FIFTH AMENDMENT — COMPELLED DECRYPTION — SUPREME COURT OF NEW JERSEY HOLDS THAT COMPELLED DISCLOSURE OF DEFENDANT'S IPHONE PASSCODES DOES NOT VIOLATE THE SELF-INCRIMINATION CLAUSE. — *State v. Andrews*, 234 A.3d 1254 (N.J. 2020).

Courts are often accused of failing to adapt doctrine to the complexities of new technology. However, courts sometimes make the opposite mistake — stretching old doctrine too readily, when a new technology in fact presents no novel legal problem to solve. Recently, in *State v. Andrews*,[1] the Supreme Court of New Jersey concluded that a defendant's compelled disclosure of his iPhone passcodes did not merit Fifth Amendment privilege because the State's knowledge of the passcodes was a "foregone conclusion,"[2] despite the fact that such a disclosure amounted to the forced revelation of the "contents of [the defendant's] own mind."[3] In stretching the so-called "act of production" doctrine to cover the compelled provision of iPhone passcodes — a step beyond the compelled *unlocking* of the device — the *Andrews* court inappropriately narrowed the privilege against self-incrimination, contravening judicial precedent and constitutional history alike.

After Quincy Lowery was arrested for suspected involvement in a Newark, New Jersey, drug-trafficking ring, he confessed to investigators that an officer in the Essex County Sheriff's Office (ECSO) had helped him evade detection.[4] Lowery claimed that the officer, defendant Robert Andrews — whom Lowery had met through a motorcycle club — warned him about a wiretap on Lowery's phone and the potential placement of a GPS device on Lowery's Jeep, among other things.[5] As proof, Lowery showed officers text messages between himself and Andrews on his iPhone; however, Lowery had reset his phone thirty days earlier, eliminating most records of their prior conversations.[6] In response, officers requested that Andrews surrender his two phones, an iPhone 5s and an iPhone 6 Plus, to the Internal Affairs Department of the ECSO.[7] Andrews surrendered the phones and was subsequently indicted on various charges.[8]

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[1] 234 A.3d 1254 (N.J. 2020).

[2] *Id.* at 1274.

[3] Curcio v. United States, 354 U.S. 118, 128 (1957); *see also Andrews*, 234 A.3d at 1273.

[4] State v. Andrews, 197 A.3d 200, 202 (N.J. Super. Ct. App. Div. 2018).

[5] *Id.* at 202–03.

[6] *Id.* at 203. Lowery told the officers that Andrews had advised him to reset his phone. *Id.*

[7] *Id.*

[8] *Id.* Andrews's charges were filed pursuant to N.J. STAT. ANN. § 2C:30-2 (West 2020) (second-degree official misconduct); N.J. STAT. ANN. § 2C:29-3(a)(2) (West 2020) (third-degree hindering the apprehension or prosecution of another person); and N.J. STAT. ANN. § 2C:29-1 (West 2020) (fourth-

Without Andrews's passcodes, however, the State could not unlock his iPhones to search for the allegedly incriminating text messages and call records missing from Lowery's phone.[9] As such, the prosecution, armed with warrants for the phones' contents,[10] moved to compel Andrews to share his passcodes.[11] In opposition, Andrews contended that the Fifth Amendment's Self-Incrimination Clause and its New Jersey statutory and common law analogues prohibited the compelled disclosure of his passcodes.[12] The trial court determined that compelled disclosure of the passcodes was not privileged under either the Fifth Amendment or New Jersey law, ordering an in camera disclosure of the passcodes and corresponding search of the iPhones.[13] Andrews appealed.[14]

The Appellate Division affirmed the trial court's order, concluding that "the compelled disclosure of the passcodes [was] not barred by the Fifth Amendment."[15] It began by explaining that the Fifth Amendment applies only when a compelled communication is "testimonial": that is, it "explicitly or implicitly[] relate[s] a factual assertion or disclose[s] information."[16] Moreover, as the Supreme Court announced in *Fisher v. United States*,[17] the production of information — though not an explicit statement or piece of oral testimony — can still be "testimonial" in nature: "'[T]he act of produc[tion]' itself may [implicitly] communicate incriminatory statements."[18] However, such an "act of production" is not protected by the Fifth Amendment when the information revealed by the compelled act is a "foregone conclusion" — in other words, when it "adds little or nothing to the sum total of the Government's information."[19] Because the State had already established that Andrews owned, possessed, and controlled his iPhones, his act of producing their passcodes, while "testimonial," fell under this "foregone conclusion" exception.[20] Andrews again appealed.[21]

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degree obstruction of the administration of the law or other governmental function). *Andrews*, 197 A.3d at 203.

