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Testimony

Michael S. Pardo*

Testimony is one of law's most important practices and sources of knowledge. Testimony is also a term of increasingly significant constitutional importance—the scope of both the Confrontation Clause and the Self-Incrimination Clause turns on whether conduct is testimonial. Surprisingly few connections have been drawn between these constitutional areas and evidentiary practices in general, including formal testimony and hearsay (a substitute for formal testimony). Contemporaneously with the increased significance of testimony in law, there has arisen a rich philosophical literature examining the concept of testimony and how it functions as a source of knowledge. Perhaps less surprisingly, few connections have been made between this literature and the law.

This Article provides an account of testimony, informed by the philosophical literature, that illuminates the relationships between testimony and evidence law, testimony and the Constitution, and the relationships between these two categories. The discussion makes both practical and theoretical contributions. On the practical side, it clarifies legal doctrine relating to in-court testimony, hearsay, and the rights to confront witnesses and against self-incrimination. It proposes and argues for a more narrow hearsay rule and for broader definitions of "testimony" than the United States Supreme Court has adopted with regard to confrontation and self-incrimination. On the theoretical side, it unifies several areas of law through a coherent account of the epistemic practice that underlies them. More abstractly, it contributes to under-theorized areas in the philosophy of law: the philosophical foundations of juridical proof and the epistemology of law in general.

I. INTRODUCTION 2
II. THE EPISTEMOLOGY OF TESTIMONY 7
    A. *Knowledge* 7
    B. *Natural Testimony* 11
    C. *Natural Testimony as a Source of Knowledge* 14
    D. *Testimonial Pathways to Knowledge* 21
III. LEGAL TESTIMONY 26
    A. *Formal Testimony* 26
    B. *Hearsay* 30
        1. The Current State of Hearsay Law 33
        2. A Testimonial Approach to Hearsay 36
        3. Testing the Testimonial Approach 40

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IV. TESTIMONY AND THE CONSTITUTION 46
 A. *The Confrontation Clause* 47
  1. *Roberts* to *Crawford* to *Davis* 48
  2. "Testimony" in *Crawford* and *Davis* 50
  3. "Testimony" Is as Testimony Does 53
 B. *The Self-Incrimination Clause* 59
  1. Testimony and Self-Incrimination 59
  2. Acts of Production as Testimony 61
V. CONCLUSION 70

I. INTRODUCTION

Testimony is as basic, fundamental, and important as anything in modern legal systems. Whether in written or oral form, it is the primary source for acquiring knowledge about the virtually infinite variety of events that give rise to litigation. Yet, despite its ubiquity,[1] the concept of testimony has remained under-theorized as a general matter.[2] Perhaps one explanation is that the scope and contours of the concept are obvious—too obvious to gain much benefit from any kind of sustained analysis. This explanation, however, is false. Significant practical and theoretical consequences turn on a correct understanding of testimony and its constituent features, and these features are far from obvious.[3] What conditions, if any, are necessary or sufficient for a speaker to offer testimony? What conditions, if any, are necessary or sufficient for a hearer to take the act of another as testimony? What conditions at least make up typical cases of testimony? Which perspective matters: speaker, hearer, both, either? How does testimony relate to other acts of communication? How does the basic social act of offering testimony relate to the requirements the law imposes on formal testimony? Under what circumstances can testimony transfer knowledge to, or generate knowledge for, a hearer? Under what circumstances can it fail to do so? A correct and perspicuous account

1. For example, a Westlaw search conducted on February 22, 2007, in the "Journals and Law Reviews" (JLR) database revealed 1261 academic articles with "testimony" in the title.

2. For example, of the 1261 articles referred to in note 1, only twenty-one also mention the word "epistemology" somewhere in the text, and all twenty-one do so in the context of expert testimony.

3. *See* Richard D. Friedman, *Grappling with the Meaning of "Testimonial"*, 71 BROOK. L. REV. 241, 242-43 (2005) (illustrating the difficulty of defining testimony and the matters that turn on a correct definition).

of testimony must provide satisfying answers to these and related questions. This Article takes up the task of providing this account.

The practical consequences of providing such an account are of constitutional importance. Major recent United States Supreme Court decisions regarding the Confrontation Clause and the Self-Incrimination Clause have turned on various possible meanings of "testimony."[4] Under the Sixth Amendment, a defendant's right to confront a speaker who made an out-of-court statement that is admitted against the defendant depends explicitly on whether the statement was testimonial.[5] Likewise, a defendant's right to invoke the privilege against self-incrimination in response to a government attempt to compel incriminating evidence depends explicitly on whether that evidence is testimonial in nature.[6] These doctrinal uses are not merely specialized terms of art, nor are they references to formal, in-court testimony. They are attempts to locate communicative acts that serve the epistemic functions of testimony (that is, as a source of knowledge). These acts include not only out-of-court verbal statements, but also nonverbal acts that communicate information. For example, turning over a document communicates that person's possession of the document.[7] The meaning of "testimony" in these different areas is not obvious, and therefore the debates and litigation in these areas are far from settled.[8] A general account of testimony can not only provide needed clarity to these areas individually but also may tie them together in a coherent way.[9]

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4. *See* Davis v. Washington, 126 S. Ct. 2266, 2270, 2273-76 (2006); Crawford v. Washington, 541 U.S. 36, 51 (2004); United States v. Hubbell, 530 U.S. 27, 34-41 (2000).

5. *Davis*, 126 S. Ct. at 2270, 2273-76; *Crawford*, 541 U.S. at 51-52.

6. *Hubbell*, 530 U.S. at 34.

7. *See infra* notes 382-396 and accompanying text.

8. With regard to the Confrontation Clause, see Friedman, *supra* note 3, at 242 ("But now that [the Supreme Court] has adopted the testimonial approach, actual cases must be decided under it, and many of them. Pretty quickly, we are going to have to get a much fuller understanding of the meaning of 'testimonial.'"). With regard to the Self-Incrimination Clause, see Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 259 (2004) ("The third component of a self-incrimination violation is testimony, the source of most of the modern theoretical problems. The Court has failed to provide a definition of 'testimony' that can explain its own cases." (footnote omitted)).

9. Not much recent scholarship has drawn connections between these two areas in their use of a testimonial approach. *But see* Michael Mannheimer, *Toward a Unified Theory of Testimonial Evidence Under the Fifth and Sixth Amendments*, 80 TEMP. L. REV. (forthcoming 2008); Randolph N. Jonakait, *"Witnesses" in the Confrontation Clause:* Crawford v. Washington*, Noah Webster, and Compulsory Process*, 79 TEMP. L. REV. 155, 169-71 (2006) (concerning whether the signing of a document should be considered testimony under Fifth Amendment jurisprudence); Won Shin, Recent Development, Crawford v.

Outside the constitutional context, a general account of testimony has practical consequences for the law of evidence. In addition to clarifying the nature of formal, in-court testimony and analogs such as affidavits and depositions, an understanding of testimony can help to clarify the doctrinal thicket surrounding the hearsay rules.[10] Because hearsay statements usually function as a substitute for formal testimony, understanding which hearsay statements were made to serve a testimonial function can locate a coherent category of statements to treat as epistemically suspect. This should be a necessary step to any kind of significant hearsay reform. In addition to clarifying the relationship between formal testimony and hearsay, an account of testimony can clarify the relationship between these areas and the constitutional issues.

Along with these practical benefits, a correct and perspicuous account of testimony contributes theoretical insight to areas that have been traditionally neglected by legal philosophy. Along with answering general jurisprudential questions, legal philosophy has contributed greatly to our understanding of specific subject-matter areas such as criminal law, contracts, and torts.[11] Evidence law and the process of legal proof, however, have received less philosophical attention.[12] Moreover, the understanding legal philosophy has provided

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Washington*: Confrontation Clause Forbids Admission of Testimonial Out-of-Court Statements Without Prior Opportunity to Cross-Examine*, 40 HARV. C.R.-C.L. L. REV. 223, 228-31 (2005) ("The Court's struggles with the meaning of testimonial statements under the Self-Incrimination Clause for nearly forty years elicits little confidence that it will be able to create a workable definition of testimonial statements under the Confrontation Clause."). For discussions of the relationship between these areas prior to the Court's adoption of a testimonial approach under the Confrontation Clause, see AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 125-31 (1997); Richard A. Nagareda, *Compulsion "To Be a Witness" and the Resurrection of* Boyd, 74 N.Y.U. L. REV. 1575, 1609-15 (1999).

10. *See* FED. R. EVID. 801-07.

11. *See* Brian Leiter, *The End of Empire: Dworkin and Jurisprudence in the 21st Century*, 36 RUTGERS L.J. 165, 166-67 (2004) ("[T]he growth of serious philosophical work on the conceptual and moral foundations of private law over the past two decades has been extraordinary, and has perhaps been most responsible, along with criminal law theory, for bringing philosophy in to the core of the law school curriculum."). Citations for these areas are too numerous to list. For examples of the classic and prominent works, see *id.* at 166-67 nn.4-6. For general discussions of various areas of law from a philosophical perspective, see A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 3-222 (Dennis Patterson ed., 1996).

12. *But see* L. JONATHAN COHEN, THE PROBABLE AND THE PROVABLE 49-120 (1977) (considering the effectiveness of a Pascalian concept of probability as it relates to judicial proof); ALVIN I. GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD 103-30 (1999) (discussing the trustworthiness of Bayesian inferences and reductionist approaches to testimony); LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 117-46

traditionally has come from the moral, political, semantic, and metaphysical domains.[13] The epistemology of law has received considerably less philosophical attention.[14] These two neglected areas come together in the epistemology of legal proof.[15] The process of legal proof is inherently an epistemological endeavor—to arrive at true and justified conclusions based on evidence.[16] An account of testimony contributes directly to this area by illuminating an important (perhaps the most important) epistemic practice in law and unifying several legal issues through the practices they share. The coherence provided by this unification allows for greater theoretical understanding of law's epistemology in general and of the related doctrinal areas that rely on testimony as a source of knowledge.[17] In this way, the philosophy of testimony provides a perspective on these issues beyond those provided by empirical, historical, and doctrinal approaches.

Along with the practical and theoretical benefits that a philosophical account of testimony can provide, increased philosophical attention to the subject makes such an account more fully realizable.[18] Although testimony was relatively neglected in the

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(2006) (analyzing the reliability of evidentiary rules from an epistemological perspective); Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1503-49 (2001) (criticizing Bayesian and economic approaches to evidentiary rules and advocating a naturalized epistemological understanding of the rules); Michael S. Pardo, *The Field of Evidence and the Field of Knowledge*, 24 L. & PHIL. 321, 321-30 (2005). Even though evidence scholarship has become largely interdisciplinary, *see* Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 949 (2006), epistemology has been neglected compared to other disciplines. This is ironic given the thesis of Park and Saks that "interdisciplinary evidence scholarship is more promising and useful to the extent that it helps to explain or advance the truth-seeking functions of trials, rather than to posit or seek extrinsic effects from rules that traditionally have been understood as protecting the accuracy of verdicts." *Id.* at 950. Epistemology contributes directly to the former.

13. *See* Leiter, *supra* note 11, at 169.

14. *But see supra* note 12 and accompanying text (listing several works in this area).

15. *See* Alvin I. Goldman, *Legal Evidence*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 163, 163-66 (Martin P. Golding & William A. Edmundson eds., 2005); Pardo, *supra* note 12, at 359-91 (discussing possible connections between epistemology and evidence law in more detail).

16. *See* Allen & Leiter, *supra* note 12, at 1493.

17. *See* Dennis Patterson, *What Is at Stake in Jurisprudence?*, 28 OKLA. CITY U. L. REV. 173, 184 (2003) ("[L]aw advances . . . in redescribing familiar terrain in new and more satisfying categories.").

18. *See, e.g.*, C. A. J. COADY, TESTIMONY: A PHILOSOPHICAL STUDY 27-53 (1992); GOLDMAN, *supra* note 12, at 103-30; Jennifer Lackey, *Introduction* to THE EPISTEMOLOGY OF TESTIMONY 1 (Jennifer Lackey & Ernest Sosa eds., 2006). *See generally* Jonathan Adler, *Epistemological Problems of Testimony*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2007), http://plato.stanford.edu/entries/testimony-episprob (providing

philosophical literature compared to other sources of knowledge such as perception, memory, and reasoning, a renewed interest in the epistemology of testimony has pushed it to the forefront of contemporary epistemology.[19] The literature has dealt with testimony as the social practice—of which legal testimony is a subset—of conveying knowledge through assertions.[20] Thus, at the same time there has been increased reliance in law on the concept of testimony in important and contested legal doctrine, there has been significant philosophical attention to that concept.[21] This Article facilitates the confluence of these two developments in the hope that the philosophical issues and the rich literature discussing them will contribute to our understanding of law.

Part II introduces the philosophical literature and explicates a general account of testimony and its elements, discusses how testimony functions as a source of knowledge, and explains the various ways testimony can succeed or fail. Parts III and IV then apply this account to law. Part III focuses on the law of evidence. The account of testimony is first used to explain the relationship between testimony as a source of knowledge and the formal evidentiary requirements the law imposes on it. The account is then used to critique the hearsay rule. This Part will propose, and argue for, restructuring the scope of the rule to cover communications that are testimonial when they are made.[22] Part IV focuses on the Constitution. In two prominent areas—the Confrontation Clause and the Self-Incrimination Clause—the Supreme Court has used "testimony" to articulate the scope of important rights.[23] "Testimony" in both contexts focuses, in part, on whether certain acts function as testimony.[24] The main thesis in this Part is that to understand whether an act functions as testimony, it will help to understand how testimony functions. In particular, this Part

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an overview of epistemological problems, such as reliance on assertions of others without independent justification).

19. Lackey, *supra* note 18, at 1-2.

20. *See* COADY, *supra* note 18, at 38, (referring usefully to the general concept as "natural" testimony and legal testimony as "formal" testimony). Much of the discussion in this Part will focus on natural testimony.

21. *See, e.g.*, Lackey, *supra* note 18, at 1 (describing increased philosophical attention).

22. Even if a reader rejects the proposal in this Part, the hearsay discussion makes two additional contributions to the literature: it provides a conceptual foundation for other types of proposed reform, and it suggests new areas for empirical study. *See infra* pp.61-83.

23. *See* Davis v. Washington, 126 S. Ct. 2266, 2270 (2006); Crawford v. Washington, 541 U.S. 36, 51 (2004).

24. *See Davis*, 126 S. Ct. at 2273-78; *Crawford*, 541 U.S. at 51-53.

will argue for a more expansive definition in both contexts than the Supreme Court has recognized to date, and it will clarify additional problems with the doctrine in both areas. The Article concludes with reflections on how the philosophical literature and the methodology employed relate to other methodological approaches to legal issues such as textual, historical, and empirical analyses.

II. THE EPISTEMOLOGY OF TESTIMONY

Testimony is a social practice by which knowledge is transmitted from speakers to hearers.[25] Understanding testimony's epistemology is fundamental to understanding the practice itself. Before turning to testimony, a brief description of some basic epistemological concepts and issues is provided in order to orient readers unfamiliar with the philosophical literature with some notions that will be relied on throughout the Article. Turning then to testimony, the Article articulates a basic account of testimony, followed by an explication of how testimony functions as a source of knowledge and the various ways in which knowledge may be transmitted and generated via testimony.

A. Knowledge

The field of epistemology is concerned primarily with the concept of knowledge and related concepts.[26] How knowledge is explicated and its relations to other epistemic concepts are topics of considerable philosophical contention, but below I rely on basic, generally accepted (or at least relatively uncontroversial) epistemic accounts. First, the knowledge under discussion is propositional knowledge (knowledge *that* . . .) rather than knowledge *how* to perform various tasks such as riding a bike, cooking, etc.[27] Propositional knowledge is generally taken to have three constituents: justified, true, and belief.[28] The latter two are more intuitively obvious, and I discuss them briefly before turning to justification. First,

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25. *See* Lackey, *supra* note 18, at 2-4.

26. *See* THE OXFORD ENGLISH DICTIONARY 338 (2d ed. 1989).

27. Epistemologists often focus on explaining the meaning of "knows" in propositions of the form "S knows that *P*," where *S* refers to a subject and *P* to a proposition. *See* JOHN HAWTHORNE, KNOWLEDGE AND LOTTERIES 2 (2004); JASON STANLEY, KNOWLEDGE AND PRACTICAL INTERESTS 10 (2005); TIMOTHY WILLIAMSON, KNOWLEDGE AND ITS LIMITS 21 (2000).

28. *See* Edmund L. Gettier, *Is Justified True Belief Knowledge?*, 23 ANALYSIS 121, 121 (1963) (noting, however, the so-called "Gettier Problem" with this conception).

knowledge requires truth.[29] If you know a proposition, it must be true; if it is false, you cannot know it. If you know that the cat is on the mat, then it must, in fact, be the case that the cat is on the mat. If it were not, you could not know it is there. Second, in order to know a proposition one has to believe or accept that proposition.[30]

True belief by itself, however, typically does not qualify as knowledge.[31] Beliefs may accidently be true, such as by a sheer lucky guess.[32] One must also be justified in holding or accepting the relevant propositions.[33] Epistemological notions of justification focus on both internal and external factors.[34] Internal factors concern those internal to agents' cognitive landscape—their evidence and reasoning in coming to believe or accept propositions.[35] External factors concern those possibly external to agents' cognitive awareness—such as whether the beliefs or accepted conclusions were formed via objectively reliable processes or methods.[36] More generally, justification may also involve whether a belief was formed in an intellectually virtuous manner or in an epistemically irresponsible manner.[37]

An additional, basic issue is the Gettier problem. As demonstrated in Edmund Gettier's seminal article, in certain circumstances truth, justification, and belief may all be present but still not be sufficient for knowledge.[38] This occurs whenever the evidence that justifies a proposition bears only an accidental or coincidental

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29. *See* JONATHAN L. KVANVIG, THE VALUE OF KNOWLEDGE AND THE PURSUIT OF UNDERSTANDING 145 (2003) ("[T]ruth is a conceptual component of knowledge."). This component of knowledge is often referred to as the "factive" part. *See* WILLIAMSON, *supra* note 27, at 21-22.

30. *See* Gettier, *supra* note 28, at 121. Jonathan Cohen has distinguished belief and acceptance on the ground that beliefs are involuntary while agents have more control over what they choose to accept. *See* L. Jonathan Cohen, *Should a Jury Say What It Believes or What It Accepts?*, 13 CARDOZO L. REV. 465, 465-67 (1991). Based on this distinction, Cohen argued that the law ought to be concerned with what jurors accept not with what they believe. *Id.* at 482-83. Nothing in my analysis will turn on whether the focus is on belief or acceptance. All that it required is some "cognitive endorsement of information." KVANVIG, *supra* note 29, at 29.

31. *See* Christopher Tollefsen, *Justified Belief*, 48 AM. J. JURIS. 281, 291-92 (2003).

32. *See* Gettier, *supra* note 28, at 121-23.

33. *See id.*

34. *See* Pardo, *supra* note 12, at 341-44.

35. *Id.* at 341-42.

36. *Id.* at 342-43.

37. Hilary Kornblith, *Justified Belief and Epistemically Responsible Action*, 92 PHIL. REV. 33, 47-48 (1983); *see* Kvanvig, *supra* note 29, at 81-107; For a discussion of the various considerations that fall under the general label of "justification," see WILLIAM P. ALSTON, BEYOND "JUSTIFICATION": DIMENSIONS OF EPISTEMIC EVALUATION 11-28 (2005).

38. Gettier, *supra* note 28, at 121-23.

relation with the truth of the proposition.[39] For example, suppose that during a conversation with a friend in a local bar, the friend tells you that he is moving to Alaska. The friend is generally trustworthy, and so you come to believe that he is moving to Alaska. Based on this you infer the further belief that someone in this bar is moving to Alaska. Now, as it turns out, your friend was just joking and is not moving to Alaska—but unbeknownst to you some person sitting across the bar is, in fact, moving to Alaska tomorrow. Under these slightly complicated circumstances, your belief that someone in the bar is moving to Alaska was both justified (based on your friend's testimony) and true, but you still did not know someone in the bar was moving to Alaska.[40] You did not know precisely because your evidence had nothing to do with the truth of the proposition. A justified true belief is thus not guaranteed to qualify as knowledge whenever justification and truth fail to connect in the ways made manifest in Gettier situations.[41] The failed connection in these situations occurs because evidence that appears to justify a proposition is in reality false or misleading and thus causes one to reason from a false premise (your friend's statement that he is moving) to a coincidentally true conclusion (someone in the bar is moving).[42] As is manifest in the Alaska example, this basic issue, like the others discussed above, may arise with regard to the epistemology of testimony.

