 91 Eng. Rep. 1370 (K.B. 1701)).

37 *See id.*

38 *See* Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1090 (1994).

39 *Id.*

40 *See id.* at 1091–92.

41 *See id.* at 1088.

42 Corwin, *supra* note 19, at 13; *see also* Boyd v. United States, 116 U.S. 616 (1886).

43 *Boyd*, 116 U.S. at 617–18.

then moved into evidence.[44] The defendant argued that compelling the production of such invoices was unconstitutional because "no evidence can be compelled from the [defendants] themselves."[45] The Court *unanimously* held that "compulsory production of the private books and papers . . . is compelling him to be a witness against himself, within the meaning of the Fifth Amendment. . ."[46] The Court explained that requiring a defendant to produce papers or documents against himself was analogous to forcing him to testify in court.[47] "[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."[48]

Importantly, the Court explained that the Fourth Amendment's protection against unreasonable searches and seizures and the Fifth Amendment's protection against self-incrimination are intertwined.[49] The Court in *Boyd* explained that compelling a defendant to produce evidence against himself was an unreasonable search and seizure.[50] In 1892, The Court reaffirmed this relationship in *Counselman v. Hitchcock*.[51] Not only is compelling a person to produce evidence against himself in books, papers, or other documents a violation of the Fifth Amendment, but it is also an unreasonable search and seizure.[52]

By the late 1890s, American courts had well established that the Self-Incrimination Clause's scope protected a defendant from producing his papers and other documents.[53] In *Brown v. Walker*, the Court was faced with an act which gave broad immunity to defendants who produced documents to the Interstate Commerce Commission.[54] The Court, in holding the Act to be constitutional, explained that since the immunity covered actions that the Self-Incrimination Clause protected, there was no Fifth Amendment issue.[55] Here, the Court

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44 *Id.*

45 *Id.* at 618.

46 *Id.* at 634–35.

47 *Id.* at 633.

48 *Id.*

49 *See Boyd*, 116 U.S. at 630.

50 *Id.* at 631–32.

51 Counselman v. Hitchcock, 142 U.S. 547, 580–82 (1892).

52 *See id.* at 581.

53 *See* Brown v. Walker, 161 U.S. 591, 635–36 (1896) (Field, J., dissenting).

54 *Id.* at 629–30.

55 *See id.* at 610 (majority opinion).

once again acknowledged that the Constitution protected the defendant from producing physical evidence that might incriminate him.[56] The *Brown* court further explained that the "essential and inherent cruelty of compelling a man to expose his own guilt is obvious to [everyone]."[57]

Case law did not, however, forbid the government from legally seizing such evidence; the evidence simply could not come from the defendant's hands.[58] The Supreme Court emphasized this in *Adams v. People of the State of New York*.[59] In *Adams*, the government seized the defendant's papers through a search warrant.[60] The Court stated that it had "no wish to detract from [*Boyd's*] authority."[61] Indeed, it emphasized that though the government could seize evidence, it could not compel the defendant to produce the evidence himself.[62]

Early 1900s self-incrimination jurisprudence is also very clear: the government can seize documents and papers under the Fourth Amendment, and, if obtained lawfully, it could use that evidence against the defendant.[63] The government, however, could not compel a defendant to produce physical evidence to be used against himself.[64] Such a compulsion, without first granting immunity, would not only be a violation of their privilege against self-incrimination, but it would also be considered an unreasonable search and seizure.[65]

B. *Legal Minds Start To Change*

After *Adams,* legal scholars started to criticize the scope of the Fifth Amendment's self-incrimination privilege.[66] There seemed to be a prevalent, deeply-held belief that the government, and not the Constitution, provided defendants with too many protections.[67] Indeed,

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56 *Id.* at 636–37 (Field, J., dissenting).

57 *Id.* at 637.

58 *See* Boyd v. United States, 116 U.S. 616, 641 (1886) (Miller, J., concurring).

59 Adams v. New York, 192 U.S. 585, 597 (1904).

60 *Id.* at 594.

61 *Id.* at 597.

62 *Id.*

63 *Id.* at 596.

64 *Id.* at 597–98.

65 *See Adams*, 192 U.S. at 597–98.

66 *See, e.g.*, Henry T. Terry, *Constitutional Provision Against Forcing Self-Incrimination*, 15 YALE L. J. 127, 127 (1906) ("The rule of law, which is embedded in our constitutions, that no one shall be compelled to criminate himself, ought to be abolished . . .").

