

**The Self-Incrimination Clause Explained**  
**And Its Future Predicted**

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Constitutional theorizing is a tricky business. The document is ancient, was often written to fix discrete problems that have little modern salience, and frequently contains vague and capacious language, the plausible extension of which defies straightforward theoretical exegesis. On occasion, as with the Fourth Amendment, all three symptoms may be present, making theorizing a largely futile endeavor.<sup>1</sup> The Self-Incrimination Clause of the Fifth Amendment suffers from at least two of these three problems. It is certainly ancient and was written to eliminate specific abuses of authority that have no close modern analogues;<sup>2</sup> indeed, the most unproblematic application of the right against self-incrimination today is to custodial interrogation by the police, a practice that did not even exist when the Fifth Amendment was ratified.<sup>3</sup> Even though the language of the Fifth Amendment (which henceforth we use

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<sup>1</sup> See Ronald J. Allen & Ross M. Rosenberg, *Legal Phenomena, Knowledge, and Theory: A Cautionary Tale of Hedgehogs and Foxes*, 77 CHI.-KENT L. REV. 683 (2002); Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149 (1998).

<sup>2</sup> Peter Arenella, *Schmerber and the Privilege Against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31, 36 (1982) (citing as examples of the "ambiguous and sometimes contradictory picture of the reasons underlying the fifth amendment's enactment" provided by traditional historical sources: LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* (1968); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949); and Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935)). See also R.H. HELMHOLZ, *THE PRIVILEGE AGAINST SELF-INCRIMINATION* 181 (1997).

<sup>3</sup> See Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, in HELMHOLZ, *supra* note xx, at 184 ("The privilege in its inception was not intended to afford criminal defendants a right to refuse to respond to incriminating questions. Its purposes were far more limited. When the privilege was embodied in the United States Constitution, its goal was simply to prohibit improper methods of interrogation."); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 312-13 (1991).

interchangeably with “Self-Incrimination Clause”) is more constraining than that of the Fourth, given the total reformation of the practical significance of the Fifth Amendment, perhaps it is not surprising that the theoretical foundations of the Fifth Amendment are thought to be in disarray, a belief fed in part by inadequacies of the Supreme Court’s efforts to articulate its foundations. The Supreme Court’s opinions contain stirring rhetoric that may move the heart but leave the intellect unconvinced. In the most famous articulation of the theoretical foundations of the fifth amendment, the Courtsaid :

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.<sup>4</sup>

The various points in the quoted passage are striking in their vacuity and circularity. To take but a few examples: an innocent person faces no trilemma; there is no simply dichotomy between accusatorial and inquisitorial regimes; never has the government had to “shoulder the entire load”; far from “human personality” being “inviolable,” law molds and shapes “human personality” directly, constantly and unavoidably; immunity permits the most private aspects of a person’s life to be divulged, as occurs in civil cases daily across the land. These points are not new.<sup>5</sup> Even Justice Goldberg, the author of the paragraph, observed that the Self-Incrimination

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<sup>4</sup> *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964) (internal quotations omitted), *quoted in* Arenella, *supra* note xx, at 36-37 (1982).

<sup>5</sup> Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COL. L. REV. 989, 1017 n. 51 (1996) (stating that these justifications were “basically dismantled” by Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968), and Arenella,

Clause is “regarded as so fundamental a part of our constitutional fabric, despite the fact that ‘the law and the lawyers . . . have never made up their minds just what it is supposed to do or just whom it is intended to protect.’”<sup>6</sup>

This conceptual ambiguity has not escaped the scholars and has led to a proliferation of scholarly emendations to the Court’s explanations, which uniformly fail to convince.<sup>7</sup> Amar and Lettow wrote, “[t]he Self-Incrimination Clause of the Fifth Amendment is an unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights.”<sup>8</sup> William Stuntz summed it up: “It is probably fair to say that most people familiar with the doctrine surrounding the privilege against self-incrimination believe that it cannot be squared with any rational theory.”<sup>9</sup>

But there is an ambiguity in the word “theory” threaded through the various judicial and scholarly treatments of the Fifth Amendment. It sometimes is used to refer to the justification of a practice, which is the sense in which Justice Goldberg was theorizing. At other times it is used to predict or prescribe the scope or limitations of governmental power on the one hand, or privacy, autonomy, or dignity interests of citizens on the other. Some of the theoretical difficulties infecting the Fifth Amendment may result from failing to sort out these different perspectives. To be sure, one reasonably may think that the theoretical justification for a practice must constrain its scope. Interestingly, the Fifth Amendment offers a counter-example to such a

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*supra* note xx). See also Alschuler, *supra* note xx, at 200 (1997) (“More than the adaptation of old doctrines to new functions, the history of the privilege against self-incrimination seem to reveal the tyranny of slogans. Shorthand phrases have taken on lives of their own. These phrases have eclipsed the goals of the doctrines that they purported to describe and even the texts that embodied these doctrines.”).

<sup>6</sup> *Murphy*, 378 U.S. at 56 n.5 (quoting Kalven, *Invoking the Fifth Amendment—Some Legal and Impractical Considerations*, 9 BULL. ATOMIC SCI. 181, 182 (1953)), quoted in Michael Edmund O’Neill, *The Fifth Amendment in Congress: Revisiting the Privilege Against Compelled Self-Incrimination*, 90 GEO. L. J. 2445, 2445-46 (2002).

<sup>7</sup> Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, *supra* note xx, at 1015-23.

<sup>8</sup> Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment, First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 857 (1995), quoted in O’Neill, *supra* note xx, at 2466.

<sup>9</sup> William J. Stuntz, *Self-incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1228 (1988). See also Stephen A. Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6, 6-10 (1986) (discussing the lack of an accepted theory), cited in Stuntz, *supra*, at 1228 n.1; Schulhofer, *supra* note xx, at 311 (“The Self-Incrimination Clause is probably our most schizophrenic amendment.”).

belief, which is the main burden of this article. While its justification is, we agree, hopelessly muddled, the scope of the Fifth Amendment (its implications in the real world for government/citizen interactions) can be specified quite clearly. While, in other words, there is no general theoretical justification for the Fifth Amendment, there is a powerfully explanatory positive theory. Moreover, we can specify equally precisely where there remains ambiguity, and the possible directions that future developments might take—indeed, must take, given what the Court has done to date. Which path the Court may choose is unclear, but the paths that will be open are apparent. In this respect, the Court’s treatment of the self-incrimination clause mirrors its treatment of the fourth amendment.<sup>10</sup> Both defy general justificatory theories, yet both lead to relatively predictable results. This, in turn, may have implications for the nature and utility of some forms of legal scholarship, a point we return to at the conclusion of this article.

Although discussion of abstract values can still be found occasionally in its opinions,<sup>11</sup> the Supreme Court has shifted to a formal approach to the Fifth Amendment.<sup>12</sup> The Self-Incrimination Clause states that no person “shall be compelled in any criminal case to be a witness against himself.”<sup>13</sup> Under what Lance Cole described as “*Fisher*’s new textualist analytical approach,”<sup>14</sup> the Court has concluded that Fifth Amendment violations must contain

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<sup>10</sup> See Allen & Rosenberg \*\*\*.

<sup>11</sup> See, e.g., *United States v. Balsys*, 524 U.S. 666, 690-98 (1998) (analyzing the “catalog of ‘Policies of the Privilege’ in *Murphy*, 378 U.S. 52).

<sup>12</sup> For a more detailed discussions of the evolution of Fifth Amendment theory, see William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L. J. 393 (1995); LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* (2d ed. 1986); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047 (1994); and Amar & Lettow, *supra* note xx.

<sup>13</sup> U.S. CONST., amend. V.

<sup>14</sup> Lance Cole, *The Fifth Amendment and Compelled Production of Personal Documents After United States v. Hubbell – New Protection for Private Papers?*, 29 AM. CRIM. L. REV. 123, 142-43 (2002) (explaining that in *Fisher v. United States*, 425 U.S. 391, 396-97 (1976), the Court “rejected both property rights and personal privacy as rationales for protection against self-incrimination; instead, it looked to the text of the Fifth Amendment and focused on the compulsion of ‘testimonial’ communications as the touchstone for self-incrimination analysis.”).

three elements: compulsion, incrimination, and testimony.<sup>15</sup> Testimony, however, has never been clearly defined and is the source of the remaining unpredictability in the future of the Fifth Amendment. Although never acknowledged by the Court, its cases make plain that “testimony” is the substantive content of cognition—the propositions with truth-value that people hold or generate (as distinct from the ability to hold or generate propositions with truth-value).

This observation leads to a comprehensive positive theory of the Fifth Amendment right: the government may not compel disclosure of the incriminating substantive results of cognition that themselves (the substantive results) are the product of state action. As we demonstrate in this article, this theory explains all of the cases, a feat not accomplished under any other scholarly or judicial theory. Indeed, its fit with the cases is remarkable. As we develop below, it even explains the most obvious datum that might be advanced against it—the sixth birthday question in *Muniz*.<sup>16</sup>

As we also elaborate below, there remain two sources of ambiguity in Fifth Amendment adjudications. First, compulsion and incrimination are both continuous variables—questions of degree. The Court has recognized this, and set about defining the amount of compulsion and incrimination essential to a Fifth Amendment violation. The result is a common law of both topics rather than a precise metric of either, but still the lay of the land is relatively clear. Thankfully, since these two variables are independent and do not interact, computational complexities do not creep in. “Compulsion,” in other words, is not determined in part by the

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<sup>15</sup> *Fisher v. United States*, 425 U.S. 391, 408 (1976) (“It is also clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a Testimonial Communication that is incriminating.”).

<sup>16</sup> See *infra* pp. xx-xx for a discussion of *Pennsylvania v. Muniz*, 496 U.S. 582, 597 (1990), where the Court considered whether the Fifth Amendment was implicated by the question, posed to a suspect by police officers, “Do you know what the date was of your sixth birthday?”

extent to which the results are “incriminating.” Compulsion is determined on its own, as is the sufficiency of incrimination.

The second source of ambiguity arises because the Court has not explicitly equated “testimony” with cognition (again, thoughts in the form of propositions with truth-value). As we show, though, that is precisely what has controlled the Court’s decisions. Given that the Court’s opinions have not focused on substantive cognition as the third element of a Fifth Amendment violation, it is not surprising that the Court has not clarified whether cognition, too, is a continuous or discontinuous variable. This is where the future lies. The Court will have to clarify two matters: first, whether the extent of cognition matters, and second, the derivative consequences of cognition. In addition, the Court will have to determine whether these two issues are, like compulsion and incrimination, independent or dependent. Does the extensiveness of the compelled cognition determine how far its causal effect will be traced?

Part I elaborates our positive theory of the Fifth Amendment through an examination of the three variables that constitute it. Of course a positive theory is not normative or justificatory, and to be clear, although we return to this point at the end of the article, we largely leave such inquiry to others (largely because we think it a futile and misguided waste of resources that misconceives the very phenomena supposedly being theorized<sup>17</sup>). In Part II, we elaborate on the ambiguity introduced into Fifth Amendment adjudications by the Court’s recent decision in *United States v. Hubbell*.<sup>18</sup> We show that in *Hubbell* the Court veered sharply from the apparent course set by *Fisher v. United States*,<sup>19</sup> by recognizing a dramatically different role for cognition and its consequences. In *Fisher*, though compelled cognition itself was protected, law enforcement had ready access to the incriminating information derived from it. In *Hubbell*, by

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<sup>17</sup> See Allen & Rosenberg, *supra* n. \*\*\*\*.

<sup>18</sup> *United States v. Hubbell*, 530 U.S. 27 (2000).

<sup>19</sup> *Fisher v. United States*, 425 U.S. 391 (1976).

inflating derivative use immunity to previously unseen proportions, the Court expanded the scope of protection. After *Hubbell*, there are three possibilities for the future of the privilege against self-incrimination, which Part III explores: 1) the Court will view *Hubbell* as a mere bump in the road past which the *Fisher* line of cases will continue, ultimately ignoring the new approach with which *Hubbell* flirted; 2) *Hubbell* will be followed to its natural end in an expansive derivative use doctrine triggered by any compelled cognition; or 3) the most likely possibility is that the Court will develop in a common-law manner the concept of “extensive” use of a suspect’s cognition, referred to in *Hubbell*, and begin to identify some threshold for “extensive” cognition that separates *Hubbell* and *Fisher*, in addition to constraining derivative use.

## I. Compulsion, Incrimination, and Cognition

*Law enforcement officers ask John Doe to consent to a lie detector test but Doe refuses, invoking his Fifth Amendment right against self-incrimination. The officers try to physically restrain him, but he resists. Eventually, they strap Doe to a gurney and attach a polygraph machine. The tester begins to ask questions. He first asks Doe easy questions like his name, age, and address. The officers already have this information but they want to establish his baseline, normal response. Doe refuses to answer even these simple questions and sits silently. Though the tester is not able to elicit any oral responses, he records Doe’s physiological responses to the questions.*

*After working through his script of introductory questions, the tester moves on to questions about Doe’s participation in a crime. Doe remains silent, but the tester continues to record the changes in his heart rate, blood pressure, breathing, and electrodermal responses (electrical conductance at the skin level).<sup>20</sup> The questions become more and more specific but Doe never speaks; in fact, he does his best not to communicate anything at all to the tester.*

*At one point, the tester asks about the victim of the crime they are investigating. The officers know that a little girl was abducted from a YMCA in Des Moines, Iowa on Christmas Eve. An eyewitness described someone who*

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<sup>20</sup> These are some of the physiological responses currently analyzed in polygraph tests. See BOARD ON BEHAVIORAL, COGNITIVE, AND SENSORY SCIENCES AND EDUCATION, COMMITTEE ON NATIONAL STATISTICS, THE POLYGRAPH AND LIE DETECTION 12-13 (2003) (available at <http://books.nap.edu/books/0309084369/html/12.html#pagetop>).

*looked like Doe and the officers arrested him pursuant to a warrant. Now they urgently want to find the little girl. The officers have provided the tester with maps of a twenty-mile area around the YMCA. The tester divides the map with a grid and tries to elicit from Doe the location of the little girl. Systematically, starting with large quadrants and narrowing to a smaller area, the tester points to each section of the map. Still, Doe remains silent and the tester records his physiological responses. By continuing this process, the tester is able to narrow in and find a very specific location that causes Doe to respond dramatically: his heart races and his breathing quickens. The officers search this location and find the body of the little girl.*

*Later, the State admits the polygraph test results at Doe's trial for abduction and murder. In his testimony, the tester reads each question that he asked Doe and describes Doe's physiological responses. He shows the jury how he systematically pointed to each area of the map and describes how he was able to elicit from Doe enough information to lead the officers to the body. The jury convicts.<sup>21</sup>*

The implications of this hypothetical have bedeviled analysis of the Fifth Amendment. There is perhaps universal agreement that the actions of the officers violate the Fifth Amendment, but why? There is certainly compulsion and incrimination, but where is the testimony?<sup>22</sup> The lack of a clear answer feeds the sense that there is a conceptual hole at the middle of the Fifth Amendment. Testimony is a necessary ingredient; yet even though it is absent, the universal intuition is that strapping someone to a lie detector would violate the Constitution.<sup>23</sup> The answer to this puzzle is that “testimony” means the substantive results of cognition. It is the failure to recognize that “testimony” reduces to cognition that has left the Justices and the theorists unable to explain the hypothetical—and more importantly to construct a coherent explanation of the cases. We discuss compulsion, incrimination, and testimony in

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<sup>21</sup> The facts in this hypothetical loosely resemble those in *Brewer v. Williams*, 430 U.S. 387 (1977). There, however, the officers used a map and grid to conduct their own search of the area. Mr. Williams told the police where to find the little girl's body in response to what has become known as the “Christian burial speech.” A polygraph test was not administered.

