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The Testimonial Component of the Right Against Self-Incrimination

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THE TESTIMONIAL COMPONENT OF THE RIGHT AGAINST SELF-INCRIMINATION

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> [T]he basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution "shoulder the entire load."[1]
>
> If a man has done wrong, he should be punished. But the evidence against him should be produced, and evaluated by a proper court in a fair trial. Neither torture nor an oath nor the threat of punishment such as imprisonment for contempt should be used to compel him to provide the evidence to accuse or to convict himself. If his crime is a serious one, careful and often laborious police work may be required to prove it by other evidence. Sometimes no other evidence can be found. But for about three centuries in the Anglo-American legal system we have accepted the standard that even then we do not compel the accused to provide that evidence.[2]

These are two representative samples of the innumerable attempts by courts and commentators to distill the essence of the right against compelled self-incrimination guaranteed by the fifth amendment to the United States Constitution. They reflect a shared view of the spirit and meaning of the fifth amendment right: that if the sovereign seeks to prosecute, convict and punish a criminal suspect, it must do so on the strength of evidence gathered through its own exertions, rather than through the coerced assistance of the accused.

However immutable this principle might seem, it has been set aside in a host of cases in which the criminal suspect has been compelled to aid his accusers in their search for evidence needed to secure his conviction. The

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1. Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 415 (1966).
2. E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7-8 (1955).

accused has been compelled to participate in a line-up,[3] to speak,[4] write,[5] or spell[6] particular words or phrases, to blow up a balloon,[7] to walk a specified way,[8] to furnish name and address,[9] and to indicate whether he uses an alias.[10]

The question of how these examples can be reconciled with the principle that an accused should not be compelled to assist his accusers in their efforts to obtain evidence against him, prompts a well settled reply: the fifth amendment goes no further than to condemn the compulsion of incriminating testimony. The evidence or information compelled in the above listed cases is nontestimonial, and therefore may be compelled without transgressing the fifth amendment. Authority for this syllogism is derived from the language of the fifth amendment itself: "No person . . . shall be compelled in any criminal case *to be a witness* against himself . . . ."[11] "To be a witness," the Supreme Court has reasoned, is to testify. Accordingly, the fifth amendment proscribes compulsion of incriminating evidence only insofar as the evidence compelled is testimonial in nature.[12] Breath, blood, fingerprints, and handwriting samples, for instance, are not testimonial as such, but are physical evidence. They are means to identify the accused. It is accepted wisdom, therefore, that the fifth amendment is no bar to the compulsion of such evidence.

This explanation begs the original question: if a purpose of the right against compelled self-incrimination is to assure that evidence against a suspect is obtained through the exertions of the accusers and not the accused, how can the language of the right be construed to justify an abandonment of that purpose whenever the exertions compelled are nontestimonial? The United States Supreme Court's only answer is admirably frank, but not particularly illuminating: "If the scope of the privilege coincided with the complex of values it helps to protect, we might be obliged to conclude that the privilege was violated . . . . [H]owever, the privilege has never been given the

3. United States v. Wade, 388 U.S. 218 (1967).

4. *Id.*

5. Gilbert v. California, 388 U.S. 263 (1967).

6. United States v. Pheaster, 544 F.2d 353, 371 (9th Cir. 1976), *cert. denied,* 429 U.S. 1099 (1977).

7. Hill v. State, 366 So. 2d 318 (Ala. 1979).

8. State v. Proctor, 535 S.W.2d 141, 144 (Mo. Ct. App. 1976).

9. California v. Byers, 402 U.S. 424 (1971).

10. United States v. Prewitt, 553 F.2d 1082, 1085-86 (7th Cir. 1977).

11. U.S. CONST. amend. V (emphasis added). The Court has made it clear, however, that the testimonial requirement does not represent a judicial undertaking to divine the plain meaning of the phrase "to be a witness," but rather results from a more searching analysis of the spirit and history of that phrase. *See* Schmerber v. California, 384 U.S. 757, 761 n.6 (1966).

12. *Schmerber,* 384 U.S. at 763.

full scope which the values it helps to protect suggest."[13]

In this Article it is my intention to demonstrate that the testimonial requirement cannot be reconciled with the purposes served by the right against self-incrimination, but that the requirement's existence may nevertheless be understood as a pragmatic compromise between the government's interest in unrestricted access to relevant evidence and the individual's fifth amendment interest in refusing to assist his accusers in any way, shape, or form. As a result of that compromise, the individual's right to resist more egregious forms of compelled self-incrimination is preserved, while the government is enabled to obtain vital nontestimonial physical evidence against criminal suspects, with or without their cooperation.

Problems with the testimonial requirement, however, do not end with the ascertainment of its *raison d'etre*. Apparent inconsistencies in the Supreme Court's application of the requirement abound. Beginning with the premise that the fifth amendment protects all communications or testimony, "whatever form they might take,"[14] the Supreme Court has held that compelling a criminal suspect to submit to wearing specified articles of clothing,[15] or to having his blood tested,[16] is nontestimonial and therefore permissible. The Court also has rejected fifth amendment claims raised with regard to compelled voice and handwriting exemplars, ruling that the exemplars themselves are nontestimonial physical evidence.[17] While the act of producing the exemplars discloses that the suspect can do what he has been requested to do, i.e., the suspect implicitly communicates that he can speak or write, the Court departed from the earlier pronouncement that the fifth amendment reaches all compelled communications, concluding instead that while the act of producing exemplars was communicative such communications were not "sufficiently" testimonial to meet the fifth amendment requirement.[18]

Similarly, in rejecting a fifth amendment challenge to a state statute requiring automobile drivers to stop and identify themselves at the scene of accidents in which they were involved,[19] a plurality of the Court held that the communication implicit in the driver's act of stopping and identifying himself—that he believed he had been involved in an accident—was a non-

13. *Id.* at 762.

14. *Id.* at 763-64.

15. Holt v. United States, 218 U.S. 245, 251-53 (1910).

16. *Schmerber,* 384 U.S. at 760-65.

17. United States v. Wade, 388 U.S. 218, 222-23 (1967) (voice exemplar); Gilbert v. California, 388 U.S. 263, 266-67 (1967) (handwriting exemplar).

18. Fisher v. United States, 425 U.S. 391, 411 (1976).

19. California v. Byers, 402 U.S. 424 (1971).

testimonial inference for fifth amendment purposes.[20] More recently, however, the Court has held that the compelled production of a preexisting document was sufficiently testimonial for the right to apply because the act of producing the document amounted to testimony that the person compelled to produce it was able to do so, i.e., the suspect implicitly testified that the document existed and that the document produced was authentic.[21]

In sum, the Court's focus in evaluating the testimonial requirement has gradually shifted from a simple inquiry as to whether there has been a compelled communication of any kind, to a seemingly standardless ad hoc assessment of whether a given communication is "sufficiently" testimonial for purposes of fifth amendment analysis. It is my view that one can make sense out of the testimonial requirement, and apply it coherently and consistently, only after it is recognized that the requirement arose as a narrow exception to the constitutional proscription of compelled incrimination that was designed to achieve the practical result of excepting physical evidence from fifth amendment protection. That objective can be served best by construing the term "testify" simply to mean a communication or transmission of information that tends to substantiate the existence or nonexistence of a fact or other matter. In light of this definition, physical evidence, from whatever source, may yield important information upon independent investigation and testing by the government, but is not itself a transmission of information from accused to accuser, and thus is not testimony. Accordingly, the suspect's body may be exploited as a source of physical evidence without transgressing the fifth amendment.

When, however, the suspect is compelled actively to assist the government in obtaining physical evidence, the act of providing the assistance demanded by producing the evidence is invariably testimonial, at least insofar as it substantiates the suspect's ability to perform the task requested. Thus, in a murder case, the corpse itself may be nontestimonial physical evidence, but if a murder suspect is compelled to assist the police by producing the corpse, the suspect tacitly attests to his ability to provide the assistance requested, i.e., he implicitly substantiates the existence and whereabouts of the body. Similarly, a suspect compelled to provide a sample of his handwriting testifies that he can do so, i.e., that he can write, even though the sample itself may constitute nontestimonial physical evidence; the suspect's ability to write may be a foregone conclusion, depending upon the circumstances of the case, but that does not make the communication of such information less testimonial. The Supreme Court's designation of this kind of testimony as

20. *Id.* at 433.

21. United States v. Doe, 465 U.S. 605 (1984).

insufficiently testimonial[22] is thus confusing and unhelpful. More accurately, in such a case, the act of producing the exemplar is compelled and testimonial, but is insufficiently informative to be incriminating for purposes of fifth amendment analysis.

The confusion that has resulted from the Court's decisions concerning the testimonial component of the right against compelled self-incrimination may be avoided if a two-part analysis is undertaken. It must first be ascertained whether the suspect has been compelled to testify, i.e., to transmit information tending to substantiate the existence of a fact or other matter. If so, it must then be determined whether the compelled testimony is incriminating under established constitutional standards. This approach to the testimonial requirement simultaneously enables the government to obtain the nontestimonial or otherwise unprotected evidence in question, ensures that criminal suspects can successfully resist more intrusive demands for incriminating communications, and clarifies the manner in which the requirement should be applied.

To these ends, Section I will consider the philosophical underpinnings of the fifth amendment right against compelled self-incrimination, with special emphasis upon the testimonial requirement. Section II will address the foundations and early judicial interpretations of the right. Section III will analyze the Supreme Court pronouncements on the testimonial requirement. Finally, Section IV will present a framework for analysis of fifth amendment claims, outlining the manner in which the testimonial requirement should be applied.

