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Lutz Eidam | Michael Lindemann | Andreas Ransiek (eds.)

Interrogation, Confession, and Truth

Comparative Studies in Criminal Procedure

Nomos

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Introduction

Originally, the defendant's interrogation was regarded mainly as an element of her or his right to be heard in criminal proceedings. Although this concept is still appealing in theory, the picture has changed in reality. Nowadays, interrogation follows a different purpose: a confession of the crime shall be obtained.

The purpose of criminal procedure is to convict the guilty and protect the innocent – but the innocent only. Many prosecutors and judges seem to assume that somebody voluntarily confessing a crime clearly must be guilty. This is not only true for an inquisitorial system of criminal procedure but for the adversarial process as well. If the defendant confesses in the early stages of criminal proceedings, especially while being interrogated by the police, things are clear before the trial even starts. The cat is out of the bag and the defendant generally stands no chance to successfully revoke her or his admission of the crime.

By interrogating the defendant the truth shall be found. To this end some pressure on the defendant and some trickery if not outright deceptions are deemed appropriate to uncover the true events that took place and constitute the crime. This does not mean that police brutality is generally welcomed. But when it comes to the prevention of terroristic attacks or the rescue of an innocent party, even brutality is not necessarily considered absolutely banned.

On the other hand, both in Europe and the United States, the privilege against self-incrimination is guaranteed as a basic right of the accused, explicitly guaranteed by the 5th Amendment to the U.S. Constitution and mandated by both the protection of human dignity and by the rule of law of Germany's Basic Law. It is a necessary element of a fair hearing according to the European Court of Human Rights. It is "one of our nation's most cherished principles" as Chief Justice Earl Warren wrote for the majority opinion in Miranda v. Arizona. While it is widely accepted, too, that a defendant's rights should not "handcuff" the police, it is common opinion that torture to obtain a confession is forbidden in regular criminal proceedings. Any recourse to physical force by the police which has not been made strictly necessary by the person's conduct diminishes human dignity and is a violation of the European Convention of Human Rights according to the European Courts.

However, the legal demands are ambiguous when it comes to more subtle means of obtaining a confession. Does slapping a person once or twice constitute torture? Even if the answer is affirmative, we still have to consider what Fred Inbau wrote in 1961: "I am unalterably opposed to the use of any interrogation technique that is apt to make an innocent person confess. (…) I do approve of such psychological tactics and techniques as trickery and deceit (…) to secure incriminating information from the guilty." So maybe, as a German law professor wrote in the 1970s, the defendant's choice to remain silent is nothing but an artful "trick" obstructing the truth finding process and the administration of justice.

Thus, the question is where the line has to be drawn. Is it sufficient to warn defendants that they have a right to remain silent and to have the assistance of a lawyer for their defense? What is the current status of the privilege against self-incrimination? Should a resulting confession be inadmissible if warnings were not given like Miranda v. Arizona stipulated in 1966 and the German Federal Criminal Court acknowledged some 25 years later as well? When has someone's will been overborne and governing self-direction is lost, as Justice Felix Frankfurter put it in 1961? When, on the other hand, is truth discovered? More fundamentally: what is this thing called truth?

Scholars from the Unites States, the Netherlands, and Germany have discussed these issues from their respective legal backgrounds and experiences in May 2019 at Bielefeld University and have contributed the papers you find in this volume. We were delighted to have you here for such a successful workshop!

Andreas Ransiek
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Content

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The Suspect as a Source of Information

Thomas Weigend

I. Why Should the Suspect Serve as a Source of Information?

In this chapter, I wish to explore the basic question what role the suspect is to play in the criminal process, especially before trial. I will start with a short trip into the distant past and will then take a brief foray into procedural theory. These steps may not be of immediate help in resolving any of the practical problems of police interrogation. But sometimes it is useful to take a step back from case law and to ask a few naive questions.

