

**THE CREDIBILITY-BASED EVALUATIVE PURPOSE:  
WHY RULE 703 DISCLOSURES DON'T OFFEND THE  
CONFRONTATION CLAUSE**

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## INTRODUCTION

In more than one place, Federal Rule of Evidence 703 has been described as an “end-run” around the Confrontation Clause.<sup>1</sup> This characterization, though unfortunate, is at least understandable.<sup>2</sup> If the Confrontation Clause prohibits the introduction of testimonial hearsay,<sup>3</sup> and Rule 703 permits expert witnesses to disclose testimonial hearsay (despite this prohibition),<sup>4</sup> doesn’t Rule 703 effectively circumvent the Confrontation Clause? Isn’t the rule just a “back door”<sup>5</sup> for inadmissible evidence? And aren’t expert witnesses nothing more than “conduits”<sup>6</sup> for testimony that would violate the Sixth Amendment? Though the metaphors for circumvention vary, this article’s answer to those questions remains the same: “No.”

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>7</sup> According to the Supreme Court, this Constitutional protection prevents the introduction of testimonial hearsay unless the person who made the hearsay statement has been called to testify, or has testified previously.<sup>8</sup> Though the definition of “testimonial” is still unsettled,<sup>9</sup> it has been held to include statements as diverse as those elicited from survivors of domestic violence at the scene of the crime,<sup>10</sup> and those included in

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1. See *Williams v. Illinois*, 132 S.Ct. 2221, 2269 (2012) (Kagan, J., dissenting); *People v. Goldstein*, 843 N.E.2d 727, 733 (N.Y. 2005) (quoting DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE* §3.7 (Supp. 2005) [hereinafter *THE NEW WIGMORE*]); Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & POLY 791, 822 (2007).

2. See *supra* note 1.

3. See *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004).

4. See FED. R. EVID. 703.

5. See *Williams*, 132 S. Ct. at 2272 (Kagan, J., dissenting); Ronald L. Carlson, *Is Revised Expert Witness Rule 703 A Critical Modernization for the New Century?*, 52 FLA. L. REV. 715, 731 n.169 (2000); L. Timothy Perrin, *Expert Witnesses Under Rules 703 and 803(4) of the Federal Rules of Evidence: Separating the Wheat from the Chaff*, 72 IND. L.J. 939, 941 (1997).

6. See *Williams*, 132 S. Ct. at 2267 (Kagan, J., dissenting); Carlson, *supra* note 5, at 724; Ian Volek, *Federal Rule of Evidence 703: The Back Door and the Confrontation Clause, Ten Years Later*, 80 FORDHAM L. REV. 959, 976 (2011).

7. See U.S. CONST. amend VI.

8. See *Crawford*, 541 U.S. at 54.

9. See, e.g., Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1868 (2012) (discussing the continuing evolution of the definition of “testimonial”); Carolyn Zabrycki, *Toward A Definition of “Testimonial”: How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 CAL. L. REV. 1093 (2008).

10. See *Davis v. Washington*, 547 U.S. 813, 829-30 (2006) (reviewing both State v.

affidavits indicating that a substance is cocaine.<sup>11</sup>

Rule 703, on the other hand, permits expert witnesses to disclose some evidence to juries that would otherwise be inadmissible.<sup>12</sup> This evidence may, in some cases, be testimonial hearsay.<sup>13</sup> For disclosure to be proper, however, the evidence must meet several threshold requirements: it must have served as a basis for the expert's opinion, must be the kind of evidence on which experts in the field would reasonably rely, and must possess probative value that substantially outweighs the prejudicial effects of disclosure.<sup>14</sup> But when these conditions are met, the jury is permitted to hear the otherwise inadmissible evidence for the purpose of evaluating the expert's opinion.<sup>15</sup> The rationale for allowing this disclosure is predicated on the belief that when jurors hear the same evidence that their expert heard in arriving at her conclusion, those jurors will be better able to determine whether the expert's position is a persuasive one.<sup>16</sup>

It's easy to see, then, the apparent conflict between Rule 703 and the Confrontation Clause. The more difficult task is to determine whether the conflict is really as irreconcilable as it seems. On this narrow issue, the scholarship speaks with one voice.<sup>17</sup> The overwhelming academic view is that expert witnesses cannot disclose testimonial hearsay under the auspices of Rule 703 without violating the Confrontation Clause.<sup>18</sup> In the view of these scholars, to allow a jury to hear testimonial statements "under the guise" of Rule 703 is to allow an end-around the Constitution.<sup>19</sup>

Just last year, however, the Supreme Court took up this very question in *Williams v. Illinois*.<sup>20</sup> In that case, the prosecution's expert witness sought to disclose DNA profiles (which were probably testimonial hearsay) to the jury in accordance with Rule 703.<sup>21</sup> On appeal, a plurality of the Court held that the expert witness's disclosure did not violate the Confrontation Clause.<sup>22</sup> In arriving at this holding, however, the plurality relied on two independent theories, only one of which addresses the problems posed by Rule

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Davis, 111 P.3d 844 (Wash. 2005), *cert. granted*, 546 U.S. 975 (2005), and Hammon v. State, 829 N.E.2d 444 (Ind. 2005), *cert. granted*, 546 U.S. 976 (2005)).

11. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309-11 (2009).

12. See FED. R. EVID. 703.

13. See, e.g., *People v. Goldstein*, 843 N.E.2d 727, 732-33 (N.Y. 2005).

14. See FED. R. EVID. 703.

15. See *id.*

16. See *infra* Part III.D.

17. See *infra* Part III.C.

18. See *id.*

19. See Mnookin, *supra* note 1, at 822 n.54.

20. See 132 S. Ct. 2221, 2232 (2012).

21. See *id.* at 2230.

22. *Id.* at 2240.

703.<sup>23</sup> This article's purpose, then, is to vindicate that theory, called the Basis Evidence Rationale. This defense of the Basis Evidence Rationale seems necessary in light of the confusion *Williams* has sown.<sup>24</sup> Because five Justices explicitly rejected both of the plurality's rationales,<sup>25</sup> lower courts have experienced difficulty in determining the case's holding.<sup>26</sup> Likewise, history indicates that the Supreme Court will probably revisit the issue, in an attempt to resolve the differences between the lower courts.<sup>27</sup> This article re-examines the Basis Evidence Rationale, then, with a view to future adoption. In service of that goal, this article proceeds in four Parts.

In Part One, this article reviews the development of the Supreme Court's Confrontation Clause jurisprudence, including an analysis of *Williams*. In Part Two, this article shows that lower courts are already divided over interpretation of the plurality's opinion, and reasons that the Supreme Court is likely to revisit the issue as a result. In the same Part, the article examines the *Williams* plurality's Targeted Individual Test, and argues that the Test should be rejected by the lower courts. In Part Three, the article considers the Basis Evidence Rationale, explaining the proper purpose for which experts may disclose basis evidence under Rule 703 and arguing that this purpose does not violate the Confrontation Clause. This article also provides a brief analysis of Rule 702, and explains how that rule should inform courts' readings of Rule 703. The article then describes how Rule 703 disclosures are helpful to juries, in light of the kind of cognitive processing jurors employ in high-complexity cases. Finally, in Part Four, this article identifies three tools to implement the Rationale elucidated in Part Three. This article contends that the last of these tools, the hypothetical question, has the potential to provide common ground for the Court when it revisits the issues presented by *Williams*. With that future case in mind, the article explains how the use of hypothetical questions can alleviate the concerns of Justices on both sides of the *Williams* divide.

## PART I

### A. *The Confrontation Clause & the Hearsay Rules*

Though the right of Confrontation dates back to Roman times,<sup>28</sup>

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23. See *id.* at 2240, 2244.

24. See *infra* notes 171-200 and accompanying text.

25. See *Williams*, 132 S. Ct. at 2265 (2012) (Kagan, J., dissenting).

26. See *infra* notes 151-62 and accompanying text.

27. See W. Jesse Weins, Note, *A Problematic Plurality Precedent: Why the Supreme Court Should Leave Marks over Van Orden v. Perry*, 85 NEB. L. REV. 830, 840 (2007).

28. Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 482 (1994).

the precise reasons for the Founders' insistence on its inclusion in the Bill of Rights remain mysterious.<sup>29</sup> Indeed, Justice Harlan has said that the right "comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause."<sup>30</sup> Despite the Clause's uncertain origins, however, there is one historical event which many cite as the reason for its existence: the 17th century trial of Sir Walter Raleigh.<sup>31</sup> After the ascension of James I to the English throne, Raleigh was accused of treason.<sup>32</sup> At trial, the only evidence presented against Raleigh was the confession made by Lord Cobham, Raleigh's alleged co-conspirator.<sup>33</sup> That evidence was further weakened by the fact that Lord Cobham had retracted his allegations against Raleigh not once, but twice.<sup>34</sup> And though Raleigh urged the Privy Council to bring Cobham before him, apparently believing that Cobham would testify in his favor, his requests were denied.<sup>35</sup> Raleigh was eventually convicted, after just fifteen minutes of deliberation.<sup>36</sup>

If the founding generation did indeed have Raleigh's trial in mind when it ratified the Sixth Amendment, preventing prosecutorial reliance on "*ex parte* examinations" would have been of prime importance.<sup>37</sup> However, the case law indicates that the Supreme Court's jurisprudence deviated from this original purpose as early as 1895.<sup>38</sup> In one of the earliest Sixth Amendment cases, *Mattox v. United States*, the Court held that the Confrontation Clause was not offended by the admission of prior testimony against the accused from a deceased witness.<sup>39</sup> The Court came to this conclusion by interpreting the Confrontation Clause with reference to the English common law's evidentiary rules.<sup>40</sup> It explained that the Sixth Amendment strictures "are subject to [evidentiary] exceptions, recognized long before the adoption of the constitution, and not interfering at all with its spirit. Such exceptions were obviously

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29. See Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. REV. 537, 540 n.3 (2003).

30. *California v. Green*, 399 U.S. 149, 174 (1970) (Harlan, J., concurring).

31. White, *supra* note 29, at 541.

32. ANTHONY J.H. MORRIS, THE QUARTERCENTENARY OF SIR WALTER RALEIGH'S TRIAL 14 (2003); White, *supra* note 29, at 541 n.10.

33. MORRIS, *supra* note 32, at 27.

34. *See id.* at 14.

35. *Id.* at 16.

36. *Id.* at 30.

37. *See Crawford v. Washington*, 541 U.S. 36, 50 (2004).

38. *See Mattox v. United States*, 156 U.S. 237, 243 (1895).

39. *See id.*

40. *See id.*

intended to be respected.”<sup>41</sup> By way of example, the Court noted that “from time immemorial [dying declarations] have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility.”<sup>42</sup> What some had intended to supersede the protections of evidentiary rules, then,<sup>43</sup> had actually become subservient to them. This notion propounded in *Mattox*, that the Sixth Amendment had been drafted to accommodate certain evidentiary exceptions,<sup>44</sup> was the precursor to a later development in Confrontation Clause doctrine: *Ohio v. Roberts*.<sup>45</sup>

In *Roberts*, the Supreme Court held that out-of-court statements could be offered against a criminal defendant, whether the declarant had been subject to cross-examination or not, when the statements bore adequate “indicia of reliability.”<sup>46</sup> The Court indicated that this finding could be inferred “without more in a case where the evidence falls within a firmly rooted hearsay exception” or when the evidence bears “particularized guarantees of trustworthiness.”<sup>47</sup> These “firmly rooted” hearsay exceptions were clearly intended to be the same exceptions that the *Mattox* Court would claim “no one would have the hardihood” to question.<sup>48</sup> In *Roberts*, then, the Court formalized and expanded<sup>49</sup> what *Mattox* had only proposed: that the hearsay rules serve as the Constitutional standard of admissibility, a union one scholar has aptly characterized as “a shotgun wedding between the hearsay rule and the Confrontation Clause.”<sup>50</sup>

#### *B. The Advent of Crawford and the Confrontation Clause Revolution*

This marriage between the Rules of Evidence and the Confrontation Clause, however, did not turn out to be an enduring one. In 2003, when the Supreme Court was asked to reconsider

41. *Id.*

42. *Id.* at 243–44.

43. *See Crawford*, 541 U.S. at 61 (“Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence.”).

44. *See Mattox*, 156 U.S. at 243.

45. 448 U.S. 56 (1980).

46. *Id.* at 66.

47. *Id.*

48. *Mattox*, 156 U.S. at 243.

49. It might be argued that *Crawford* was an unwarranted extension of *Mattox* in light of the unique nature of the dying declaration exception. *See Crawford*, 541 U.S. at 56 n.6 (“We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.”).

50. Thomas J. Reed, *Crawford v. Washington and the Irretrievable Breakdown of A Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185, 199 (2004).

*Roberts*, it concluded that divorce was the only remedy.<sup>51</sup> In the now-seminal Confrontation Clause case, *Crawford v. Washington*, the Court opined, “[W]e do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’”<sup>52</sup> Accordingly, the Court held that “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”<sup>53</sup>

However, the divorce between the Federal Rules of Evidence and the Confrontation Clause was not as complete as it appeared.<sup>54</sup> In a footnote, and even there, in parentheses, the Court noted, “The Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”<sup>55</sup> In other words, the Court seemed to be saying, when a “testimonial statement” is *not* hearsay, but an out-of-court statement offered for some purpose other than to prove its truth, then that testimonial statement does not fall within the scope of the Confrontation Clause. In effect, then, *Crawford’s* ninth footnote is the lipstick on the collar of the Confrontation Clause<sup>56</sup>: it means that the separation between the hearsay rules and the Confrontation Clause is not yet complete; it means that Rule 801 is still relevant for determining whether a testimonial statement is violative.<sup>57</sup>

As for “testimonial,” the Court (naturally) declined to “spell out a comprehensive definition,”<sup>58</sup> an omission at least one commentator has called *Crawford’s* chief weakness.<sup>59</sup> But the Court did suggest that a “core class” of testimonial statements is comprised of “*ex parte* in-court testimony or its functional equivalent” which it understood to include “material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar

51. See *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004).

52. *Id.*

53. *Id.* at 68-69.

54. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1174 (2011) (Scalia, J., dissenting) (“The Court announces that in future cases it will look to ‘standard rules of hearsay, designed to identify some statements as reliable,’ when deciding whether a statement is testimonial. . . . We tried that approach to the Confrontation Clause for nearly 25 years . . .”); see also *infra* notes 55-57 and accompanying text.

55. *Crawford*, 541 U.S. at 59 n.9; see also *Bryant*, 131 S. Ct. at 1160 n.11.

56. See CONNIE FRANCIS, LIPSTICK ON YOUR COLLAR (MGM Records 1959).

57. But see Stephen Aslett, Comment, *Crawford’s Curious Dictum: Why Testimonial “Nonhearsay” Implicates the Confrontation Clause*, 82 TUL. L. REV. 297, 324-25 (2007) (arguing that the footnote should be read to encompass only a limited category of hearsay statements).

58. *Crawford*, 541 U.S. at 68.