I. PHILOSOPHICAL UNDERPINNINGS

By its terms, the fifth amendment provides that no person shall be compelled in any criminal case "to be a witness against himself." Considered in a vacuum, the phrase "to be a witness" is susceptible of various meanings from the very broad to the very narrow. In perhaps the broadest sense of the phrase, to be a witness is to be a source of evidence. Alternatively, it is to assist in the disclosure of evidence. Narrower still, to be a witness is to testify, to attest to a fact or to communicate information. Narrowest of all, it is to appear in court and respond to questioning under oath. When the various meanings ascribable to the phrase "to be a witness" are evaluated in light of the purposes that the right as a whole is intended to serve, it should be possible, one might logically suppose, better to ascertain the most appropriate definition.

The right against compelled self-incrimination furthers a multiplicity of

22. *Fisher*, 425 U.S. at 411.

objectives.[23] One is protection of the innocent. When threats or intimidation are employed to coerce a confession from a suspect, there can be no assurance that the suspect is testifying truthfully on the basis of his knowledge, and not falsely, out of fear of his accuser.[24] Another objective is the protection of society by conviction of the guilty. To convict and sentence an innocent person on the basis of a coerced confession plainly fails to deter, punish, rehabilitate or incapacitate the wrongdoer, leaving the guilty at liberty to repeat his crime.[25] Similarly, the right promotes conviction of the guilty by encouraging witnesses to come forward and testify who might otherwise refuse out of fear of self-incrimination.[26]

The Supreme Court has made it quite clear that while the right may make the criminal process more efficacious in some cases by guarding against false admissions of guilt prompted by coercion, that is not its primary purpose. As a practical matter, the right impedes the truth finding process more often than not.[27] Moreover, to the extent that law enforcement agencies seek to maximize efficiency, it is in their interest to develop self-imposed restrictions upon investigative practices that may yield untrustworthy information, thereby rendering superfluous those aspects of the right that enhance the accuracy of the factfinding process. Given the Supreme Court's longstanding admonition that the right is intended to protect the guilty and innocent defendant alike,[28] it would defy logic to say that this personal "right" of the criminally accused exists primarily, or even in part, for the purpose of streamlining the efficiency of the process whereby the accused is convicted.

In addition to the suspect goals of protecting the innocent and detecting the guilty, the right serves to encourage diligence and discourage cruelty by

23. Whether the stated objectives or purposes commonly ascribed to the right against self-incrimination do in fact justify its existence is a question outside the scope of this article. *See* Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986) (concluding that the various rationales given in support of the right against self-incrimination are uniformly unsatisfactory). For purposes here, I am taking the stated purposes of the right at face value, in an effort to determine whether the testimonial requirement can be justified in light of those stated purposes, irrespective of whether those purposes justify the existence of the right.

24. E. GRISWOLD, *supra* note 2, at 10-19; L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 375 (1968).

25. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 187-89 (1968).

26. McNaughton, *The Privilege Against Self-Incrimination, Its Constitutional Affection, Raison d'Etre and Miscellaneous Implications*, 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 138, 143 (1960).

27. Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) (the right "derogates rather than improves" truthfinding); *In re* Gault, 387 U.S. 1, 47 (1967) ("[T]he privilege has a broader and deeper thrust than the rule which prevents the use of confessions which are the product of coercion because coercion is thought to carry with it the danger of unreliability.").

28. Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 415 (1966).

law enforcement authorities by foreclosing the police and prosecutors from torturing, threatening, or coercing the accused as a means to simplify their jobs, thereby requiring reliance entirely upon their own investigative efforts to obtain evidence against the suspect.[29] Still another purpose served by the right is preservation of the accusatorial system of justice. The principles that an accused is legally innocent until proven guilty and that the burden is at all times upon the prosecution to establish the defendant's guilt, commend a rule requiring the accuser to "shoulder the entire load" of the criminal investigation, without the compelled cooperation of the accused.[30] A final value arguably preserved is a general right of privacy—the right to be left alone.[31]

Upon consideration of the several purposes served by the right, it is possible to reject the most broad and most narrow of the four alternative constructions posited earlier for the phrase "to be a witness." To define the concept of being a witness in its broadest sense is to construe it so as to reach all situations in which the accused is a source of evidence. Such a definition encompasses not only those cases in which the suspect is obliged actively to assist his accusers by providing them with evidence of any and all kinds, but also includes those cases in which the accused is compelled to submit passively to a search or inspection of his body. In light of the purposes served by the right, compelling a suspect to submit to inspection, examination, and so on, is unobjectionable. While these investigative activities intrude upon the suspect's privacy, the Supreme Court has apparently debunked the notion that the fifth amendment is calculated to protect a general right of privacy.[32] It certainly has no adverse impact upon the veracity of evidence thereby obtained, does not alter the prosecution's duty to gather evidence exclusively through its own efforts, and does not relieve the prosecution of its burden of proof. A suspect compelled to submit to a search or inspection

29. *See* Dolinko, *supra* note 23, at 1077 n.78 and authorities cited therein ("The belief that the privilege against self-incrimination is a safeguard against torture is widespread."); *see also* 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 194 (1927); J. WIGMORE, TREATISE ON EVIDENCE § 2263, at 3123 (1904).

30. *Tehan,* 382 U.S. at 415; United States v. Yurasovich, 580 F.2d 1212 (3d Cir. 1978).

31. Gavison, *Privacy and the Limits of the Law,* 89 YALE L.J. 421, 435-36 (1980). In Bellis v. United States, 417 U.S. 85, 91 (1974), the Court remarked that a purpose of the right is to protect the individual's private "inner sanctum." Two years later, however, in Fisher v. United States, 425 U.S. 391 (1976), the Court cast considerable doubt upon the continuing vitality of that notion.

> We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment. We adhere to the view that the Fifth Amendment protects against "compelled self-incrimination, not [the disclosure of] private information."

Id. at 401.

32. *See supra* note 31.

of his person is under no compulsion to give his accusers evidence, but is obliged only to sit still while evidence is gathered through the independent investigation of the prosecution.

At the opposite end of the spectrum, it is plainly unjustifiable to confine the definition of being a witness solely to the declarations of persons under oath in courtroom proceedings. The "classic" case of a confession elicited by torture and introduced into evidence through the testimony of the torturer, violates every conceivable purpose of the fifth amendment, but would be unassailable if the right against self-incrimination were available only to courtroom witnesses.

Of the two remaining definitions of being a witness against oneself—one who actively assists his accuser and one who testifies against himself—the former would seem to be more compatible with the purposes of the right. When a suspect is compelled affirmatively to assist his accusers by producing incriminating evidence, the government is relieved of its burden of garnering evidence against the accused exclusively through its own efforts. That burden is instead shifted to the accused, and is thus contrary to an accusatorial system of justice, regardless of whether the evidence compelled takes the form of testimony. The more actively a suspect is compelled to cooperate with his accusers, the more obvious the fifth amendment implications. To that extent, the compulsion of testimony may constitute a more serious infraction than the compulsion of most nontestimonial evidence, but that would seem to be a difference of degree and not of kind.

The only coherent justification for defining "to be a witness" more restrictively, so as to mean to testify, is the earlier raised and rejected notion that one purpose of the right is to maximize the efficacy of the criminal process by enhancing protection of the innocent and detection of the guilty. The veracity of nontestimonial evidence, be it a murder weapon, a voice or writing sample, or the results of a line-up or breath test, is normally going to be unaffected by whether such evidence is obtained with the active assistance of the accused.[33] Only when the compelled assistance takes the form of testi-

33. Unlike blood or fingerprints, the suspect does exert some control over his voice and handwriting, and is thus in a position to falsify them in an effort to evade detection. *See* Dann, *The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence From a Suspect,* 43 S. CAL. L. REV. 597 (1970). However, in compelling a suspect to furnish a handwriting or voice exemplar, there is comparatively little risk that the coercion employed to obtain the samples, as distinguished from the suspect's guilty conscience, will affect their reliability. In other words, in response to a demand for exemplars, a guilty suspect's fear of detection may prompt him to adulterate his handwriting or voice, but an innocent suspect's fear of his accusers is likely to prompt him merely to accede to the demand, with no adverse effect on the reliability of the sample offered. Because the utilization of coercive tactics to obtain exemplars does not appreciably increase the risk that an innocent person will be convicted, crime control concerns are satisfied.

mony from the lips of the accused, does the trustworthiness of the evidence thereby obtained become a concern. It is only then that the risk arises that an innocent suspect will make a false admission of guilt to satisfy the coercive demands of his accusers. If one proceeds on the assumption that the right should be construed to maximize the truthfinding capacity of the criminal process, a "testimonial" requirement is optimal because it prevents the government from compelling potentially unreliable communications, while enabling it to obtain a variety of probative nontestimonial evidence that could not be obtained if the government were generally prohibited from enlisting the suspect's active assistance.

While maximizing the trustworthiness and efficiency of the evidence gathering process may not be among the purposes of the right against self-incrimination, the government's interest in an effective system of crime control is nevertheless an omnipresent counterweight to the full and free exercise of procedural rights in general, and fifth amendment rights in particular.[34] The testimonial requirement may thus be understood to represent a balance struck between the values the right was intended to protect, and the practical need for effective crime control.[35]

A primary impediment to ready acceptance of this explanation is that the testimonial requirement has never been justified by the Court in terms of such a compromise or balancing of interests. In *Schmerber v. California,* the Court conceded that the requirement is at odds with the values protected by the privilege, but held that the requirement is nevertheless appropriate in light of a "long line of authorities in lower courts," that have "consistently limited" application of the privilege to testimonial compulsion.[36] There is

34. California v. Byers, 402 U.S. 424, 427 (1970) ("Tension between the State's demand for disclosures and the protection of the right against self-incrimination . . . must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other."); *see generally* H. PACKER, *supra* note 25.