The first question of this kind is: Why should the suspect be obliged to serve as a source of information for law enforcement agencies in the criminal process? In the German legal literature, one can often find ambivalent statements about the role of the suspect: on the one hand, he must be treated as a subject, not a mere object of the proceedings; on the other

hand, he can be forced to participate in the process and serves as evidence.[1] The suspect's obligation to participate includes an enforceable duty to appear for interrogations at the prosecutor's office (§ 163a s. 3 German Code of Criminal Procedure [*Strafprozessordnung, StPO*], and it extends to presenting his body for medical examinations (§ 81a StPO), to tolerate searches of his person, his home and his property (§ 102 StPO), and to be subjected to all kinds of secret measures of surveillance (§§ 100a et seq. StPO). There is also pretrial detention, exclusively provided for persons suspected of crime (§ 112 StPO). Although not *per se* a device for collecting evidence, detention has the welcome side-effect of making suspects more willing to talk in order to regain their freedom. Since the danger of tampering with evidence is one of the grounds permitting pretrial detention (§ 112 s. 2 no. 3 StPO), suspects may be encouraged to confess and thereby to minimize the risk that any destruction of evidence could prevent a conviction, which would remove that grounds for detention. Looking at the totality of obligations the law imposes on the suspect, one is hard-put *not* to conclude that he is an „object" of the criminal proceedings.

The situation is not fundamentally different in Anglo-American procedural systems. Suspects are subject to arrest and detention before trial, they can be held for interrogation, their person and effects can be searched, and their telephones and computers may be placed under secret surveillance. Whatever the suspect says under questioning[2] can be introduced as evidence against him at his trial.

The fact that the suspect is subject to intrusive measures of investigation may come as a surprise, because in an adversarial system the defendant is styled a co-equal party to the proceedings. One would therefore expect the suspect (and future defendant) to have a stronger legal position, on more or less the same level as the prosecutor. Such a position would also square with the notion of "equality of arms", which implies that the defendant must have adequate means to defend himself effectively and to offer evidence.[3] However, it is only at the trial that the defendant is afforded this kind of procedural equality; at the critical phase of the investigation, even

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1 *Roxin/Schünemann*, Strafverfahrensrecht, 28th ed. 2014, p. 106; *Rogall*, in: Wolter (ed.), Systematischer Kommentar zur Strafprozessordnung, 5th ed. 2016, vor § 133 notes 123, 129; Meyer-Goßner/*Schmitt*, StPO, 62nd ed. 2019, Einl note 80.

2 In England, even the fact that the defendant *declined* to answer certain questions put to him can be used as an argument for disbelieving any defense he may present later. See Police and Criminal Evidence Act 1984, Code C, s. 10.5.

3 See, e.g., ECtHR, Borgers v. Belgium, no. 12005/86, Judgment of 30 Oct. 1991, §§ 24-29; Kuopila v. Finland, no. 27752/95, Judgment of 27 April 2000, §§ 37-38;

the Anglo-American system does not treat the suspect as a co-equal party but limits his protection to certain civil rights, such as the freedom from unreasonable searches and from oppressive interrogations.[4]

II. A Brief Journey to the Past

Looking for an explanation, let us take a brief journey back into history. In both systems, there may exist similar traditions dating far back in history, which could explain the similarity of the present situation.

Let us first look at the European Continent[5]: In the early Middle Ages, "proof" in criminal cases was provided by oaths being sworn to support the claim of the plaintiff (i.e. the victim) or the defendant, or in the absence of sufficient community support for the defendant by ordeals (*Gottesurteile*), such as touching brand hot iron or being submerged into water to show guilt or (very rarely) innocence.[6] By contrast, in canonic (ecclesiastical) courts bishops or their representatives relied on a rational investigation of the facts, based on procedures used in ancient Rome. At the 4th Lateran Council of 1215, the church withdrew its support from the execution of death sentences and the use of ordeals in secular courts.[7] Jurisdiction of secular courts in criminal matters gathered importance due to the interest of local and regional authorities in administering criminal justice, partly in order to show and enforce their political power, partly to profit from the confiscation of the property of executed felons.[8]

In order to establish a plausible system of fact-finding, secular authorities borrowed the ecclesiastic style of searching for the truth by interrogat-

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Zhuk v. Ukraine, no. 45783/05, Judgment of 21 Oct. 2010, §§ 25-28: Kasparov et al. v. Russia, no. 21613/07, Judgment of 3 Oct. 2013, §§ 64-65. For a comprehensive treatment, see *Sidhu*, The Concept of Equality of Arms in Criminal Proceedings under Article 6 of the European Convention on Human Rights, 2017.