<sup>22</sup> *Fisher*, 425 U.S. at 408 (“It is also clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a Testimonial Communication that is incriminating.”).

<sup>23</sup> *See Schmerber v. California*, 384 U.S. 757, 764 (1966) (“To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.”).



turn, the first two somewhat more briefly as they present no real theoretical problems, and testimony as cognition more in detail, as that is the contribution and the lynchpin of our argument. The section closes with a comprehensive theory of the privilege that explains all of the cases.

### **A. Compulsion**

The test for compulsion under the Fifth Amendment is “whether, considering the totality of the circumstances, the free will of the witness was overborne.”<sup>24</sup> Most of the difficulty with determining compulsion is a direct consequence of the free will/determinism problem at the center of this definition.<sup>25</sup> If free will does not exist, the most plausible position,<sup>26</sup> then obviously the test is conceptually and functionally bankrupt. If it does exist, then either all choices are exercises of free will (a person can always choose to endure more torture), leaving the test inconsequential if not bankrupt, or there is no method to distinguish whether a particular act is a result of free will or of free will being overborne. How would we ever know, for instance, if a particular person being subjected to torture could have held out but confessed because of the rising tide of guilt washing over him? And how would we know whether the mildest threat, like the risk of a short jail sentence, actually overbore the will of a weak-willed individual?

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<sup>24</sup> *United States v. Washington*, 431 U.S. 181, 188 (1977) (citing *Rogers v. Richmond*, 365 U.S. 534, 544 (1961)).

<sup>25</sup> For a very basic explanation of the free will/determinism debate see SIMON BLACKBURN, *THE OXFORD DICTIONARY OF PHILOSOPHY* 102-03, 147 (Oxford University Press, 1996) (1994).

<sup>26</sup> If an act is constrained by the reasons for the act, the act is not free. If these reasons exist because of other reasons, an infinite regress ensues. “Free will” would have to be composed of, or derived from, reasons held for no reason at all, which, while “free” in one sense eliminates rationality. If “free will” means random or capricious starting points, it does not seem to be worthy of respect. But, any alternative to randomness or capriciousness that preserves rationality rules out free will.

Although some of the rhetoric of the Supreme Court, and that of some commentators, remain fascinated with, or stuck in, the free will/determinism debate,<sup>27</sup> the results of the cases are explainable in other terms, indicating that the Fifth Amendment does not require an answer to the problem. Free will, despite the assertions of some,<sup>28</sup> is not a necessary predicate for criminal law generally, or for the right against compelled self-incrimination specifically.<sup>29</sup> As in many areas of the law, the Court has employed an objective test that focuses on the governmental action rather than the individual response. This converts the meaningless or intractable question of free will into a demarcation of how much pressure is too much to exceed the threshold for the “compulsion” necessary for a Fifth Amendment violation.<sup>30</sup>

The question remains, where is the demarcation—what sorts of governmental actions that result in disclosure of self-incriminating testimony are prohibited by the Constitution? The answer emerges from the Court’s assessments of social conventions concerning threats and promises, assessments that are factually bound and developed in a traditional common-law manner. One such convention is that physical force is inappropriate, and thus the case of John

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<sup>27</sup> See, e.g., George C. Thomas III & Marshall D. Bilder, *Aristotle’s Paradox and the Self-Incrimination Puzzle*, 82 J. CRIM. L. & CRIMINOLOGY 243 (1991).

<sup>28</sup> See *id.* at 243-44 (“The criminal law follows Plato and Aristotle by presupposing that members of society are autonomous actors who can be punished for choosing to act in certain ways.”) (citing R. POUND, INTRODUCTION TO SAYRE, CASES ON CRIMINAL LAW (1927) (“noting that criminal law historically “postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong”); 4 W. BLACKSTONE, COMMENTARIES \*20-21 (“the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable.”)).

<sup>29</sup> Jeremy Bentham, for instance, was a determinist in addition to being very interested in jurisprudence and hopeful that a code of laws could be established that would make men conform to the public interest. See BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 775 (1945). Determinism should not be confused with fatalism which may be more incongruous with a system of criminal law. See SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY 137 (Oxford University Press, 1996) (1994) (Fatalism is “[t]he doctrine that human action has no influence on events. . . . Fatalism is wrongly confused with determinism, which by itself carries no implication that human action is ineffectual.”).

<sup>30</sup> See Arenella, *supra* note xx at 39 (“Ultimately, what is at issue here is a normative question: the extent to which an individual can be forced to participate in his own self-condemnation. Its resolution requires the Court to balance conflicting concerns of fairness to the accused against the state’s legitimate need to secure reliable information of wrongdoing.”); Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 866 (1979) (arguing that “normative judgments about various degrees of impairment of mental freedom” are required), cited in Thomas & Bilder, *supra* note xx, at 266 n.125. To be clear, we take no position on whether what the Court has done is itself normatively desirable; rather, we are simply engaging in factual exegesis.

Doe involves compulsion.<sup>31</sup> If there is any “testimony” in Doe’s hypothetical case, it was obtained by physically restraining him and subjecting him to unwanted touching by a machine.

Through a standard common-law approach the Court has placed various kinds of compulsion along a continuum, producing a list of acceptable and unacceptable governmental actions. Examples abound; indeed, they define the constitutional conception of compulsion for purposes of the Fifth Amendment. A defendant may be made to allocute when entering a guilty plea.<sup>32</sup> The government can place burdens on an individual’s out-of-court choice whether to invoke the privilege.<sup>33</sup> There is no “impermissible coercion” where the defendant is not involved

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<sup>31</sup> See *Mitchell v. United States*, 526 U.S. 314, 332 (1999) (“The longstanding common-law principle, *nemo tenetur seipsum prodere*, was thought to ban only testimony forced by compulsory oath or physical torture . . .”); *South Dakota v. Neville*, 459 U.S. 553, 562 (1983) (“[T]he Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of ‘physical or moral compulsion’ exerted on the person asserting the privilege.”) (citing *Fisher v. United States*, 425 U.S. 391, 397 (1976)).

<sup>32</sup> Though this has sometimes been described as a waiver of the Fifth Amendment right, *LAFAYETTE ET AL., CRIMINAL PROCEDURE* §21.5(f) (3d ed. 2000), it is more accurate to recognize it as a simple absence of compulsion because a court may only accept guilty pleas that are “voluntary.” *Brady v. United States*, 397 U.S. 742, 748 (1970) (“Central to the plea and the foundation for entering judgment against the defendant is the defendant’s admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so—hence the minimum requirement that his plea be the voluntary expression of his own choice.”). A valid plea colloquy cannot violate the right against self-incrimination because the defendant has, by definition, freely chosen to plead guilty. Federal courts enforce this through Rule 11(d) of the Federal Rules of Criminal Procedure which states, “courts shall not accept a plea of guilty or *nolo contendere* without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement.” *FED. R. CRIM. P.* 11(d) (2000).

<sup>33</sup> See, e.g., *McKune v. Lile*, 536 U.S. 24, 41 (2002) (“respondent’s choice is marked less by compulsion than by choices the Court has held give no rise to a self-incrimination claim. The ‘criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.’ It is well settled that the government need not make the exercise of the Fifth Amendment privilege cost free.”) (citing *McGautha v. California*, 402 U.S. 183, 213 (1971)). See also *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998) (finding no violation where an adverse inference is drawn from an individual’s refusal to answer questions before a clemency board); *Jenkins v. Anderson*, 447 U.S. 231 (1980) (concluding that the state’s impeachment use of the defendant’s pre-arrest silence did not constitute an undue burden on the exercise of the Fifth Amendment rights); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (upholding the validity of imposing serious burdens on the defendant’s exercise of his privilege in the plea-bargaining context); *Baxter v. Palmigiano*, 425 U.S. 947 (1976) (permitting adverse inference from the refusal to testify in a prison disciplinary hearing); *Williams v. Florida*, 399 U.S. 78 (1970) (holding that application of the Florida notice-of-alibi rule did not compel the defendant to be a witness against himself); *Amar & Lettow*, *supra* note xx, at 868 (arguing that “outside the courtroom, the ‘no worse off’ test seems extravagant and unworkable: the logical consequences are absurd.”). But see *Uniform Sanitation Men Ass’n, Inc. v. Commissioner of Sanitation of City of New York*, 392 U.S. 280 (1968) (loss of employment as a penalty is capable of coercing incriminating testimony); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (holding that the loss of the right to

in the production of information,<sup>34</sup> or takes an action contrary to what the state wants him to do.<sup>35</sup> Included here are cases where the individual lies,<sup>36</sup> refuses to cooperate with a permissible test,<sup>37</sup> or engages in “guilty conduct.”<sup>38</sup> The government has clearly applied too much pressure—compulsion has occurred—where there has been physical or psychological torture,<sup>39</sup>

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participate in political associations and to hold public office are penalties capable of coercing incriminating testimony).

<sup>34</sup> See, e.g., *Andresen v. Maryland*, 427 U.S. 463, 473 (1976) (“[I]n this case, petitioner was not asked to say or to do anything. The records seized contained statements that petitioner had voluntarily committed to writing. The search for and seizure of these records were conducted by law enforcement personnel. Finally, when these records were introduced at trial, they were authenticated by a handwriting expert, not by petitioner. Any compulsion of petitioner to speak, other than the inherent psychological pressure to respond at trial to unfavorable evidence, was not present.”); *Couch v. United States*, 409 U.S. 322, 329 (1973) (holding that where the petitioner had delivered business and tax records to her accountant, she was not entitled to invoke the Fifth Amendment privilege to prevent production of the documents pursuant to a subpoena served on the accountant because her “divestment of possession” of the records had removed the “element of personal compulsion” necessary under the Fifth Amendment).

<sup>35</sup> See, e.g., *South Dakota v. Neville*, 459 U.S. 553, 560-62 (1983) (finding no Fifth Amendment violation where the state admitted at trial the defendant’s refusal to undergo a permissible blood-alcohol test because the response was not compelled).

<sup>36</sup> See, e.g., *United States v. Kahan*, 415 U.S. 239 (1974) (finding that it was not error to admit false exculpatory statements); *United States v. Knox*, 396 U.S. 77 (1969) (holding that prosecution for making false statements on wagering registration forms was not barred, though defendant could have validly refused to complete the form by invoking the privilege against self-incrimination). It is possible to imagine a situation in which a suspect is compelled to lie by being forced to sign a confession he knows is not true. This would satisfy the compulsion component of a Fifth Amendment violation.

<sup>37</sup> See, e.g., *Neville*, 459 U.S. 553 (finding no violation of the privilege for lack of compulsion where the state admitted the defendant’s refusal to take a blood-alcohol test that could be legitimately compelled by the state). Refusals to speak, or choosing to remain silent, cannot be presented as evidence of guilt. This is not because the refusal has been compelled but because to comment on silence may make the assertion of the right too burdensome. See *supra* note xx and accompanying text.

<sup>38</sup> When an individual engages in what might be described as “guilty conduct,” such as unprovoked flight from police or destruction of evidence, there is no compulsion and thus no violation of the privilege if evidence of such conduct is introduced at trial as circumstantial evidence of the individual’s consciousness of guilt. Professor Arenella argued that use of “guilty conduct evidence” is not a violation of the Self-incrimination Clause, but emphasized that this was because the conduct was not “testimonial.” Arenella, *supra* note xx, at 43. We believe that “guilty conduct evidence,” is best analyzed under the compulsion component. Though the Supreme Court has not squarely addressed this issue, it is firmly established that guilty conduct evidence may be presented and commented on at trial without violating a defendant’s right against self-incrimination. See *United States v. Carter*, 236 F.3d 777, 792 n.11 (6th Cir. 2001) (finding no abuse of discretion where the trial court gave the following instruction on flight: “You have received evidence that after the crime was supposed to have been committed, the Defendant, Roquel Allen Carter, fled. If you believe from the evidence that the Defendant did indeed flee, then you may consider this conduct, along with all the other evidence, in deciding whether the Government has proved beyond a reasonable doubt that he committed the crime charged. This conduct may indicate that he thought he was guilty and was trying to avoid punishment. On the other hand, sometimes an innocent person may flee to avoid being arrested, or for some other innocent reason.”).

<sup>39</sup> See *McKune v. Lile*, 536 U.S. 24, 26 (2002) (“Determining what constitutes unconstitutional compulsion involves a question of judgment: Courts must decide whether the consequences of an inmate’s choice to remain silent are closer to the physical torture against which the Constitution clearly protects or the *de minimis* harms against which it does not.”); *Application of Gault*, 387 U.S. 1, 47 (1967) (“One of [the privilege’s] purposes is to prevent the state,

or where a defendant, upon a grant of immunity, has been ordered to testify in court under penalty of contempt.<sup>40</sup>

These determinations by courts of what constitutes impermissible coercion do little more than reflect our conventions about when an individual's will is likely to be overborne. Professor Peter Westen and Stewart Mandell recognized that compulsion is a continuous variable involving different kinds or levels of pressure in differing settings.<sup>41</sup> Not only is there a common-law line demarking how much compulsion is necessary for a Fifth Amendment violation, but Westen and

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whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.”). See also *Alschuler*, *supra* note xx, at 192 (analyzing the meaning of the Fifth Amendment privilege at the time of the adoption of the amendment and concluding, “the Fifth Amendment privilege prohibited (1) incriminating interrogation under oath, (2) torture, and (3) probably other forms of coercive interrogation such as threats of future punishment and promises of leniency.”); *Miranda v. Arizona*, 384 U.S. 436, 461 (1966) (creating the presumption of compulsion in custodial interrogations after observing that “[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under the compulsion to speak.”).

<sup>40</sup> See *South Dakota v. Neville*, 459 U.S. 553, 563 (1983) (observing that the “classic Fifth Amendment violation” is “telling a defendant at trial to testify.”); *New Jersey v. Portash*, 440 U.S. 450, 459 (1979) (“Testimony given in response to a grant of legislative immunity is the essence of coerced testimony. In such cases there is no question whether physical or psychological pressures overrode the defendant’s will; the witness is told to talk or face the government’s coercive sanctions, notably, a conviction for contempt. The information given in response to a grant of immunity may well be more reliable than information beaten from a helpless defendant, but it is no less compelled. The Fifth and Fourteenth Amendments provide a privilege against *compelled* self-incrimination, not merely against unreliable self-incrimination. . . . Here, . . . we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form.”); *Murphy v. Waterfront Comm’n*, 378 U.S. 52 (1964) (finding that testimony obtained under a grant of immunity from state prosecution is compelled and thus cannot be used in federal prosecution either).

In addition, the Court has constructed several prophylactic rules to protect the exercise of the Fifth Amendment. For example, a defendant’s right to invoke the privilege cannot be made too “costly” by allowing the prosecutor to comment on the defendant’s silence. *Griffin v. California*, 380 U.S. 609, 614-15 (1965). In a formal sense, the element of compulsion is lacking here because the defendant has taken an action contrary to what the state wants him to do. Still, the Court has prohibited this and other state-imposed burdens where they may make the assertion of the right too burdensome. See, e.g., *Mitchell v. United States*, 526 U.S. 314, 328 (1999) (stating that no negative inferences may be drawn from the defendant’s failure to testify in the sentencing phase); *Carter v. Kentucky*, 450 U.S. 288, 300 (1981) (holding that “the Fifth Amendment requires that a criminal trial judge must give a ‘no-adverse-inference’ [from the failure to testify] jury instruction when requested by a defendant to do so”); *United States v. Jackson*, 390 U.S. 570, 581 (1968) (holding that the Federal Kidnaping Act, which provided that a death sentence could only be imposed through a jury verdict, was unconstitutional because the effect was to “discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.”); *Chapman v. California*, 386 U.S. 18, 25-26 (1967) (refusing to find that it was harmless error for the prosecutor to repeatedly comment on the defendant’s failure to testify); *Spevack v. Klein*, 385 U.S. 511, 515 (1967) (“In this context ‘penalty’ is not restricted to fine or imprisonment. It means . . . the imposition of any sanction which makes assertion of the Fifth Amendment privilege ‘costly.’”).