9 *Andrews*, 197 A.3d at 203.

10 *See id.* at 210.

11 *Id.* at 203.

12 *See id.*

13 *See id.* at 203–04.

14 *Id.* at 204.

15 *Id.*

16 *Id.* (quoting Doe v. United States, 487 U.S. 201, 209–10 (1988)).

17 425 U.S. 391 (1976).

18 *Andrews*, 197 A.3d at 204 (second alteration in original) (quoting *Fisher*, 425 U.S. at 410).

19 *Id.* at 205 (quoting *Fisher*, 425 U.S. at 411).

20 *See id.* The court also determined that the disclosure did not violate the Fifth Amendment parallels in either New Jersey common law or statutory law. *See id.* at 209–11.

21 *Andrews*, 234 A.3d at 1259.

The Supreme Court of New Jersey affirmed.[22] Writing for the court, Justice Solomon[23] concluded that the compelled disclosure of the passcodes was not shielded by the Fifth Amendment privilege against self-incrimination or its analogues in New Jersey law.[24] The court began by reiterating that "[t]estimonial communications may take any form, but must 'imply assertions of fact.'"[25] The court continued: the "act of produc[ing information]" — not *just* the information contained in the documents or files produced — can be testimonial "in its own right."[26] Because entering the passcodes implied assertions of fact (for example, that Andrews knew the passcodes and that the iPhones belonged to him), the court determined that the compelled disclosure of Andrews's passcodes was a "testimonial act of production."[27] As such, it was presumptively barred by the Fifth Amendment privilege.[28]

Nonetheless, like the Appellate Division before it, the Supreme Court of New Jersey applied the foregone conclusion exception to Andrews's "testimonial act of production," holding that the Fifth Amendment privilege was overcome by the government's knowledge of three key facts: the passcodes' existence, their possession by the defendant, and their authenticity.[29] In other words, any information revealed to the government by the passcodes' production was a "foregone conclusion."[30] As such, the Fifth Amendment did not prevent the government from compelling Andrews to disclose the passcodes.[31]

Justice LaVecchia dissented.[32] Conceding that the foregone conclusion exception has often been applied to cases involving compelled decryption, the dissent highlighted that courts have disagreed upon "what [that] compelled act produces" and in turn what "the government must establish in order for the foregone conclusion exception to apply."[33] Pointing out that the application of the foregone conclusion exception

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[22] *Id.*

[23] Justice Solomon was joined by Chief Justice Rabner and Justices Patterson and Fernandez-Vina.

[24] *Andrews*, 234 A.3d at 1259.

[25] *Id.* at 1265 (citation omitted) (quoting Doe v. United States, 487 U.S. 201, 209 (1988)).

[26] *Id.* at 1269.

[27] *Id.* at 1273.

[28] *Id.* at 1274.

[29] *See id.* at 1273–75. The court also noted that it "would reach the same conclusion [even] if [it] viewed the analysis to encompass the phones' contents." *Id.* at 1275.

[30] *Id.* at 1275.

[31] *Id.* The court also concluded that the passcodes were not "incriminating" information protected by state statutory law. *Id.* at 1276. Nor were they protected by state common law: while New Jersey's common law privilege, unlike the Fifth Amendment, incorporated privacy considerations, the valid warrants for the contents of Andrews's phone meant that those considerations had been "considered and overcome." *Id.* at 1277.

[32] *Id.* at 1278 (LaVecchia, J., dissenting). Justice LaVecchia was joined by Justices Albin and Timpone.

[33] *Id.* at 1285.

by the Court in *Fisher* does not "resemble its application to information on an encrypted device,"[34] however, the dissent expressed concern about the extension of the act of production framework — "developed in the context of the compelled production of books, records, and physical documents" — to compelled decryption.[35] Instead, the dissent advocated "adher[ing] to the Court's bright line: the contents of one's mind are not available for use by the government in its effort to prosecute an individual."[36]

In classifying the defendant's compelled disclosure of his passcodes as an "act of production" to which the foregone conclusion exception might apply, the *Andrews* court inappropriately narrowed the Fifth Amendment right against compelled self-incrimination. Faced with a case requiring a defendant to communicate his iPhone passcodes, the court employed an ill-fitting and rarely applied framework, jettisoning the fundamental Fifth Amendment principle of protecting a defendant's individual, private thoughts. Ultimately, the *Andrews* decision contravened both judicial precedent and constitutional history.

