



## Alabama Law Scholarly Commons

---

Working Papers

Faculty Scholarship

---

5-19-2008

### Self-Incrimination and the Epistemology of Testimony

Michael S. Pardo

University of Alabama - School of Law, [mpardo@law.ua.edu](mailto:mpardo@law.ua.edu)

Follow this and additional works at: [https://scholarship.law.ua.edu/fac\\_working\\_papers](https://scholarship.law.ua.edu/fac_working_papers)

---

#### Recommended Citation

Michael S. Pardo, *Self-Incrimination and the Epistemology of Testimony*, (2008).

Available at: [https://scholarship.law.ua.edu/fac\\_working\\_papers/280](https://scholarship.law.ua.edu/fac_working_papers/280)

This Working Paper is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Working Papers by an authorized administrator of Alabama Law Scholarly Commons.

THE UNIVERSITY OF  
**ALABAMA**  

---

SCHOOL OF LAW

**Self-Incrimination and the Epistemology  
of Testimony**

Michael S. Pardo

*30 Cardozo Law Review (forthcoming)*

This paper can be downloaded without charge from the Social  
Science Research Network Electronic Paper Collection:  
<http://ssrn.com/abstract=1134033>

## Self-Incrimination and the Epistemology of Testimony

Michael S. Pardo<sup>\*</sup>

*Abstract: The United States Supreme Court's limitation of the privilege against self-incrimination to evidence of a testimonial nature has been controversial. The doctrinal reliance on a distinction between physical and testimonial evidence has proven difficult to apply in practice, and it has been criticized as being descriptively inaccurate, analytically incoherent, and normatively indefensible. This article offers a defense of the distinction on epistemological grounds. The philosophical focus on testimony as a source of knowledge provides some insight into what makes testimony distinct as an epistemic source. These considerations are used to provide a coherent and principled way to distinguish what evidence to treat as testimonial for Fifth Amendment purposes: any evidence that requires a fact-finder to rely on the epistemic authority of the defendant. This principle is then used to justify a testimonial privilege in light of the presumption of innocence and to clarify doctrine.*

Over forty years ago, Justice Brennan, writing for a majority of the United States Supreme Court in *Schmerber v. California*, limited the scope of the Fifth Amendment privilege against self-incrimination to evidence of a “testimonial” nature.<sup>1</sup> This limitation, the Court explained, excludes from the privilege’s scope “physical” evidence compelled from defendants such as blood samples, fingerprints, standing in a lineup, and voice and handwriting samples.<sup>2</sup> Given the important consequences of this limitation (compelling DNA samples, in particular), debates regarding the future of self-incrimination must come to terms with whether this distinction is justifiable. The scholarly consensus seems to be that it is not.<sup>3</sup> Philosophers in recent years have given

---

<sup>\*</sup> Assistant Professor, University of Alabama School of Law. My thanks to the participants at the Cardozo Law School symposium on “The Future of Self-Incrimination” for their helpful comments; to Alex Stein for the invitation to present this paper (and for his comments); to Mike Redmayne for his comments on a previous draft; to Meredith Render for her comments on methodology; and to Dean Ken Randall and the Alabama Law School Foundation for generous research support.

<sup>1</sup> 384 U.S. 757 (1966). In addition to the testimonial requirement, two other variables delineate the scope of the privilege: the testimonial evidence must be both “compelled” by the government and “incriminating” for the defendant. This article focuses only on the testimony requirement. The doctrine for these other two requirements is discussed in Michael S. Pardo, *Disentangling the Fourth Amendment and the Self-Incrimination Clause*, 90 Iowa L. Rev. 1857, 1868-70 (2005).

<sup>2</sup> *Id.* at 764.

<sup>3</sup> See, e.g., SUSAN EASTON, *THE CASE FOR THE RIGHT TO SILENCE* 217-220 (1998); Mike Redmayne, *Rethinking the Privilege Against Self-Incrimination*, 27 Oxford J. Legal Stud. 209 (2007); Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and its Future Predicted*, 94 J. Crim. L. & Criminology 243 (2004); Michael Steven Green, *The Paradox of Auxiliary Rights: The Privilege Against Self-Incrimination and the Right to Keep and Bear Arms*, 52 Duke L.J. 113 (2002); Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment*

sustained focus to testimony as a source of knowledge, however, and this article will examine whether the epistemology of testimony contains any lessons for the privilege against self-incrimination and its limitation to testimonial evidence.

The notion that the privilege applies only to testimonial evidence was not Justice Brennan's invention—Justice Holmes had relied on a similar idea decades earlier<sup>4</sup> and John Henry Wigmore had explicitly argued that the privilege ought to be limited to testimony.<sup>5</sup> Notwithstanding the powerful minds on Justice Brennan's side, however, reliance on a testimonial-physical evidence distinction was far from inevitable (as the 5-4 vote and dissenting opinions indicate). The decision and its reasoning were on shaky ground from the beginning. Two developments following the decision have confirmed its shaky foundations and have even further destabilized this important doctrinal area. First, lower courts and the Supreme Court itself have notoriously struggled to make sense of what evidence to treat as testimonial, injecting considerable uncertainty into this area.<sup>6</sup> Second, scholars have subjected the testimonial limitation to withering attack, arguing that it is untenable and incoherent to maintain in practice and that it is an illegitimate limitation on the privilege, given its conventional theoretical justifications.<sup>7</sup> Indeed, the most often given defenses of the testimony requirement rely on practical rather than principled reasons—the privilege would simply be too costly or would deprive the government of too much evidence if it were given the scope implied by the principles justifying it.<sup>8</sup>

Philosophers in recent years, however, helped to clarify the nature of testimony as a source of knowledge. In examining testimonial knowledge, philosophers are focusing on the general social practice by which knowledge is conveyed by speakers to an audience.<sup>9</sup> This more general epistemic category may shed light on the doctrinal category of Fifth Amendment “testimony.” Two features, in particular, may be useful in distinguishing testimonial evidence from other kinds of juridical evidence: the reliance on the epistemic authority of an agent offering testimony and the justificatory moves available to an agent relying on the epistemic authority of another. This article will rely on these features to offer a principled way to identify testimonial evidence for purposes of the privilege against self-incrimination—it is any evidence that requires reliance by the fact-finder on the epistemic authority of the defendant. In light of the distinct

---

*Privilege*, 114 Harv. L. Rev. 430 (2000); Richard A. Nagareda, *Compulsion “to be a Witness” and the Resurrection of Boyd*, 74 N.Y.U. L. Rev. 1575 (1999).

<sup>4</sup> *Holt v. United States*, 218 U.S. 245, 252-53 (1910).

<sup>5</sup> 8 WIGMORE, EVIDENCE § 2263 (McNaughton rev. 1961).

<sup>6</sup> The subsequent Supreme Court cases are discussed in Part II. The D.C. Circuit has referred to the problem of defining testimony in this context to be an “admittedly abstract and under-determined area of law.” See *United States v. Hubbell*, 167 F.3d 552, 570 (D.C. Cir. 1999), affirmed by, 530 U.S. 27 (2000).

<sup>7</sup> See the sources cited in note 3.

<sup>8</sup> See Easton, *supra* note 3 at 220 (commenting that the distinction is “artificial and problematic” but that it may be justified on grounds of “policy and expediency”); Green, *supra* note 3 at 155 (describing the distinction as based on “unprincipled balancing” because of the “excessive social costs” of a broader privilege).