The basic epistemic concepts relate to the legal proof process in a direct way. The process structures epistemological tasks that involve drawing factual inferences from presented evidence.[43] Therefore, the general epistemic concepts have specific applications in the legal

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39. *See id.*

40. For readers who question the importance of such mundane examples for law, see the notorious evidence-law case of *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 294-96, 294 (1892), which involved a hearsay statement in a letter alleging that the writer was planning on traveling out of state. *See also* John MacArthur Maguire, *The* Hillmon *Case—Thirty-Three Years After*, 38 HARV. L. REV. 709, 731-32 (1925) (criticizing the significant effects of the *Hillmon* case); Marianne Wesson, *"Particular Intentions": The* Hillmon *Case and the Supreme Court*, 18 LAW & LITERATURE 343, 343-45 (2006) (explaining that while many cases are only studied for points of law, a narrative explanation may serve to demonstrate the importance of a court's decision).

41. *See* Gettier, *supra* note 28, at 121-23.

42. *Id.* at 122. Solutions to Gettier situations thus involve eliminating certain kinds of luck—the kind that occurs when one arrives at a true conclusion via false premises. *See* KVANVIG, *supra* note 29, at 180-81.

43. *See* Ronald J. Allen & Michael S. Pardo, *The Problematic Value of Mathematical Models of Evidence*, 36 J. LEGAL STUD. 107, 111 (2007) ("Evidence law has epistemic aims: to promote true conclusions arrived at via reliable evidence and rational reasoning methods and to prevent false, arbitrary, or irrational conclusions.").

domain.[44] We want judges and juries to know certain propositions, and we want to know that they know.[45] Although the ultimate goal of the system is truth and the related notions of error avoidance and just outcomes, the primary focus and route to this goal is through epistemic justification.[46] This is so because justification is more transparent than truth and is taken to be a mark of truth. We often do not know the truth; that is why we have a trial.[47] But we can ask fact finders to accept the conclusions justified by the evidence,[48] and we can evaluate such conclusions based on whether they are indeed justified.[49] Moreover, in Gettier-type situations, conclusions ought to be based on more than truth and justification; there ought to be an appropriate connection between the truth and what justifies the conclusions.[50] For example, imagine a guilty verdict based solely on perjured testimony, in which the defendant just happens to be guilty but no other inculpatory evidence was presented or is even available. Here, the jury may have been justified in relying on the testimony at the time, and the conclusion was coincidentally true, but the verdict would be illegitimate.[51]

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44. *See* Pardo, *supra* note 12, at 321-22. The epistemological aspects of legal proof have, unfortunately, been relatively neglected compared with other theoretical approaches. For exceptions, however, see *supra* note 12 and accompanying text.

45. Often what we want juries and judges to know is whether the party with the burden of proof on an issue has proven that issue to the relevant standard. Sometimes, however, it is a second-order question. *See* House v. Bell, 126 S. Ct. 2064, 2076-77 (2006) ("[P]risoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, 'it is *more likely than not* that no reasonable juror would have found petitioner guilty *beyond a reasonable doubt*.'" (emphasis added) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995))).

46. *See* Allen & Leiter, *supra* note 12, at 1501.

47. *See id.* at 1500. In other words, the law endorses jury inferences and conclusions when epistemically justified based upon the evidence and the applicable standard of proof. *See* Pardo, *supra* note 12, at 359-69.

48. Jury instructions are worded precisely in this manner. *See, e.g.*, PATTERN CRIMINAL FED. JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT § 1.01, at 2 (1998), *available at* http://www.ca7.uscourts.gov/Rules/pjury.pdf ("Your first duty is to decide the facts from the evidence in the case.").

49. The law confers entitlement and hence endorses jury conclusions when reasonably inferable based on the evidence and the standard of proof. *See, e.g.*, FED. R. CIV. P. 50 (permitting judgment when a court finds a reasonable jury could not find otherwise); FED. R. CRIM. P. 29 (permitting judgment of acquittal in the absence of sufficient evidence); Jackson v. Virginia, 443 U.S. 307, 324 (1979) (holding that an applicant is entitled to relief if "no rational trier of fact" could find against him).

50. *See* Pardo, *supra* note 12, at 334-36.

51. *See id.* This would not be harmless error because there was no other evidence presented which a reasonable jury could have relied on to convict. *See* Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 NW. U. L. REV. 1053, 1059 (2005) (noting harmless error review must be

The general applicability of the basic epistemic concepts to juridical proof further suggests that an account of the epistemology of testimony may be applied usefully to the legal domain. I turn now to providing that account.

B. Natural Testimony

The purpose of the account of testimony articulated below is to illuminate the social practice by which knowledge is transmitted or generated. In other words, the focus is on the category referred to as "natural testimony."[52] Examples within this broad category include communicative acts such as giving directions to a location, giving a report of an event, or telling someone which team won yesterday's baseball game. Subsequent subparts discuss in more detail how testimony functions as a source of knowledge and trace the various ways in which testimony can succeed or fail in providing knowledge.[53]

The general concept of testimony is composed of two main aspects, focusing on speakers and hearers (or testifiers and recipients of testimony, respectively).[54] The first aspect focuses on what it is for an actor to engage in the act of testifying.[55] The second focuses on what it is for a hearer to use the testimony of others as a source of belief or knowledge.[56] Both aspects, in distinct ways, illuminate the general concept, and they relate to each other in the following way: the presence of either aspect (speaker or hearer) causes a communicative act to fall under the general concept of testimony.[57] A speaker can offer testimony even when the hearer does not take it as

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on the record). Courts have been less than clear about what makes an error harmless. *See id.* at 1059-64. But even under a restrictive test, the above example would not be harmless because of the absence of other evidence.

52. COADY, *supra* note 18, at 38. This natural, everyday category is thus distinct from, but related to, formal testimony, which requires specific legal requirements, such as whether a statement is made in court and under oath. The connection between the two is discussed later in this Article. *See infra* pp. 26-29.

53. These ways are more varied than the four familiar failures in hearsay scholarship—viz., problems due to sincerity, perception, memory, or narration. *See* Edmund M. Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138, 1138 (1935). These four potential testimonial failures also form the basis of Laurence Tribe's triangle approach to analyzing hearsay. Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958-61 (1974).

54. *See* Jennifer Lackey, *The Nature of Testimony*, 87 PAC. PHIL. Q. 177, 186-87 (2006).

55. *Id.* at 187.

56. *Id.*

57. *See id.* at 187-88.

such, and a hearer can take a communicative act as testimony even when the speaker did not intend to convey information to that hearer.[58]

The social act of offering testimony requires intentional behavior by the speaker.[59] A speaker offers testimony when the speaker intends to convey information to an audience with a communicative act.[60] Not all assertions therefore are testimony. A speaker is not intending to offer testimony in contexts where the speaker believes the audience already knows the proposition being uttered.[61] Some examples of this category would include a student asserting answers to a teacher's questions, on an examination, a child's confession to a parent when the parent already knows of the child's actions and the child is aware the parent knows, a speaker reminding a listener of events they experienced together, or a speaker reviewing facts with a listener.[62]

The act of offering testimony can be further clarified with two principles. First, the speaker must intend a listener or an audience to believe that the speaker has competence, authority, or credentials to assert the proposition.[63] There is no requirement, however, that

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58. *See id.* at 187-88, 193.

59. *Id.* at 187.

60. *See* Charles W. Collier, *Speech and Communication in Law and Philosophy*, 12 LEGAL THEORY 1, 1-2 (2006) (considering speech in the First Amendment context to be limited to speech or acts intended to communicate); Peter J. Graham, *What Is Testimony?*, 47 PHIL. Q. 227, 231-32 (1997) (defining "testimony" as relevant assertions offered by competent speakers as evidence in support of a proposition). The articulation of testimony in this Article is meant to capture our "everyday practice of spreading knowledge through communication." *Id.* at 232. It should be noted that certain dictionary definitions of "testimony" include broader notions such as "any form of evidence or proof." *See* THE OXFORD ENGLISH DICTIONARY 833 (2d ed. 1989). The focus in this Article, however, is on analyzing the concept or general idea of testimony as it relates to spreading knowledge through communication, not tracking all possible usages of the word. Although the relationship between words and concepts is complicated, lexicography is a different practice from analyzing a concept; words can express different concepts and different words can express the same concept. The analysis throughout is thus a species of conceptual analysis in that it attempts both to elucidate the components of a concept and to show how the concept relates to other concepts. For types of conceptual analysis, see FRANK JACKSON, FROM METAPHYSICS TO ETHICS: A DEFENCE OF CONCEPTUAL ANALYSIS 28-55 (1998), and P. F. STRAWSON, ANALYSIS AND METAPHYSICS: AN INTRODUCTION TO PHILOSOPHY 17-28 (1992). On the topic in general, see Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* 358 (Jules Coleman ed., 2001), and John Oberdiek & Dennis Patterson, *Moral Evaluation and Conceptual Analysis in Jurisprudential Methodology*, *in* CURRENT LEGAL ISSUES: LAW AND PHILOSOPHY (Ross Harrison ed., forthcoming 2007) (manuscript at 14-20, on file with author), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925628.

61. *See* Graham, *supra* note 60, at 231-32.

62. *See* PAUL GRICE, STUDIES IN THE WAY OF WORDS 106 (1989).

63. Graham, *supra* note 60, at 227. This is often determined by whether the speaker has sufficient evidence, according to the appropriate norms of assertion in that context. *See*

speakers must actually possess these qualities in order to offer testimony; speakers are still offering testimony even when they are lying, guessing, or otherwise do not know whether what they are asserting is true. Second, the speaker must believe that the propositions communicated are relevant to some question that the speaker "believes is disputed or unresolved" from the audience's standpoint—in other words, the assertion is made to serve as testimony.[64] There is no requirement that the assertion actually be relevant to a disputed or unresolved question, nor that the listener or audience actually be in need of such evidence. For example, speakers may testify to settled issues or they may testify when the audience already has the same or superior evidence. The key point is that speakers must believe that their assertions are contributing as evidence to a matter that from the audience's perspective is unresolved or disputed.[65]

Turning to the hearer's perspective, two further points clarify this aspect. First, the content of the communicative act must be what conveys information to the hearer.[66] So, for example, if a speaker utters the statement, "I am alive," to a hearer, the statement is not serving a testimonial function for the hearer. The hearer can perceive that the speaker is alive from the fact that the speaker has uttered something; the statement's content did not convey any further information with regard to this proposition.[67]

Second, if a speaker has engaged in an act of communication, it may serve as testimony for a hearer even if the speaker did not intend to convey information (viz., the content communicated) to that hearer.[68] Someone overhearing a conversation, for example, may take declarations made as testimony even when the speaker did not intend to convey the information to that hearer.[69] Likewise, journal entries,

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ROBERT B. BRANDOM, MAKING IT EXPLICIT: REASONING, REPRESENTING, AND DISCURSIVE COMMITMENT 168 (1994).

64. *See* Graham, *supra* note 60, at 227.

65. *See* Peter J. Graham, *The Reliability of Testimony*, 61 PHIL. & PHENOMENOLOGICAL RES. 695, 698 (2000) ("Making a report is like throwing a pass. You typically pass the ball to someone you expect will try to catch it."). Even if the issue is unresolved, the audience may not care about it, or even if they do, they may not want the speaker's evidence. In either case, however, the speaker may still be offering testimony.

66. The content includes direct assertions and reasonable implications of those direct assertions. *See* Lackey, *supra* note 54, at 188-89.

67. More specifically, the statement *exemplifies* that the speaker is alive, as would any other statement with a different content. *See* Roy A. Sorenson, *'P, Therefore, P' Without Circularity*, 88 J. PHIL. 245-66 (1991).

68. *See* Lackey, *supra* note 54, at 188.

69. *Id.*

diaries, and grocery lists express communicative content, but the writers may not intend to convey information to anyone other than themselves.[70] Nevertheless, someone reading them may take assertions as testimony.[71]

C. *Natural Testimony as a Source of Knowledge*

A moment's reflection reveals that much of our knowledge is based on the testimony of others rather than on first-hand observations. Yet, despite our overwhelming dependence on the word of others, testimony has been historically disfavored as a source of knowledge when compared with other epistemic modalities such as perceptual experience, memory, and logical reasoning.[72] Increased focus, however, has concentrated on issues such as whether and when beliefs based on testimony are justified, whether and when testimony is reliable, whether and when knowledge may be transmitted or preserved via testimony, and whether and when knowledge may be generated via testimony.[73] This subpart focuses on the details underlying and constituting our natural testimonial practices and the justification of conclusions based on testimony; the next subpart then traces the various epistemic pathways through which testimony succeeds or fails in transferring or generating knowledge.

Examples of testimony typically take the following form. A Speaker (*S*) engages in a communicative act that conveys that a proposition (that-*P*) is true, and a Hearer (*H*) comes to believe "that-*P*" is true on the basis of *S*'s act.[74] A basic problem involves when, if at all, *H*'s belief "that-*P*" is justified. The contrasting views of David Hume and Thomas Reid provide a common starting point for examining this issue. Hume, who like the other classical empiricists strongly favored first-hand experience, argued that beliefs based on

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70. In these cases, the speakers may still be offering testimony to themselves at a later date.

71. For further discussion of the hearer aspect of testimony, see Lackey, *supra* note 54, at 190-91.

72. Both Plato and Locke disfavored testimony as an epistemic source. *See* 1 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 105 (Roger Woolhouse ed., Penguin Books 2004) (1690) ("[W]e may as rationally hope to see with other men's eyes, as to know by other men's understandings. . . . The floating of other men's opinions in our brains makes us not one jot the more knowing, though they happen to be true."); PLATO, THEAETETUS 115 (Robin A.H. Waterfield trans., Penguin Books 1987) (n.d.) ("[W]hen a jury has been persuaded, fairly, of things which no one but an eyewitness could possibly know, then, in reaching a decision based on hearsay, they do so without knowledge . . . .").

73. *See* sources cited *supra* note 18.

74. *See* Lackey, *supra* note 54, at 190-91.

testimony were never justified unless the hearer had evidence establishing the reliability of such testimony.[75] Likewise, he argued that all knowledge based on testimony is ultimately reducible to someone's first-hand perceptual experience.[76] Reid, by contrast, argued that beliefs based on testimony are a priori justified even when the hearer has no specific information about the speaker.[77] He posited principles of veracity and credulity whereby beliefs based on testimony were prima facie justified because people spoke the truth naturally, unreflectively, and much more often than they asserted falsely; he also posited that hearers possessed a corresponding disposition to believe most assertions.[78] More recently, C. A. J. Coady has offered two additional arguments for the a priori justification of testimonial beliefs.[79] First, he relies on other philosophical work arguing that in order for understanding and communication to be possible, most of our beliefs, and those we ascribe to others, must be true.[80] Therefore, Coady argues, most of what we and others assert must be true, and thus, testimonial assertions are prima facie more likely than not to be true.[81] Second, he argues that our testimonial

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75. *See* DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 170-73 (Tom L. Beauchamp ed., Oxford Univ. Press 1999) (1748). In this sense, beliefs based on testimony are inferentially justified by drawing inferences from evidence about the speaker. *See id.* at 171.

76. For a critique of this thesis, see COADY, *supra* note 18, at 79-100. Indeed, often our perceptual beliefs may be deeply dependent on knowledge gained through testimony. Someone's belief that she is seeing a robin rather than a sparrow may depend on her previously being told the difference. Arindam Chakrabarti, *Testimony: A Philosophical Study*, 54 PHIL. & PHENOMOLOGICAL RES. 965, 968 (1994) (reviewing C. A. J. Coady, TESTIMONY, A PHILOSOPHICAL STUDY (1992)). Consider also sporting events. It may be quite easy to recognize a double play or a balk once one has learned a great deal about baseball, but the background knowledge that makes the recognition obvious will no doubt be learned partly through testimony.

77. *See* THOMAS REID, *Essays on the Intellectual Powers*, *in* THOMAS REID'S INQUIRY AND ESSAYS 127, 281-82 (Ronald E. Beanblossom & Keith Lehrer eds., Hackett Publishing Co. 1983) (1785).

78. *Id.* In this sense, the prima facie justification was noninferential in that the hearer need not draw any particular inferences about the speaker.

79. COADY, *supra* note 18, at 152-76.

80. *Id.* Coady relies heavily on the work of Donald Davidson regarding the interpretive principle of charity. *See id.* This principle states that in order to make sense of someone's utterances, an interpreter must assume that most of what the speaker believes is true. *See* Donald Davidson, *The Structure and Content of Truth*, 87 J. PHIL. 279, 310-11 (1990).

81. *See* COADY, *supra* note 18, at 173. The move from most beliefs being true to most testimony being true does not necessarily follow. Speakers are unlikely to assert the several mundane and obvious beliefs they hold because, under the Gricean maxims, assertions must be informative and relevant. GRICE, *supra* note 62, at 26-28. For a developed critique of

practices are engaged in and followed precisely because they are more likely than not accurate ways of conveying information; if they were not (if people were more likely wrong in their assertions), we would cease to rely on testimonial assertions and thus we would cease to engage in the practice.[82]

Neither the Humean nor the Reid-Coady position will tell one much about particular testimonial statements. But insights from both positions are helpful in analyzing an individual belief or conclusion based upon a testimonial assertion.[83] Even if the Reid-Coady arguments vindicate our testimonial practices in general, they will not necessarily confer justification on any individual conclusion.[84] This is so because of a reference-class problem—the testimonial assertion may exhibit features that place it into a class of assertions that are inherently unreliable and hence not worthy of a priori justification.[85]

The famous evidence-law case of *Knapp v. State* helps to illustrate the problem.[86] The defendant had been convicted of murder and had argued self-defense at trial.[87] To support his defense, he testified that he feared the victim (a marshal) because he had heard that the victim had previously clubbed and seriously injured an elderly man.[88] The defendant could not, however, recall from whom he heard the story.[89] In rebuttal, the prosecution offered testimony that the elderly man in question died of senility and alcoholism and had no bruises or marks on him.[90] The proffered relevance was that if the story regarding the victim were false, it would be less likely that the defendant had heard it and thus more likely he was lying.[91] In

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Coady along these lines, see Jonathan E. Adler, *Testimony, Trust, Knowing*, 91 J. PHIL. 264, 268-75 (1994).

82. COADY, *supra* note 18, at 152-76.

83. *See* Adler, *supra* note 81, at 265, 268.

84. *See id.* at 271.

85. Allen & Pardo, *supra* note 43, at 112. The reference-class problem affects the value of all evidence in drawing inferences about particular events, including statements. The problem arises because to make judgments about how likely an event is (e.g., that a speaker has stated a true proposition), one has to place the event into a larger class (e.g., all statements, all statements made by this person, all statements made on this subject matter, all subjects made on Tuesday, and so on). But the event will be a member of a virtually limitless number of classes. *See id.* at 111-14; Pardo, *supra* note 12, at 374-83.

86. 79 N.E. 1076 (Ind. 1907).

87. *Id.* at 1077.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

upholding the admission of the evidence, the Supreme Court of Indiana relied explicitly on Reidian grounds:

> One of the first principles of human nature is the impulse to speak the truth. "This principle," says Dr. Reid, whom Professor Greenleaf quotes at length in his work on Evidence (volume 1, § 7n), "has a powerful operation, even in the greatest liars; for where they lie once they speak truth 100 times." Truth speaking preponderating, it follows that to show that there was no basis in fact for the statement appellant claims to have heard had a tendency to make it less probable that his testimony on this point was true.[92]

The court's inference from general to specific, however, works only if there is relative homogeneity among statements such that the ratio of true to false statements (whatever that may be) applies to any given statement.[93] But this does not follow. Statements like the one in *Knapp* may, for example, be a kind of statement (rumors) that is just as likely to be false as true (hence making it irrelevant), or even more likely to be false (hence favoring Knapp rather than the government).[94] Because it is unclear what the ratios might be for statements of this kind, the trial court was probably correct to allow the jury to draw whatever reasonable inferences from the evidence it felt appropriate, but the statement was not obviously relevant to the prosecution simply because people in general tell the truth.[95]

Thus, while our testimonial practices may confer some prima facie justification based on their general success, Hume's concerns for the details of the individual report and reporter will always be relevant.[96] Thus, the prima facie status of beliefs based on testimony is perhaps best characterized by Tyler Burge's intermediate position, which employs a default epistemic position.[97] Absent any evidence to the contrary, we are prima facie entitled to accept a testimonial assertion as true; however, this entitlement is fallible and defeasible: "A person is entitled to accept as true something that is presented as true and that is intelligible to him, unless there are stronger reasons not to do so."[98]

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92. *Id.*
93. *Cf.* Allen & Pardo, *supra* note 43, at 111-14 (discussing the limitations on drawing inferences about individual events based on their membership in a class).
94. *See Graham*, *supra* note 65, at 698-99.
95. *See Knapp*, 79 N.E. at 1079.
96. *See* HUME, *supra* note 75, at 170-72.
97. Tyler Burge, *Content Preservation*, 102 PHIL. REV. 457, 467-69 (1993).
98. *Id.* at 467 (emphasis removed). Burge refers to this as the "acceptance principle," which he explains as follows: "The Acceptance Principle is not a statistical point about

The reasons for the default position and the ways in which it may be defeated become clearer when focusing in more detail on our testimonial practices. Three separate but closely related issues involve Grice's maxims, the epistemic norms of assertion, and the role of additional evaluative concepts such as trust, authority, and responsibility. I discuss each in turn.