35. The fifth amendment right against self-incrimination is stated in absolute terms, and would not appear to allow for a balancing of this sort. The first amendment freedom of speech, however, is likewise stated in the absolute, yet the Supreme Court has long resolved claims of first amendment violation by balancing the interests of government and individual. In some situations, the Court has balanced the respective interests of the parties categorically, as in the case of "fighting words," in which the Court has held that whatever first amendment interest the individual may have in making such utterances is "clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). First amendment claims not amenable to categorical treatment are resolved by a balancing of the interests at stake on a case-by-case basis. Konigsberg v. State Bar of California, 366 U.S. 36 (1961). In the context of the fifth amendment, the testimonial requirement may simply be viewed as the product of a categorical balancing of interests, in which the Court has determined that whatever fifth amendment interest a suspect may have in refusing to make nontestimonial disclosures is inevitably outweighed by the government's interest in obtaining such disclosures.

36. Schmerber v. California, 384 U.S. 757, 762-63 (1966).

no indication, however, as to which if any of the explanations supporting a testimonial requirement proffered in this line of lower court cases justified the requirement in the Court's view.[37] In order to better understand the purpose of the testimonial requirement, and the manner in which it has been construed, it is useful to review the origins of the right and the line of early lower court cases to which the Supreme Court refers.

II. ORIGINS AND EARLY INTERPRETATIONS OF THE RIGHT

The right against self-incrimination became a part of the English common law in the mid-1600's, following the celebrated trials of John Lilburne, in which the defendant's adamant refusals to testify against himself were ultimately, albeit grudgingly, respected by the presiding judges.[38] Prior to that time, the common practice among the ecclesiastical courts of England had been to put the defendant upon his oath and compel a statement from him as to the crimes of which he was accused.[39]

The American colonies borrowed heavily from England's common law of criminal procedure, making no exception for the right against compelled self-incrimination.[40] By the mid-eighteenth century, the right was firmly established throughout the colonies.[41] In 1776, George Mason incorporated a self-incrimination clause into the Virginia state constitution, and seven other states followed suit shortly thereafter.[42] With the constitutional provisions of Virginia and several other states to guide him, James Madison drafted the fifth amendment to the United States Constitution in 1789.[43] Unlike the state constitutions, which had phrased the clause in terms of a right not to be compelled to "give evidence," "furnish evidence," or "secure evidence," Madison's version was unique in phrasing the provision in terms of a right not to be compelled to "be a witness."[44] Latter day scholars and courts are in agreement, however, that the differences in phrasing do not reflect intended differences in meaning. The several provisions share a common origin, and regardless of whether the words read "to give evidence," "to be a witness," or as is the case in some states, "to testify," the variations in semantics do not warrant variation in interpretation.[45]

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37. *Id.*
38. L. LEVY, *supra* note 24, at 301-13.
39. *Id.* at 266-300.
40. *Id.* at 371-75.
41. *Id.* at 368-404.
42. *Id.* at 405-09.
43. *Id.* at 422.
44. *Id.* at 410, 423.
45. Schmerber v. California, 384 U.S. 757, 761-62 n.6 (1966) (quoting Counselman v. Hitchcock, 142 U.S. 547, 585 (1892)); *Counselman,* 142 U.S. at 584-85 (the various state and

Early judicial interpretations of the right offer some clues as to the meaning ascribed to these variously worded phrases. Until the turn of the twentieth century, contrary to the Supreme Court's observation in *Schmerber,* a majority of courts addressing the issue were of the opinion that the right to refuse to give evidence, to be a witness, or to testify, encompassed a right to refuse to cooperate passively or actively with prosecutorial authorities. Thus, it was generally held that a defendant could not be compelled to make a footprint (for purposes of comparison to a track found at the scene of a crime),[46] to participate in a physical examination,[47] to exhibit a part of his body,[48] or to wear particular clothing.[49]

The principle underlying these decisions was relatively straightforward:

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federal provisions relating to the right against self-incrimination, "however differently worded, should have as far as possible the same interpretation"); Twining v. New Jersey, 211 U.S. 78, 92 (1908) ("[A]ll the States of the Union have, from time to time, with varying form but uniform meaning, included the [self-incrimination] privilege in their constitutions . . . ."); *see also* J. WIGMORE, WIGMORE ON EVIDENCE § 2263, at 378 (McNaughton rev. ed. 1961) (It is "immaterial that the witness is protected by one constitution from 'testifying,' or by another from 'furnishing evidence,' or by still another from 'being a witness.' These various phrasings have a common conception, in respect to the *form* of the protected disclosure.") (emphasis in original).

46. "[B]y the weight of authority it is held to be error to compel the accused to submit to a comparison of footprints and to permit a witness who was present when the accused was forcibly compelled to place his foot in footprints, or to surrender his shoes for the purpose of making a comparison, to testify as to the result . . . ." State v. Sirmay, 40 Utah 525, 537, 122 P. 748, 753 (1912); Cooper v. State, 86 Ala. 610, 6 So. 110 (1889) (admission of evidence that defendant refused to make tracks in his stocking feet for comparison purposes was reversible error); Day v. State, 63 Ga. 667 (1879); State v. Griffin, 129 S.C. 200, 124 S.E. 81 (1924); Stokes v. State, 64 Tenn. 619 (1875).

47. People v. Akin, 25 Cal. App. 373, 143 P. 795 (1914); State v. Horton, 247 Mo. 657, 153 S.W. 1051 (1913) (reversible error to compel accused to undergo physical examination); Bowers v. State, 45 Tex. Crim. 185, 75 S.W. 299 (1903); Whitehead v. State, 39 Tex. Crim. 89, 45 S.W. 10 (1898).

48. State v. Jacobs, 50 N.C. 259 (1858) (defendant cannot be compelled to exhibit himself as a means to establish that he is a free negro); Blackwell v. State, 67 Ga. 76 (1881) (it was error to compel the defendant to exhibit his leg); State v. Garrett, 71 N.C. 85, 87 (1874) (impermissible to compel an accused to unwrap a bandage and exhibit a wound; once done, however, a witness' testimony concerning the wound was admissible); *see also* Aiken v. State, 16 Ga. App. 848, 86 S.E. 1076 (1915) (it was error to compel defendant to stand in a window for identification).

49. People v. Mead, 50 Mich. 228, 15 N.W. 95 (1883) (a prisoner cannot be required to measure or try on a shoe; it is permissible, however, if he does so voluntarily); Gallaher v. State, 28 Tex. App. 247, 281, 125 S.W. 1087, 1095 (1889) (no violation of right where defendant voluntarily dons a hat and mask; however, "if in his case, the defendant had declined to be distinguished and exhibited, the court would doubtless have protected him in his constitutional right to be exempted from giving evidence against himself"); Turman v. State, 50 Tex. Crim. 7, 95 S.W. 533 (1906) (defendant cannot be compelled to put a cap on his head); Ward v. State, 27 Okla. Crim. 362, 228 P. 498 (1924) (defendant may not be compelled to put on a coat); Reyes v. Municipal Court, 41 P.R. 892 (1931) (defendant may not be compelled to dishevel his hair and pull down his cap).

the right against compelled self-incrimination prohibited the state from compelling a criminal defendant to "testify," to "be a witness," to "give evidence," or to "furnish evidence" against himself, and that meant that "the accused cannot be compelled to do or say anything that may tend to criminate him, and his refusal to do so cannot be proved as a circumstance against him."[50] Compelling a defendant to "make evidence" against himself, by putting on a cap or making a footprint, was thus prohibited, for it compelled him to do something that might tend to be incriminating.[51]

While it is accurate to characterize the position reflected in these cases as the majority view, a significant minority of jurisdictions took a contrary position. Some courts ascribed to the principle that the purpose of the right was to assist the pursuit of truth, and because physical evidence, unlike a confession, could not be fabricated or distorted by compulsion, the right against compelled self-incrimination did not apply to the coerced production of such evidence.[52] Along somewhat similar lines, other courts held that while compelling the disclosure of physical evidence may have violated the defendant's right against compelled self-incrimination, the veracity of evidence thus obtained was indisputable and, therefore, the illegality of the state's conduct did not render the evidence inadmissible.[53] At least two courts, faced with cases involving compelled submission rather than compelled assistance, ruled that compelling the suspect to submit to testing and examination was permissible, because in such cases it is the police who take, rather than the suspect who gives, evidence.[54] Still other courts simply rejected the defendant's self-incrimination claims without any explanation at

50. Davis v. State, 131 Ala. 10, 16, 31 So. 569, 571 (1902).

51. Stokes v. State, 64 Tenn. 619, 621 (1875). "In the presence of the jury the prisoner is asked to make evidence against himself. The court should not have permitted the pan of mud to be brought before the jury, and the defendant asked to put his foot in it." *Id.* at 621; *see also* Cooper v. State, 86 Ala. 610, 6 So. 110, 111 (1889) (a witness cannot be compelled "to give [or make]" evidence against himself).

52. "It is true that this ground upon which this testimony is said to be admissible is that in these cases the physical facts speak for themselves, and no facts or hopes of the prisoner could produce or effect a resemblance of his track, or of the wounds or clothing, and their resemblance aids the jury in their search after the truth."
Bruce v. State, 31 Tex. Crim. 590, 593, 21 S.W. 681, 682 (1893); Magee v. State, 92 Miss. 865, 46 So. 529 (1908) (defendant can be compelled to place his foot in a track for comparison, because such compulsion presents no risk to truthfinding).