<sup>9</sup> Overviews of the philosophical literature are provided in Michael S. Pardo, *Testimony*, 82 Tulane L. Rev. 119, 125-44 (2007); Jonathan Adler, *Epistemological Problems of Testimony*, Stanford Encyclopedia of Philosophy (<http://plato.stanford.edu/entries/testimony-episprob/>).

epistemology of testimony, this article then attempts to justify the testimonial-physical evidence distinction in terms of a particular understanding of the presumption of innocence and to clarify current doctrine. The paper is in six parts. Part I discusses *Schmerber* and the physical-testimonial distinction. Part II discusses the subsequent caselaw attempting to apply and to further refine the distinction. Part III discusses the different ways scholars have attacked the Court's reliance on the distinction. Part IV outlines the features of the epistemology of testimony and explains what distinguishes it as a source of knowledge. Part V attempts to defend the distinction based on the idea of epistemic authority and its relation to the presumption of innocence. Part VI concludes by clarify the doctrine in light on the discussions in Parts IV and V.

## I. *Schmerber* and the Physical-Testimonial Distinction

The case of *Schmerber v. California* presented the Supreme Court with the issue of whether a compelled blood test of a defendant forced the defendant to be “a witness against himself” in violation of the Fifth Amendment.<sup>10</sup> The Court concluded “no,” and in doing so it limited the privilege against self-incrimination to the analytically obscure category of “testimony.”<sup>11</sup> The analytical obscurity was made evident by subsequent caselaw attempting to articulate the scope of the privilege, but the source of the subsequent doctrinal confusion can be found in the reasoning of *Schmerber* itself.

While receiving treatment at a hospital following an automobile accident, Armando Schmerber had a blood sample taken against his will at the direction of a police officer.<sup>12</sup> Analysis of the sample revealed that Schmerber was intoxicated, and the results were admitted into evidence to convict him of drunk driving.<sup>13</sup> He raised several constitutional claims, including that use of the results of the blood test violated his Fifth Amendment privilege against self-incrimination.<sup>14</sup> In rejecting the Fifth Amendment claim, the Court relied on a distinction between evidence of a “testimonial” or “communicative” nature versus evidence of a “physical” or “real” nature, concluding that the privilege applies to the former but not to the latter.<sup>15</sup> To reach this conclusion the Court began by recounting the “complex of values” the privilege helps to protect: according dignity and integrity to citizens; maintaining a fair state-individual balance; requiring the government to shoulder the entire load; respecting the inviolability of human personality; and requiring the state to produce evidence by independent labors rather than relying on the “cruel, simple expedient” of compelling evidence from the defendant.<sup>16</sup> Recognizing that this “complex of values” may just as well be implicated by puncturing the skin of the defendant against his will in order to extract blood to use as

---

<sup>10</sup> 384 U.S. 757, 758-59 (1966).

<sup>11</sup> Id. At 760-65.

<sup>12</sup> Id. At 758.

<sup>13</sup> Id. At 758-59.

<sup>14</sup> Schmerber also raised claims based on Due Process, the Fourth Amendment, and the Sixth Amendment right to counsel, each of which the Court also rejected. Id. at 759-772.

<sup>15</sup> Id. at 761.

<sup>16</sup> Id. at 762.

incriminating evidence, the Court quickly backed off from this seemingly logical extension.<sup>17</sup>

Turning from logic to history, the Court noted that “the privilege has never been given the full scope which the values it helps to protect suggest.”<sup>18</sup> To which the critics, as well as the dissenting Justices, are left wondering: well, why not?<sup>19</sup> Rather than providing a justification for limiting the privilege to “testimony,” however, the Court instead simply proceeded to invoke “a long line of authorities” that appeared to have “limited [the privilege’s] protection to situations in which the State seeks to submerge those values by obtaining the evidence against an accused . . . ‘from his own mouth.’”<sup>20</sup> Most notably the Court cites Justice Holmes’ opinion in *Holt*, in which a defendant was forced to try on an article of clothing.<sup>21</sup> In that case Holmes had stated that the privilege prohibits the use of compulsion to “extort communications” from the defendant, not to use of the defendant’s “body as evidence” (referring to the latter as an “extravagant extension of the 5th Amendment”).<sup>22</sup> Likewise, the Court in *Schmerber* cites Wigmore’s position that “the privilege is limited to testimonial disclosures” and prohibits only attempts to compel “from the person’s own lips an admission of guilt, which would thus take the place of other evidence.”<sup>23</sup> Finally, the Court notes other examples in which courts had held the privilege not to apply to physical evidence regarding the defendant, including “compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.”<sup>24</sup>

After appealing to authority the limit the privilege so, the Court then offers a few clues regarding the contours of the now-all-important category of Fifth Amendment “testimony.” First, the Court explains that the privilege applies to testimonial communications “whatever form they might take.”<sup>25</sup> In other words, the Court rejected a formal limitation of the privilege to oral communications, extending it to written words as well as to gestures intended to communicate (such as pointing and head nods). Second, the Court notes that even the physical-testimonial distinction may break down when physical evidence is meant to compel “responses which are essentially testimonial” such as a lie-detector test measuring physiological responses during interrogation.<sup>26</sup> This

---

<sup>17</sup> Id. At 762-63.

<sup>18</sup> Id.

<sup>19</sup> Consider Justice Black’s comment in dissent: “I think it unfortunate that the Court rests so heavily for its very restrictive reading of the Fifth Amendment’s privilege against self-incrimination on the words ‘testimonial’ and ‘communicative.’ These words are not models of clarity and precision as the Court’s rather labored explication shows. Nor can the Court, so far as I know, find precedent in the former opinions of this Court for using these particular words to limit the scope of the Fifth Amendment protection.” Id. at 774.

<sup>20</sup> Id. at 763.

<sup>21</sup> Id.

<sup>22</sup> 218 U.S. 245, 253 (1910).

<sup>23</sup> 383 U.S. 763.

<sup>24</sup> Id. at 764.

<sup>25</sup> Id. at 763-64.

<sup>26</sup> Id. at 764.

example (but apparently not a compelled blood test) invokes the “spirit and history” of the Fifth Amendment.<sup>27</sup>

The lack of justification by the Court for the decision in *Schmerber* is glaring. The Court: (1) gives us a theory of the privilege: it protects a complex of values; then (2) acknowledges that the theory applies to physical evidence as well as to testimonial evidence; then (3) nevertheless limits the privilege to testimony despite (1) and (2); and finally (4) explicates “testimony” as having no formal limitations and as sometimes being physical evidence.

It is therefore not surprising that two consequences followed. Courts have had a difficult time determining whether evidence is testimonial and thus determining the scope of the privilege. And scholars have argued that the Court’s limitation of the privilege to testimonial evidence is theoretically indefensible. The next two sections discuss these developments.

## II. *Schmerber*’s Progeny

Following *Schmerber*, the Supreme Court held that several types of compelled physical evidence was not testimonial and thus outside the scope of the privilege. Notable examples include voice<sup>28</sup> and handwriting<sup>29</sup> exemplars and being forced to stand in a line-up.<sup>30</sup> This was somewhat unremarkable given the examples provided in *Schmerber* itself of non-testimonial evidence: “compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.”<sup>31</sup> Several cases post-*Schmerber*, however, have provided challenges for the physical-testimonial distinction. The examples in the cases have strained the distinction from three different directions. First, some cases have involved verbal responses that were elicited in order to infer further facts about a defendant’s psychological or physical state. Second, some cases called for only minor responses from the defendant such as a “yes” or “no” answer or identifying oneself. Finally, some cases have involved non-verbal physical acts that communicate information during the process of producing other evidence.