59. Miguel A. Méndez, *Crawford v. Washington: A Critique*, 57 STAN. L. REV. 569, 587 (2004).

pretrial statements that declarants would reasonably expect to be used prosecutorially.”<sup>60</sup> It is no surprise, then, that most of *Crawford’s* progeny have added to this “core class,” attempting to finish what *Crawford* had only begun.<sup>61</sup>

### C. *The Crawford Progeny*

Many scholars organize the cases following *Crawford* by sorting them into one of two branches of precedent.<sup>62</sup> The cases that comprise the first of these branches consider whether statements given in response to police investigation are testimonial.<sup>63</sup> In *Davis v. Washington*, Michelle McCottry called 911 during the course of a domestic assault.<sup>64</sup> When the operator asked McCottry to name her assailant, she related his last, first, and middle name.<sup>65</sup> After giving this information, McCottry reported that her attacker was “runnin’ now.”<sup>66</sup> At trial, McCottry did not testify, and prosecutors introduced the recording of her call to the 911 operator.<sup>67</sup> In *Hammon v. Indiana*, which the Court decided together with *Davis*, police questioned the petitioner after responding to the report of similar a domestic disturbance.<sup>68</sup> With her husband in the next room, Hammon told police that he had attacked her.<sup>69</sup> After hearing her story, officers asked her to complete a battery affidavit.<sup>70</sup> Hammon wrote, “Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn’t leave the house. Attacked my daughter.”<sup>71</sup> At trial, Hammon did not testify, and prosecutors introduced her affidavit.<sup>72</sup> The question presented to the Court was whether either set of statements was testimonial, and

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60. *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (internal quotations omitted).

61. See *infra* notes 62-73 and accompanying text.

62. See, e.g., Michael D. Cicchini, *Dead Again: The Latest Demise of the Confrontation Clause*, 80 FORDHAM L. REV. 1301, 1303 n.16 (2011); Ronald J. Coleman & Paul F. Rothstein, *Grabbing the Bullcoming by the Horns: How the Supreme Court Could Have Used Bullcoming v. New Mexico to Clarify Confrontation Clause Requirements for CSI-type Reports*, 90 NEB. L. REV. 502, 511 (2011); Robert K. Kry, *Confrontation at a Crossroads: Crawford’s Seven-Year Itch*, 6 CHARLESTON L. REV. 49, 52 (2011).

63. See *infra* note 64 and accompanying text.

64. 547 U.S. 813, 817–18 (2006).

65. *Id.* at 818.

66. *Id.*

67. *Id.* at 819.

68. *Id.*

69. *Id.* at 820.

70. *Id.*

71. *Id.*

72. *Id.*



therefore violative of the Sixth Amendment.<sup>73</sup>

Ultimately, the Court held 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.”<sup>74</sup> By contrast, statements 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.”<sup>75</sup> Applying this rule, it concluded that the “frantic answers” McCottry gave to the 911 operator were nontestimonial, because she had described “events *as they were actually happening.*”<sup>76</sup> This led the Court to conclude that the circumstances objectively indicated that the primary purpose of her interrogation was to enable police to meet an ongoing emergency.<sup>77</sup> On the other hand, the Court noted that Hammon’s statements were not given in the context of an “emergency in progress.”<sup>78</sup> Instead, police officers were attempting to determine by questioning Hammon “how potentially criminal past events began and progressed . . . some time after the events described were over.”<sup>79</sup> For this reason, the Court held that the affidavit Hammon had written was testimonial.<sup>80</sup>

In a subsequent case, *Michigan v. Bryant*, the Court considered whether the primary purpose test it had developed in *Davis* required courts to consider the statements and actions of the interrogators, only, or “the statements and actions of both the declarant and interrogators” in determining whether a statement were testimonial.<sup>81</sup> In *Bryant*, police officers found Anthony Covington lying in the parking lot of a gas station, with a bullet wound in his abdomen.<sup>82</sup> Police questioned Covington, who informed them of the identity of his attacker.<sup>83</sup> The interrogation lasted five or ten minutes, after which Covington was transported to a hospital.<sup>84</sup> He died several hours later, and the police who had questioned Covington testified at his attacker’s trial.<sup>85</sup> On appeal, the Court

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73. *Id.* at 822.

74. *Id.*

75. *Id.*

76. *Id.* at 827.

77. *Id.*

78. *Id.* at 829.

79. *Id.* at 830.

80. *Id.*

81. 131 S. Ct. 1143, 1148, 1160 (2011).

82. *Id.* at 1150.

83. *Id.*

84. *Id.*

85. *Id.*

reasoned that because Covington was mortally wounded, and officers did not know whether his attacker intended to shoot another victim, Covington's statements about the identity of the shooter were made "under circumstances objectively indicating," taking into account the statements and actions of both the interrogators and the declarant, "that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency."<sup>86</sup> As a result, it held that the officers' testimony relating Covington's statements did not offend the Confrontation Clause.

The cases following *Crawford* that fall into the second branch of precedent consider a very different question: whether forensic reports admitted absent the analysts who drafted them are testimonial.<sup>87</sup> In *Melendez-Diaz v. Massachusetts*, police officers observed the sale of a substance that appeared to be cocaine, and arrested both participants in the transaction.<sup>88</sup> In accordance with police procedure, the officers sent the substance to be tested and identified at a lab.<sup>89</sup> At trial, the prosecution introduced affidavits titled "certificates of analysis" from the forensic laboratory indicating that the substance was indeed cocaine.<sup>90</sup> The prosecution did not call the analysts who had performed the tests and drafted the certificate of analysis.<sup>91</sup> The question presented to the Court was whether an analyst who had performed the test and signed the affidavit, but had never seen the defendant, was a "witness" for purposes of the Sixth Amendment.<sup>92</sup> The Court called the case a "rather straightforward application of our holding in *Crawford*,"<sup>93</sup> and noted that *Crawford* had stated twice that affidavits fell within the "core class of testimonial statements."<sup>94</sup> As a result, the Court held that the introduction of the certificates of analysis absent the analysts who drafted them violated the Confrontation Clause.<sup>95</sup>

In a later case, *Bullcoming v. New Mexico*, the Court answered the question that naturally followed *Melendez-Diaz*: whether the Sixth Amendment requires testimony from the analyst who actually prepared a forensic report, or whether the testimony of her co-worker or supervisor would suffice for Confrontation Clause purposes.<sup>96</sup> In *Bullcoming*, the petitioner was arrested on suspicion of drunk

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86. *Id.* at 1150, 1166–67.

87. *See infra* notes 62–73 and accompanying text.

88. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2530 (2009).

89. *Id.*

90. *Id.* at 2531.

91. *Id.*

92. *Id.* at 2532.

93. *Id.* at 2533.

94. *Id.* at 2532 (quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004)).

95. *Id.*

96. 131 S. Ct. 2705, 2710 (2011).

driving.<sup>97</sup> At his trial, prosecutors introduced a forensic laboratory report certifying that Bullcoming's blood-alcohol concentration exceeded the amount necessary to convict him of aggravated DUI.<sup>98</sup> However, rather than produce the analyst who had signed the certification used at trial, the prosecutors called another analyst who worked in the same lab, but had not participated in the testing of Bullcoming's blood.<sup>99</sup> Following the hard line it had established in *Melendez-Diaz*, the Court held that the "surrogate testimony" of a scientist who does not sign a forensic certification (or perform or observe the test reported in that certification) does not satisfy the Confrontation Clause.<sup>100</sup>

The precedent expounding upon *Crawford*, then, dealt almost exclusively with issues surrounding responses to police interrogations and reports of forensic labs.<sup>101</sup> However, in her concurrence in *Bullcoming*, Justice Sotomayor emphasized that there were other factual scenarios which the Court had not yet considered.<sup>102</sup> She explained, "we would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence."<sup>103</sup> It was this very question the Supreme Court would consider again, five days later, when it decided to grant certiorari in *Williams v. Illinois*.<sup>104</sup>

#### *D. Williams in the Lower Courts*

On the night of February 10, 2000, Latonya Jackson was walking home from work when a man emerged from a dark alley, instructed her to sit in the back seat of his car, and raped her.<sup>105</sup> Jackson was then pushed out of the car—without her coat or her money—and forced to run the rest of the way home.<sup>106</sup> When Jackson's mother opened the door, and saw her daughter only partially clothed and in tears, she called the police.<sup>107</sup> Eventually, officers arrived on the scene and found Jackson in the bathtub.<sup>108</sup> An ambulance was summoned to take Jackson and her mother to the

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97. *Id.* at 2709.

98. *Id.*

99. *Id.*

100. *Id.* at 2710.