<sup>41</sup> Peter Westen & Stewart Mandell, *To Talk, To Balk, or To Lie: The Emerging Fifth Amendment Doctrine of the “Preferred Response”*, 91 AM. CRIM. L. REV. 521, 535-40 (1982).

Mandell suggested that different types of compulsion may require different procedures to avoid Fifth Amendment violations.<sup>42</sup> For example, a state can insist that an individual making a compulsory tax filing make the “preferred response” of remaining silent, rather than lying or incriminating himself.<sup>43</sup> The constitutionally permissible consequences of not making this “preferred response” are prosecution for perjury if the individual lies, or admission of the incriminating statements against the individual in a prosecution of the substantive crime.<sup>44</sup> Where compulsion takes the form of custodial interrogation, however, silence cannot be a “preferred response” because a Fifth Amendment claim cannot be asserted through silence in such a situation without “risking irreparable injury of the kind the privilege is designed to prevent.”<sup>45</sup> Westen and Mandell went on to consider several other types of compulsion and the requirements for avoiding a Fifth Amendment violation.<sup>46</sup> They have, in essence, provided a map of what pressure is appropriate under what circumstances. Whether Westen and Mandell’s map turns out to accurately predict the Court’s decisions, we predict that the Court will continue the common-law process of locating types of pressure along the its conception of the proper continuum and using social conventions to determine whether they are appropriate or inappropriate.

## **B. Incrimination**

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<sup>42</sup> *Id.* at 535-37.

<sup>43</sup> *Id.* at 532 n.40 (citing *Garner v. United States*, 424 U.S. 648, 665 & n.21 (1976) (concluding that “since Garner made disclosures instead of claiming the privilege on his tax returns his disclosures were not compelled incriminations.”)).

<sup>44</sup> *Id.* at 532-33 (citing *United States v. Kordel*, 397 U.S. 1 (1970)).

<sup>45</sup> *Id.* at 535-36 (“The state may not insist that a criminal suspect respond to custodial interrogation by remaining silent. A suspect who is subjected to station house interrogation is constitutionally entitled to respond to police compulsion by making an incriminating statement and later challenging its admission against him at trial. The Supreme Court emphasized this point in *Miranda v. Arizona*.”).

<sup>46</sup> *Id.* at 537-55 (analyzing several situations, including where there is insufficient time to reflect or where a witness has reasonably relied on the state’s assurance of immunity).

The second component necessary to a violation of the Fifth Amendment is incrimination. The relevant question is “whether there is a risk that [the person’s] testimony will be used in a proceeding that is a ‘criminal case’” in which the person is himself the defendant.<sup>47</sup> This formulation captures the two sides of this particular coin: 1) there must be a sufficient risk of testimonial use, and 2) it must be in a criminal case. Some proceedings simply are not “criminal,” and thus there is no need to appraise the “risk” that compelled testimony will be used against the individual. For example, there is no incrimination where a witness has been granted immunity from criminal prosecution but still faces hardships such as the loss of a job” or “general public opprobrium.”<sup>48</sup> “The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away the Amendment ceases to apply.”<sup>49</sup> In addition, the Fifth Amendment is not implicated if the person resisting disclosure wishes to protect another natural<sup>50</sup> or legal person,<sup>51</sup> or where the legal regulation is civil and the penalty is not punitive.<sup>52</sup>

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<sup>47</sup> *United States v. Balsys*, 524 U.S. 666, 671 (1998).

<sup>48</sup> *Ullman v. United States*, 350 U.S. 422, 430 (1956). *See also* *Smith v. United States*, 337 U.S. 137, 147 (1949) (“If a witness could not be prosecuted on facts concerning which he testified, the witness could not fairly say he had been compelled in a criminal case to be a witness against himself. He might suffer disgrace and humiliation but such unfortunate results to him are outside of constitutional protection.”).

<sup>49</sup> *Hale v. Henkel*, 201 U.S. 43, 67 (1906), *cited in* *Ullman v. United States*, 350 U.S. 422, 430 (1956). *See also*, *Chavez v. Martinez*, 123 S.Ct. 1994, 2000 (2003) (“We fail to see how, based on the text of the Fifth Amendment, Martinez can allege a violation of this right, since Martinez was never prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case.”).

<sup>50</sup> *See, e.g.*, *Couch v. United States*, 409 U.S. 322, 329 (1973) (holding that where a taxpayer gave her tax records to her accountant, and the “accountant makes no claim that he may tend to be incriminated by the production,” he too is precluded from invoking the Fifth Amendment’s protections); *Rogers v. United States*, 340 U.S. 367, 371 (1951) (“the privilege against self-incrimination ‘is solely for the benefit of the witness,’ and ‘is purely a personal privilege of the witness.’ Petitioner expressly placed her original declination to answer on an untenable ground, since a refusal to answer cannot be justified by a desire to protect others from punishment, much less to protect another from interrogation by a grand jury.”).

<sup>51</sup> *See, e.g.*, *United States v. White*, 322 U.S. 694, 701 (1944) (Whether an entity is entitled to protection turns on an inquiry into whether “a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only.”); *George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 288 (1967) (“the constitutional privilege against self-incrimination is ‘essentially a personal one, applying only

The “risk” part of the “incrimination” component is a variable. “The central standard for the privilege’s application has been whether the claimant is confronted by substantial and ‘real,’ and not merely trifling or imaginary, hazards of incrimination.”<sup>53</sup> Like compulsion, there is no analytical dividing point that can explain why courts find no violation with an incrimination likelihood of  $x$ , but do find a violation with a quantity of  $x + 1$ . The “substantial and real” test is an attempt to locate on the continuum the threshold likelihood of incrimination that will trigger the Fifth Amendment protection. Through case-by-case analysis, the Court has placed various types of cases on either side of the threshold. The threshold has not been met and there is no violation where, for example, information disclosures required by statute will not typically result in the production of incriminating information,<sup>54</sup> the government requires that records in “an

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to natural individuals.’ It ‘cannot be utilized by or on behalf of any organization, such as a corporation.’”) (quoting *White*, 322 U.S. at 698-99); *Rogers v. United States*, 340 U.S. 367, 371-72 (1951) (Communist Party may not claim the privilege); *Bellis v. United States*, 417 U.S. 85, 88-89 (1974) (small law partnership may not claim the privilege). *But see* *United States v. Doe (Doe I)*, 465 U.S. 605, 612-13 (1984) (holding that a sole proprietor’s act of production may be protected under the privilege).

<sup>52</sup> *See, e.g., United States v. Ward*, 448 U.S. 242, 251 (1980) (mere civil liability “does not trigger all the protections afforded by the Constitution to criminal defendants.”); *United States v. United States Coin and Currency*, 401 U.S. 715, 718 (1971) (relying on *Boyd v. United States* for the proposition that “proceedings instituted for the purpose of declaring the forfeiture of a man’s property by reason of offences committed by him, though they may be civil in form, are in their nature criminal’ for Fifth Amendment purposes” and holding that where “money liability is predicated upon a finding of the owner’s wrongful conduct,” the Fifth Amendment may be invoked in forfeiture proceedings); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 79 (1965) (finding, with regards to the registration requirements for members of the Communist Party under the Subversive Activities Control Act of 1950, that “Petitioners’ claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form’s questions in context might involve the petitioners in the admission of a crucial element of a crime.”).

Deportation hearings are probably not “criminal” for Fifth Amendment purposes. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (Noting that a “deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime” and so “various protections that apply in the context of a criminal trial do not apply in a deportation hearing.”); *Navia-Duran v. INS*, 568 F.2d 803, 808 (1<sup>st</sup> Cir. 1977) (“Miranda warnings are not applicable in a deportation setting”).

<sup>53</sup> *Marchetti v. United States*, 390 U.S. 39, 53 (1968).

<sup>54</sup> *See, e.g., California v. Byers*, 402 U.S. 424, 428-430 (1971) (upholding California’s “hit and run” statute which required drivers of cars involved in accidents to stop at the scene and provide their names and addresses because the statute “was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents.” “[T]he mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here.”); *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549, 555-56 (1990) (holding that a mother who refused to produce her child at the demand of the Department of Social Services, even though the production may incriminate her in a crime, “may not



essentially non-criminal and regulatory area” be kept and disclosed,<sup>55</sup> a witness has “a future intention to commit perjury . . . if granted immunity because of a claim of compulsory self-incrimination,”<sup>56</sup> self-incriminating information will not be available to law enforcement agencies,<sup>57</sup> or an individual faces only foreign criminal liability.<sup>58</sup> The threshold for Fifth Amendment incrimination is met where compliance with a registration act “will significantly enhance the likelihood” of prosecution for future acts, and will “readily provide evidence which will facilitate” convictions.<sup>59</sup> In John Doe’s case, a court would certainly find that knowledge of the location of a crime victim is sufficiently incriminating.

### C. The Problem of Defining “Testimony”

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invoke the privilege to resist the production order because she has assumed custodial duties related to production and because production is required as part of a noncriminal regulatory regime.”).

<sup>55</sup> *Marchetti v. United States*, 390 U.S. 39, 57 (1968). Under the “required records” doctrine, the government can require individuals and entities to keep and disclose certain types of records. For example, the government may require that income records be kept and disclosed in tax returns, *United States v. Sullivan*, 274 U.S. 259 (1927), or that product pricing information be provided to the government under the Emergency Price Control Act, *Shapiro v. United States*, 335 U.S. 1 (1948). The Court has allowed disclosure requirements in “required records” cases only where incrimination is likely. To fit within the doctrine, the records must be “customarily kept,” be of a “public character,” and be within “an essentially non-criminal and regulatory area of inquiry.” *Marchetti*, 390 U.S. at 56-57. In *Marchetti*, the Court reversed the petitioner’s conviction under federal wagering laws that required disclosure of illegal gambling, reasoning that “[t]he United States’ principle interest is evidently the collection of revenue, and not the punishment of gamblers; but the characteristics of the activities about which information is sought, and the composition of the groups to which inquiries are made, readily distinguish this situation from that in *Shapiro*” because the requirements “are directed to a selective group inherently suspect of criminal activities.” *Id.* at 58 (internal citation omitted). See also *Haynes v. United States*, 390 U.S. 85 (1968) (reversing a conviction under the National Firearms Act which required registration of illegal weapons because “[t]he hazards of incrimination created by the registration requirement [are] ‘real and appreciable.’”).

<sup>56</sup> *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980).

<sup>57</sup> *United States v. Freed*, 401 U.S. 601, 606 (1971) (reversing the dismissal of an indictment for possession of unregistered hand grenades; the registration statute did not violate the Fifth Amendment because any risk of incrimination was “merely ‘trifling or imaginary’” and not “substantial and real.”).

<sup>58</sup> Compare *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 78 (1964) (“the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law”), with *United States v. Balsys*, 524 U.S. 666, 669-70 (1998) (holding that a suspected Nazi war criminal may not invoke the right against compelled self-incrimination where his responses to questions would not subject him to prosecution under domestic law but may make him vulnerable to criminal prosecution in Lithuania, Israel, and Germany because “concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause.”).

<sup>59</sup> *Marchetti v. United States*, 390 U.S. 39, 54 (1968).

The third component of a self-incrimination violation is testimony,<sup>60</sup> and here is where most of the modern theoretical problems lie. The Court has failed to provide a definition of “testimony” that can explain its own cases. This has led the commentators to wonderfully interesting, but uniformly unconvincing, speculation as to what might explain the Fifth Amendment. We discuss here the problems posed for both the Court and the commentators by the absence of a plausible conception of “testimony.” In the next section we solve the riddle by showing that testimony, for purposes of the Fifth Amendment, is the substantive results of cognition, and further that this explains both the cases and the polygraph hypothetical.

In *Schmerber v. California*, the Supreme Court made an explicit effort to define the parameters of “testimony”.<sup>61</sup> The defendant in *Schmerber* appealed his conviction for driving under the influence of alcohol on the grounds that his right against self-incrimination had been violated when the police ordered a hospital physician to extract the defendant’s blood despite the defendant’s refusal to consent.<sup>62</sup> A lab test indicated intoxication and was later admitted in evidence at trial.<sup>63</sup> The Supreme Court affirmed the conviction, holding that “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, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.”<sup>64</sup>

The Court acknowledged that the distinction between “testimony” and “real or physical evidence” is not always easily drawn.<sup>65</sup> A polygraph test, according to the Court, will measure physiological changes during an interrogation and thus the results could be construed as physical

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<sup>60</sup> See *Fisher v. United States*, 425 U.S. 391, 408 (1976) (“It is also clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a Testimonial Communication that is incriminating.”).

<sup>61</sup> *Schmerber v. California*, 384 U.S. 757 (1966).

<sup>62</sup> *Id.* at 758-59.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 761.

<sup>65</sup> *Id.* at 764.

or real, like the blood-alcohol test at issue in *Schmerber*.<sup>66</sup> Without remedying this obvious flaw in the theory, the Court simply asserted that “[t]o compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.”<sup>67</sup> The Court did not find any of the same concerns in the blood test under consideration, but provided no explanation for why that is so.<sup>68</sup> Seventeen years later, the Court still did little more than note the polygraph problem when it considered the testimonial/physical distinction in *South Dakota v. Neville*.<sup>69</sup> The Court again concluded without explanation that although the lie detector test seeks to obtain physical evidence, “to compel a person to submit to such testing ‘is to evoke the spirit and history of the Fifth Amendment.’”<sup>70</sup> The problem is obvious: the very test that the Court advances, which is to distinguish between “testimony” and “real or physical evidence,” does not provide answers as to which is which.

Consider whether anything that was forcefully taken from Doe is “testimonial.”<sup>71</sup> The only things extracted and presented to the jury were his heart rate, blood pressure, rate of breathing, and electrodermal responses. The physical data obtained through a scientific procedure seems analogous to the blood extracted and tested in *Schmerber*. If there is a difference, the testimonial/real distinction does not get at it. The test was designed for, and succeeded in, excluding physical exemplars<sup>72</sup> and medical extractions<sup>73</sup> from Fifth Amendment protection, but it fails to explain the reoccurring specter of the polygraph.

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 765.

<sup>69</sup> 459 U.S. 553, 562 n.12 (1983).

<sup>70</sup> *Id.* (quoting *Schmerber*, 384 U.S. at 764).

<sup>71</sup> See *supra* pp. xx-xx.

<sup>72</sup> See, e.g., *United States v. Euge*, 444 U.S. 707 (1980) (handwriting exemplar); *United States v. Dionisio*, 410 U.S. 1 (1973) (voice exemplar); *United States v. Mara*, 410 U.S. 19 (1973) (handwriting exemplar); *United States v.*

Commentators have tried unsuccessfully to rectify this gap.<sup>74</sup> One approach has focused on privacy as the core value that should be taken as an indicator of “testimony.”<sup>75</sup> Whether or not privacy is a core Fifth Amendment value, it obviously cannot explain why the privilege applies when it does. A privacy interest would obviously include the right to exclude the government from what’s *inside* one’s body, like the blood taken in *Schmerber*.<sup>76</sup> In an effort to avoid this point, Professor Arenella argued that perhaps “mental privacy,” as distinguished from physical privacy, is “at the heart of the privilege.”<sup>77</sup> He used both psychological examinations and the polygraph as a demonstration of “the futility of trying to separate one’s definition of what constitutes testimony for fifth amendment purposes from one’s view of the core values that are impaired by permitting testimonial compulsion.”<sup>78</sup> Assuming that the “privilege’s primary objective is to prevent the state from intruding upon the individual’s mental privacy,” Arenella concluded that the privilege should apply where the “state forces the accused to disclose *involuntarily* his private thoughts, feelings, and beliefs about the crime charged and then proposes to make testimonial use of these extracted thoughts.”<sup>79</sup> His mental-privacy-plus-

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Wade, 388 U.S. 218 (1967) (voice exemplar); *Gilbert v. California*, 388 U.S. 263 (1967) (handwriting exemplar); *Holt v. United States*, 218 U.S. 245 (1910) (holding that a defendant may be compelled to try on a blouse).