The first category includes the compelled psychological examination in *Estelle v. Smith*<sup>32</sup> and the “sixth birthday” question in *Pennsylvania v. Muniz*.<sup>33</sup> *Estelle* involved a pre-trial psychiatric examination of a criminal defendant to determine competency, which later formed the basis of expert testimony regarding the defendant during sentencing.<sup>34</sup> The doctor who performed the examination testified during a capital-sentencing proceeding that the defendant was a “severe sociopath” who will “continue his previous

---

<sup>27</sup> Id.

<sup>28</sup> *United States v. Dionisio*, 410 U.S. 1 (1973)

<sup>29</sup> *United States v. Mara*, 410 U.S. 19 (1973)

<sup>30</sup> *United States v. Wade*, 388 U.S. 218 (1967)

<sup>31</sup> 384 U.S. at 762.

<sup>32</sup> 451 U.S. 454 (1981).

<sup>33</sup> 496 U.S. 582 (1990).

<sup>34</sup> 451 U.S. at 456.

behavior;” that it will “only get worse;” that no treatment was available; and that the defendant had no “sorrow or remorse” for his conduct.<sup>35</sup> Because the doctor’s testimony was based on the “substance” of the defendant’s disclosures, the disclosures were testimonial: “Dr. Grigson’s diagnosis, as detailed in his testimony, was not based simply on his observations of respondent. Rather, Dr. Grigson drew his conclusions largely from respondent’s account of the crime.”<sup>36</sup> Because the content (or truth) of the propositions the defendant revealed helped to form the incriminating conclusions about his mental state, the disclosures were testimonial.

Then in *Muniz* the Court struggled to determine whether a question designed to reveal whether a defendant was intoxicated was testimonial.<sup>37</sup> While Muniz was being booked for drunk driving, the following recorded exchange took place:

Officer Hosterman first asked Muniz his name, address, height, weight, eye color, date of birth, and current age. He responded to each of these questions, stumbling over his address and age. The officer then asked Muniz, “Do you know what the date was of your sixth birthday?” After Muniz offered an inaudible reply, the officer repeated, “When you turned six years old, do you remember what the date was?” Muniz responded, “No, I don’t.”<sup>38</sup>

A four-Justice plurality concluded that the answer to the sixth-birthday question was testimonial because:

The content of his truthful answer supported an inference that his mental faculties were impaired, because his assertion (he did not know the date of his sixth birthday) was different from the assertion (he knew the date was (correct date)) that the trier of fact might reasonably have expected a lucid person to provide.<sup>39</sup>

A four-Justice dissent concluded that the answer was not testimonial because:

If the police may require Muniz to use his body in order to demonstrate the level of his physical coordination, there is no reason why they should not be able to require him to speak or write in order to determine his mental coordination.<sup>40</sup>

Justice Marshall rejected the testimonial limitation on the privilege, concluding that the evidence should be covered by the privilege regardless and thus providing the fifth vote for concluding that Muniz’s constitutional right was violated.<sup>41</sup>

---

<sup>35</sup> Id. at 459-60.

<sup>36</sup> Id. at 464. An amicus brief from the American Psychiatric Association also explained that a meaningful diagnosis would have to be based on the content of the defendant’s answers: “absent a defendant’s willingness to cooperate as to the verbal *content* of his communications, . . . a psychiatric examination would be meaningless” (emphasis in Brief). Id. at 465.

<sup>37</sup> 496 U.S. 582 (1990).

<sup>38</sup> Id.

<sup>39</sup> Id. at 586.

<sup>40</sup> Id. at 608.



The second category includes both the refusal to submit to a blood-alcohol test<sup>42</sup> and identification requirements during *Terry* stops.<sup>43</sup> In *South Dakota v. Neville*, the Court was faced with the question of whether a suspect's refusal to submit to a blood-alcohol test is testimonial and thus within the scope of the privilege.<sup>44</sup> Recognizing that the refusal may fall on the physical side of the line, the Court invoked the lie-detector example to illustrate the difficulty of drawing the distinction, and then simply avoided the issue by concluding that, even if testimonial, there was no compulsion:

The situations arising from a refusal present a difficult gradation from a person who indicates refusal by complete inaction, to one who nods his head negatively, to one who states "I refuse to take the test," to the respondent here, who stated "I'm too drunk, I won't pass the test." Since no impermissible coercion is involved when the suspect refuses to submit to take the test, regardless of the form of refusal, we prefer to rest our decision on this ground, and draw possible distinctions when necessary for decision in other circumstances.<sup>45</sup>

Likewise, the Court recently decided the constitutionality of so-called "stop-and-identify" statutes, which require suspects to identify themselves during *Terry* stops.<sup>46</sup> The defendant in *Hiibel* refused, claiming the requirement violated the privilege against self-incrimination. Considering the State's argument that the disclosures would not be testimonial, the Court again avoided the issue and decided on other grounds: "Even if these required actions are testimonial, however, petitioner's challenge must fail because in this case disclosure of his name presented no reasonable danger of incrimination."<sup>47</sup>

The third category includes the "testimonial acts of production" cases. In *Fisher v. United States*, the Court held that previously created documents sought in response to grand-jury subpoenas are not within the scope of the privilege because the government is not compelling their creation.<sup>48</sup> The Court acknowledged, however, that the act of producing the documents has "communicative aspects."<sup>49</sup> These aspects include information about the existence, possession, authentication, and the target's beliefs.<sup>50</sup> Whether these communicative aspects "rise to the level of testimony" will depend on the "facts and circumstances of particular cases."<sup>51</sup> The Court concluded in this case that the

---

<sup>41</sup> See *id.* at 616 n.4 (Marshall, J., concurring in part and dissenting in part) ("I continue to have serious reservations about the Court's limitation of the Fifth Amendment privilege to "testimonial" evidence . . . I believe that privilege extends to *any* evidence that a person is compelled to furnish against himself.")

<sup>42</sup> *South Dakota v. Neville*, 459 U.S. 553 (1983).

<sup>43</sup> *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004).

<sup>44</sup> 459 U.S. 553 (1983).

<sup>45</sup> *Id.* at 561-62. The Court explained that there was no coercion because the defendant had a choice of whether to take the test, and the state, under *Schmerber*, could have compelled the test. Thus there was nothing impermissibly coercive about giving the defendant a second option. See *id.*

<sup>46</sup> *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004).

<sup>47</sup> *Id.* at 189.

<sup>48</sup> 425 U.S. 391 (1976).

<sup>49</sup> *Id.* at 410.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 410-11.

“existence and location of the papers are a foregone conclusion and the [target] adds little or nothing to the sum total of the Government’s information.”<sup>52</sup> Eight years later, in *United States v. Doe*,<sup>53</sup> the Court concluded that the defendant’s acts of production were testimonial because the government failed to show that “possession, existence, and authentication were a ‘foregone conclusion.’”<sup>54</sup>

In 2000 the Court decided *United States v. Hubbell*, which involved a subpoena to a defendant who had previously pleaded guilty in order to examine whether he had complied fully with the government.<sup>55</sup> Hubbell invoked his right against self-incrimination; he was provided with immunity for any testimonial acts of production and ordered by the District Court to respond.<sup>56</sup> The subpoena was broad ranging and prompted Hubbell to produce over 13,000 pages of documents in response.<sup>57</sup> Based on information disclosed in those documents, Hubbell was indicted on new, unrelated charges.<sup>58</sup> The government conceded that it could not prove prior knowledge of the documents or their contents (or other evidence of the crimes), but explained that it did not plan on using any of the produced documents against Hubbell at trial.<sup>59</sup> The Supreme Court addressed whether (1) the privilege protects a target “from being compelled to disclose the existence of incriminating documents that the Government is unable to describe with reasonable particularity” and (2) the Government may use such documents “to prepare criminal charges” when the target “produces such documents pursuant to a grant of immunity.”<sup>60</sup>

Following *Fisher* and *Doe*, the Court concluded that Hubbell’s acts were testimonial by focusing on two variables: (1) the amount and quality of the mental effort Hubbell’s response required<sup>61</sup> and (2) the government’s prior knowledge of the information disclosed by the acts themselves (as apart from the content of the documents).<sup>62</sup> With regard to the first variable, the Court noted that it “was unquestionably necessary for [Hubbell] to make extensive use of ‘the contents of his own mind’ in identifying the hundreds of documents responsive to the requests in the subpoena.”<sup>63</sup> His compiling and producing over 13,000 pages was “the functional

---

<sup>52</sup> Id. at 411.