53. Morris v. State, 124 Ala. 44, 46-47, 27 So. 336, 337 (1900); State v. Fuller, 34 Mont. 12, 22, 85 P. 369, 372 (1906); State v. McIntosh, 94 S.C. 439, 441-42, 78 S.E. 327, 328-29 (1913).

54. Magee v. State, 92 Miss. 865, 874-75, 46 So. 529, 532 (1908) (" 'We think that officers having a prisoner in custody have a right to acquire information about him, even by force, and that, for example, when his photograph is taken, or his measurement taken, it is simply the act of the officers, and is not compelling him to give evidence against himself.' " (quoting United States v. Cross, 20 D.C. (9 Mackey) 365, 382 (1892)).

all.[55]

Finally, a number of courts adopted the view that the right against compelled self-incrimination proscribes only the compulsion of incriminating testimony, and that insofar as the coerced disclosure of physical evidence from the accused did not constitute compelled testimony, the right did not apply. Even within this group of cases, however, disparate opinions were expressed as to the definition of testimony. Some courts took the view that "to testify" was to bear witness in a court of law, and rejected self-incrimination claims made with respect to compelled pre-trial physical examinations, not on the grounds that such examinations were noncommunicative, but because they took place outside the courtroom.[56]

A handful of other courts defined "to testify" essentially as to communicate information attesting to guilt (variously phrased in terms of making "utterances," "declarations," etc.), and decided that because physical evidence was not communication as such, it was not testimony, and therefore fell outside the protection of the right.[57] Considering that, as of the turn of the twentieth century, these few courts represented the lone adherents to one of several justifications for the minority view that the right against compelled self-incrimination applied only to the compelled production of testimony, one is led to inquire as to how and why this particular justification ultimately came to rule the day in both the state and federal courts.

It may well be that Professor John Wigmore, more than any other individual, is responsible for the ultimate proliferation of the testimonial requirement. Wigmore was among the earliest, best known, and most respected advocates of the proposition that the right against self-incrimination applied only to testimonial compulsion. It is evident that his treatise on evidence was influential among courts adopting that proposition.[58] Moreover, it is

55. State v. Ruck, 194 Mo. 416, 92 S.W. 706 (1906); People v. Austin, 199 N.Y. 446, 93 N.E. 57 (1910); People v. Van Wormer, 175 N.Y. 188, 67 N.E. 299 (1903).

56. O'Brien v. State, 125 Ind. 38, 44-45, 25 N.E. 137, 139 (1890); State v. Garrett, 71 N.C. 85, 87 (1874).

> The prisoner objected to the admissibility of the evidence as to the condition of her hand and relied on the case of State v. Jacobs . . . . The distinction between that and our case is that in *Jacobs'* case, the prisoner himself, on trial, was compelled to exhibit himself to the jury, that they might see that he was within the prohibited degree of color, thus he was forced to become a witness against himself. . . . In our case, not the prisoners, but the *witnesses,* were called to prove what they saw upon inspecting the prisoner's hand, although that inspection was obtained by intimidation.

Id. (emphasis in original).

57. Magee v. State, 92 Miss. 865, 46 So. 529 (1908) (utterances); State v. Fuller, 34 Mont. 12, 85 P. 369 (1906) (admission); State v. Ah Chuey, 14 Nev. 79 (1879); People v. Gardner, 144 N.Y. 119, 38 N.E. 1003 (1894) (declarations); White v. State, 62 S.W. 749 (Tex. Crim. App. 1901) (statement).

58. *See, e.g., Magee,*, 92 Miss. at 871-74, 46 So. at 530-31; *Fuller,* 34 Mont. at 18-20, 85 P.

clear that Wigmore's thinking exerted a profound influence upon the Supreme Court in *Schmerber* and its progeny. While the *Schmerber* Court declined to adopt the Wigmore formulation in full, it made repeated references to Wigmore's treatise in support of its holding that the fifth amendment reaches no further than an accused's communications,[59] prompting Justice Black to remark in his dissent: "Though my admiration for Professor Wigmore's scholarship is great, I regret to see the word he used to narrow the Fifth Amendment's protection ['testimonial'] play such a major part in any of this Court's opinions."[60]

In the original 1904 edition of his treatise on evidence, Wigmore offered three justifications for his view that the right against self-incrimination applied only to the "employment of legal process to extract from the person's own lips an admission of his guilt."[61] The first justification was that the right originally arose in response to "the process of the ecclesiastical [c]ourt, as opposed through two centuries,—the inquisitorial method of putting the accused upon his oath, in order to supply the lack of the required two witnesses."[62] The second justification was based upon the "policy of the privilege as a defensible institution," which in Wigmore's view was simply "to stimulate the prosecution to a full and fair search for evidence procurable by their own exertions."[63] The third and final justification for limiting the scope of the privilege against self-incrimination to testimonial compulsion was the "practical requirement that follows from the necessity of recognizing other unquestioned methods of procuring evidence."[64] If the privilege afforded protection not only for the suspect's "physical control of his own vocal utterances, but also for his physical control in whatever form exercised," then, Wigmore concluded,

> it would be possible for a guilty person to shut himself up in his house, with all the tools and indicia of his crime, and defy the authority of the law to employ in evidence anything that might be obtained by forcibly overthrowing his possession and compelling the surrender of the evidential articles,—a clear *reductio ad absurdum*.[65]

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at 371; *see also* Dann, *supra* note 33, at 599 ("[Wigmore's] statements concerning the scope of the privilege are referred to for support by virtually every court and commentator that has dealt with the problem.").

59. Schmerber v. California, 384 U.S. 757, 761-63 (1966).

60. *Id.* at 774 (Black, J., dissenting).

61. J. WIGMORE, *supra* note 29, § 2263, at 3123.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

Wigmore's first justification, while correct, is of questionable relevance. The simple, unremarkable fact is that the early English courts had, and took, the opportunity to recognize the suspect's right to refuse to confess his crimes, but either had, or took, no like occasion to recognize the suspect's right to refuse to disclose physical evidence. That the latter issue did not arise in the early cases is hardly overwhelming evidence that if it had, the suspect's assertion of the right would or should have been rejected. The nonoccurrence of such an issue may just as easily be ascribed to the comparatively insignificant role of physical evidence as a form of proof in the seventeenth and eighteenth centuries vis-à-vis the present day.[66]

As to Wigmore's second justification, it would not appear that the policy of the privilege, as Wigmore characterizes it, lends any support whatever to his conclusion that only testimonial compulsion should be protected. If the right is designed to assure that any evidence gathered against the accused is obtained through the exertions of the prosecution alone, it would be inappropriate for the prosecution to garner evidence against the suspect by means that compel him to assist in producing such evidence, regardless of whether that evidence takes the form of testimony.[67]

This brings us to Wigmore's third and final justification for limiting the scope of the right to testimonial disclosures—practical necessity. Wigmore overstates the case in suggesting that if nontestimonial compulsion were proscribed by the privilege, a suspect could escape prosecution by locking himself and the evidence against him in his room. A search of a suspect's room or person requires no exertions from the suspect. In such a case, the suspect does not incriminate himself; rather he is incriminated through the independent investigation of the police. Compelled, nontestimonial cooperation could thus be prohibited without affecting the prosecution's right to undertake unassisted searches for evidence.

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66. As discussed in greater detail at the end of this section, the establishment of forensic science and the concomitant need for a wide variety of physical evidence did not emerge until the end of the nineteenth century. *See infra* notes 70-79 and accompanying text. Indeed, Jacobs Law Dictionary, published in 1782, does not even make passing reference to physical, or demonstrative proof or its equivalent in its six page definition of the term "evidence." Rather, "[e]vidence . . . is u[s]ed in the law for [s]ome proof, by te[s]timony of men on oath, or by writings or records." JACOB'S LAW DICTIONARY (10th ed. 1782).

67. McNaughton's revision of Wigmore's treatise appears to have recognized this problem and, in an effort to salvage Wigmore's conclusion that the policy of the privilege dictates that only testimonial compulsion be protected, McNaughton simply changed the original author's characterization of the policy the privilege protects:

> Such, too, is the main thrust of the *policies* of the privilege . . . . While the policies admittedly apply to some extent to nontestimonial cooperation, it is in testimonial disclosures only that the oath and private thoughts and beliefs of the individual—and therefore the fundamental sentiments supporting the privilege—are involved.

J. WIGMORE, *supra* note 45, § 2263, at 379.

Nevertheless, Wigmore's general point is a good one. The state has an indispensable need to obtain physical evidence from the suspect's person, and there is often no way to obtain such evidence without at least some cooperation from the suspect. It is probably safe to say that if a criminal suspect could not be compelled to take a breathalizer test, to participate in line-ups, to stand for identification, and so on, law enforcement efforts would be severely hampered.[68]

This purely practical concern may well furnish the one unifying feature to that otherwise disparate minority of early American cases holding that the right against compelled self-incrimination did not apply to compelling a suspect to produce physical evidence. While in no case is practical necessity the only reason given for sanctioning the compelled production of this kind of evidence, when the many and varied reasons are tallied, it nevertheless proves to be among the most common.[69] The emergence and eventual acceptance of the testimonial requirement closely parallels advances in forensic science, developed in response to the changing character of criminal conduct, which rendered "nontestimonial" evidence (physical evidence obtained from the suspect's person) indispensable in crime detection.

The latter half of the nineteenth century witnessed the emergence of a professional criminal class throughout Europe and the eastern United States.[70] One contemporary account estimated that during the 1860's, there were 2,500 professional criminals in New York City alone, ranging from

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68. 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE, § 7.2, at 556 (1984).

69. United States v. Cross, 20 D.C. (9 Mackey) 365, 382 (1892).

> What would be the consequence if such evidence should be entirely excluded? You could not compel a person after his arrest to empty his pockets and disclose a weapon, when the most vital evidence on the part of the Government, in a homicide case, is the possession of the deadly weapon . . . . We think that officers having a prisoner in custody have a right to acquire information about him, even by force.