<sup>73</sup> See, e.g., *Schmerber*, 384 U.S. at 765.

<sup>74</sup> For comprehensive evaluations of the many proposed theories, see Stuntz, *Self-incrimination and Excuse*, *supra* note xx; David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986); Donald A. Dripps, *Foreword: Against Police Interrogation--And the Privilege Against Self-Incrimination*, 78 J.CRIM.L. & CRIMINOLOGY 699, 711-18 (1988); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968).

<sup>75</sup> See, e.g., *Andresen v. Maryland*, 427 U.S. 463, 485 (1976) (Brennan, J. dissenting) (“the Fifth Amendment protects an individual citizen against the compelled production of testimonial matter that might tend to incriminate him, provided it is matter that comes within the zone of privacy recognized by the Amendment to secure to the individual ‘a private inner sanctum of individual feeling and thought.’”) (quoting *Couch v. United States*, 409 U.S. 322, 327 (1973)); *Schmerber*, 384 U.S. at 778 (1966) (Douglas, J. dissenting) (“Thus, the Fifth Amendment marks ‘a zone of privacy’ which the Government may not force a person to surrender.”).

<sup>76</sup> Arenella, *supra* note xx, at 40-41 (“While privacy concerns may justify the privilege’s prohibition of testimonial compulsion, they do not explain why the state *may* extract physical evidence from the accused. . . . When the state uses compulsion to extract physical evidence from a suspect and then uses that evidence against him, the state intrudes upon the individual’s privacy by gaining physical access to his body and securing information about him.”).

<sup>77</sup> *Id.* at 40-42, cited in Stuntz, *Self-incrimination and Excuse*, *supra* note xx, at 1234 n.18.

<sup>78</sup> *Id.* at 42 n.63, 44.

<sup>79</sup> *Id.* at 43-44 (emphasis in original).

testimonial-use test seems to give the right answer in the case of John Doe’s polygraph test. His theory, however, cannot overcome the other main problem of privacy-based theories.

The most serious difficulty for the theory that privacy is the explanatory variable is that the present state of the Fifth Amendment in no way responds to it. It is indisputable that the government has “a right to every man’s evidence,” if that evidence incriminates another person, such as a friend or a family member.<sup>80</sup> The state can even compel *self*-incriminating testimony with a grant of immunity.<sup>81</sup> Given these powers of the government to demand evidence from every area of our personal lives, it is hard to see how privacy can be a guidepost for identifying where the right against self-incrimination applies.<sup>82</sup> These governmental powers also explain the failure of theories based on personal autonomy, a variation on privacy theories.<sup>83</sup>

Arenella asserted that this problem disappears “once one recognizes that the privilege only protects against invasions of mental privacy that impair accusatorial process values.”<sup>84</sup> By this he presumably means that the “accusatorial process norms” that are also core values of the privilege, namely things like the “preference for an accusatorial system and fair state-individual balance,” explain why the privilege does not apply when immunity is granted or when information is sought against a third person.<sup>85</sup> The difficulty here is that the argument is ad hoc. To explain the cases, it asserts that, when privacy does not work, some other norm trumps it. But

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<sup>80</sup> See *Kastigar v. United States*, 406 U.S. 441, 443 (1972) (recognizing that the “general common-law principle that the public has a right to every man’s evidence” is considered an indubitable certainty) (internal quotations omitted).

<sup>81</sup> See *id.* at 445 (recognizing that immunity statutes “have historical roots deep in Anglo-American jurisprudence”) (citing L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 328, 495 (1968)).

<sup>82</sup> See Stuntz, *Self-incrimination and Excuse*, *supra* note xx, at 1233-34 (“There are, however, two major stumbling blocks to a privacy theory of the privilege. First, the privilege does not protect physical evidence, but instead prohibits only compelled “testimonial” or “communicative” conduct. . . . The second problem is more devastating. The privilege applies only to testimony that is incriminating.”); Robert S. Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 *UCLA L. REV.* 343, 388 (1979) (there is a “incoherence between the focus of privacy and the Fifth Amendment’s obvious preoccupation with self-incrimination”), *quoted in* Arenella, *supra* note xx, at 44 n.70.

<sup>83</sup> See Stuntz, *Self-incrimination and Excuse*, *supra* note xx, at 1234-35.

<sup>84</sup> Arenella, *supra* note xx, at 44 n.70.

<sup>85</sup> *Id.* at 40, 40 n.58.

why? And how will one predict what the next case will bring? In essence, another “value” is added to describe each seemingly contradictory case.

Professor Michael Dann tried a different angle for a privacy-focused analysis in his criticisms of the testimonial/real distinction.<sup>86</sup> He hypothesized that the protection of “one’s mental and emotional state including personal thoughts, beliefs, ideas, and information” is the “*raison d’etre*” for the Fifth Amendment privilege.<sup>87</sup> A violation of the privilege could be detected, he argued, where “psychologically intrusive compulsion occurred.”<sup>88</sup> Dann was right to look to the nature of the suspect’s involvement rather than whether the character of the information derived was real or testimonial. His theory, however, fails to explain the cases.

Dann’s reason for looking to whether “psychologically intrusive compulsion” has occurred is to discover if the “accused can or cannot reasonably believe that he can affect the result” of the disclosure.<sup>89</sup> If this belief is possible, then the accused will suffer the “psychological pain occasioned by forcing an accused” into “the trilemma of self-accusation, perjury or contempt.”<sup>90</sup> This argument based on psychological cruelty generally has been rejected.<sup>91</sup> Dann was concerned not only about the “psychological pain” of the individual,

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<sup>86</sup> See B. Michael Dann, *The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence from a Suspect*, 43 U.S.C. L. REV. 597, 598 (1970). Professors Robert Gerstein and Samuel Alito have presented variations on this same argument. See Gerstein, *supra* note 33, at 346 n.17 (“What makes an act testimonial is the fact-finder’s reliance upon the actor’s oral responsibility for truth-telling in making use of its as evidence. This, in turn, must imply the existence of an opportunity to be truthful or not.”), *cited in* Arenella, *supra* note 26, at 44 n.70; Samuel A. Alito, *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. LAW. REV. 27, 47 (1986) (“A person served with a subpoena for incriminating evidence in his possession has three practical alternatives: first, he can comply; second, he can claim the fifth amendment privilege; and third, he can falsely deny the existence of the evidence or destroy it. . . . [T]he rational, unscrupulous witness will turn over documents and thus concede possession only when that concession is either not incriminating or is believed to reveal no more than can be proved independently.”), *cited in*, *United States v. Hubbell*, 530 U.S. 27, 43 n.23 (2000)).

<sup>87</sup> Dann, *supra* note xx, at 611.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 598.

<sup>90</sup> *Id.* at 604 (citing *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964)).

<sup>91</sup> See Allen *The Simpson Affair*, *supra* note xx, at 1016 (describing the theory as “bizarre”) (citing Schulhofer, *supra* note xx, at 318 (“Notice that the innocent defendant faces no trilemma, no dilemma, in fact no problem at all.”)); Stuntz, *Self-incrimination and Excuse*, *supra* note xx, at 1237-39.

though, but also about the likelihood that the person who “has the power to alter the evidence” will actually choose to do so and thus undermine the truth-seeking function of criminal investigations and trials.<sup>92</sup>

The focus on choice has practical allure because it can ground the privilege in the unassailable goal of promoting the use of reliable evidence in solving and prosecuting crimes. The privilege would apply when the witness produces evidence after having the opportunity to choose whether to do so honestly. There are strong policy reasons for not wanting to rely on the evidence from someone who has an incentive to hide the truth. In *Pennsylvania v. Muniz*, Justice Brennan wrote for a majority that “[w]henver a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the ‘trilemma’ of truth, falsity, or silence, and hence the response (whether based on truth or falsity) contains a testimonial component.”<sup>93</sup> [Moved to FN 84]

In an interesting reworking of the choice theory, Professor Stuntz, suggested that the Fifth Amendment can be explained as an excuse theory.<sup>94</sup> “The central principle underlying [excuse] doctrines is that absent a compelling reason to do otherwise,” he explained, “people should not be held to a standard higher than that which their judges can meet.”<sup>95</sup> In the Fifth Amendment context, if “even honest people would commit perjury when asked under oath to confess to criminal conduct, then a serious argument for excusing perjury in such cases would

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<sup>92</sup> See Dann, *supra* note xx, at 612.

<sup>93</sup> *Pennsylvania v. Muniz*, 496 U.S. 582, 597 (1990). See also Fisher, 425 U.S. at 411 (“Surely the Government is in no way relying on the ‘truth-telling’ of the taxpayer to prove the existence of or his access to the documents.”) (citing 8 WIGMORE, EVIDENCE § 2264); *Hubbell*, 530 U.S. at 43, n.23 (again citing Wigmore and describing a subpoena *duces tecum* as a ‘process relying on [the witness’] moral responsibility for truth-telling”).

<sup>94</sup> See Stuntz, *Self-incrimination and Excuse*, *supra* note xx.

<sup>95</sup> *Id.* at 1229.

exist.”<sup>96</sup> Since there are serious policy problems that would result from excusing perjury, he concludes, silence rather than perjury is immunized under the privilege.<sup>97</sup>

Under Stuntz’s excuse theory, silence is immunized when the person is in a situation in which “even honest people” may be tempted to commit perjury.<sup>98</sup> This is similar to the choice or truth-telling theories to the effect that criminal trials should not rely on the compelled testimony of someone with a significant incentive to lie. Stuntz’s theory does a better job of explaining why we immunize silence in criminal cases but allow a defendant with an incentive to lie to voluntarily testify in his own defense. Still, his theory fails to explain both the lie detector hypothetical and a number of the cases.

As Arenella pointed out, a theory based on choice cannot explain our John Doe hypothetical.<sup>99</sup> Doe did not implicate himself after a “cruel” decision was put to him. Rather, the officers were able to extract from him the evidence they needed without his cooperation. He engaged in no “volitional acts” and had no “power to alter the evidence.”<sup>100</sup> “Since an effective and reliable lie detector test deprives the individual of any opportunity to deceive the questioner,” Arenella explained, its results might be admissible under a choice-based theory.<sup>101</sup> The “truth-telling” inquiry, even under Stuntz’s theory, fails because “there is no falsehood to excuse and therefore no need to immunize noncooperation.”<sup>102</sup>

More tellingly, these theories fail to explain both the exemplar and the subpoena cases. The Court has not extended the privilege to cases where an individual is compelled to give an

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Arenella, *supra* note xx, at 44 n.70.

<sup>100</sup> Dann, *supra* note xx, at 619.

<sup>101</sup> See Arenella, *supra* note xx, at 44 n.70.

<sup>102</sup> Stuntz, *Self-incrimination and Excuse*, *supra* note xx, at 1276.



example of his handwriting, the way he talks, or how he looks in a particular piece of clothing.<sup>103</sup>

Dann acknowledged that under his theory there should be Fifth Amendment protection in exemplar and demonstration cases,<sup>104</sup> though this is inconsistent with cases.

Stuntz tried to explain away the problem:

Handwriting and voice samples can be altered, so that if alteration were excusable for the same reason as self-protective perjury, noncooperation with the police ought to be immunized. On the other hand, it may be that handwriting and voice exemplars are outside the scope of the privilege because plausible alteration, while possible, is very difficult.<sup>105</sup>

Dann explained why this doesn't avoid the problem:

It should not be determinative that "deceit is improbable" in the giving of a voice or handwriting sample since such evidence can be disguised. Even though the deceit is successful for only some "talented" people, only some people are able to lie successfully. Such a distinction, however, is irrelevant. . . . As long as there is any possibility of successful deceit, the average person, talented or not, will have to decide whether to attempt to disguise the sample; this is precisely the trilemma the privilege seeks to guard against.<sup>106</sup>

Nor do these theories explain the subpoena cases like *Fisher*. Plainly a person required to disgorge possibility incriminating documents has choice and would have the incentive to adulterate their contents by purging any incriminatory material, for example, and yet immunity is limited to the act of production.<sup>107</sup> The polygraph test and exemplar cases all create problems for the current theories of the Fifth Amendment. Privacy- and choice-based theories fail to properly predict the outcome of cases. The next section presents a theory that can explain all of the cases.

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<sup>103</sup> See, e.g., *United States v. Euge*, 444 U.S. 707 (1980) (handwriting exemplar); *United States v. Dionisio*, 410 U.S. 1 (1973) (voice exemplar); *United States v. Mara*, 410 U.S. 19 (1973) (handwriting exemplar); *United States v. Wade*, 388 U.S. 218 (1967) (voice exemplar); *Gilbert v. California*, 388 U.S. 263 (1967) (handwriting exemplar); *Holt v. United States*, 218 U.S. 245 (1910) (holding that a defendant may be compelled to try on a blouse).

<sup>104</sup> See Dann, *supra* note xx, at 622-25, 627-29.

<sup>105</sup> Stuntz, *Self-incrimination and Excuse*, *supra* note xx, at 1276-77.

<sup>106</sup> Dann, *supra* note xx, at 623.

<sup>107</sup> Although as we discuss below, perhaps *Hubbell* changes things in this regard. Even if it does, the privacy/choice theories still cannot explain the other cases discussed in the text.

#### D. A Comprehensive Theory of the Fifth Amendment Privilege

As we have been suggesting throughout the earlier sections of this article, a simple correction to the understanding of “testimony” produces an explanation of all the cases. In the cases, “testimony” means substantive cognition—the product of cognition that results in holding or asserting propositions with truth-value. Although never expressly formulating a cognition-based test, the Court has acknowledged that “[i]t is the ‘extortion of information from the accused,’ the attempt to force him ‘to disclose the contents of his own mind,’ that implicates the Self-Incrimination Clause.”<sup>108</sup> It has never gone the further step, however, to develop explicitly a test based on this observation, but functionally it is precisely what the Court has been doing.<sup>109</sup> This leads to the following explanation or theory: The government may not compel revelation of the incriminating substantive results of cognition caused by the state.

Cognition “involves the acquisition, storage, retrieval, and use of knowledge.”<sup>110</sup> We use the term here to refer to these intellectual processes that allow one to gain and make use of substantive knowledge and to compare one’s “inner world” (previous knowledge) with the

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<sup>108</sup> *Doe v. United States*, 487 U.S. 201 (1988) (*Doe II*) (quoting *Couch v. United States*, 409 U.S. 322, 328 (1973) and *Curcio v. United States*, 354 U.S. 118, 128 (1957)); *United States v. Hubbell*, 530 U.S. 27, 43 (2000) (also quoting *Couch* and *Curcio*). See also *Braswell v. United States*, 487 U.S. 99, 126 (1988) (Kennedy, J. dissenting) (“Physical acts will constitute testimony if they probe the state of mind, memory, perception, or cognition of the witness.”).

