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Disentangling the Fourth Amendment and the Self-Incrimination Clause

Michael S. Pardo[*]

The relationship between the Fourth Amendment's prohibition of unreasonable searches and seizures and the Fifth Amendment's[1] prohibition of compelled self-incrimination has engendered a history wrought with doctrinal confusion and theoretical disarray, which current doctrine has only exacerbated. The lack of a proper theoretical understanding of this relationship has allowed a particular type of "entanglement" to occur, whereby the concerns, concepts, or rationales from one amendment become transposed into the doctrine of the other, and, consequently, problems proper to one amendment are mistakenly analyzed under the other. In this Article I offer a general theory of the relationship between the amendments that attempts to disentangle the doctrine and straighten out the analytic disarray. My theory is then employed to solve current doctrinal problems that have arisen because of this entanglement. These areas include the government's subpoena power, so-called "stop and identify" statutes, and the use of pre-arrest silence as evidence of guilt.

The usual villain in this story is the Supreme Court's opinion in *Boyd v. United States*.[2] In *Boyd*, a civil-forfeiture proceeding, the defendants were ordered to give the government a shipping invoice.[3] The Court held that the order, as well as the forfeiture statute that authorized it, violated both the Fourth Amendment and Fifth Amendment rights of the defendants.[4] In construing the relationship between the two amendments, the Court explained that they "shed great light on each other"[5] and in this case "run almost into each other,"[6] thus compelling the production of the incriminating invoice would constitute self-incrimination and would be the "functional equivalent" of an unreasonable search and seizure.[7] In such a situation, both amendments overlapped to

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[1] Throughout this Article I will at times use "Fifth Amendment" as short-hand for the Fifth Amendment provision against compelled self-incrimination. I do not mean to refer to any of the amendment's other provisions.

[2] 116 U.S. 616 (1886).

[3] *Id.* at 618.

[4] *Id*. at 632.

[5] *Id*. at 633.

[6] *Id*. at 630.

[7] *Id*. at 633–35.

create an inviolable zone of privacy within which the government could not gather information.[8]

Subsequent doctrinal developments have torpedoed *Boyd*'s view of the overlap as the Supreme Court has systematically rejected and cabined *Boyd*'s holding. On the Fourth Amendment side, the Court has rejected the "mere evidence" rule[9]—which prevented the government from seizing any evidence that was not contraband or the instrumentality of a crime—thereby removing to a large extent the property-based conception of the Fourth Amendment manifested in *Boyd*.[10] On the Fifth Amendment side, the Court limited the scope of the privilege against self-incrimination to compelled, incriminating, testimonial communications, thereby excluding non-testimonial evidence.[11] The Court also narrowed the scope of the privilege to exclude collective entities,[12] records the government requires be kept,[13] and communications made pursuant to a non-criminal regulatory regime.[14] Subsequent doctrine has, in Justice O'Connor's words from twenty years ago, "sounded the death knell for *Boyd*."[15] As the Court has repelled from *Boyd*, scholars also have for the most part rejected the opinion's analysis for both its reliance on "our old friend, *Lochner*-era property fetishism,"[16] and, more importantly, its fusion of Fourth and Fifth Amendment analysis.[17]

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[8] The zone of privacy was tied to the notion of property and a search and seizure of the invoice would have been unreasonable because the invoice was the defendants' personal property. *Id.* at 635.

[9] Warden v. Hayden, 387 U.S. 294, 300-01 (1967).

[10] Although not as important formally, property still ends up having a significant practical effect in Fourth-Amendment analysis. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 40 (2001) (holding that the use of thermal-imaging device that revealed details about a home by measuring heat coming off the home constitutes a search for purposes of the Fourth Amendment).

[11] Schmerber v. California, 384 U.S. 757, 760-65 (1966).

[12] Bellis v. United States, 417 U.S. 85, 92 (1974).

[13] Shapiro v. United States, 335 U.S. 1, 16-20 (1948).

[14] Baltimore City Dept. of Soc. Serv. v. Bouknight, 493 U.S. 549, 556-61 (1990); California v. Byers, 402 U.S. 424. 430-31 (1971).

[15] United States v. Doe, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring).

[16] Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 791 (1994).

[17] See, e.g., H. Richard Uviller, *Foreword: Fisher Goes on Quintessential Fishing Expedition and Hubbell is off the Hook*, 91 J. CRIM. & CRIMINOLOGY 311, 329-30 (2001) (criticizing the Court's "inability to distinguish" the amendments); Richard A. Nagareda, *Compulsion " to be a Witness" and the Resurrection of Boyd*, 74 N.Y.U. L. REV. 1575, 1585 (1999) (referring to the Court's "conflation" of the amendments as "understandable, but not analytically sound"); Akhil Reed Amar & Renee B. Lettow, 93 Mich. L. Rev. 857, 916 (1995) (referring to the Court's fusion of the amendments as "mishmash").

In light of this state of affairs, the title of this article may need some explaining. Given that the Court and commentators have rejected *Boyd*'s analysis of the two amendments as overlapping—and have instead pulled the amendments apart[18]—what is left to disentangle? Hasn't the Court already freed the doctrine of each from *Boyd*'s entanglement? The answer to this question is yes and no. Yes, *Boyd*'s particular conception of the relationship was problematic and justifiably jettisoned. But, contrary to current wisdom, the opinion was basically correct that the amendments should be understood in *some* way as connected and overlapping. Thus, I argue for the heretical view that the *Boyd* Court was partially correct in seeing the two amendments as overlapping and that the complete rejection of this view in current doctrine and theory has led to its own type of entanglement—an entanglement that arises from a failure to see a connection between the two constitutional provisions. This entanglement occurs when courts and scholars treat the two strands of doctrine as separate, independent problems. Doing so causes an analytic tangling of the rationales, concerns, and concepts proper to each amendment's analysis. Fourth Amendment rationales, concerns, and concepts get mistakenly imported into Fifth Amendment analysis, and vice versa.

This article argues that courts and scholars should reevaluate the relationship between the Fourth Amendment and the privilege against self-incrimination. Both amendments regulate government attempts to gather information from citizens. In doing so, potential Fifth Amendment events may also be potential Fourth Amendment events. To put it another way, the self-incrimination privilege applies to a subset of events *within* the universe of potential Fourth Amendment events.[19] The Fourth Amendment is more general and not absolute; the government may search for information and seize people or objects, but it must act reasonably in doing so.[20] The privilege against self-incrimination has no such categorical reasonableness component. Rather, it says that even if the government acts reasonably in searching for information, it cannot compel incriminating information from someone's mind and, subject to certain categorical exceptions, use that information as evidence against that person at a criminal trial. In other words, the clause forbids even otherwise reasonable searches (literally searching someone's mind for information) by the government in these circumstances—or, alternatively, such searches are unreasonable. The self-incrimination privilege thus provides a second hurdle (and sometimes a ban) for the government when it wants information from the smaller

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[18] With regard to incorporation, however, (and while not explicating the relationship), the Court again saw a relation between the two amendments. See Mapp v. Ohio, 367 U.S. 643, 655 (1961) (incorporating the "exclusionary" rule for the Fourth Amendment); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (incorporating the Self-Incrimination Clause).

[19] There may be some exceptions to this. *See infra* note 134. The boundaries of this overlap may be thought of in one of two ways, depending on how one views the scope of the Fourth Amendment. Under the more narrow view, some Fifth Amendment events occur outside the universe of Fourth Amendment events, in which case a phrase like "for the most part" should be inserted in the above sentence. Nothing in the test I will present or its applications turns on which view one adopts.

[20] The Fourth Amendment is also more general in that it applies to government searches and seizures that occur outside of criminal prosecutions; by contrast, the privilege applies only to the use of statements in criminal prosecutions. *See* Chavez v. Martinez, 538 U.S. 760, 766 (2003).

category of events that do not provide a problem under the Fourth Amendment but still implicate privilege.

In the next section, prior to presenting my theory, I discuss methodology. My approach is a middle way between the two dominant methods for constitutional theorizing in this area: top-down, normative and bottom-up, descriptive. Section II describes the core features of the doctrine for each amendment. Section III, after first discussing the shortcomings of alternative views, presents my view of the relationship between the two amendments. Incorporating the core features described in Section II, I argue for a view of the amendments as overlapping in the sense that potential Fifth-Amendment events may arise within potential Fourth-Amendment events. Accordingly, courts should subject government attempts at evidence gathering to a two-part inquiry: first, does the Fourth Amendment render the attempt unreasonable; second, if not unreasonable under the first inquiry, would the attempt compel incriminating propositional content[21] from the mind of a suspect in order to use it against that suspect at a criminal trial? If the answer to the second inquiry is "yes," then the privilege applies.

Section IV turns the theory back on current practices by using it to critique three current doctrinal problems where both amendments are implicated. First, I show how subpoena doctrine has become entangled by confusing the two inquiries. After initially developing feckless Fourth Amendment protections for subpoena targets by creating difficult (if not impossible) standards for targets to satisfy, the Court began to incorporate Fourth Amendment rationales into self-incrimination doctrine— most notably, by determining whether acts of producing items are "testimonial" for purposes of the privilege based on the government's knowledge.[22] My theory shows how to straighten out these two inquires. Second, I apply my theory to stop-and-identify statutes—which criminalize suspects' refusals to identify themselves during lawful, investigative stops—and show how the stops raise less of a Fourth Amendment problem and more of a Fifth Amendment problem than courts acknowledge. Accordingly, I conclude that nothing in the Fourth Amendment would preclude criminalizing the failure to answer *any* questions that arise within the scope of a lawful, investigative stop, but that suspects who fear incrimination should be able to invoke the privilege and avoid punishment. Third, and finally, I apply my theory to a putative circuit split on whether prosecutors may use a criminal defendant's pre-arrest silence as substantive evidence of guilt at trial. I conclude that the split is more apparent than real, that use of silence becomes improper when it is in direct response to government questioning, and that the alternative approach—which would allow use of silence so long as it occurred prior to arrest and *Miranda* warnings—confuses Fourth and Fifth Amendment issues.

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[21] In other words, for the privilege to apply, the *content* of the suspect's beliefs or knowledge must be incriminating, not the fact that they are capable of engaging in cognition. This point is discussed further *infra* at p. 18–19.

[22] Fisher v. United States, 425 U.S. 391, 411 (1976).

I. A Prelude on Methodology

This section attempts to make explicit the methodological approach implicit in the subsequent sections. Theorizing in the criminal-procedure area typically takes one of two forms, which might loosely be characterized as normative, prescriptive, or revisionary on the one hand and positive, descriptive, or explanatory on the other. I employ a third approach.

Under the top-down approach one articulates some value or end that a constitutional provision ought to protect, then argues that the doctrine and its contours may be explained or, as is more often the case, should be adjusted to serve, the articulated value or end.[23] For example, one might posit that the value protected by the self-incrimination privilege is mental privacy,[24] reliability,[25] dignity,[26] the prevention of torture[27] or cruelty generally,[28] or the avoidance of subjecting people to the "cruel trilemma" of incrimination, perjury, or contempt.[29]

The problem with this approach, however, is that the value-driven theories it inspires are both over- and under-inclusive. They are over-inclusive because the privilege does not cover all instantiations of the given value. For example, people are forced to disclose private thoughts once prosecutors give them immunity (contra privacy); a co-conspirator given immunity may be quite unreliable yet cannot invoke the privilege (contra reliability); the privilege does nothing to protect one who has a confession beaten out of him if the government does not offer it into evidence or derive other evidence from it (contra preventing torture); and anyone deciding whether to disguise his or her handwriting or voice, or to provide someone else's urine or blood, when compelled to produce a sample, faces the cruel trilemma, and yet cannot invoke the privilege (contra dignity and cruelty). Proponents of this top-down approach have a quick response at their disposal to this disjunct between theory and practice: the practice should be changed to fit the contours dictated by any particular theory.[30] It is not clear

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[23] *See, e.g.,* Robert S. Gerstein, *Privacy and Self-Incrimination*, 80 Ethics 87, 87–88 (1970) ("Any defense of the privilege must be founded on a clearly articulated justification for its existence. It must be a justification which will form a solid basis for the core of the privilege as we now know it, while offering criteria for a soundly rationalized redrawing of the boundaries for its applicability.").

[24] *See* Peter Arnella, *Schmerber and the Privilege against Self-Incrimination: A reappraisal*, 20 AM. CRIM. L. REV. 31, 40-42 (1982).

[25] *See* Amar & Lettow, *supra* note 17, at 900.

[26] *See* Gerstein, *supra* note 23, at 99.

[27] *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

[28] *See* Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 39 (1981).

[29] *See* Murphy, 378 U.S. at 55.

[30] *See, e.g.*, Gerstein, *supra* note 23.

that this is the right answer. Such a switch may result in radical departures with significant real-world consequences, which may or may not be desirable from a societal point of view. Some theories, for example, would greatly expand the privilege to prevent the taking of blood and fingerprints or the use of breathalyzers,[31] or to allow witnesses to refuse to testify even if they can no longer incriminate themselves.[32] On the other side, some theories would greatly retract the privilege so that, for example, the law could force suspects to talk out of court or be guilty of contempt, and any fruits (but not their statements) derived from such interrogations could be used at trial.[33] Regardless of whether the privilege should be expanded or contracted one way or the other, such a change probably should not be done just because it is a necessary consequence of some normative theory.

The more serious defect with the top-down approach is that the theories it has inspired are under-inclusive. Each would deny the privilege's applicability to situations in which the privilege would clearly apply and in which most observers would intuitively want it to apply. Take, for example, a mental-privacy theory. If the government already knows of the information in the defendant's head, can it force the defendant to testify at trial or interrogate him until he reveals his knowledge? Surely not. Or consider a torture theory. One can justifiably invoke the privilege in a variety of situations even if one would not otherwise be subject to torture. Such an instance is trial, which is perhaps the least controversial situation in which the privilege applies. Finally, consider a more extreme example. Imagine a reliable device, such as an enhanced lie detector, that could read one's thoughts.[34] Can the government strap the accused to the machine, ask her questions, and measure her brain responses? This would seem to be a clear violation of her Fifth-Amendment right. And yet, a reliability theory would say "yes" because the machine is reliable, as would a cruel-trilemma theory because there is no choice at all for the defendant to make. The under-inclusiveness of such theories likely means that there

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[31] This would be the case if the Court still embraced *Boyd*'s view. Justice Douglas took this position in Schmerber v. California, 384 U.S. 757, 778-79 (1966) (Douglas, J., dissenting). Nagareda argues that, based on his theory, the privilege should expanded to preclude compelled voice and handwriting samples. See Nagareda, *supra* note 17, at 1628–29.