Id.; O'Brien v. State, 125 Ind. 38, 44, 25 N.E. 137, 139 (1890)

> ("To hold that the testimony of the witness was incompetent would compel us in every case involving the identity of a person accused of crime to hold that testimony as to marks and scars hidden under the clothing which he wears is inadmissible if the information of the witness was obtained without the consent of the accused . . . .");

Magee v. State, 92 Miss. 865, 874, 46 So. 529, 531 (1908) (quoting and following *Cross*); State v. Fuller, 34 Mont. 12, 20, 85 P. 369, 371-72 (1906) (quoting practical concerns expressed by Wigmore and by the *Gardner* Court); People v. Gardner, 144 N.Y. 119, 128, 38 N.E. 1003, 1005 (1894)

> ("A prisoner's person may be examined for marks and bruises, and then they may be proved upon his trial to establish this guilt; and it would be stretching the constitutional inhibition too far to make it cover such cases and cases like this, and the inhibition thus applied would greatly embarrass the administration of justice.")

70. R. LANE, POLICING THE CITY: BOSTON 1822-1885, at 142-46 (1967).

shoplifters and pickpockets to burglars and bank robbers.[71] The development of sophisticated techniques for committing crimes and evading detection left the public increasingly vulnerable, and prompted an outcry for an aggressive response from the police.[72] The police, however, were initially ill-equipped to respond effectively or efficiently. As one scholar explains in his study of the Boston police force:

> In part this inefficiency resulted from a lack of technical tools. Some of the achievements of mid-century technology, such as the telegraph, were used in pursuing wanted persons. And in 1862 the Boston police chief instituted a rogues' gallery of several hundred daguerreotypes, to supplement the handbills, verbal descriptions, and mnemonic powers of his detectives. But there was still little which could be used in establishing the identities of persons unknown.[73]

Change was not long in coming. In the 1870's, Alphonse Bertillon developed a systematic procedure for distinguishing individuals. Called anthropometry, Bertillon devised a series of body measurements as a means for identification.[74] It was also Bertillon who sought to introduce professional handwriting analysis into the context of a criminal investigation.[75]

In 1892, Francis Galton published *Fingerprints,* a work containing the first statistical support for the uniqueness of fingerprints.[76] Scotland Yard began to use fingerprinting as an identification method in 1901, and the United States followed suit shortly thereafter.[77] In 1901, Dr. Karl Landsteiner discovered that blood could be grouped into types,[78] and about the same time, a test was devised for distinguishing blood from other stains in cloth.[79]

With the rise of a professional criminal class, and developments in forensic science to combat that rise, came an ever-increasing government need for access to physical evidence and a judicial interpretation to accommodate that need. It was in 1910, as these fledgling discoveries and procedures were beginning to gain acceptability as methods of crime detection, that the

71. Crapsey, *Our Criminal Population,* VIII GALAXY 346 (Oct. 1869), *cited in* R. LANE, *supra* note 70, at 143-44.

72. R. LANE, *supra* note 70, at 222.

73. *Id.* at 149.

74. R. SAFERSTEIN, CRIMINALISTICS: AN INTRODUCTION TO FORENSIC SCIENCE 4 (1977).

75. F. INBAU, A. MOENSSENS & L. VITULLO, SCIENTIFIC POLICE INVESTIGATION 42-43 (1972).

76. R. SAFERSTEIN, *supra* note 74, at 4.

77. S. KIND & M. OVERMAN, SCIENCE AGAINST CRIME 21 (1972).

78. R. SAFERSTEIN, *supra* note 74, at 4.

79. J. HALL, INSIDE THE CRIME LAB 7 (1974).

Supreme Court took its first opportunity to address the propriety of compelling a suspect to disclose incriminating physical evidence.

III. SUPREME COURT INTERPRETATIONS

In *Holt v. United States,*[80] Justice Holmes, writing for a unanimous Court, described and resolved the issue before the Court as follows:

> A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reasons. But the prohibition of compelling a man in criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof.[81]

Justice Holmes offered no explanation for why the right should apply only to compelled "communications," except to say that it should not apply to something other than communications. The logical consequence of a contrary holding, the Court asserted, would be to invalidate compelling a suspect to present himself for identification—a longstanding method of obtaining important, if not indispensable, evidence against the accused. The Supreme Court's adoption of the testimonial requirement in *Holt* thus appears to rest largely, if not exclusively, upon the idea expressed by Wigmore less than a decade previously, that limiting the right to compelled and incriminating communications "is the practical requirement that follows from the necessity of recognizing other unquestioned methods of procuring evidence."[82]

The Court did not address the issue again until *Schmerber* was decided some fifty years later.[83] Defendant Schmerber was stopped for drunk driv-

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80. 218 U.S. 245 (1910).

81. *Id.* at 252-53.

82. J. WIGMORE, *supra* note 29, § 2263, at 3123.

83. 384 U.S. 757 (1966). In the interim, the "mere evidence rule" was born, bred and died. Prior to *Holt,* in Boyd v. United States, 116 U.S. 616 (1886), the Court had held that a subpoena *duces tecum* compelling a suspect to produce his private papers simultaneously violated the fourth amendment, which forbade the government from seizing papers that legally belonged to the suspect alone, and the fifth amendment, which forbade the government from taking a suspect's papers against his will and using their contents against him. On the authority of *Boyd,* the mere evidence rule was spawned in Gouled v. United States, 255 U.S. 298 (1920). The focus of the *Gouled* Court's attention was on the fourth amendment. Search warrants, the Court concluded, may not be used as a means for obtaining mere evidence against a suspect; rather, the public or complainant must have a possessory or other legal

ing and was compelled to submit to a blood-alcohol test, the results of which contributed to his conviction. The Supreme Court rejected the claim that the compelled production of a blood sample from Schmerber's body violated his right against compelled self-incrimination. Justice Brennan, writing for a 5-4 majority, allowed that "[i]f the scope of the privilege coincided with the complex of values it helps to protect, we might be obliged to conclude that the privilege was violated."[84]

The Court was nevertheless of the view that "the privilege has never been given the full scope which the values it helps to protect suggest."[85] "History and a long line of authorities in lower courts," the majority opined, have "consistently limited" the protection of the right to an accused's testimony or communications.[86] Three sources of authority are cited in support of this

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interest in the property to be seized before the search and seizure is proper. As in *Boyd,* however, the *Gouled* Court's decision was decided on fifth amendment grounds as well:

> [T]he result is the same to one accused of a crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence and the fifth amendment forbids that he shall be compelled to be a witness against himself in a criminal case.

Id. at 255.

Gouled made no reference to the pronouncement in *Holt* that the fifth amendment applies only to compelled communications; while the documents at issue in *Gouled* contained communications, the *Gouled* decision was in no way logically limited to searches and seizures of communicative evidence, and was in fact subsequently applied to invalidate searches and seizures of physical evidence. *See, e.g.,* Morrison v. United States, 262 F.2d 449 (D.C. Cir. 1958) (excluding stained handkerchief).

Gouled led a hard and unpopular life. As a philosophical matter, its interpretation of the fifth amendment could not be justified in terms of the objectives underlying the right, because as previously noted, those objectives are not threatened by compelling a suspect merely to submit to a search, be it a search of his body or other property. *See supra* text accompanying note 32. And as a practical matter, the decision portended to deprive the government of access to vitally needed evidence. As a consequence, *Gouled* was rejected by several state courts, and circumvented by federal courts to the extent possible. *See* 1 W. LAFAVE, SEARCH AND SEIZURE 489 (2d ed. 1987) (discussing the history of the mere evidence rule). Ultimately, the fourth amendment component of the holding in *Gouled* was overturned in Warden v. Hayden, 387 U.S. 294 (1967), the fifth amendment ruling that searches and seizures of mere evidence generally violate the suspect's right against self-incrimination was silently rejected in Schmerber v. California, 384 U.S. 757 (1966), and in Andreson v. Maryland, 427 U.S. 463 (1976), the Court explicitly held that the search for and seizure of a suspect's documents did not constitute compelled communication and thus did not violate the fifth amendment.

84. 384 U.S. at 762. The Court noted that compelled submission fails to respect " 'the inviolability of the human personality. Moreover, since it enables the State to rely on evidence forced from the accused, the compulsion violates at least one meaning of the requirement that the state procure the evidence against the accused 'by its own independent labors.' " *Id.* As previously suggested, however, it is doubtful whether compelled submission, as distinguished from affirmative assistance, does implicate these values.

85. 384 U.S. at 762.

86. *Id.* at 762-67.

conclusion—*Holt,* Wigmore's treatise on evidence, and the state court cases cited in Wigmore's treatise. On the basis of this authority, the Court ruled categorically that the right against compelled self-incrimination applies only to the compulsion of incriminating testimony or communications.