101. *But see* *Giles v. California*, 554 U.S. 353, 357 (2008) (considering whether forfeiture by wrongdoing constitutes an exception to the confrontation right).

102. *See* 131 S. Ct. 2705, 2721-22 (2011) (Sotomayor, J., concurring).

103. *Id.* at 2722.

104. *See* 131 S. Ct. 3090, 3090-91 (2011) (mem.) (granting certiorari).

105. *People v. Williams*, 939 N.E.2d 268, 270 (Ill. 2010).

106. *Id.*

107. *Id.*

108. *Id.*

emergency room, where a doctor conducted a vaginal exam and prepared vaginal swabs, which were placed in an evidence collection kit along with a sample of Jackson's blood.<sup>109</sup>

A few days later, the Illinois State Police (ISP) Crime Lab received the evidence collection kit, and "confirmed the presence of semen."<sup>110</sup> The samples recovered were then sent to Cellmark Diagnostic Laboratory, a private lab, for DNA analysis.<sup>111</sup> Cellmark created a DNA profile for the person whose semen was taken from the evidence collection kit, and relayed that information back to the ISP Crime Lab, where it was received by analyst Sandra Lambatos.<sup>112</sup> In the meantime, Sandy Williams had been apprehended for an unrelated offense, and, pursuant to a court order, had had his blood drawn.<sup>113</sup> This blood sample had been analyzed by a state-employed analyst, Karen Kooi Abbinanti, who had created a DNA profile, and stored it in the ISP database.<sup>114</sup> So when Sandra Lambatos entered the Cellmark profile into the ISP database, she found that the DNA profile created by Abbinanti (from Williams's blood) was a match for the DNA profile created by Cellmark (from the semen found on Jackson's vaginal swabs).<sup>115</sup> Based on that match, Williams was arrested and charged with aggravated criminal sexual assault, aggravated kidnapping, and aggravated robbery.<sup>116</sup>

At Williams's bench trial, the prosecution called Abbinanti to testify about the profile she had created from Williams's blood.<sup>117</sup> Abbinanti explained that she had derived the profile using a method called STR analysis.<sup>118</sup> STR stands for "short tandem repeat," and, at a very basic level, "looks to particular regions of the genome where certain known sequences of the four DNA base pairs (GATC) repeat themselves, and then measures how many times those repeats occur."<sup>119</sup> Most crime laboratories consider the number of repeats at thirteen important loci, where each person will present two numbers—one inherited from her mother, and the other from her father.<sup>120</sup> Ultimately, a person's DNA profile is expressed as a list of

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109. *Id.*

110. *Id.*

111. *Id.* at 271.

112. *Id.*

113. *Id.* at 270.

114. *Id.* at 270–71.

115. *Williams v. Illinois*, 132 S. Ct. 2221, 2229 (2012).

116. *Id.*

117. *Id.*

118. Joint Appendix at 12–13, *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (No. 10-8505) [hereinafter Joint Appendix].

119. Erin Murphy, *The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing*, 58 EMORY L.J. 489, 494-95 (2008).

120. *Id.* at 495.

twenty-six of these numbers.<sup>121</sup> Analysts arrive at these numbers by interpreting an electropherogram, which is a computer-produced graph charting the repeating segments of base pairs.<sup>122</sup> Interpreting the electropherogram (and therefore arriving at the twenty-six numbers) is a process that involves subjective judgment.<sup>123</sup>

Although Abbinanti had been called to testify about the profile she had created from Williams's blood, the Cellmark employee who had analyzed the semen recovered from Latonya Jackson did not testify at trial;<sup>124</sup> accordingly, no witness testified directly about that DNA profile, and the prosecution did not attempt to enter the Cellmark report into evidence.<sup>125</sup> Sandra Lambatos, however, was called to describe how she had matched the DNA profile prepared from Williams's blood to the profile prepared from Jackson's vaginal swabs.<sup>126</sup> Lambatos explained that analysts are able to match two profiles by comparing the numbers that appear in each profile's thirteen crucial loci.<sup>127</sup> Lambatos also detailed how, in examining the profiles at issue, she had concluded that one particular marker was "background noise," and filtered it out.<sup>128</sup> Eventually, Lambatos expressed her opinion that the DNA profile in the Cellmark report and the DNA profile in the ISP report (prepared by Abbinanti) reflected the same individual.<sup>129</sup> In arriving at this conclusion, Lambatos affirmed that she had relied on Cellmark report, which had not been entered into evidence.<sup>130</sup> This portion of her testimony eventually became the focal point of the Supreme Court's scrutiny, and is reproduced below:

Q: Was there a computer match generated of the male DNA profile found in semen from the vaginal swabs of [L.J.] to a male DNA profile that had been identified as having originated from Sandy Williams?

A: Yes, there was.

Q: Did you compare the semen . . . from the vaginal swabs of [L.J.] to the male DNA profile . . . from the blood of Sandy Williams?

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121. *Id.*

122. *Id.* at 498.

123. *Id.* at 501.

124. *See Williams v. Illinois*, 132 S. Ct. 2221, 2229-30 (2012).

125. *Id.* at 2230.

126. *Id.*

127. Joint Appendix, *supra* note 118, at 81.

128. Joint Appendix, *supra* note 118, at 79.

129. *People v. Williams*, 939 N.E.2d 268, 272 (Ill. 2010).

130. Joint Appendix, *supra* note 118, at 55-56.

A: Yes, I did.

...

Q: [I]s the semen identified in the vaginal swabs of [L.J.] consistent with having originated from Sandy Williams?

A: Yes.<sup>131</sup>

At the conclusion of Lambatos's testimony, Williams moved to strike her remarks regarding the Cellmark report, arguing that her references to the report had violated the Confrontation Clause.<sup>132</sup> However, the trial court, after careful deliberation, denied his motion.<sup>133</sup> Eventually, the trial court convicted Williams of the charges against him.<sup>134</sup>

Both the appellate court and the Illinois Supreme Court affirmed Williams's conviction.<sup>135</sup> As a preliminary matter, though the latter did not decide whether the unsponsored report constituted a testimonial statement, *Melendez-Diaz* seemed to foreclose any arguments to the contrary.<sup>136</sup> And yet *Crawford* had made plain that even when a statement is testimonial, it nonetheless escapes the strictures of the Confrontation Clause when it is not offered for its truth.<sup>137</sup> The argument before the Illinois Supreme Court, then, focused on whether Lambatos had offered the unsponsored Cellmark report for its truth, or for another purpose.<sup>138</sup> Williams argued that the report must have been offered for its truth because "without Cellmark's report . . . Lambatos could not have given her testimony that the defendant's DNA matched the profile deduced by Cellmark."<sup>139</sup> In response, the State argued that "Lambatos testified about the Cellmark tests only to explain how she formed her own opinion. Therefore, the only statement that the prosecution offered for the truth of the matter asserted was Lambatos' own opinion."<sup>140</sup> The alternative purpose proposed by the State—to explain how

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131. *Williams v. Illinois*, 132 S. Ct. 2221, 2235-36, 2267 (2012) (Kagan, J., dissenting) (emphasis omitted); Joint Appendix, *supra* note 118, at 56-57.

132. The defendant's motion was general: "I would move to exclude that evidence with regards to testing done by [Cellmark] based on 6th amendment [sic] right to confront witnesses . . . ." See Joint Appendix, *supra* note 118, at 90.

133. See Joint Appendix, *supra* note 118, at 90-95.

134. *Williams*, 132 S. Ct. at 2231.

135. *Id.*

136. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009).

137. See *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004).

138. *People v. Williams*, 939 N.E.2d 267, 278 (Ill. 2010).