<sup>53</sup> 465 U.S. 605 (1984).

<sup>54</sup> Id. at 614. The government could have immunized Doe for the acts of production see *Kastigar v. United States*, 406 U.S. 441 (1972), and then used the contents of the documents, but it failed to do so. 465 U.S. at 614.

<sup>55</sup> 530 U.S. 27 (2000).

<sup>56</sup> Id. at 31. See also 18 U.S.C. § 6003(a) (2000) (federal immunity statute).

<sup>57</sup> 530 U.S. at 31.

<sup>58</sup> Id. at 31-32.

<sup>59</sup> Id. at 33.

<sup>60</sup> Id. at 30.

<sup>61</sup> See *Allen & Mace*, supra note 3 at 289 (“In what may prove to be the single most important word in the *Hubbell* opinion, the Court referred to the “extensive” effort that Hubbell had to make to respond to the subpoena.”).

<sup>62</sup> By relying on government knowledge, the Court may be using the Fifth Amendment to answer concerns typically arising under the Fourth Amendment—whether the government’s attempt at evidence gathering is reasonable under the circumstances is typically a Fourth Amendment inquiry. See *Pardo*, supra note 3 at 1881-90.

<sup>63</sup> Id. at 43 (citing *Curcio v. United States*, 354 U.S. 118 (1957)).

equivalent of the preparation of an answer to either a detailed written interrogatory or a series of oral questions at a discovery deposition.”<sup>64</sup> In addition to quantity, the Court also suggested that the quality of the mental effort was somehow different from other physical responses: “the assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox.”<sup>65</sup> With regard to the second variable, the Court noted that “the prosecutor needed [Hubbell’s] assistance both to identify potential sources of information and to produce those sources.”<sup>66</sup> It was only after Hubbell’s “truthful reply to the subpoena,” his taking “steps necessary to provide the prosecutor with an accurate inventory of . . . evidence sought,” that the government received the incriminating documents.<sup>67</sup> Like *Doe*, but unlike *Fisher*, “here the Government has not shown that it had any prior knowledge of either the existence or the whereabouts of the 13,120 pages of documents ultimately produced.”<sup>68</sup> Because Hubbell was given immunity for the testimonial act, its derivative use by the Government violated the Fifth Amendment.

### III. Scholarly Critique

The doctrinal confusion caused by the testimony-physical evidence distinction has been perhaps equaled or exceeded by the scholarly critique it has engendered. Consider the following critiques from four different perspectives: historical, normative, descriptive, and metaphysical.

First, writing from an original-understanding perspective, Richard Nagareda has argued that a testimonial limitation gets the relevant history of the privilege all wrong. Examining the relevant materials, he concludes that the “most plausible construction of the phrase ‘to be a witness’” in the Fifth Amendment would be something similar to the phrase “to give evidence” that one would find in “contemporaneous state sources.”<sup>69</sup> This construction would thus expand the scope of the privilege to include not just testimony but any other evidence that a defendant would be compelled to produce.<sup>70</sup> This view appears to have the support from at least two Justices on the current Supreme Court.<sup>71</sup>

Second, others have critiqued the distinction by beginning from a preferred justification for the privilege and then demonstrating that the justification extends to physical evidence. Here are three recent examples of critiques from this perspective. Michael Steven Green argues that from a Lockean social-contract perspective, the privilege is a type of auxiliary constitutional right (along with the Second Amendment right to keep and bear arms) that “give[s] individuals the power frustrate the

---

<sup>64</sup> Id. at 42-43.

<sup>65</sup> Id. at 43.

<sup>66</sup> Id. at 41.

<sup>67</sup> Id. at 42-43.

<sup>68</sup> Id. at 44-45.

<sup>69</sup> See Nagareda, *supra* note 3 at 1605.

<sup>70</sup> See *id.* at 1656, 1658-59.

<sup>71</sup> Justices Thomas and Scalia. See *United States v. Hubbell*, 530 U.S. 27, 49-56 (2000) (Thomas, J., concurring).

government's legitimate attempts to protect citizens against mutually-imposed risks of violence."<sup>72</sup> Given this justification, a principled privilege would extend to any evidence the government attempted to compel from defendants. Because this extension would be "unacceptably broad," *Schmerber* represents "an unprincipled balancing."<sup>73</sup> Likewise, Mike Redmayne argues that "the most compelling rationale for the privilege is that it serves as a distancing mechanism, allowing defendants to disassociate themselves from prosecutions."<sup>74</sup> And that this rationale "suggests that no distinction should be drawn between requirements to speak and requirements to provide the authorities with documents, blood samples and the like."<sup>75</sup> Finally, Daniel Seidmann and Alex Stein argue for more modest revisions in providing an "organizing principle" for the *Schmerber* doctrine.<sup>76</sup> Under their "anti-pooling" rationale, evidence is testimonial whenever a defendant could shape its content (and thus pool with innocents) and so handwriting (and presumably voice) exemplars ought to shift from the physical to the testimonial side of the line and thus fall within the scope of the privilege.<sup>77</sup>

Third, eschewing any attempt at a normative theory, Ron Allen and Kristen Mace argue that the problem with *Schmerber* is that "the very test the Court advances, which is to distinguish between 'testimony' and 'real or physical evidence,' cannot provide answers in important cases."<sup>78</sup> Their test example is a hypothetical lie detector that measures bodily responses when a defendant is presented with images and which does not require a verbal response from the defendant—the test is, by hypothesis, reliable and involuntary (no "cruel" choices or chances to alter the evidence are present).<sup>79</sup> Their intuition is that the privilege would apply but that the extraction of physical evidence is much like the situation for *Schmerber*, thus showing the inadequacy of *Schmerber*'s test. In its place, they offer a descriptive and explanatory account of "testimony" that accounts for the Court's various holdings. Although not explicitly stated by the Court, "testimony" appears to involve a "cognition-based test"—"testimony" applies to "substantive cognition—the product of cognition that results in holding or asserting propositions with truth value."<sup>80</sup>

Finally, and perhaps most provocatively, Susan Easton criticizes the distinction on metaphysical grounds. She argues that the testimony-physical evidence distinction reflects a now-defunct kind of Cartesian dualism, with some evidence existing in a spiritual realm of mind (testimony) and some in the material body (real or physical evidence).<sup>81</sup> She contends that arguably there is "no fundamental difference" between

<sup>72</sup> See Green, *supra* note 3 at 113-14.

<sup>73</sup> *Id.* at 155. See also *id.* at 154 ("Since the principled position is unacceptable [covering blood samples, etc.], the Court had no choice but to settle upon a limitation that is unprincipled.")

<sup>74</sup> See Redmayne, *supra* note 3 at 209.

<sup>75</sup> *Id.*

<sup>76</sup> See Seidmann & Stein, *supra* note 3 at 475.