Paul Grice's well-known philosophical work examined the general conditions governing conversation.[99] He discovered principles underlying our conversational practices, which hold irrespective of subject matter and help to facilitate the efficient communication of information.[100] It is "a well-recognized empirical fact that people do behave in these ways."[101] The primary maxim is a cooperative principle, which states that speakers cooperate by making their assertions adhere to the four subsidiary maxims, as much as is appropriate in the context, in order to facilitate understanding.[102] First, the "Quantity" maxim states that assertions should be as informative as is required in the context and not more informative than is necessary.[103] Second, the "Quality" maxim states that speakers should not utter what they know to be false or for which they lack adequate evidence.[104] Third, the "Relation" maxim states that assertions should be relevant to the conversation.[105] Fourth, the "Manner" maxim states that assertions should be brief and orderly and not obscure or ambiguous.[106] Those interested in successful conversational

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people's tending to tell the truth more often than not. . . . The principle is also not a point about innateness . . . . The principle is about entitlement, not psychological origin." *Id.* at 468. Because this entitlement is defeasible and at a high level of abstraction, any contrary evidence in a particular context is likely to override it. In legal terms, it operates much like a shift in the burden of production but not the burden of persuasion. In other words, it holds until credible contrary evidence is produced, and then it drops out. *See* Paul Thagard, *Evaluating Explanations in Law, Science, and Everyday Life*, 15 CURRENT DIRECTIONS PSYCHOL. SCI. 141, 141-45 (2006).

99. *See generally* GRICE, *supra* note 62, at 337-85 (summarizing the philosophical themes of the author's analysis of the conditions governing conversation).

100. *See, e.g.*, *id.* at 26.

101. *Id.* at 29. Grice's work forms the empirical base for communication studies not only in philosophy but in cognitive science, linguistics, psychology, and other areas. *See* Craig R. Callen, *Hearsay and Informal Reasoning*, 47 VAND. L. REV. 43, 60 & n.76 (1994) (discussing the various applications of Grice's work and collecting sources).

102. GRICE, *supra* note 62, at 26-31.

103. *Id.* at 26-27.

104. *Id.* at 27.

105. *Id.*

106. *Id.*

communication have a practical interest in adhering to these maxims.[107] The fact that speakers for the most part so adhere supports the default position outlined above through the well-justified reasoning process of "inference to the best explanation."[108] Absent evidence to the contrary, the best explanation for the fact that a speaker has asserted that-*P* is that she is following the maxims and thus believes that-*P* for epistemically responsible reasons and wishes to inform me that-*P*.[109] And the best explanation for why this is the best explanation is that it follows from our background conversational practices.[110]

Grice's maxims in general—and the Quality maxim in particular—underlie our epistemic norms of assertions. To clarify, by a "norm of assertion" I mean (1) something that people in general follow, (2) that the existence of the norm provides a reason for following it, and (3) that those who deviate from the norm are subject to criticism for doing so.[111] Some philosophers have asserted the strong norm that knowledge is the norm of assertion—in others words, that one should assert only what one knows to be true and that one ought to be subject to criticism for failing to do so.[112] This norm, however, is too strong for many contexts. In many situations, it would be appropriate to assert what you have good reasons or evidence to

107. Grice further explained how assuming that a speaker is adhering to the maxims helps to determine what a speaker is implying. He refers to these implications as "conversational implicatures." *Id.* at 31-40. Here is an example: suppose you ask me whether Amy has a boyfriend and I reply, "I have seen her spending a lot of time with John lately." Although I have not said so, the implication is that Amy may be dating John. Why? Because the Relation maxim states that assertions ought to be relevant and thus that my assertion ought to relate to your question. Of course, I could have not intended to imply that (perhaps I was changing the subject), but the recognition of the maxim by both of us provides an efficient way to convey that implication. We will both assume, absent evidence to the contrary, that this is what is going on.

108. PETER LIPTON, INFERENCE TO THE BEST EXPLANATION 1-2 (2d ed. 2004); Gilbert H. Harman, *The Inference to the Best Explanation* 74 PHIL. REV. 88, 88 (1965). The process of inference to the best explanation itself best explains the nature and the structure of legal proof. *See* Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, LAW & PHIL. (forthcoming) (manuscript at 5-20, on file with author), *available at* http://papers.ssrn.com/so13/paperes.cfm?abstract_id=1003421.

109. *See* Adler, *supra* note 81, at 274-75.

110. *See id.*

111. The term is not meant to imply a conscious, explicit choice by a group to follow the norm. Some norms, in particular linguistic ones, may come about as a matter of nonexplicit convention. *See* DAVID LEWIS, CONVENTION: A PHILOSOPHICAL STUDY 3-4 (2002) (defining convention as general sense of common interest). In the jurisprudence context, Hart's "rule of recognition" may function as such a convention. *See* H. L. A. HART, THE CONCEPT OF LAW 256 (2d ed. 1994); *see also* JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 94-102 (2001) (discussing the "rule of recognition").

112. *See* HAWTHORNE, *supra* note 27, at 23; WILLIAMSON, *supra* note 27, at 249-55.

believe or are epistemically justified in believing, even if you do not know it is true. Thus, another epistemic norm would be that one should assert only that for which one has adequate evidence or good reasons and does not know to be false.[113] In addition, it may be appropriate to assert propositions even if the speaker does not believe or accept them.[114] To illustrate, consider Jennifer Lackey's excellent example that it would be epistemically appropriate for a teacher to assert well-justified propositions based on the theory of evolution to her students even if the teacher did not herself believe or accept them, perhaps for religious reasons.[115] Finally, consider again Gettier situations. Here, a speaker may fail to have knowledge, but it may still be appropriate to assert the true proposition that she is justified in believing, even if accidentally true based on that evidence.[116] The basic point is that the existence of such norms and criticism for deviations provides further support for a default position that provides some defeasible justification for testimonial assertions in the absence of evidence to the contrary.[117]

Related to the norms of assertion, those who make testimonial assertions undertake certain commitments and responsibility. In making an assertion, one invites the hearer to rely on that proposition and the speaker thereby assumes responsibility for it. There is a type of "quasi-contractual" social practice at work.[118] Consistent with the maxims, the speaker likewise has implied that he has the proper authority and was epistemically entitled to make the assertion, thus assuring hearers that they may rely on this authority and entitlement in accepting the proposition for use in their own reasoning and actions.[119]

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113. This norm would provide a more congenial fit with Grice's maxims, which state that one ought to assert only that which one has evidence or reason for and does not know to be false. *See* KVANVIG, *supra* note 29, at 26-27 (providing examples of justified belief as a norm of assertion).

114. Because knowledge requires belief or acceptance, the speaker would not know the propositions.

115. Jennifer Lackey, *Testimonial Knowledge and Transmission*, 49 PHIL. Q. 471, 477 (1999). For this reason, the norm of assertion may not require that the speaker believe the proposition asserted.

116. Gettier, *supra* note 28, at 121-23.

117. Similar norms may exist between knowledge and practical reasoning; in other words, one ought to act only on that which one knows or is justified in believing. *See* STANLEY, *supra* note 27; *see also* HAWTHORNE, *supra* note 27, at 176 ("Insofar as it is unacceptable . . . to use a belief that *p* as a premise in practical reasoning on a certain occasion, the belief is not a piece of knowledge at that time.").

118. *See* GRICE, *supra* note 62, at 29.

119. *See* BRANDOM, *supra* note 63, at 168 ("The function of assertion is making sentences available for use as premises in inferences. For performances to play this role or have this significance requires that assertional endorsement of or commitment to something

Accordingly, the hearer must trust the speaker to have authority and entitlement, and the speaker is subject to criticism if he turns out to be wrong, unlike in situations where he has not invited such reliance and assumed such responsibility.[120] For example, consider the difference between someone who happens to notice me packing a suitcase and comes to believe that I am leaving on a trip versus me telling someone that I am leaving on a trip tomorrow.[121] If I am not planning to leave on a trip, I am subject to criticism in the second case for inviting reliance on that proposition and accepting responsibility for it, but not in the first case. These undertaken commitments and concomitant responsibility for utterances provide further support for a default position with regard to testimony.

D. Testimonial Pathways to Knowledge

There are several ways in which a speaker's testimony can transfer or generate knowledge. I refer to the various routes as epistemic "pathways."[122] There are also several ways in which a speaker's testimony can fail to transfer or generate knowledge. I refer to these failures as epistemic "dead ends." Both categories are organized around whether the speaker does or does not have knowledge of the propositions at issue. The relevant inquiry in each example is whether the hearer gains knowledge of the relevant propositions.[123] For the sake of simplicity, in the examples I refer to all speakers as *S* and all hearers as *H*.[124]

There are two ways in which a speaker who has knowledge of a proposition may transfer knowledge to a hearer via testimony:

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entitles or obliges one to other endorsements."). Thus, if a hearer is later challenged by a third party, she can refer back to the original speaker who has assumed responsibility for the utterance. *See* JOHN MCDOWELL, MEANING, KNOWLEDGE, AND REALITY 438 (1998).

120. The possible failures are those familiar to hearsay doctrine. The speaker may be insincere, may have failed to perceive accurately or at all, may have remembered incorrectly, or may be poorly narrating or describing the information. *See* Morgan, *supra* note 53, at 1138.

121. This is not to deny that under the right circumstances packing the suitcase could be done in order to communicate to an observer that one is leaving.

122. Here I employ the term somewhat differently than Alvin Goldman. ALVIN I. GOLDMAN, PATHWAYS TO KNOWLEDGE: PUBLIC AND PRIVATE vii-viii (2002) (using the term "pathway" to refer to general processes, methods, and activities). I am using it to refer to specific routes from a speaker's assertion of a proposition to a listener's acceptance.

123. This is the purpose of law's reliance on testimony. *See* COADY, *supra* note 18, at 27 (discussing formal testimony as evidence).

124. There is nothing special about the fact that most the examples refer to oral statements; the examples and conclusions would be the same if they involved written assertions.

Pathway 1: *The Basic Account*. The basic account of how testimony can transfer knowledge is when a speaker with knowledge of a proposition asserts that proposition and a hearer understands the utterance and comes to accept and know the proposition on the basis of the speaker's utterance.[125] For example, *S* tells *H* that his black eye is due to the fact that Tyson punched him yesterday. If *S* has knowledge of the proposition and utters it, then *H* too has knowledge of that proposition, assuming *H* accepts the proposition and does not have evidence that would undermine this acceptance.[126]

Pathway 2: *The Reliable Liar*. Although much less frequently occurring than Pathway 1, testimony can transfer knowledge even when a speaker asserts something false.[127] For example, imagine *S* always lies when asked questions about a particular subject matter. In addition, *S* is always correct in her beliefs about which she chooses to lie with regard to this subject matter. Suppose, for example, *S* always knows who won yesterday's Cubs game but always tells people the opposite result. Someone who knew about *S*'s consistently inaccurate utterances would come to know that the Cubs won yesterday whenever she heard *S* say that that the Cubs lost yesterday. Examples in this category would also include reliable liars with Pinocchio-style "tells."

Even when speakers fail to have knowledge of the propositions they assert, testimony may still generate knowledge. The following three pathways illustrate the ways in which this may come about.

Pathway 3: *The Epistemically Superior Listener*. Speakers who fail to have knowledge may in fact generate knowledge with their assertions when listeners are in an epistemically superior position by virtue of having better evidence than the speakers.[128] For example, consider a case in which *S* asserts that he saw Shaun, whom he met once before, steal a book from the library last Thursday. *S* does not know, however, that Shaun has a twin brother named Shem, who loves books. Because it could just have likely (if not more so) been Shem who stole the book, *S* is no longer justified in believing that Shaun

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125. *See* Lackey, *supra* note 115, at 471-72 ("We often talk about knowledge being *transferred* or *transmitted* via testimony. This suggests two things: (1) that hearers can acquire knowledge via the testimony of others; and (2) that speakers must themselves have the knowledge in question in order to pass it to their hearers.").

126. *See* Alvin I. Goldman, *Discrimination and Perceptual Knowledge*, 73 J. PHIL. 771, 772-74 (1976).

127. *See* Lackey, *supra* note 115, at 474-75.

128. *Id.* at 476.

(and not Shem) stole the book.[129] Assume, however, that *H* (but not *S*) knows that Shem was out of town last Tuesday and, therefore, could not have been the culprit. Based upon *S*'s assertion, *H* may now come to know that Shaun stole the book.[130]

Pathway 4: *The Nonaccepting Speaker*. Speakers may generate knowledge with their assertions even when the speakers fail to believe or accept the propositions asserted.[131] Because knowledge requires belief or acceptance, speakers who do not believe or accept their assertions cannot know them.[132] Consider, for example, a science teacher, *S*, who asserts well-established, well-justified, and true scientific facts to a student, *H*, who then comes to accept the assertions, but *S* does not himself believe or accept them. Perhaps for religious reasons he does not accept the theory of evolution, but he is nevertheless required to teach it.[133] The assertions create knowledge for *H* even though *S* lacks knowledge of those propositions.[134]

Pathway 5: *Canceling Testimonial Failures*. As will be familiar to students of hearsay doctrine, there are four general ways in which a speaker's assertion may fail to be true. The speaker could be lying, could have perceived inaccurately, could be remembering inaccurately, or could be describing inaccurately.[135] If an assertion suffers from two (or four) of these defects it would result in a true statement. For example, assume some proposition X is true (Jones punched Smith first). If *S* perceived the event inaccurately (it looked to her like Smith threw the first punch), then if *S* has one (or three) other testimonial failures, her assertion will be true (she remembers inaccurately her previous misperception, intends to lie by saying Jones struck first, or says Jones struck first when she meant to say that Smith struck first). Any *H* aware of these canceling-out testimonial failures could come to know the assertion made by *S* even if *S* does not.

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129. The presence of relevant alternatives that agents cannot rule out can defeat their justification and hence knowledge. *See* Goldman, *supra* note 126, at 774-84.

130. The epistemically-superior-hearer pathway also may generate knowledge for a hearer when a speaker asserts a proposition, *X*, and the hearer already knows proposition, *Y*, and that *X* and *Y* entail *Z*. In such circumstances, the hearer comes to know *Z* even though the speaker may not.

131. Lackey, *supra* note 115, at 476-77.

132. *But see id.* at 488-89 (explaining that although belief is required for the speaker to have knowledge of what is testified, the speaker need not believe the testimony for the hearer to gain such knowledge).

133. *Id.* at 477.

134. *Id.*

135. *See* Morgan, *supra* note 53, at 1138; Tribe, *supra* note 53, at 958.

While there are several ways in which testimony can result in knowledge for hearers, there are also several ways in which assertions can fail to transfer or generate knowledge. Again, like the pathways, these "dead ends" can occur in situations in which the speaker has and does not have knowledge. The examples all assume that the hearer comes to accept the asserted proposition based on the speaker's assertion. If the hearer does not accept or believe the proposition, the hearer obviously does not know the proposition on the basis of the testimony.[136]

Dead end 1: *The Asserted Proposition is False*. The basic testimonial dead end occurs when a speaker utters a false proposition.[137] Because the proposition is false, the hearer necessarily cannot come to know it. This dead end can occur whenever there is one (or three) of the four testimonial failures mentioned in Pathway 5: sincerity, narration, perception, or memory. For example, if *S* knows that the stop light was red but either lies or mistakenly says "green" when he meant red, he will fail to transfer knowledge that the light was red to a listener who accepts the assertion.[138] Likewise, if *S* misperceives the green light as red or remembers the light incorrectly as red, he also fails to transfer knowledge to an accepting *H* when he asserts that the light was red.[139] Finally, this dead end may arise from a speaker who has no reasons or evidence at all for a proposition and guesses incorrectly by asserting a false proposition.[140]

Dead end 2: *True but Unjustified Assertions*. A speaker fails to transfer knowledge when the speaker utters an unjustified belief that just happens to be true.[141] For example, suppose *S* has no idea whether a certain event occurred (the Cubs won last night) but just guesses and happens to be right. In this situation neither *S* nor *H* knows whether the event occurred. Even if they end up with true beliefs about the event, they are true by pure accident.[142] The lack of justification for the assertion fails to result in knowledge for *H*.[143]

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136. *Cf.* Lackey, *supra* note 115, at 488 ("[I]t seems uncontentious that speakers can have various defeaters which hearers do not (and, of course, *vice versa*).").

137. *See id.* at 474-76.

138. *See id.*

139. *See id.*

140. *See id.*

141. *See* Gettier, *supra* note 28, at 121-23.

142. If the speaker is generally reliable, then the hearer may have been justified in relying on the utterance, but the accidental relationship between the assertion and its truth undermines knowledge for the hearer in ways similar to Gettier situations. *See supra* pp. 8-9.

143. *See* Gettier, *supra* note 28, at 121-23.

Dead end 3: *The Epistemically Inferior Listener*. A speaker with knowledge may fail to transfer knowledge to a hearer when the hearer possesses misleading evidence that defeats the hearer's being justified in accepting the proposition.[144] For example, suppose *S* asserts that he saw Shaun steal a book from the library. *H*, however, believes incorrectly that Shaun has an identical twin brother, Shem, who just as likely was the one who *S* saw steal the book. *H* thus has no reason to believe it was Shaun rather than Shem and so would be unjustified in accepting the asserted proposition. For a second example, consider the boy who cried wolf. If he does so ten times and there is no wolf, on the eleventh time his audience would be unjustified in accepting the assertion (and hence not know there is a wolf) even if the boy's assertion is correct.[145]

Dead end 4: *Gettier Cases*. A fourth type of testimonial dead end is a straightforward Gettier situation. Consider again the Alaska example discussed above. *S* tells *H* at a bar that he (*S*) is moving to Alaska tomorrow. *S* was joking and does not plan on leaving town tomorrow. *H*, however, accepts it and tells a third person in the bar that someone in the bar tonight is moving to Alaska tomorrow, and it just so happens that someone across the bar coincidentally is moving to Alaska tomorrow. Even though this is true, neither *H* nor the third person knows it.[146]

Dead end 5: *"Cognitive Cul-de-sacs*."[147] The fifth and final type of testimonial dead end is more complicated. A speaker with knowledge of a proposition can assert that knowledge, and yet a hearer who understands and accepts the proposition can in certain circumstances fail to know it, even without possessing defeating evidence (as in dead end 3).[148] Consider the following example. *S* is a beer connoisseur and prefers to drink Irish stouts. He, however, mistakenly believes that Young's is an Irish stout when, in fact, it is brewed in England. At a party he is drinking an Irish stout (a Guinness) and is asked by *H*, a beer novice who knows nothing of

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144. *See* Chakrabarti, *supra* note 76, at 968-72.

145. *See id.* at 970. Notice, however, that a listener new to town at the time of the eleventh utterance could come to know there is a wolf based on the assertion. *Id.*

146. *See* Gettier, *supra* note 28, at 122. In Gettier situations the act of asserting may be justified at the time, such as when the speaker had evidence and did not know it to be false, but what was said is no longer justified when the misleading nature of the evidence is revealed. *See* KVANVIG, *supra* note 29, at 25.

147. The term and the example are based on Fred I. Dretske, *A Cognitive Cul-de-Sac*, 91 MIND 109 (1982).

148. *Id.* at 110-11.

stouts, what he is drinking. *S* asserts that he is drinking an Irish stout. *S* knows this proposition—he knows Guinness is an Irish stout. *H*, however, does not know the asserted proposition, even though it is true, because *S* would have said the same thing even if he were drinking a Young's. This possibility undermines *H*'s knowledge, even though he is unaware of it.[149]

III. LEGAL TESTIMONY

Turning to the legal domain, the obvious starting point is with formal, in-court testimony. After discussing how formal testimony fits with the discussion of natural testimony in Part II, this Part then discusses hearsay, which typically functions as a substitute for formal testimony. The discussions of formal testimony and hearsay together form a general picture of law's core testimonial practices and the epistemology underlying them. Part IV will then move from this general picture to specific testimonial practices that are of constitutional significance.

A. Formal Testimony

Formal, in-court testimony instantiates the social practice of natural testimony in a way that is epistemically sound. Speakers offer natural testimony when they intend to convey information through an act of communication.[150] When they do so, speakers (1) intend that their audience believe that the speakers have the necessary authority (or competence or credentials) to convey the communicated information,[151] and (2) believe the information to be relevant to some disputed or unresolved issue for the audience.[152] Formal in-court

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149. Notice that had *S* asserted that he is drinking a Guinness, then *H* could have come to know it. Perhaps if the conversation got that far, then *H* could then come to know both that it is a Guinness and an Irish stout. The example works because of the limited information transmitted. *S* is just as likely to be incorrect as correct. This, however, can be crucial in legal contexts because hearsay statements often arise with such a paucity of information. Dretske pursues a further example where *S* later forgets it was Guinness but remembers it was an Irish stout. *See id.* This would be a true cul-de-sac in that he could no longer transfer his knowledge to anyone. Relevant alternatives can undermine knowledge even when the agent is not aware of them. *Id.*; *see* GILBERT HARMAN, THOUGHT 120-72 (1973) (finding that inferring the best explanatory account is the best approach in examining Gettier-type situations).