139. *Id.*

140. *Id.*

Lambatos formed her opinion—is of course rooted in Rule 703.<sup>141</sup> The State, then, argued that the Cellmark report had been a basis for Lambatos’s opinion, and could therefore be disclosed for the purpose of “aiding the jury in assessing the value of [the] opinion,” which, in its view, was a purpose distinct from offering the report for its truth.<sup>142</sup>

#### *E. Williams Before the Supreme Court*

The question facing the Supreme Court, then, seemed to be whether the Illinois Supreme Court had correctly concluded that when an expert discloses apparently testimonial data—not for its truth but for the purpose of explaining the basis for her opinion—she does not violate the Confrontation Clause.<sup>143</sup> The question *seemed* to be whether the conflict between Rule 703 and the Confrontation Clause could be resolved. And, indeed, the Supreme Court did answer that question.<sup>144</sup> It also answered another.<sup>145</sup>

The plurality opinion, written by Justice Alito, announced two holdings: First, the plurality responded to the obvious question: “Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which [her] opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.”<sup>146</sup> The plurality explained that disclosures are offered in order to “help the factfinder understand the expert’s thought process and determine what weight to give to the expert’s opinion,” which is a purpose distinct from, according to the plurality, offering the basis evidence for its truth.<sup>147</sup> Instead, the disclosure serves “to show that the expert’s reasoning was not illogical, and that the weight of the expert’s opinion does not depend on factual premises unsupported by other evidence in the record.”<sup>148</sup> This is the reasoning this article refers to as the Basis Evidence Rationale.

However, the plurality also announced “a second, independent basis” for its decision:<sup>149</sup> it explained that because the Cellmark report was “not prepared for the primary purpose of accusing a targeted individual,” but rather for the purpose of “catch[ing] a dangerous rapist who was still at large,” it did not violate the

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141. Illinois has adopted a number of the Federal Rules, including Rule 703, by judicial fiat. *See* *People v. Pasch*, 602 N.E.2d 294, 310 (Ill. 1992). As a result, this article’s analysis focuses on FED. R. EVID. 703.

142. *See Williams*, 939 N.E.2d at 278-79.

143. *Id.*

144. *Williams v. Illinois*, 132 S. Ct. 2221, 2228 (2012).

145. *Id.*

146. *Id.*

147. *Id.* at 2240.

148. *Id.*

149. *Id.* at 2228.

Confrontation Clause.<sup>150</sup> This purpose, the dissent noted, was a subset of the “to respond to an ‘ongoing emergency’” purpose first elucidated in *Davis*.<sup>151</sup> The plurality explained that in all of its post-*Crawford* cases “the statement at issue had the primary purpose of accusing a targeted individual.”<sup>152</sup> This case was different, the plurality reasoned, because the subject of the tests, Sandy Williams, “was neither in custody nor under suspicion” at the time the tests were conducted.<sup>153</sup> The plurality distinguished *Melendez-Diaz* and *Bullcoming* by pointing out that in both of those cases the offender had “already been captured,” and “[t]here was nothing resembling an ongoing emergency.”<sup>154</sup> The plurality’s second holding is called the Targeted Individual Test.

Though Justice Alito announced the case’s holding, his opinion was joined by only three other justices.<sup>155</sup> The plurality was accorded that title, then, because Justice Thomas provided the fifth vote, concurring in the result—though not, as he made abundantly clear—in the reasoning.<sup>156</sup> Just as he had in *Davis* and *Bryant*,<sup>157</sup> Justice Thomas concurred on separate grounds, joined by no other justice.<sup>158</sup> In his concurrence, the justice repeated his by-then familiar refrain: “I reach this conclusion . . . solely because Cellmark’s statements lacked the requisite ‘formality and solemnity’ to be considered ‘testimonial’ for purposes of the Confrontation Clause.”<sup>159</sup> Justice Thomas also explained that he “share[d] the dissent’s view of the plurality’s flawed analysis.”<sup>160</sup>

Justice Kagan wrote a thoughtful dissent, criticizing both rationales propounded by the plurality and chastising its members for failing to “settle on a reason” for their decision.<sup>161</sup> In explaining her own view of the facts in *Williams*, Justice Kagan essentially argued that the Court’s holding in *Bullcoming* should control the outcome in *Williams*: “Have we not already decided this case? Lambatos’s testimony is functionally identical to the ‘surrogate testimony’ that New Mexico proffered in *Bullcoming*, which did

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150. *Id.* at 2243.

151. *Id.* at 2274 (Kagan, J., dissenting) (quoting *Michigan v. Bryant*, 131 S. Ct. 1143, 1147 (2011)).

152. *Id.* at 2243.

153. *Id.*

154. *Id.*

155. *Id.* at 2227.

156. *See id.* at 2255 (Thomas, J., concurring).

157. *See Davis v. Washington*, 547 U.S. 813, 834 (2006) (Thomas, J., concurring); *see also Michigan v. Bryant*, 131 S. Ct. 1143, 1167 (2011) (Thomas, J., concurring).

158. *See Williams*, 132 S. Ct. at 2255 (Thomas, J., concurring).

159. *Id.*

160. *Id.*

161. *Id.* at 2265 (Kagan, J., dissenting).



nothing to cure the problem identified in *Melendez-Diaz* . . .”<sup>162</sup> In response to the Basis Evidence Rationale, Justice Kagan’s primary argument was this: when an expert witness discloses the basis for her conclusion, the conclusion’s utility is dependent on the truth of the basis-evidence; therefore the jury must evaluate the basis-evidence for its truth.<sup>163</sup> In her own words, “[i]f the statement is true, then the conclusion based on it is probably true; if not, not. So to determine the validity of the witness’s conclusion, the factfinder must assess the truth of the out-of-court statement on which it relies.”<sup>164</sup> Justice Thomas made the same argument, quoting *The New Wigmore*: “To use the inadmissible information in evaluating the expert’s testimony, the jury must make a preliminary judgment about whether this information is true.”<sup>165</sup>

Justice Kagan continued by responding to the plurality’s Targeted Individual Test.<sup>166</sup> In Justice Kagan’s view, the Targeted Individual Test was infirm because it lacked any basis in precedent, and was, as a result, a distinction without a difference.<sup>167</sup> She also objected to the plurality’s analogizing the purpose it had suggested (“to catch a dangerous rapist who was still at large”) to the purpose elucidated in *Davis* (“to enable police assistance to meet an ongoing emergency”), contending that the comparison was a “stretch” of both the ongoing emergency test and the facts of *Williams*.<sup>168</sup> Finally, she pointed out that such reasoning was foreclosed by *Lambatos* herself, who had testified that the purpose of her testing was to prepare reports for eventual litigation.<sup>169</sup>

In sum, then, the Supreme Court rendered an opinion in which four justices agreed that two rationales independently supported a plurality holding, one justice concurred, basing his concurrence on an entirely different rationale, and the remaining four justices dissented, disagreeing with both the rationales offered by the plurality and the concurrence.<sup>170</sup>

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162. *Id.* at 2267.

163. *See id.* at 2268–69.

164. *Id.*

165. *Id.* at 2257 (Thomas, J., concurring) (quoting THE NEW WIGMORE, *supra* note 1, § 4.10.1, at 196).

166. *See id.* at 2273–74 (Kagan, J., dissenting).

167. *Id.*

168. *Id.* at 2243, 2274.

169. *Id.*

170. *See supra* notes 143–69 and accompanying text. Also, please note that I have excluded specific mention of Justice Breyer’s concurrence because this article does not address the issues his concurrence raises.