<sup>77</sup> *Id.* at 477.

<sup>78</sup> See Allen & Mace, *supra* note 3 at 260.

<sup>79</sup> *Id.* at 248-49.

<sup>80</sup> *Id.* at 266.

<sup>81</sup> See Easton, *supra* note 3 at 217.

relying on a defendant's words and relying on his blood.<sup>82</sup> To think otherwise is to fail to grasp that knowledge may be imparted or "communicated" in many ways beyond testimony. Easton points out that these ways constitute a continuum that runs from (1) oral communications to (2) body language intended to communicate (nods, pointing) to (3) non-verbal communications without intentionality (showing fear or nervousness) to (5) external bodily markings (scars and tattoos) to (5) bodily samples.<sup>83</sup> She sees no principled reason to draw a distinction along this continuum, and thus concludes that "while the distinction might be justified on grounds of policy or expediency, nonetheless it is artificial and problematic, because both samples and speech are subject to similar considerations and arguments."<sup>84</sup>

In sum, then, the physical-testimonial distinction misconstrues the original meaning of "to be a witness" in the Constitution; it fails to do justice to the normative justifications for the privilege; it fails descriptively on its own terms; and it reflects one of the most influential but also deeply problematic ideas in the history of modern thought. Whither testimony?

#### IV. The Epistemology of Testimony

The privilege against self-incrimination functions as a constitutionally enshrined evidentiary rule. It operates by providing criminal defendants with the option of limiting the flow of certain information to the government and to fact-finders for use in criminal trials.<sup>85</sup> *Schmerber* and its progeny have limited the scope of this right to information that functions as testimonial communications by defendants. Therefore, understanding how testimony functions as a general epistemic source may help to illuminate when defendants are, and when they are not, offering testimonial evidence. Knowing how testimony functions, in other words, elucidates whether evidence is functioning as testimony. This section thus explores how the epistemology of testimony can help to clarify the doctrinal category.<sup>86</sup> The next section then explores whether the doctrinal category, as clarified in this section, is normatively defensible.

---

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 217-18.

<sup>84</sup> *Id.* at 220.

<sup>85</sup> It is government *use* in a criminal case (of compelled, incriminating testimony) that triggers the constitutional violation, not simply compelling potentially incriminating testimony. See *Chavez v. Martinez*, 538 U.S. 760, 767 (2003).

<sup>86</sup> My contention is not that the Court meant to tie the privilege to the philosophical literature; rather, my point is that the Court appears to have tied the privilege to the general social practice of testimony and that the philosophical literature helps to make explicit the scope and contours of this practice. In this way, the literature can help to illuminate the concept presupposed by the doctrine. An analogy to "scientific" knowledge under Fed. R. Evid. 702 may be helpful. In giving content to the doctrinal category, the Court appealed to both the general social practice of science and to literature in the philosophy of science attempting to illuminate that practice. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993) (citing CARL G. HEMPEL, *PHILOSOPHY OF NATURAL SCIENCE* 49 (1966) and KARL POPPER, *CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE* 37 (5th ed. 1989)). Likewise, I contend, a focus on the social practice of testimony and the philosophical literature discussing it can help give content to the doctrinal category of Fifth Amendment testimony.

Philosophers investigating the epistemology of testimony have focused on several related questions concerning how testimony functions as an epistemic modality in creating knowledge for its recipients. Most relevant for the Fifth Amendment concept of testimony is a focus on what makes testimony *distinct* from other sources of knowledge such as perception, memory, and logical reasoning. This section first explicates the basic features of the concept and then discusses how the epistemic features of testimony separate it from other types of physical or real evidence.

Testimony is the social practice by which a speaker purports to convey information to an audience.<sup>87</sup> The general concept may be illuminated by focusing on the perspectives of both the speaker and the audience. In offering testimony, speakers typically assert some proposition while (1) intending the assertion to make an evidentiary contribution to the audience, and (2) believing the assertion is relevant to a matter that is in dispute for the audience or for which the audience is otherwise in need in evidence.<sup>88</sup> This act may generally be explained in Gricean terms: in making the assertion, the speaker represents that the assertion is relevant, informative, based on adequate evidence, and not false.<sup>89</sup> Assertion are governed by norms of assertion such as that speakers ought to assert only what they know to be true, or at least that they ought to assert that for which they have adequate evidence and do not know to be false.<sup>90</sup> In testifying, speakers hold themselves out to be epistemic authorities; they invite reliance by the audience. In others words, there is a quasi-contractual social practice at work--speakers undertake certain commitments and invite trust and reliance by the audience. In undertaking these commitments, the speaker represents to the audience that they are entitled to rely on the speaker with regard to the propositions asserted.<sup>91</sup>

From the audience's perspective, they must decide whether to rely on the epistemic authority of the speaker in choosing whether to accept the propositions asserted. In genuine cases of testimonial knowledge, the audience comes to know propositions on the basis of the *content* communicated. This excludes, for example, cases in which someone says "I'm awake" and the audience learns the person is awake—the

---

<sup>87</sup> See C. A. J. COADY, *TESTIMONY: A PHILOSOPHICAL STUDY* (1992) (referring to the general social practice as "natural testimony"). Both formal legal testimony and hearsay are subsets of this practice. See Tulane article.

<sup>88</sup> Peter J. Graham, *What is Testimony?*, 47 *PHIL. Q.* 227 (1997) (defining testimony as assertions offered as evidence in support of a proposition).

<sup>89</sup> PAUL GRICE, *STUDIES IN THE WAY OF WORDS* (1991) (first published 1989). Grice's work explored the general conditions governing conversation. He identified several principles underlying our assertional practices. The first is a master principle, the cooperation maxim, which states that speakers generally adhere to four subsidiary maxims. The four subsidiary maxims are: quantity (make assertions as informative as is required by the context); quality (don't assert what you know to be false or for which you lack evidence); relation (make assertion that are relevant); manner (make assertions brief and orderly, not ambiguous or obscure). See *id.* at 26-31.

<sup>90</sup> JOHN HAWTHORNE, *KNOWLEDGE AND LOTTERIES* 23 (2004); TIMOTHY WILLIAMSON, *KNOWLEDGE AND ITS LIMITS* 249-53 (2000); See Jennifer Lackey, *Testimonial Knowledge and Transmission*, 49 *PHIL. Q.* 471, 477 (1999).

<sup>91</sup> ROBERT B. BRANDOM, *MAKING IT EXPLICIT: REASONING, REPRESENTING, AND DISCURSIVE COMMITMENT* 168 (1994) ("The function of assertion is making sentences available for use as premises in inferences. For performances to play this role or have this significance requires that assertional endorsement of or commitment to something entitles or obliges one to other endorsements.").

audience can perceive directly the person is awake (the content did not inform them because the speaker could have said anything to convey the same information). In deciding whether to rely on testimony, the audience may appeal to their background beliefs about the reliability of testimony in general, this kind of testimony, or the testimonial qualities of this speaker.<sup>92</sup> Finally, even if someone is not the intended audience of an act of testimony, they may still rely on the assertion (for example, someone overhearing someone testifying).