67 *See id.*

scholars believed that the government *coddled* criminals.[68] One scholar noted that the conditions under which the self-incrimination privilege originated no longer existed; the punishment for many crimes no longer included death.[69] Therefore, the justification of this privilege was outdated.[70] Finally, the distinguished Professor Wigmore advocated for the privilege against self-incrimination to be "kept within limits the strictest possible."[71] Around this time of criticism, courts started to constrict the Fifth Amendment privilege.[72]

1. Exclusion of Corporations

Two years after *Adams*, the Court chipped away at the broad right to be free from self-incrimination. In *Hale v. Henkel*, the petitioner was required to submit before a grand jury "all understandings, agreements, arrangements, or contracts, whether evidenced by correspondence, memoranda, formal agreements, or other writings" between seven corporations.[73] Before the grand jury, the petitioner asserted both a personal privilege and the privilege of the corporation.[74] He refused to answer any questions and produce the papers requested on the ground that the papers tended to incriminate him.[75] The Court held that (1) as an individual, he was protected not by the Fifth Amendment, but by the Immunity Act of 1903, which grants complete immunity from prosecution;[76] and (2) a corporation *has no right* to refuse to produce books and papers.[77] However, personal rights to refuse production were still intact.[78] The Court explained that it did not overrule prior precedent

68 Joseph M. Proskauer, *Corporate Privilege Against Self-Incrimination*, 17 VA. L. REV. 417, 418 (1911).

69 *See* Terry, *supra* note 66.

70 *See id.*

71 Proskauer, *supra* note 68, at 445–46 (internal citation omitted). An interesting thing of note: The cases that restrict the privilege's scope frequently cite Professor Wigmore's treatises.

72 *Id.*

73 Hale v. Henkel, 201 U.S. 43, 45 (1906).

74 Proskauer, *supra* note 68, at 446.

75 *Hale*, 201 U.S. at 45–46.

76 Proskauer, *supra* note 68, at 446.

77 *Hale*, 201 U.S. at 74–75 (1906) (citing Interstate Commerce Comm'n v. Brimson, 154 U.S. 447, 489 (1894)). In holding this, the Court relied on *Brimson*. This author believes that the Court's reliance on this case was misplaced because the question of whether compulsion was constitutional was not actually at issue in *Brimson*.

78 *See id.*

as it came to individual rights, only the rights of the corporation.[79] Therefore, the government could compel an agent of the corporation to produce documents that would incriminate the corporation but could not compel that individual to produce documents that would incriminate himself.[80] The former would be constitutional under the Fourth and Fifth Amendments, but the latter would not.[81]

The Court also separated the relationship between the Fourth and Fifth Amendments as they applied to corporations.[82] Corporations were still entitled to some Fourth Amendment protection, but compelling a corporation to produce documents is no longer considered an "unreasonable search and seizure."[83] Because this type of compulsion was not considered a violation of the Fourth Amendment, the evidence could be used in court without violating the Fifth Amendment.[84] One scholar recognized that the purpose of limiting the privilege in this way would be to "curtail the privilege generally."[85] The infringement of corporations, gave more precedent to curtailing the Fifth Amendment right for individuals.[86]

2. Required Records Test

In 1911, the "required records" test was born.[87] In *Wilson v. United States*, the Court explained that the government could compel the defendant to produce *certain* documents.[88] Public documents and other records required by law to be kept were not protected.[89] In *Davis v. United States*, the evidence produced by and seized from the defendant were gasoline rations.[90] The *Davis* Court distinguished *Boyd* on this fact; the rations were government property, not private papers.[91] Thus,

79 *See id.* at 73–74.
80 *See id.* at 74–75.
81 *Id.* at 75.
82 *See id.* at 72–73.
83 *See Hale*, 201 U.S. at 77 (1906).
84 *See id.* at 73, 77.
85 Proskauer, *supra* note 68, at 452.
86 *See id.*
87 *See* Wilson v. United States, 221 U.S. 361, 380 (1911).
88 *See id.*
89 *Id.*
90 Davis v. United States, 328 U.S. 582, 588 (1946).
91 *Id.*

the defendant "ha[d] no privilege to refuse production although their contents tend[ed] to criminate him."[92] The records in *Shapiro v. United States* were kept by private individuals for the purpose of running their business.[93] Specifically, the petitioner was required to produce "all duplicate sales, invoices, sales books, ledgers, inventory records, contracts, and records relating to the sale of all commodities" for a given time period.[94] The only relation these records had to government regulation was the fact that Congress passed the Emergency Price Control Act.[95] The Court in *Shapiro* effectively moved certain documents out of the Constitution's reach simply by tying them to an act of Congress.[96]

3. Testimonial Requirement

In 1910, the Supreme Court, for the *first time*, included a "communications" requirement in the self-incrimination analysis, distinguishing between communicatory and physical evidence.[97] In *Holt v. United States*, the evidence the government wanted to introduce was that if the defendant put on a blouse, it would fit him.[98] The Court held that the defendant can be compelled to put on a blouse or to produce "his body as evidence" because it was not a compulsion to "extort communications from him."[99] This opinion was supported by very little precedent, while the precedent it did rely on was misplaced.[100]

After that decision, courts were required to determine whether compelled evidence consisted of a "testimonial utterance."[101] If the court determined it did, then the evidence was inadmissible. If the court determined it did not, then the evidence was admissible. After *Holt*,

92 *Id.* at 590 (internal citation omitted).