## PART II

A. *What is the Holding of Williams?*

In light of the Court's fractured opinion, it seems doubtless that, in coming years, *Williams* will cause confusion in the lower courts, particularly when those courts attempt to assess which parts of *Williams*, if any, constitute binding precedent.<sup>171</sup> For most of the Supreme Court's history, only the holdings, and not the reasoning, of plurality opinions were considered authoritative.<sup>172</sup> In those days, it could be said that "[t]hose joining in a plurality opinion may speak with the authority accorded wise men, but their voices do not carry the authority of the Supreme Court as an institution."<sup>173</sup> In an attempt to alter that reality, the Supreme Court provided guidelines for the interpretation of plurality opinions in *Marks v. United States*.<sup>174</sup> In that case, the Court indicated that "[w]hen a fragmented Court decides a case . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."<sup>175</sup> However, the Court has done little to give further content to the definition of "narrowest grounds,"<sup>176</sup> though it has admitted that the phrase has "baffled and divided the lower courts" on more than one occasion.<sup>177</sup> Despite the confusion, two methods for determining the "narrowest grounds" of a given plurality opinion have gained general acceptance.<sup>178</sup> The first is the implicit consensus method, which directs lower courts to search out a common denominator that establishes a logical connection between the reasoning of the majority opinion and the reasoning of the concurring opinion(s).<sup>179</sup> The second method, less readily

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171. See John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 71–75 (1974) (noting that plurality opinions may cause confusion in lower courts); see also Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 757–58 (1980) (explaining why decisions with "coherent majority rationale[s]" offer better guidance to the lower courts).

172. Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 420 (1992); W. Jesse Weins, Note, *A Problematic Plurality Precedent: Why the Supreme Court Should Leave Marks over Van Orden v. Perry*, 85 NEB. L. REV. 830, 834 (2007).

173. Davis & Reynolds, *supra* note 171, at 61–62.

174. See *Marks v. United States*, 430 U.S. 188, 193 (1977).

175. *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1975)) (opinion of Stewart, Powell, and Stevens, JJ.) (internal quotations omitted).

176. *Gregg*, 428 U.S. at 169 n.15; see also Novak, *supra* note 171, at 763; Weins, *supra* note 172, at 835.

177. See *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols v. United States*, 511 U.S. 738, 746 (1994)).

178. See Weins, *supra* note 172, at 835 (citing Thurmon, *supra* note 172, at 428–29).

179. Thurmon, *supra* note 172, at 428–29.

apparent, is the predictive method, which directs courts to forecast how the higher court would rule on the issue before the lower court, assuming the justices of the higher court remained faithful to the positions they had propounded in their fractured opinion.<sup>180</sup> This method is somewhat more controversial,<sup>181</sup> however, as it may result in a case's turning on the opinion of a single justice.<sup>182</sup>

In assessing *Williams*, the implicit consensus method has been of limited use: so far, lower courts have not relied on it. And this stands to reason. In his concurrence, Justice Thomas made clear that he did not agree with the reasoning set forth in the plurality opinion,<sup>183</sup> and the argument that he nonetheless shares some common ground with the plurality is a difficult one to make. The best formulation of that argument might be that Justice Thomas, like the plurality, agreed that the statements made by Sandra Lambatos were not "testimonial."<sup>184</sup> A lower court could, then, apply the implicit consensus model to determine that when a DNA analyst references an out-of-court statement that lacks formality or solemnity *Williams* holds that the statement does not violate the Confrontation Clause. A court could also apply the model to determine that when a statement lacking formality or solemnity is made before the defendant is targeted as a suspect, *Williams* holds that the statement does not violate the Confrontation Clause even when introduced for its truth. But this is indistinguishable from the old-fashioned solution of limiting *Williams* to its holding. Under this model, the reasoning set forth in *Williams* still has no reach.

Application of the predictive model has proven more popular.<sup>185</sup> When utilizing this method, courts proceed in steps. First, the court considers whether the defendant qualified as a "targeted individual" at the time the statements were made, or whether the statements were disclosed by an expert witness for the purpose of explaining the

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180. *Id.* at 435–36; see also Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 47 (1993) ("[T]he narrowest grounds approach works well, in the sense that it identifies a gravamen of decision for a lower court that insulates that court from reversal if the rationales in the pertinent prior Supreme Court case are perfectly clear and the Justices remain perfectly faithful to their respective rationales.")

181. Weins, *supra* note 172, at 837 n.47. But see Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1 (1994) (advocating for predictive decision-making by lower courts even outside the *Marks* context).

182. See *Grutter*, 539 U.S. at 325.

183. *Williams v. Illinois*, 132 S. Ct. 2221, 2255 (2012) (Thomas, J., concurring).

184. *Id.*

185. See, e.g., *United States v. Turner*, 709 F.3d 1187, 1194 (7th Cir. 2013); *United States v. Pablo*, 696 F.3d 1280, 1291–92 (10th Cir. 2013); *State v. Medina*, 306 P.3d 48, 63–64 (Ariz. 2013), *cert. denied*, 134 S. Ct. 1309 (2014); *State v. Deadwiller*, 834 N.W.2d 362, 373–75 (Wis. 2013).

basis for her opinion.<sup>186</sup> If either of these requirements is satisfied, the court tallies the four votes of Chief Justice Roberts, Justice Kennedy, Justice Breyer, and Justice Alito.<sup>187</sup> To obtain the fifth, the court considers whether the statements were lacking in formality or solemnity.<sup>188</sup> If the statements are found informal, then the court tallies Justice Thomas's tie-breaking vote.<sup>189</sup> However, couching these conclusions as predictions, and counting votes rather than parsing holdings, does not seem to put much theoretical space between the implicit consensus method and the predictive method, at least not when applied to *Williams*. In situations like these, then, is *Marks* inapplicable?

Some commentators have argued that *Marks* does not actually make binding precedent out of true plurality opinions, but only serves to “ferret out ‘false plurality’ situations where parts of the plurality opinion actually have majority support.”<sup>190</sup> In the view of these commentators, “false pluralities” are those opinions where a majority of justices actually agree on a rationale, though “some Justices go on to state additional ideas,”<sup>191</sup> while true pluralities are those in which there is no consensus—implicit, predictable, or otherwise—to be found.<sup>192</sup> It seems that *Williams*, then, is the kind of decision those commentators would characterize as a true plurality, or, alternatively, an “irrational plurality,”<sup>193</sup> a species of judicial opinion which cannot be resuscitated by *Marks*. Indeed, in her dissent Justice Kagan noted: “[I]n all except its disposition [Justice Alito’s] opinion is a dissent: Five Justices specifically reject every aspect of its reasoning and every paragraph of its explication.”<sup>194</sup> What, then, is the holding of *Williams*?

Though the predictive method of interpretation has provided some consistency among the various jurisdictions, confusion still

186. See, e.g., *United States v. Turner*, 709 F.3d 1187, 1194 (7th Cir. 2013); *United States v. Pablo*, 696 F.3d 1280, 1291–92 (10th Cir. 2013); *State v. Medina*, 306 P.3d 48, 63–64 (Ariz. 2013), *cert. denied*, 134 S. Ct. 1309 (2014); *State v. Deadwiller*, 834 N.W.2d 362, 373–75 (Wis. 2013).

187. See *supra* note 186.

188. See *supra* note 186.

189. See *supra* note 186.

190. See Michael L. Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207, 218 & n.83 (2008) (citing Joseph M. Cacace, Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1130 (1981) [hereinafter *Judicial Decisionmaking*]).

191. See *Judicial Decisionmaking*, *supra* note 190, at 1130.

192. See *id.* at 1135 (defining “true pluralities” negatively: as all pluralities which are not “false and illegitimate plurality decisions”).

193. See Eber, *supra* note 190, at 214–15; Michael I. Meyerson, *The Irrational Supreme Court*, 84 NEB. L. REV. 895, 916 (2006).

194. *Williams v. Illinois*, 132 S. Ct. 2221, 2265 (2012) (Kagan, J., dissenting).

abounds.<sup>195</sup> Of the courts that have considered *Williams*, at least one has concluded that Justice Thomas’s concurrence is the “narrowest ground” on which five justices agreed, and made his opinion, joined by no other justice, binding precedent;<sup>196</sup> other courts have confined *Williams* to its facts, essentially disregarding its holding;<sup>197</sup> others have cited to the Targeted Individual Test as though it were authoritative;<sup>198</sup> and still others have cited to Justice Kagan’s dissent and Justice Thomas’s concurrence to support the proposition that when an expert witness discloses testimonial statements to explain the basis for her opinion she is actually disclosing those statements for their truth.<sup>199</sup> This last approach, which states the opposite of the plurality’s holding, may seem tempting to those judges who would join the dissent, but proves problematic insofar as dissenting opinions are technically dicta.<sup>200</sup>

The difficulty courts have experienced in applying *Williams*, however, actually provides a foundation for the rest of this article: because *Williams* will only cause more confusion in the lower courts,<sup>201</sup> the Supreme Court will probably revisit the issue.<sup>202</sup> However, before arguing that a majority of the Court should—and actually might—approve of a modified version of the Basis Evidence Rationale in a future case, this article turns to the Targeted Individual Test.