<sup>109</sup> Professor Uviller recognized that “personal control over the production of cognitive evidence, free of official coercion, is guaranteed by the self-incrimination clause of the fifth amendment.” H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137 (1987). He, however, was engaged in a different project when he wrote this and did not follow the idea through to a theory of the Fifth Amendment. Uviller’s article argues that the Supreme Court’s Sixth Amendment cases “misappropriated the right to the services of counsel . . . and deployed it as an awkward and ill-suited restraint upon the access of law enforcement officers to the thoughts of a suspect.” *Id.* at 1212. It is not clear whether Uviller recognized the importance of his observation about cognition. His 2001 article on the Fifth Amendment privilege does not make any explicit mention of “cognition” but he does interpret Justice Brennan’s opinion in *Schmerber* as saying that “no one can be forced to divulge cerebral evidence, to speak the contents and products of the mind” and emphasizes the Court’s “contents of his own mind” language in *Hubbell*. H. Richard Uviller, *Forward: Fisher Goes on the Quintessential Fishing Expedition and Hubbell is Off the Hook*, 91 J. CRIM. L. & CRIMINOLOGY 311 (2001). Though Uviller hasn’t followed through with an examination of the implications of this insight, he deserves credit for the observation.

<sup>110</sup> MARGARET W. MATLIN, *COGNITION* 2 (3d ed. 1994).

“outside world” (including stimuli, such as a question from an interrogator).<sup>111</sup> Excluded are simple psychological responses to stimuli such as fear, warmth, and hunger; the mental processes that produce muscular movements; and one’s will or faculty for choice.

It is important to note that state action is required to trigger both the cognition and the disclosure of the results. There would be nothing objectionable about the police compelling a suspect to think about whether he was guilty if the conclusion was never elicited or was disclosed voluntarily. Conversely, even when cognition is involved in the original creation of documents, their contents are not directly protected.<sup>112</sup> The state must cause the cognition, such as that involved in responding to a subpoena, before the Fifth Amendment is implicated. We discuss below how the contents of voluntarily made documents may enjoy derivative protection under *Hubbell*.<sup>113</sup> Still, the direct protection extends only to the cognition caused by the state, the paradigmatic example being the retrieval of information from memory in response to a question. Finally, only the incriminating substantive results of cognition are protected from compelled disclosure. The fact or quality of cognition is not protected but only those propositions with truth-value that would tend to incriminate the author.

Our theory of the Self-Incrimination Clause—that the government may not compel revelation of the incriminating substantive results of cognition—can explain all of the cases. As in all theories of the Fifth Amendment, the variables of compulsion<sup>114</sup> and incrimination will

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<sup>111</sup> *Id.* at 26 (using these terms in a different context).

<sup>112</sup> *United States v. Doe (Doe I)*, 465 U.S. 605, 612 (1984) (“We therefore hold that the contents of those records are not privileged.”), *quoted in United States v. Hubbell*, 530 U.S. 27, 36 (2000).

<sup>113</sup> *See infra* pp. xx-xx.

<sup>114</sup> As discussed above, refusals to submit to tests generally lack the component of compulsion because it is the opposite result of what the State is seeking. *See supra* pp. xx; *South Dakota v. Neville*, 459 U.S. 553 (1983). Even if one could imagine a situation in which a refusal was somehow compelled, however, the refusal would still not trigger the privilege for lack of cognition. An unadorned refusal does not reveal substantive knowledge derived from perceptions or ideas. Though a witness to the refusal may think that it reveals something about the person’s knowledge (possibly his own guilt), the additional assumption of the witness does not transform the bare abstention into the revelation of cognition.

exclude some cases from protection categorically, and others when the judicially-created threshold is not met. However, the cases that are problematic for other theories can be explained by ours, as can the polygraph hypothetical.

In John Doe's case, the government would be prohibited from using the polygraph results of the unspeaking suspect. The officer asking questions caused Doe to engage in cognition. Though he made no oral responses, his differing physiological responses to suggestions about the location of the little girl are a by-product of those thoughts; indeed, the evidence of responses would be relevant only if they were a reliable code—a language, in other words—of those thoughts. The officer's questions caused Doe (outside stimuli) to retrieve his own previous knowledge and arrive at answers to the questions. Despite Doe's stubborn resistance, the officer also compelled the revelation of the substantive results of this cognition by capturing Doe's physiological responses that are a code for his thoughts. Since the substantive content of his thoughts, as reported through those physiological responses, was incriminating, the privilege should apply.

The same analysis applies to psychological examinations. Plainly, the information extracted could be considered medical like the blood in *Schmerber*, but still the privilege is implicated.<sup>115</sup> The patient is compelled to compare the meaning of the doctor's statements with his own knowledge and experiences and to arrive at incriminating substantive answers which are then extracted through compulsion. In the cases to date, the Court has concluded that those answers would be used substantively. In *Estelle v. Smith*, the Court "specifically rejected the

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<sup>115</sup> The Court has recognized that, similar to the polygraph, psychological examination can be problematic under the testimonial/physical test. See *South Dakota v. Neville*, 459 U.S. 553, 562 n.12 (1983) ("A second example of seemingly physical evidence that nevertheless invokes Fifth Amendment protection was presented in *Estelle v. Smith*, 451 U.S. 454 (1981). There, we held that the Fifth Amendment privilege protected compelled disclosures during a court-ordered psychiatric examination. We specifically rejected the claim that the psychiatrist was observing the patient's communications simply to infer facts of his mind, rather than to examine the truth of the patient's statements.").

claim that the psychiatrist [in a court-ordered examination] was observing the patient's communications simply to infer facts of his mind, rather than to examine the truth of the patient's statements."<sup>116</sup> The Court rejected the state's argument that the Fifth Amendment was inapposite because the defendant's communications to the doctor were "nontestimonial in nature":

However, Dr. Grigson's diagnosis, as detailed in his testimony, was not based simply on his observation of respondent. Rather, Dr. Grigson drew his conclusions largely from respondent's account of the crime during their interview, and he placed particular emphasis on what he considered to be respondent's lack of remorse. Dr. Grigson's prognosis as to future dangerousness rested on statements respondent made, and remarks he omitted, in reciting the details of the crime. The Fifth Amendment privilege, therefore, is directly involved here because the State used as evidence against respondent the substance of his disclosures during the pretrial psychiatric examination.<sup>117</sup>

Since the substantive results of cognition were compelled and incriminating, the Fifth Amendment was violated. This is precisely as our theory predicts. We also predict, however, that psychological exams that carry no risk of using substantive responses to questions as substantive evidence against the accused would not violate the Fifth Amendment.

Consistent with the holding of *Schmerber*, medical tests are not privileged under this theory. *Schmerber* can be restated in terms of cognition. In standard medical exams a patient/suspect is not compelled to engage in cognition at all and the test results do not reveal any knowledge or substantive results of cognition. The tests could presumably be performed on a totally non-thinking individual. Although the testimonial/real analysis cannot make the necessary distinction between medical and psychological tests, the cognition test shows that only the latter should be protected because even the completely uncooperative suspect can be compelled to reveal the incriminating substantive results of compelled cognition.

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<sup>116</sup> *South Dakota v. Neville*, 459 U.S. 553, 562 n.12 (1983) (citing *Estelle v. Smith*, 451 U.S. 454 (1981)).

<sup>117</sup> *Estelle v. Smith*, 451 U.S. 454, 463-64 (1981).

Exemplar cases also can be explained. These cases do not trigger the privilege because, though the person must understand the command and respond accordingly (comparing the outside stimulus with his previous knowledge), no substantive knowledge is dislodged. When one only has to present or refrain from hiding personal characteristics, there is no disclosure of the results of cognition. Signing one's name or trying on a blouse involves some mental effort in understanding the directions and complying with them. Still, there is no revelation of the substantive results of cognition. All that is revealed is the use of the will or faculty of deliberate action to follow directions in signing one's name normally. There is no assertion disclosed, only the decision to not let one's will interfere with the naturalness of the response. This decision is a choice and this point highlights the important difference between a cognition-based theory and one that relies on the presence of choice. Choice theories get exemplar cases wrong.<sup>118</sup>

The Court's decision in *United States v. Doe (Doe II)* further demonstrates this point.<sup>119</sup> There, a court order compelled a target of a grand jury investigation to authorize foreign banks to disclose records of his accounts.<sup>120</sup> The target was compelled to sign a form that "purported to apply to any and all accounts over which Doe had a right of withdrawal, without acknowledging the existence of any such account."<sup>121</sup> The Court analogized the demand to exemplar cases and explained:

We do not disagree with the dissent that "[t]he expression of the contents of an individual's mind" is testimonial for purposes of the Fifth Amendment. . . . We simply disagree with the dissent's conclusion that the execution of the consent directive at issue here forced petitioner to express the contents of his mind. In our view, such compulsion is more like "be[ing] forced to surrender a key to a strongbox containing incriminating documents" than it is like "be[ing] compelled to reveal the combination to [petitioner's] wall safe."<sup>122</sup>

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<sup>118</sup> See *supra* pp. xx-xx.

<sup>119</sup> *Doe v. United States (Doe II)*, 487 U.S. 201 (1988).

<sup>120</sup> *Id.* at 202.

<sup>121</sup> *Id.* at 204.

<sup>122</sup> *Id.* at 210 n.9.

The Court concluded that because the consent directive was not “testimonial in nature,” “the District Court’s order compelling petitioner to sign the directive does not violate his Fifth Amendment privilege against self-incrimination.”<sup>123</sup> In *Doe II*, as in exemplar cases, the target had to use his will or faculty of deliberate action to follow directions in signing his name. Complying with the order, however, did not require Doe to disclose the substantive results of cognition.<sup>124</sup>

Finally, the act of production cases also can be explained. All subpoenas for documents or other tangible evidence involve cognition. The government, through its issuance of a subpoena, causes cognition through the recipient reading the subpoena, comparing its language with his own knowledge, and arriving at substantive answers as to which documents satisfy the terms of the subpoena. The government then, through a grant of immunity or threat of contempt, compels the disclosure of the incriminating substantive results of that compelled cognition. However, the act of production cases do pose unanswered questions about the development of the Fifth Amendment. We turn to these questions in the following section.

Perhaps the only datum not obviously explained by our theory is the sixth birthday question in *Pennsylvania v. Muniz*,<sup>125</sup> but it, too, is consistent. In *Muniz*, a drunk -driving suspect

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<sup>123</sup> *Id.* at 219.

<sup>124</sup> It should be noted that *Doe II* presents a different situation from *California v. Byers*, 420 U.S. 424 (1971), though both cases involve the compelled presentation of one’s name. In *Byers*, California’s “hit and run” statute required drivers of cars involved in accidents to stop at the scene and provide their names and addresses. The driver, like the target in *Doe II*, had to understand the command and respond accordingly by comparing the outside stimulus of the accident with his previous knowledge of the law. In stating his name, however, the driver had to disclose a proposition with truth-value, namely, that he had driven the car and gotten into the accident. Thus, the cognition component of a Fifth Amendment violation was present in *Byers*. However, because most traffic accidents do not create criminal liability, the Court concluded that the risk of incrimination was so low as to not cross the threshold necessary for a fifth amendment claim, and thus the statute was upheld. *Id.* at 428 (upholding the statute because it created only a “mere possibility of incrimination,” which was insufficient for a Fifth Amendment violation). See *supra* note xx and accompanying text.

<sup>125</sup> 496 U.S. 582 (1990).

was arrested and taken to a police station where he was told that his actions and voice would be recorded on video, but he was not advised of his *Miranda* rights.<sup>126</sup> This exchange followed:

Officer Hosterman first asked Muniz his name, address, height, weight, eye color, date of birth, and current age. He responded to each of these questions, stumbling over his address and age. The officer then asked Muniz, “Do you know what the date was of your sixth birthday?” After Muniz offered an inaudible reply, the officer repeated, “When you turned six years old, do you remember what the date was?” Muniz responded, “No, I don’t.”<sup>127</sup>

Following this discussion, the police officers performed three sobriety tests that had also been done on the roadside.<sup>128</sup> The suspect made several incriminating statements reflecting his inability to follow directions while trying to perform these tests.<sup>129</sup> The Court considered whether any of the suspect’s “utterances” constituted “testimonial responses to custodial interrogation for purposes of the Self-Incrimination Clause.”<sup>130</sup> The Court delivered a complex web of opinions. Justice Brennan wrote the plurality opinion, representing four votes.<sup>131</sup> Justice Rehnquist also represented four votes, joining Brennan’s opinion on some issues and dissenting on others.<sup>132</sup> Finally, Justice Marshall wrote only for himself, and though providing an important vote for the plurality, presented reasoning different from all eight other Justices.

Eight Justices agreed that “any verbal statements that were both testimonial in nature and elicited during custodial interrogation should be suppressed” because of the failure by the police to advise the suspect of his *Miranda* rights.<sup>133</sup> These same eight all agreed that “[r]equiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound produced by his voice, does not, without more, compel him

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<sup>126</sup> *Id.* at 585-86.

<sup>127</sup> *Id.* at 586.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 584.

<sup>131</sup> Justice Brennan was joined by Justices O’Connor, Scalia, and Kennedy.

<sup>132</sup> Justice Rehnquist was joined by White, Blackmun, and Stevens.

<sup>133</sup> *Muniz*, 496 U.S. at 590.



to provide a ‘testimonial’ response for purposes of the privilege.”<sup>134</sup> Citing several exemplar cases, the Court held that the fact that the suspect slurred his speech was not protected.<sup>135</sup> The sobriety tests were also held to be permissible under *Schmerber* and the statements made during the sobriety tests were found to be “voluntary” under *Neville* since the police did nothing to solicit the statements.<sup>136</sup> This is all consistent with our theory.

With regard to the first seven questions eliciting the suspect’s name, address, height, weight, eye color, date of birth, and current age, Justice Brennan, with four votes, asserted that the statements and their delivery need not be suppressed because they fall within the routine booking exception.<sup>137</sup> Rehnquist’s four found that the statements needn’t be suppressed because they were not “testimonial.”<sup>138</sup> Only Justice Marshall felt the statements should be suppressed.<sup>139</sup> Again, the decision not to suppress these statements is consistent with our theory—no substantive products of cognition were being extracted to be used against the defendant.

The most contentious issue was the sixth birthday question, and it is also the greatest challenge to us. Justice Brennan, still representing four votes, found this to be different from the first seven questions because it “was incriminating, not just because of his delivery, but also because of his answer’s content; the trier of fact could infer from Muniz’s answer (that he did not know the proper date) that his mental state was confused.”<sup>140</sup> The questions “required a

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<sup>134</sup> *Id.* at 592 (citing *United States v. Dionisio*, 410 U.S. 1 (1973)).

<sup>135</sup> *Id.* at 591-92 (citing *United States v. Dionisio*, 410 U.S. 1 (1973); *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967)).

<sup>136</sup> *Id.* at 602 (citing *Schmerber v. California*, 384 U.S. 757 (1966); *South Dakota v. Neville*, 459 U.S. 553 (1983)).

<sup>137</sup> *Id.* at 601 (citing *Rhode Island v. Innis*, 446 U.S. 291 (1980)) (Brennan, J., joined by Justices O’Connor, Scalia, and Kennedy).

<sup>138</sup> *Id.* at 608 (Rehnquist, J., joined by White, Blackmun, and Stevens).

<sup>139</sup> *Id.* at 611 (Marshall, J. dissenting).

<sup>140</sup> *Id.* at 592.

testimonial response” that the state “cared about.”<sup>141</sup> Justice Rehnquist’s four dissenters, disagreed:

If the police may require Muniz to use his body in order to demonstrate the level of his physical coordination, there is no reason why they should not be able to require him to speak or write in order to determine his mental coordination. That was all that was sought here. Since it was permissible for the police to extract and examine a sample of Schmerber’s blood to determine how much that part of his system had been affected by alcohol, I see no reason why they may not examine the functioning of Muniz’s mental processes for the same purpose.<sup>142</sup>

Justice Marshall cast the deciding vote by concurring with Justice Brennan’s opinion that “the ‘sixth birthday question’ required a testimonial response from respondent Muniz.”<sup>143</sup> Before concluding that the Court held that Muniz’s response to the sixth birthday question was testimonial, however, it is necessary to look more closely at Marshall’s concurrence. His reasoning that differs so dramatically from that of all eight other Justices reveals that the sixth birthday question was never decided by a majority of the Court.