Given the Court's statements suggesting that compelling production of nontestimonial evidence is at odds with the values underlying the right, one is naturally inclined to wonder why the Court found the cited authority persuasive. The opinion offers no explanation. It is nevertheless worth recalling that *Holt,* Wigmore, and many of the early state court cases Wigmore cites, justified the testimonial requirement in terms of the practical need for government access to nontestimonial physical evidence.[87]

The year following *Schmerber,* the Court decided the companion cases of *United States v. Wade*[88] and *Gilbert v. California.*[89] In *Wade,* the defendant was identified by a witness after he was compelled to participate in a line-up and to speak the words "put the money in the bag." Similarly, in *Gilbert,* the defendant was identified after being compelled to furnish a sample of his handwriting for purposes of comparison to a note the robber had given the bank teller. On the basis of *Schmerber,* the Court ruled that the compelled incrimination in *Gilbert* and *Wade* did not violate the fifth amendment, reasoning that:

> One's voice and handwriting are, of course, means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication within the cover of the privilege. A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection.[90]

Unlike in *Schmerber* and *Holt,* in *Wade* and *Gilbert* the suspect was compelled actively to assist the government in its search for incriminating evidence.[91] Cases of compelled assistance, as distinguished from submission,

87. *See supra* notes 61-82 and accompanying text. This is not to suggest that Justice Brennan espoused an explicit balancing of interests approach to the fifth amendment. To the contrary, he did not favor such an approach. *See* California v. Byers, 402 U.S. 424, 464-65, 473-74 (1971) (Brennan, J., dissenting). The point remains that in *Schmerber,* Justice Brennan assigned nontestimonial compulsion a place within the perimeter of conduct undercutting values protected by the fifth amendment, yet concluded that because such conduct does not strike so close to the core of the right as "to evoke the spirit and history of the Fifth Amendment," nontestimonial compulsion is permissible. 384 U.S. at 762. On the basis of the authority Justice Brennan cited, the only consistent and coherent justification offered for permitting such peripheral assaults on the fifth amendment is that the defendant's fifth amendment interest is outweighed by the government's interest in an orderly and efficient criminal process.

88. 388 U.S. 218 (1967).

89. 388 U.S. 263 (1967).

90. *Gilbert,* 388 U.S. at 266-67.

91. In *Holt,* the suspect was compelled to put on a shirt, which might ordinarily be

present two special problems. The first problem, as discussed in section I, is that compelling an accused to assist in his own undoing is difficult to reconcile with the purposes the right is intended to serve, unless one simply concedes as much, but concludes that whatever fifth amendment interest the suspect has in refusing to provide nontestimonial evidence is outweighed by the government's practical need to obtain such evidence.

The second problem is that there is a testimonial aspect inherent in every act of compelled cooperation, even if the fifth amendment limits the meaning of being a witness to testifying or communicating. When a suspect is ordered to perform an affirmative act as a means for the government to obtain evidence, what is compelled is not only the evidence itself, but also the act of producing that evidence. The evidence itself may be noncommunicative; however, implicit in every act of producing evidence is a testimonial communication or substantiation of the suspect's ability to perform the requested act. The exemplars in *Wade* and *Gilbert* may have been noncommunicative or nontestimonial in and of themselves. In producing them, however, the suspects necessarily communicated that they were able to speak or write the words in question.

Neither of these problems was acknowledged or addressed in *Wade* and *Gilbert.* The Court drew no distinction between compelled submission in *Schmerber* and compelled assistance in *Wade* and *Gilbert,* and made no attempt to reconcile compelling the accused's affirmative cooperation with the purposes served by the right. The Court likewise failed to consider the testimonial aspect inherent in the act of producing the exemplars. A decade later, in *Fisher v. United States,*[92] the Court acknowledged that a handwriting exemplar communicated first, that the suspect could write, and second, that the exemplar furnished was in the suspect's handwriting, but remarked that "in common experience, the first would be a near truism, and the latter self-evident," and that nothing the suspect has said or done "is deemed to be sufficiently testimonial for purposes of the privilege."[93] It is not enough, then, for the conduct compelled to be merely testimonial; it must be "sufficiently" so. The $64,000 question, of course, is: when is a testimonial act sufficiently testimonial?

Three years after *Wade* and *Gilbert* were decided, the matter was further

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thought of as active assistance. In effect, however, Holt was required merely to submit passively to a measurement of his body—his assistance was unnecessary. *Cf. Gilbert,* 388 U.S. at 265 *and Wade,* 388 U.S. at 220, where the only means for the government to obtain the evidence sought was with the suspect's cooperation.

92. 425 U.S. 391 (1976).

93. *Id.* at 411.

confused in *California v. Byers.*[94] Byers was convicted of causing an automobile accident by improperly passing and of failing to stop and leave his name and address at the scene of the automobile accident, as required by California statute.[95]

Chief Justice Burger, writing for a plurality of four, concluded that the disclosure sought by the statute was neither incriminating nor testimonial, and rejected Byers' claim that the statute violated his fifth amendment right. Compelling Byers to stop and leave his name and address was not incriminating, the plurality opined, because "disclosures with respect to automobile accidents simply do not entail . . . substantial risk of self-incrimination."[96] Nor was it testimonial, the plurality continued, because "[i]t merely provides the State . . . with the driver's identity,"[97] and so compels "an essentially neutral act."[98] The Chief Justice did not deny that the driver's act of stopping and disclosing his identity would give rise to the inference that the driver believed he had been involved in an automobile accident, given that the duty to stop was imposed only upon drivers of vehicles involved in accidents. "In *Wade,* however," the plurality nevertheless concluded, "the Court rejected the notion that such inferences are communicative or testimonial."[99]

As a matter of common sense, the conclusion would appear inescapable that conduct compelled by the California statute was communicative or testimonial. At a minimum, the statute compelled a driver to transmit or attest to his or her name and address, a "neutral" communication perhaps, but still a communication. Moreover, and as a practical matter, the driver's act of furnishing his name and address in compliance with the statute communicated the driver's involvement in an accident—inferential communication or testimony perhaps, but again still communication or testimony.[100]

In this Article, I have suggested that the testimonial requirement arose as

94. 402 U.S. 424 (1971).

95. His conviction on the latter charge was reversed by the California Supreme Court on the grounds that the self-reporting statute violated Byers' federal constitutional right against compelled self-incrimination, and the state appealed. *Id.* at 426.

96. *Id.* at 431.

97. *Id.* at 433.

98. *Id.* at 432.

99. *Id.* at 433. Justice Harlan concurred in the judgment. In his view, compelling Byers to stop and identify himself did involve the compulsion of incriminating testimony. Justice Harlan nevertheless maintained that Byers' claim must fail because his fifth amendment interest in refusing to comply with the statute was outweighed by the state's two-fold interest in prosecuting traffic violations and establishing a system of personal financial responsibility for automobile accidents. *Id.* at 452 (Harlan, J., concurring).

100. This was, in fact, the view shared by a majority of the Court: the four dissenters and Justice Harlan.

a simple means to the very limited end of placing physical evidence outside the scope of the fifth amendment, thereby enabling the government to exploit the suspect as a source of physical evidence without running afoul of the suspect's right against self-incrimination. Once one accepts the initial premise that "to be a witness" within the meaning of the right is limited to testifying or communicating, it is comparatively easy to accept that physical evidence is not testimonial evidence, and that incriminating physical evidence, therefore, may be compelled from the accused without transgressing the fifth amendment.

In *Byers,* however, (and in *Gilbert* and *Wade* as well, at least as subsequently construed in *Byers* and *Fisher*), the testimonial requirement was expanded in such a way as to exclude from fifth amendment protection not only the evidence or information compelled (the driver's name and address), but also the communicative inferences inherent in the driver's act of producing his name and address (that he had and took the opportunity to identify himself at the scene of the accident as a participant in the accident). In so expanding the testimonial requirement, the Court put itself in the difficult, if not indefensible position of ruling that an act of producing evidence was communicative but not communicative enough to be afforded fifth amendment protection, while offering no guidance as to why the communication at issue was not communicative enough or when a communication would meet the fifth amendment testimonial requirement.

The question of whether the act of producing evidence or information is testimonial enough to meet fifth amendment standards was addressed again in *Fisher v. United States.*[101] In *Fisher,* the government sought to compel production of a document in the possession of the suspect's attorney, that had been prepared by the suspect's accountant. The document request was resisted on fifth amendment grounds. The Supreme Court held that while the attorney-client privilege entitled the suspect to refuse to permit his attorney to disclose what the suspect would not be required to disclose himself, the suspect had no fifth amendment right to refuse to produce the document.[102]

The Court reasoned that the document itself was unprotected by the fifth amendment: while the document was unquestionably testimonial, and may well have been incriminating, it had not been compelled, because it had been drafted voluntarily by the suspect's agent.[103] The Court acknowledged that the act of producing the document possessed "communicative aspects of its

101. 425 U.S. 391 (1976).

102. *Id.* at 409.

103. *Id.* at 409-10. In so holding, the Court overruled the longstanding precedent of Boyd v. United States, 116 U.S. 616 (1886). *See* Note, *The Rights of Criminal Defendants and the*

own," implicitly communicating the existence and authenticity of the documents produced. The Court nevertheless concluded, that in the context of that case, the existence and authenticity of the documents sought were foregone conclusions, that "the Government [was] in no way relying on 'the truthtelling' of the taxpayer to prove the existence of or his access to the documents" and, therefore, that the act of producing the document was nontestimonial.[104]

In *Holt, Schmerber, Wade, Gilbert,* and *Byers,* the Court had referred to communications and testimony in the same breath, drawing no distinctions between them as far as their eligibility for fifth amendment protection was concerned. In *Fisher,* however, the Court silently jettisoned fifth amendment protection for communications generally in favor of protection only for testimonial ("truthtelling") communications, and even then only if such communications are "sufficiently" testimonial.

In 1984, *United States v. Doe*[105] was decided, in which the Court addressed the flip side of the issue confronted in *Fisher* and held that, where the district court had made a specific finding that the existence and authenticity of the document were not foregone conclusions, the act of producing the document was sufficiently testimonial for fifth amendment purposes.[106] In ruling that communications inferable from the act of producing a document were sufficiently testimonial, the Court appears to have rejected the plurality's intimation in *Byers* that testimonial inferences are not testimonial enough to satisfy the requirement. After *Doe,* the unanswered question thus remains: what determines when the act of producing evidence should be "sufficiently testimonial" for the fifth amendment to apply?