First, the *Andrews* court's reading of the Fifth Amendment contradicted precedent. To be protected by the Fifth Amendment, a communication must be "testimonial," meaning it "impl[ies] assertions of fact"[37] and expresses the "contents of [the defendant's] own mind."[38] Conversely, when a communication is *not* testimonial — that is, when it does not reveal the "contents of [one's] own mind"[39] — it is unprotected.[40] For example, the state can lawfully compel a defendant to furnish a handwriting, blood, or voice sample;[41] to stand in a lineup;[42] or to don particular clothing.[43] The dividing line between "testimonial" and not is the state's use of a defendant's individual, private thoughts "to assist in his prosecution."[44] This distinction undergirds Justice Stevens's oft-quoted dissent in *Doe v. United States*,[45] which suggests that a defendant "may in some cases be forced to surrender a key to a strongbox

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[34] *Id.* at 1287–88.

[35] *Id.* at 1286.

[36] *Id.* at 1288. Justice LaVecchia also dissented from the court's interpretation of state statutory and common law. *See id.* at 1288–94.

[37] Doe v. United States, 487 U.S. 201, 209 (1988).

[38] Curcio v. United States, 354 U.S. 118, 128 (1957).

[39] *Id.*

[40] *See Doe*, 487 U.S. at 210.

[41] *See, e.g.*, Gilbert v. California, 388 U.S. 263, 266–67 (1967) (handwriting sample); Schmerber v. California, 384 U.S. 757, 765 (1966) (blood sample); United States v. Dionisio, 410 U.S. 1, 7 (1973) (voice sample).

[42] *See* United States v. Wade, 388 U.S. 218, 221–22 (1967).

[43] *See* Holt v. United States, 218 U.S. 245, 252–53 (1910).

[44] *Doe*, 487 U.S. at 213.

[45] 487 U.S. 201 (1988).

containing incriminating documents," but cannot "be compelled to reveal the combination to his wall safe."[46]

In *Fisher*, the Court recognized that some compelled *acts* — as opposed to compelled *statements* — may nonetheless bear testimonial aspects, giving life to the Court's so-called "act of production" doctrine.[47] Using this doctrine, federal courts have extended the Fifth Amendment privilege to physical acts with "communicative aspect[s]."[48] Responding to a subpoena for documents, the *Fisher* Court argued, carried with it the "tacit averments" of the defendant: namely, "the existence of the papers demanded and their possession or control by the [defendant]."[49] Because these "tacit averments" were potentially incriminating, the Court reasoned, the act of producing the documents merited Fifth Amendment scrutiny.[50]

But the *Fisher* Court imposed an important limitation on the act of production doctrine. If the potentially incriminating "tacit averments" incidental to an "act of production" were already known to the government, the act — although testimonial — was not protected by the Fifth Amendment.[51] This "foregone conclusion"[52] exception has no analogue in cases involving "ordinary, oral testimony," the Fifth Amendment's traditional domain; the exception applies only to "acts of production."[53] Importantly, since *Fisher*, the Court has considered the foregone conclusion exception only twice, and solely in the context of the compelled production of documents in response to a subpoena.[54] And in both cases, the Court refrained from applying the exception.[55]

Nonetheless, lower courts have repeatedly (and inconsistently) applied the act of production doctrine and the foregone conclusion exception in a variety of contexts — in particular, to the compelled decryption of encrypted electronic devices. In the vast landscape of compelled decryption cases, courts have disagreed over whether ordering a defendant

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[46] *Id.* at 219 (Stevens, J., dissenting).

[47] Fisher v. United States, 425 U.S. 391, 410 (1976); *see also* Laurent Sacharoff, *Unlocking the Fifth Amendment: Passwords and Encrypted Devices*, 87 FORDHAM L. REV. 203, 217–18 (2018).

[48] United States v. Hubbell, 530 U.S. 27, 44 (2000).

[49] *Fisher*, 425 U.S. at 410.

[50] *Id.*

[51] *See id.* at 411; *see also* Aloni Cohen & Sunoo Park, *Compelled Decryption and the Fifth Amendment: Exploring the Technical Boundaries*, 32 HARV. J.L. & TECH. 169, 182 (2018).

[52] *Fisher*, 425 U.S. at 411.