93 Shapiro v. United States, 335 U.S. 1, 36 (1948) (Frankfurter, J., dissenting).

94 *Id.* at 4.

95 *See id.* at 75–76 (Rutledge, J., dissenting).

96 *See id.*

97 Holt v. United States, 218 U.S. 245, 252–53 (1910).

98 *Id.*

99 *Id.*

100 *See id.* at 253. The *Holt* Court improperly relied on *Adams* to assert that "when [a defendant] is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent." The *Adams* case is factually distinguishable on this matter as all the evidence was procured by government agents, not the defendant.

101 Mary E. Mann & Thomas A. Thomas, *To What Extent Does the Privilege Against Self-Incrimination Protect an Accused from Physical Disclosures*, 1 VAND. L. REV. 243, 243–44 (1948).

many physical actions compelled by the government became admissible because they were not considered testimonial utterances but merely a form of identification, despite the fact that each one of these actions communicated something to the convicting court or jury.[102] These acts included: fingerprints, photographs, or measurements taken by police, standing up in court, shaving, and removing clothing to reveal scars, wounds, or blood.[103] Some courts even held that scraping blood off fingernails was not in violation of the privilege.[104]

Despite the testimonial requirement, the Supreme Court reaffirmed a defendant's right to be free from producing documents that might incriminate him.[105] *Gouled v. United States* concerned the seizing of and admission into evidence of papers taken from the defendant's office by the direction of the U.S. Army.[106] The defendant argued admission of these articles would violate both the Fourth and Fifth Amendments.[107] The Court held that the seizure of such documents was certainly a violation of the Fourth Amendment because they were seized without a warrant,[108] further explaining that to make those documents admissible would be a violation of the Fifth Amendment.[109] The Court explained,

> [W]hether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the *unwilling source of the evidence*, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case.[110]

Notably, the Court emphasized the importance of voluntariness. The defendant cannot be the "unwilling source of the evidence."[111] Though this holding only applied to documents and papers, it illustrates one of the major purposes of the Fifth Amendment, the requirement that the government be charged with obtaining the evidence.

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102 *Id.* at 245.
103 *Id.* at 245–49.
104 *Id.* at 249.
105 Gouled v. United States, 255 U.S. 298, 306 (1921).
106 *Id.* at 303.
107 *Id.*
108 *Id.* at 305.
109 *Id.* at 311.
110 *Id.* at 306 (emphasis added).
111 *Gouled*, 255 U.S. at 306.

Forty years later, the Court again took up the "testimonial" and "communicative" nature tests. In *Schmerber v. California*, the issue before the Court was whether compelling a defendant to give blood and use it as evidence against him was a violation of the Self-Incrimination Clause.[112] Under the guise of "history" that was never cited, the Court held "the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature. . ."[113]

The Court did attempt to draw a line between producing documents and submitting to physical acts like fingerprinting, photographing, etc.[114] It argues that *Boyd* is still good law; *testimonial* documents cannot be compelled.[115] The line it drew—or rather the classification it used—has caused more issues than it has solved. The Court stated that the self-incrimination privilege protects against compelling communications or testimony, but not "real or physical evidence."[116] The "real or physical evidence" classification is a misnomer because it does not sufficiently or correctly explain what is or is not protected. Blood is undoubtedly as "real or physical evidence" as a document, a diary, or an invoice. Yet, the Court explained that *physical evidence*, such as blood, is not testamentary, but *physical evidence*, such as documents can be.[117]

In fact, the Court pointed out this flaw in the very next paragraph; "[s]ome tests seemingly directed to obtain 'physical evidence,' for example, lie detector tests . . . may actually be directed to eliciting responses which are essentially testimonial."[118] So, this Article's author can only believe the Court does not really mean "real or physical evidence," because, as it admits, there are instances in which such evidence would be protected under the Fifth Amendment.[119] For example, the Court explains: "[i]n the present case, however,

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112 Schmerber v. California, 384 U.S. 757, 761 (1966).