4 See, for the United States, the rights listed in the 4th, 5th and 6th amendment to the Constitution.

5 For a short overview see *Ambos*, Jura 2008, 586.

6 See the description of practices in *Blackstone*, Commentaries on the Laws of Englands in Four Books, 1893, vol. 2, Book IV, pp. 342 et seq.

7 Decisions of the IVth Lateran Council, Canon 18 (http://www.intratext.com/IXT/ENG0431/).

8 In a process that took centuries, local and regional authorities exercising criminal jurisdiction pushed aside the individual victim, who in former centuries had been the formal prosecutor, and presented themselves as both prosecutors and judges; see *Weigend*, Deliktsopfer und Strafverfahren, 1989, pp. 86 et seq.

ing suspects and witnesses under oath. Problems started when courts began to follow the Biblical exhortation[9] that two (male) eye witnesses to the crime are needed for a conviction. Since many crimes were not committed in public, the means of proof required for a conviction were often not available – which led to a fateful reliance on the only alternative path to conviction, that is, the suspect's confession. We all know that legal systems were incredibly inventive in devising means for encouraging suspects to confess, and the famous 16th century German code of criminal law and procedure, the *Constitutio Criminalis Carolina* of 1532,[10] was full of rules indicating under what circumstances the „painful" interrogation of a suspect was permissible.[11] Technically, the result of the suspect's interrogation under torture was never to be used as evidence; only a confession made in open court was legally valid, but if the defendant refused to confess he faced further torture. An in-court confession made the presentation of further evidence unnecessary; the defendant could immediately be convicted and sentenced.[12] It is no wonder that the widespread use of torture to obtain confessions initiated a tradition that regarded the suspect mainly as a source of information.

The situation in England was quite different.[13] Relying on a tradition starting with the Magna Carta of 1215 (ironically the same year in which the inquisitorial tradition began to take hold on the Continent), 14th century royal legislation established a jury of peers as an important bulwark against abusive prosecution and conviction. Originally, the jury was understood as a self-informing body of members of the suspect's community who would already have, or be in a position to quickly obtain, the information necessary for deciding on the guilt or innocence of the defendant. The rule that findings of guilt by the trial jury had to be unanimous worked as a powerful protection. On the other hand, there was originally no procedural law that would regulate the taking of evidence before the jury, which functioned as a mysterious black box.

In the 16th century, the process of urbanization made it no longer feasible for jurors to base their verdict on what they happened to have learned about the case and the person of the defendant. At the same time, laws be-

9 5 Mos. 19, 15; see also 2. Corinthians 13, 1.

10 For a comprehensive account of the *Carolina* and further developments see *Ignor*, Geschichte des Strafprozesses in Deutschland 1532–1846, 2002, pp. 41 et seq.

11 Carolina arts. 57-61.

12 Carolina arts. 58, 60.

13 The account on English developments is based on sources presented in *Langbein/Lerner/Smith*, History of the Common Law, 2009, pp. 58 et seq., 578 et seq.

gan to regulate the process of gathering evidence before trial. The central figure came to be the Justice of the Peace, who was commissioned by the King to deal with legal matters in the community in the intervals between the half-yearly visits of the higher royal judges of the assize, who were authorized to conduct trials in felony matters.[14] Originally, Justices of the Peace simply recorded complaints, including statements made by the victim (who at the trial served as prosecutor) and any witnesses the victim might bring along, as well as statements made by the suspect. The Justice of the Peace also decided on whether the suspect was to be taken into detention until the trial. At the jury trial, conducted before the judge, the prosecution was represented by the private victim or, in matters of importance to the Crown, by the Attorney-General. It should be mentioned that, although criminal punishments in 18th century England were no less cruel and severe than on the Continent, British judges – with the exception of a short period in the 17th century – never resorted to torture as a means of making the suspect confess. Nor was a confession necessary for conviction – the trial jury was not bound by the Biblical two-eyewitnesses rule but was free in its evaluation of the evidence, under the guidance of the trial judge.