Justice Marshall reasoned that everything Mr. Muniz said or did was in the context of custodial questioning, and since no *Miranda* warning was given, all of his incriminating actions and statements should have been suppressed.<sup>144</sup> Thus, Marshall implicitly agreed with the dissenters that no distinction should be drawn between the first seven questions as to Mr. Muniz’s name, address, height, etc., the sobriety tests, and the “sixth birthday question,” though he disagreed about the consequence of this conclusion.<sup>145</sup> More importantly, his concurrence

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<sup>141</sup> *Id.* at 598, 599 n.3.

<sup>142</sup> *Id.* at 607 (Rehnquist, J. dissenting).

<sup>143</sup> *Id.* at 608 (Marshall, J. dissenting).

<sup>144</sup> *Id.* at 608-609 (Marshall, J. dissenting).

<sup>145</sup> *See id.* (Marshall, J. dissenting).

reveals the hollowness of his assertion that everything said or done in front of the police officers was testimonial. He admitted:

I continue to have serious reservations about the Court's limitation of the Fifth Amendment privilege to "testimonial" evidence. *See United States v. Mara*, 410 U.S. 19, 32-38 (1973) (Marshall, J., dissenting). I believe that privilege extends to any evidence that a person is compelled to furnish against himself. At the very least, the privilege includes evidence that can be obtained only through the person's affirmative cooperation. Of course, a person's refusal to incriminate himself also cannot be used against him.<sup>146</sup>

Marshall wrote that, if Muniz had raised the issue, he would have found that even Muniz's performance of the sobriety tests and his refusal to take the breathalyzer examination violate the Fifth Amendment.<sup>147</sup> The videotape showing these things should have been suppressed, he argued.<sup>148</sup>

Though Marshall cooperatively labeled everything "testimonial" to reach the desired result, he explicitly stated in his concurrence that he thought that "[t]he far better course would be to maintain the clarity of the doctrine by requiring police to preface all direct questioning of a suspect with *Miranda* warnings" regardless of the type of evidence elicited.<sup>149</sup> The rule should apply, he urged, when the police delayed processing Mr. Muniz for the purpose of observing him, even though no questions were asked, because his actions and statements during this time were likely to be incriminating.<sup>150</sup> The rule also should apply when Mr. Muniz counted to six rather than to thirty as he was instructed, because "his failure to complete the count was incriminating in itself."<sup>151</sup> Marshall called all of these things "testimonial" so that as many of them as possible would be suppressed within the framework adopted by the rest of the Court.

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<sup>146</sup> *Id.* at 616 n.4 (all but the first internal citation have been omitted) (Marshall, J. dissenting).

<sup>147</sup> *Id.* (Marshall, J. dissenting).

<sup>148</sup> *Id.* (Marshall, J. dissenting).

<sup>149</sup> *Id.* at 610 (Marshall, J. dissenting).

<sup>150</sup> *Id.* at 614 n.2 (Marshall, J. dissenting).

<sup>151</sup> *Id.* at 615 (Marshall, J. dissenting).

Although Marshall stated that the sixth birthday question is testimonial, his vote on this issue is undermined by his failure to agree with Brennan about the distinction between this question and the sobriety tests. Marshall's concurrence should be read as a vote for bolstering the *Miranda* prophylactic rule, and not as a vote on the competing theories of the testimonial/physical evidence distinction.

A holding of the Court that the sixth birthday question violates the Fifth Amendment would be inconsistent with our theory (although note that it is the only case that we would not be able to explain as compared to other theories that have considerably greater problems in this regard). It is true that cognition is involved in knowing one's birthday but the revelation of the substantive knowledge is not incriminating. The fact that the suspect had difficulty making the calculation reveals nothing about his perceptions or ideas or the knowledge he has derived from them. Incrimination as to the fact of cognition, or the facility or mental dexterity with which one engages in cognition, is instead analogous to blood tests. The privilege does not protect the fact or quality of cognition, but only those substantive results that would tend to incriminate the author. Only if Muniz had answered the question, and the content of that answer was somehow incriminating, should the privilege have applied.

However, the Court did not hold that the sixth birthday question violated the Fifth Amendment. That position only received four votes; Justice Marshall's concurrence should be understood as only considering whether the question violated *Miranda*, which has a broader scope than the actual Fifth Amendment protection.<sup>152</sup> To be sure, the *Muniz* Court came close to

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<sup>152</sup> See *Oregon v. Elstad*, 470 U.S. 298, 306-307 (1985) ("The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. . . . Thus, in the individual case, *Miranda*'s preventative medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm."). Though *Dickerson v. United States*, 530 U.S. 428 (2000), has clouded the water a bit, Justice Marshall concurred and dissented in *Muniz* in 1990, after *Elstad* but before *Dickerson*.

making a mistake, but did not. As cases get close to any line, it is not surprising to see opinions splinter; that is what we suggest occurred in *Muniz*. We also predict the line will not be breached in the future. Justice Brennan’s plurality opinion in *Muniz* is inconsistent with the Court’s previous, and later, holdings. Never before or since has the Court held that a physical or psychological process deserves protection independent of its substantive results.

## **II. The Remaining Ambiguities: Thresholds for Cognition and the Extent of Derivative Use**

As the previous section demonstrated, notwithstanding all the hand wringing over the chaotic state of Fifth Amendment theory, the cases are quite consistent and explained by a fairly simple theory. Three years ago, however, the Court handed down what appeared to be a highly technical result, but which in fact had explosive potential—so explosive that if developed it could essentially mean the end of subpoenas to targets of criminal investigations. This was *United States v. Hubbell*.<sup>153</sup> Interestingly, what makes *Hubbell* so potentially significant is the possibility that it embraces precisely the theory we have laid out in this article, and carries it to its logical extension by bringing all derivative evidence within its scope. The Court’s opinion was in the vocabulary of traditional Fifth Amendment case law, and the case purported to be nothing more than an application of the *Fisher* act of production doctrine.<sup>154</sup> The Court essentially held, however, that anything produced from compelled cognition that itself was protected, would be immunized under the Fifth Amendment. This seems to reverse *Fisher*’s conclusion that, at least in the context of subpoenas, the compelled cognition, but not its fruits,

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<sup>153</sup> 530 U.S. 27 (2000).

<sup>154</sup> See *Fisher v. United States*, 425 U.S. 391 (1976) (recognizing that “[t]he act of producing evidence in response to a subpoena . . . has communicative aspects of its own”).

would be immunized.<sup>155</sup> We say “seems” because there is an alternative explanation that may explain the two cases: perhaps the Court will conceive of cognition, like compulsion and incrimination, as a variable with a threshold that must be passed before the Fifth Amendment is violated. These are the remaining sources of ambiguity. We elaborate on them in this section, and explain how they arose. In the next section, we present the Court’s options and predict what it is likely to do.

In the act of production cases, the Court has flirted with various ways of limiting the reach of “testimony,” but never has arrived at a satisfactory answer or comprehensible explanation. Professor Cole lamented that in *Fisher* and the later act of production doctrine cases, the Court “declined to articulate a test of general application that the lower courts could use to assess the testimonial value of the act of producing documents.”<sup>156</sup> This is because a consistent “testimonial communications” test cannot be articulated given the Court’s understanding of the term. By contrast, cognition as a test of this third component permits a threshold to be set to exclude some cases from protection. We elaborate these points here. First, we explicate the crooked path from *Fisher* to *Hubbell* and its significance for the reach of the Fifth Amendment. We then show how cognition is the key to understanding the progression.

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<sup>155</sup> Justice O’Connor expressed the view that the fruits of a “mere” *Miranda* violation need not be suppressed. *See New York v. Quarles*, 467 U.S. 649, 660-74 (1984) (O’Connor, J., concurring). Justice O’Connor made it clear that though evidence derived from *Miranda* violations is properly admissible, derivative evidence from actual Fifth Amendment violations should be suppressed. “The values underlying the privilege may justify exclusion of an unwarned person’s out-of-court statements, as perhaps they may justify exclusion of statements and derivative evidence compelled under the threat of contempt. But when the only evidence to be admitted is derivative evidence such as a gun—derived not from actual compulsion but from a statement taken in the absence of *Miranda* warnings—those values simply cannot require suppression, at least no more so than they would for other such nontestimonial evidence.” *Id.* at 671 (O’Connor, J., concurring). *Fisher* suggested that, in the context of document subpoenas, the fruits are never immunized. *See Fisher*, 425 U.S. at 411. *United States v. Doe (Doe II)* made it clear that the content of subpoenaed documents are not protected. 487 U.S. 201, 206 (1988) (“It is undisputed that the contents of the foreign bank records sought by the Government are not privileged under the Fifth Amendment.”) (citing *Fisher*, among other cases).

<sup>156</sup> Cole, *supra* note xx, at 149, 162.

In *United States v. Fisher*, the Court concluded that the act of producing things demanded by the government through subpoenas may merit Fifth Amendment protection.<sup>157</sup> In *Fisher*, the Court addressed whether a summons demanding production of documents created by an accountant for a taxpayer could be resisted on Fifth Amendment grounds.<sup>158</sup> The Court found that the content of subpoenaed documents was not protected but that “[t]he act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced.”<sup>159</sup> “Compliance with the subpoena tacitly concedes” the existence, possession or control, and authenticity of the documents delivered.<sup>160</sup> The Court held, however, that compliance with the summons in the case at hand “would involve no incriminating testimony within the protection of the Fifth Amendment.”<sup>161</sup>

In reaching this conclusion, the Court revealed its concern about the possible expansiveness of the act of production doctrine.<sup>162</sup> Without providing a satisfactory explanation for its conclusion, the Court embraced a constricted act of production doctrine, mentioning two aspects of the case that presumably affected the outcome. First, compliance with the subpoena was not “testimony” because the papers were not the defendant’s “private papers” but rather had been created by an accountant. This fact is meant to distinguish *Fisher* from *Boyd v. United States*.<sup>163</sup> In *Boyd*, the Court announced a very broad privilege for individuals’ “private books and papers.”<sup>164</sup> Since the *Boyd* Court included within this protection a subpoenaed business

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<sup>157</sup> *Fisher*, 425 U.S. at 410. For a full account of the history of the act of production doctrine, see Thomas Kiefer Wedeles, Note, *Fishing for Clarity in a Post-Hubbell World: The Need for a Bright-Line Rule in the Self-Incrimination Clause’s Act of Production Doctrine*, 56 VAND. L. REV. 613, 620-26 (2003).

<sup>158</sup> *Fisher*, 425 U.S. at 393-95.

<sup>159</sup> *Id.* at 410.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 414.

<sup>162</sup> *See id.* at 411-12.

<sup>163</sup> *Boyd v. United States*, 116 U.S. 616 (1886).

<sup>164</sup> *Id.* at 634-35.

invoice, this is hardly a persuasive distinction.<sup>165</sup> In fact, Justice White, writing for the majority, stated dismissively that “[s]everal of *Boyd*’s express or implicit declarations have not stood the test of time.”<sup>166</sup> Justice O’Connor and others have since stated that *Fisher* “sounded the death-knell for *Boyd*.”<sup>167</sup> The holding in *Fisher* narrowed the scope of the privilege dramatically from what essentially had been a broad “zone of privacy” recognized in *Boyd*.<sup>168</sup>

The second factor affecting *Fisher*’s outcome, according to the Court, was that the “existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government’s information by conceding that he in fact has the papers.”<sup>169</sup> This also effectively limited the scope of “testimony,” and thus of the reach of the Fifth Amendment, but it left unclear what precisely would be protected.<sup>170</sup> Were these necessary or sufficient conditions? If the former, how did they interact? If the latter, what was the scope of the “foregone conclusion” rationale? Indeed, commentators thought that perhaps the real point of *Fisher* was to bring an end to the *Boyd* era, and not simply to extend it through a different vocabulary.<sup>171</sup>

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<sup>165</sup> *See id.* at 618.

<sup>166</sup> *Fisher*, 425 U.S. at 407.

<sup>167</sup> *United States v. Doe (Doe I)*, 465 U.S. 605, 618 (1984) (O’Connor, J., concurring) (“The notion that the Fifth Amendment protects the privacy of papers originated in *Boyd v. United States* but our decision in *Fisher v. United States* sounded the death-knell for *Boyd*.”). *See also* Stanton D. Krauss, *The Life and Times of Boyd v. United States (1888-1976)*, 76 MICH. L. REV. 184, 184 (1977) (“Thus, in light of *Andresen* and *Fisher*, *Boyd* is dead. No zone of privacy now exists that the government cannot enter to take an individual’s property for the purpose of obtaining incriminating information.”).

<sup>168</sup> *See* Krauss, *supra* note xx, at 184.

<sup>169</sup> *Fisher*, 425 U.S. at 411, 414.

<sup>170</sup> Scholars have adopted this language as the basis for a foregone conclusion doctrine that is proclaimed to be central to the act of production doctrine. This claim has become quite common since *Hubbell* and is considered at the end of this section after discussion of that case. *See infra* pp. xx – xx.

<sup>171</sup> *See, e.g.*, Gerstein, *supra* note xx, at 343 (“The venerable opinion of Justice Bradley in *Boyd v. United States*, much celebrated and much maligned through its long history, has at last been deprived of its remaining vitality by the Burger Court.”) (citing *Andresen v. Maryland*, 427 U.S. 463 (1976); *Fisher v. United States*, 425 U.S. 391 (1976); *Couch v. United States*, 409 U.S. 322 (1973)); Krauss, *supra* note xx, at 212 (declaring that after *Andresen* and *Fisher*, “*Boyd* is dead”); Cole, *supra* note xx, at 133 (describing the judicial abandonment of *Boyd*, culminating with *Fisher*); Mosteller, *supra* note xx, at 504 n.73 (describing how *Boyd* was “dismantled”).



In *United States v. Doe (Doe I)*, the Court for the first time, and to the surprise of many, upheld the invocation of the privilege based on the act of production, thus indicating that the reports of *Boyd's* demise were greatly exaggerated.<sup>172</sup> The owner of several sole proprietorships received subpoenas requiring production of several categories of business documents.<sup>173</sup> The owner's motion to quash was granted by the District Court upon a finding "that the act of production would compel respondent to "admit that the records exist, that they are in his possession, and that they are authentic."<sup>174</sup> The Supreme Court deferred to the lower court's "determination of factual issues" and affirmed the granting of the motion.<sup>175</sup>

The Court's decisions in the years following *Doe I* gave a curious gloss to the act of production doctrine. It emphasized that "in order to be 'testimonial,' an accused's oral or written communication, or act, must itself, explicitly or implicitly, relate a factual assertion or disclose information."<sup>176</sup> Yet, in two cases where clearly incriminating communications were at issue, the Court seemed to find the privilege inapplicable. In *Braswell v. United States*, the Court affirmed the Fifth Circuit's holding that "Braswell, as custodian of corporate documents, has no act of production privilege under the fifth amendment regarding corporate documents" and thus "may not resist a subpoena for corporate records on Fifth Amendment grounds."<sup>177</sup> The Court distinguished *Doe I*:

Had petitioner conducted his business as a sole proprietorship, *Doe* would require that he be provided the opportunity to show that his act of production would entail testimonial self-incrimination. But petitioner has operated his business through the corporate form, and we have long recognized that, for purposes of the Fifth

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<sup>172</sup> 465 U.S. 605 (1984).