[32] This would be true with a proponent concerned solely with a privacy theory.

[33] *See, e.g.*, Amar & Lettow, *supra* note 17, at 922-27.

[34] *See* Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. & CRIMINOLOGY 243, 248–49 (2004) (presenting this example and concluding that the privilege would apply). *Cf.* Andre A. Moenssens, *Brain Fingerprinting – Can it be used to Detect the Innocence of Persons Charged with a Crime?*, 70 UMKC L. REV. 891 (2002); Mark Peplow, "Brain Imaging Could Spot Liars: tests reveals patches in the brain that light up during a lie," http://www.nature.com/news/2004/041129/full/041129-1.html (Nov. 29, 2004) ("Lying activates tell-tale areas of the brain that can be tracked using functional magnetic resonance imaging (fMRI), according to scientists who believe the technique could replace traditional lie detectors.").

is no *one* essential value the privilege protects; rather, the protected events likely have a "family resemblance," making it difficult to form a general normative theory.[35]

Enter the second methodological form, the bottom-up approach. Rather than take this articulate-a-value-and-deduce-its-consequences approach, one might attempt to describe and explain the trajectory of current doctrine. Under this bottom-up methodology, one takes the current opinions as data points, seeks to develop a theory that accounts for and explains what unifies them, and predicts where the doctrine is heading. For example, Allen and Mace take this approach with regard to the privilege against self-incrimination.[36] They posit that the privilege protects the "substantive content of cognition,"[37] which they explicate further as applying to incriminating "propositions with truth value" compelled from a suspect,[38] and that such a theory accounts for the Court's holdings regarding the privilege. This raises the obvious question: why protect the content of cognition? One reason may be that this theory—which the Court may intuitively be applying without making that application explicit—captures the "family resemblance" of many situations and values that the privilege protects in a way that is easy to apply. But there may be no reason at all; the cases explained under the bottom-up

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[35] Ludwig Wittgenstein argued that the same was true of games and language. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 31-34 (1953) (G.E.M. Anscombe ed.). Wittgenstein argued that it was a mistake to think that our uses of a concept (for example "game") must share one essential characteristic. Rather, sometimes our multifarious uses of a concept share some similarities with other uses, which in turn share some similarities with other uses, and so on, so that our uses form a "family resemblance"—much like the members of a family can be said to look alike in sharing certain characteristics with other members without everyone having *one* essential visual characteristic shared by all. *See id*. at 32. Likewise, he argued that language itself, like "game," has no one essential use, but rather it allows us to play different language games, with more or less resemblance to others. *See id*. at 11–12. For this reason, criticisms of the privilege saying that there is no *one* essential justification for it, including Judge Friendly's famous attack, may be misplaced. *See* Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 691-720 (1968); *see also* David Dolinko, *Is there a Rationale for the Privilege against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1147 (1986) (concluding the privilege "cannot be justified either functionally or conceptually"). Frederick Schauer has suggested that the "family resemblance" idea may apply to freedom of speech, with none of the extant theories being able to justify all of the covered practices. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 14 (1982). More recently, Schauer has criticized free-speech scholars for focusing on unsuccessful, top-down, normative theories rather than articulating descriptively accurate positive theories. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1784-87 (2004). More generally, in the *Postscript* to THE CONCEPT OF LAW 248 (2d ed. 1997), H.L.A. Hart criticizes Dworkin for assuming (and for mistakenly ascribing a similar view to Hart) that law must have the one essential purpose of justifying state coercion.

[36] Allen & Mace, *supra* note 34, at 245-46; *see also generally* 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) (criticizing normative theories of the Fourth Amendment); Richard Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433 (1992).

[37] Allen & Mace, *supra* note 34, at 246.

[38] *Id*. at 246–47.

approach may be confused, incoherent, or unjustifiable from a normative perspective. Under this second approach to theorizing, however, justification for the practices is less important than accurate description, explanation, and prediction. There is great value in predicting, say, earthquakes and volcanoes even if we cannot understand what, if anything, might "justify"[39] them.

In sum, the first approach offers a theory that attempts to best or better justify (or offer reasons for) a particular provision, and then attempts to deduce the scope and consequences of the constitutional right in light of the theory. Under the second approach, one offers a theory that attempts to explain given doctrine and cases in a way that makes explicit their logic and predicts their future path. The shortcoming with the normative approach is that, at least in its extant manifestations, it is both over- and under-inclusive as a descriptive matter. The shortcoming of the descriptive approach is that it accepts as given the current doctrine and caselaw, regardless of how normatively unappealing they might be.

My approach takes a third approach that operates in the logical space between the two more common approaches and, in doing so, seeks to gain the benefits of the first two approaches while also avoiding their shortcomings. To be clear, I am not attempting to articulate an "intermediate" or "mid-level" theory, which might, for example, include normative theories for subsets of the issues that arise in a given area[40] or explanatory theories with a normative aspect of revealing useless analysis and showing how to eliminate it.[41] Rather, I present a general theory of the relationship between both amendments that preserves core features of the doctrine of each. My theory is then turned back on practices to straighten out problematic doctrinal puzzles that arise where the two bodies of doctrine have become entangled.[42]

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[39] Susan Neiman has argued recently that scholars can see some of modern philosophy as growing out of attempts to find justifications for natural disasters. *See* SUSAN NEIMAN, EVIL IN MODERN THOUGHT: AN ALTERNATIVE HISTORY OF PHILOSOPHY 113–202 (2002) (discussing, for example, Voltaire's responses to the Lisbon earthquake of 1755 in a chapter entitled "Condemning the Architect").

[40] Carol Steiker, for example, has argued that scholars should attempt to articulate such normative, "mid-level" theories for aspects of the Fourth Amendment. *See* Carol S. Steiker, *Of Cities, Rainforests, and Frogs: A Response to Allen and Rosenberg*, 72 ST. JOHN'S L. REV. 1203, 1210-11 (1998).

[41] See, for example, Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1771-89 (2003), where we show several examples of inconsistencies in law-fact doctrine and courts' failures to focus on the factors that actually control law-fact classification.

[42] There is some resemblance between the method employed in this Article of moving between entrenched practices and theory and Rawls' notion of "reflective equilibrium," which he uses to describe the relationship between principles and "considered judgments." *See* JOHN RAWLS, A THEORY OF JUSTICE 42–5 (rev. ed. 1999). A closer analog, however, is Nelson Goodman's discussion of our inferential practices and our logical rules:

> The point is that rules and particular inferences are justified by being brought into agreement with each other. *A rule is amended if it yields an inference we are unwilling to accept; an inference is rejected if it violates a rule we are unwilling to amend.* The process of justification is the delicate

In this Article, I begin descriptively, taking as given certain entrenched practices as "fixtures" or "guideposts" in current Fourth and Fifth Amendment doctrine. This move preserves core features of current practices and avoids the over- and under-inclusiveness inflicting normative theories.[43] I then articulate a theory of the relationship between the two bodies of doctrine that incorporates these key features and is thus descriptively superior to other views of the amendments and their relationship that do not. My theory, however, does not jettison normative theorizing to focus solely on description followed by explanation and prediction. It therefore avoids the criticism of such theories that, by settling for indiscriminate description, offer no normative guidance but rather seek to explain current practices, regardless of how unappealing, incoherent, or confused they might be. My theory, thus, along with providing a better understanding of the relationship of the amendments, turns a critical eye toward current practices. I examine three areas where the Fourth and Fifth Amendment doctrines have become entangled and show how my theory disentangles and simplifies doctrine while at the same time addressing the expressed and implied concerns to which the tangled doctrine purports be responding.

Enough meta-theory; on with the story.

II. Entrenched Practices

When the government attempts to gather information, the Fourth Amendment and the Fifth Amendment's Self-Incrimination Clause place limits on the government's access to, and the uses it can make of,[44]certain information. I take the entrenched

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> one of making mutual adjustments between rules and accepted inferences; and in the agreement achieved lies the only justification needed for either. [original emphasis]

NELSON GOODMAN, FACT, FICTION, AND FORECAST 64 (4th ed. 1983). I employ a similar methodology in discussing law's evidentiary practices and epistemological theory in Michael S. Pardo, *The Field of Evidence and the Field of Knowledge*, Law & Philosophy (forthcoming 2005).

[43] It may be interposed that it begs the question which practices are the core or entrenched ones. While this may be true enough, every theory of a practice will be circular in a similar sense, either on the theory side or the practice side. *See generally* SCOTT SOAMES, PHILOSOPHICAL ANALYSIS IN THE TWENTIETH CENTURY 69, 345 (Vol. I) (2003). Justification arises from bringing the theory and the practices into agreement with one another; pure normative theories create the agreement by revising practices to fit the theory, and pure descriptive theories do the reverse. *Cf.* Goodman, *supra* note 42, at 64:

> This looks flagrantly circular. I have said that deductive inferences are justified by their conformity to valid general rules, and that general rules are justified by their conformity to valid inferences. But this circle is a virtuous one. The point is that rules and particular inferences alike are justified by being brought into agreement with each other.

Moreover, by preserving core features of the doctrine of each amendment, my theory conforms to Quine's maxim for theory choice in science of "minimum mutilation" to existing theories. W.V. QUINE, PURSUIT OF TRUTH 14–15 (rev. ed. 1992) ("We heed a maxim of minimum mutilation.").

[44] Grants of immunity place limits of the government's use of statements that would otherwise be protected by the self-incrimination privilege. *See* Kastigar v. United States, 406 U.S. 441, 453 (1972). So-called

practices regarding each right, discussed below, as given and thus as guideposts upon which I build my theory of the proper relationship between these two provisions.

The Fourth Amendment provides that searches and seizures by the government must be reasonable, and thus requires a two-step inquiry: has a search or seizure occurred, and, if so, was it reasonable? A search occurs for purposes of the amendment when the government's attempt at information gathering implicates a citizen's reasonable expectation of privacy.[45] Physical trespass is neither a necessary[46] nor sufficient[47] condition for triggering whether a search has occurred, and the evidence gathered during a search has been "seized" under the Fourth Amendment even if it is not physical property.[48] A person is seized when a government agent either (1) intentionally physically touches a suspect[49] or (2) engages in a show of authority followed by the suspect's submission.[50]

The Fourth Amendment's doctrine regarding reasonableness takes as a default rule the second clause of the amendment:[51] namely, that searches and seizures are

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"standing" doctrine places limits on the government's use of evidence otherwise protected by the Fourth Amendment by saying that the government can use illegally obtained evidence against those whose lack standing because their rights were not violated by the illegal search. Minnesota v. Carter, 525 U.S. 83, 91 (1998). Evidence obtained in violation of the Fourth Amendment may be used for impeachment purposes. United States v. Havens, 446 U.S. 620, 626-29 (1980). Statements made after grants of immunity, *see* New Jersey v. Portash, 440 U.S. 450, 459-60 (1979), and involuntary statements, *see* Mincey v. Arizona, 437 U.S. 385, 401-02 (1978), may not be used for impeachment purposes; but otherwise voluntary statements obtained in violation of *Miranda*, *see* Harris v. New York, 401 U.S. 222, 226 (1971), and pre-arrest silence, *see* Jenkins v. Anderson, 447 U.S. 231, 240 (1980), may be used for impeachment purposes. For substantive use of the latter, see *infra* at p. 56–63.

[45] *See* Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

[46] *See* Kyllo v. United States, 533 U.S. 27, 40 (2001).

[47] *See, e.g.*, United States v. Dunn, 480 U.S. 294, 301-03 (1987) (holding that there is no search when police officers entered a barn because there was no reasonable expectation of privacy).

[48] *See* Kyllo v. United States, 533 U.S. 27, 36-41 (2001) (finding that the government seized details about the inside of a house revealed through thermal-imaging device); Berger v. New York, 388 U.S. 41, 59 (1967) (holding that the government seized conversations revealed through wiretaps); Katz, 389 U.S. at 351 (same).

[49] California v. Hodari D., 499 U.S. 621, 625-29 (1991). A seizure does not occur when the government's physical contact was not "intentionally applied." *See* Brower v. County of Inyo, 489 U.S. 593, 596-99 (1989) (finding no seizure when suspect crashed his car into a police roadblock set up to stop him).

[50] California v. Hodari D., 499 U.S. 621, 625-29 (1991).

[51] U.S. Const. Amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

reasonable if conducted pursuant to a warrant supported by probable cause.[52] This formal rule, however, is subject to many exceptions. For example, warrants are unnecessary when there are exigent circumstances,[53] automobiles involved,[54] suspects arrested outside their home,[55] or searches conducted incident to arrests.[56] In addition, police may conduct limited investigatory stop-and-frisks without a warrant or probable cause if there is reasonable suspicion that a crime has occurred or is about to occur.[57] Additionally, the amendment requires no suspicion when police conduct searches based on "special needs."[58]

Like the Fourth Amendment, the privilege against self-incrimination also limits the government's attempts to gather information. The government may not compel incriminating testimonial communications from someone and then use those statements (or evidence derived from such statements) as evidence against that person in a criminal trial. The doctrine on the privilege focuses on three formal elements: (1) compulsion, (2) incrimination, and (3) testimony. The first two elements are relatively clear, but the third has created some degree of confusion.

Compulsion in this context refers to government conduct that the courts consider impermissible as a causal antecedent for triggering statements from suspects or defendants. While the Court's rhetoric has at times suggested that compulsion turns on notions of "voluntariness" and "free will,"[59] the key determinant is not the amount of pressure employed by the government but rather the type of pressure employed. Offers of favorable plea agreements or reduced punishment play a much greater causal role in getting suspects to talk than the possibility of the prosecution mentioning a defendant's

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Everything after "violated" is seen as modifying "reasonable." For criticism of this interpretation on original-understanding grounds see Amar, supra note 16, at 764.

[52] *See, e.g.*, United States v. Jeffers, 342 U.S. 48, 50-51 (1951); Wong Sun v. United States, 371 U.S. 471, 481-82 (1963).

[53] Warden v. Hayden, 387 U.S. 294, 298 (1967).

[54] California v. Acevedo, 500 U.S. 565, 569-73 (1991).

[55] United States v. Watson, 423 U.S. 411, 421-24 (1976).

[56] Chimel v. California, 395 U.S. 752, 762-68 (1969).

[57] Terry v. Ohio, 392 U.S. 1, 16-27 (1968).

[58] *See, e.g.*, Illinois v. Lidster, 540 U.S. 419, 424-28 (2004) (discussing roadblocks); Bd. of Ed. v. Earls, 122 S. Ct. 2559, 828-38 (2002) (discussing school drug testing).