150. *See* COADY, *supra* note 18, at 38.

151. *See* Graham, *supra* note 60, at 227. In general, speakers convey that they have sufficient evidence, in that context, to make the assertion.

152. *Id.* The speaker must believe the issue to be disputed from the hearer's perspective; it may not in fact be so disputed. In other words, the speaker must generally

testimony builds upon this basic practice by placing the burden on parties to ensure related requirements. To offer a witness's assertions as evidence in court, the party seeking to offer the testimony bears the burden of showing that the witness has personal knowledge of the subject matter and that the testimony would be relevant to a disputed litigated issue.[153] The relevance requirement is unremarkable from an epistemological perspective; if testimony is irrelevant, then it does not help with the epistemological tasks at trial. The personal-knowledge requirement, however, requires more discussion.

Federal Rule of Evidence 602 states that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."[154] The personal-knowledge requirement is primarily a requirement that the witness directly observed the events she describes in her testimonial assertions.[155] It is not necessary that the witness actually have knowledge to testify; rather, there must be sufficient evidence to convince the trier of fact that it is more likely than not true that the witness observed the events described.[156] This limitation is both significant and justified from an epistemological perspective. On one hand, this requirement seeks to eliminate two epistemic dead ends—false assertions and true-but-unjustified assertions.[157] On the other hand, knowledge of a proposition (in the sense of justified, true, belief) by a speaker is neither necessary nor sufficient for a hearer to acquire knowledge.[158] It thus may appear initially that the personal-knowledge

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believe the hearer needs evidence. These requirements correspond to the speaker aspect of testimony, which is most relevant in illuminating what witnesses do when they give formal testimony. *See supra* pp. 12-13.

153. *See* FED. R. EVID. 401, 602.

154. *Id.* at 602. This requirement is often, but need not be, established by the witness's own testimony. *Id.*

155. *Id.*

156. *See id.* The Supreme Court has articulated this sufficiency standard as "whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence." Huddleston v. United States, 485 U.S. 681, 690 (1988) (announcing this standard in the context of Rule 104(b)).

157. *See supra* pp. 24-25. A third possible dead end, an epistemically inferior hearer, is best eliminated by providing the jury with the additional information needed to gain knowledge, either from the witness or through other evidence. In this situation, the witness's testimony may be conditionally relevant on the jury getting the additional evidence needed to come to know the relevant proposition. *See* FED. R. EVID. 104(b). The final two dead-ends, Gettier cases and cognitive cul-de-sacs, are also best eliminated through providing additional information to the jury. Recall that these situations fail to transfer knowledge because of the limited information given to the hearer. *See supra* pp. 25-26.

158. *Supra* pp. 22-24. Part II.D outlines the various pathways to knowledge when a speaker has knowledge and the pathways when the speaker does not have knowledge.

requirement is too severe a limitation because it prevents instances in which the hearers (jurors) could have otherwise acquired relevant knowledge. Construing the Rule 602 personal-knowledge clause to require only that the witness have observed the relevant events, however, keeps open alternative epistemic pathways and eliminates epistemic dead ends.

Let me explain. If the witness did not observe the event, he either has no knowledge, and thus the assertion is a sheer guess—an epistemic dead end,[159] or he acquired knowledge some other way (for example, via hearsay), in which case he can describe how he acquired knowledge of the proposition and the jury can evaluate *those* observations, thus satisfying Rule 602.[160] If the witness did observe the event, then alternative pathways for generating knowledge remain open, even when the witness does not have knowledge of the relevant propositions. Consider again the epistemic pathways to knowledge for a hearer when the speaker does not in fact possess knowledge. There are three: (1) the epistemically superior hearer, in which the hearer possesses more information and can use the speaker's assertion to acquire knowledge even when the speaker lacks such additional information and hence knowledge; (2) the nonaccepting speaker, in which the speaker utters a justified true proposition but for some reason fails to believe it herself; and (3) canceling testimonial failures, in which two (or four) of the following testimonial problems cancel each other out: sincerity, perception, narration, and memory.[161]

Requiring witnesses to describe their perceptions helps to keep the first two of these three pathways open.[162] By relaying their observations, witnesses assert propositions that can function as premises in the jurors' own reasoning and hence lead to knowledge, even when the witnesses cannot, or will not, use those same propositions to acquire knowledge (i.e., justified true belief) of additional relevant propositions.[163] First, a juror can come to know a

159. It is either false or is true but unjustified.

160. This assumes that the statement falls under a hearsay exception. *See* FED. R. EVID. 803-07. Hearsay is discussed in the next sub-part. It is, of course, also possible that the witness has knowledge of the event and is lying, which the oath and cross-examination are meant to minimize.

161. *Supra* pp. 22-23.

162. Although witnesses must testify in the "language of perception," this still requires some interpretation as to the information on which those perceptions are based. *See* ROBERT P. BURNS, A THEORY OF THE TRIAL 54 (1999).

163. Even when witnesses offer lay opinions, these too must be "rationally based on the perception of the witness." FED. R. EVID. 701(a). Expert testimony likewise must be based on "specialized knowledge," and even when it is offered as an opinion, the expert may

proposition the witness does not because of additional information the juror possesses that the witness does not. This would be an example of the epistemically-superior-hearer pathway.[164] For example, a witness may testify that she saw someone who looked like the defendant commit the crime, but she cannot be sure whether it was the defendant or his twin. The juror may know, based on other testimony, that the twin was out of town and thus that it was the defendant whom the witness observed. Second, a juror can come to know a proposition even when the witness himself refuses to accept the true and well-justified proposition based on the witness's assertions. This would be an example of the nonaccepting-speaker pathway.[165] For example, a witness could describe his true observations while simultaneously withholding belief in the truth of those observations.[166] Rule 602 thus maintains these possible pathways to knowledge.

The third pathway, canceling testimonial failures, on the other hand, is so problematic that the system appears perfectly justified in not countenancing it. In other words, a legal system need not welcome testimony on the ground that because it is bad in one way, it might somehow be bad in an equally opposite way that neutralizes its effect—for example, "the witness had such bad perception problems that he probably did not observe the event correctly, but not to worry because he probably misremembered it as well!" Such situations are, of course, possible and perhaps a strong argument could be made to allow it in a particular case, but as a general rule, this possibility does not undermine Rule 602.[167]

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be required during cross-examination to disclose the underlying facts and data on which the opinion is based. *See id.* at 702, 705. This Article does not discuss expert testimony in detail or treat it as a special category, but it should be noted that the analysis of testimony in general applies in the expert setting as well. There are a few potential problems, however, that are more salient in the expert context. Most important is the epistemically-inferior-hearer dead end. That is, even when experts assert their knowledge, hearers may not have enough background understanding to receive that knowledge. Scott Brewer has argued that this will always be the case with scientific expert testimony. Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1601-30 (1998). *But see* Pardo, *supra* note 12, at 369-74.

164. *See supra* pp. 22-23.

165. *See supra* p. 23.

166. Perhaps the witness is an undergraduate philosophy student enamored with radical skepticism who refuses to believe in anything but the sensations themselves.

167. Other types of formal testimony such as affidavits, depositions, or answers to interrogatories generally require the same "personal knowledge" standard as Rule 602. *See* FED. R. CIV. P. 56(e) (specifying that supporting affidavits for summary-judgment motions "shall show affirmatively that the affiant is competent to testify to the matters stated therein"); Garside v. Osco Drug, Inc., 895 F.2d 46, 49-50 (1st Cir. 1990) (holding that interrogatory answers must be based on personal knowledge). A deposition may be used in

B. Hearsay

Because criticisms of the hearsay rule are both numerous and familiar, writing on the topic can be tricky. The doctrine is complicated, hard to apply, overly rigid and formalistic, and consumes a great deal of time and resources to litigate (and to teach and learn).[168] The scope and contours of the basic definition are not clear, and the numerous exemptions and exceptions may be based on false or implausible assumptions about human behavior.[169] Along with the Byzantine structure of the rules, it is not clear the extent to which the rule contributes to or detracts from just results.[170] The rule may serve primarily as a trap for the wary, and the numerous exceptions are possibilities for clever lawyers to get evidence admitted.[171] Along with—and because of—these criticisms, the hearsay rule has attracted voluminous scholarly attention.[172] As one prominent evidence scholar put it: "Nearly every important scholar in the field of evidence, and many a lesser one, has written on the problem of the scope of the hearsay rule."[173] And another: "Evidence professors seem to have a pathological compulsion to scrutinize and reorder the hearsay system."[174] In succumbing to the "pathological compulsion,"[175] one must therefore proceed cautiously.

Notwithstanding the voluminous commentary, the hearsay rule continues to demand our attention. Appellate courts reverse for

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court proceedings "so far as admissible under the rules of evidence applied as though the witness were then present and testifying." FED. R. CIV. P. 32(a). Therefore, the above analysis regarding formal testimony applies to these areas as well.

168. For a discussion of criticisms of the hearsay rule, see Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 373-76 (1992).

169. *See* John E.B. Myers et al., *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, 65 LAW & CONTEMP. PROBS. 3, 3-4 (2002).

170. Empirical studies on how jurors evaluate hearsay have reached inconsistent results. Roger C. Park, *Visions of Applying the Scientific Method to the Hearsay Rule*, 2003 MICH. ST. L. REV. 1149, 1152.

171. *See* Ronald J. Allen, *The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797, 801 (1992).

172. *See, e.g.*, Glen Weissenberger, *Reconstructing the Definition of Hearsay*, 57 OHIO ST. L.J. 1525 (1996) (proposing a definition of hearsay that would presume all out-of-court statements are inadmissible); Olin Guy Wellborn III, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 TEX. L. REV. 49 (1982) (arguing the hearsay rules are too narrow).

173. Wellborn, *supra* note 172, at 58.

174. Weissenberger, *supra* note 172, at 1525.

175. To which I readily plead guilty.

hearsay error on a regular basis.[176] "In our current legal environment," reports a prominent evidence scholar, "the hearsay rule retains significant influence."[177] The inherent manipulability in the complicated, yet vague, hearsay structure remains a concern because a primary justification for the hearsay rule is to constrain and guide judicial discretion.[178] A simpler and better-justified rule thus remains a laudable goal.[179]

Contributions to this goal may come from three areas: (1) conceptual understanding of the rule and its constituents, (2) empirical understanding of the evidence and the cognitive processes employed in analyzing it, and (3) political or practical understanding of constraints on hearsay reform. The discussion that follows focuses on the first area, but conceptual understanding of the epistemology of hearsay informs the other two areas. Conceptual insight provides for sharper categories. These categories suggest new and clearer questions for subsequent empirical study. And they

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176. Roger C. Park, *Hearsay, Dead or Alive?*, 40 ARIZ. L. REV. 647, 648 (1998); Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473, 478 (1992).

177. Park, *supra* note 176, at 658.

178. *See* Allen, *supra* note 171, at 802 ("The only meritorious justification for the hearsay rule is that it limits judicial discretion."); Roger C. Park, McCormick on Evidence *and the Concept of Hearsay: A Critical Analysis Followed by Suggestions to Law Teachers*, 65 MINN. L. REV. 423, 458 (1981) ("[Students] may realize that concepts like 'verbal act' and 'circumstantial evidence' can be manipulated at a judge's pleasure. Perhaps as lawyers they will come to favor the proposals to simplify hearsay doctrine . . . .").

179. In proposing such a rule, I put aside more radical proposals such as eliminating the rule in large part or shifting the burden of producing the declarant in court. *See, e.g.*, Allen, *supra* note 171, at 811 (advocating abolition of the rule); Richard D. Friedman, *Toward a Partial Economic, Game-Theoretic Analysis of Hearsay*, 76 MINN. L. REV. 723, 750-96 (1992) (arguing the party objecting to hearsay have the burden of producing the declarant of the out-of-court statement). The Supreme Court's recent Confrontation Clause decisions add further impetus for a restructured hearsay rule. *See* Davis v. Washington, 126 S. Ct. 2266 (2006); Crawford v. Washington, 541 U.S. 36 (2004). Prior to these decisions, the primary concern with a relaxed hearsay rule was how it might adversely affect criminal defendants. Now that confrontation doctrine has been separated from hearsay law, the need for a broad hearsay rule to protect confrontation rights is less necessary. *See* Richard D. Friedman, Crawford*,* Davis*, and* Way *Beyond*, 15 J.L. & POL'Y 553, 584-85 (2007) [hereinafter Friedman, Crawford*,* Davis*, and* Way *Beyond*]. Any radical reform, however, ought to account for "best evidence" considerations—viz., to put constraints on the ability of parties to introduce less epistemically desirable evidence when more epistemically desirable evidence is readily available. *See generally* Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 230-70 (1988) (explaining the best evidence principle, including structure, theory, and arguments for and against the continued adherence to the rule).

provide clearer rules for constraining and guiding judicial discretion, which may be a prerequisite for any significant hearsay reform.[180]

From an epistemological standpoint, hearsay statements function like formal, in-court testimony.[181] In the typical case, a speaker has uttered or written a statement, and one party wishes to offer that statement as evidence of its truth, inviting the judge or jury to rely on the speaker's knowledge.[182] Similar to in-court testimony, the legal system's goal is that the statement will transfer knowledge to or generate knowledge for the fact finder.[183] The process can occur along one of the five pathways outlined above, or it may fail to do so because of one of the five dead ends outlined above.[184] The key differences from in-court testimony are that hearsay statements are typically not made under oath, nor subject to cross-examination, nor are they made in front of the fact finder, who can evaluate demeanor.[185]

The similarities between hearsay and in-court testimony thus suggest that any account of the hearsay rule ought to recognize its role within a more general account of testimony.[186] The concept of testimony will be used to suggest reform in delineating the scope of the hearsay rule. I proceed below by (1) describing the current state of the hearsay rule and identifying the current problems regarding its scope, (2) presenting and justifying a testimonial approach to hearsay, and (3) demonstrating how the testimonial approach can sort out several examples of possible hearsay that create problems under current doctrine.

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180. *See* Paul S. Milich, *Hearsay Antinomies: The Case for Abolishing the Rule and Starting Over*, 71 OR. L. REV. 723, 767 (1992) (noting that a hearsay reform proposal should create a simpler system that bars clear instances of hearsay while simultaneously restricting judicial discretion).

181. *See id.* at 725-26.

182. *See* FED. R. EVID. 801(c).

183. *See* Allen, *supra* note 171, at 797.

184. *Supra* pp. 22-26. There is an additional level of complexity because hearsay statements come into evidence through either a witness who heard them or in a document or recording. The epistemic possibilities may be instantiated at both levels, but this does not change these possibilities.

185. *See* Mueller, *supra* note 168, at 370. Some hearsay statements are made in prior judicial proceedings and thus under oath and subject to cross-examination. *See* FED. R. EVID. 804(b)(1).

186. *See* 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1788, at 313 (James H. Chadbourne ed., 1976) ("The hearsay rule forbids merely the use of an extrajudicial utterance as an assertion to evidence the fact asserted. Such a use would be testimonial . . . ." (citation omitted)); Peter Tillers & David Schum, *Hearsay Logic*, 76 MINN. L. REV. 813, 815 (1992) ("[L]ike Wigmore, we believe that a theory of hearsay credibility must be part of a more general theory of testimonial credibility.").

1. The Current State of Hearsay Law

Hearsay is defined as any statement not "made by the declarant while testifying at the trial or hearing" and "offered in evidence to prove the truth of the matter asserted."[187] A *declarant* is anyone who makes a statement.[188] Statements include two categories: (1) "oral or written assertion[s]" and (2) "nonverbal conduct" that is "intended by the [declarant] as an assertion."[189] Like an in-court witness, a hearsay declarant's assertions may suffer from similar possible defects—sincerity, memory, perception, and narration problems.[190] The law's preference for in-court testimony follows from features of in-court testimony that are thought to increase its reliability over hearsay: an oath and threat of perjury; the ability to perceive the demeanor of witnesses; and, most important, the possibility to cross-examine witnesses.[191] These features are thought to make in-court testimony more reliable by decreasing or ferreting out possible defects with it.[192]

The basic definition, however, faces notorious questions regarding the scope of each of its two categories: oral and written assertions and nonverbal conduct intended as an assertion.[193] The difficulty with the first category—oral and written assertions—arises from attempts to identify which propositions are in fact asserted by a given verbal act. Included in the definition are statements offered for the truth of the propositions explicitly asserted—for example, the declarant's utterance that, "the stoplight was red," offered to prove that the stoplight was red.[194] Excluded from the definition are various performative verbal acts that do not depend for their evidentiary relevance on the truth of any asserted propositions—examples would include an offer or acceptance of a contract, a defamatory statement, or a bomb threat.[195] Within these clear boundaries, considerable difficulty

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187. FED. R. EVID. 801(c).

188. *Id.* at 801(b).

189. *Id.* at 801(a). Exemptions to this basic definition are found in FED. R. EVID. 801(d).

190. *See* Morgan, *supra* note 53, at 1138; Tribe, *supra* note 53, at 958.

191. *See* 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 1697 (1904) (referring to cross-examination as the "greatest legal engine ever invented for the discovery of truth"). For criticism of the demeanor rationale, see Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1075 (1991). For a discussion of the "darker side of cross-examination," see Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1354 (2005).

192. *See* Lininger, *supra* note 191, at 1354 & n.11.

193. *See* FED. R. EVID. 801(a)(1)-(2).

194. *See* Wellborn, *supra* note 172, at 50-51.

195. *See id.* at 52.

arises when the relevance of verbal utterances is not to prove what is explicitly asserted, but rather is to prove unstated, often implied, propositions.[196] Examples include statements such as "I didn't tell [the police] anything about you" to prove that the hearer was involved in the crime;[197] "Nice to meet you" to prove that the speaker and hearer had not met previously;[198] and a phone call making a bet to prove betting took place at the called location.[199]

The Federal Rules of Evidence are not clear on the scope of the rule, and federal appellate and district courts have divided on the question.[200] The Supreme Court has never decided the question. First, some courts apply an intent test, similar to the one for nonverbal conduct, which considers the statement hearsay only when the declarant intended to communicate the unstated, implied proposition.[201] Second, some courts apply a literal test, considering the statement hearsay only when offered to prove what is explicitly stated and not hearsay to prove anything else.[202] Finally, other courts employ a more expansive common-law test, considering the statement hearsay when the probative value of the statement depends on the perception, memory, sincerity, or narration of the declarant.[203] In the words of a prominent evidence scholar, this problem of implied assertions "is not small" and "shows no promise of going away."[204]

With the second category—nonverbal conduct intended as an assertion—the rule is at least explicit in implementing an intent test.[205] However, limiting the rule to nonverbal conduct intended to be an assertion may be too narrow given the noted policy concerns (i.e., possible problems regarding sincerity, perception, memory, or

196. United States v. Reynolds, 715 F.2d 99, 103 (3d Cir. 1983).

197. *Id.*

198. United States v. Palma-Ruedas, 121 F.3d 841, 857 (3d Cir. 1997), *rev'd*, 526 U.S. 275 (1999).

199. United States v. Zenni, 492 F. Supp. 464, 465 (E.D. Ky. 1980).

200. *Compare* United States v. Jackson, 88 F.3d 845, 848 (10th Cir. 1996) (adopting a broad scope in favor of admissibility), *and* United States v. Long, 905 F.2d 1572, 1579-80 (D.C. Cir. 1990) (holding that nonassertive statements made over the phone are not hearsay, and therefore admissible), *with Reynolds*, 715 F.2d at 104 (finding that even statements offered as implied assertions may be hearsay).

201. Lyle v. Koehler, 720 F.2d 426, 433 (6th Cir. 1983); *Reynolds*, 715 F.2d at 104.

202. *Jackson*, 88 F.3d at 848; United States v. Oguns, 921 F.2d 442, 448-49 (2d Cir. 1990); *Long*, 905 F.2d at 1579-80.

203. State v. Dullard, 668 N.W.2d 585, 594-95 (Iowa 2003); Stoddard v. State, 887 A.2d 564, 577 (Md. 2005). Both cases construe state rules worded similarly to Federal Rules of Evidence 801.

204. Mueller, *supra* note 168, at 413.

205. FED. R. EVID. 801(a)(2).

narration).[206] Any nonverbal conduct may raise similar problems when the relevance of such conduct depends on the accuracy of the actor's unstated beliefs. The classic example is a ship captain's boarding and sailing a ship after inspecting it offered as evidence to show that the ship was seaworthy at the time.[207] The purported value of the evidence follows from the following line of reasoning: the captain inspected the ship and believed it to be seaworthy (otherwise he would not have sailed), and because the captain believed it seaworthy, it probably was seaworthy (or it appears more likely than without this evidence). The evidentiary value depends on the captain having this belief and the accuracy of this belief. The captain could have misperceived or misremembered a problem, or could have been doing something other than inspecting it, or wanted to kill himself, and so on. Thus, regardless of the captain's intent to communicate or assert anything, his conduct raises similar concerns as those that hearsay policy attempts to address. Based on this insight, the common law took an expansive approach, considering conduct hearsay whenever its evidentiary value relied on the truth of an actor's unstated beliefs, like the captain's.[208] The narrower approach taken by the Federal Rules of Evidence, focusing only on conduct intended to be an assertion, is based on the view that the danger of insincerity is most important, and the risk of insincerity is significantly diminished, if not eliminated, when the conduct is not intended to assert.[209] Whether the narrow intent-based approach makes sense and is justified—and the relationship between it and the first category of verbal assertions—has bedeviled courts, lawyers, commentators, and evidence students for years.[210]

On top of these complex foundational questions are then built eight exemptions and twenty-nine exceptions.[211] Such is the current state of the hearsay thicket.[212]

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206. *See* Morgan, *supra* note 53, at 1138; Tribe, *supra* note 53, at 958.