<sup>173</sup> *Id.* at 606-07.

<sup>174</sup> *Id.* at 608.

<sup>175</sup> *Id.* at 614.

<sup>176</sup> *Doe v. United States (Doe II)*, 487 U.S. 201, 202, 210 (1988) (holding that "a court order compelling a target of a grand jury investigation to authorize foreign banks to disclose records of his accounts, without identifying those documents or acknowledging their existence" does not violate the target's Fifth Amendment privilege.)

<sup>177</sup> *Braswell v. United States*, 487 U.S. 99, 101, 109 (1988) (citing *In re Grand Jury Proceedings*, 814 F.2d 190, 193 (5th Cir. 1987)).

Amendment, corporations and other collective entities are treated differently from individuals. This doctrine—known as the collective entity rule—has a lengthy and distinguished pedigree.<sup>178</sup>

The petitioner in *Braswell* was the sole shareholder of his two companies and he, his wife, and his mother, were the only directors.<sup>179</sup> His wife and mother held the positions of secretary-treasurer and vice-president of the corporations, respectively, and “neither ha[d] any authority over the business affairs of either corporation.”<sup>180</sup> Thus, the Court seems to say that a person may not invoke the privilege, even if the production would be “personally incriminating,” if he has chosen one corporate form over another.<sup>181</sup> This disturbingly formalistic approach led the dissent to criticize the majority for being “captive to its own fictions.”<sup>182</sup>

*Braswell* was another unpersuasive effort to limit the privilege, as ironically the majority itself seemed to admit. Despite the unequivocal statement that the act of production would afford corporate custodians no Fifth Amendment protection, the Court undid its entire opinion in a last qualifying paragraph:

Although a corporate custodian is not entitled to resist a subpoena on the ground that his act of production will be personally incriminating, we do think certain consequences flow from the fact that the custodian’s act of production is one in his representative rather than personal capacity. Because the custodian acts as a representative, the act is deemed one of the corporation and not the individual. Therefore, the Government concedes, as it must, that it may make no evidentiary use of the “individual act” against the individual. For example, in a criminal prosecution against the custodian, the Government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation’s documents were delivered by one particular individual, the custodian.<sup>183</sup>

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<sup>178</sup> *Braswell*, 487 U.S. at 104.

<sup>179</sup> *Id.* at 101.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 113.

<sup>182</sup> *Id.* at 130 (Kennedy, J. dissenting).

<sup>183</sup> *Id.* at 117-18.

This amounts to an implicit grant of use immunity: in a criminal trial, the custodian’s act of production cannot be used against him personally. If the privilege applies, why did the Court state that “Braswell, as custodian of corporate documents, has no act of production privilege under the fifth amendment”?<sup>184</sup> As Justice Kennedy commented, “[t]his exercise admits what the Court denied in the first place, namely, that compelled compliance with the subpoena implicates the Fifth Amendment self-incrimination privilege.”<sup>185</sup>

The Court revealed this same uncertainty about applying the act of production doctrine in *Baltimore City Department of Social Services v. Bouknight*.<sup>186</sup> After holding that a mother may not invoke the Fifth Amendment to resist a court order to produce her child, whom authorities feared had been abused and possibly killed, the Court again ended its opinion with a cryptic qualification:

We are not called upon to define the precise limitations that may exist upon the State’s ability to use the testimonial aspects of Bouknight’s act of production in subsequent criminal proceedings. But we note that imposition of such limitations is not foreclosed. The same custodial role that limited the ability to resist the production order may give rise to corresponding limitations upon the direct and indirect use of that testimony.<sup>187</sup>

As in *Braswell*, the Court concluded that the State was not required to grant immunity *ex ante* but implied that *ex post* it might, thus leaving the state of the law unclear.<sup>188</sup> The puzzles are obvious. First, the cases may have produced a judicially-created form of immunity, not constrained by statute, which can be recognized *ex post* by judges evaluating a prosecutor’s proposed use of the evidence. It seems unlikely that this was the Court’s intent, however, given that in its earlier decision in *Doe I*, it declined to adopt a “doctrine of constructive immunity”

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<sup>184</sup> *Id.* at 102, 113 (citing *In re Grand Jury Proceedings*, 814 F.2d 190, 193 (5th Cir. 1987)).

<sup>185</sup> *Id.* at 119 (Kennedy, J. dissenting).

<sup>186</sup> 493 U.S. 549 (1990).

<sup>187</sup> *Id.* at 561.

<sup>188</sup> *See id.* at 561-62 (citing cases where the Fifth Amendment was found to limit prosecutors’ ability to use testimony that has been compelled even where no statutory immunity has been granted).

under which “the courts would impose a requirement on the Government not to use the incriminatory aspects of the act of production against the person claiming the privilege even though the statutory procedures have not been followed.”<sup>189</sup>

Alternatively, perhaps the Court was trying in *Bouknight* and *Braswell* to be faithful to the very narrow act of production doctrine of *Fisher*, but stumbled because of the lack of a clear understanding of the nature of the very distinctions the Court was attempting to draw. Through our theory—that the government may not compel revelation of the incriminating substantive results of compelled cognition—the debate underlying these cases can be better understood. In both *Bouknight* and *Braswell* the government sought to compel production of evidence through a court order. To compel such a response is to compel cognition by forcing the recipient of the subpoena/order to read the subpoena, compare its language with his own knowledge, and arrive at substantive answers as to which documents or physical items satisfy the terms of the order. The government would then compel revelation of the presumably incriminating results of this compelled cognition. The only remaining questions are whether the level of cognition meets some threshold, and what the derivative consequences are if it does.

Some scholars have suggested that the scope of the Fifth Amendment should be confined to explicit “testimonial use” and have little or no derivative consequences. Professor Arenella explained that a violation would only occur, or conversely immunity should only be granted, where the government seeks to make “testimonial use” of an actor’s “thoughts, feelings, and beliefs.”<sup>190</sup> Similarly, Amar and Lettow suggested an approach limiting what is presented at trial:

[T]he Court should move beyond the way station of *Kastigar* and declare that a person’s (perhaps unreliable) compelled pretrial statements can never be

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<sup>189</sup> *United States v. Doe (Doe I)*, 465 U.S. 605, 616 (1984).

<sup>190</sup> Arenella, *supra* note xx, at 44.

introduced against him in a criminal case but that reliable fruits of such statements virtually always can be. Thus, the government should be allowed to require a suspect to answer relevant questions in a civilized pretrial hearing presided over by a judge or magistrate. Under penalty of contempt, a suspect must answer truthfully, but he will be entitled to ‘testimonial immunity’: that is, the compelled words will never be introduced over the defendant’s objection in a criminal trial – the defendant will never be an involuntary ‘witness’ against himself ‘in’ a ‘criminal case’ – but the fruits of these compelled pretrial words will generally be admissible.<sup>191</sup>

Amar and Lettow declared that the Court was “leaning” in this direction.<sup>192</sup> The Supreme Court’s conclusion in *United States v. Hubbell*, in an opinion with potentially astonishing implications, is to the contrary.<sup>193</sup>

Webster Hubbell pleaded guilty to tax evasion and mail fraud in 1994 and promised, as part of his plea agreement, to provide the Independent Counsel with “full, complete, accurate, and truthful information” about the investigation into the Whitewater Development Corporation.<sup>194</sup> While Hubbell was serving his twenty-one-month sentence, the Independent Counsel tried to determine whether the agreement to provide information had been violated by serving Hubbell with a subpoena duces tecum calling for eleven categories of documents.<sup>195</sup> Hubbell appeared before an Arkansas grand jury but invoked his Fifth Amendment privilege.<sup>196</sup> The prosecutor presented a § 6003 order from the District Court, granting Hubbell immunity “to the extent allowed by law” and ordering him to respond to the subpoena.<sup>197</sup> Hubbell produced 13,120 pages of documents and asserted, “those were all of the documents in his custody or control that were responsive to the commands in the subpoena . . . .”<sup>198</sup>

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<sup>191</sup> Amar & Lettow, *supra* note xx, at 858-59.

<sup>192</sup> *Id.* at 858.

<sup>193</sup> 530 U.S. 27 (2000).

<sup>194</sup> *Id.* at 30.

<sup>195</sup> *Id.* at 31.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

In 1998 a new grand jury returned an indictment for tax-related crimes as well as mail and wire fraud.<sup>199</sup> Though the contents of the documents produced by Hubbell “provided the Independent Counsel with the information that led to this second prosecution, the government asserted that in the criminal case against Hubbell “it would not have to advert to [Hubbell’s] act of production in order to prove the existence, authenticity, or custody” or to even “introduce any of the documents” into evidence.<sup>200</sup> The question before the Court was whether Hubbell’s “act of production immunity” would pose a “significant bar” to prosecution.<sup>201</sup> Since “the scope of ‘use and derivative-use’ immunity that [§ 6002] provides is coextensive with the scope of the constitutional privilege,” the real issue was the scope of the Fifth Amendment privilege.<sup>202</sup> The Supreme Court affirmed the District Court’s dismissal of the indictment.<sup>203</sup>

The Court found that the prosecution was barred from producing at trial Hubbell’s response to the subpoena or the fact of his having produced the evidence.<sup>204</sup> “That would surely be a prohibited ‘use’ of the immunized act of production.”<sup>205</sup> The Court went further, however, and found it “clear” that the government had “already made ‘derivative use’ of the testimonial aspect of that act in obtaining the indictment against the respondent and in preparing its case for trial.”<sup>206</sup> “[I]t is undeniable,” the Court wrote, “that providing a catalog of existing documents fitting within any of the 11 broadly worded subpoena categories could provide a prosecutor with a ‘lead to incriminating evidence,’ or ‘a link in the chain of evidence needed to prosecute.’”<sup>207</sup> Although the Court asserted, as it had in prior cases, that the contents of the documents were not

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 31, 41.

<sup>201</sup> *Id.* at 33.

<sup>202</sup> *Id.* at 38.

<sup>203</sup> *Id.* at 32-34.

<sup>204</sup> *Id.* at 41.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 42.

privileged,<sup>208</sup> the contents themselves did provide the link. “The contents of the documents produced by respondent provided the Independent Counsel with the information that led to this second prosecution.”<sup>209</sup>

In reaching its conclusion, the Court analyzed the nature of Hubbell’s actions in responding to the subpoena.<sup>210</sup> It observed:

It was unquestionably necessary for respondent to make extensive use of “the contents of his own mind” in identifying the hundreds of documents responsive to the requests in the subpoena. The assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox. The Government’s anemic view of respondent’s act of production as a mere physical act that is principally nontestimonial in character and can be entirely divorced from its “implicit” testimonial aspect so as to constitute a “legitimate, wholly independent source” (as required by *Kastigar*) for the documents produced simply fails to account for these realities.<sup>211</sup>

In other words, the Court concluded that the government had, through its issuance of a subpoena, caused cognition when the recipient read the subpoena, compared its language with his own knowledge, and arrived at substantive answers as to which documents satisfied the terms of the subpoena. The government then compelled the disclosure of the incriminating substantive results of this compelled cognition through a grant of immunity.

The dramatic change from *Fisher* to *Hubbell* is now plain. *Fisher* suggested a high threshold for cognition and a limited derivative use doctrine. A substantial use of knowledge would be required before the privilege would apply, and the scope of immunity would be limited to the bare act of production. The privilege’s applicability to interrogations and confessions was unaffected because these cases necessarily involve significant use of knowledge and could themselves be used substantively at trial. Where the individual only had to respond

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<sup>208</sup> *Id.* at 36 n.18.

<sup>209</sup> *Id.* at 31.

<sup>210</sup> *Id.* at 43-44.

<sup>211</sup> *Id.* at 43 (quoting *Curcio v. United States*, 354 U.S. 118, 128 (1957); *Doe v. United States (Doe II)*, 487 U.S. 201 (1988)).

mechanically to an order, as in *Fisher*, the response to subpoenas was either below the minimal threshold for cognition, evidentially irrelevant, or some combination of the two. The Court in *Fisher* implied that there might be a situation in which the act of production would involve sufficient cognition so that the threshold would be met, although it also suggested that this would not be common. Thus in *Fisher*, although the subject of the subpoena had to read, understand, and respond to the contents of the subpoena—all of which require cognition as we use the term—the Court concluded that there was no Fifth Amendment protection for the act of production itself, and consequently, not for the contents of the disclosed documents. Following *Fisher*, then, cognition appeared to be a variable requiring some minimal threshold, and the scope of derivative use, while unclear, seemed constricted.

In *Hubbell*, the Court took a dramatic new step in concluding that no derivative use at all could be made of the incriminating substantive results of Hubbell’s cognition. The attachment of derivative use to the “testimony” component significantly expanded the potential scope of protection, suggesting that the two cases are in direct tension with each other. Justices Thomas and Scalia, concurring in *Hubbell*, expressed a willingness to reconsider *Fisher*,<sup>212</sup> but the majority made a half-hearted effort to distinguish the case.<sup>213</sup> In *Fisher*, the Court explained, the “existence and location of the papers” was a “foregone conclusion.”<sup>214</sup> Without doing much to explain their rationale, the Court simply stated that it did not apply to Hubbell’s situation.<sup>215</sup>

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<sup>212</sup> *Hubbell*, 530 U.S. at 56 (Thomas, J., concurring) (“None of the parties in this case has asked us to depart from *Fisher*, but in light of the historical evidence that the Self-Incrimination Clause may have a broader reach than *Fisher* holds, I remain open to a reconsideration of that decision and its progeny in a proper case.”)

<sup>213</sup> *Hubbell*, 530 U.S. at 44-45.

<sup>214</sup> *Id.* at 44 (citing *Fisher*, 425 U.S. at 411).

<sup>215</sup> *See id.* at 44.



If we look to the subpoenas at issue in these cases, we find no support for a categorical distinction. In *Fisher*, the Court considered appeals in two cases from two Circuits. In *United States v. Kasmir*, the subpoena considered by the Fifth Circuit ordered production of:

1. Accountant's work papers pertaining to Dr. Mason's books and records of 1969, 1970, and 1971.
2. Retained copies of Dr. Mason's income tax returns for 1969, 1970, and 1971.
3. Retained copies of reports and other correspondence between (the accounting firm) and Dr. Mason during 1969, 1970, and 1971.<sup>216</sup>

In *United States v. Fisher*, the subpoena considered by the Third Circuit required the recipient:

'to give testimony relating to the tax liability or the collection of the tax liability' of Morris Goldsmith and to bring with him, among other things, an 'Analysis of Receipts and Disbursements for Morris Goldsmith for 1969 and 1970' and an 'Analysis of the Receipts and Disbursements of Sally Goldsmith for 1969 and 1970.'<sup>217</sup>

The *Hubbell* subpoena demanded documents in several areas including:

C. Copies of all bank records of Webster Hubbell, his wife, or children for all accounts from January 1, 1993 to the present, including but not limited to all statements, registers and ledgers, cancelled checks, deposit items, and wire transfers.

D. Any and all documents reflecting, referring, or relating to time worked or billed by Webster Hubbell from January 1, 1993 to the present, including but not limited to original time sheets, books, notes, papers, and/or computer records.<sup>218</sup>

All three of these subpoenas require cognition. There may be differences in the quantity of documents to be produced and the length of time it will take to gather them. Yet, each subpoena recipient will be required to determine which documents fit the description of the subpoena. In *Kasmir*, the prosecutor presumably knew that there were "accountant's work papers" and that they were likely in the accountant's possession. Still, there was no "foregone conclusion" about any particular document. The *Hubbell* subpoena is similar, differing only by degree.

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<sup>216</sup> *United States v. Kasmir*, 499 F.2d 444, 447 n.1 (5th Cir. 1974).