[59] *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 8 (1964) (stating that suspects may remain silent until they "choose[ ] to speak in the unfettered exercise of [their] own will"); Garner v. United States, 424 U.S. 648, 657 (1976) (stating that suspects must have "a free choice"); *but see* Allen & Mace, *supra* note 34, at 250 (rejecting both the concept of "free will" and its necessity for analyzing compulsion).

refusal to testify, but the latter is prohibited[60] while the former is not.[61] The paradigm of in-court compulsion would be a threat of prosecution for contempt of court for refusal to testify. The paradigm of out-of-court compulsion would be physical torture of a suspect in order to extract a confession. Conduct close to these situations may satisfy the compulsion element. Tricking or misleading a defendant, however, is not compulsion.[62]

The Court has interpreted incrimination broadly. A suspect's disclosure satisfies this element if it reasonably "could be used in a criminal prosecution or *could lead to other evidence* that *might* be so used."[63] In other words, a disclosure is incriminating if it could "furnish a link in the chain of evidence needed to prosecute" a defendant.[64] Incrimination, however, applies only to evidence that prosecutors might use in a criminal proceeding; therefore, the concept does not apply to individuals granted immunity from prosecution[65] or to disclosures that subject one to non-criminal sanctions only, such as loss of a job or a license, or to disgrace or embarrassment.[66] The privilege also is person specific: one can be forced to disclose information that would incriminate a third party but not oneself, including friends and family members.[67] Moreover, collective entities, such as corporations, partnerships, and organizations, cannot invoke the privilege.[68]

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[60] *See* Griffin v. California, 380 U.S. 609, 613-15 (1965); *see also* Lefkowitz v. Turner, 414 U.S. 70, 77-85 (1973) (striking down state statute that required state contracts to contain a clause that contractors waive their right to invoke the self-incrimination privilege with regard to subject matter relating to the contract).

[61] Over ninety percent of convictions in the United States are by guilty plea. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697-98 (2002) During the process of plea bargaining, "Prosecutors and other officials exert extraordinary pressure on defendants, not merely to obtain an answer, but to secure an unqualified admission of guilt. . . . Few nations are as dependent as ours on proving guilt from a defendant's own mouth." Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, in THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 184 (Helmholz et al. 1997). The U.S. Sentencing Guidelines also provide a reduced sentence to defendants who provide the government with complete information about their involvement in the criminal offenses for which they are convicted. *See* U.S.S.G. § 3E1.1. Under the common law, out-of-court confessions made after promises of favorable treatment were considered involuntary and were hence inadmissible at trial. *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 12 (1979).

[62] *See, e.g.*, Illinois v. Perkins, 496 U.S. 292, 294-300 (1990) (discussing an undercover officer posing as an inmate); Moran v. Burbine, 475 U.S. 412, 419-28 (1986) (involving a situation where the police did not tell suspect during interrogation that his lawyer had been trying to contact him); Oregon v. Mathiason, 429 U.S. 492, 493-96 (1977) (discussing police who told suspect falsely that his fingerprints had been found at the crime scene).

[63] Kastigar v. United States, 406 U.S. 441, 445 (1972).

[64] Hiibel v. Nevada, 124 S Ct. 2451, 2461 (2004) (quoting Hoffman v. United States, 341 U.S. 479, 486 (1951)). Even innocent suspects can satisfy the incrimination element if they reasonably fear that their answers may incriminate them. *See* Ohio v. Reiner, 532 U.S. 17, 18-22 (2001).

[65] Kastigar v. United States, 406 U.S. 441, 445 (1972).

[66] *See* Ullmann v. United States, 350 U.S. 422, 430-31 (1956).

[67] *See id.* at 431.

Testimony—the third formal element—refers to the communication of propositional content.[69] In other words, the privilege applies to the disclosure of one's knowledge or beliefs,[70] the contents of which are incriminating. The paradigm is that of suspects forced to verbally disclose the propositional content of their knowledge or beliefs. Non-verbal conduct, however, also may be testimonial: for example, the act of responding to a subpoena by providing a requested object discloses one's (1) knowledge that the object exists, (2) possession of it, and (3) belief that the provided object is the one demanded.[71] Physical evidence, by contrast, is not "testimony" and hence an individual forced to disclose it is not protected, even if the evidence is compelled and incriminating. This includes evidence (including DNA evidence) taken from a suspect's body such as blood, hair, fingerprints, breath, and so on.[72] Also excluded from "testimony"—because physical characteristics rather than content are what is relevant—are requiring suspects to provide voice and handwriting samples[73], appear in a lineup[74], and to try on clothing.[75]

The Fourth Amendment and the self-incrimination privilege share similarities in how they regulate the government's information-gathering practices. Government motive and fruit-of-the-poisonous-tree analysis provide two examples. The Fourth Amendment lowers the probable-cause burden when the government is not attempting to gather information from criminal suspects: examples include school drug testing,[76] roadblocks to protect motorists from drunk drivers[77] or locate witnesses,[78] and administrative inspections to protect the health and safety of citizens.[79] On the Fifth

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[68] Bellis v. United States, 417 U.S. 85, 92 (1974).

[69] *See* Allen & Mace, *supra* note 34, at 246-47.

[70] United States v. Hubbell, 530 U.S. 27, 35 (2000) (stating that the privilege applies to "express or implied assertions of fact or belief").

[71] Fisher v. United States, 425 U.S. 391, 410 (1976).

[72] Schmerber v. California, 384 U.S. 757, 760-65 (1966).

[73] United States v. Dionisio, 410 U.S. 1, 5-7 (1973) (involving voice exemplars); United States v. Mara, 410 U.S. 19, 21-22 (1973) (involving handwriting exemplars).

[74] United States v. Wade, 388 U.S. 218, 221-23 (1967).

[75] Holt v. United States, 218 U.S. 245, 252-53 (1910).

[76] See Bd. of Ed. v. Earls, 122 S. Ct. 2559, 2562 (2002).

[77] Michigan v. Sitz, 496 U.S. 444, 452-55 (1990).

[78] Illinois v. Lidster, 540 U.S. 419, 421 (2004).

[79] *See, e.g.*, Camara v. San Francisco, 387 U.S. 523, 528-40 (1967) (involving housing inspectors); See v. Seattle, 387 U.S. 541, 544-46 (1967) (involving commercial-property inspectors).

Amendment side, the privilege is generally unavailable if the government demands information in order to effectuate a non-criminal regulatory regime: examples include motorists who must identify themselves when involved in an accident[80] and guardians who must produce children under the care of social services.[81] However, in both contexts the Court has held the amendments to be fully applicable when the government purports to be carrying out a non-criminal purpose but its true motive is directed at criminals and criminal prosecutions.[82] For example, the Court has held that a government hospital's practice of drug-testing pregnant mothers and turning the results over to police violated the Fourth Amendment,[83] and the Court has held the Fifth Amendment privilege applied when a tax regulation targeted the proceeds of illegal gambling.[84] A second doctrinal similarity concerns fruit-of-the-poisonous-tree analysis: not only may the government generally not use evidence or statements it obtains as a result of violating the amendments, it also may not use evidence derived from the illegally obtained evidence or statements.[85]

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[80] California v. Byers, 402 U.S. 424, 427-31 (1971).

[81] Baltimore City Dept. of Soc. Serv. v. Bouknight, 493 U.S. 549, 556-62 (1990).

[82] Officer motive, however, is irrelevant when full Fourth-Amendment probable-cause analysis applies, even when evaluating routine traffic stops. *See* Whren v. United States, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary probable-cause Fourth Amendment analysis.").

[83] Ferguson v. Charleston, 532 U.S. 67, 85-6 (2001).

[84] Marchetti v. United States, 390 U.S. 39, 46-61 (1968).

[85] Wong Sun v. United States, 371 U.S 471, 484-93 (1963) (applying the Fourth Amendment). In the Fifth-Amendment context, the fruit-of-the-poisonous-tree doctrine does not apply to violations of *Miranda* that are otherwise voluntary. *See* United States v. Patane, 124 S. Ct. 2620, 2620 (2004) ("The Self-Incrimination Clause, however, is not implicated by the admission into evidence of the physical fruit of a voluntary statement. Accordingly, there is no justification for extending the *Miranda* rule to this context."). Outside of the immunity context, discussed *supra* p. 34–46, the Court has not held that the physical fruits of a Fifth-Amendment violation following involuntary statements must be suppressed; therefore, this may technically still be an open question. The Court has, however, expressly stated in dicta several times that the *Wong Sun* analysis would apply, and it has applied such analysis in evaluating police interrogation that violated the right to counsel under the Sixth Amendment. *See id.* at 2630 ("And although it is true that the Court requires the exclusion of the physical fruit of actually coerced statements, it must be remembered that statements taken without sufficient *Miranda* warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination."); Chavez v. Martinez, 123 S. Ct. 1994, 2002 (2003) ("our cases provide that those subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial." (original emphasis)); Michigan v. Tucker 417 U.S. 433, 445 (1974) (rejecting *Wong Sun* analysis for a third-party witness discovered based on statements made in violation of *Miranda* because "we have already concluded that the police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination."); *see also* Nix v. Williams, 467 U.S. 431, 442 (1984) (applying *Wong Sun* analysis to police interrogation that violated the defendant's right to counsel under the Sixth Amendment; and stating that such analysis applies to violations of the Fourth, Fifth, and Sixth Amendments).

Two doctrinal differences are worth noting as well. The first is the remedies provided for violations of the two amendments. The Fifth Amendment prohibits only the use or derivative use of compelled, incriminating testimonial communications during a criminal prosecution.[86] Therefore, there is no remedy if statements are compelled out of court but the suspect is not prosecuted.[87] By contrast, the Fourth Amendment provides a remedy regardless of whether illegally seized evidence is ever used to prosecute a criminal defendant; one has a civil remedy for damages for illegal searches and seizures.[88] A second difference is that the Fifth Amendment requires that suspects be given warnings and waivers when they are interrogated while in custody.[89] The Fourth Amendment has no similar requirement that suspects be apprised of their rights.[90]

The above doctrinal guideposts, along with the doctrinal similarities and differences, provide the framework from which I build my theory of the relationship between the Fourth Amendment and the Self-incrimination Clause—a task to which I now turn.

III. *Boyd* on the Overlapping Amendments: Still Crazy After All These Years?

The story of the relationship between the amendments begins with *Boyd*, and the subsequent chapters of the story include the Court's systematic rejection of *Boyd*. In doing so, however, the Court has largely avoided explicating a general theory of the necessary? relationship between the two amendments, leaving any such connections implicit in its various rulings. As Carolyn Frantz has remarked recently, after the amendments had been incorporated "questions about the relationship between the Fourth and Fifth Amendments [ ] largely faded into the constitutional background."[91]

At first blush, however, this remark may be neither a criticism nor relevant to a significant gap. It may not be entirely clear why we need a theory of the relationship

[86] Chavez v. Martinez, 538 U.S. 760, 766-67 (2003).

[87] *See id*. The Court (by a different majority) also concluded, however, that an officer's behavior in attempting to compel testimony may be so egregious as to violate substantive due process. *See id.* at 779-80.

[88] 42 U.S.C. § 1983; Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 392-97 (1971). Moreover, if a violation of the Fourth Amendment has occurred, it is complete following the completion of the illegal search. *See* Unites States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (holding that the Fourth Amendment does not apply to a search of a nonresident alien's foreign home, even though the government sought to use evidence seized during the search against the alien during his prosecution in the United States).

[89] Dickerson v. United States, 530 U.S. 428, 431-32 (2000); Miranda v. Arizona, 384 U.S. 436, 444-45 (1966).

[90] Florida v. Bostick, 501 U.S. 429, 439-40 (1991).

[91] Carolyn J. Frantz, Chavez v. Martinez's *Constitutional Division of Labor*, 55 Sup. Ct. Rev. 269, 277-78 (2003).

between these two constitutional provisions any more than we need a theory of the relationship between any other two given provisions in the Constitution. They are separate amendments, each with their own developed doctrine. Moreover, even if such a theory is helpful, it need not be the Court's job to articulate it, as opposed to deciding the separate Fourth and Fifth Amendment claims and arguments put before it in each discrete case. This last argument may be sound, but the first is not. The two amendments both regulate government evidence-gathering and they both protect citizens from government abuse in this activity. As such, some idea about how they work together will be useful.[92] As subsequent sections will demonstrate, the failure to appreciate this relationship has led to doctrinal confusion in several areas that implicate both amendments.

Other scholars have appreciated the need to articulate a theory of the relationship between the two amendments. Before presenting my theory, I discuss these other views and conclude that they fail as a theoretical matter. However, because these theories also are reacting to *Boyd*, I first explicate *Boyd*'s view. I ultimately conclude that the *Boyd* view is not as crazy as conventional wisdom has it.

A. *Boyd*'s View of the Fourth and Fifth Amendments

Along with being the Court's first detailed examination of the privilege against self-incrimination, *Boyd* presented a view of the relationship between the Fifth Amendment privilege and the Fourth Amendment. The case involved a civil-forfeiture proceeding, in which the key issue was whether the defendants (the two partners in an import business) had fraudulently imported cases of plate glass without paying import duties.[93] At trial the quantity and value of previously imported cases by the defendants became relevant, and the government (authorized by a federal statute) ordered the defendants to produce the previous invoice.[94] The government offered the invoice into evidence, and the trial court found for the government.[95]

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[92] The relationship is only one connection in a much larger pattern of provisions in the Bills of Rights that work together to constrain criminal prosecutions. The larger pattern includes, for example, the Fifth Amendment's provisions regarding double jeopardy, grand juries, and due process; the Sixth Amendment's provisions regarding jury trials, counsel, notice, confrontation of witnesses, and compulsory process; and the Eight Amendment's provisions regarding bail, fines, and punishment. Moreover, outside the criminal-procedure context, other amendments likewise work together, for example, most notably, the Thirteenth, Fourteenth, and Fifteenth Amendments, as well as the Ninth, Tenth, and Eleventh Amendments. Moreover, even if two amendments do not work together, the relationship between them may cause significant theoretical and doctrinal problems. *See, e.g.*, Pardo, supra note 42 (discussing the problematic, and unresolved, relationship between the First Amendment and the Seventh Amendment's Reexamination Clause).

[93] Boyd v. United States, 116 U.S. 616 (1886).

[94] *Id*. at 618.

[95] *Id*.