[53] Sacharoff, *supra* note 47, at 225, 228 (contrasting the "full Fifth Amendment protection" enjoyed by "ordinary, oral testimony," *id.* at 225, with the more limited protection given to "act-of-production testimony," *id.* at 228); *see also* Orin S. Kerr, Essay, *Compelled Decryption and the Privilege Against Self-Incrimination*, 97 TEX. L. REV. 767, 776 (2019) ("There is no obvious analogue to [the foregone conclusion exception] when the government compels an answer to a direct question.").

[54] Seo v. State, 148 N.E.3d 952, 961 (Ind. 2020); *see also* United States v. Hubbell, 530 U.S. 27, 44–45 (2000); United States v. Doe, 465 U.S. 605, 613–14, 614 n.13 (1984).

[55] *Hubbell*, 530 U.S. at 44; *Doe*, 465 U.S. at 614 n.13.

to physically enter her passcode into a device[56] or provide her biometric features (such as her fingerprints or face) to unlock a device[57] is a testimonial "act of production"; if so, what incriminating evidence — or rather, "tacit averments" — the compelled testimonial act produces;[58] and, in turn, what knowledge the government must demonstrate for the foregone conclusion exception to apply.[59] But cases like *Andrews*, concerning the actual *disclosure* of a passcode — far more communication than act — are seemingly much less complicated.[60] Yet the *Andrews* court continued down the "act of production" line of reasoning nonetheless.

In *Andrews*, the Supreme Court of New Jersey mischaracterized the communication at issue as an "act of production" with "communicative aspects," as in *Fisher*, rather than a piece of compelled testimony anathematic to the Fifth Amendment. As Professor Laurent Sacharoff has argued, asking a defendant to state or write down her passcode "directly involve[s] testimony in its purest form"[61]: the government "cannot compel the password itself from a person's head."[62] There is nothing "tacit" about such an averment at all. *Andrews* could have been resolved with the court's admission that ordinary, oral testimony was at issue: "Communicating . . . a passcode requires facts contained *within the holder's mind* — the numbers, letters, or symbols composing the passcode."[63]

The *Andrews* court missed the fact that the act of production doctrine and its foregone conclusion exception have no relevance to the compelled disclosure of a passcode, regardless of whether they are applicable to other forms of compelled decryption. When a defendant is compelled to enter her passcode into her iPhone *without disclosing it to the State*, it is plausible she performs a physical act with "communicative aspect[s]" akin to the "act of production" in *Fisher*.[64] But when a

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56 *Compare Seo*, 148 N.E.3d at 955 (compelling defendant to unlock iPhone constituted testimonial act protected by the Fifth Amendment), *with* Commonwealth v. Jones, 117 N.E.3d 702, 718 (Mass. 2019) (concluding the same did not merit Fifth Amendment privilege).

57 *See, e.g.*, State v. Diamond, 890 N.W.2d 143, 152–53 (Minn. Ct. App. 2017) (ordering defendant to provide fingerprint to unlock device did not "require a testimonial communication").

58 *See Andrews*, 234 A.3d at 1285–86 (LaVecchia, J., dissenting) (citing state and federal court decisions with conflicting holdings).

59 *Id.*

60 *See id.* at 1259 (majority opinion) (characterizing the issue in *Andrews* as "whether a court order requiring a criminal defendant *to disclose* the passcodes to his passcode-protected cellphones violates the Self-Incrimination Clause" (emphasis added)).

61 Sacharoff, *supra* note 47, at 223.

62 Laurent Sacharoff, Response, *What Am I Really Saying when I Open My Smartphone? A Response to Orin S. Kerr*, 97 TEX. L. REV. ONLINE 63, 68 (2019).

63 *Andrews*, 234 A.3d at 1273 (emphasis added).

64 *See* United States v. Hubbell, 530 U.S. 27, 44 (2000); *see also* Sacharoff, *supra* note 47, at 228 ("Few cases expressly consider this question, and those that do find that typing in a password . . . counts as testimony, but not necessarily testimony on the level of ordinary, oral testimony." (footnote omitted)).

defendant communicates *the passcode itself*, as in *Andrews*, she expressly gives the State an additional piece of information. That piece of information has no equivalent in *Fisher*; after all, if the passcode were a foregone conclusion, the State would not need it to be revealed. And unlike the (previously existing, voluntarily created) documents sought in a typical act of production case, which enjoy no independent Fifth Amendment protection,[65] the passcode must be compelled directly from the defendant's head.