113 *Id.*

114 *Id.* at 762–64. While this goes beyond the scope of this Article, it is important to note that the cases the Court cites to support the proposition that physical acts do not violate the law had a narrow reasoning, i.e., to identify the defendant. Forcing the defendant to sit for a blood draw in no way was used to identify the defendant in this case.

115 *Id.* at 763–64.

116 *Id.* at 764.

117 *Id.*

118 *Schmerber*, 384 U.S. at 764.

119 *Id.*

no such problem of application is presented."[120] Ultimately, had the Court classified the test any other way, it could not justify taking the defendant's blood.

Justice Black's dissent sheds light on another important issue, criticizing the majority's "restrictive reading" of the Fifth Amendment and their use of the words "testimonial" and "communicative."[121] "These words are not models of clarity and precision as the Court's rather labored explication shows."[122] Justice Black pointed out how the Court cited very little precedent regarding the 'testimonial and communicative' test; indeed, the only precedents are scholarly works from Professor Wigmore who advocated for a "testimonial" analysis.[123]

This case is also important for the Fourth and Fifth Amendments relationship. In past cases, the Supreme Court has held that when the Fourth Amendment is violated, using that evidence against a defendant would also be a violation of the Fifth Amendment.[124] Here, the Court seemingly diverges from this point. Instead of starting with an unreasonable search and seizure analysis, the Court starts with self-incrimination.[125] "We begin with the assumption that once the privilege against self-incrimination has been found not to bar compelled instructions into the body for blood . . . the Fourth Amendment's proper function is to constrain. . ."[126] On its face, this might seem like an alteration that has little to no effect; however, with the Court's very broad "real or physical evidence" distinction, it is this Article's author's opinion that this slight alteration in the Fourth and Fifth Amendment relationship makes a real difference to defendants.

As if *Schmerber* did not do enough damage to *Boyd*, the Supreme Court, in *Fisher*, twisted the knife. There, the Court alleged the rationale in *Boyd* was fraught and had not "withstood the test of time."[127] Not to mention that *Boyd,* at this moment in time, was ninety years old. The Court answered the question, "What, if any, incriminating testimony within the Fifth Amendment's protection is

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120 *Id.* at 765.

121 *Id.* at 774 (Black, J., dissenting).

122 *Id.*

123 *Id.*

124 *See* Counselman v. Hitchcock, 142 U.S. 547, 580–82 (1892).

125 *Schmerber*, 384 U.S. at 768.

126 *Id.*

127 Fisher v. United States, 425 U.S. 391, 407–08 (1976).

compelled by a documentary summons?"[128] Here, we see a merger of the testimonial communication requirement and the protection against compelling documents. Before *Schmerber* and *Fisher*, compelling a defendant to produce incriminating evidence was almost categorically prohibited.[129] *Fisher* limited this to those documents containing "testimonial declarations" by the defendant himself.[130] The Court explained that "the act of producing [the papers,] the only thing which the [defendant] is compelled to do would not itself involve testimonial self-incrimination."[131]

This analysis misses the point. Yes, turning over the documents demonstrates that the documents were in the defendant's custody. However, that was never the real fear, which was the *contents* of the documents. By being compelled to turn over the documents, defendants would be compelled to turn over incriminating evidence, akin to testifying against themselves. This would violate several purposes of the Fifth Amendment, including voluntary compliance with the government, but also to force the government to do its job.

In present day jurisprudence, the self-incrimination privilege applies when (1) the person faces legal compulsion; (2) the compelled evidence is testimonial; and (3) the evidence is incriminating.[132]

II. TECHNOLOGY & THE LAW

In the past one hundred years, technology has changed the way government agents obtain evidence for criminal proceedings.[133] Evidence retrieval methods from DNA recovery and testing to body worn camera have made criminal prosecutions much more effective.[134] "Discovery and invention have made it possible for the government, by means far more effective" than looking through drawers to uncover evidence for a criminal proceeding.[135]

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128 *Id.* at 409.

129 *See generally* Boyd v. United States, 116 U.S. 616, 633 (1886).

130 *Fisher*, 425 U.S. at 409.

131 *Id.* at 411.

132 Orin S. Kerr, *Compelled Decryption and the Privilege Against Self-Incrimination*, 97 TEX. L. REV. 767, 771 (2019).

133 Schaefer, *supra* note 4, at 271.

134 *See generally* On Lee v. U.S., 343 U.S. 747, 763 (1952) (Douglas, J., dissenting).