Unlike other sources of knowledge, two related features distinguish acts of testimony. First, the knowledge that an audience obtains comes about through recognition of and reliance on the speaker's intention to inform them of the content of the assertion. In offering testimony, a speaker presents his utterance as an *assertion*—he “presents himself as accountable for the truth of what he says, and in doing so he offers a kind of guarantee for this truth.”<sup>93</sup> If the audience were to learn that what appeared to be an assertion was not in fact one (for example, it was a line in a play or a lyric in a song), the audience would cease to take the utterance as a reason to believe in the truth of its content. Contrast a testimonial assertion with two other pieces of evidence: a glove and a photograph. Suppose the glove of the defendant is found at a crime scene (thus implicating him). It serves as evidence, that is, it provides a reason to believe the defendant was involved, regardless of any intentions on the part of the defendant. Indeed, even if it was planted there by a third party (say, the police), it still may serve as (misleading) *evidence* for a jury despite the fact that the jury would make no use of the third-party's *intention* (which was that it would be used as evidence by the jury). Now, consider a photograph of a crime scene. Regardless of the intentions of the photographer, anyone looking at it could perceive its contents and take the photograph as evidence.<sup>94</sup> Not so with a testimonial assertion.

Second, related to the commitments undertaken by one who offers testimony, acts of testimony correspondingly provide audiences with a unique epistemic move, one that is not available with regard to other sources of knowledge. Because testimonial knowledge is knowledge acquired based on the epistemic authority of the speaker, the audience can, in Sanford Goldberg's apt phrase, “pass the epistemic buck” to the speaker after the audience's own justificatory resources have been exhausted.<sup>95</sup> To illustrate, consider Anna who wants to know the temperature and whom has two options: consult

---

<sup>92</sup> As a general matter, speakers may assume that testimonial assertions are true unless they have reasons for not doing so. See Tyler Burge, *Content Preservation*, 102 *Phil. Rev.* 457, 467 (1993) (“A person is entitled to accept as true something that is presented as true and that is intelligible to him, unless there are stronger reasons for not doing so.”) In the legal context, however, the interests of parties and witnesses, as well as the presence of conflicting testimony, naturally makes—and ought to make—the audience more skeptical of the testimony they hear.

<sup>93</sup> Richard Moran, *Getting Told and Being Believed*, in *THE EPISTEMOLOGY OF TESTIMONY* 283 (Jennifer Lackey & Ernest Sosa eds., 2006).

<sup>94</sup> For admissibility purposes, the photograph could be authenticated by someone other than the photographer, see Fed. R. Evid. 901, in which case a fact-finder may rely on this person's testimony. But it need not be. The photograph could have been taken by an automated process—a security camera, for example—which would make it more like the thermometer example below.

<sup>95</sup> Sanford C. Goldberg, *Reductionism and the Distinctiveness of Testimonial Knowledge*, in *THE EPISTEMOLOGY OF TESTIMONY* 133-37 (Jennifer Lackey & Ernest Sosa eds., 2006)

her thermometer or ask her friend Bob. Suppose she takes the first option, and the reading is 50 degrees. If asked to defend her belief that it is 50 degrees, she could cite the general reliability of the thermometer in the past, that it appears to be working properly, and so on. But suppose she takes the second option, and Bob tells her that it is 50 degrees. Now, if asked to defend her belief that it is 50 degrees, she could cite Bob's generally reliable testimony in the past (or Bob's past reliable testimony about the weather), but she has another legitimate move available: she can simply pass the epistemic buck to Bob:

In cases in which the knowledge was not acquired on the basis of testimony, the only epistemically appropriate moves that can be made in response to a 'how do you know?' question are those in which one produces one's justifications for the belief in question—roughly, the reasons one has for believing it. If the belief was acquired on the basis of another's testimony, however, a subject has not exhausted the epistemically appropriate moves available to her, once she has exhausted her justifications for the belief. On the contrary, when the knowledge is testimonial knowledge, even after the subject has exhausted her justifications for the belief, there remains the 'move of last resort', whereby she passes the epistemic buck onto [her speaker].<sup>96</sup>

In the case of testimony, the audience can discharge its justificatory obligations by passing them to the person from whom they received testimony. In cases of epistemic buck passing, a speaker may answer a request for epistemic justification by pointing toward someone else who can provide direct epistemic support for the speaker's assertions.<sup>97</sup>

One might object at this point that, in the above example, Anna could likewise pass the epistemic buck to a thermometer expert after taking the first option. This is true, but the cases are not parallel. The thermometer expert could, let us assume, explain how the thermometer works and why we can rely on its readings, but the expert cannot offer direct epistemic support for the original claim that the thermometer read 50 degrees when Anna checked it (the expert was not there). Another example will help to make the distinction plain, and also illustrate its connection to law. Suppose Chris hears a crime being committed outside his window. To learn what the perpetrator looks like, he can either come to the window and see what the perpetrator looks like or he can ask Dana, who is currently looking out the window. If Chris takes the first option and is subsequently asked to justify his descriptions, he may cite his generally good eyesight

---

<sup>96</sup> Id. at 137. In terms of epistemic justification this is an appropriate move once the subject has good reasons for relying on the testimony in the first place (or, alternatively, has no reason to not rely on it). One distinguishing feature between the thermometer and Bob is the idea of epistemic responsibility, "In relying on a rational being's testimony, one is relying on that being having lived up to her relevant epistemic responsibilities." Id. at 136. One other related difference is that the thermometer is governed solely by physical laws, while Bob's beliefs, knowledge, and other mental states are governed by normative principle of rationality.

<sup>97</sup> When the buck is passed to Bob he is then in the same position that Anna was previously. He may cite his reasons, for example, his trusty thermometer. Or he may pass the buck to whoever told him this information. And so on.



and memory as well as the conditions (lighting, distance, etc.) at the time of his perceptions. But if he instead learned what the perpetrator looked like based on Dana's testimony, he may similarly cite Dana's general reliability, Dana's good perception and memory, and the perception conditions of which he is aware, but he could also simply pass the epistemic buck to Dana (in other words, he could direct the hypothetical inquirer to get epistemic justification for the assertions directly from Dana). Again, under the first option, perhaps an expert could testify about Chris's good perception and memory, but the expert could not offer direct epistemic support for Chris's descriptions (the expert did not see the perpetrator—the buck could not legitimately be passed to the expert regarding those assertions). In cases of knowledge acquired based on testimony, speakers can potentially pass the epistemic buck to the person from whom they received testimony and who can potentially provide direct epistemic support for the assertions.

These differences distinguish testimonial communications from the defendant from all other cases in which the defendant may be considered a “source” of compelled incriminating evidence. In the bodily-sample cases, the defendant will not be serving as an epistemic authority for whether he has a certain blood type, or whether his DNA matched a sample found at the scene, or whether his urine contained trace amounts of illegal drugs. Fact-finders asked to justify their conclusions could not pass the epistemic buck to the defendant with regard to any of these claims. In the exemplar cases, the defendant is not the epistemic authority for whether a voice or handwriting sample matches.<sup>98</sup> In line-up cases or cases involving bodily markings or details regarding the defendant's appearance, the defendant is likewise not the epistemic authority. In each of these cases, either another witness is the authority or the fact-finder can perceive features of the evidence directly. Not so with testimonial communications. With testimonial communications the defendant is the epistemic authority, and fact-finders are being asked to rely on the epistemic authority of the defendant. If they were challenged to defend a conclusion, based on the defendant's testimonial communications, that the defendant is guilty, they could pass the epistemic buck to the defendant. In other words, fact-finders could potentially justify their decisions by citing the defendant's own epistemic authority, by claiming that the defendant (and not they) are the ones with direct epistemic support justifying the fact-finders' conclusions. The buck passing could take a variety of forms: either by relying on the fact that the defendant made incriminating assertions (“well, he confessed” or “he asserted incriminating facts x, y, and z”) or indirectly by not believing the defendant's exculpatory assertions.<sup>99</sup>

Returning to Easton's philosophical challenge to the testimony-physical evidence distinction, observe that the epistemic difference outlined above does not depend on Cartesian dualism or otherwise questionable metaphysics. Consider again Easton claims, first, that there is no difference between relying on a defendant's words and on his

---

<sup>98</sup> While the defendant may not be an epistemic authority on whether there is a match, he may be an authority on whether *this* sample is his normal voice or handwriting.