### *B. The Targeted Individual Test*

Justice Kagan’s critique of the Targeted Individual Test is a powerful one, explaining many of the reasons lower courts should not predicate their decisions on the Targeted Individual Test.<sup>203</sup> This brief analysis considers Justice Kagan’s arguments against the Test, and suggests an additional objection. Then, this section analyzes a

195. See *supra* notes 180-82, 185-90 and accompanying text.

196. See *Cooper v. State*, 73 A.3d 1108, 1123 (Md. 2013).

197. See *United States v. James*, 712 F.3d 79, 95–96 (2d Cir. 2013); *United States v. Duron-Caldera*, 737 F.3d 988, 994 (5th Cir. 2013); *State v. Med. Eagle*, 835 N.W.2d 886, 896 (S.D. 2013); *State v. Kennedy*, 735 S.E.2d 905, 916 (W.Va. 2012)

198. See *United States v. Bourlier*, 518 F. App’x 848, 854–55 (11th Cir. 2013) (unpublished op.); *State v. Leibel*, 838 N.W.2d 286, 294 (Neb. 2013).

199. See *Martin v. State*, 60 A.3d 1100, 1107 (Del. 2013); *State v. McLeod*, 66 A.3d 1221, 1226–27 (N.H. 2013); *State v. Navarette*, 294 P.3d 435, 439–40 (N.M. 2013).

200. See *Eber*, *supra* note 190, at 222.

201. See *Davis & Reynolds*, *supra* note 171, at 71–75 (noting that plurality opinions may cause confusion in lower courts); see also *Novak*, *supra* note 171, at 757–58 (explaining why decisions with “coherent majority rationale[s]” offer better guidance to the lower courts).

202. See *Weins*, *supra* note 172, at 840.

203. See *Williams v. Illinois*, 132 S. Ct. 2221, 2277 (2012) (Kagan, J., dissenting) (encouraging courts to understand *Melendez-Diaz* and *Bullcoming* as “continuing to govern, in every particular, the admission of forensic evidence”).

recent Fifth Circuit case, *U.S. v. Polidore*,<sup>204</sup> which illustrates the problems associated with the application of the plurality's second rationale.

Each of Justice Kagan's individual arguments seems to build to a larger proposition. Taken as a whole, her dissent seems to suggest that the Targeted Individual Test is so theoretically inconsistent that it must have been the product of results-oriented thinking by the plurality.<sup>205</sup> To put it another way, Justice Kagan seems to concede that the members of the plurality were too intelligent to be inept, and so concludes that they must have been possessed of some ulterior motive to suggest a resolution as ill-conceived as the Targeted Individual Test.<sup>206</sup> She begins her critique of the Test by calling attention to the stark contrast between *Bullcoming* and the plurality opinion in *Williams*, writing, "[a]ccording to the plurality, we should declare the Cellmark report nontestimonial because 'the use at trial of a DNA report . . . bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.'"<sup>207</sup> However, she reminds her colleagues, "we just last year treated as testimonial a forensic report" which the Court declared "fell within the core class of testimonial statements' implicating the Confrontation Clause."<sup>208</sup> She posits that the obvious inconsistency could only be explained by "four Justices' desire to limit *Melendez-Diaz* and *Bullcoming* in whatever way possible."<sup>209</sup>

To support the notion that the plurality had conjured up the Targeted Individual Test simply to limit the reach of *Melendez-Diaz* and *Bullcoming*, Justice Kagan bluntly criticizes the uncertain provenance of the Test: "Where that test comes from is anyone's guess. Justice T[homas] rightly shows that it derives neither from the text nor from the history of the Confrontation Clause. And it has no basis in our precedents."<sup>210</sup> Justice Kagan argues persuasively that, though the Test appeared to be a species of the primary purpose test first elucidated in *Davis*, the plurality could offer no justification for its evolution in *Williams*.<sup>211</sup> It is worth noting that the plurality makes two leaps to arrive at its Targeted Individual Test.<sup>212</sup> For one, it relies on precedent that had originally been established in the context of police investigation to create a test for the admissibility of

204. 690 F.3d 705 (5th Cir. 2013).

205. See *infra* notes 208-21 and accompanying text.

206. See *infra* notes 208-21 and accompanying text.

207. *Williams*, 132 S. Ct. at 2273 (Kagan, J., dissenting) (internal quotations omitted).

208. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717 (2011).

209. *Williams*, 132 S. Ct. at 2277.

210. *Id.* at 2273 (internal citation omitted).

211. *Id.*

212. See *supra* notes 180-85 and accompanying text.

forensic reports.<sup>213</sup> Because the Court had established a separate branch of precedent for use specifically in the context of forensic science, that reliance seems misplaced.<sup>214</sup> Second, the plurality alters the Primary Purpose Test, which, as its name suggests, had previously turned on whether police questioning had been conducted for the primary purpose of resolving an ongoing emergency.<sup>215</sup> In *Williams*, the test was made to turn on whether police had targeted a specific individual.<sup>216</sup> Justice Kagan criticizes this unwarranted distortion of the Court's precedent explicitly: "[H]ere, the plurality insists, the Cellmark report's purpose was 'to catch a dangerous rapist who was still at large.' But that is to stretch both our 'ongoing emergency' test and the facts of this case beyond all recognition."<sup>217</sup> In Justice Kagan's view, then, grounding the Targeted Individual Test in the Court's primary purpose case law not only makes little sense, but distorts the Court's precedent.<sup>218</sup>

To bolster her assertion that Justice Alito had created an arbitrary test, Justice Kagan observes that the plurality had provided an unlikely justification for distinguishing between statements made before an individual becomes the subject of an investigation and statements made after.<sup>219</sup> Justice Kagan explains,

The plurality apparently agrees with Justice B[reyer] that prior to a suspect's identification, it will be 'unlikely that a particular researcher has a defendant-related motive to behave dishonestly. [However,] surely the typical problem with laboratory analyses—and the typical focus of cross-examination—has to do with careless or incompetent work, rather than with personal vendettas. And as to that [problem], it makes not a whit of difference whether, at the time of the laboratory test, the police already have a suspect.'<sup>220</sup>

In other words, Justice Kagan argues that the plurality's test allays an illusory fear: no one would suggest that the primary function of the Confrontation Clause in the context of forensic evidence is to prevent analysts from settling scores with defendants by falsifying test results. Instead, the Clause's function is to ensure that accurate data is placed before the fact-finder.

Justice Kagan's suspicion that the plurality compromised its integrity is confirmed by the superfluity of the plurality's second rationale. After holding that the Basis Evidence Rationale rendered Lamatos's statements non-testimonial, the plurality had already

213. *See supra* notes 62–64 and accompanying text.

214. *See supra* notes 65–71 and accompanying text.

215. *See supra* notes 62–64 and accompanying text.

216. *See Williams v. Illinois*, 132 S. Ct. 2221, 2242–43 (2012).

217. *Id.* at 2274 (Kagan, J., dissenting) (internal citation omitted).

218. *See id.*

219. *Id.* at 2274.