135 *Id.*

Computers have replaced bookkeeping records. Smartphones have replaced diaries. As of 2021, eighty-one percent of Americans owned a smartphone.[136] Over the past decade, individuals have become increasingly comfortable storing highly sensitive information on their cell phones.[137] Photos, emails, passwords, and banking information are some examples of sensitive information stored on these devices.[138] Smartphones can store more data than filing cabinets, meaning that police can gain access to more data in a single seizure in the twenty-first century than they ever could have before.

Most individuals' smartphones are password protected.[139] Originally, an Apple password consisted of a four-digit number.[140] However, a computer can decode a passcode of this length in just over six minutes,[141] while a six-digit numerical password can be decoded in eleven hours.[142] Password entry is relatively easy. For this reason, many individuals fear their cell phone getting stolen.[143] In response, companies like Apple have come out with cell phones capable of opening via biometric authentication.[144] "A biometric is a unique, measurable, biological characteristic or trait for . . . verifying the identity of a human being."[145]

In 2013, Apple released the iPhone 5s, the first smartphone capable of unlocking via a biometric scan.[146] The iPhone 5s utilized Touch ID technology that allows users to scan their fingerprints into their cell phone so all the individual has to do is touch the pad, and the cell phone opens if the fingerprints match.[147] Then, in 2017, Apple released the first smartphone capable of unlocking via facial recognition technology

136 William Murphy, *Hey, Alexa… I Take the Fifth*, 36 CRIM. JUST. 24, 24 (2021).

137 *See* Adam Herrera, *Biometric Passwords and the Fifth Amendment: How Technology Has Outgrown the Right to Be Free From Self-Incrimination*, 66 UCLA L. REV. 778, 783 (2019).

138 *Id.*

139 Kerr, *supra* note 132, at 768.

140 Herrera, *supra* note 137, at 784.

141 Robert Hackett, *How Long It Takes to Break a Passcode*, FORTUNE (Mar. 18, 2016), http://fortune.com/2016/03/18/apple-fbi-iphone-passcode-hack.

142 Herrera, *supra* note 137, at 785.

143 *Id.*

144 *Id.*

145 *Id.* (internal citation omitted).

146 *Id.* at 786.

147 *Id.*

("FRT").[148] Now, all the individual has to do to unlock their cell phone is look at it.[149]

It is clear that police can get a search warrant to obtain a cell phone.[150] It is unclear how police can lawfully gain access to the contents of that cell phone if it is encrypted.[151] For a biometric scan of fingertips or thumbs for access into a cell phone, some courts acknowledge that (1) the scan is compelled; (2) the act is incriminating; but (3) it is not testimonial.[152] Other courts argue that unlocking a smartphone communicates a breadth of information and is, therefore, testimonial.[153]

Recently, the Ninth Circuit was the first Federal Circuit to take up the question of whether compelling a defendant to unlock their cell phone with biometrics was a violation of their right to be free from self-incrimination.[154] The Ninth Circuit starts its analysis by using *Schmerber* to explain that physical acts are not testimonials.[155] It then explains that providing police with a thumb is different than a compulsive blood draw as in *Schmerber*.[156] In *United States v. Payne*, the defendant argued that the Act of Production Doctrine protects him.[157] This doctrine stands for the proposition that a purely physical act may nonetheless be testimonial because of what it communicates, i.e. that the documents or phone were in the defendant's control.[158] The Ninth Circuit held that, despite this doctrine, Payne's Fifth Amendment rights were not violated because orally conveying the password was different than pressing a thumbprint to the sensor.[159]

Importantly, the Ninth Circuit focused on an interesting argument, "the use of biometrics to open an electronic device is akin to providing a physical key to a safe."[160] The Court dismissed this argument as a syllogistic fallacy because "the Supreme Court has framed the question

148 Herrera, *supra* note 137, at 780.

149 *Id.*

150 *See* Kerr, *supra* note 132, at 768.

151 *Id.*

152 In re Search Warrant Application for the Cellular Tel. in United States v. Barrera, 415 F. Supp. 3d 832, 836 (N.D. Ill. 2019).

153 *See* Seo v. State, 148 N.E.3d 952, 958–59 (Ind. 2020).

154 *See* United States v. Payne, 99 F.4th 495, 508 (2024).

155 *See id.* at 508–09.

156 *Id.*

157 *Id.* at 509.

158 *See id.*

159 *Id.* at 512–13.

160 *Payne*, 99 F.4th at 511.

around whether a particular action requires a defendant to divulge the contents of his mind, not whether two actions yield the same result."[161] As such, compelling a defendant to give police his password is different from compelling a defendant to unlock his cell phone via biometrics because of the way the Supreme Court has framed this issue. And this is exactly the problem.