<sup>99</sup> In situations in which the defendant's assertions are incriminating because they are not believed or are contradicted by other evidence, the defendant is being convicted based, in whole or in part, on his failure to live up to his epistemic obligations. In either case, the government is forcing the defendant into the role of taking on epistemic obligations.

blood<sup>100</sup> and, second, that evidence from defendants run along a continuum from (1) oral communications to (2) body language intended to communicate to (3) non-verbal “communications” without intentionality (showing fear or nervousness) to (4) external bodily markings such as scars and tattoos to (5) bodily samples.<sup>101</sup> One does not have to posit distinct material and non-physical realms to see an epistemic difference either between words and blood, or between categories (1) and (2), on one hand, and (3)-(5), on the other.<sup>102</sup> With words (and with categories (1) and (2)), the fact-finder’s knowledge would be dependent on the epistemic authority the defendant; with blood (and with categories (3)-(5)), their knowledge would be dependent on either their own perceptions or on the epistemic authority of another person. To recognize that knowledge may be generated through these distinct social practices—these different epistemic pathways—does not require that one take a position on the mind-body problem.

Similar considerations apply in the context of freedom of speech, which is in many ways the obverse of the right-to-silence context. Just as one might argue that “all conduct is expressive” and thus that there may be no way to distinguish expressive conduct for First Amendment purposes from other conduct, one could also think that all incriminating evidence a defendant must reveal to the government “communicates” his guilt or “testifies” against him (as Easton’s continuum suggests). But, as Charles Collier’s examples demonstrate in the freedom-of-expression context, there is a plain difference between a cough caused by cigarette smoke and a “stylized, ostentatious, highly exaggerated” cough meant to indicate to the smoker that one is bothered by the smoke.<sup>103</sup> One intends to communicate in the second example and intends for the recipient to get the message *based on recognizing the intent to communicate*. With *testimonial* communications the speaker attempts to convey knowledge based on the recipient’s recognition that the speaker is purporting to be an epistemic authority, is inviting reliance. Just as we can distinguish communicative from non-communicative actions for First Amendment purposes, we can distinguish testimonial evidence from non-testimonial (and non-communicative) evidence for Fifth Amendment purposes. The key questions, though, are: why should we? and how should we? I now turn to these questions.

## V. A Defense of the Testimonial-Physical Evidence Distinction

The notion of epistemic authority and the justificatory move of “passing the epistemic buck” provide a principled justification for the testimonial-physical evidence

---

<sup>100</sup> See Easton, *supra* note 3 at 217.

<sup>101</sup> *Id.* at 217-18.

<sup>102</sup> More generally, one does not have to posit distinct mental and physical realms to see important differences between the two based on the fact that the former is normatively constituted.

<sup>103</sup> Charles W. Collier, *Speech and Communication in Law and Philosophy*, 12 LEGAL THEORY 1 (2006). Collier provides a continuum similar to Easton’s, but in order to argue that a line may in fact be drawn. His examples are (1) being asleep and being awakened by a cough from nearby smoke; (2) trying not to cough and then doing so quietly so as not to disturb anyone; (3) a regular cough, not trying to suppress it (or amplify it); (4) a “stylized, ostentatious, highly exaggerated” cough intended to send a message to the smoker that the smoke is bothering you. He draws a line between (3) and (4).

distinction and an approach for clarifying difficult doctrinal questions. This section discusses the former; the next section discusses the latter.

Note first that cases of compelled testimony (whether from defendants or from other witnesses) are in some sense atypical, deviant cases of natural testimony. In typical cases, speakers choose to undertake epistemic commitments, to represent themselves as authorities, and to invite reliance. By contrast, when speakers are compelled to offer testimony, they are forced into assuming this quasi-contractual position against their will. Given the epistemic similarity of defendants and other compelled witnesses, a defense of the privilege on epistemic grounds ought to be able explain not only what justifies extending the privilege to defendants, but it also ought to be able to explain why this justification applies to defendants and not to other witnesses. Both explanations can be accomplished through—and a principled justification for a testimonial-physical evidence distinction provided by—a particular interpretation of the presumption of innocence.<sup>104</sup>

The presumption of innocence, although intuitively fundamental, is an obscure notion. Properly understood it helps to locate a justification for a privilege against *testimonial* self-incrimination. If the presumption is thought to just mean that the prosecution has the burden of proving guilt beyond a reasonable doubt, then the presumption does not add anything beyond the burden of proof and the decision standard. On the other hand, it might be an additional right possessed by criminal defendants. The latter is the better interpretation because without it the government could meet its burden by simply presuming guilt. Thus the presumption provides an additional limitation on the structure of proof. This additional limitation structures how fact-finders are to approach their task of assessing whether the government has met its burden of proof—by beginning the process with a presumption of innocence.

But this raises a second question: what exactly should the fact-finder be presuming, that the defendant is actually innocent or that the prosecution has not yet proven guilt? Larry Laudan has usefully termed the former “material” innocence and the latter “probatory” innocence, and he has provided strong arguments for the probatory understanding of the presumption.<sup>105</sup> The material-innocence understanding is problematic for two reasons. First, and less importantly, it is epiphenomenal because fact-finders are never asked to make decisions about the defendant’s material innocence. Second, and more importantly, an instruction telling jurors to presume innocence until guilt is proven beyond a reasonable doubt asks jurors to do the impossible. In order to move from a belief of material innocence to a belief of guilt beyond a reasonable doubt, the jurors will along the way have intermediate belief states (for example, that the defendant is more likely than not guilty but not yet guilty beyond a reasonable doubt). A presumption of material innocence denies this cognitive fact about how jurors process

---

<sup>104</sup> The European Court of Human Rights has drawn a connection between the privilege and the presumption of innocence, but without providing an explanation of the how the two are connected analytically. See *Saunders v. United Kingdom*, 23 EHRR 313 (1997), para. 67-69.

<sup>105</sup> LARRY LAUDAN, *TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY* 90-109 (2006).

information and thus cannot be correct.<sup>106</sup> The more plausible understanding is a probatory presumption of innocence. The presumption, under this interpretation, adds to the burden of proof and the decision standard of beyond a reasonable doubt a sort of epistemic “clean slate”: fact-finders should begin with no inculpatory evidence or prior beliefs about likely guilt.<sup>107</sup> The prosecution must overcome this presumption by presenting enough inculpatory evidence to epistemically justify a conclusion that the decision standard has been met.

This probatory, epistemic-blank-slate understanding of the presumption of innocence provides a justification for a testimonial privilege. Possessing a right to this blank slate, a defendant should not as a probatory matter have to respond until the government has met its burden of filling up the epistemic void.<sup>108</sup> Just as the state cannot overcome its burden of proof by presuming guilt, it should not be able to overcome its epistemic burden by passing the epistemic buck to the defendant. Attempting to compel the defendant to assume epistemic authority for incriminating propositions (or to assume epistemic authority for contrary propositions, which can then be attacked in order to suggest guilt) violates this initial probatory presumption. It would be perverse to say the government carries an epistemic burden but that it can discharge this burden by simply passing it to the defendant—just as the legislature cannot use presumptions to shift the burden of proof to the defendant on an element of a crime.<sup>109</sup> With non-testimonial evidence, by contrast, including physical evidence the defendant is forced to produce, the government is proving guilt through independent epistemic means, through other justificatory resources (either the epistemic authority of other witnesses or fact-finders’ own perceptions). In sum, both the presumption of innocence and privilege against testimonial self-incrimination merge to provide the defendant with a proof right beyond the burden of proof and the decision standard—the prosecution cannot overcome the presumption of innocence by passing the epistemic buck to the defendant and asking the fact-finder to rely on the epistemic authority of the defendant.<sup>110</sup>

---

<sup>106</sup> Id. at 102.