The defendant was precluded from testifying and thus reduced to the role of a silent observer at his own trial. It was only in the course of the 18th century that the assistance of a lawyer became available to defendants, and originally only to those accused of a felony.[15] It took until 1898 for the defendant to be able to testify in his own behalf.[16] But what about the suspect's role as a source of evidence? In the middle of the 18th century, some Justices of the Peace, especially in metropolitan London, took it upon themselves to actively search for evidence, and to proactively interrogate the suspect and witnesses with a view toward preparing evidence useful for the trial. Some of these Justices employed detectives who helped them gather information. But it was only with the early 19th century development of an organized urban police force – which also adopted the role of prosecutor at the criminal trial – that questioning of suspects became a regular feature of the pretrial process.[17] Yet, with the advent of a state interest in the effective prosecution of crime, the temptation to use the suspect as a main source of evidence seemingly became irresistible even in English-

14 *Langbein/Lerner/Smith*, History of the Common Law, 2009, pp. 665-671.
15 *Langbein/Lerner/Smith*, History of the Common Law, 2009, pp. 690-692.
16 An Act to Amend the Law of Evidence, 1898, 61 & 62 Vict. c. 36.
17 *Langbein/Lerner/Smith*, History of the Common Law, 2009, p. 706.

speaking jurisdictions. Restrictions and regulations of police efforts to obtain confessions were implemented only through the jurisprudence of the U.S. Supreme Court in the 1960s[18] and 1984 legislation in England.[19]

III. The Role of the Suspect before Trial

After this look into the past, let us return to the more fundamental question: Should the suspect be obliged to provide information, even passively, in a process that is conducted against him and is likely to lead to his conviction and punishment? How, if at all, can this obligation against his clear interest be justified? Would it not be preferable to grant the suspect the right to stay completely aloof from the investigation?

Several arguments can be made in favor of the status quo. There is, first of all, the obvious fact that the suspect is a prime source of relevant information. One might argue that the police must be able to collect information from the suspect (and secretly from other sources as well) in order to catch up with the offender, who after all knows best about all circumstances of the crime and thus has every opportunity to conceal relevant evidence. But this argument is flawed in two respects: first, it assumes that the suspect is in fact the offender – which is contrary to the presumption of innocence. More importantly, the mere fact that a person may possess relevant information does not confer any legal authority upon the State to *obtain* that information; in other words, the fact that the suspect may be a rich source of information is not a sufficient normative argument for overruling his interest in being left alone, especially where an investigation is likely to lead to his conviction.

A more powerful argument differentiates between the trial and the pretrial phases of the criminal process. At the trial, the defendant has a specified role. In the Continental criminal process, he may actively contribute to the court's efforts to determine the truth.[20] In the Anglo-American pro-

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18 See the landmark decisions of the U.S. Supreme Court in Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966). For a comprehensive treatment, see *Ransiek*, Die Rechte des Beschuldigten in der Polizeivernehmung, 1998, pp. 23 et seq.