The U.S. Supreme Court held that both the order and the statute that authorized it violated both the Fourth and Fifth Amendments.[96] With regard to the Fourth Amendment, the Court concluded that, although no literal search had occurred, the order operated as the equivalent of a search and seizure because it served the same object and purpose.[97] The Court also found that the "search and seizure" was unreasonable because it authorized the government to take the defendants' private papers, a practice without historical precedent.[98] With regard to the Fifth Amendment, the Court noted that although this was technically a civil proceeding, the nature of the forfeiture proceeding was "quasi-criminal" and thus the privilege was applicable.[99] The Court concluded that compelling the defendants to produce their papers was a form of self-incrimination for purposes of the privilege.[100]

In holding that the order violated both amendments, the Court stated that in this case the amendments "run almost into each other."[101] Under the Court's view, the two amendments overlapped to protect citizens by creating a zone from which the government could not extract evidence, neither by searching and seizing the evidence nor, as the Government had done in *Boyd*, by ordering its production.[102] This inviolable zone was tied to the notion of property—citizens have a right to their property and it is unreasonable for the government either to search and seize it or to force citizens to turn it over for use against them in criminal proceedings; seizing or compelling the production of citizens' property is like forcing them to be witnesses against themselves.[103] Speaking of the "intimate relation" between the two amendments, the Court explained:

> They throw great light on each other. For the "unreasonable searches and seizures" condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment.[104]

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[96] *Id*. at 632.

[97] *Id*. at 632-33.

[98] *Id*.

[99] *Id*.

[100] *Id*.

[101] *Id*. at 633.

[102] *Id*. at 635.

[103] *Id*.

[104] Boyd v. U.S. 116 U.S. 616, 633 (1886).

Thus, according to the *Boyd* Court, the two amendments overlap whenever an unreasonable search and seizure produces evidence that is used in a criminal prosecution against the person from whom the evidence was seized.

Subsequent doctrinal developments have torpedoed *Boyd*'s view of the overlap. The elimination of the "mere evidence" rule meant that the government could, consistent with the Fourth Amendment, seize a citizen's personal property even if it was not contraband or a fruit or an instrumentality of crime.[105] The privilege against self-incrimination was limited to compelled, incriminating testimonial communications, thus removing physical evidence from the privilege's auspices. In addition, the invoice in *Boyd* would now be outside the privilege's scope because of the collective-entity doctrine (the invoice was the property of the defendants' partnership) and also perhaps the required-records doctrine (the government could have simply required that such shipping invoices be kept for future inspection by the government).

B. Scholarly Views of the Relationship between the Amendments

Reacting to the now-rejected *Boyd* view, scholars have offered a variety of ways to re-conceptualize the relationship between the amendments. Two prominent and robust examples are the recent views of Richard Uviller and Richard Nagareda. Uviller proposes that scholars should draw a distinction between the amendments based on the *location from which* and *from what* the government gathers information: property versus the suspect's mind.[106] Nagareda proposes we also draw a distinction, but between the *means* by which the government gathers information: unilateral taking by the government versus compelled giving by the suspect.[107] Both views fail as a theoretical matter; they are over- and under-inclusive of the amendments' core doctrinal features, and they incorrectly assume the amendments divide the protected events between them (i.e. that they do not overlap).

Professor Uviller begins by criticizing *Boyd*'s "inability to distinguish the invasion of privacy by unlawful search and seizure from the compelled disclosure of inculpatory facts," concluding that this "ultimately doomed the case" and that the amendments "do not run into each other."[108] According to Uviller, the amendments:

> diverge sharply to protect in different ways two very different aspects of personal security and autonomy. And in that distinction, the difference is clear between the personal papers protected by the Fourth Amendment, not against forced surrender, but against arbitrary invasion of its locus and baseless deprivation of its

[105] Warden v. Hayden, 387 U.S. 294, 300-01 (1967).

[106] Uviller, *supra* note 17, at 329–30.

[107] Nagareda, *supra* note 17, at 1581.

[108] Uviller, *supra* note 17, at 330.

> corpus, and, in contrast, the mind of the suspect protected by the Fifth against any form of curtailment of volitional control.[109]

Under this view, the relationship is that the Fifth Amendment protects "a person's sovereignty over the contents of his mind," and the Fourth Amendment protects "security in places and things."[110]

This view fails to capture the true relationship for two reasons. First, its theory of the self-incrimination privilege (like other top-down theories) is over-inclusive of core practices; the amendment does not protect "a person's sovereignty over the contents of his mind" or "against any form of curtailment of volitional control."[111] The government may invade the sovereignty of the contents of one's mind or curtail volitional control, such as when the government grants someone immunity or wants the contents of one's mind that would incriminate a third party. Second, the view mistakenly takes an either-or approach with regard to coverage by assuming the amendments "diverge sharply." If, as Uviller maintains, the Fourth Amendment protects against arbitrary invasions of privacy, there is no reason to suppose that one's mind is not also so protected. The Fourth Amendment protects "persons, houses, papers, and effects."[112] Plainly one's mind belongs to one's person.[113] Therefore, rather than "diverge sharply," they may overlap to protect this area.[114]

Professor Nagareda also begins by criticizing *Boyd*'s "conflation of the Fourth and Fifth Amendments" as "not analytically sound."[115] According to Nagareda, the amendments "articulate two very different sorts of restraints upon two distinct means of information gathering by the government."[116] The "fundamental distinction" between the amendments, he explains,

> is between the compelled giving of self-incriminatory evidence to the government (categorically impermissible under the Fifth Amendment) and the unilateral

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[109] *Id*.

[110] *Id*. at 324 n. 50.

[111] *Id.* at 330.

[112] U.S. Const. Amend. IV.

[113] In a recent essay, in arguing that custodial interrogation raises Fourth- in addition to Fifth Amendment concerns, Timothy O'Neill comes to a similar conclusion. *See* Timothy P. O'Neill, *Rethinking* Miranda*: Custodial Interrogation as a Fourth Amendment Search and Seizure*, 37 U.C. DAVIS L. REV. 1109, 1114 (2004) ("interrogation in nothing less than an attempt to "search" a person's mind. And when the police obtain answers to their questions, they are "seizing" the person's words").

[114] This indeed is my view, which I turn to shortly.

[115] Nagareda, *supra* note 17, at 1585.

[116] *Id*. at 1587.

> taking of such evidence by the government (permissible, when done in compliance with the Fourth).[117]

Thus, under this view, the Fifth Amendment restricts evidence gathered through "compelled giving," and the Fourth Amendment restricts evidence gathered through "unilateral taking" by the government.[118]

Nagareda's view is also both over- and under-inclusive. The over-inclusiveness, however, may be a virtue rather than a criticism in this case. His primary claim is that, as a matter of original understanding, the phrase "to be a witness" in the Fifth Amendment means "to give evidence,"[119] not the narrow reading of "testimonial communications" in current doctrine.[120] Thus, he argues, the privilege's scope should be expanded to include all acts of compelled giving of evidence. This change has the potential to be quite radical. At first blush it would appear to make the privilege applicable to a wide range of common and important evidence: some examples include blood, urine, and breath samples; fingerprints; line-up appearances; and making suspects or defendants try on clothing.[121] Nagareda, however, excludes such examples from the scope of the privilege on the ground that they are closer to unilateral taking rather than compelled giving because with probable cause the government can simply force a suspect's submission[122] and take the samples or fingerprints, or make the suspect stand in the lineup or wear clothing.

Even with this emendation, however, Nagareda's view still would extend the current privilege, and hence curtail government access, to other areas: for example, voice and handwriting samples would now be protected by the privilege. In addition, his theory would eliminate many of the doctrine's current exceptions—such as required records, reporting requirements, "booking" questions, and the compelled production of evidence for a regulatory purpose—that provide the government with needed information to carry out purportedly non-criminal regulatory regimes. Part of the story of *Boyd*'s downfall was the need for information concomitant with the rise of the modern administrative state; this bureaucratic system could not be carried out with an expansive self-

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[117] *Id.* at 1581.

[118] *Id.* at 1626.

[119] Justice Thomas (joined by Justice Scalia) has recently expressed a willingness to accept this more expansive view of the privilege. *See* United States v. Hubbell, 530 U.S. 27, 49–56 (2000) (Thomas, J., concurring).

[120] Schmerber v. California, 384 U.S. 757, 760-65 (1966).

[121] *See supra* notes 72-75 and accompanying text.

[122] Even the so-called "unilateral taking" under the Fourth Amendment, however, still requires suspects to engage in certain conduct, namely, cooperating with a search by staying out of the officers' way or submitting during an arrest.

incrimination privilege. Thus, even if Nagareda's view is theoretically virtuous, in practice it may simply be too costly to implement.[123]

The more serious criticism of Nagareda's theory is that it is under-inclusive. Regardless of whether courts should expand the privilege in the ways Nagareda suggests, his theory fails to account for what is plainly within the core of the privilege's scope. Namely, the privilege protects the compelled, incriminating propositional content of one's mind, the content of one's knowledge or beliefs.[124] By focusing solely on "means" rather than "ends," Nagareda's theory authorizes the government to use such content so long as it was gathered by appropriate means. Therefore, the government would be free to use a machine, something like a reliable lie detector, that could read one's thoughts.[125] As with blood samples, the government could strap unwilling suspects to the machine and extract their thoughts for use against them in a criminal trial. Now, Nagareda may bite the bullet here and say that such conduct is not protected because it involves forced submission rather than compelled giving. But authorizing the government to use suspects' thoughts (their knowledge and beliefs), taken against their will, against them in a criminal trial more plausibly provides a *reductio ad absurdum* for Nagareda's theory.[126]

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[123] Nagareda recognizes this point and suggests that if the government needs information it should grant immunity for its production. *See* Narareda, *supra* note 17, at 1645. The Court rejected such an approach in California v. Byers, 402 U.S. 424, 427-31 (1971).

[124] Allen & Mace, *supra* note 34, at 266-70.

[125] *See id*. at 248-50.

[126] Akhil Amar also criticizes *Boyd* for fusing the two amendments together:

> Boyd's mistake was to misread both the Reasonableness Clause and the Incrimination Clause by trying to fuse them together. At heart, the two provisions are motivated by very different ideas; they do not "run almost into each other" as a general matter. The Fourth, unlike the Fifth, applies equally to civil searches, and the Fifth, unlike the Fourth, is limited to compelled testimony.

Amar, *supra* note 16, at 790. Within his larger project, however, Amar does not offer a theory of how the amendments do or should fit together in their present manifestations. Rather, he suggests the each should be radically revised, and, in doing so, he rejects many core features of each. For example, the exclusionary rule and the probable-cause and warrant requirements under the Fourth Amendment, *see id*. at 800–19, and the exclusion of the fruits derived from statements compelled in violation of the self-incrimination privilege, *see* Amar & Lettow, *supra* note 17, at 918. (The Amar & Lettow view of the privilege—that it should be seen as protecting the reliability of evidence—is a classic example of a top-down theory, which then seeks to re-structure doctrine to fit the theory. *See supra* p. 6–10.) My theory takes certain core features of current doctrine as given (those described *supra* p. 14–21) and then offers a theory of their relationship. Amar's view of the amendments is more of an invitation to change the subject—which is not to deny that it might turn out to be an invitation worth accepting. If it is and the doctrine of each (or either) amendment changes radically, then the relationship *between* the amendments may need to be rethought as well.

C. A New Two-Step Approach

I submit that a better way to understand the relationship is as follows. Courts should see potential Fifth Amendment events as a subset of potential Fourth Amendment events. Fifth Amendment questions, thus, should be understood as arising second in a two-part inquiry. The first part of the inquiry—involving the Fourth Amendment—asks, whenever the government attempts to gather evidence, whether it has done so unreasonably. This should be just as true for searches of a defendant's mind. One may object that this view commits a sort of categorical mistakebecause mental content is intentional rather than extensional and, therefore, is not technically a "place" being searched.[128] But this objection would miss the mark. The Fourth Amendment protects "persons" (and clearly one's mind belongs to one's person) as well as places, and the test for whether a search has occurred is whether the government's attempt at evidence gathering implicates a "reasonable expectation of privacy."[129] If one has an expectation of privacy anywhere, it is likely to be in the contents of one's own mind.[130] Moreover, the Court has made clear that it is not necessary that for a search to occur there must be any physical trespass or touching.[131] Many Fifth Amendment events may qualify as seizures as well.[132] Compelling someone to appear at a certain time and place to testify before a grand jury plainly restricts one's movements through a show of authority followed by the suspect's submission; compelling someone to spend many hours searching for and compiling thousands of documents or objects plainly does as well.[133] Although these Fifth Amendment events may be searches or seizures, they might also be

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[128] The philosopher Gilbert Ryle famously argued that Cartesian notions of mind-body dualism commit such a category mistake. *See* GILBERT RYLE, THE CONCEPT OF MIND 11–24 (1949). "Extensional" language refers to objects in space, for example, persons, houses, papers, and effects; "intensional" language refers to internal states like beliefs, desires, fears, hopes, etc. On the distinction see A COMPANION TO THE PHILOSOPHY OF LANGUAGE 663-64, 668 (2000) (Bob Hale & Crispin Wright eds.)

[129] *See* Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

[130] Consistent with this is the fact that we do not convict and punish people for Orwellian "thought-crime," i.e., criminal thoughts that occur without overt acts. *See also* O'Neill, *supra* note 113, at 1119 ("If, when we consider that inside a house 'all details are intimate details,' how much more intimate are the very thoughts inside a person's head?") (quoting Kyllo v. United States, 533 U.S. 27, 37 (2001)).

[131] *See* Kyllo v. United States, 533 U.S. 27, 40 (2001).

[132] A seizure occurs when government agents restrict a suspect's movements through intentional physical touching or a show of authority followed by submission. California v. Hodari D., 499 U.S. 621, 625-29 (1991).

[133] But see United States v. Dionisio, 410 U.S. 1, 5-7 (1973), discussed *infra* at note 145 and accompanying text.

reasonable and thus permissible under the Fourth Amendment. However, the crucial point is that whether they are reasonable or not is a Fourth Amendment concern.[134]

The second part of the inquiry involves the subset of the above events (i.e., those that are not unreasonable under the Fourth Amendment) that implicate the Fifth Amendment. These are the events that fall within the privilege's formal doctrine: namely, those that involve government conduct that compels incriminating, testimonial communications, defined as the propositional content of one's knowledge or beliefs, for use at a criminal trial. If information falls within this category and does not fall under an exception, then the privilege kicks in and such content may not be compelled—even if the government's evidence gathering was reasonable under the first part of the inquiry.

To sum up, my theory relates to the theories discussed above as follows. Uviller was correct to focus on the location from which evidence is gathered, rather than on means of evidence gathering, to explain the Fifth Amendment. However, his view that it protects mental sovereignty was over-inclusive. Both Uviller and Nagareda incorrectly assumed that the amendments diverged to protect different events, rather than overlapping in some situations. *Boyd*, on the other hand, was correct to view the two amendments as overlapping—but not in the way the opinion suggests. They do not overlap to protect against having one's property "testify" against one at a criminal trial. They overlap to form the two-part inquiry outlined above, in situations where the government is seeking access to the propositional content of one's knowledge or beliefs.