207. *See* Wright v. Tatham, (1837) 112 Eng. Rep. 488, 516 (K.B.).

208. Roger Park has referred to this position as the "declarant-centered" approach to hearsay. Roger C. Park, *"I Didn't Tell Them Anything About You": Implied Assertions as Hearsay Under the Federal Rules of Evidence*, 74 MINN. L. REV. 783, 783-84 (1990).

209. *See* FED. R. EVID. 801(c) advisory committee's note.

210. *See, e.g.*, Paul F. Kirgis, *Meaning, Intention, and the Hearsay Rule*, 43 WM. & MARY L. REV. 275, 283-84 (2001) (applying linguistic principles to determine a statement's meaning for the purposes of the hearsay rule); Wellborn, *supra* note 172, at 73-81.

211. FED. R. EVID. 801(d), 803-04, 807.

212. The reference is to John M. Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 742 (1961).

2. A Testimonial Approach to Hearsay

Out-of-court conduct that was itself operating as natural testimony ought to be the primary focus of the hearsay rule. In other words, focusing on instances in which the declarant was offering natural testimony is a coherent and justifiable category to treat as epistemically suspect. This occurs when the declarant has engaged in a communicative act with the intent to convey information.[213] In doing so, the declarant intends the hearer(s) to believe that the declarant has the proper evidence (authority, competence, credentials) to convey the information communicated, and the declarant believes that the information would make an evidentiary contribution to an issue the speaker believes is unresolved or disputed for the hearer. In addition, when a declarant has attempted to communicate information, the content of that communication may be taken as testimony by a hearer even if the declarant did not intend to convey the information to that hearer.[214] This latter category would include assertions written in a diary or journal, but not the hypothetical ship captain in *Wright v. Tatham*, because the captain has not expressed any communicable content.[215]

Communicative acts offered as natural testimony should be treated as epistemically suspect for several reasons. As Grice's work has illuminated, understanding a communicative act requires understanding whether the speaker complied with or deviated from the maxims underlying our communicative practices.[216] When a speaker is offering testimony, the speaker purports to be in an epistemically superior position vis-à-vis the hearer.[217] In such cases, by inviting the hearer to rely on the testimonial assertions, the speaker has assumed responsibility for the assertions and has represented that she has sufficient evidence to make them. In other words, the speaker is purporting to comply with the norm of assertion relevant in that context.[218] This is potentially problematic not only because the speaker may be lying, which is the primary concern of the Advisory Committee, but also because the evidence required to comply with the

213. A more precise proposed definition of hearsay is provided at the end of this section. *Infra* p. 70 and note 241.

214. *See* Lackey, *supra* note 54, at 188.

215. *See* Wright v. Tatham, (1837) 112 Eng. Rep. 488, 516 (K.B.).

216. *See* GRICE, *supra* note 62, at 26; Callen, *supra* note 101, at 73-74.

217. *See* Lackey, *supra* note 18, at 2.

218. *See* Kornblith, *supra* note 37, at 38-39 (discussing the need for an epistemically responsible agent).

norm of assertion in this context may be lower than what the law requires.[219] The evidence required to be justified in making an assertion varies from context to context, often depending on what is at stake.[220] Thus it may be quite appropriate for a declarant to assert a proposition based on evidence that would not meet the law's standards (in particular, Rule 602). For example, when asserting what time the party started, it might be quite appropriate to assert a particular time based on speculation (or hearsay) when little turns on it, but better evidence (direct perception) is needed for the declarant to assert the proposition in court.[221] In such cases, initial hearers, and, ultimately, legal fact finders are placed in the position of granting or withholding epistemic entitlement to the declarant in part because the declarant has assumed responsibility for his testimony.[222] Moreover, there is a danger that one interpreting the utterance without more information will adopt a default position of acceptance and credit it as true.[223] When such hearsay is presented, each of the epistemic pathways and dead ends are possible, and whether the assertion follows one of the pathways to knowledge or results in a dead end, will depend on trusting the declarant and his epistemic credentials.

These concerns are diminished when out-of-court assertions are not testimonial. Often what is asserted in a communicative context refers explicitly or implicitly to shared knowledge between a speaker and hearer.[224] When an assertion explicitly refers to or implicitly assumes propositions known by both the speaker and the hearer, the assertion is not being offered as testimony with regard to those propositions.[225] We make such assertions, for example, explicitly while reminiscing or reviewing facts or implicitly by using shared understanding to convey new information. In such cases, the crucial issue of epistemic pathways or dead ends is irrelevant for the known

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219. *See* FED. R. EVID. 801 advisory committee's note.

220. *See* STANLEY, *supra* note 27, at 3-6.

221. If the speaker testified to this proposition in court there would have to be evidence sufficient to support a finding by a preponderance of the evidence that the speaker observed what time the party started. *See* FED. R. EVID. 602. As a general matter, this personal knowledge requirement also applies to hearsay declarants. *See* FED. R. EVID. 803 advisory committee's note. An exception exists, however, for party admissions. *See, e.g.*, United States v. McKeon, 738 F.2d 26, 32 (2d Cir. 1984).

222. The speaker would be subject to criticism by a hearer who relied on that statement if it turned out to be wrong.

223. *See* Burge, *supra* note 97, at 467-69.

224. *Cf.* Kirgis, *supra* note 210, at 297-98 (differentiating between natural and nonnatural meanings as the basis for shared knowledge).

225. *Cf.* Lackey, *supra* note 54, at 187 (drawing similar conclusion in cases where the speaker did not intend to communicate).

propositions because the speaker is not offering evidence to the hearer on these points. Not only is a lie less likely in such cases, but a hearer with knowledge is more likely to correct the speaker if the expressed or implied assertion is otherwise incorrect.[226] Rather than limiting the rule to the category of natural testimony, however, the Federal Rules extend the hearsay rule to all oral and written assertions and all nonverbal conduct intended as an assertion.[227] The current definition is thus too broad in that it includes nontestimonial as well as testimonial acts and does not distinguish between them.

In another sense, however, the hearsay definition is much too narrow when interpreted to apply only to the content explicitly asserted in an utterance. Within the legal literature, two scholars, Craig Callen and Paul Kirgis, have both used Grice's work to argue convincingly against a narrow interpretation of the hearsay rule.[228] One of the great lessons from Grice's work was to make plain that assertions convey a great deal more information than what is stated explicitly. The maxims themselves, and the speaker's compliance or deviation from them, include some of the implicit information conveyed with an assertion.[229] To illustrate consider Callen's excellent example: "The utterance, 'Could it be a little more quiet in here?' may relate the speaker's opinion that the stereo is too loud, rather than a question about applied acoustics."[230] Applying Grice's insights, Callen thus suggests that a more appropriate hearsay rule ought to recognize these facts about communication.[231] He proposes to define a communicative act as hearsay when (1) "the proponent offers it to establish any inference that the [declarant] generally would have intended the audience to draw from the communication," and (2) "assessment of the degree of accuracy of the [declarant's] implicit claim of co-operation would be essential to a thoughtful, unprejudiced factfinder's determination of the

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226. Likewise, an act is not testimony when the act was not communicative at all, that is, when it does not express communicable content (for example, in the case of the ship captain). *See* Lackey, *supra* note 54, at 187. Of course, the evidence may be ambiguous, but this is a concern with all evidence. By contrast, with a communicative act, an actor who engages in a noncommunicative act has not attempted to convey information; the actor has not invited reliance and undertaken responsibility for expressed content. Noncommunicative acts are in a different epistemic category than testimony—they involve a perception issue only, that is, whether the witness who testifies to the act perceived it correctly. Any ambiguity with regard to a noncommunicative act should factor into whether the evidence should be excluded under Federal Rule of Evidence 403.

227. FED. R. EVID. 801(a).

228. *See* Callen, *supra* note 101, at 73-78, 101-12; Kirgis, *supra* note 210, at 296-322.

229. *See* Callen, *supra* note 101, at 89.

230. *Id.*

231. *Id.* at 86-87.

inference's reliability."[232] This definition, however, includes nontestimonial as well as testimonial assertions. The above example ("Could it be a little more quiet?") would appear to fit the above definition, but it is not testimony if offered to prove that the stereo is too loud. The hearer presumably is in an identical epistemic situation to the speaker and thus not in need of evidence on the question of how loud the stereo happens to be.[233]

Likewise, Kirgis relies on Grice in proposing a definition of hearsay.[234] He proposes that a statement ought to be considered hearsay when the declarant intended an audience to believe a proposition based on the audience's recognition that the declarant intended the audience to believe the proposition.[235] This proposed definition, however, also extends beyond testimonial assertions. Kirgis notes that it would apply to the statements of "two old friends [who] get together to reminisce," and it would apply to statements made while "reminding or reviewing facts."[236] Whether explicit or implied, this shared knowledge would not be the subject of testimony and, thus, would not carry the risks and problems associated with this conceptual category.

Sometimes, however, the information conveyed implicitly is itself testimonial. Acts of communication convey not only explicit content, but also the obvious or reasonable implications of those acts.[237] Consider a variation on one of Grice's own examples.[238] Suppose Professor *Y* is asked to write a letter of recommendation for Mr. *X*, a student applying for judicial clerkships. The professor writes only, "Dear Judge, Mr. *X* was a student in two of my classes. He has adequate command of English and is punctual. Sincerely, Professor *Y*." Although not stated explicitly, the assertions imply that Professor *Y* does not think highly of Mr. *X*'s potential as a judicial clerk and that

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232. *Id.* (footnote omitted).

233. This assumes the speaker and hearer are in a similar epistemic position. One can imagine contexts where the speaker does have superior information and is thus testifying to the hearer—when the hearer has poor auditory capabilities, for example.

234. *See* Kirgis, *supra* note 210, at 296-302.

235. *Id.* at 302 ("(1) The declarant intended the audience to believe *P*; (2) The declarant intended the audience to recognize the intention in (1); and (3) The declarant intended the audience's belief in *P* to result at least in part from the audience's recognition of the intention in (1).").

236. *Id.* at 303, 323. If, however, a hearer indicates that he needs help recalling an event, then the speaker would be testifying to the hearer with assertions regarding the event.

237. Wellborn, *supra* note 172, at 50-52.

238. *See* GRICE, *supra* note 62, at 33.

he has no other positive information to share.[239] In either case, these implied assertions are serving as natural testimony. Thus, they too ought to be subject to the hearsay rule if offered to prove these propositions. Finally, acts of communication also convey propositions entailed by the explicit content of the communication when those implications are obvious to the hearer (or a reasonable hearer). For example, when a speaker declares that "the killer lives in Chicago, Illinois," the speaker has also conveyed the information that the killer lives in the United States.

My proposed testimonial approach to the hearsay rule would define hearsay as follows:

> Hearsay is any oral, written, or nonverbal act of communication—not made while testifying at the trial or hearing at issue—by which the declarant intends[240] to convey a particular proposition, based on the content communicated, and that is offered to prove the truth of that proposition.[241]

3. Testing the Testimonial Approach

The testimonial approach can be used to sort out problematic examples of possible hearsay in a way that is epistemically sound and analytically clear. The examples were chosen for their venerability; they are based on cases that have caused trouble for courts or have generated disagreement among evidence scholars. They are, therefore, examples that any account of the hearsay rule must deal with satisfactorily. For the sake of brevity, I limit the examples to five that

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239. *See id.*

240. It might be interposed that any test that depends on intent will be problematic because of potential difficulties in figuring out a speaker's intent. Even if this so, the current hearsay definition already employs such considerations; thus, the other features of the proposed definition may improve on the current definition. Moreover, intent appears to be an integral part of the concept of testimony from the speaker's perspective.

241. This definition captures several lessons regarding the function of testimony as an epistemic source. These lessons can be used to further clarify the scope of the above definition. First, the requirement that the declarant intend to communicate eliminates the ship captain and other actions that do not express communicative content. *See supra* note 226. The admissibility of this evidence should be evaluated like all other perceived evidence. Second, the declarant's intent to convey should be interpreted broadly to include situations like a diary entry, where it may not be reasonable to conclude that the declarant intended to convey propositions to anyone other than herself. This would also apply to most kinds of written records. The "content" requirement eliminates situations where the content is irrelevant for conveying the information. For example, when a speaker utters, "I'm alive," and it is offered to prove the person was alive. *See supra* note 67. Based on the statement, the hearer perceives that the speaker is alive; the hearer does not have to rely on the content of the speaker's testimony.

qualify as nonhearsay under the proposed definition and five that qualify as hearsay, but additional examples are discussed in the footnotes.

The following five examples would be nonhearsay under the testimonial approach:

1. Two coconspirators are arrested and one is overheard saying to the other, "It would be better for us two girls to take the blame than Kay (the defendant) because he couldn't stand it, he couldn't stand to take it."[242] The statement should not be hearsay if it is offered to prove that Kay was engaged in the conspiracy. The speaker is not attempting to convey information, or offer natural testimony, about Kay's involvement to the hearer. The hearer does not appear to be in need of evidence on this point; she and the speaker are in a similar epistemic position with regard to this proposition.
2. While searching an apartment for suspected bookmaking, the police answer several telephone calls from people attempting to place bets on sporting events. The calls should not be hearsay if offered to prove that bookmaking was taking place at the apartment. The callers are not attempting to convey to the recipient that he or she is engaged in bookmaking. The recipient does not appear to be in need of evidence of this point. The recipients are in a superior epistemic position compared to the callers; they know whether they take bets.[243]
3. In order to prove someone was mentally competent, a party offers a letter written to the person proposing a business deal. The letter should not be hearsay to prove the writer believed the person competent and therefore that it is more likely he was competent. Although the letter may communicate the writer's implicit belief that the person is competent, such an assertion is not offered as natural testimony on that point. The letter does not appear to be an attempt

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242. *See* Krulewitch v. United States, 336 U.S. 440, 441, 444 (1949) (concluding that the statement was hearsay). In *Krulewitch v. United States*, the conspiracy involved transporting a woman across state lines in order to engage in prostitution. *Id.* at 441. Rather than being a coconspirator, the hearer of the statement was in fact the complaining witness. *Id.* This fact is irrelevant for purposes of the discussion.

243. *See* United States v. Zenni, 492 F. Supp. 464, 465, 469 (E.D. Ky. 1980) (concluding the calls were not hearsay). The House of Lords reached an opposite conclusion based on similar facts. *See* Regina v. Kearley, (1992) 1 A.C. 228, 228-29 (H.L.) (appeal taken from Eng.) (U.K.) (concluding telephone calls attempting to buy drugs were hearsay to prove drugs sold from location); *see also* Callen, *supra* note 101, at 108 (arguing that "a single call should be hearsay"); Kirgis, *supra* note 210, at 310-11 (arguing the calls should be hearsay if there is no preexisting relationship with the callers, but that they should not be hearsay if there is a preexisting relationship); Christopher B. Mueller, Electronic Discussion, *Conduct, Performative Speech, and Communication*, 16 MISS. C. L. REV. 151, 151-52 (1995) (demonstrating a typical call for help and its evidentiary implications). For an argument that such calls should be excluded on nonhearsay grounds, see ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 194-96 (2005).

to convey this information to the recipient. Generally the recipient will be in a superior epistemic position with regard to his or her mental competence.[244]

4. A landlord gives an eviction notice to two tenants. The notice should not be hearsay if offered to prove that the tenants lived in the apartment. Although the landlord's conduct implies his belief that the tenants live there, and the notice may say so explicitly, the landlord is not attempting to convey, to offer natural testimony, to the tenants that they live there. He and the tenants are in a similar epistemic position with regard to this proposition. The tenants know whether they live there.[245]
5. A defendant is charged with possessing materials to make methamphetamine.[246] The materials were found in the garage of a house that the defendant shared with several roommates. To connect the materials to the defendant, the prosecution offers a note found near the materials. The note is addressed to someone with the defendant's first name and states, "I had to go calm my nerves down. I saw a cop car parked outside and the officer kept looking in our direction." The note should not be hearsay if offered to prove the defendant knew about and was connected to the materials. The writer of the note does not appear to be attempting to convey to the defendant that the defendant knows about and is connected to the

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244. And if the recipient truly is incompetent, it is hard to see how the communication could be intended to make an evidentiary contribution for the recipient. Although the example is based loosely on *Wright v. Tatham*, (1837) 112 Eng. Rep. 488, 490-92 (K.B.), this is not meant to suggest that the letters should have been admitted in that case. *See* Callen, *supra* note 101, at 101-03 (arguing that the letters should have been excluded as hearsay). The probative value of the letters—offered to show a will maker's competence—was low given that they were written more than twenty years before the will was made. *Id.* That alone would have warranted their exclusion even if not hearsay. *See* Ronald J. Allen, *Rules, Logic, and Judgment*, 16 MISS. C. L. REV. 61, 67 (1995).

245. This example is based on *United States v. Singer*, 687 F.2d 1135, 1147 (8th Cir. 1982). The court stated that the notice would be hearsay and inadmissible if "submitted to *assert* the implied truth of its *written contents*—that Carlos Almaden lived at 600 Wilshire" but admitted it anyway as nonhearsay for the curious rationale that the landlord's behavior implied Almaden lived there. *Id.* In *Singer* the landlord actually mailed the letter to the apartment. *Id.* It might be argued that the landlord is testifying to the mail carrier about where the tenants live. This is implausible. The mail system has superior information about who receives mail at the address as well perhaps as where to forward mail for the tenants. Alternatively, the envelope is a direction to deliver it to a particular address. Either way it is not testimonial. Paul Milich has argued that the notice ought to be hearsay because the value of the evidence depends on whether the landlord is lying or mistaken. *See* Paul S. Milich, *Re-Examining Hearsay Under the Federal Rules: Some Method for the Madness*, 39 U. KAN. L. REV. 893, 923-25 (1991).

246. This example is based on *State v. Dullard*, 668 N.W.2d 585, 588 (Iowa 2003), which concluded that the implied assertions in a note are hearsay. The facts are varied in order to simplify the example.

materials. The defendant does not need evidence on this point; he is in an identical or superior epistemic position.[247]

By contrast, the following five examples would all be hearsay under the testimonial approach:

1. A defendant is arrested while trying to cash a stolen check. While in the presence of the police, the defendant states to a codefendant, "I didn't tell them anything about you."[248] This statement should be hearsay if offered to prove the codefendant's involvement in the crime. Although the declarant is not attempting to convey to the defendant that he was involved, the act of communication is conveying this information to the police. They are in an inferior epistemic position and in need of evidence on this point, for which the declarant's statement is serving as natural testimony.[249]
2. In order to connect a defendant to a particular location, the prosecution offers a glass found at the location with the word "Dink," the defendant's nickname, engraved on it.[250] The relevance of the glass depends on the implied assertion, "this glass belongs to 'Dink.'" This should be hearsay if offered to prove that the glass belongs to Dink. The engraving appears to serve as natural testimony for this proposition. The engraving purports to convey that the glass belongs to Dink.[251]
3. A declarant returns to his prison cell after an arraignment. The cellmate asks how things went, and the declarant utters to his cellmate, "If it hadn't been for . . . Alex Evans, we wouldn't be in this now."[252] This statement should be hearsay if offered to prove that

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247. For another example in which the speaker and hearer are in similar epistemic positions consider the following: two people say, "Nice to meet you," to each other, and this is offered to prove that they had not met prior to that point. *See* United States v. Palma-Ruedas, 121 F.3d 841, 857 (3d Cir. 1997), *rev'd*, 526 U.S. 275 (1999).

248. *See* United States v. Reynolds, 715 F.2d 99, 101, 104 (3d Cir. 1983) (concluding that the statement was hearsay); *see also* Park, *supra* note 208, at 804-05 (drawing the similarity between the assertion definition and the declarant definition of hearsay post-*Reynolds*).

249. Contrast this example with the first nonhearsay example. When the statement is being overheard, unbeknownst to the speaker, the speaker does not believe that she is offering natural testimony on the relevant point. But when the speaker is aware of the presence of an uninformed third party, she is now aware that her communication will serve as testimony.

250. United States v. Hensel, 699 F.2d 18, 30-31 (1st Cir. 1983) (concluding that the evidence was not hearsay). Likewise, a name tag on a suitcase would be hearsay if offered to prove the suitcase belongs to the name on the tag. The tag impliedly asserts that this suitcase belongs to the person named, and it serves a testimonial function. The tag seeks to make an evidentiary contribution to anyone interested in to whom the suitcase belongs, and it claims the proper epistemic authority to do so. *But see* United States v. Snow, 517 F.2d 441, 442-45 (9th Cir. 1975) (concluding that a name on a case containing firearm was not hearsay).