In mistakenly applying the act of production doctrine and the foregone conclusion exception to what is actually ordinary testimony, *Andrews* also broke with a historical understanding of the Fifth Amendment. Namely, the origins of the Fifth Amendment underscore the sanctity of the particular type of evidence at issue in *Andrews*. Federal courts often hearken back to the Fifth Amendment's origins in the ecclesiastical courts and the Star Chamber, British courts of equity infamous for "putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source."[66] Importantly, one of the Framers' main objections to the Star Chamber was the manner in which it eased the State's burden of proof in criminal prosecutions, permitting the State to simply "call the accused as [its] first witness."[67] The Fifth Amendment thus codified the belief that the government, in choosing to bring a criminal case against an individual, is obligated to shoulder the entire load of producing evidence[68] — leaving a defendant "privileged from producing the evidence [herself] but not from its production."[69]

The fact, then, that the compelled communication in *Andrews* was of "minimal evidentiary significance"[70] — a point repeatedly emphasized by the court as grounds for applying the foregone conclusion exception[71] — is irrelevant. When it comes to compelled oral testimony, courts have long concluded that such communications are privileged if they "may 'lead to incriminating evidence' . . . *even if the information*

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[65] Voluntarily created documents are "not 'compelled' within the meaning of the privilege." *Hubbell*, 530 U.S. at 35–36; *see also* Fisher v. United States, 425 U.S. 391, 410 n.11 (1976).

[66] Doe v. United States, 487 U.S. 201, 212 (1988); *see, e.g.*, *id.*

[67] Leonard G. Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. CHI. L. REV. 472, 487 (1957); *see also* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2252, at 324 (John T. McNaughton ed., rev. ed. 1961).

[68] *See* Abe Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. BAR ASS'N J. 91, 98–99 (1954) ("[The Englishman] himself was a sovereign. He had the sovereign right to refuse to cooperate . . . . He could put the state to its proof." *Id.* at 98.); Ratner, *supra* note 67, at 487–89.

[69] Johnson v. United States, 228 U.S. 457, 458 (1913).

[70] *Andrews*, 234 A.3d at 1276.

[71] *Id.* at 1274, 1276.

itself is not inculpatory."[72] True, the foregone conclusion exception might be necessary to prevent defendants from employing the act of production doctrine to "introduce testimonial doors that block government access to their nontestimonial treasure."[73] However, it cannot be used to strip what is itself testimonial treasure — here, Andrews's passcodes — of its privilege simply because that testimony is not facially incriminating or is of limited evidentiary value. Whatever the passcodes' value, the State's problem was that it could only solicit them from Andrews himself, requiring him to shoulder part of the evidence-gathering burden.

Despite the act of production doctrine's inapplicability to the disclosure of Andrews's iPhone passcodes — and its irreconcilability with the Fifth Amendment's history — the *Andrews* court nonetheless categorized the disclosure as an "act of production," permitting a subsequent "foregone conclusion" analysis to strip it of its Fifth Amendment privilege.[74] In the end, *Andrews* is an easy case. But in demonstrating the clash between the act of production framework and the compelled revelation of an iPhone passcode, it ought to make judges think twice before applying the foregone conclusion exception outside the context of document production. As Justice Murphy declared in 1944: "The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime."[75] These evils also transcend the development of new technologies. Courts ought not to let them sneak into modern prosecutions via extension of the oft-questioned and rarely applied act of production doctrine.

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[72] United States v. Hubbell, 530 U.S. 27, 38 (2000) (emphasis added) (quoting Doe v. United States, 487 U.S. 201, 208 n.6 (1988)). Professor Orin Kerr conceives of a narrower understanding of self-incrimination that rejects mere causal connections between testimony and incriminating evidence, noting in *Decryption Originalism: The Lessons of* Burr, 134 HARV. L. REV. 905 (2021), that "ordering a suspect to disclose a password to access evidence ordinarily will not be incriminating." *Id.* at 954. This understanding of the Fifth Amendment has been rejected by the Court. *See Hubbell*, 530 U.S. at 37 ("It has, however, long been settled that [the Fifth Amendment's] protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence."); *see also* Kastigar v. United States, 406 U.S. 441, 444–45 (1972) ("[The Fifth Amendment] protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.").

[73] Kerr, *supra* note 53, at 777; *see* Sacharoff, *supra* note 47, at 218–19.

[74] *Andrews*, 234 A.3d at 1274–75.

[75] United States v. White, 322 U.S. 694, 698 (1944).