My theory is further developed in the next section, where I turn to recent doctrinal problems involving the relationship between the amendments.

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[134] One may reject the broad reading above by concluding that some Fifth-Amendment events—in particular, in-court questioning—simply occur outside of the Fourth Amendment universe of events. If so, in these outside-the-Fourth-Amendment situations one's conclusions would still come out the same under the first inquiry, but for a different reason—namely, that nothing in the Fourth Amendment would make the conduct unreasonable because the conduct does not constitute a search or seizure. The theoretical difference would be that rather than *all* Fifth-Amendment events arising within the Fourth Amendment, some would not. But there would still be considerable overlap. I reject this view for the reasons explained above. See *also infra* note 144 and accompanying text. The best candidate for a Fifth Amendment event occurring outside the Fourth Amendment universe is questioning in court by defense counsel or in civil cases—where witnesses can invoke the privilege—because there may be no state actor attempting to gather information. But the Court has already made clear that both defense counsel and counsel in civil cases are engaged in "state action" when they exercise peremptory challenges in a discriminatory manner that is constitutionally impermissible because the jury system (of which peremptory challenges are a part) would not exist without "overt, significant participation from the government." *See* Georgia v. McCollum, 505 U.S. 42, 59 (1992) (involving defense counsel); Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 616 (1991) (involving civil litigants). This rationale applies even more so when it comes to questioning witnesses. It is the government (and not the defendant or civil parties) that can compel a witness's attendance; it is the government (and not the defendant or civil parties) that can punish a witness for contempt or perjury. To be clear, while I consider the Fourth Amendment to be implicated, it will largely be epiphenomenal in these contexts; if the questioning is relevant (and not superfluous) it will be reasonable and if not relevant the evidence rules will already preclude it (thus leaving little if any work for the Fourth Amendment to do).

IV. Three Problems of Transposition

This section discusses three areas where the Fourth and Fifth Amendment doctrines are implicated and have become entangled, and where the theory presented in the previous section disentangles the doctrines. These three issues concern subpoenas, stop-and-identify statutes, and the use of pre-arrest silence at trial as substantive evidence of guilt. The first issue, on one hand, and the second two, on the other, display opposite paths to entanglement.

The first entanglement, subpoenas, occurred as part of *Boyd*'s dismantling. Fourth Amendment doctrine became unnecessarily truncated, and courts have employed Fifth Amendment doctrine to compensate for the truncation and to address a Fourth Amendment concern—the reasonableness of government evidence gathering. This entanglement has led to analytical disarray and the employment of a mismatched tool. The additional two issues go in the opposite direction. These issues arise prior to formal arrest and thus prior to the triggering point for *Miranda* warnings, custodial interrogation. One concerns statutes that criminalize the failure of suspects to identify themselves during *Terry*-style stop-and-frisks; the other concerns the prosecution's use at trial of a defendant's silence prior to formal arrest as evidence of the defendant's guilt. During these "overlapping" situations, the doctrine has mistakenly focused primarily on Fourth Amendment doctrine and unnecessarily truncated Fifth Amendment analysis. Due to this truncation, courts began to employ Fourth Amendment doctrine to address a Fifth Amendment concern: whether the government is compelling incriminating propositional content from the mind of a suspect. This entanglement also has led to analytical disarray and the employment of a mismatched tool. My theory attempts to disentangle these three areas.

A. Subpoenas

The use of subpoenas to compel testimony and the production of documents, objects, and other evidence provides the government with an efficient way to obtain evidence.[135] It shifts much of the work to the target to gather, sort, and provide sometimes large amounts of information. Perhaps this reason more than any other explains and perhaps justifies the rejection of the *Boyd* view that the Fourth and Fifth Amendments overlap to prevent the government from compelling citizens to produce incriminating evidence. For the same reason that their use provides a powerful evidence-gathering tool, however, subpoenas also create the potential for abuse of their targets. While entangling various rationales, the post-*Boyd* Court proceeded to dismantle the protection from subpoenas that both amendments provided. This left targets subject to virtually unlimited government intrusion, a situation instantiated in the eyes of many by

[135] Both testimonial subpoenas and subpoenas *duces tecum* (to compel, for example, documents or other items) are governed by Fed. R. Crim. P. 17.

the Independent Counsel's investigation of President Clinton.[136] In a case related to that investigation, *Hubbell v. United States*[137]—which the Court of Appeals had referred to as involving an "admittedly abstract and under-determined area of law"[138]—the Court proceeded to put back some of the constitutional protection afforded to subpoena targets. This, however, also further entangled the doctrine.

1. The Fourth Amendment . . .

Of the two amendments, the Fifth Amendment plays the major role in subpoena doctrine. This is due, in part, to the absence of a significant role for the Fourth Amendment. I first discuss this limited role for the Fourth Amendment, the doctrine of which (or absence thereof) lurks in the background of the more complicated Fifth Amendment role.

The Post-*Boyd* starting point is *Hale v. Henkel*, which involved a grand-jury subpoena for a corporate officer to provide any corporate documents regarding correspondences or contracts between his company and six other companies.[139] The Court concluded that "an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment," and that in this case "the *subpoena duces tecum* is far too sweeping in its terms to be regarded as reasonable."[140] The Court explained that because the order did not ask for the production of "a single contract" or "contracts of a particular corporation," but rather for "all understandings, contracts, or correspondences between the company and six other companies," it could "scarcely be more universal in its operation" and might even "completely put a stop to the business of that company."[141] Thus, the Court required the government to show "some necessity" or to produce "some evidence of their materiality" in order "to justify an order for the production of a mass of papers."[142] *Hale* thus suggested three related ways the Fourth Amendment might protect targets of subpoenas: overbreadth, relevance, and the burden imposed. These three ideas are related because a subpoena will be too

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[136] *See, e.g.,* William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 856-69 (2001); Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in their Investigative Role*, 68 FORDHAM L. REV. 723, 729-33 (1999).

[137] 530 U.S. 27 (2000).

[138] United States v. Hubbell, 167 F.3d 552, 570 (D.C. Cir. 1999).

[139] 201 U.S. 43, 44-46 (1906). The Fifth Amendment was not available, the Court explained, because the privilege was personal and Hale could not assert it on behalf of the corporation. *Id*. at 70.

[140] *Id*. at 76.

[141] *Id*. at 76.

[142] *Id*. at 77 ("A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms.").

sweeping and burden the recipient more than is necessary precisely because it compels masses of irrelevant (instead of or as well as relevant) evidence.

While these three protections are available formally,[143] more recent Supreme Court decisions have left them without much bite. For example, in *United States v. Dionisio* the recipient of a grand-jury subpoena brought a Fourth-Amendment challenge when he was one of twenty people ordered to the local United States Attorney's office to provide a voice exemplar.[144] The Court held that, although inconvenient and burdensome, such subpoenas are not "seizures" for Fourth Amendment purposes because they carry less "social stigma" than arrests.[145] Then, in applying the *Hale* "too sweeping" standard, the Court concluded that the subpoena was reasonable by noting that the grand jury's investigative power is "necessarily broad," and by assuming the grand jury likely had a legitimate reason for subpoenaing all twenty targets.[146]

The Court's determination that the grand jury has "necessarily broad" powers means it will be difficult for targets to show that a subpoena is too sweeping, particularly when the government need not make any showing of the requested item's relevance. This standard was solidified in *United States v. R. Enterprises, Inc*, in which the Court held that recipients bear the burden of showing subpoenas are unreasonable.[147] After noting that grand juries cannot engage in "arbitrary fishing expeditions" or "select targets . . . out of malice or an intent to harass," the Court required that targets objecting on relevance grounds must satisfy the nearly impossible-to-satisfy standard of whether

> there is *no reasonable possibility* that the *category* of materials the Government seeks will produce information relevant to the *general subject* of the grand jury's investigation.[148]

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[143] *See* Fed. R. Crim. P. 17; United States v. Dionisio, 410 U.S. 1, 11-12 (1973) (recognizing that subpoenas may be too sweeping and thus unreasonable); United States v. R Enterprises, Inc., 498 U.S. 292, 299 (1991) (recognizing that subpoenas may not be arbitrary or issued to harass targets).

[144] United States v. Dionisio, 410 U.S. 1, 3 (1973).

[145] Under current doctrine, this is a non sequitur. Stigma has nothing to do with the test for seizures. Seizures occur when there is submission in response to a government's show of authority. *See* California v. Hodari D., 499 U.S. 621, 625-29 (1991). This was the case here because Dionisio was held in contempt for his initial refusal to comply before he submitted. United States v. Dionisio, 410 U.S. at 5-7. Brief highway stops of five minutes or less are "seizures" under the Fourth Amendment, even when the stops take place without individualized suspicion (and hence no stigma). *See* Indianapolis v. Edmond, 531 U.S. 32, ???? (2000) ("It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment.").

[146] 410 U.S. at 12–13.

[147] 498 U.S. 292, 301 (1991). This case involved "a series of subpoenas" to three companies for "a variety of corporate books and records" as part of an investigation for the interstate transportation of obscene materials. *Id*. at 294-95.

[148] *Id*. at 301 [emphasis added].

Because a subpoena is not too sweeping if what it seeks is relevant—and Courts determine relevance by whether the requested information is part of a general category with some reasonable possibility of producing evidence relevant to a general subject matter—both relevance and overbreadth challenges are feckless.[149] The third potential challenge—the burden imposed—is ineffective as well. Increased technology making data storage, retrieval, and copying relatively cheap has meant that "[c]ourts commonly have viewed the expense of assembling and duplicating the materials as simply another cost of doing business, particularly where the subpoenaed party is a large corporation."[150]

It is against this background that Fifth-Amendment doctrine also protects subpoena targets.

2. . . . and the Fifth Amendment . . .

After *Boyd*, it appeared that the Fifth Amendment protected against the use of defendants' papers to incriminate them. Just as the government could not compel a defendant to utter testimony in court, the defendant's out-of-court, written-down words likewise could not be introduced to, as it were, "testify" against her. Thus the government could not compel a subpoena target to provide her incriminating papers. The Court, however, rejected this view in *Fisher v. United States*.[151]

Fisher concerned a subpoena, issued as part of an IRS investigation, to compel a taxpayer to produce documents, prepared by an accountant, in the taxpayer's lawyer's possession.[152] The taxpayer attempted to invoke his self-incrimination privilege, but the Court concluded that the privilege did not apply.[153] This situation differs from the one in the above paragraph in two respects that might appear to be relevant: the taxpayer did not prepare or possess the documents. The Court found these two differences to be irrelevant. Regardless of whether the documents were prepared by the taxpayer and in his possession, the taxpayer still could not invoke the privilege.[154] The significant point for the Court was that the documents were voluntarily prepared,[155] because the privilege

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[149] Administrative subpoenas require the government to describe the desired documents or objects with reasonable "particularity." *See* Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 209 (1946). Trial-court subpoenas require the government to show both relevancy and admissibility (and the request must meet a specificity requirement). *See* United States v. Nixon, 418 U.S. 683, 700 (1974).

[150] LA FAVE, ISRAEL & KING, CRIMINAL PROCEDURE § 8.7, 432 (3d. ed. 2000).

[151] 425 U.S. 391 (1976).

[152] *Id*. at 393–96. The appeal before the Court involved several consolidated cases. *See id.*

[153] *Id.* at 414.

[154] The Court appeared to leave open the issue of "private papers," *id*. at 414, but the Court's reasoning (i.e. no compulsion) would appear to apply to private papers as well.

[155] Id. at 409–10.

applies only to compelled, incriminating testimony. Since the documents were prepared voluntarily, the Court reasoned, they were not compelled and thus not protected.[156]

Although the Court concluded that the privilege did not apply to the content of subpoenaed documents (or to objects),[157] it explained that the privilege may apply to the act of producing a document or an object because doing so may be testimonial. Namely, the act of production may reveal the existence of the document or object, the target's possession of it, its authenticity, or the target's belief the produced document or object matches the document or object described in the subpoena.[158] The Court concluded, however, that in this case these testimonial aspects were not implicated because "[t]he 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."[159] Thus the Court concluded that any implicit admissions were not testimony and, therefore, not protected by the privilege.[160]

Although *Fisher* removed much of the potential Fifth Amendment protection for subpoena targets by saying the contents of what is subpoenaed is not protected, it put additional protection in place for testimonial features of production. Eight years later, for example, the Court invalidated a subpoena where the target's production of documents would reveal the existence and location of bank accounts in absence of the government's knowledge of these facts.[161] Thus, under *Fisher*'s act-of-production doctrine, if the government wanted documents or objects, it needed to immunize the target for any incriminating acts of production.[162] Then came *United States v. Hubbell*, a confusing

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[156] *Id.* This conclusion creates some irony when viewed in connection with the "required records" exception, which states that the privilege does not apply to certain records *because* the government requires the records be created. *See* Shapiro v. United States, 335 U.S. 1, 16-20 (1948).

[157] The Court's conclusion applies to voluntarily possessed objects as well as documents. Moreover, although the Court has never so held, the logic of *Fisher* implies that the contents of private papers also are not protected when they were voluntarily prepared. Most appellate courts have reached this conclusion. *See, e.g.*, Barrett v. Acevedo, 169 F.3d 1155, 1168 (8th Cir. 1999); In re Grand Jury Subpoenas Duces Tecum, 1 F.3d 87, 93 (2d Cir. 1993); United States v. Wujkowski, 929 F.2d 981, 983-85 (4th Cir. 1991); In re Sealed Case, 877 F.2d 83, 84 (D.C. Cir. 1989); In re Grand Jury Proceedings, 759 F.2d 1418, 1419 (9th Cir. 1985). Two circuits, however, have resisted this trend and have extended protection to private papers. *See* In re Grand Jury Proceedings, 55 F.3d 1012, 1013–14 (5th Cir. 1995); In re Grand Jury Proceedings, 632 F.2d 1033, 1043 (3d Cir. 1980).

[158] 425 U.S. at 410.

[159] *Id.* at 411.

[160] *Id.* at 411–12.

[161] United States v. Doe, 465 U.S. 605, 617 (1984).