251. This is true regardless of whom the original declarant happens to be.

252. *See* Dutton v. Evans, 400 U.S. 74, 77, 83 (1970) (assuming that the statement was hearsay for purpose of rejecting the defendant's confrontation claim).

Alex Evans was involved in the crime charged. The statement conveys the proposition that Evans was involved, and the assertion makes an evidentiary contribution to the hearer's knowledge, assuming the hearer was not himself involved or otherwise knew about Evans' involvement.[253]

4. A defendant named Erik is on trial for the murder of a child that he was supervising.[254] Another child who was also in Erik's care, later states to her mother, "Is Erik going to get me?" The statement should be hearsay if offered to prove that the declarant was afraid of Erik because she saw him commit the murder. The statement, to be relevant, must be attempting to convey this information to the mother, who was not herself a witness. The mother is in an inferior epistemic position and in need of evidence on this point.
5. A declarant tells his friend that if anything happens to the declarant to give a piece of paper to the police.[255] The paper contains a name and phone number. The person whose name and phone number are written on the paper is later charged with murdering the declarant. The paper should be hearsay if offered to prove that the defendant was involved in the crime. The declarant's words and actions are conveying that in such circumstances the defendant may have something to do with it. The declarant is representing to his friend and the police that he has proper evidence to convey this information, and the information would make an evidentiary contribution to those in need of it—those trying to answer the question of who killed the declarant.

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253. This would be a question for the judge to answer under Federal Rule of Evidence 104(a). Likewise, if a defendant awaiting trial sends an e-mail to a friend instructing the friend to give a false alibi, the statement is hearsay if the friend is not otherwise aware of the defendant's involvement with the crime charged. In the absence of such knowledge, the defendant's instructions impliedly asserts the belief the he needs a false alibi because the truth would be incriminating. The implied assertion is serving a testimonial function in this context. *See* Lyle v. Koehler, 720 F.2d 426, 429-35 (6th Cir. 1983) (concluding that a letter written from prison by a codefendant was hearsay). By contrast, giving a false name or other information to the police would not be hearsay to prove consciousness of guilt. Suppose someone named Smith is questioned by the police and states that his name is "Jones." Although the declarant did make a testimonial assertion—that his name is Jones—that proposition is not what the statement is offered to prove. And Smith did not assert explicitly, nor imply, the proposition for which it is offered—that he is aware of guilty conduct on his part and needs to conceal his identity. He plainly has not testified to that. *See* United States v. Palma-Ruedas, 121 F.3d 841, 856 (3d Cir. 1997) (holding that such a statement is not hearsay).

254. Stoddard v. State, 887 A.2d 564, 565-66, 581 (Md. 2005) (concluding that the statement was hearsay).

255. *See* United States v. Day, 591 F.2d 861, 880, 883 (D.C. Cir. 1978) (concluding that the slip was not hearsay). For criticism of *United States v. Day*, see Kirgis, *supra* note 210, at 287-91.

The preceding discussion has focused on the scope of the hearsay rule. In other words, it has attempted to locate the communicative behavior that ought to be considered subject to the rule. The discussion is not meant to suggest that any statement subject to the rule ought to be always inadmissible. A statement that falls under the scope of the rule may still be admissible under an exemption or exception.[256] I have used the notion of offering natural testimony to locate a particular category of assertions to treat as epistemically suspect and to redefine "hearsay" and "nonhearsay" on the basis of this category. It is possible either to leave the rest of hearsay's doctrinal artifice in place or to revise the exemptions and exceptions. This difficult task is beyond the scope of this Article, but I offer a few general comments on how such reform might proceed.

The proposed rule narrows the current rule's scope from a focus on all assertions to a focus on those in which the declarant is offering natural testimony on the point for which the evidence is offered at trial. This narrowing creates three related conditions that may help with further reform.

First, part of the reason for the elaborate doctrinal hearsay structure may be that the basic definition is too broad. When the initial rule is too broad, many exceptions may be necessary to account for the undesirable implications created by applying the rule. A rule that covers many situations at the front end requires more work at the back end—sorting which of those situations deserve ultimate inclusion and exclusion. A narrow rule may thus be more powerful precisely because it applies to fewer situations.[257]

Second, the testimonial approach presents a new analytic category to be tested empirically. Although recent empirical work suggests that in general jurors can use hearsay reliably in reaching accurate verdicts, the studies have reached inconsistent results.[258] Our understanding of both the value of hearsay evidence and the extent to which jurors discount or overvalue it is still not nuanced enough to make clear judgments about the many different categories of possible hearsay.[259] Further empirical work could, for example, study which

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256. *See* FED. R. EVID. 801(d), 803-04, 807.

257. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 155 (1991). Schauer has made a similar point about the right to free speech. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 5 (1982).

258. *See* Park, *supra* note 170, at 1151-70 (reviewing current empirical work on the hearsay rule).

259. *Id.* at 1170.

categories of testimonial statements are used reliably and which are not—and thus be used to create exceptions for those types used reliably.

Finally, the proposed rule may accord with political realities with regard to hearsay reform.[260] Paul Milich has suggested that any hearsay reform ought to satisfy three conditions: make the rule more transparent, not make everything up to the trial judge's discretion, and eliminate the most offensive kinds of hearsay.[261] The testimonial approach helps to foster each of these goals. Narrowing the definition helps to provide a clear analytic category to sort hearsay from nonhearsay at the beginning of any analysis. It does so by defining hearsay as the epistemically suspect category of natural testimony. This narrower, but perhaps more powerful, rule could then be subject to simpler policy-based or empirically justified exceptions, whereas other less problematic, nontestimonial statements could be left to the judge's discretion. This would make the rankest and most problematic kinds of statements subject to clearer categorical rules and the less problematic statements subject to simple analysis (it is simply not hearsay) and, like other evidence, judicial discretion.

This reform would be further supported by the increased constitutional protection for criminal defendants under the Confrontation Clause; hearsay law no longer needs to perform this constitutional function. This Article now turns to the constitutional roles of testimony.

IV. TESTIMONY AND THE CONSTITUTION

The word testimony has become a term of constitutional importance.[262] Indeed, it has become an important doctrinal term in the fields of evidence and criminal procedure.[263] Whether a communication is deemed to be testimonial is the key issue for delineating the scope of both the Confrontation Clause and the privilege against self-incrimination.[264] The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[265] The Supreme Court has interpreted

260. *See* Milich, *supra* note 180, at 765-67.

261. *See id.* at 767.

262. *See* Davis v. Washington, 126 S. Ct. 2266, 2274 (2006); United States v. Hubbell, 530 U.S. 27, 34 (2000).

263. *Davis*, 126 S. Ct. at 2274; *Hubbell*, 530 U.S. at 34.

264. *See Davis*, 126 S. Ct. at 2274 (regarding the Confrontation Clause); *Hubbell*, 530 U.S. at 34 (regarding the right against self-incrimination).

265. U.S. CONST. amend. VI.

the word *witness* to cover anyone who gives out-of-court "testimonial" statements, and thus "testimony" determines the scope of the clause.[266] Likewise, the Fifth Amendment states that "No person . . . shall be compelled in any criminal case to be a witness against himself."[267] The Supreme Court has interpreted the term *witness* to apply only to compelled and incriminating "testimonial" communications.[268]

A focus on the general concept of testimony can illuminate and clarify these areas. The Court's use of "testimony" in these contexts is, to be sure, a doctrinal term, but these doctrinal uses build upon the general, everyday sense of the term.[269] This sense also underlies the concept of natural testimony, and understanding that concept will help to illuminate the Court's uses of "testimony." I first discuss the Confrontation Cause and then the Self-Incrimination Clause.

A. *The Confrontation Clause*

The Supreme Court's reinterpretation of the Confrontation Clause has been the most significant development within evidence law in recent years.[270] Within the span of a few years, the Court's decisions in *Crawford v. Washington* and *Davis v. Washington* have transformed significant aspects of criminal prosecutions and police practices,[271] generated numerous inconsistent state and federal lower-court opinions,[272] and inspired much academic commentary.[273] These consequences flowed from the Court's decision to link the clause to the concept of testimony.[274]

This subpart first discusses, albeit briefly, the story of the Court's recent transformation of the Clause; this story has already been told

266. *Davis*, 126 S. Ct. at 2274 (citing Crawford v. Washington, 541 U.S. 36, 51 (2004)).

267. U.S. CONST. amend. V.

268. *Hubbell*, 530 U.S. at 34; Schmerber v. California, 384 U.S. 757, 761-65 (1966).

269. *See supra* note 60.

270. A possible exception is the Court's decisions regarding expert testimony.

271. *See* Tom Lininger, *Reconceptualizing Confrontation After* Davis, 85 TEX. L. REV. 271, 272 (2006) [hereinafter Lininger, *Reconceptualizing Confrontation*]; Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 748-50 (2005) [hereinafter Lininger, *Prosecuting Batterers*].

272. *See* Robert P. Mosteller, Crawford v. Washington*: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 526-29 (2005) (discussing different judicial approaches post-*Crawford* and collecting cases).

273. *See supra* notes 271-272.

274. *See* Lininger, *Reconceptualizing Confrontation*, *supra* note 271, at 273; Mosteller, *supra* note 272, at 526-33.

ably and in more detail by others.[275] This subpart then focuses on the possible meanings of "testimony" offered by *Crawford* and *Davis*, and, most importantly, illustrates how the general concept can provide theoretical support for understanding and clarifying the constitutional category.

1. *Roberts* to *Crawford* to *Davis*

Prior to 2004, confrontation challenges by criminal defendants to the admissibility of out-of-court statements were examined under the framework that the Supreme Court established in *Ohio v. Roberts*.[276] Under this framework, statements are to be admitted only if they have sufficient "indicia of reliability."[277] The requisite reliability could be established by showing that the statement falls within a "firmly rooted hearsay exception" or otherwise displays "particularized guarantees of trustworthiness."[278] The Court originally imposed an unavailability requirement but in subsequent cases relaxed this requirement.[279] Subsequent cases also held most hearsay exceptions to be "firmly rooted."[280] The bottom line was that if prosecution evidence was admissible under the hearsay rules, then the Confrontation Clause imposed little additional challenge to admissibility.[281]

Enter *Crawford*. In 2004, the Court issued its opinion in *Crawford* and largely dismantled the *Roberts* framework.[282] The defendant was charged with assault and attempted murder, allegedly stabbing another man, and claimed self-defense.[283] At trial, the prosecution introduced videotaped statements made by the defendant's wife during interrogation at the police station and describing the

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275. *See, e.g.*, Lininger, *Reconceptualizing Confrontation*, *supra* note 271, at 376-80; Friedman, Crawford*,* Davis*, and* Way *Beyond*, *supra* note 179, at 557-71; *see also* Online Symposium on the Confrontation Clause, 105 MICH. L. REV. FIRST IMPRESSIONS (2006), http://www.michiganlawreview.org/firstimpressions/vol105/ConfrontationClause.htm (presenting commentaries on *Davis* by eight attorneys).

276. 448 U.S. 56 (1980).

277. *Id.* at 65-66.

278. *Id.* at 66.

279. *See* United States v. Inadi, 475 U.S. 387, 399-400 (1986); *Roberts*, 488 U.S. at 65 n.7.

280. Lilly v. Virginia, 527 U.S. 116, 125-26 (1999) (discussing the firmly rooted doctrine). The Court has held only two exceptions not to be firmly rooted. *See id.* at 126 (holding that the "against penal interest" hearsay exception is not firmly rooted); Idaho v. Wright, 497 U.S. 805, 817 (1990) (noting that the state remedial "catch-all" exception is "not a firmly rooted hearsay exception for Confrontation Clause purposes").

281. *See Lilly*, 527 U.S. at 125-26.

282. Crawford v. Washington, 541 U.S. 36, 60-63 (2004).

283. *Id.* at 39-40.

altercation, at which she was present, in details that differed from the defendant's account.[284] The wife did not testify at trial based on the state's marital privilege.[285]

In reinterpreting the scope of the Clause, the Court relied on both textual and historical analysis. First, the Court noted that the use of the term "witness," which meant one who "bears testimony," implies that the Framers were not concerned with all out-of-court statements, but only those of a testimonial nature.[286] Second, the Court examined historical practices in England and the individual States prior to and around 1791 and concluded that historical materials supported two inferences: that the "principal evil" the Clause was directed at was the civil-law mode of examining witnesses ex parte for use against criminal defendants,[287] and that the Framers would not have allowed the admission of testimonial statements from a witness who does not testify, unless the witness was unavailable and the defendant had a prior opportunity to cross-examine the witness.[288] The Court thus established the rule that the Clause bars testimonial statements from witnesses who do not testify at trial unless they are shown to be unavailable and the defendant had a prior opportunity for cross-examination.[289] Most significantly, the Court declined to define "testimonial" for purposes of the confrontation right, but held that the defendant's wife's statements to police during interrogation qualify "under even a narrow standard."[290]

Enter *Davis*. In 2006 the Court decided *Davis*, two consolidated cases, in an effort to clarify "testimonial" for purposes of confrontation.[291] Both cases arose in the domestic-violence context.[292] One involved statements made during a 911 call, and the other involved statements made to officers after responding to the scene.[293] The Court answered the testimonial question by looking at the

284. *Id.* at 38-40.
285. *Id.* at 40.
286. *Id.* at 51.
287. *Id.* at 50-53.
288. *Id.* at 53-56.
289. *Id.* at 53-54.
290. *Id.* at 52, 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (footnote omitted)).
291. *See* Davis v. Washington, 126 S. Ct. 2266, 2270 (2006).
292. *Id.* at 2271-72.
293. *Id.* at 2270-72.

"primary purpose" of the interrogation.[294] The Court held that the 911 call was nontestimonial because the primary purpose of the questioning was to meet an "ongoing emergency" and that the statements made at the scene were testimonial because the primary purpose of the questioning was to establish past events relevant to criminal prosecution.[295] *Davis* again declined to offer a comprehensive definition of "testimony," leaving several issues unanswered.[296] The Court also suggested in dicta that *Roberts* is dead with regard to nontestimonial statements—in other words, that nontestimonial statements are completely outside the scope of the Clause, thus further enhancing the significance of the testimony category.[297]

2. "Testimony" in *Crawford* and *Davis*

Both *Crawford* and *Davis* involved the context of police interrogation and focused on defining "testimony" is this context.[298]

In *Crawford* the Court focused on the word "witness" in the amendment.[299] The Court, quoting from Webster's 1828 Dictionary, defined "witnesses" as those who "bear testimony," and "testimony" as "typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[300] Because testimony typically involves a "solemn declaration or affirmation," a witness who "makes a formal statement to government officers" is bearing testimony, while a person who makes a "casual remark" is not.[301] The difference, according to the Court, is not that one category is necessarily more or less reliable than the other;[302] the difference involves a procedural

294. *Id.* at 2273-74, 2277.

295. *Id.* at 2276-79.

296. *See id.* at 2273. These issues include, for example, if and when statements made to nongovernment actors are testimonial, when child statements are testimonial, when forfeiture by the defendant permits the admissibility of testimonial statements, and whether any other exceptions apply.

297. *Id.* at 2275. *See also* Lininger, *Reconceptualizing Confrontation*, *supra* note 271, at 273 (discussing the nontestimonial aspect of *Davis*).

298. *Davis*, 126 S. Ct. at 2274 n.2 (assuming that 911 operators were law enforcement agents); Crawford v. Washington, 541 U.S. 36, 38 (2004).

299. *Crawford*, 541 U.S. at 51.

300. *Id.* (internal quotation marks omitted).

301. *Id.*

302. *Id.* at 61 ("To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee.").

judgment that reliability in the "testimonial" category is best assessed when tested with cross-examination.[303]

The Court considered three possible articulations of "testimony."[304] First, and most narrowly of the three, testimony may include only "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'"[305] Second, testimony may more broadly include any form of "ex parte in-court testimony or its functional equivalent."[306] This category would include "affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."[307] The reference to ex parte communications implies that some type of government involvement would be necessary, either as questioner or direct recipient of statements. Third, and most broadly of the three, testimony may include all "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"[308] This would presumably also apply to statements to nongovernment actors, such as emergency-room doctors, when the circumstances fit the definition. The Court did not choose any of the three as defining the outer boundaries of the category; rather, the Court explained that they shared a "common nucleus" that applied regardless of definition.[309] This nucleus includes, and the term "at a minimum" covers, testimony at a preliminary hearing, prior trial, or before a grand jury, and, mostly importantly in *Crawford*, statements made in response to police interrogation.[310]

Davis elaborated on the definition of testimony in two important, related ways with regard to police interrogation. First, the Court concluded that not all statements made to the police are testimonial.[311]

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303. *Id.* at 51 ("An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted.").

304. *Id.* at 51-52.

305. *Id.* (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas J., concurring in part and concurring in judgment)). This would arguably include the recorded statement of the defendant's wife.

306. *Id.* at 51 (quoting Brief for Petitioner at 23, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410)).

307. *Id.*

308. *Id.* at 52 (quoting Brief for National Association of Criminal Defense lawyers et al. as Amicus Curiae at 3, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410)).

309. *Id.*

310. *Id.* at 68.

311. *See* Davis v. Washington, 126 S. Ct. 2266, 2273-74 (2006).

Second, in narrowing the category of testimonial statements within the police-interrogation context, the Court emphasized the point of view of the relevant government actors, not the speaker, holding that:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[312]

Applying these considerations to the 911 call in *Davis*, the Court concluded the statements were not testimonial because (1) the declarant caller was describing events "*as they were actually happening*" rather than "describ[ing] past events," (2) the declarant caller was facing an ongoing emergency as apparent to a reasonable listener, (3) the information asked for and answered was necessary to resolve the present emergency as "viewed objectively", (4) the environment was less formal than in *Crawford* and "not tranquil," and (5) the caller's answers were "frantic."[313] For these reasons, the circumstances "objectively indicate[d]" that the "primary purpose was to enable police assistance to meet an ongoing emergency."[314] The declarant "simply was not acting as a *witness*; she was not *testifying*."[315]

By contrast, the Court concluded that the statements made at the scene in the second case were testimonial because (1) the interrogation was "part of an investigation into possibly criminal past conduct," (2) the questions were designed to elicit "what happened," not "what is happening," and (3) there was no ongoing emergency.[316] The Court explained that any lack of formality with regard to the interrogation was irrelevant.[317] The declarant's statements were "an obvious

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312. *Id.* In a footnote, however, the Court qualified this language by pointing out that even without questioning by the police, "volunteered testimony" may still be testimonial; and that even in the interrogation context, "in the final analysis the declarant's statements, not the interrogator's questions," require evaluation. *Id.* at 2274 n.1.

313. *Id.* at 2276-77 (internal quotation marks omitted).

314. *Id.* at 2277.

315. *Id.* The Court, however, noted that later portions of the recorded conversation might be testimonial. *Id.*

316. *Id.* at 2278.

317. *Id.*

substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial."[318]

3. "Testimony" Is as Testimony Does

The Court's focus in *Crawford* and *Davis* on how out-of-court statements function is important. In both cases, the Court looked to whether the statements served a testimonial function—in particular, whether the statements functioned as a substitute for live trial testimony.[319] In other words, the Court was examining whether an act of *natural* testimony was being offered to serve the function of *formal* testimony while dispensing with the formalities required by the Clause.[320] Because the general concept of testimony is underlying this issue, making features of that concept explicit provides some clarity to the doctrinal category and offers epistemically coherent answers to nagging questions regarding its scope.[321] These questions include: (1) which person's perspective is relevant for determining whether a statement is testimonial: speaker, hearer, both, either; (2) whether the hearer must be a government agent; (3) whether the speaker must know whether the hearer is a government agent; and (4) whether the Court's distinctions of present vs. past and emergency vs. nonemergency are coherent. Finally, and more generally, the concept of testimony also helps to better articulate the relationship between confrontation and hearsay than is currently manifested in the cases.

To review briefly the account of testimony, the concept of testimony has two aspects: a speaker perspective and a hearer perspective.[322] To testify, a speaker must intend to convey information to an audience with a communicative act.[323] This aspect entails that the speaker intends the audience to believe the speaker has the proper epistemic credentials to communicate the information, and the speaker believes that the information is relevant to a question or issue that is unresolved from the audience's perspective.[324] Also, when the speaker

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318. *Id.*

319. *Id.* at 2277; Crawford v. Washington, 541 U.S. 36, 51 (2004).

320. *See Davis*, 126 S. Ct. at 2277; *Crawford*, 541 U.S. at 51.

321. The general concept is more salient and more important because the Court in *Davis* rejected formality requirements for "testimonial," i.e., that it be recorded, transcribed, or made in custody, and so on. *See Davis*, 126 S. Ct. at 2278. The focus instead is on whether a statement functions as testimony; to understand this we need to know how testimony functions. That, in a sense, is the main point of this Article.