19 Police and Criminal Evidence Act 1984, ss. 58-60, 76-78.

20 See especially § 244 ss. 3-6, § 245 StPO (right to request the taking of additional evidence and to present evidence at trial), § 257 StPO (right to comment on any piece of evidence), § 258 s. 3 StPO (right to have the „last word" at the end of the trial).

cess, he may make use of party rights to present and challenge evidence on an equal level with the prosecutor. The defendant also may choose a passive defense strategy and then need not do anything beyond being physically present.[21] Before trial, by contrast, the suspect neither has a defined role nor any affirmative rights beyond the right to remain silent (§ 136 s. 1 2nd sent. StPO). In both the German and the Anglo-American systems, the pre-trial investigation has the purpose of collecting information and evidence in order to determine whether there is sufficient cause to make the suspect stand trial.[22] Therefore, so the argument goes, investigators should have access to all information needed to enable the prosecutor to make an intelligent decision on whether to prosecute, which includes information in the possession of the suspect.

But that argument more or less restates the present law and fails to explain *why* the state's interest in investigating crime should override the suspect's right to be left alone. The missing element in this line of argument may be the proposition that citizens generally rely on and benefit from a functioning police and criminal justice system and therefore are obliged to support the state in its efforts to determine the truth about crime by providing any relevant information they may have.[23] This line of argument explains the general obligation of everyone to offer his time and effort if summoned to appear as a witness, and to submit documents and other objects if they are needed as evidence.

Does this general reciprocal obligation of active cooperation extend to the person whose (possible) crime is the object of the investigation? In a recent monograph, *Luna Rösinger* states that the suspect must be exempted from this obligation. By labeling him a suspect, she claims, the state conditionally excludes him from the community of morally co-equal persons; the state hence cannot expect him to continue to fulfil the civic duty of cooperating in the criminal process.[24] This argument is interesting; but it is precarious in that it lets the mere suspicion of having committed a crime suffice to change the suspect's status to the extent of dispensing him from normal civic obligations. If the presumption of innocence can be taken se-

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21 See § 230 s. 2, § 231 StPO (defendant's duty to be present at trial), § 243 s. 5, 1st sent. StPO (judge must inform the defendant of his right to remain silent).

22 In Germany, the prosecutor is expected to consider both incriminating and exonerating evidence (§ 160 s. 2 StPO).

23 See for this argument (*Aufopferungsgedanke*, „solidarity principle") *Rösinger*, Die Freiheit des Beschuldigten vom Zwang der Selbstbelastung, 2019, pp. 171 et seq.

24 *Rösinger*, Die Freiheit des Beschuldigten vom Zwang der Selbstbelastung, 2019, pp. 153 et seq., 189 et seq.

riously, it should work as a sufficient counterweight against a premature degradation of the suspect, thus preserving his status of a responsible participant in the process. But I concede that it is questionable to use the presumption of innocence as a basis for imposing obligations on the suspect.[25]

Even if we regard the suspect as being obliged to provide *some* cooperation, the fact that the investigation is directed against him – triggering his strong interest in self-preservation – suggests a strict limitation of any civic duty to serve (even passively) as a source of information in the criminal process. The suspect's obligation to cooperate can certainly not be more extensive than the obligation of persons not targeted by the investigation. German procedure law, however, permits infringements of a suspect's personal sphere to a much larger extent than with regard to third parties. Only suspects may be detained before trial (§ 112 StPO); incisive measures such as secret telephone surveillance and acoustic surveillance of the home may be directed only against suspects (§§ 100a III, 100c II StPO), and searches of suspects and their possessions are permissible to a greater extent than searches of other persons (§§ 102, 103 I StPO). This places the suspect at a double disadvantage: The state uses its power for gathering information and evidence against him; and the suspect is obliged to cooperate and serve as a personal source of information. The fact that there exists a suspicion against him – whatever its source and its strength – can hardly be regarded as a sufficient reason for turning the suspect into a primary source of information for the prosecution. The traditional distinction between the suspect's role of an object of investigation *before* trial and of a party *at* the trial fails to reflect the fact that most cases today are disposed of without trial and that the outcome of the trial – where it takes place – is largely determined by the results of the investigation. The law should therefore recognize the suspect's rights as a person from the very beginning of the investigation and should strive to assimilate his status to that of a party, that is, an agent of the process rather than a person subject to someone else's investigatory efforts.