[162] *See id.* Kastigar v. United States, 406 U.S. 441, 445 (1972), held that immunity must be "coextensive" with the privilege, meaning that the government cannot use any statements or acts that would be covered by the privilege, nor may it use protected statements or acts to derive other evidence.

case that has been explained as a possible return to *Boyd* as well as a mistake that the Court may correct.[163]

Hubbell arose out of the Independent Counsel's ("the IC") investigation of the Whitewater Development Corporation.[164] In 1994, as a result of the investigation, Webster Hubbell, an Arkansas lawyer, pleaded guilty to mail fraud and tax evasion and agreed to provide the IC with information regarding Whitewater.[165] Two years later, while Hubbell was incarcerated, the IC served Hubbell with a broad-ranging subpoena,[166] intended to determine whether he had cooperated fully. Hubbell invoked his Fifth Amendment privilege, was granted immunity for his acts of production, and was ordered to respond.[167] Hubbell responded with more than 13,000 pages of documents and answered a series of questions.[168] Based on these documents, Hubbell was indicted for additional, unrelated tax-evasion and mail-fraud charges.[169] The government explained that it did not plan on using any of the produced documents against Hubbell at trial, but the government conceded it could not demonstrate prior knowledge of the produced documents, their contents, or other evidence of the charged crimes.[170]

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[163] 530 U.S. 27 (2000). *See* Uviller, *supra* note 17, at 321 (stating that *Hubbell* "hints at a rebirth of the thoroughly discredited and deeply interred *Boyd* doctrine"); Allen & Mace, *supra* note 34, at 290 (describing *Hubbell* as a possible "aberration").

[164] *Hubbell*, 530 U.S. at 30.

[165] *Id*. at 3031.

[166] The subpoena's language is reprinted in the Court's opinion. *See id.* at 46–49. To illustrate the breadth of the subpoena, consider just one of the eleven categories:

> F. Any and all documents reflecting, referring, or relating to Webster Hubbell's schedule of activities, including but not limited to any and all calendars, day-timers, time books, appointment books, diaries, records of reverse telephone calls, credit card calls, telephone message slips, logs, other telephone records, minutes, databases, electronic mail messages, travel records, itineraries, tickets for transportation of any kind, payments, bills, expense backup documentation, schedules, and/or any other document or database that would disclose Webster Hubbell's activities from January 1, 1993. *Id*. at 47.

One can only imagine how difficult it would be to produce this kind of documentation, along with ten other similarly worded categories, from three years ago?

[167] 18 U.S.C. § 6003(a), upheld in Kastigar v. United States, 406 U.S. 441, 462 (1972), provides immunity to the extent allowed by law. As discussed above, according to *Fisher* the privilege does not apply to the content of the documents but only to testimonial acts of production. 425 U.S. 391, 410-11 (1976). Thus immunity extends to any testimonial acts.

[168] Hubbell, 530 U.S. at 31.

[169] *Id*. at 31–32.

[170] *Id*. at 33.

The Court framed the issues in terms of whether the government could compel a witness to produce "incriminating documents that the Government is unable to describe with reasonable particularity," and whether, following a grant of immunity, the privilege prevents "the Government from using them to prepare criminal charges against him."[171] While the privilege did not apply to the contents of the documents Hubbell produced, the Court applied *Fisher* to examine whether the privilege applied to his acts of production. The Court explained *that Fisher* did apply because Hubbell's "truthful reply" identified and produced incriminating documents,[172] and "the Government [had] not shown that had any prior knowledge of either the existence or whereabouts of the . . . documents."[173] Because the government could not satisfy *Fisher*'s "foregone conclusion" rationale[174] and had used extensively "the contents of [Hubbell's] mind,"[175] the act of production was testimony protected by the privilege and for which immunity attached. Therefore, the Court concluded that, because the government could not show the evidence it used to obtain the indictment or planned to use at trial had a "wholly independent" source, the indictment must be dismissed.[176]

3. . . . Disentangled

Fisher's act-of-production doctrine (and its latest instantiation in *Hubbell*) manifests doctrinal entanglement. Under the auspices of the self-incrimination privilege, courts are applying Fourth Amendment rationales to respond to Fourth Amendment concerns. The concerns are that the government will use the subpoena power to engage in broad "fishing expeditions," use it arbitrarily, or use it as a tool to harass targets.[177] Indeed, the Court has pointed to these concerns in its Fourth Amendment cases,[178] even though the effect of these cases was a broad subpoena power, an area typically addressed under the Fifth Amendment.[179] Despite rhetoric about grand-jury independence, prosecutors (not the courts or jury members) control the issuance of subpoenas,

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171 *Id*. at 29–30.

172 *Id*. at 41–42.

173 *Id*. at 45.

174 *Id.* at 44 ("Whatever the scope of the 'foregone conclusion' rationale, the facts of this case plainly fall outside it.")

175 *Id*. at 43.

176 *Id.* at 45-46.

177 *See* William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 861 (2001) (stating that "an almost limitless subpoena power means an almost limitless potential for unjustified intrusions on the privacy, time, and energy of suspects and witnesses").

178 *See supra* p. 37-8.

179 *See* Niki Kuckles, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 35 (2004) ("The breadth of the grand jury's power is virtually without parallel.")

determine what evidence to present, and decide on the charges.[180] Even the broadly worded subpoena in *Hubbell* was "hardly unique" and included "standard boilerplate subpoena language" routinely used in white-collar crime investigations.[181]

My theory of the relationship between the amendments makes the entanglement in this area explicit and shows how the courts could correct it. Under my theory, a government attempt at evidence gathering should be subject to a two-part inquiry: first, whether was government's action was unreasonable under the Fourth Amendment, and second, whether the action attempts to compel incriminating propositional content from the mind of a suspect in order to use it against that suspect at a criminal trial. According to *Fisher* and *Hubbell*, acts of production may become "testimony" and hence within the scope of the privilege if they add information to the government's knowledge and the government makes use of that information. By determining the scope of the privilege based on what the government knows—whether in terms of "forgone conclusion" (*Fisher*) or "reasonable particularity" (*Hubbell*)—the act-of-production cases confuse the two inquiries. Government knowledge is relevant to the Fourth Amendment reasonableness inquiry, and it is not relevant to whether the production compels incriminating propositional content.[182]

Whether the Fifth Amendment privilege applies should not depend on the government's knowledge. Any act of production will reveal the propositional content of the target's mind, namely, beliefs about the existence, possession, and authenticity of the items produced, as well as that the items match the subpoena's description. This will be so even when the government already knows everything about the items prior to their production. Other areas protected by the privilege show the folly in this approach. For example, if the privilege truly depended on whether the information added to the government's knowledge, then this would imply that defendants should be forced to testify or suspects not be allowed to invoke their *Miranda* warnings whenever the government already knows what their answers will be.[183] While somewhat unrelated, the

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[180] *Id.* at 26 (stating that "[a] grand jury investigation is simply the term for an investigation in which the prosecutor chooses to use the grand jury as one of her tools").

[181] Lance Cole, *The Fifth Amendment and Compelled Production of Personal Document After* United States v. Hubbell – *New Protection for Private Papers?*, 29 AM. J. CRIM. L. 123, 164 (2002).

[182] Even prior to *Fisher*, the Court's self-incrimination cases imported other Fourth Amendment rationales. For example, in two cases decided in the three years before *Fisher*, the Court found the privilege did not apply because the targets had no "expectation of privacy" in the subpoenaed items. *See* Bellis v. United States, 417 U.S. 85, 92 (1974) (holding that partners cannot invoke privilege with regard to partnership's records); Couch v. United States, 409 U.S. 322, 335 (1973) (involving financial records turned over to accountant). Whether one has a reasonable expectation of privacy is the test for whether there has been a search for purposes of the Fourth Amendment. *See* Kyllo v. United States, 533 U.S. 27, 40 (2001); Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

[183] *See* Fisher, 425 U.S. at 429 (Brennan, J., concurring) ("I know of no Fifth Amendment principle which makes the testimonial nature of evidence . . . turn on the strength of the Government's case against him."); *cf.* Nagareda, supra note 17, at 1597 ("being a witness against oneself has nothing to do with the extent of the government's preexisting knowledge").

hearsay doctrine also helps to illustrate this point because, similar to act-of-production "testimony," acts may be "implied assertions" and hence hearsay. For example, suppose the police ask a robbery suspect's wife for the shirt he was wearing the night the robbery occurred, and then the prosecution at trial offers testimony by an officer that the wife gave a particular shirt to prove the suspect was wearing the shirt on the night in question. This "implied assertion" by the wife would plainly be hearsay,[184] and it would be regardless of whether the government already knew which shirt the suspect wore. The same should be true with regard to the self-incrimination privilege.

But, according to *Fisher* and *Hubbell*, the government would be free to use a target's acts of production at trial to prove existence, authenticity, etc., so long as they already knew the information beforehand. This use can take place because when the government already knows the information, the acts of production are not "testimonial" and hence not within the scope of the privilege.[185] If this is so, then there is nothing left to prevent the government from using them at trial. Now, such evidence may be cumulative and hence excluded if the government already offers evidence on this point.[186] The crucial point, however, is that the government would be free to substitute and use an act of production instead of its other evidence on the same point because the act's status as testimony depends on government knowledge. When this happens the government will be using the compelled, incriminating contents of a target's mind against him at a criminal trial, which is precisely what the privilege is intended to protect against.

Government knowledge should, however, play a more prominent role in the first inquiry: was the subpoena unreasonable? The more the government already knows about the requested items, the less likely it is engaged in a "fishing expedition" or compelling items arbitrarily or to harass.[187] This is not to suggest that subpoenas should be subject to the Fourth Amendment's probable-cause requirement or a Fourth

[184] Although hearsay, the implied assertion may still be admissible under an exemption or exception. Moreover, when defendants' acts of production are "implied assertions" they fall under the hearsay exemption for party-opponent admissions. *See* Fed. R. Evid. 801(d)(2). *See also* Davis v. Israel, 453 F. Supp. 1316, 1323-26 (E.D. Wis. 1978) (holding that a robbery suspect's actions in response to police statements to put on the clothes he wore the night before were "testimony" for purposes of the Fifth Amendment).

[185] Like the Supreme Court's opinions, Professor Cole also assumes that acts of production are not "testimony" when they don't add to the government's knowledge. *See* Cole, *supra* note 180, at 159–60 ("If the government can meet the reasonable particularity test . . . then the act of production does not have sufficient testimonial value to warrant Fifth Amendment protection."). Thus, under his analysis, the government also would be free to use those acts at trial.

[186] *See* Fed. R. Evid. 403.

[187] In addition to a tougher Fourth Amendment standard, another proposal to curb such practices may be through changing ethical rules for prosecutors. *See* Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in their Investigative Role*, 68 FORDHAM L. REV. 723, 751-70 (1999).

Amendment analog to *Fisher*'s "forgone conclusion" standard.[188] Grand-jury investigations are just that -- investigations -- and therefore need wider latitude to operate effectively.[189] As discussed in the next Section, the Fourth Amendment provides a lower standard, reasonable suspicion, for limited investigative stops, and a similar standard could be employed in this area. Indeed, *Hubbell*'s use of "reasonable particularity" could provide the standard—but under the Fourth, rather than the Fifth Amendment.[190]

Finally, while government knowledge should play primarily a Fourth Amendment role, it will also, under my theory, enter into the Fifth Amendment inquiry. But its role should not be to determine whether the acts are "testimonial" and thus whether the privilege applies. Once the privilege applies, it may be necessary for courts to determine whether the government, as in *Hubbell*, made derivative use of the acts in gathering evidence. In these circumstances, government knowledge is relevant to show the government had an independent source for the information gathered.[191] In other words, once a court has determined that information was obtained in violation of *either* amendment, what the government knew before the violation took place will be important for determining whether it had an independent source for such information.

B. Stop-and-Identify Statutes

Many states have criminalized the failure of suspects to identify themselves while detained during lawful investigative stops.[192] The Court authorized such stops under the Fourth Amendment in *Terry v. Ohio*.[193] When officers can articulate "reasonable suspicion" that a suspect has engaged, is currently engaged, or is about to engage in criminal conduct, officers may briefly stop and detain the suspect for the purpose of asking questions in order to verify or alleviate their suspicions.[194] If probable cause does

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[188] Cole suggests that, after *Hubbell*, prosecutors may be better off getting search warrants (rather than subpoenas) for private documents whenever they can satisfy the Fourth Amendment's probable-cause and particularity requirements. *See* Cole, *supra* note 180, at 130.

[189] Uviller, *supra* note 17, at 321–22, 334–35, recognizes that "beefing" up the Fourth Amendment to require probable cause and particularity would essentially "defeat the value" of grand-jury investigations, which by their nature are necessarily broad.

[190] The court of appeals in *Hubbell* used "reasonable particularity" as the test for Government knowledge in its analysis under the Fifth Amendment. *Hubbell*, 167 F.3d at 579. *See also* In re Grand Jury Subpoena Duces Tecum, 1 F.3d 87, 93 (2d Cir. 1993) (using "reasonable particularity" as the test for the self-incrimination privilege). Indeed, this standard arose in the Fourth-Amendment context as the standard for administrative subpoenas. *See* Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 209 (1946).

[191] Independent-source analysis applies under Fourth Amendment doctrine as well. *See* Murray v. United States, 487 U.S. 533, 542 (1988).

[192] *See* Hiibel v. Nevada, 124 S. Ct. 2451, 2456 (2004) (collecting state statutes). Sometimes the crime is the violation of a general obstruction-of-justice statute, as was true in this case. *See id*. at 2455.

[193] 392 U.S. 1, 16-27 (1968).

[194] Officers can also frisk suspects to check for weapons. *See id.* at 16-27.

not arise during the encounter, the suspect is free to go. But what if a state criminalizes the very act of not answering questions during this encounter? Does either the Fourth or Fifth Amendment prohibit this practice?

This past term, the Court considered an example of this general issue in *Hiibel v. Nevada*, concluding that neither amendment prohibited the arrest of a suspect who refused to identify himself during a *Terry* stop.[195] The Court's opinion and the general issue provide a second example of Fourth and Fifth Amendment entanglement. The entanglement in this example is in one sense the reverse of the subpoena issue discussed above. The entanglement there involved more of a Fourth Amendment problem being treated primarily with Fifth Amendment analysis; this issue involves more of a Fifth Amendment issue being treated primarily with Fourth Amendment analysis.

The facts of *Hiibbel* can be summarized quickly. The police in Humbolt County, Nevada, received a call reporting an assault in a truck near a particular road.[196] When the police arrived at the scene, they found Larry Hiibbel standing outside a truck and a woman, his daughter, inside.[197] The officers told Hiibel they were investigating a report of a fight and asked if he had any identification.[198] He refused and asked why they wanted it; they said they wanted to find out who he was and what he was doing there.[199] After several requests and subsequent refusals from Hiibel, the officers told him that if he did not identify himself, they would arrest him.[201] He refused again; they arrested him.[202] A jury convicted Hiibel of violating a Nevada statute for obstructing "a public officer in attempting to discharge his duty."[203] Hiibel argued that his arrest and conviction violated both his Fourth and Fifth Amendment rights. The Nevada Supreme Court rejected both arguments, without even discussing the Fifth Amendment argument.[204] It rejected the Fourth Amendment argument after balancing the individual's privacy interest against the

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[195] 124 S. Ct. 2451, 2457-61 (2004).