ANALYSIS*

Under current law, the police cannot force a defendant to give them the password to his cell phone, but they can force him to unlock it with his body. This inconsistency can be traced to *Schmerber*'s destruction of the *Boyd* holding, but more dramatically, the *Fisher* opinion. The best way to remedy this inconsistency is to revert to a historical understanding of the Fifth Amendment protections. In reverting to a historical understanding, courts must dispense with the "testimonial requirement." There are two reasons why this requirement does not adequately address Fifth Amendment issues: (1) it is misleading; and (2) it leads to inconsistent applications.

First, the Fifth Amendment, as explained above, protects defendants from being "compelled in any criminal case to be a *witness* against himself."[162] United States Supreme Court decisions in the twentieth and twenty-first centuries have tried to explain what "being a witness" means.[163] The Court determined that "[t]he word witness in the constitutional text limits the relevant category of compelled incriminating communications to those that are 'testimonial' in character."[164] However, this understanding of testimonials is misleading.

In criminal trials, many types of evidence can be admitted to prove guilt, from witness testimony to lab results to photos and videos. A witness can be called on the stand to admit physical or documentary evidence. In fact, most pieces of physical evidence require a witness to authenticate the evidence and testify to its contents on the stand.[165] For

161 *Id.*

* This author is a criminal trial attorney in Colorado. Because of this, much of the information in this section is based off of the author's own personal, in-court experiences.

162 U.S. CONST. amend. V (emphasis added).

163 *See* United States v. Hubbell, 530 U.S. 27, 34 (2000).

164 *Id.*

165 Subject to certain exceptions in the Federal Rules of Evidence regarding self-authenticating documents. *See, e.g.*, Fed. R. Evid. 902.

example, almost every driving under the influence trial, drug case, or even firearm case requires the testimony of an expert witness because the government wants to admit laboratory results, blood work, drug testing, or a ballistics report. The government cannot admit laboratory results or reports without the witness who drafted the document taking the stand.[166] The expert needs to take the stand otherwise the admission of the lab results would violate the defendant's confrontation rights because the *document itself* is a testimonial.[167] So why, then, do courts consider some documentary evidence to be testimonial and others not? The truth is physical evidence, documentary evidence, and live testimony are *all* testimonial.

Second, and as shown above, the testimonial requirement leads to inconsistent applications. Police can compel a defendant to open their cell phone with their fingerprint or face, but they cannot compel the defendant to say their password.[168] Police can compel the defendant to provide a blood sample because the blood is not testimonial, but the laboratory results of the blood sample are testimonial.[169] Police can compel the defendant to record his voice, but the prosecution cannot compel the defendant to speak during trial.[170] The way in which the Supreme Court has tried to explain what is or is not a violation of the defendant's Fifth Amendment rights against self-incrimination has, at best, not been compelling, and at worst, puzzling.

A dive into history shows us that the Fifth Amendment's Self-Incrimination Clause had several purposes, such as to protect a defendant's personal liberty and to strike a balance between the government's interest and that of the individual. On that scale, stones have been placed on the side of the government for decades; in many instances, the clause has lost its purpose. The primary consideration of the self-incrimination clause is voluntariness.[171] An individual must be free from compulsion.[172] To compel an action is to rid that person of their liberty and render their actions involuntary.[173] History shows us that to protect voluntariness and force the government to do its job, the

166 *See* Smith v. Arizona, 602 U.S. 779, 802–03 (2024).

167 *See id.*

168 *See, e.g.*, *Payne*, 99 F.4th at 511.

169 *See* Schmerber v. California, 384 U.S. 757, 761 (1966); *see also Smith*, 602 U.S. at 802–03.

170 *See, e.g.*, United States v. Dionisio, 410 U.S. 1, 5 (1973); *see also* U.S. CONST. amend. V.

171 *See* Carter, *supra* note 15, at 933–34.

172 *See id.*

173 *See id.*

self-incrimination clause must be construed broadly, and given a liberal interpretation.[174]

A court's analysis of this issue should depend on the type of evidence obtained because the clause applies differently to different types of evidence. As stated previously, the recommendations of this Article are limited to documentary evidence. Defendants should not be compelled to produce their documents to be used as evidence against themselves. Courts should use the historical analog of a person's personal papers and documents to deal with biometric technology. Cell phones and other technology have largely replaced the use of paper. Cell phones store more data than filing cabinets, and turning the contents of a cell phone over to the police is the modern equivalent practice to turning over the contents of a filing cabinet.

Historically, the compulsive production of documentary evidence is protected under a Fourth and Fifth Amendment analysis.[175] Modern day courts should continue to apply the analysis used in *Boyd* and clarified in *Gouled* while also using a historical analog to fill in the gaps created by technology, such as biometric encryption. To illustrate how this test would apply to smartphones, the author poses a series of hypotheticals.