IV. A Framework for Analysis of Fifth Amendment Claims

A. A Summary of the Problem

The fundamental problem with the testimonial requirement as it has been applied, is that the primary purpose it was intended to serve has been served poorly. As previously discussed, the requirement arose as a means to enable the government to obtain incriminating physical evidence from the suspect's body without running afoul of the fifth amendment.[107] Accepting as much, however, in cases of compelled submission, the requirement is superfluous. Subduing a suspect for the purpose of exploiting his body as a source of

Subpoena Duces Tecum: Aftermath of Fisher v. United States, 95 Harv. L. Rev. 683 (1982); *see also supra* note 83.

104. *Fisher,* 425 U.S. at 411.

105. 465 U.S. 605 (1984).

106. *Id.* at 613-14.

107. *See supra* notes 68-87 and accompanying text.

physical evidence is unobjectionable because the suspect is not obliged to incriminate himself; the suspect is incriminated, if at all, through the independent efforts of his accusers. The physical evidence obtained falls outside the scope of the fifth amendment right without regard to the fact that the evidence is nontestimonial.

Alternatively, in cases of compelled cooperation, the testimonial requirement would appear to be either ineffectual or arbitrary. The evidence a suspect is compelled to assist in providing may be nontestimonial, but the act of producing the evidence *is* testimonial, at least insofar as it compels the accused to attest to his ability to produce the physical evidence sought. If the testimonial inferences inherent in the act of producing incriminating physical evidence are deemed to be testimonial for purposes of the fifth amendment requirement, however, the concern is that the act of production could not properly be compelled, and consequently that the physical evidence sought could not be obtained—a result that would defeat the original purpose of the testimonial requirement. The Court has avoided this problem by ruling that the act of producing evidence may be testimonial, but not necessarily enough so as to trigger fifth amendment protection and prevent the government from gaining access to the underlying evidence in question. In so holding, however, the Court's failure to offer any guidance as to what distinguishes sufficiently testimonial acts from insufficiently testimonial acts leaves the impression that its decisions on the question are purely arbitrary.

While furnishing no explicit clues, in distinguishing testimonial disclosures from "sufficiently" testimonial disclosures, the Court appears to have gone beyond an inquiry into whether there has been a testimonial communication, and focused upon the extent to which the testimony communicated is damaging to the defendant. The act of providing exemplars is thus insufficiently testimonial because the testimony implicitly communicated is either self-evident or truistic. Compelled disclosure of one's name and address at the scene of an accident is nontestimonial because the testimony thereby transmitted is "neutral" or "inferential." The act of producing a document is likewise nontestimonial, insofar as the testimony transmitted provides the government with no more than a "foregone conclusion."

Assessing *whether* a suspect has been compelled to testify in light of *what* he has been compelled to testify serves only to muddy fifth amendment analysis. The issue of what a suspect may be compelled to attest to is addressed by the incrimination requirement. Under that requirement, a suspect may refuse to respond to a request from his accusers only if a direct answer would furnish *"evidence* which may lead to criminal conviction," *"information* which would furnish a link in the chain of evidence" leading to prosecution, or *"evidence* which the individual reasonably believes could be used against

him in a criminal prosecution."[108] Testimonial communications that do not put the suspect at risk of furnishing the prosecution with substantive information or evidence are not incriminating within the meaning of the fifth amendment. They are, nonetheless, testimonial communications.

A direct answer furnishing truisms, foregone conclusions, or neutral information cannot reasonably be construed to put the suspect at risk of providing either evidence or substantive information, and thus is not incriminating. In *Doe,* the Court clearly intimated as much in a footnote suggesting that the act of producing a document would not be incriminating if the government could successfully demonstrate that the existence and authenticity of the document in question were "foregone conclusion[s]."[109] To the extent that the question of whether a given disclosure is testimonial is answered in terms of whether the suspect has been compelled to substantiate information potentially valuable to the prosecution, the testimonial requirement merely duplicates the role of the incrimination requirement.

The confusion and error engendered by the failure of the Supreme Court to segregate clearly the testimonial communication itself from the incriminating substance of the testimony communicated is illustrated by the decision of the United States Court of Appeals for the Seventh Circuit in *United States v. Prewitt.*[110]

Prewitt was arrested on suspicion of intentionally passing altered postal money orders. He was photographed, fingerprinted, and asked whether he used an alias. Prewitt responded that he was also known by the name of Maji Mabarafu. Correspondence signed in the name of Maji Mabarafu was

108. Maness v. Meyers, 419 U.S. 449, 461 (1975) (emphasis added).

109. United States v. Doe, 465 U.S. at 614 n.13 (quoting Fisher v. United States, 425 U.S. 391, 411 (1976)). Superficially, at least, the Court's remarks in *Doe* appear difficult to reconcile with its holding in Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 81 (1965). There, the government contended that because the SACB had already determined that Albertson was a communist, it would not aid the prosecution for Albertson to concede as much, and such a concession would, therefore, not be incriminating. The Court rejected the government's claim, with the explanation that:

> "[T]he judgment as to whether a disclosure would be 'incriminatory' has never been made dependent on an assessment of the information possessed by the Government at the time of interrogation; the protection of the privilege would be seriously impaired if the right to invoke it was dependent on such an assessment, with all its uncertainties."

Id.

A closer look reveals no fundamental inconsistency between *Doe* and *Albertson.* The *Doe* Court recognized that when the government can demonstrate that a fact at risk of being disclosed is a foregone conclusion, the suspect cannot reasonably apprehend any danger from disclosing such a fact. 465 U.S. at 610-12. In *Albertson,* the Court reaffirmed the long respected proposition, unaffected by *Doe,* that the risk of incrimination must be assessed from the perspective of the suspect, not the prosecution. 382 U.S. at 81.

110. 553 F.2d 1082 (7th Cir.), *cert. denied,* 434 U.S. 840 (1977).

subsequently seized from Prewitt's home, reflecting the author's awareness that the money orders had been altered.[111] Proceeding on the assumption that the disclosure of the alias had been compelled because the suspect had not contemporaneously received *Miranda* warnings, the court of appeals concluded that compelling the disclosure was permissible because the suspect's response was nontestimonial: "An alias is as much an identifying characteristic as a defendant's voice or handwriting, and the Supreme Court has held that the compelled production of voice or handwriting exemplars does not violate the fifth amendment."[112]

Contrary to the Seventh Circuit's conclusion, Prewitt's disclosure was testimonial on two levels. First, the act of producing a response to the question of whether the suspect used an alias testified to the suspect's ability to speak. Second, the response itself substantiated that the suspect had an alias, and what that alias was. While the former communication was not incriminating, the latter obviously was. In sum, the *Prewitt* court embarked upon the questionable venture of assessing whether a compelled disclosure constituted testimony in light of the substance of that testimony. Because the substance of Prewitt's testimony pertained to an "identifying characteristic," the court was led to the perverse conclusion that compelled and incriminating testimony was nontestimonial, and therefore unobjectionable.[113]

B. An Alternative Analytical Approach

A more sensible approach is to begin with the premise that a testimonial communication is a transmission or communication of information that tends to substantiate the existence or nonexistence of a fact or other matter. Such a construction comports with the *Fisher* Court's observation that a testimonial communication is one that implicitly calls upon the communicator to tell the truth, i.e., to substantiate something.[114] Accepting this definition, the first question is whether the government's request would compel the sus-

111. *Prewitt*, 553 F.2d at 1084-85.

112. *Id.* at 1086.

113. The court's ruling is premised upon a misunderstanding of *Gilbert* and *Wade*. In those cases, the Supreme Court authorized the compelled disclosure of two identifying physical characteristics—voice and handwriting—because the disclosures did not require the suspect to make any incriminating communications. It would have been a different case entirely, if the police had confronted Gilbert with the bank robber's note, and asked him at gunpoint if it was in his handwriting. In that case, he would have been compelled to testify against himself in violation of his fifth amendment right, and it is difficult to imagine that the Court would have held otherwise, notwithstanding that the question asked related to an identifying characteristic. Similarly, Prewitt was asked whether he had an alias, and if so what that alias was. His response was undeniably incriminating and testimonial; the fact that it concerned an identifying characteristic is irrelevant.

114. Fisher v. United States, 425 U.S. 391, 411 (1976).

pect to testify to anything. As a purely semantic matter, the existence of a testimonial communication in any given instance is a yes or no proposition; the phrase "not sufficiently testimonial," like not sufficiently unique, pregnant, or dead, is a nonsensical juxtaposition of terms. Compelled submission, on the one hand, is always nontestimonial. When a suspect is subdued for the purpose of having his blood tested, as in *Schmerber,* or of having clothes put on his body, as in *Holt,* he substantiates nothing. He merely sits there while the police conduct a search of his body or prepare him for identification. Compelled assistance, on the other hand, is invariably testimonial. The evidence or information a suspect is compelled to assist in providing may itself be testimonial, as was the answer to the question of whether the suspect had an alias in *Prewitt,* or the classic example of a compelled confession. Even if the evidence a suspect is compelled to produce is nontestimonial, however, the act of producing that evidence will always be testimonial, at least insofar as it obligates the suspect to substantiate that he is able to do what he was told to do—write, speak, stand, walk, produce a document, etc. Granted, a suspect's ability to walk, speak or produce a document may be minimally informative, depending upon the circumstances of the case, but that is a matter relevant only to whether the compelled testimony is incriminating. Whenever a suspect's compelled affirmative assistance is the subject of a fifth amendment challenge, the testimonial requirement should be satisfied, at least with respect to the act of producing the information or evidence sought, if not with regard to the evidence or information itself.