322. *See* Lackey, *supra* note 54, at 186-87.

323. *See* Collier, *supra* note 60, at 2; Graham, *supra* note 60, at 227.

324. *See* COADY, *supra* note 18, at 38.

intends to communicate, a hearer can take the content of that communicative act as testimony even when the speaker did not intend to convey information to that hearer.[325] In the confrontation context, this is precisely the concept at issue,[326] with one additional requirement—that the testimony be given or taken for criminal prosecution.[327]

Davis's imposition of a primary-purpose-of-the-investigation standard has raised questions about which person's perspective is relevant for determining whether a statement is testimonial.[328] On the one hand, the "primary purpose" looks to the government's purpose (i.e., the hearer),[329] but on the other hand, both *Davis* and *Crawford* emphasize that it is the declarant's statements that are being analyzed for their testimonial qualities.[330] Four possibilities exist for when a statement becomes testimonial for confrontation purposes: it must be testimonial from the speaker's perspective, from the hearer's perspective, from both perspectives, or from either perspective. Some scholars have suggested that *Davis* requires a focus on the government's perspective as the primary determinate of whether a statement is testimonial.[331] Like the general concept of testimony, however, a statement ought to be considered testimonial if it so from either perspective.[332] First, the hearer-perspective-only test leaves out intuitively clear cases of testimonial statements, as recognized by the Court.[333] These would include volunteered statements without government involvement.[334] If someone writes an anonymous letter or e-mail or sends a videotape to the police or prosecutor accusing someone of a crime, and this evidence is admitted for its truth at trial,

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325. *See* Lackey, *supra* note 54, at 188.

326. *See supra* pp. 22-26 (implicating potentially all of the epistemic pathways and dead ends).

327. *See* U.S. CONST. amend. VI.

328. *See* Lininger, *Reconceptualizing Confrontation*, *supra* note 271, at 280.

329. Davis v. Washington, 126 S. Ct. 2266, 2273-74 (2006).

330. *Id.* at 2274 n.1; Crawford v. Washington, 541 U.S. 36, 51-56 (2004).

331. *See* Lininger, *Reconceptualizing Confrontation*, *supra* note 271, at 280; Michael H. Graham, *The* Davis *Narrowing of* Crawford*: Is the Primary Purpose Test of* Davis *Jurisprudentially Sound, "Workable," and "Predictable"?*, 42 CRIM. L. BULL. 604, 608 (2006). *But see* State v. Stahl, 855 N.E.2d 834, 844 (Ohio 2006) (adopting an objective speaker perspective after *Davis*).

332. *See* State v. Bobadilla, 709 N.W.2d 243, 253 (Minn. 2006) ("Whether a declarant or government questioner is acting, to a substantial degree, in order to produce a statement for trial is determined by asking whether a reasonable government questioner or declarant in the relevant situation would exhibit that purpose.").

333. *See Davis*, 126 S. Ct. at 2274 n.1.

334. *See id.*

it would plainly serve a testimonial purpose—it would function exactly like a prosecution witness.

Now, consider the speaker-perspective test. Richard Friedman has argued for this perspective.[335] He explains that the key question ought to be "whether the declarant *understood* that there was a significant probability that the statement would be used in prosecution."[336] But consider the following example. The police (or a doctor) trick a witness into thinking that whatever they say is privileged and cannot be admitted against the defendant. Such a variation could have arisen in *Crawford* itself if the police had convinced the defendant's wife that they only wanted to know what happened to exonerate her husband, and that anything she said could not be used against her husband. Even though it might be reasonable for a person in the speaker's position to believe the statements will not be used for criminal prosecution, the government is still collecting statements to function as testimony. If the Framers were concerned with ex parte communications for use at trial, they would presumably be equally concerned when potential witnesses are tricked into making such statements without realizing it. Consistent with the general concept of testimony, the speaker is attempting to communicate information through an act of communication. The statements are therefore testimony, and they are being gathered for use in a criminal prosecution. The testimony is thus "testimonial."[337] If neither perspective is necessary to make a statement "testimonial," then, as a matter of logic, it cannot be the case that both are necessary. Rather, either perspective can make a statement testimony and thus "testimonial" for confrontation purposes.

These considerations entail additional important consequences regarding the scope of "testimonial" for confrontation purposes. First,

335. *See* Friedman, Crawford*,* Davis*, and* Way *Beyond*, *supra* note 179, at 561.

336. Friedman, *supra* note 3, at 252.

337. Friedman has suggested that the government should perhaps be estopped from arguing that a statement is nontestimonial when the government withholds information from a witness that would make the statement appear testimonial if the witness knew the information. Friedman, Crawford*,* Davis*, and* Way *Beyond*, *supra* note 179, at 574. For instance, the police conduct in the above example would qualify. Rather than create secondary issues through estoppel doctrine, however, it makes more sense to simply recognize these statements for what they are: testimony. If the general concept of testimony is disjunctive, *see supra* pp. 22-26, then testimony in this context ought to be as well. Moreover, the estoppel rationale would not apply when a nongovernment actor (for example, a doctor) tricks a witness, which should also make the statements testimonial if the nongovernment actor was gathering the statements for use in a criminal prosecution.

the hearer need not be a government agent.[338] If the speaker's perspective alone can make a statement testimonial, then any time the speaker conveys information that reasonably could be used for criminal prosecutions it falls within the scope of the Clause.[339] For example, a letter to the local newspaper accusing someone of a crime will reasonably serve the function of testimony just as well as a similar letter to the police. Second, when communicating with a government agent, the speaker need not know that the hearer is, in fact, a government agent.[340] For example, consider an officer posing as a doctor in order to take testimonial assertions made by a witness for use in a criminal prosecution.[341] If a speaker is conveying information and a government agent is gathering the content of the speaker's communication for use in a criminal prosecution, then the content is testimony.[342]

The scope of "testimonial" is further complicated by two distinctions the Court drew in *Davis*.[343] The Court explained that testimonial statements describe past events (and descriptions in the present tense are nontestimonial), and that statements made to relieve an emergency situation are nontestimonial.[344] The second distinction may be coherent, but the first is not. One can testify and offer testimonial statements for the purpose of criminal prosecutions regardless of whether one is describing past, present, or future events. A speaker who tells the police his neighbor just finished selling drugs, is currently selling drugs, or will be selling drugs in one hour is offering a testimonial statement in all three instances, if the statements are introduced at the neighbor's trial.

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338. *See* Friedman, Crawford, Davis, *and* Way *Beyond*, *supra* note 179, at 573.

339. *See id.*

340. Robert Mosteller suggests that the Supreme Court may define the confrontation right to require that speakers communicating with government agents know that the hearer is a government agent. *See* Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them"*, 82 IND. L.J. 917, 966 (2007).

341. Although it is not entirely clear from the Court's opinions, I am assuming the confrontation right would not apply to a defendant's own statements when the defendant does not testify because the defendant cannot benefit from cross-examining himself. If he could, he would testify. Given this, a defendant's statements to an undercover officer would not be within the scope of the Clause. But a third party's statements to an undercover officer would be within the scope if the officer were taking testimonial assertions for use in a criminal prosecution.

342. *See* Friedman, Crawford, Davis, *and* Way *Beyond*, *supra* note 179, at 573.

343. Davis v. Washington, 126 S. Ct. 2266, 2273-74 (2006).

344. *Id.*

The emergency versus nonemergency distinction does not matter for purposes of whether the speaker is offering natural testimony—a cry for help is conveying information to an intended audience, to be sure. The distinction does matter, however, for whether the statement was made with the reasonable belief it would be used for criminal prosecution.[345] These are difficult issues, and ones that the concept of testimony cannot answer because the issues are not over whether someone testified, but why they testified. Nevertheless, a few suggestions based on the above discussion are relevant. The best interpretation of the Court's conclusion is that in an emergency situation the speaker and hearer would be more concerned about resolving the emergency rather than with gathering statements for use in prosecution, and both would engage in the same conduct even if there were no prosecution forthcoming.[346] This conclusion involves complex psychological assumptions that will likely vary from speaker to speaker, even among "reasonable" speakers, and case to case. Rather than try to answer these complex questions on a case-by-case basis, the Court may have been creating an easier-to-apply general rule to apply in future cases.[347] Thus, the Court's invocation of the "emergency" rationale should be seen as much as an exception to the inadmissibility of testimonial statements as a limit on the scope of the category.[348]

One final conclusion follows from the general concept of testimony. This relates, more generally, to the relationship between testimonial statements (for purposes of confrontation) and hearsay. A few statements in *Davis* may suggest that the "testimonial" test applies only to statements that are hearsay.[349] The Court was clear in *Crawford* that admissibility under the hearsay rules was not sufficient for admissibility for confrontation purposes.[350] But Justice Scalia's opinion in *Davis* at one point suggests that testimonial statements may nevertheless be a subset of hearsay statements: "It is the testimonial character of the statement that separates it from other hearsay that,

345. *See id.* at 2277-78.

346. *Id.* at 2276. Asking this counterfactual question may be a useful way of locating the "primary purpose."

347. *Id.* at 2277. In other words, the Court tried to articulate what "reasonable" people generally believe in these frequently reoccurring situations in order to make the fact-based inquiry easier to resolve in future cases.

348. Other confrontation issues such as when forfeiture or waiver apply, or whether other exceptions ought to exist to the rule are beyond the scope of this Article's focus on the category of testimony.

349. *See id.* at 2273.

350. Crawford v. Washington, 541 U.S. 36, 50-51 (2003).

while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause."[351] Likewise, Justice Thomas's separate opinion assumed that the Clause applies to "otherwise admissible hearsay."[352] But it is false that a statement has to first fall under the definition of hearsay for it to be testimonial for confrontation purposes. A speaker testifies when she conveys information through an act of communication—and this communication is "testimonial" when conveyed for purposes of criminal prosecution.[353] Such communications should be subject to the Clause even when they do not fall under the basic definition of hearsay.[354] For example, in jurisdictions that apply a literal, narrow test and consider "implied assertions" to be outside the scope of the hearsay rule, the implied conveyance of information should still be subject to confrontation analysis even when it falls outside the scope of the hearsay rule.[355] Likewise, the use of statements to prove propositions obviously entailed by those asserted should be subject to confrontation analysis. More significantly, the Court has recognized the freedom of states to develop their own hearsay law.[356] It would plainly be perverse to allow states to tinker with the basic definition of hearsay under state law to avoid compliance with the Clause's procedural requirements. The two issues are, therefore, analytically distinct, and despite the fact that they

351. *Davis*, 126 S. Ct. at 2273.

352. *Id.* at 2281 (Thomas, J., concurring in part and dissenting in part).

353. *Id.* at 2273-74 (majority opinion).

354. *Crawford* did explain in dicta that "[t]he Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 60 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414 (1985)). *Tennessee v. Street* involved admitting a prior statement of an accomplice for impeachment purposes, and the Court relied on the fact that the statement was not hearsay to conclude there was no confrontation problem. *Street*, 471 U.S. at 414 ("The *nonhearsay* aspect of Peele's confession—not to prove what happened at the murder scene but to prove what happened when respondent confessed—raises no Confrontation Clause concerns."). For an argument that the confrontation right ought to apply to all testimonial statements regardless of whether they are offered for their truth, see Stephen Aslett, Comment, Crawford*'s Curious Dictum: Why Testimonial "Nonhearsay" Implicates the Confrontation Clause*, Comment, 82 TUL. L. REV. __ (2007).{forthcoming info here}

355. *See* Craig R. Callen, *An Interdisciplinary and Comparative Device for Teaching Hearsay and Confrontation*, *in* INNOVATIONS IN EVIDENCE AND PROOF: INTEGRATING THEORY, RESEARCH AND TEACHING (Paul Roberts & Mike Redmayne eds., forthcoming 2007) (analyzing implied-assertion cases under *Crawford* and *Davis*).

356. *See, e.g.*, United States v. Scheffer, 523 U.S. 303, 308 (1998) ("[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.").

both build on the general concept of natural testimony, it invites confusion to mix them further by thinking that one entails the other.[357]

B. The Self-Incrimination Clause

The Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[358] This right against self-incrimination, like the right to confront witnesses under the Sixth Amendment, has faced significant recent controversy and debate regarding its scope.[359] As with the Confrontation Clause, the key issue involves the meaning of the term "witness," and the Supreme Court has again equated "witness" with "testimony."[360] Few connections in general have been made between these areas, and none have been made by connecting them conceptually through the basic idea of natural testimony.[361] This Part both remedies this neglect and, as with previous Parts, illuminates and clarifies features of the legal issue with the concept of testimony. This subpart first discusses the general contours of the doctrine in light of the concept of testimony and then clarifies a particularly problematic area regarding the scope of the privilege: the extent to which the privilege applies to the target of subpoenas to produce documents and other physical evidence.[362]

1. Testimony and Self-Incrimination

In *Schmerber v. California*, the Court limited the scope of the privilege to "testimonial" acts.[363] The case involved a blood test, taken at a hospital at the behest of a police officer, of a suspected drunk driver involved in a car accident.[364] The defendant claimed that the compelled blood test violated his right under the Fifth Amendment not

357. *See* People v. Morgan, 23 Cal. Rptr. 3d 224, 227-33 (Ct. App. 2005) (analyzing implied assertions under *Crawford*).

358. U.S. CONST. amend V.

359. *See* Allen & Mace, *supra* note 8, at 259; Lance Cole, *The Fifth Amendment and Compelled Production of Personal Documents After* United States v. Hubbell—*New Protection for Private Papers?*, 29 AM. J. CRIM. L. 123, 167 (2002); Nagareda, *supra* note 9, at 1609-15; H. Richard Uviller, *Foreword:* Fisher *Goes on Quintessential Fishing Expedition and* Hubbell *Is Off the Hook*, 91 J. CRIM. L. & CRIMINOLOGY 311, 329-30 (2001).

360. United States v. Hubbell, 530 U.S. 27, 34 (2000).

361. *But see supra* note 9 (noting the limited scholarship on this connection).

362. *See, e.g.*, Cole, *supra* note 359, at 126-31 (noting the unsettled nature of the issue, but concluding that the majority of documents are not protected from production); *see also* United States v. Hubbell, 167 F.3d 552, 570 (D.C. Cir. 1999), *aff'd*, 530 U.S. 27 (2000) (referring to this problem as an "admittedly abstract and under-determined area of the law").

363. 384 U.S. 757, 761 (1966).

364. *Id.* at 758.

be to compelled to incriminate himself.[365] The Court disagreed.[366] Rather than covering all the incriminating evidence that a defendant might be forced to supply, the privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature."[367] Physical evidence, such as the drawing of blood in this case, is not testimonial or communicative in nature and is thus outside the scope of the privilege.[368] After drawing this distinction between testimonial and physical evidence, the Court elaborated briefly on what counts as testimony, explicating a functional definition: "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take . . . ."[369] For example, the Court noted that head nods and head shakes may be testimonial or communicative, as would one's written papers.[370] In linking the privilege with testimony, in the sense of acts that function as communications, the Court linked the privilege to the concept of testimony, in its natural sense, and our social communicative practices in general.[371] A speaker's compelled communicative acts that would convey incriminating information are within the scope of the privilege.[372]

The Court's doctrine in this area is also consistent with the hearer aspect of the general concept of testimony. Recall that to take a speaker's communicative act as testimony, the content of the communication must be what conveys information to the hearer.[373] So, uttering the statement, "I am alive," or singing soprano, "I can sing soprano," would convey information that the speaker is alive or can sing soprano, but the content would be irrelevant to conveying the information.[374] The hearer can perceive the relevant facts directly

365. *Id.* at 759.

366. *Id.* at 765.

367. *Id.* at 761.

368. *Id.* at 762-72. In reaching this conclusion, the Court relied on *Holt v. United States*, 218 U.S. 245, 252-53 (1910), in which the Court held that forcing a defendant to try on a shirt at trial was not within the scope of the privilege.

369. *Schmerber*, 384 U.S. at 763-64.

370. *Id.* at 761 n.5. With regard to documents, the Court limited the scope of the privilege in *Fisher v. United States*, 425 U.S. 391, 409-11 (1976). This will be discussed shortly.

371. Thus, like with the Confrontation Clause, the inquiry of whether something functions as testimony can be illuminated by understanding how testimony functions.

372. *See* Dickerson v. United States, 530 U.S. 428, 433 (2000).

373. *See* Lackey, *supra* note 54, at 187-89.

374. For the same reasons, a handwriting or voice sample would not be testimony. *See* United States v. Dionisio, 410 U.S. 1, 5-6 (1973) (voice exemplars); United States v. Mara,

rather than having to rely on testimony from the speakers that those propositions are true.

The requirement that the content be incriminating was recognized in *Estelle v. Smith*.[375] The case involved a pretrial psychiatric examination of a criminal defendant, which later formed the basis of expert testimony regarding the defendant during sentencing.[376] The Court had ordered the pretrial examination to determine the defendant's competency to stand trial.[377] The doctor who performed the examination found the defendant competent and later testified during a capital-sentencing proceeding that the defendant was a "severe sociopath" who will "continue his previous behavior," that it will "only get worse," that no treatment was available, and that the defendant had no "sorrow or remorse" for his conduct.[378] The State argued that the defendant's disclosures were nontestimonial, but the Court disagreed.[379] Because the doctor's testimony was based on the "substance" of the defendant's disclosures, the disclosures were testimonial: "Dr. Grigson's diagnosis, as detailed in his testimony, was not based simply on his observation of respondent. Rather, Dr. Grigson drew his conclusions largely from respondent's account of the crime . . . ."[380] Because the incriminating statements from the compelled examination were testimonial and the defendant was not apprised of his right to refuse to answer, the Court concluded that the defendant's right against self-incrimination had been violated.[381]

2. Acts of Production as Testimony

The most problematic issue regarding the scope of the privilege against self-incrimination occurs when targets of grand-jury subpoenas

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410 U.S. 19, 21-22 (1973) (handwriting exemplars). Nor would standing in a lineup. *See* United States v. Wade, 388 U.S. 218, 221-23 (1967).

375. 451 U.S. 454, 462-63 (1981).

376. *Id.* at 456, 458.

377. *Id.* at 456-57.

378. *Id.* at 459-60.

379. *Id.* at 462.

380. *Id.* at 464. The Supreme Court also noted that, in addition to reliance on the substance of a defendant's disclosures, a meaningful diagnosis may have to be based on the content of the defendant's answers: "'[A]bsent a defendant's willingness to cooperate as to the verbal *content* of his communications, . . . a psychiatric examination in these circumstances would be meaningless.'" *Id.* at 464 n.8 (quoting Brief for American Psychiatric Association as Amicus Curiae at 26, Estelle v. Smith, 451 U.S. 454 (1981) (No. 79-1127)). This reliance on the content of the communications is precisely what brings it under the general concept of testimony.

381. *Id.* at 468-69.

duces tecum are ordered to produce records or physical objects.[382] This power provides prosecutors with a broad and efficient method for gathering large amounts of evidence.[383] In responding to such subpoenas, however, targets provide not only the requested evidence; their acts of producing the evidence also communicate additional information.[384] The additional information that targets communicate includes that the requested evidence exists, that the evidence was in the target's possession, and the target's belief that the evidence matches the government's request.[385] In addition, the act of production could be used to authenticate the evidence in court.[386] When may a target invoke the privilege against self-incrimination in such circumstances? This question has proven to be notoriously difficult to answer. In attempting to do so, the Court has appealed to the concept of testimony.

The Court's opinion in *Fisher v. United States* provided an initial answer.[387] The case involved a subpoena, as part of an IRS investigation, directing the target to produce documents prepared by an accountant and in possession of the target's attorney.[388] The target invoked his right against self-incrimination.[389] Although the documents obviously contained content, which may have been incriminating, the Court concluded that the contents of the documents were not protected by the Fifth Amendment because the documents were created voluntarily—that is, the government did not compel their creation.[390] This conclusion had wide-ranging consequences. *Schmerber* had stated in dicta that the contents of even voluntarily created papers would be protected.[391] *Fisher* cut back on this suggestion and held that the government must compel the communicable content itself for the

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382. Both testimonial subpoenas and subpoenas duces tecum (to compel documents or other items) are governed in the criminal context by the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 17.

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

384. *See* Fisher v. United States, 425 U.S. 391, 410 (1976).

385. *Id.*

386. *See* Curcio v. United States, 354 U.S. 118, 125 (1957).

387. 425 U.S. 391 (1976).

388. *Id.* at 393-95.

389. *Id.* at 395.

390. *Id.* at 409-10.