[196] *Id*. at 2455.

[197] *Id*.

[198] *Id*.

[199] *Id*.

[201] *Id*.

[202] *Id*. A video recording of the encounter (from a camera on the officers' car) is available at www.papersplease.org/hiibel .

[203] Nev. Rev. Stat. § 171.123.

[204] Hiibel v. Sixth Jud. Dist. Ct., 59 P.3d 1201, 1203-07 (2002).

government's need for the information, concluding that the government's need for investigative purposes and to protect officer safety outweighed any privacy interests.[205]

The relevant U.S. Supreme Court cases prior to *Hiibel* can also be summarized quickly. After *Terry*, the Court has invalidated both more general vagrancy and more narrow identification statutes on vagueness and Fourth Amendment grounds. With regard to vagueness, the Court struck down a vagrancy statute because its classifications—which relied on "archaic" terms such as "rogues," "common night walkers," and "habitual loafers"—failed to give notice to ordinary citizens and encouraged "arbitrary and erratic arrests and convictions."[206] Likewise, the Court struck down on vagueness grounds a stop-and-identify statute that required those detained to produce "credible and reliable" information.[207] With regard to the Fourth Amendment, the Court invalidated a conviction for violating a state stop-and-identify statute because the initial stop was not based on "reasonable suspicion" of criminality, as is required for a lawful *Terry* stop.[208]

Turning back to *Hiibel*, after noting that the statute did not suffer from the vagueness problems inflicting previous statutes,[209] the Court rejected Hiibel's Fourth Amendment argument. The Court first explained that the Fourth Amendment requires only that officers support their initial stops with reasonable suspicion and that officers' actions must be "reasonably related in scope to the circumstances which justified the [stop] in the first place."[210] Then, the Court explained that a request for identification will typically be within the scope of a *Terry* stop because (1) it will not alter the nature, location, or duration of the stop,[211] and (2) the request relates to the "purpose, rationale, and practical demands" of the stop—obtaining the information will serve important government interests such as informing the officer that the suspect is wanted for another

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[205] *Id*. at 1205–06. In evaluating the same statute, the Ninth Circuit concluded that it did violate a suspect's Fourth Amendment rights because the "serious intrusions on personal security" outweighed "the mere possibility that identification might provide a link leading to arrest." Carey v. Nevada Gaming Control Bd., 279 F.3d 873, 880 (9th Cir. 2002). *See also* Oliver v. Woods, 209 F.3d 1179, 1189(10th Cir. 2000) (upholding a Utah statute that required suspects to produce identification during investigative stops).

[206] Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972).

[207] Kolender v. Lawson, 461 U.S. 352, 353-62 (1983).

[208] Brown v. Texas, 433 U.S. 47, 52 (1979).

[209] This is because the statute only requires suspects to provide their names. *Hiibel*, 124 S. Ct. at 2457 ("As we understand it, the statute does not require a suspect to give the officer a driver's license or any other document. Provided that the suspect either states his name or communicates it to the officer by other means—a choice, we assume, that the suspect may make—the statute is satisfied and no violation occurs.").

[210] *Id*. at 2458. *See also id*. at 2459 ("an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonable related to the circumstances justifying the stop").

[211] *See id.*

offense or has a record of violence or mental disorder.[212] The threat of criminal sanctions merely "helps ensure the request for identity does not become a legal nullity."[213] Finally, in Hiibel's specific situation, the Court concluded that the initial stop was based on reasonable suspicion (i.e. the call reporting the assault) and that it was obvious[214] that the request for identification was "reasonably related to the circumstances which justified" the stop and was "a common-sense inquiry, not an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence."[215]

The Court went on to tersely dispose of Hiibel's Fifth Amendment argument. The Court assumed the threat of criminal sanctions satisfied the compulsion element, and assumed but did not decide that revealing one's name would be "testimonial."[216] But, the Court concluded, the privilege did not apply in this case because the answer was not incriminating.[217] Hiibel, the Court explained, faced no fear that his name would incriminate him or that it would furnish a link in a chain leading to incriminating evidence.[218] Rather, Hiibel's refusal appeared to be based on his belief that his name was "none of the officer's business."[219] The Court thus left open the question of whether the privilege would apply when the answer to a demand for identification likely would incriminate the suspect.[220] In doing so, the Court dismissed this possibility as "unusual" because one's identity is a "universal characteristic" and "[e]ven witnesses who plan to invoke the Fifth Amendment privilege answer when their names are called to take the stand."[221]

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[212] *See id* at 2458–59.

[213] *Id*. at 2459.

[214] The Court's conclusory analysis, however, is not so clear. In drawing this conclusion, the Court analogized the situation to *Hayes v. Florida*, where the Court noted that a suspect's fingerprints might lawfully be compelled during a *Terry* stop if there is "a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with [the investigated] crime." 470 U.S. 811, 817 (1985). But it is not at all clear how Hiibel's answer of "Larry Hiibel" could have either confirmed or alleviated the officer's suspicions about the reported assault.

[215] *Id*. at 2460. In dissent, Justice Breyer noted that Hiibel's refusal to answer was consistent with several of the Court's statements in dicta in *Terry*-stop cases that those detained are not obliged to answer questions. *See id*. at 2465 (Breyer, J., dissenting).

[216] *Id*. at 2460.

[217] *Id*.

[218] *Id*. at 2461.

[219] *Id*.

[220] *Id*.

[221] *Id*. In dissent, Justice Stevens noted that one's identity is more likely to be incriminating than the majority supposes given the vast amount of information available to officers with access to electronic databases, and, moreover, investigating officers seek the information precisely because it might be incriminating. *See id.* at 2464 (Stevens, J. dissenting).

My theory helps to clarify this undecided issue by showing that it is both less of a Fourth Amendment problem and more of Fifth Amendment problem than courts have realized. Under the Fourth Amendment inquiry, the key question is whether the government acted reasonably in gathering information. If there was "reasonable suspicion" to support the *Terry* stop and the questioning was reasonably related to the circumstances warranting the stop, the Fourth Amendment is satisfied. Thus, the Court was correct to reject the methodology of the Nevada Supreme Court and the Ninth Circuit in balancing suspects' privacy interests in their identities against officers' need for the information. Further, an arrest for failure to answer the question likewise does not raise any additional Fourth Amendment concerns. If the police may lawfully detain and question suspects, nothing in the Fourth Amendment prevents the sanctioning of the suspects' failure to cooperate. To see this, consider the stop itself. If *Terry* allows the police to briefly detain suspects (i.e. they are not free to leave), then plainly the government may sanction suspects who refuse to stop or attempt to run away for obstruction of justice, as would someone who attempts to interfere with a lawful search or refuses to submit to an arrest. Thus the Court was also correct to reject any dicta from previous cases that could suggest that the Fourth Amendment *requires* suspects be allowed to refuse to answer questions. Again, this would the equivalent of saying that officers are authorized to detain suspects upon reasonable suspicion, but the amendment also requires that suspects be free to run away. But this rationale extends more broadly than the limited nature of the information, identity, that was at issue in *Hiibel* and emphasized by the Court.[222] If the above analysis is correct, then nothing in the Fourth Amendment prevents the government from sanctioning the refusal to answer *any* "reasonably related" question asked during a *Terry* stop.

The issue, however, raises significant Fifth Amendment concerns, which were largely left open by the Court's narrow holding in *Hiibel*. First, stop-and-identify statutes satisfy the privilege's "compulsion" element. Suspects may face a "cruel trilemma" similar to those faced by witnesses in court: incrimination, perjury, or contempt. The threat of criminal sanctions for not revealing one's identify during the stop operates like a contempt threat, and, although not technically perjury, those who lie about their identity may be guilty of violating either specific statutes for providing false information to government agents[223] or more general obstruction-of-justice statutes. Second, revealing one's identity qualifies as "testimonial" for purposes of the privilege. Although the Court assumed without deciding that revealing one's identity would be testimonial, the act is indeed testimonial because it reveals—and the government is interested in—the propositional content of a suspect's beliefs or knowledge. More specifically, the government wants accurate information about the stopped suspect's specific identity, not some non-testimonial aspect such as the suspect's being able to remember his name or,

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[222] *Id*.

[223] *See, e.g.*, 18 U.S.C. § 1001(a)(2).

say, speak without slurring his words.[224] As discussed above, when the government seeks to compel and make use of the *content* of a suspect's knowledge or beliefs, this response is testimonial for purposes of the privilege.[225]

Turning to the third and final element, incrimination, it is clear that revealing one's identity during a stop is more likely to be incriminating than the Court acknowledged in *Hiibel*. The Court suggested that the disclosure will be incriminating only in "unusual circumstances" because it is narrow in scope: "[o]ne's identity is, by definition, unique; yet it is, in another sense, a universal characteristic."[226] That fact that everyone has a name, however, does not speak to the incrimination issue. One's location at a particular time is also "unique" and a "universal characteristic" (everyone is *somewhere* at a given time) but revealing one's whereabouts at a particular time can be incriminating in more than "unusual circumstances." The most obvious way disclosure of identity can be incriminating is when suspects have a warrant out for their arrests. Indeed, this was one of the important government interests the Court pointed to in its Fourth Amendment analysis discussing the reasonableness of requiring disclosure.[227] However, disclosures can be incriminating for purposes of the privilege even when they are not themselves incriminating or introduced at trial. All that is required is that they "could lead to other evidence that might be" incriminating.[228] As Justice Stevens noted in dissent, officers who know a suspect's identity and have access to electronic databases may learn a vast array of information about the suspect.[229] Therefore, disclosing one's identity could plausibly lead to information that might be incriminating in more than unusual circumstances.

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[224] For this reason, the famous "sixth birthday" question in *Pennsylvania v. Muniz*, 496 U.S. 582, 586 (1990), where the police asked an arrested drunk driver during booking the date of his sixth birthday in order to test the suspect's cognitive acuity (and not because they were interested in the content of the answer), should not be considered testimonial and hence not protected by the privilege. Although the Court concluded that his answer was protected by the privilege, Allen and Mace explain that Justice Marshall's concurrence provided the deciding fifth vote. In his concurring opinion he argued that any conduct by Muniz should have been suppressed (because he was not given *Miranda* warnings), regardless of whether they revealed incriminating propositional content. *See* Allen & Mace, *supra* note 34, at 273–77.

[225] *See supra* at p. 18–19. The act remains testimonial even when the suspect chooses to respond to the request by producing an identifying document. In this case, the government is still relying on the suspect's "implied assertion" that the disclosed document accurately identifies her. *See supra* note 183 and accompanying text.

[226] *Id*. at 2461.

[227] *Id*. at 2458 ("Knowledge of identity may inform an officer that a suspect is wanted for another offense").

[228] Kastigar v. United States, 406 U.S. 441, 445 (1972). Even an innocent suspect can invoke the privilege if she reasonably believes her answers might incriminate her. *See* Ohio v. Reiner, 532 U.S. 17, 18-22 (2001).

[229] *Hiibel*, 124 S. Ct. at 2464 (Stevens, J., dissenting).

The Court's resolution in *Hiibel* raises more practical difficulties as well. Hiibel's arrest did not violate his Fifth Amendment rights because, according to the Court, it was not clear how his identity could be incriminating and he appeared to refuse because he did not think his identity was the officer's business. But, assume his identity would be incriminating: what is a suspect to do in this situation if they wish to invoke the privilege? Under the Court's analysis, it appears that the officer conducting the investigative stop will have to decide *why* the suspect is not disclosing his identity and whether disclosure could plausibly be incriminating. Should the suspect who is being detained by an officer have to explain to that officer why disclosing his identity may incriminate him? Or, should officers just always arrest and leave it up to the suspect to explain to a judge at a later criminal proceeding that disclosure would have been incriminating? Either of these approaches may be implicit in the Court's approach to the problem, but neither seems very practical. Under the first approach, courts cannot expect officers during a brief stop to be able to accurately figure out why a suspect is being silent and, if for fear of incrimination,[230] be able to sort out in a reliable way whether the fear is legitimate or not (they won't even know who the person is at this point!). Under the second approach, arrests as a matter of course put too high a price on those invoking the privilege.[231] This would be like arresting all witnesses who invoke the privilege for contempt and then telling them that they can raise the self-incrimination issue as a defense at their subsequent contempt trials.

A better approach would allow witnesses to invoke the privilege by either explicitly invoking it or by remaining silent, as they are allowed to do in the custodial-interrogation setting.[232] To be clear, because investigative stops likely are not custodial, there is no need to provide *Miranda* warnings, including the right to remain silent.[233] But the two situations are similar in that they involve the police questioning detained suspects. During custodial interrogation, there is no requirement that suspects explain why they are being silent or have to convince the officers why answering the questions could be incriminating. A similar rule should apply to the investigative-stop setting.[234]

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[230] Even if this is the reason for silence, it also seems unlikely that suspects will want to communicate this to the very officers who are currently detaining them because the officers suspect them of crime.

[231] *Cf.* Griffin v. California, 380 U.S. 609, 613-15 (1965) (holding that prosecutors may not comment on a defendant's decision not to testify at trial because doing so raises the costs of invoking the privilege).

[232] The Court has previously explained that "invocation" of the privilege is to be given a liberal construction and "does not require any special combination of words." Quinn v. United States, 349 U.S. 155, 162 (1955).

[233] *Cf.* Berkemer v. McCarty, 468 U.S. 420, 435-42 (1984) (holding that a motorist detained during routine traffic stop was not "in custody" for purposes of *Miranda* warnings). Handcuffing suspects, however, may qualify as "custody." United States v. Newton, 369 F.3d 659, 669-77 (2d Cir. 2004) (holding that a suspect handcuffed during parole search of his home was "in custody" for purposes of *Miranda*).

[234] Thus, only those who make clear (as Hiibel may have done) that their refusals are based on reasons other than fear of incrimination may be convicted under stop-and-identify statutes.