Assuming that the suspect is under compulsion to assist his accusers in some fashion, and therefore compelled to testify to something, the next question is whether the testimonial communication the suspect is compelled to make is incriminating. It bears emphasizing that the testimonial communication itself must transmit incriminating knowledge or information before the right will apply. The fact that a suspect is compelled to make an innocuous communication incidental to the act of producing incriminating but uncompelled or nontestimonial evidence, will render neither the evidence produced nor the act of its production eligible for fifth amendment protection.[115] In such a case, the act of producing the evidence is testimonial and

115. In *Doe,* it will be recalled, the act of production would clearly have enabled the government to obtain the incriminating document produced. That fact, however, did not make the act of producing the document incriminating. The testimonial communication compelled must furnish incriminating information before the right will apply. In *Doe,* the testimony compelled was that the document sought existed, and that the document produced was authentic. If such information was a foregone conclusion, the act of production would not have been incriminating; granted, the government would have obtained the incriminating document but not as a result of any information the suspect was compelled to communicate through the act of production. United States v. Doe, 465 U.S. 605, 614 n.13 (1984).

compelled, but not incriminating, while the evidence itself is incriminating, but either uncompelled or nontestimonial. Whenever compelling the suspect to produce evidence is the government's selected means of obtaining the evidence produced, either the act of production or the evidence produced may have been obtained in violation of the suspect's fifth amendment rights, but the two must be evaluated separately.

In *Fisher,* for example, compelling a suspect, or in that case the suspect's lawyer, to undertake the act of producing a document was the means employed by the government to achieve the end of obtaining that document. The end sought—the document itself—was testimonial and incriminating, but not compelled. The means, on the other hand—the act of producing the document—was compelled. The ends and the means, however, could not be combined to form a single fifth amendment violation. Because the information substantiated by the act of producing the document was a foregone conclusion, the Court held that the act of production was not testimonial. More accurately, the act of production was testimonial, but not incriminating. In either case, however, the three prerequisites for a fifth amendment claim were present in neither the document itself nor in the act of its production. The suspect's fifth amendment claim was, therefore, properly rejected.

In *Doe,* as in *Fisher,* creation of the document itself had not been compelled. However, the act of producing it was compelled, and attested to its existence and authenticity, which in the context of that case were facts that the suspect could reasonably apprehend as constituting information furnishing a link in the evidentiary chain culminating in his conviction. The means employed to obtain the document in *Doe,* thus amounted to a fifth amendment violation.

The principal advantages of the proposed two-part analysis over the approach generally taken by the courts are greater consistency and clarity. The exemplar cases provide a useful illustration. While the *Gilbert* Court overlooked the issue entirely, the Court has since observed that the communication implicit in Gilbert's act of producing a writing sample (that he could write) was not sufficiently testimonial for fifth amendment purposes.[116] Suppose, however, that Gilbert's defense to the bank robbery charge had been that he was illiterate and could not possibly have written the note to the teller demanding money. Further suppose that the exemplar was compelled in part for the purpose of establishing, contrary to Gilbert's assertions, that he could write. Assuming that Gilbert's capacity to write was not a truism or a foregone conclusion, the Court would appear constrained to conclude that the transmission implicit in the act of producing

116. *Fisher,* 425 U.S. at 411.

the exemplar (that Gilbert could write) was a testimonial communication for fifth amendment purposes.[117]

The problem is that the testimonial communication which Gilbert was compelled to make in the original case and in the hypothetical variation, are identical. The difference lies not in the extent to which there has been a testimonial communication, but in the extent to which the communication is incriminating. The standard for determining whether a given act will be sufficiently testimonial is inherently amorphous and contradictory. Increased reliance upon the incrimination requirement is advisable if for no other reason than its contours are comparatively well defined.

Applying the proposed two-part analysis to the *Gilbert* illustration, the first question to be asked is whether the suspect has been compelled to communicate anything. With respect to the exemplar Gilbert produced, the answer is no. The exemplar itself may have been compelled and incriminating, but was only physical evidence, and communicated nothing from accused to accuser. However, the means employed to obtain the exemplar—compelling the act of writing certain words—constituted a transmission of information substantiating the suspect's ability to write, and was therefore testimonial.

Moving on to the second question of whether Gilbert's compelled testimonial communication was incriminating, the answer is again no, assuming that the communication that Gilbert could write provided the government with no more than a truism or a foregone conclusion. If Gilbert's ability to write were obvious to all, he could not reasonably fear danger from such disclosure. If, however, as in the hypothetical variation, the suspect's ability to write is in fact an open question, compelling him to furnish an exemplar would have violated his fifth amendment right.

A discussion of *Byers* has been reserved for last because it is superficially

117. In United States v. Campbell, 732 F.2d 1017 (1st Cir. 1984), for example, the First Circuit concluded that compelling a suspect to furnish a handwriting exemplar from dictation for purposes of determining whether he could spell a word correctly, was testimonial and incriminating. *Id.* at 1021. The object of the government's inquiry was not the physical form of the suspect's handwriting, but rather substantiation of the extent of the suspect's proficiency in English, i.e., a truthful communication as to the limits of his knowledge of the language, which in the context of that case portended to be highly incriminating.

A contrary conclusion was reached by the Ninth Circuit in United States v. Pheaster, 544 F.2d 353, 372 (9th Cir. 1976), *cert. denied,* 429 U.S. 1099 (1977), on the grounds that spelling, like handwriting, is a nontestimonial identifying characteristic. What the court neglected to consider, is that obtaining the evidence sought—a distinctive misspelling of a particular word—depended upon a truthful communication from the suspect that the way he spelled the word for the police was the way he ordinarily spelled the word. If a suspect is made to substantiate whether he can write or spell, and if a direct answer may be incriminating, he has been compelled to make an incriminating communication in violation of the fifth amendment right.

more difficult to understand and explain in terms of the foregoing two-part analysis, due largely to the context in which it arose. The California statute compelled Byers to make two testimonial communications: the first was the communication of his name and address, and the second, implicit in the act of disclosing his name and address, was the communication that he was identifying himself as required by the statute, in the belief that he had been involved in an accident. The testimonial requirement, therefore, was unquestionably satisfied and the plurality's decision should not have turned on it, even in part. Rather, the exclusive issue should have been whether compliance with the statute was incriminating.

As the *Byers* plurality noted, the communication of name and address is "neutral" and not incriminating.[118] The communication implicit in the act of furnishing name and address at the scene of the accident, however, would have attested to Byers' presence at the scene and his involvement in the accident, thereby establishing his opportunity to commit the offense of causing an accident by improper passing. At a minimum, the act of identifying himself at the scene of the accident would have furnished the police with an investigatory lead that Byers could quite reasonably apprehend would culminate in his prosecution.

The other cases discussed in this article arose in the context of conduct compelled or sought to be compelled from a criminal suspect by means of a direct command from police or prosecutor. To determine whether the conduct compelled is incriminating, the balance between the government's interest in crime control and the suspect's interest in his fifth amendment rights is struck by a rule entitling the suspect to refuse to respond if he reasonably believes that his compliance will furnish the authorities with evidence or information that could lead to his prosecution or conviction.[119] If this standard were applicable to *Byers,* the testimonial communication compelled was undoubtedly incriminating.

Byers, however, arose in the context of conduct compelled by statute. In determining whether such conduct is incriminating, the individual's interest in his fifth amendment rights may be counterbalanced not only by the state's interest in the control of crime, but by other noncriminal interests as well. In such cases, the Court has struck a different balance. The resulting rule is that compelled compliance with a preexisting statute will be incriminating for fifth amendment purposes only if the statute is directed toward a " 'highly selective group inherently suspect of criminal activities.' "[120] In

118. California v. Byers, 402 U.S. 424, 432-34 (1971).

119. Kastigar v. United States, 406 U.S. 441 (1972).

120. *Byers,* 402 U.S. at 429 (quoting Albertson v. Subversive Activities Control Bd, 382 U.S. 70, 79 (1965)), relying on Marchetti v. United States, 390 U.S. 39, 47 (1968).

the plurality's view, persons involved in automobile accidents do not constitute such a group, and, therefore, compliance with the statute was not deemed incriminating.

V. CONCLUSION

The testimonial component of the right against compelled self-incrimination is a simple device designed to achieve a practical result. It establishes an artificial line enabling the government to obtain vital physical evidence, while leaving undisturbed the suspect's right to refuse to cooperate with more intrusive demands for incriminating testimonial communications.

The purpose of the testimonial requirement is best served by defining "testimony" simply and narrowly as the transmission of information tending to substantiate the existence or nonexistence of a fact or other matter. Defined in this way, physical evidence is nontestimonial, as is compelled submission to a police search for such evidence. While physical evidence itself is nontestimonial, if the defendant is compelled actively to assist his accusers in acquiring physical evidence or other unprotected information, the act of producing such evidence or information is invariably testimonial, inasmuch as it compels the accused to disclose that he is capable or incapable of providing the assistance requested. The act of production will not be incriminating, however, unless the suspect's capacity to perform the task compelled is a relevant and unresolved issue, because only then can the suspect reasonably apprehend danger from performing the task compelled.

This Article has proposed a straightforward two-part inquiry for resolution of cases presenting issues involving the testimonial component of the right against compelled self-incrimination. One must first ask: Has the suspect been compelled to make a testimonial communication, i.e., has he been compelled to substantiate the existence or nonexistence of a fact or other matter through a transmission of information? If so, then one asks second: Is the fact or other matter the suspect has been compelled to substantiate incriminating? By means of this simple analysis, applied in the manner suggested in this Article, it is submitted that much of the confusion and error engendered by the Supreme Court's decisions to date may be avoided.