25 *Rösinger,* Die Freiheit des Beschuldigten vom Zwang der Selbstbelastung, 2019, p. 199 note 429, argues that the presumption of innocence (which is meant to *protect* the suspect) must not be abused for obliging the suspect to participate in the process like any other person.

IV. Mechanisms Protecting the Suspect?

Present law does not meet that standard. But its proponents claim that two principles protect the suspect against overbearing by the State even during the investigation: the presumption of innocence and the privilege against self-incrimination. But do these principles really establish a reliable basis for safeguarding the suspect's position as an autonomous person?

1. Presumption of Innocence

We can give short shrift to the presumption of innocence. The number of times the presumption is cited in legal journals is quite out of proportion with its practical impact. According to the Anglo-American tradition, the presumption of innocence is used – counter-intuitively – as an abbreviation for the high standard of proof needed for conviction,[26] which Germans express by the Latin maxim *in dubio pro reo*. Beyond that, the presumption of innocence denotes a prohibition of denouncing or treating someone as „guilty" before his guilt has been established by a court.[27] Evidently, the rules of the pretrial investigation remain largely unaffected by either meaning of the presumption. In fact, there is general consensus that the presumption does not prohibit anyone from drawing negative consequences from the existence of a *suspicion* against a person – as long as the term „guilty" is not being used.[28] Hence the presumption of innocence is

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26 See, e.g., *Bergman/Hollander*, Wharton's Criminal Evidence, 15th ed. 2005, vol. 1, pp. 23 et seq. This approach has been adopted by the European Court of Human Rights; see, e.g., ECtHR, Salabiaku v. France, no. 10519/83, Judgment of 7 Oct. 1988 § 28; Barbéra, Mességué and Jabardo v. Spain, no. 10590/83, Judgment of 6 Dec. 1988, § 77; Telfner v. Austria, no. 33501/96, Judgment of 20 March 2001; § 15. For criticism of this approach, see *Weigend*, in: Stein et al. (eds.), Systematik in Strafrechtswissenschaft und Gesetzgebung. Festschrift für Klaus Rogall, 2018, p. 739 at 753 et seq.

27 BVerfGE 74, 358; BVerfG NStZ 1992, 289; *Roxin/Schünemann*, Strafverfahrensrecht, 28th ed. 2014, p. 67; for an extensive discussion see *Stuckenberg*, Untersuchungen zur Unschuldsvermutung, 1998, pp. 67 et seq.

28 See, e.g., ECtHR, Allenet de Ribemont v. France, no. 15175/89, Judgment of 10 Feb. 1995, §§ 38 et seq.; Daktaras v. Lithuania, no. 42095/98, Judgment of 10 Oct. 2000, §§ 41 et seq.; Garycki v. Poland, no. 14348/02, Judgment of 6 Feb. 2007, §§ 67 et seq.; Fatullayev v. Azerbeijan, no. 40984/07, Judgment of 22 April 2010, §§ 159 et seq.

of little value to a person that has become the target of a criminal investigation.

2. *Privilege against Self-Incrimination*

What, then, about the privilege against self-incrimination? The right to remain silent, which in the German tradition is expressed by another Latin maxim, *nemo tenetur seipsum accusare*, certainly is relevant for our topic, not least because the privilege attaches early in the criminal process and limits the authority of the state to enforce a suspect's active cooperation. Much has been written about the possible historical and doctrinal sources of the privilege against self-incrimination, and in the end its basis remains somewhat shaky.[29] In Germany, the Constitutional Court and many legal writers have drawn a connection between the privilege and the supreme constitutional value of human dignity.[30] But it remains unclear what exactly violates human dignity if the law obliges a person to actively contribute to his accusation or conviction. If one uses the popular „object" formula, that is, human dignity is violated if a person is treated not as an end in himself but as a mere object of the interests of others, it must be acknowledged that any witness in the criminal process is mainly used as an object, more particularly: an object for promoting the state's interest in discovering the truth.[31] Others have claimed that the privilege against self-incrimination must be recognized in order to protect the freedom to conduct one's defense[32] – but that freedom is limited in many ways, and an obligation to provide certain information does not necessarily make it impossible for the defendant to devise and conduct an effective defense at the trial. Finally, one may argue that a forced production of self-incriminatory evidence would go against a natural urge to protect oneself from harm. But that argument can be questioned on the ground that legal obligations of all kinds

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29 For a comprehensive discussion, see *Rösinger*, Die Freiheit des Beschuldigten vom Zwang zur Selbstbelastung, 20919, pp. 8 et seq., 123 et seq.