391. Schmerber v. California, 384 U.S 757, 763-64 (1966). The conclusion in *Fisher* thus cut back significantly on the protection for documents that the Court had recognized in *Boyd v. United States*, 116 U.S. 616, 633 (1886).

right to apply, rather than the right applying to the compelled production of previously created content.[392]

Along with this limitation, however, and more importantly for this discussion, the Court acknowledged that, apart from the contents of the documents, the act of producing the documents has "communicative aspects."[393] These aspects include those noted above: existence, possession, and the belief that they match the request.[394] Whether these communicative aspects "rise[] to the level of testimony" and hence fall within the scope of the Fifth Amendment, will depend on the "facts and circumstances of particular cases."[395] In this case, the Court concluded, "[t]he existence and location of the papers are a foregone conclusion and the [target] adds little or nothing to the sum total of the Government's information."[396]

Eight years later, in *United States v. Doe*, the Court revisited *Fisher*.[397] *Doe* involved a subpoena to produce, among other items, documents regarding a bank account, and the target invoked his right against self-incrimination.[398] The Court reaffirmed *Fisher*'s rule that the contents of the documents were not within the scope of the privilege because they were prepared voluntarily.[399] But the Court concluded that the defendant's acts of production were testimonial because the government failed to show that "possession, existence, and authentication were a 'foregone conclusion.'"[400]

Then, in 2000, the Court provided its most recent pronouncement on the scope of "testimonial" acts of production. *United States v. Hubbell*, which arose out of the Whitewater investigation, involved a subpoena to a defendant who had previously pleaded guilty in order to examine whether he had complied fully with the government.[401] Hubbell invoked his right against self-incrimination; he was provided with immunity for any testimonial acts of production and ordered by

392. *Fisher*, 425 U.S. at 409-10. Ironically, the privilege also does not apply to records that the government requires be kept for an administrative purpose. *See* Shapiro v. United States, 335 U.S. 1, 7 (1948).

393. *Fisher*, 425 U.S. at 410.

394. *Id.*

395. *Id.* at 410-11.

396. *Id.* at 411.

397. 465 U.S. 605, 610-12 (1984).

398. *Id.* at 606.

399. *Id.* at 611-12.

400. *Id.* at 614 n.13, 617 (quoting *Fisher*, 425 U.S. at 411). The government could have immunized Doe for the acts of production, *see* Kastigar v. United States, 406 U.S. 441, 442-43, 462 (1972), and then used the contents of the documents, but it did not do so, *see* *Doe*, 465 U.S. at 614-16.

401. 530 U.S. 27, 30-31 (2000).

the district court to respond.[402] The subpoena was broad ranging and prompted Hubbell to produce over 13,000 pages of documents in response.[403] Based on information disclosed in those documents, Hubbell was indicted on new, unrelated charges.[404] The government conceded that it could not prove prior knowledge of the documents or their contents (or other evidence of the crimes) but explained that it did not plan on using any of the produced documents against Hubbell at trial.[405] The Supreme Court addressed whether: (1) the privilege protects a target "from being compelled to disclose the existence of incriminating documents that the Government is unable to describe with reasonable particularity," and (2) the Government may use such documents "to prepare criminal charges" when the target "produces such documents pursuant to a grant of immunity."[406] The key issue underlying these questions was whether Hubbell's act of producing the documents was testimonial.[407]

Following *Fisher* and *Doe*, the Court explained that acts of production may in certain cases be testimonial.[408] To be testimonial, however, the acts must "'imply assertions of fact'" or be "'communications'" that "'explicitly or implicitly, relate a factual assertion or disclose information.'"[409] The Court proceeded to answer whether Hubbell's acts were testimonial—that is, whether they were implicit communications of information—by focusing on two variables: (1) the amount and quality of the mental effort Hubbell's response required[410] and (2) the government's prior knowledge of the information disclosed by the acts themselves (as apart from the content

402. *Id.* at 31; *see also* 18 U.S.C. §§ 6002-03 (2000) (federal immunity statutes).
403. *Hubbell*, 530 U.S. at 31.
404. *Id.* at 31-32.
405. *Id.* at 41.
406. *Id.* at 30.
407. *Id.* at 34.
408. *Id.* at 36-37 & n.19 (quoting Doe v. United States, 487 U.S. 201, 209-10 (1988)).
409. *Id.*
410. *Id.* at 43; *see also* Allen & Mace, *supra* note 8, at 289 ("In what may prove to be the single most important word in the *Hubbell* opinion, the Court referred to the 'extensive' effort that Hubbell had to make to respond to the subpoena.").

of the documents).[411] Both variables suggested that Hubbell's response was testimonial.[412]

With regard to the first variable, the Court noted that it "was unquestionably necessary for [Hubbell] to make extensive use of 'the contents of his own mind' in identifying the hundreds of documents responsive to the requests in the subpoena."[413] His compiling and producing over 13,000 pages was "the functional equivalent of the preparation of an answer to either a detailed written interrogatory or a series of oral questions at a discovery deposition."[414] In addition to quantity, the Court also suggested that the quality of the mental effort was somehow different from other physical responses: "The assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox."[415]

With regard to the second variable, the Court noted that "the prosecutor needed [Hubbell's] assistance both to identify potential sources of information and to produce those sources."[416] It was only after Hubbell's "truthful reply to the subpoena," his taking "steps necessary to provide the prosecutor with an accurate inventory of . . . evidence sought," that the government received the incriminating documents.[417] Like *Doe*, but unlike *Fisher*, "here the Government has not shown that it had any prior knowledge of either the existence or the whereabouts of the 13,120 pages of documents ultimately produced."[418] Despite the fact that the government did not plan on using the act of production at trial (for example, to authenticate the documents), the government "[clearly] has already made 'derivative use' of the testimonial aspect of that act in obtaining the indictment . . . and in preparing its case for trial."[419] Because Hubbell was given immunity for the testimonial act, its derivative use by the Government violated the Fifth Amendment "unless the Government proves that the evidence

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411. *Hubbell*, 530 U.S. at 44-45. By relying on government knowledge, the Court may be using the Fifth Amendment to answer concerns typically arising under the Fourth Amendment. In particular, whether the government's attempt at evidence gathering is reasonable under the circumstances or is instead a "fishing" expedition, is typically a Fourth Amendment inquiry. *See* Michael S. Pardo, *Disentangling the Fourth Amendment and the Self-Incrimination Clause*, 90 IOWA L. REV. 1857, 1883-84 (2005).

412. *Hubbell*, 530 U.S. at 44-45.

413. *Id.* at 43 (quoting Curcio v. United States, 354 U.S. 118, 128 (1957)).

414. *Id.* at 41-42.

415. *Id.* at 43.

416. *Id.* at 41.

417. *Id.* at 42.

418. *Id.* at 45.

419. *Id.* at 41.

it used in obtaining the indictment and proposed to use at trial was derived from legitimate sources 'wholly independent' of the testimonial aspect of respondent's immunized conduct in assembling and producing the documents."[420] The Government conceded it could not.[421]

The act-of-production cases in general—and *Hubbell* in particular—have analytically confused and misapplied certain aspects of the concept of testimony. Straightening out and correcting these aspects will clarify this difficult doctrinal problem. Given *Schmerber*'s initial decision to tie the privilege to the idea of testimonial communications in general, the Court was quite right—as it was in the Confrontation Clause context—to employ a functional definition of "testimony" (viz., any act that serves a communicative function) rather than to impose arbitrary formal requirements, such as that the acts must be verbal or written.[422] As should be clear from both the general discussion of testimony[423] and the discussion of hearsay,[424] nonverbal acts can be just as communicative as verbal ones from both the actor and audience perspectives. Not only obvious nonverbal acts like pointing or head nods can serve this function. Consider a police officer who requests that a suspect put on the shirt he wore yesterday; whatever shirt the man wears will communicate to the officer that this is the shirt he wore yesterday. Given this functional definition, the Court was also quite right to recognize that acts of production can function as communications and that to analyze whether they do, one needs to examine how they function in a particular context. So far, so good. The cases, however, begin to confuse the issue by linking "testimony" to the quantity of the suspect's mental efforts and to the government's prior knowledge.[425] Both have some relevance to the general concept of testimony, but in the ways that the Court has used these notions, neither notion can analytically separate testimonial communications from nontestimony.

First, *Hubbell*'s suggestion that the act of production was testimony because it required Hubbell to make "extensive use of 'the contents of his own mind'" is beside the point.[426] Whether his response

420. *Id.* at 45.
421. *Id.* at 33.
422. *See supra* pp. 51-57.
423. *See supra* pp. 7-26.
424. *See supra* pp. 30-46.
425. *See supra* notes 410-411 and accompanying text.
426. *See Hubbell*, 530 U.S. at 43 (quoting Curcio v. United States, 354 U.S. 118, 128 (1957)).

was like answering "a detailed written interrogatory" or "a series of oral questions" goes only to how much information was conveyed.[427] A response that communicates a single proposition or a small amount of information is still functioning as testimony and should be covered as long as the content of that information is compelled and incriminating. Nor does the amount of cognitive effort distinguish testimony from nontestimonial acts—some testimonial acts may be quite easy (an answer to a simple question, such as where the suspect was an hour ago), and some nontestimonial acts may require a great deal of cognitive effort (for example, playing a complex musical piece or solving a puzzle).[428] This renders the Court's distinction between "telling an inquisitor the combination to a wall safe" and "being forced to surrender the key to a strongbox" as a distinction without a difference.[429] Both may be testimonial under certain circumstances, and both may be nontestimonial. A suspect ordered to surrender the key may be conveying incriminating information that there is such a key, that the key was in his possession, and his belief that the one surrendered is the right key. This is testimony. And although "telling the combination" may usually be testimonial, it may not be testimonial under certain circumstances. For example, it would not when it is clear to both the speaker and the inquisitor that the speaker has no prior knowledge of the safe and is just guessing. Here, what may be conveyed is the proposition that the speaker does not know, but, most importantly, what is *not* conveyed are propositions such as that the combination is, say, 10-20-30, or that the speaker knows it, or even his belief that it is 10-20-30.[430] This would not be testimony. What makes an act of production testimony is that the act conveys information (regardless of how much) and that it conveys information based on the content of what is communicated. And the privilege ought to apply when that testimonial content was compelled and is incriminating.

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427. *Id.* at 41-42.

428. If somehow the latter examples were the subject of litigation—for example, to show the mental capabilities of a defendant—they would not be testimonial. The relevance would not depend on the content of anything expressed; an observer can perceive directly whether the defendant performed the tasks. By contrast, while an observer could perceive a defendant turning over a key, the act may still communicate the defendant's incriminating belief that the key turned over is the one relevant to the prosecution. To the extent the act is relevant because it reveals the incriminating content of belief or knowledge, it is testimonial. *See* Allen & Mace, *supra* note 8, at 266-76.

429. *Hubbell*, 530 U.S. at 43.

430. Perhaps, under certain circumstances, it might be testimonial to prove that the speaker does not know the combination.

The second, and more confusing, aspect of the Court's doctrine is the use of the government's prior knowledge to assess whether a statement is testimonial.[431] In *Fisher*, the Court held that the acts of production were not testimonial because the information conveyed implicitly (existence and possession) was a "foregone conclusion."[432] By contrast, both *Doe* and *Hubbell* held that the acts of production were testimonial because the government did not have prior knowledge of the information conveyed implicitly by the acts.[433] Now, as a general matter, the knowledge of the hearer is relevant for whether a communication functions as testimony. If a speaker knows that the hearer already knows a proposition or has the same or superior evidence compared with the speaker, the speaker is not testifying to that proposition by asserting it. Nor would a hearer who already knows the proposition or believes she has the same or superior evidence take the assertion as testimony. The Court's opinions may have been responding intuitively to this point about testimony.

The problem, however, is that the government is not the only potential audience. More important, a judge or jury would also be a potential recipient of the information. According to the Court's analysis, government knowledge makes the acts nontestimonial and hence not within the scope of the privilege.[434] Therefore, nothing would prevent the government from using the information conveyed by such acts at trial against the defendant responding to the subpoena. For example, the act of production could be used to authenticate produced documents. In such a case, the act of production would be serving a testimonial function for the jury. But in such cases, the government would be compelling communicable content from a defendant to use against him at a criminal trial. This is the functional equivalent of the defendant being forced to take the stand and testify

431. *See* Pardo, *supra* note 411, at 1881-1902 (arguing that the confusion arises, in part, because the Court has transposed Fourth and Fifth Amendment concerns). Following *Hubbell*, at least two federal appellate courts now determine whether acts of production are testimonial based on whether the government can describe them with "reasonable particularity." *See* United States v. Ponds, 454 F.3d 313, 320-21 (D.C. Cir. 2006) ("Although the Supreme Court did not adopt the 'reasonable particularity' standard in affirming our decision, it emphasized that the applicability of the Fifth Amendment turns on the level of the government's prior knowledge of the existence and location of the produced documents. Post-*Hubbell*, another circuit has applied the reasonable particularity standard to determine whether an act of production is sufficiently testimonial to implicate the Fifth Amendment. Because that standard conceptualizes the Supreme Court's focus in a useful way, so do we." (citations omitted)).

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

433. *Hubbell*, 530 U.S. at 44-45; United States v. Doe, 465 U.S. 605, 614 n.13 (1984).

434. *See Fisher*, 425 U.S. at 411.

against himself, and thus the privilege ought to apply. The issues of hearsay and the Confrontation Clause provide some additional insight. Even if the government already knows information conveyed by a hearsay statement or a "testimonial" statement for confrontation purposes, the introduction of such statements at trial still may be prohibited by the hearsay rules or the Confrontation Clause because of the testimonial function the statement serves for the fact finder.[435] The right against self-incrimination also ought to apply.

The government's knowledge does, however, serve a crucial role in the analysis after an act of production is testimonial (and compelled and incriminating). If an act of production is within the scope of the privilege, then the Government can show that its prior knowledge of, for example, the existence and possession of the produced evidence means that it did not have to rely on the acts in gathering information. This "independent source" analysis, however, is not relevant to

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435. Hearsay doctrine provides a useful contrast with the privilege against self-incrimination. Even though the hearsay rule currently does not turn on the knowledge of the hearer, the above discussion proposed narrowing the rule to exclude when speakers are not offering natural testimony on the proposition for which it is offered at trial. *See supra* pp. 30-46. In terms of epistemic reliability, this is a relevant and coherent distinction to employ in determining whether to allow the judge or jury to take those statements as testimony. The privilege against self-incrimination, by contrast, serves values beyond epistemic reliability and therefore ought to apply whenever a compelled, incriminating action by the defendant is taken as testimony against him. The additional values include protecting certain kinds of privacy and dignity, preventing certain kinds of abuse, and removing defendants from the "cruel trilemma" of incrimination, contempt, or perjury. For discussions and criticisms of the values underlying the privilege, see Allen & Mace, *supra* note 8, at 244-47; Peter Arenella, Schmerber *and the Privilege against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31, 38-48 (1982); David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1070-1147 (1986); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 679-98 (1968); Robert S. Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87, 87-88 (1970); R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 39 (1981); and Pardo, *supra* note 411, at 1873-78. For arguments that the contours of the privilege ought to focus on the reliability of evidence, see AMAR, *supra* note 9, at 46-48, and Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 858-59 (1995). For an argument that the current manifestation of the privilege does foster reliable evidence, see ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 158-64, 200-04 (2005), and Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 498-502 (2000). Similar considerations apply to the Confrontation Clause. For example, Justice Scalia explained in *Crawford* that even though the goal of the right is ultimately concerned with reliability, it reflects a procedural judgment that the reliability of testimony is best assured through cross-examination. *See* Crawford v. Washington, 541 U.S. 36, 61 (2004) ("To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee."). For further discussion of the values underlying the confrontation right, see Lininger, *Reconceptualizing Confrontation*, *supra* note 271, at 291-99.

whether the act is testimonial. It is relevant to whether the government made derivative use of the testimonial acts of production. This prior knowledge would thus license the government to use the produced evidence and its content, but not the acts of production, at trial.

To sum up: an act of production ought to be deemed testimonial for purposes of the Self-Incrimination Clause when, under the particular circumstances of the case, the act implicitly communicates information, and it is within the scope of the right when the content of the implicit communication was compelled and is incriminating. It does not matter how much information was conveyed or whether the government had prior knowledge of it. The government's prior knowledge, however, may be relevant to show that it had an independent source for the information and, thus, did not make derivative use of the act of production and will not make use of it at trial. Finally, and further tying together the two constitutional issues in this Part, testimonial acts of production would be testimonial for purposes of the Confrontation Clause when used to prosecute third-party defendants.

V. CONCLUSION

An account of testimony and its epistemology was applied to evidentiary and constitutional issues. First, the account helped to explain the somewhat complex relationship between natural testimony and the epistemically justified ways in which the law imposes formal testimonial requirements. Second, the account supported a restructuring of the scope of the hearsay rule to apply to communications offered as natural testimony on the propositions for which they are offered at trial. Third, it clarified aspects of the Court's recent cases on the Confrontation Clause. Most importantly, to the extent that the Court is committed to a testimonial approach, a broad definition is warranted under which either a speaker's or a hearer's perspective can make a communication testimony for use in prosecution. Finally, it explained and clarified key aspects of the Court's testimonial approach to self-incrimination. Most importantly, to the extent that the Court is committed to a testimonial approach, two factors employed in the doctrine to separate testimony from nontestimony are ill-suited to the task. These factors are the amount of cognitive effort expended by the target and the government's prior knowledge. They should be purged from the analysis in favor of a simpler test: whether the content of a compelled communicative act conveys incriminating information.

Along with these specific conclusions, this Article attempts to vindicate a particular methodology—viz., that analysis of the philosophical concepts underlying and presupposed by legal issues can be used to improve our understanding of those issues. The role of this analysis is modest and does not seek to displace other methodologies. But this analysis does make unique contributions to our understanding. Consider the constitutional issues. Textual analysis gets one only so far. For example, the very same dictionary that Justice Scalia cited in *Crawford* for the proposition that "witnesses" in the Sixth Amendment meant those who "'bear testimony,'"[436] Justice Thomas cited four years earlier in *Hubbell* for the much broader proposition that "witness" in the Fifth Amendment meant "'[t]hat which furnishes evidence or proof.'"[437] Similar uncertainties surround the historical analysis. With regard to confrontation, "[h]istory offers up few and slender documents for historically-based conclusions about the Framers' understanding of the Confrontation Clause."[438] And with regard to self-incrimination, scholars as distinguished as Akhil Amar and Richard Nagareda have reached radically different conclusions about what the scope of the right ought to be in order to accord with historical understanding.[439] Given such uncertainty, our understanding cannot help but be improved by examining the very concepts presupposed by our constitutional doctrine, apart from what any person living or dead thought the words used to express those concepts meant. And even if the textual and historical uncertainty could be resolved, for example, to establish definitively that "witness" means "testimony,"[440] the understanding provided by the philosophical analysis would remain because the doctrine would appeal to and presuppose the social practice the analysis illuminates.[441]

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436. *See Crawford*, 541 U.S. at 51 (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

437. *Hubbell*, 530 U.S. at 50 (Thomas, J., concurring) (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

438. Frank R. Herrmann, *The Uses of History in* Crawford v. Washington, 2 INT'L COMMENT. ON EVIDENCE 1, 2 (2004).

439. *Compare Nagareda*, *supra* note 9, at 1609-15 (arguing that the right should be significantly expanded), *with* AMAR, *supra* note 9, at 47 (arguing that the right should be significantly constricted).

440. Of course, the Court could conclude that "witness" does not mean "testimony," in which case the concept of testimony may no longer be presupposed by the doctrine.

441. Similar considerations apply to the law of evidence. Textual, historical, and especially empirical methodologies contribute greatly to understanding our evidentiary practices. But these practices presuppose certain concepts, and analysis of the concepts improves our understanding. This understanding provides a unique perspective to evaluate and critique the doctrine surrounding the practices and to delineate clearer categories for

Finally, along with contributing to doctrinal analysis,[442] the philosophical analysis also provides understanding beyond empirical approaches that attempt to predict or explain the behavior of judicial actors with factors beyond (or in addition to) legal doctrine, such as political affiliation or institutional characteristics and incentives.[443] Understanding the factors that predict decisions by themselves or along with the doctrine does not exhaust our understanding when the decisions presuppose identifiable concepts and practices, as is the case with testimony.[444] Understanding the concepts and practices themselves provides a unique perspective from which to examine, evaluate, and perhaps improve both the doctrine and the arguments that influence behavior from the "internal point of view."[445] Providing such understanding has been the aim of this Article.

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further empirical inquiry. As Roger Park has noted with regard to hearsay studies, we need more nuanced findings about what conditions make hearsay more or less reliable. *See* Park, *supra* note 170, at 1169-70. This Article suggests that whether the statement is testimonial is such a factor.

442. The methodologies of textual and historical analysis contribute primarily under the so-called "legal model" in which decisions are made based on the legal analysis of preexisting doctrine. *See* Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 NW. U. L. REV. 517, 517-27 (2006).

443. The most notable of these empirical approaches are the "attitudinal model" and "positive" political theory. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86-97 (2002); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 270-329 (2005).

444. Because legal issues presuppose concepts and practices, such as natural testimony, there is an ineluctable factual component to legal decisions that transcends both the legal model and the empirical models. *See* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1770 (2003).

445. *See* HART, *supra* note 111, at 56-57; Scott J. Shapiro, *What is the Internal Point of View?*, 75 FORDHAM L. REV. 1157, 1158-61 (2006).