One further point about stop-and-identify statutes involves disclosure for non-criminal purposes. The privilege is not applicable when disclosure of information is required to effectuate a non-criminal regime. Two examples include automobile-accident reporting requirements to facilitate civil-law dispositions[235] and requirements to protect the welfare of children in social services.[236] A similar argument is that police can require disclosure not for investigative purposes but to protect officer safety. However, this exception does not apply when the purported non-criminal purpose is aimed at a "highly selective group inherently suspect of criminal activities," rather than at the general public[237] By definition, those involved in lawful investigative stops are a "group inherently suspect of criminal activities" because such stops can take place only after an officer can articulate reasonable suspicion that the person may be involved in criminal conduct.[238] Therefore those involved in such stops should still be able to invoke the privilege, which my reformulation of the Fourth and Fifth Amendment doctrine would facilitate.

C. Pre-arrest Silence

The federal circuits are putatively split on the question of whether prosecutors may use a suspect's pre-arrest silence as substantive evidence of guilt at trial.[239] In *Jenkins v. Anderson*, in which the defendant testified that he was acting in self-defense, the Supreme Court held that the prosecutor's use of the defendant's pre-arrest silence to impeach the defendant (who admitted he did not tell the police about the stabbing after it occurred) did not violate the Fifth Amendment.[240] The Court explained that by taking the stand, the defendant decides to "cast aside his cloak of silence" and "advance[] the truth-

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[235] California v. Byers, 402 U.S. 424, 427-31 (1971).

[236] Baltimore City Dept. of Soc. Serv. v. Bouknight, 493 U.S. 549, 556-62 (1990).

[237] Marchetti v. United States, 390 U.S. 39, 46-61 (1968) (holding that the privilege applies to tax reporting requirements aimed at the proceeds of illegal gambling).

[238] For this reason, nothing at issue in *Hiibel* affects, and nothing in self-incrimination doctrine would appear to prevent, some kind of mandatory "national ID card," which would be required for a non-criminal purpose and for the public at large. This is not to suggest that such a card might not raise other constitutional issues.

[239] United States v. McCann, 366 F.3d 46, 56–7 (1st Cir. 2004) ("the other courts of appeal are split on the question whether, under some circumstances, the Fifth-Amendment privilege against self-incrimination prevents the government from using a suspect's pre-arrest silence as substantive evidence of guilt) (collecting cases); Combs v. Coyle, 205 F.3d 269, 282 (6th Cir. 2000) ("The circuits that have considered whether the government may comment on a defendant's prearrest silence in its case in chief are equally divided."); United States v. Opplinger, 150 F.3d 1061, 1067 (9th Cir. 1998) ("In so holding, we respectfully disagree with the First, Seventh, and Tenth Circuits, which have all held that pre-arrest silence comes within the proscription against commenting on a defendant's privilege against self-incrimination laid down in *Griffin*.").

[240] 447 U.S. 231, 235–38 (1980). Concurring in *Jenkins,* Justice Stevens argued that the privilege against self-incrimination is irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak. *See id*. at 241 (Stevens, J., concurring).

finding function of the criminal trial."[241] Because impeachment is integral to this function, the prosecution may use silence for impeachment purposes.[242] In *Griffin v. California*, the Court held that prosecutors cannot comment on a defendant's silence at trial as being evidence of guilt.[243] The federal circuits divide over which of these two cases should control a situation left open by both: whether a prosecutor may use as evidence of guilt, rather than for impeachment, a defendant's pre-arrest silence when the suspect does not testify at trial.

My theory helps to clarify this issue, reconcile what might otherwise appear to be contradictory cases, and show that the proper line for whether the prosecution may use pre-arrest silence is whether or not the silence is in direct response to government questioning. If it is, it may not be used for substantive purposes; if not, it may. I first briefly describe the cases that held the use to be proper and then the cases that come out differently.

The following three cases have held the use of silence to be proper:

1. United States v. Rivera—An airport customs inspector testified that the defendant remained silent when he approached her and began to question her about her bag, and the prosecutor commented on her silence during closing argument.[244] The Eleventh Circuit concluded that "the government may comment on a defendant's silence if it occurred prior to the time that he is arrested and given his *Miranda* warnings."[245]

2. United States v. Zambria—The defendant was arrested after the police found cocaine in his suitcase.[246] He did not testify in court, but his wife testified they were being threatened by an unidentified third party and attempted to smuggle the drugs to pay off a debt to the third party.[247] The arresting officer testified that the defendant did not mention the threats prior to his arrest.[248] The Fifth Circuit held that the use of silence was

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[241] *Id*. at 238.

[242] The Court previously held that due process precluded the use of a suspect's silence for impeachment purposes when the silence occurred after *Miranda* warnings because the warnings carry an implicit assurance that silence will not carry a penalty. *See* Doyle v. Ohio, 426 U.S. 610, 611-18 (1976). After *Jenkins*, the Court held that post-arrest, pre-*Miranda* silence may also be used for impeachment purposes. Fletcher v. Weir, 455 U.S. 603, 607 (1982).

[243] 380 U.S. 609, 613-15 (1965).

[244] 944 F.2d 1563, 1565-68 (11th Cir. 1991).

[245] *Id*. at 1568.

[246] 74 F.3d 590, 592 (5th Cir 1996).

[247] *Id*.

[248] *Id*.

proper because "the record makes manifest that the silence at issue was neither induced by nor a response to any action by a government agent."[249]

3. United States v. Opplinger—The defendant remained silent when he was interviewed by his supervisors about the embezzlement of funds and was told his answers would be turned over to the FBI.[250] The Ninth Circuit explained that the use of silence was permissible so long as there was no government action compelling the silence because "the government made no effort to compel Opplinger to speak; he was free to act as he pleased."[251]

By contrast, the following cases have held the use of pre-arrest silence to be improper:

1. Savory v. Lane—The defendant did not testify at trial, and an officer testified that when he questioned the defendant a week after the murders for which he was charged, the defendant answered that he "did not want to talk about it."[252] The Seventh Circuit concluded that the privilege applies to informal questioning, that the defendant invoked the privilege, and that *Griffin*'s preclusion applies equally to out-of-court invocations of the privilege.[253]

2. Coppola v. Powell—The police questioned the defendant about a burglary and sexual assault; he refused to talk and said, "if you think I'm going to confess to you, you're crazy."[254] The defendant did not testify at trial, and an officer testified to what the defendant said when they attempted to question him. The First Circuit concluded that the defendant invoked the privilege while being questioned and that *Griffin* precluded mention of the defendant's exercise of the privilege.[255]

3. United States v. Burson—The defendant did not testify at trial, and two IRS investigators testified that when they tried to question the defendant at his home he

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[249] *Id*. at 593.

[250] 150 F.3d 1061, 1064 (9th Cir. 1998). Nothing in the facts suggests that the supervisors were interviewing Opplinger at the behest of FBI agents, in which case the Fifth Amendment privilege might apply.

[251] *Id*. at 1067.

[252] 832 F.2d 1011, 1015 (7th Cir. 1987).

[253] Id. at 1016–18.

[254] 878 F.2d 1562, 1563 (1st Cir. 1989).

[255] *Id*. The Court has previously explained that "invocation" of the privilege is to be given a liberal construction and "does not require any special combination of words." Quinn v. United States, 349 U.S. 155, 162 (1955).

refused to talk.[256] The Tenth Circuit found that the defendant had invoked the privilege and thus the testimony impermissibly referred to his exercise of the privilege.[257]

4. *Combs v. Coyle*—The defendant did not testify at trial, and an officer testified at trial that when they questioned the defendant he refused to talk and said "talk to my lawyer."[258] The Sixth Circuit concluded that the defendant had invoked the privilege and the use of the statements therefore violated *Griffin*'s dictates.[259]

As may already be clear from these terse descriptions, with one exception (and despite courts' descriptions to the contrary), there is no split here. With the exception of the first case, *Rivera*, the courts divide based upon whether the silence was in direct response to government questioning.[260] The argument in *Rivera* that the *Doyle-Jenkins-Weir* rule regarding impeachment—which says that silence may be used until there has been an arrest and *Miranda* warnings—misses the point.[261] Officers give *Miranda* warnings to combat a purported coercive environment after arrest, but the Court has made clear that the privilege extends beyond the arrest situation: the privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory."[262] The Court made this plain in *Minnesota v. Murphy*, where it held that a parolee meeting with his parole officer was not in custody because he did not have to show up, and hence he was not entitled to *Miranda* warnings, but that he could invoke the privilege in response to questions.[263] Although *Miranda* is a rule that protects the Fifth

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[256] 952 F.2d 1196, 1200 (10th Cir. 1991).

[257] *Id*. at 1200–01 ("It is clear from the agents' testimony Mr. Burson 'did not want to be questioned' and would not answer any of the agents' questions. Whether Mr. Burson was advised of his privilege against self-incrimination is immaterial. What is important is that Mr. Burson clearly was not going to answer any of the agents' questions.").

[258] 205 F.3d 269, 279 (6th Cir. 2000).

[259] *Id*. at 282–84 ("We agree with the reasoning expressed in the opinions of the Seventh, First, and Tenth Circuits, and today we join those circuits in holding that the use of a defendant's prearrest silence as substantive evidence of guilt violates the Fifth Amendment's privilege against self-incrimination.").

[260] All four cases holding the use improper involved government questioning. Two of the cases that found no violation (*Opplinger* and *Zambria*) did not involve government questioning. *See also* Ohio v. Leach, 807 N.E.2d 335, 339-42 (Oh. 2004) (holding that the use of pre-arrest silence violated defendant's Fifth Amendment rights because a police officer testified that when he telephoned the defendant to request an interview, the defendant stated that he wanted to first speak with is lawyer).

[261] These cases were based on the rationales that a defendant who testifies has waived the privilege, but post-*Miranda* silence still cannot be used because the government promised in the warnings that silence would carry no penalty.

[262] Kastigar v. United States, 406 U.S. 441, 444 (1972).

[263] 465 U.S. 420, 440 (1984). Even in *Hiibel*, the Court assumed that one detained at a *Terry* stop might be able to invoke the privilege—if *Miranda* were the dividing line, then the issue in *Hiibel* could never even have arisen. *See supra* p. 47–57.

Amendment privilege, its purpose is to respond to questioning that takes place after a situation crosses a Fourth Amendment threshold. In other words, it is the dividing line for when the relationship becomes coercive and the suspect needs help, not for when the privilege applies. The need for warnings is triggered because the *Fourth* Amendment has authorized the police to take the suspect into the coercive environment.[264] To assume *Miranda* warnings are the dividing line for the privilege is to once again entangle Fourth and Fifth Amendment issues.

My theory helps make explicit why the implicit line in the cases—whether the silence is in direct response to government questioning—should be the correct line for whether the government may use pre-arrest silence as substantive evidence of guilt. To repeat, my theory involves a two-part inquiry: first, whether the government's attempt at evidence gathering was unreasonable (Fourth Amendment), and, second, whether the evidence gathering involved the attempt to compel evidence from the mind of an accused to use against her in a criminal trial (Fifth Amendment). Under the first inquiry, nothing in the Fourth Amendment prevents the government from trying to gather information from suspects by asking them questions, so long as the suspects have not been seized and are free to terminate the encounters.[265] Therefore, government questioning that meets this standard is reasonable, satisfying the first inquiry. Under the second inquiry, however, government questioning is attempting to gather incriminating information from the mind of suspects to use against them. But, it might be interposed, the suspects are not compelled to answer because they can refuse. What this point misses, however, is that the use of silence as substantive evidence of guilt is precisely what makes the situation compelling. As a direct result of government questioning, the government may once again put suspects in a similar cruel-trilemma situation. Rather than facing incrimination, perjury, or contempt (or arrest as in *Hiibel*), the suspect may now be put in the position of (1) incriminating herself; (2) lying and exposing herself to a criminal conviction for lying to government agents or obstructing justice; or (3) providing the government with her silence to use as incriminating evidence against her. Therefore, when government questioning triggers silence, the privilege should apply. Further, *Griffin* mandates that when the privilege applies, "the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."[266] Thus, the government cannot make evidentiary use of a suspect's invocation of the privilege.[267] When government questioning has not caused the silence,

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[264] Consistent with this statement is Professor O'Neill's recent and interesting suggestion that the Fourth Amendment (along with the Fifth) provides a constitutional grounding for *Miranda*. *See* O'NEILL, *supra* note 113, at 1114-19.

[265] Alternatively, if officers have reasonable suspicion of criminality, they may briefly detain suspects and ask questions. *See supra* p. 47–57.

[266] Griffin v. California, 380 U.S. 609, 615 (1965).

[267] This proposed dividing line—whether silence is in direct response to government questioning—should also apply to when a suspect's *post*-arrest, pre-*Miranda* silence may be used as evidence of guilt. For a recent decision consistent with this line see *United States v. Frazier*, 394 F.3d 612, 617–20 (8th Cir. 2005) (holding that the prosecution's use and mention of defendant's post-arrest, pre-*Miranda* silence, when not is response to interrogation, did not violate the Fifth Amendment).

then the government has not engaged in any conduct that would trigger the second inquiry under my theory; in such a case the privilege does not apply and the government can make evidentiary use of silence.

V. Conclusion

The Court's opinion in *Boyd* no doubt engendered a confusing picture of the relationship between the Fourth and Fifth Amendments, but the entanglement of the kinds of restraint on government conduct manifest in each amendment goes much deeper. Indeed, R. H. Helmholz explains that in one of its earliest recognizable forms in the Middle Ages, the privilege against self-incrimination operated much like the probable-cause requirement in the Fourth Amendment:

> [t]he privilege was a check on overzealous officials rather than a subjective right that could be invoked by anyone who stood in danger of prosecution . . . It was designed to guarantee that only when there was a good reason for suspecting that a particular person had violated the law would it be permissible to require that person to answer incriminating questions.[268]

My aim in attempting to disentangle the amendments has not been to return to a previous pristine picture of the relationship, to provide a complete etiological account of how the entanglement came about, or to restructure doctrine by deducing consequences from a top-down, normative theory. Rather, taking core practices of the current manifestations of each amendment as given, I have attempted to present a picture of the relationship that provides greater analytic clarity than the extant views, explicit in scholarship and implicit in case-law, that see the amendments as responding to separate, independent events. Instead of an either-or picture, we should see the two amendments as overlapping in their response to government attempts at evidence gathering: the Fourth Amendment requires that attempts not be unreasonable, and then, even if reasonable under the first inquiry, the privilege provides additional protection when the attempts seek to compel incriminating propositional content from the minds of individuals to aid in prosecuting them. In other words, one small part of *Boyd*'s confusing picture—the idea of overlap—might be worth salvaging.

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[268] R. H. Helmholz, *The Privilege and the* Ius Commune*: The Middle Ages to the Seventeenth Century*, in THE PRIVILEGE AGAINST SELF-INCRIMINATION 7 (Helmholz et al. 1997).