I. WARRANTLESS SEIZURE OF A SUSPECT'S PHONE

For the first hypothetical, the government enters an office without a warrant and takes a suspect's phone without a warrant. That action would violate the Fourth Amendment, absent exigent circumstances, because a search without a warrant is presumptively unreasonable.[176] The Fourth and Fifth Amendments protect the same liberty interests. So, because both amendments run together, and the cell phone was seized in violation of the Fourth Amendment, the admission of the contents of the phone would violate the defendant's Fifth Amendment right to be free from self-incrimination.

This very hypothetical was under consideration in the Eastern District of New York in 2023.[177] Unbeknownst to the defendant, Eldarir, the Department of Homeland Security began investigating him after

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174 *See generally* Sales, *supra* note 5, at 197–98.

175 *See, e.g.*, Boyd v. United States, 116 U.S. 616, 622 (1886).

176 *See generally* Katz v. United States, 389 U.S. 347, 361 (1967).

177 United States v. Eldarir, 681 F. Supp. 3d 43, 46–47 (E.D.N.Y. 2023).

intel showed that he had been illegally selling Egyptian antiques.[178] Eldarir, who travels through John F. Kennedy International Airport frequently, was stopped by Customs and Border Patrol.[179] When he denied smuggling artifacts, the agents searched Eldarir's luggage and located 590 artifacts in his suitcase.[180] One of the agents directed Eldarir to open his cell phone using his finger.[181]

Unlike the District Court, this Article starts with a Fourth Amendment analysis. Under these facts, searching Eldarir's phone without a warrant violates the Fourth Amendment. Now, importantly, the *Eldarir* court explained that the independent source doctrine applied here and thus cured any Fourth Amendment violations.[182] How the independent source doctrine plays into this analysis is outside the scope of this Article. Therefore, if we assume the doctrine does not apply, then Eldarir's Fourth Amendment protections were violated.

Next, a Fifth Amendment analysis. In this situation, the analysis is simple. This author does not need to ask what type of evidence is at play here because the sheer fact that the Fourth Amendment was violated necessarily meant the Fifth Amendment was violated. This is because of the historical understanding that both the Fourth and the Fifth Amendments protect the same liberty interests and are so intertwined that a violation of one amendment is almost always a violation of the other.[183]

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178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.* at 48.

182 *Id.* at 54.

183 *See* Boyd v. United States, 116 U.S. 616, 630 (1886); *Eldarir*, 681 F. Supp. 3d at 52. The author would like to point out that the Court in this case did very little Fifth Amendment analysis but primarily relied on the "weight of authority" in concluding that the compelled use of a defendant's biometric features to unlock a phone does not amount to testimonial communication. The Court later explains that simply because someone can open a phone with their finger does not "necessarily imply ownership or control over it," because phones can store up to five fingerprints at a time. This author would argue that in that rare case, five potential people would have control over that phone and the compelled use of any one of those individual's fingers would communicate as much.

II. VALID WARRANT TO SEIZE PHONE WITHOUT BIOMETRICS

In the second hypothetical, the government has a valid search warrant to enter an office and search and seize a cell phone. The government, not having the passcode, demands the defendant to tell them the code. The seizure of the phone is lawful, and a search of the phone would be lawful, because of the valid warrant. However, the government cannot compel the defendant to tell them his password. Doing so would violate the defendant's Fifth Amendment right unless the password was given voluntarily, or the defendant was read his Miranda warnings.[184]

A. *Valid Warrant to Seize Phone with Biometrics*

In the third hypothetical, the government enters an office pursuant to a valid search warrant. The warrant permits him to seize and search the smartphone. The government does not know the passcode, but the cell phone can be unlocked via facial recognition technology. The government turns the phone around to face the suspect, and the cell phone opens. This action would be a violation of the Fifth Amendment because in using the defendant's body to open the phone, the government compelled the defendant to produce documents that are incriminating to him. The defendant did not voluntarily open his cell phone for the police, but the police nonetheless compelled the production of the contents of the cell phone. This goes against the Court's understanding in *Boyd* that requiring a defendant to produce documents to be used as evidence against himself was akin to forcing him to testify.[185]

Applying the Ninth Circuit's *United States v. Payne* further complicates this analysis. The defendant in *Payne* was convicted of assault with a deadly weapon on a peace officer in 2018.[186] He was sentenced to three years imprisonment.[187] After being released on parole, Payne signed a "Notice and Conditions of Parole" and a "Special Conditions of Parole" form which included the following conditions:

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184 *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.").