<sup>107</sup> Id. at 110.

<sup>108</sup> Kent Greenawalt has argued that, as a moral matter, one normally ought not have to respond to accusations until they have been supported with evidence. R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 Wm & Mary L. Rev. 15 (1981). My analysis extends this point to the proof context: the defendant need not assume epistemic obligations until the government has met its epistemic obligations. The Court’s decision in *Chavez v. Martinez*, 538 U.S. 760, 767 (2003), which locates the constitutional violation at the point of its use in a criminal proceeding, supports my above analysis, which justifies the privilege in terms of the proof structure of the criminal proceeding. Greenawalt’s moral point also has Fourth Amendment implications—compelled questioning ought to take place only when supported by sufficient evidence (probable cause or, when appropriate, reasonable suspicion). See also Pardo, *supra* note 3 (explaining the relationship between the Fourth and Fifth Amendments in the interrogation context).

<sup>109</sup> See, e.g., *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

<sup>110</sup> In the plea context, and consistent with the above analysis, the Supreme Court has concluded that defendants who plead guilty likewise need not take epistemic authority for the factual basis underlying their plea. See *North Carolina v. Alford*, 400 U.S. 25 (1970). One further implication of the above analysis is that the privilege may not apply once the government has met its burden of proof. If so, this will not matter much functionally—defendants in this position will often be compelled to testify anyway because they will need to rebut the government’s evidence in order to avoid conviction.

Moreover, these considerations regarding the presumption of innocence distinguish defendants from other compelled witnesses. If the privilege is seen as a corollary to a presumption of innocence, as essentially a right of criminal defendants during the criminal proof process, then the normative justifications evaporate when applied to cases of non-self-incrimination. If a compelled witness is not a defendant, or offering potentially self-incriminating testimony, there is no potential criminal prosecution (and thus no presumption of innocence) that would justify their refusal to provide such testimony.<sup>111</sup>

One sees the seeds of this presumption-of-innocence justification in the “complex values” the Court referred to in *Schmerber*: requiring the state to produce evidence by independent labors; to shoulder the entire load; and to not be able to replace other evidence with the simple expedient of taking it from the defendant’s mouth.<sup>112</sup> But these values sweep too broadly—taking blood is not an independent labor or shouldering the entire load, and if it is not ok to gather evidence from the defendant’s mouth, why is his vein ok?—and they miss the crucial issue of epistemic authority. As do most other possible principles: dignity, autonomy, and privacy considerations apply to both kinds of evidence; defendants may face the “cruel” choice of whether to alter physical evidence for which they are not serving as an epistemic authority (thereby raising reliability concerns); and even evidence that defendants may have less or no control over (certain kinds of lie-detectors, for example) may nevertheless force them into a position of epistemic authority for incriminating propositions. Each principle fails to sort evidence based on whether the government (and, potentially, the fact-finder) is attempting to pass the epistemic buck to the defendant.

## VI. Conclusion

This section concludes by clarifying the difficult doctrinal examples raised in this article in light of the discussions in parts IV and V.

1. The psychological examination in *Estelle*<sup>113</sup> was testimonial because in order to evaluate the doctor’s conclusions the fact-finder had to rely on the defendant’s epistemic authority regarding his assertions during the examination.
2. The sixth-birthday question in *Muniz* should not have been testimonial because the government was not asking the fact-finder to rely on the defendant’s epistemic authority regarding the date of his sixth birthday.<sup>114</sup>

---

<sup>111</sup> Note there is still something perverse from an epistemic perspective about compelled testimony of any sort, but it is enough to distinguish cases of self-incrimination from other situations of compelled testimony with the general rule that the government is entitled to “every man’s evidence.” See *Katigar v. United States*, 406 U.S. 441, 443-44 (1972) (discussing this “general common-law principle” as being entrenched by 1742). In epistemic terms, this would mean that citizens have epistemic obligations to the government when they know relevant information, even if they might be reluctant to undertake those obligations in the absence of government compulsion.

<sup>112</sup> 384 U.S. 757, 762 (1966).

<sup>113</sup> 451 U.S. 454 (1981).

3. The refusals in both *Neville*<sup>115</sup> and *Hübel*<sup>116</sup> were testimonial because they required reliance on the defendant's epistemic authority.

4. The acts of production in cases like *Hubbell* are testimonial because the government made derivative use of the defendant's epistemic authority in responding to the subpoena.<sup>117</sup> But whether they are testimonial or not should not depend on either (1) the amount of cognitive effort employed, or (2) the government's prior knowledge. First, one may rely on the defendant's epistemic authority even when little cognitive effort is required by the defendant (saying his name, for example), and great cognitive effort by the defendant may not require any reliance on his epistemic authority (for example, if asked to recite the alphabet backwards). Second, regardless of government knowledge, use of the defendant's acts should be testimonial whenever the *fact-finder* would be asked to rely on the defendant's epistemic authority. If neither the government nor the fact-finder so rely (for example, because the government has independent evidence to prove the propositions), then there is no violation of the privilege.

5. Lie detectors. The results of polygraphs and other lie-detection tests, whether they call for a voluntary response or not, are testimonial because the tests are just inductive evidence of the defendant's epistemic state.<sup>118</sup> They are evidence that purports to tell us either: (1) that we can or cannot rely on the assertions made by the defendant and for which he has represented himself to be an authority, or (2) what propositions the defendant would assume authority for and would invite reliance upon, were he to testify truthfully.

\* \* \*

A final caveat. Nothing in my argument is meant to suggest that the proposed justification for the privilege is inevitable or has to be adopted. We may, of course, on one hand, collectively determine that other, more expansive rationales are more attractive and thus that the privilege should expand accordingly. Or, on the other hand, we may conclude that the privilege as construed above is too costly because it leads to too many false acquittals and thus ought to be constricted. Rather, I have started with the fact that the trial is an epistemic event and have attempted to articulate a principled,

---

<sup>114</sup> 496 U.S. 582 (1990). The relevance was whether the defendant could perform a particular mental task (intoxication being the explanation for his failure to do so); based on the evidence, the fact-finder could perceive that he could not (it need not rely on his epistemic authority).

<sup>115</sup> 459 U.S. 553 (1983).

<sup>116</sup> 542 U.S. 177 (2004).

<sup>117</sup> This assumes that derivative-use immunity is a corollary of testimonial evidence. A case could be made based on the above analysis that no violation occurs if the fact-finder is not asked to rely on the defendant's epistemic authority. The concern, of course, would be "fishing expeditions," but these are better regulated by the Fourth Amendment. See Pardo, *supra* note 1 at 1881-90. Moreover, previously created documents or previously made statement by the defendants may be testimonial, but the privilege would not to apply when they were not compelled. In creating the evidence, the defendant may have already represented himself as an epistemic authority and invited reliance.

<sup>118</sup> See Michael S. Pardo, *Neuroscience Evidence, Legal Culture, and Criminal Procedure*, 33 Am J. Crim. L. 301, 328-33 (2006).

epistemological reason to treat testimonial evidence differently from other evidence. The idea of epistemic authority, I have argued, provides that reason.