<sup>217</sup> *United States v. Fisher*, 500 F.2d 683, 686 (3d Cir. 1974).

<sup>218</sup> *Hubbell*, 530 U.S. at 46-47.

Commentators have given much weight to the “foregone conclusion” doctrine, arguing that it creates a useful dichotomy.<sup>219</sup> Acknowledging the difficulty of distinguishing *Fisher* from *Hubbell*, Cole wrote, “the difference between the two cases, if any, arises out of the application of the ‘foregone conclusion’ doctrine.”<sup>220</sup> Although disappointed that the Court had “declined to provide a definitive answer,” Cole concluded that “[b]y recognizing the extent of the Government’s prior knowledge as the critical inquiry for purposes of the application of the foregone conclusion doctrine, the Court effectively resolved the issue of when the doctrine should apply.”<sup>221</sup> Proceeding to lay out the “analytical framework mandated by *Hubbell*,” Cole presented a three-part test.<sup>222</sup> The second and third phases asked about the presence of incrimination and compulsion, respectively.<sup>223</sup> “Phase One” of the inquiry asked “whether the act of production has sufficient testimonial value to be protected by the Fifth Amendment, or stated differently, whether the testimonial information that would be conveyed is a ‘foregone conclusion’ because the government has ‘prior knowledge’ of that information.”<sup>224</sup> In the context of document production, Cole equated the “testimonial” component with “prior knowledge” by the government.

Robert Mosteller, also concluded that the foregone conclusion doctrine is at the center of the analysis.<sup>225</sup> Mosteller interpreted *Hubbell* as holding that “when the prosecution does not have specific information about the existence of incriminating documents, demanding them

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<sup>219</sup> See, e.g., LAFAVE ET AL., CRIMINAL PROCEDURE § 8.13 (3d ed. 2000 & Supp. 2002) (discussing the importance of the “foregone conclusion doctrine”); Robert P. Mosteller, *Cowboy Prosecutors and Subpoenas for Incriminating Evidence: The Consequences and Corrections of Excess*, 58 WASH. & LEE L. REV. 487, 508-10 (2001); Cole, *supra* note xx, at 151.

<sup>220</sup> Cole, *supra* note xx, at 166.

<sup>221</sup> *Id.* at 167-68.

<sup>222</sup> *Id.* at 184.

<sup>223</sup> *Id.* at 186-88.

<sup>224</sup> *Id.* at 184.

<sup>225</sup> See Mosteller, *supra* note xx, at 508-510.

violates the Fifth Amendment.”<sup>226</sup> He concluded that “[n]ow the important battle is the determination of the extent of prosecutorial knowledge necessary to establish that the existence of the documents is a ‘foregone conclusion.’”<sup>227</sup> He joined this battle and presented a complex hypothesis of how the foregone conclusion doctrine can work in practice.<sup>228</sup>

The “foregone conclusion” doctrine almost surely cannot sustain this weight. First, it is hard to read the Court’s opinion as providing much support. The Court never suggests that its holding is based on a foregone conclusion analysis, its only reference to it being the half-hearted and rather dismissive comment that, “[w]hatever the scope of this ‘foregone conclusion’ rationale, the facts of this case plainly fall outside of it.”<sup>229</sup> More importantly, the argument leads to unacceptable results. If the information sought is evidentially important, then it cannot matter how much the government already knows.<sup>230</sup> Under Mosteller’s and Cole’s analysis, the government could presumably compel oral confessions if it had other evidence of what the defendant knew or would say. In John Doe’s polygraph case, there would be no violation if the government already had the little girl’s body and substantial evidence of Doe’s guilt, but merely wanted to solidify the case against him.

By contrast, the foregone conclusion doctrine makes more sense if it is understood as directed toward the witness’s cognitive efforts rather than the government’s knowledge. The doctrine does not define a difference in kind between types of subpoenas; rather, it highlights that cognitive demands may vary between different subpoenas. A subpoena that demands

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<sup>226</sup> *Id.* at 492.

<sup>227</sup> *Id.* at 518.

<sup>228</sup> See also Wedeles, *supra* note xx, at 625-26 (also proclaiming the importance of the “foregone conclusion” doctrine).

<sup>229</sup> *Hubbell*, 530 U.S. at 44.

<sup>230</sup> Anticipating this argument, Justice Brennan commented that “I know of no Fifth Amendment principle which makes the testimonial nature of evidence, and therefore, one’s protection against incriminating himself, turn on the strength of the Government’s case against him.” *Fisher v. United States*, 425 U.S. 391, 429 (1976) (Brennan, J., concurring).

production of a very specific document kept in a very specific location requires very little mental effort. The individual must only compare the language of the request to his own knowledge of the document sought. A more vague or more wide-ranging subpoena requires greater cognitive effort. The individual must interpret the meaning of the request, sort through large numbers of documents, and try to determine if a variety of documents can all fit within the parameters of a request.

### III. The Future

How *Fisher* and *Hubbell* relate—and thus the future of the Fifth Amendment—is unclear on two fronts. First, is cognition a variable like compulsion and incrimination? In what may prove to be the single most important word in the opinion, the Court referred to the “extensive” effort that Hubbell had to make to respond to the subpoena.<sup>231</sup> Perhaps less extensive efforts will not meet the required threshold, and the location of the breaking point will be determined through a common-law process. The second issue is the scope of derivative immunity—how far will the causal consequences of cognition extend? These two issues may be dependent or independent. The extensiveness of cognitive effort may result in a more extensive derivative use protection, or the permissible derivative use may remain constant so long as the threshold of cognition is met. These two variables point the way to the future.

There are three possible directions in which the law can evolve. First, the Court may choose to follow *Fisher* in both respects. This would limit the privilege to situations where the bare act of production is itself incriminating, and would permit derivative use. Second, the Court may follow *Hubbell* in both respects. This would extend the privilege to all cases where the substantive contents of cognition is compelled, and create a broad derivative use doctrine. Third,

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<sup>231</sup> *Hubbell*, 530 U.S. at 43.

the Court might embrace the derivative use aspect of *Hubbell* and couple it with a requirement of “extensive” cognition. Doing so would raise the related question of the relationship between the two variables—as the extent of the compelled substantive cognition increases, does the scope of protection for the derivative consequences increase as well?

The practical consequences of these different choices are obvious. If the Court embraces *Fisher*, and comes to view *Hubbell* as an aberration, the privilege will be substantially curtailed with regard to subpoenas. A reductionist view of the act of production doctrine and the nature of a compelled act would result. All complexities and conditions would be obscured or ignored so that a bare act would seem to carry no significance. The context of the compelled disclosure would be shielded from view so that the government could act as though it obtained the evidence through its own independent efforts. Following the *Fisher* approach, no preexisting documents would be protected. The government would only be limited in the way that it described to a trier of fact how it came into possession of the documents. The government could use compelled evidence if it were treated as though it arrived like “manna from heaven,” “by assuming that it miraculously appeared in the district attorney’s office.”<sup>232</sup> The Fifth Amendment would be orderly and curtailed. Where compulsion or incrimination is missing or below the required threshold, there would be no privilege. Only where there is compulsion, incrimination, and a high level of cognition, such as in John Doe’s polygraph case or a psychological test, would the privilege apply. At the low end of the cognition scale, in the context of subpoenas for example, the privilege would not apply. The government would continue to be able to use subpoenas to compel incriminating evidence. The substance of the evidence, such as the contents of the documents or the condition of the child in *Bouknight*, would not be protected.

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<sup>232</sup> United States v. Hubbell, 167 F.3d 552, 584 (D.C. Cir. 1999). See also *Hubbell*, 530 U.S. at 33.

If *Hubbell* dominates the future, and every response to a subpoena is determined to involve sufficient cognition to implicate the privilege, which in turn is coupled with extensive derivative use protection, the scope of the Fifth Amendment will be so large as to swallow subpoenas. Uviller recognized with dismay that *Hubbell*'s derivative protection "comes perilously close to treating the contents of a document as the indirect product of its production."<sup>233</sup> As the Court stated in *Hubbell*, it was the "contents of the documents produced by respondent" that "provided the Independent Counsel with the information that led to his second prosecution."<sup>234</sup> But this means that no subpoena can be enforced over a Fifth Amendment objection without a grant of immunity. The grant of immunity in turn would make it next to impossible to prosecute the subject of a subpoena.<sup>235</sup>

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<sup>233</sup> Uviller, *Forward: Fisher Goes on the Quintessential Fishing Expedition and Hubbell is Off the Hook*, *supra* note xx at 321. See also, *id.* at 320 ("The problem with this reasoning is that it goes too far. Virtually every custodian who complies with a subpoena *duces tecum*, must use his or her mind to sort out the files and to cull and organize documents. The process of recognition and the implicit voucher of authenticity—attesting, in effect, that these are the items answering the description in the subpoena—are, of course, the predicates of Fisher. But Fisher precludes only the use of the inculpatory inference itself (here displaced by the immunity). The facilitation of understanding from an organized catalogue, like the discovery of the substantive crimes from the facts recorded in the documents, is not really a secondary gain from the compelled act of production; it is simply drawing inferences from contents. It hardly seems "anemic" to argue that Fisher forbids the use of inferences from the "physical act" of production only, and not from the contents of the items produced.").

<sup>234</sup> *Hubbell*, 530 U.S. at 31.

<sup>235</sup> See *United States v. Oliver North*, 910 F.2d 823, 872-73, *as amended*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991). In *North*, the D.C. Circuit described the burdensome procedure for determining whether a prosecution had been tainted by the use of immunized testimony:

[T]he District Court must hold a full *Kastigar* hearing that will inquire into the *content* as well as the *sources* of the grand jury and trial witnesses' testimony. That inquiry must proceed witness-by-witness; if necessary, it will proceed line-by-line and item-by-item. For each grand jury and trial witness, the prosecution must show by a preponderance of the evidence that no use whatsoever was made of any of the immunized testimony either by the witness or by the Office of Independent Counsel in questioning the witness. This burden may be met by establishing that the witness was never exposed to North's immunized testimony, or that the allegedly tainted testimony contains no evidence not "canned" by the prosecution before such exposure occurred. Unless the District Court can make express findings that the government has carried this heavy burden as to the content of all of the testimony of each witness, that testimony cannot survive the *Kastigar* test. We remind the prosecution that the *Kastigar* burden is "heavy" not because of the evidentiary standard, but because of the constitutional standard: the government has to meet its proof only by a preponderance of the evidence, but *any* failure to meet that standard must result in exclusion of the testimony. *Id.* at 872-73.

If the Court chooses to follow this approach, again we can expect it to decide cases in a relatively orderly fashion. As under *Fisher*, there would be no privilege where either compulsion or incrimination was missing. The polygraph and psychological examination cases will also be decided the same under both approaches. The privilege will apply because of the sufficient level of cognition. The privilege will not be applicable in exemplar cases under either approach as long as the plurality decision in *Muniz* on the sixth birthday question is wrong. If *Hubbell* and the plurality in *Muniz* are both right then all aspects of incriminating forced reasoning can constitute a violation of the Fifth Amendment. If *Hubbell* is right and the plurality in *Muniz* is wrong, however, then the Fifth Amendment would apply to every subpoena that demands information that incriminates the recipient. The quality of the recipient's reasoning, or his mental or intellectual aptitude, however, would not fall within the scope of the privilege. The privilege would remain concerned only with disclosure of the substantive results of cognition.

The third possibility is that neither *Fisher* nor *Hubbell* sets the right threshold for cognition. *Hubbell* locates the threshold much lower on the continuum than does *Fisher*.<sup>236</sup> There is broad continuum of possibilities between the two extremes and the Court may try to find a different spot in the middle, and perhaps the future will turn on Justice Stevens' comment that "[i]t was unquestionably necessary for respondent to make extensive use of 'the contents of his own mind' in identifying the hundreds of documents responsive to the request in the subpoena."<sup>237</sup> It may be that the entire impact of *Hubbell* will be contained in the word "extensive." Future cases would search out the meaning of this term, looking for a location for the threshold. As an inherently relative term, "extensive" can never provide a clear definition. It would require courts to continuously analogize and distinguish the facts of future cases,

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<sup>236</sup> See Mosteller, *supra* note xx, at 521 (suggesting a different analysis but also recognizing that *Fisher* and *Hubbell* occupy "two ends of the spectrum").

<sup>237</sup> *Hubbell*, 530 U.S. at 31.

gradually limiting the possibilities for the variable. The remaining question would then be whether the extent of cognition related to the extensiveness of derivative use protection. The answer to that question would in turn determine whether subpoenas would ever issue for targets of investigation.

How will the Court choose between these possibilities? Almost certainly it will do so in light of the “felt necessities of the times.”<sup>238</sup> A broad reading of *Hubbell* coupled with a robust derivative use doctrine will increase the protections of the Fifth Amendment but also the costs of investigations, and vice versa. We thus predict that the Court will see both cognition and derivative use as variables that interact. As the government makes more cognitive demands on the subject of a subpoena, the probability will increase of both that the act of production is compelled “testimony” and that the derivative fruits are protected. This will mean that two new common-law lines of cases will have to be developed. This will have its own costs, including the lack of a clear *a priori* rule. Nonetheless, if what we predict comes to pass, it will have the effect—and some might say the virtue—of capturing the notion that the protection of the citizen increases as the government makes greater demands.

One last substantive point. It has also not escaped our notice that our theory may pose the next hypothetical that may bedevil Fifth Amendment scholars. Suppose the state could capture the product of cognition that it did not cause.<sup>239</sup> Suppose that the next “lie detector” machine reads minds and captures incriminating thoughts even when no questions are asked. Does the causal difference of the state action between this and the original lie detector hypothetical (where questions are asked that cause the cognition that in turn causes the physiological responses) make

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<sup>238</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

<sup>239</sup> Causing the cognition, but capturing it without compulsion, is already permitted under the secret agent line of cases. *See, e.g., Hoffa v. United States*, 385 U.S. 293 (1966) (holding that use of testimony of a government informer regarding conversations between the defendant and the informer did not violate the defendant’s Fourth, Fifth, or Sixth Amendment rights).



a difference? Interestingly, not only our positive explanation of the Fifth Amendment but many other constitutional holdings suggest that it does. Our revised hypothetical looks much more like a search than an interrogation, which is precisely the line drawn by cases such as *Andresen v. Maryland*.<sup>240</sup>

If there is a normative justification for the positive theory we have developed here, using the terms as conventionally used in legal scholarship, we suspect that it resides in the point noted above that one effect of the Court's opinions is, and we predict will be, to maintain a relationship between the demands made by government and the protection afforded citizens, however prosaic that may appear. This raises the pointed question whether the ease with which the fifth amendment cases can be given a positive explanation, and their intractability to standard efforts at "normative justification" casts doubt on whether grand legal theorizing is very useful in any field of law with the range of either the fourth or fifth amendment, and, relatedly, whether scholarly efforts to discover the truth in this regard are doomed to failure. This does not mean that fields of law are necessarily unjustified, but instead that the justification, if it exists, must come in other terms. The terms plainly applicable to these two areas are the traditional ones of the rule of law. The Court has strived to make sense of ambiguous directives through creating and sustaining legal categories that for the most part are recognizable and by responding to new situations through analogies to prior cases. The applicable terms in which to appraise or criticize such efforts are clarity, precision, fidelity to text, tradition, and case law, and the use of judgment in the face of new and unanticipated developments. If we may be indulged one small normative comment, not only does this accurately capture what the Court is doing, we think it plausible that, however dull this may appear to the legal theorist, the country may be better off as a result.

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<sup>240</sup> 427 U.S. 463 (1976). It is also hard to see salient differences between our hypothetical and secret surveillance, such as wire-tapping.