185 *See generally Boyd*, 116 U.S. at 622–23.

186 *Payne*, 99 F.4th at 499.

187 *Id.*

> You, your residence, and any property under your control are subject to search or seizure by a probation officer, an agent or officer of the California Department of Corrections and Rehabilitation, or any other peace officer, at any time of the day or night, with or without a search warrant, with or without cause. . . . You shall surrender any digital/electronic device and provide a pass key/code to unlock the device to any law enforcement officer for inspection other than what is visible on the display screen. This includes any digital/electronic device in your vicinity. Failure to comply can result in your arrest pending further investigation and/or confiscation of any device pending investigation.[188]

A year after being released on parole, officers pulled Payne over for traffic violations.[189] Payne informed the officers about his parole status, so the officers handcuffed and detained him in the back of a police car.[190] Officers searched Payne's person and the car he was driving, and officers found a cell phone, among other suspicious items.[191] Officers asked Payne for the passcode to the cell phone to which Payne replied he did not know the passcode.[192] Instead of confiscating the device, the officer "forcibly grabbed Payne's thumb and used it to unlock the phone via a built-in biometric unlocking feature."[193] The officers discovered two videos: one of a room full of blue pills suspected of being fentanyl and the other depicting a grey building with a man whose voice was believed to be Payne's.[194] These videos led to an investigation which ultimately ended in a grand jury indictment charging Payne with various drug possession and distribution charges.[195]

Under the author's proposed historical analogs test, this instance would not necessarily violate Payne's Fifth Amendment rights. This conclusion differs from the Ninth Circuit analysis in this case. First, these facts must go through a Fourth Amendment analysis. The search of Payne's car and the seizure of his cell phone did not violate the Fourth Amendment. Indeed, the officers did not have a warrant,

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188 *Id.*

189 *Id.*

190 *Id.* at 499–500.

191 *Id.* at 500.

192 *Payne*, 99 F.4th at 500.

193 *Id.*

194 *Id.*

195 *Id.* at 501.

but they seized the cell phone pursuant to Payne's valid and signed parole conditions. Second, this Article applies these facts to a Fifth Amendment analysis. First and foremost, this Article must decide what evidence is at issue. In *Payne*, the evidence at issue was his cell phone.[196] Using a historical analog test, a cell phone is equal to a filing cabinet or a desk drawer. Under the author's proffered analysis, this analog would give the defendant Fifth Amendment protections; officers could not compel the defendant to open his cell phone, just like officers could not have compelled a defendant, historically, to turn a key on a locked drawer. What distinguishes this case from the third example above is the signed parole conditions. The signed conditions make clear that Payne must give officers the passcode, or key, to the phone.[197] In this case, Payne was required, per his agreement, to open the cell phone using his biometrics.[198] Because Payne agreed to these parole conditions, his cell phone and the data in it are not protected under the Fifth Amendment.[199] He essentially waived that right under this analysis.[200] The Ninth Circuit made its analysis more complicated than necessary by asserting that using the defendant's thumb to unlock the cell phone was not testimonial.[201] While Payne's rights were not violated under either analysis, the author's proffered analysis does not delve into the confusion that defining "testimonial" communications entails.

CONCLUSION

Historically, the Fifth Amendment's Self-Incrimination Clause has been interpreted as a broad and liberally construed protection against government intrusion.[202] This privilege existed as early as the sixteenth century. Centuries later, legal minds began criticizing the broad scope of this right in American courts, arguing that it was *too* favorable to defendants. Slowly, the Supreme Court began to chip away at this historically broad protection, and by the mid-1970s, had almost demolished it. Modern-day jurisprudence has lost sight of the original

196 *Id.* at 499.
197 *Id.* at 506.
198 *Payne*, 99 F.4th at 506.
199 *Id.*
200 *Id.*
201 *Id.* at 513.
202 *See generally* Sales, *supra* note 5, at 197–98.

purposes of the clause: to protect the individual's privacy against government intrusion and to promote voluntariness in our justice system.[203]

With the increase in biometric technology, modern courts' interpretation of a 1970s rule has led to illogical consequences. The police can compel a defendant to open his cell phone, divulging its contents with his body, but the police cannot compel a defendant to give the police his password. This nonsensical outcome is just the most recent example of Fifth Amendment confusion. The "testimonial" requirement in Fifth Amendment cases has not made sense in decades. With the rapid increase of biometric technology, the jurisprudence in this area continues to mislead and confuse courts. Therefore, the Court should overrule *Fisher* and instead apply the *Boyd* standard regarding the compulsion of documents as the historical analog to smartphones to hold that the government cannot compel a defendant to produce its contents.

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203 *See id.* at 197.