30 BVerfGE 56, 37, 41 et seq.; BVerfG NJW 2005, 352, 353; BGHSt 34, 324, 326; 45, 367, 368; *Kühne*, Strafprozessrecht, 8th ed. 2010, p. 71; *Roxin/Schünemann*, Strafverfahrensrecht, 28th ed. 2014, p. 190; *Rogall*, in: Wolter (ed.), Systematischer Kommentar zur Strafprozessordnung, 5th ed. 2016,, vor § 133 note 132.

31 See *Weigend*, in: Albrecht et al. (eds.), Internationale Perspektiven in Kriminologie und Strafrecht. Festschrift für Günther Kaiser, 1998, vol. 2, p. 1481, 1482 et seq.

32 *Bosch*, Aspekte des nemo-tenetur-Prinzips aus verfassungsrechtlicher und strafprozessualer Sicht, 1998, pp. 103 et seq.; *Lesch*, ZStW 111 (1999), 624, 638; *Böse*, GA 2002, 98, 117, 121.

limit a person's selfish desire to protect his interests, so that this self-interest cannot be regarded as a *normative* principle.[33] Perhaps the most cogent explanation of the privilege against self-incrimination is to derive it from a person's legally protected option to distance himself from a criminal investigation directed against him. But that option could not well be limited to the withholding of activities but should logically extend to all kinds of conduct (including passive conduct) that might further the investigation of a crime provisionally ascribed to the suspect.[34]

Given the uncertain foundation of the privilege, it does not come as a surprise that its extent is doubtful. Comparing different jurisdictions, we realize that in the United States the privilege is said to cover only testimonial evidence,[35] whereas in Germany it is supposed to extend to all kinds of „activities",[36] including the provision of a breath sample by exhaling into a device for measuring the alcohol content of air. But if we understand the privilege against self-incrimination as protecting the autonomy and privacy of the suspect against forced participation in the investigation against him, a limitation of the privilege to „active" conduct makes little sense: Why should it be a violation of human dignity (or autonomy or privacy or whatever other ultimate legal position is supposed to be involved) to be obliged to exhale or provide a voice sample, but not to submit to an extraction of a blood or saliva sample?

V. The Suspect as a Co-Equal Party to the Pretrial Proceedings

A broad privilege against self-incrimination reflects a concept of the suspect as a co-equal party in pretrial proceedings rather than as a mere source of information.[37] It is this concept that I would like to sketch in the last part of this chapter. The starting point of my argument is the assumption that the suspect should be treated as a person with a legitimate interest in protecting himself from the possible negative consequences of the investigation. This interest is legitimate even though it may (and often will) run

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33 *Lesch*, ZStW 111 (1999), 624, 637-8; *von Freier* ZStW 122 (2010), 117 at 128-9.

34 For a further explanation of the „distancing" interest see *Rösinger*, Die Freiheit des Beschuldigten vom Zwang der Selbstbelastung, 2019, pp. 153 et seq.

35 See Schmerber v. California, 384 US 757 at 766 et seq. ("evidence of a testimonial or communicative nature") (1966); Fisher v. U.S., 425 U.S. 391 (1976).

36 *Rogall*, in: Wolter (ed.), Systematischer Kommentar zur Strafprozessordnung, 5th ed. 2016, vor § 133 note 142.

37 For a similar conclusion see *Weßlau*, ZStW 110 (1998) 1 at 33 et seq.