220. *Id.* (internal citation omitted).

fully resolved *Williams*. Justice Alito made no attempt to disguise this reality, calling the Targeted Individual Test a “second, independent basis” for the plurality’s decision.<sup>221</sup> That the plurality overreached in formulating the Targeted Individual Test is apparent from an even cursory inspection of the oral argument transcript, where no version of the Targeted Individual Test was even mentioned.<sup>222</sup> Instead, the phrase “for the truth” appears nineteen times, the word “basis” eleven times, and the word (expert) “opinion” thirty-two times.<sup>223</sup> Similarly, *Melendez-Diaz* was referenced eight times and *Bullcoming* seventeen times.<sup>224</sup> By contrast, the phrase “primary purpose,” was spoken only once (and then in reference to *Melendez-Diaz*) and neither *Davis* nor *Bryant* was mentioned at all.<sup>225</sup> This focus was also reflected in the parties’ filings: in none of the briefs was the Targeted Individual Test championed, or even suggested.<sup>226</sup> It follows, then, that the plurality did not offer two independent holdings in *Williams* because it needed to respond to two independent arguments presented by the parties. Instead, the plurality must have offered its second rationale for some reason unrelated to the resolution of *Williams*. If Justice Kagan is correct, that reason was “to limit *Melendez-Diaz* and *Bullcoming* in whatever way possible.”<sup>227</sup>

It should be emphasized that this criticism of the Targeted Individual Test is more than mere pedantry. The Test’s logical and jurisprudential inconsistencies work undesirable results, too. In a recent Fifth Circuit case, a jury found Kennedy Polidore guilty of possessing crack cocaine with an intent to distribute.<sup>228</sup> Officers first became aware of Polidore’s criminal activity when police received two 911 calls, apparently from the same anonymous individual, notifying them that Polidore was dealing drugs in a particular location.<sup>229</sup> During the first phone call, the tipster indicated that Polidore was selling crack cocaine out of his car in the parking lot of a certain apartment complex.<sup>230</sup> When prompted, the tipster was also able to supply Polidore’s name.<sup>231</sup> During the second phone call, which

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221. *Id.* at 2228 (plurality opinion).

222. Transcript of Oral Argument *passim*, *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (No. 10-8505).

223. *Id.*

224. *Id.*

225. *Id.* at 33:14.

226. *See, e.g.*, Brief for Respondent, *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (No. 10-8505); Brief for Petitioner, *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (No. 10-8505).

227. *Williams*, 126 S. Ct. at 2277 (Kagan, J., dissenting).

228. *United States v. Polidore*, 690 F.3d 705, 708 (5th Cir. 2012).

229. *Id.* at 708–09.

230. *Id.* at 708.

231. *Id.*



occurred some ten minutes later, the tipster informed police that Polidore was concealing the cocaine in his vehicle's driver's side door panel.<sup>232</sup> The caller also requested that police make the bust away from the apartment complex where Polidore was selling drugs "[c]ause I don't want him to think that I was the one [who] told."<sup>233</sup> Police agreed with the caller's plan, and apprehended Polidore as he drove away from the apartment complex.<sup>234</sup> During a search, police found crack cocaine in Polidore's vehicle.<sup>235</sup>

At trial, the prosecutor introduced recordings of the 911 calls made by the anonymous informant<sup>236</sup> over Polidore's objection.<sup>237</sup> Polidore was convicted, and timely appealed his conviction, arguing that admission of the 911 recordings had violated his Sixth Amendment rights.<sup>238</sup> In determining whether the statements were testimonial, the Fifth Circuit took an unusual approach. It declared that the statements made by the anonymous caller were elicited neither to "enable police assistance to meet an ongoing emergency," nor to "establish or prove past events potentially relevant to later criminal prosecution."<sup>239</sup> Instead, the Fifth Circuit reasoned, "the primary purpose of the interrogation was to gather information necessary for the police to respond to a report of *ongoing* criminal activity."<sup>240</sup> "Like a statement made to resolve 'an ongoing emergency,'" the court explained, citing *Williams*, "the caller's 'purpose [was] not to provide a solemn declaration for use at trial, but to bring to an end an ongoing [drug trafficking crime].'"<sup>241</sup>

Before *Williams*, it is doubtful that a federal circuit court would have found that a police interrogation conducted for the purpose of bringing an end to an ongoing crime—as distinct from resolving an ongoing emergency—were non-testimonial. Before *Williams*, the Fifth Circuit probably would have restricted itself to the dichotomy upon which *Davis* and *Bryant* seemed to insist: it would have found either that the statements were elicited "to enable police assistance to meet an ongoing emergency" or that the statements were elicited "to establish or prove past events potentially relevant to later criminal prosecution."<sup>242</sup> It is worth considering whether the Fifth Circuit would have found the 911 calls non-testimonial under the old

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232. *Id.* at 709.

233. *Id.* at 714 n.6.

234. *Id.* at 709–10.

235. *Id.*

236. *Id.* at 708–09.

237. *Id.* at 710.

238. *Id.*

239. *Id.* at 712.

240. *Id.*

241. *Id.* at 718 (citing *Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012)).

242. *Davis v. Washington*, 547 U.S. 810, 822 (2006).

paradigm; a few important facts suggest that *Williams* changes the result.

For one, although the *Polidore* court insisted that the caller's statements did not describe past events,<sup>243</sup> the transcript of the calls belies that characterization.<sup>244</sup> The anonymous caller explained that, before he had called, he had observed Polidore sitting on the steps of the apartment complex, and also running in and out of the building.<sup>245</sup> The caller further indicated that Polidore was selling crack, and stated that he had seen Polidore conceal the drugs in the door panel of his car.<sup>246</sup> The anonymous caller's account, then, was not as contemporaneous as the Fifth Circuit suggested. Unlike the victim of domestic violence in *Davis*, who was describing the events "as they were actually happening,"<sup>247</sup> the caller in *Polidore* observed the suspect engage in a crime, and then called to report it.<sup>248</sup> Before a middle path was open to the Fifth Circuit, the scenario's lack of immediacy might have suggested that the statements were testimonial. But after *Williams*, the Fifth Circuit seemed to feel at liberty to create its own category: the interrogation conducted for the primary purpose of bringing to an end an ongoing crime.<sup>249</sup>

It is also worth noting that the anonymous caller was familiar enough with Polidore to provide his first and last name without hesitation.<sup>250</sup> When this familiarity is combined with the caller's insistence that the police execute the arrest away from the apartment complex "[c]ause I don't want him to think that I was the one [that] told,"<sup>251</sup> an alternative reading of the call begins to emerge. In one interpretation of the transcript, the caller is not alerting police to "ongoing criminal activity," but rather accusing an individual, and perhaps an enemy, of selling drugs. It could be forcefully argued that a statement accusing another individual of a crime is precisely the kind of statement that an objective witness would reasonably believe might be available for use at a subsequent trial.<sup>252</sup> That these statements were actually played to the jury at Polidore's trial only bolsters this conclusion.<sup>253</sup> It seems likely that, before *Williams* departed from the dichotomy established in *Davis*, the Fifth Circuit probably would have recognized this reality, and held the statements

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243. *United States v. Polidore*, 690 F.3d 705, 716 (5th Cir. 2012).

244. *See id.* at 708–09.

245. *Id.* at 708.

246. *Id.* at 708–09.

247. 547 U.S. at 827.

248. *Polidore*, 690 F.3d at 708–09.

249. *See id.* at 718.

250. *Id.* at 708.

251. *Id.* at 709.

252. *See Crawford v. Washington*, 541 U.S. 36, 52 (2004).

253. *See Polidore*, 690 F.3d at 708–09.

testimonial.

This speculation, however, is not an end in itself. Instead, it suggests that *Williams* may work even more harm in the context of police interrogation than it does in the context of forensic science. This is because the category of statements the *Williams* plurality excepts—statements made for “the primary purpose of accusing a targeted individual”<sup>254</sup>—may be especially damaging in the context of police investigation. As this article has already recounted, Justice Kagan has argued persuasively that in the context of forensic science “it makes not a whit of difference whether, at the time of the laboratory test, the police already have a suspect.”<sup>255</sup> That is, Justice Kagan has argued that the Targeted Individual Test is an arbitrary one. But, in the context of police investigation, the test is worse than arbitrary—it is insidious. This is because the test is tailor-made to except statements from Confrontation Clause scrutiny that have the primary purpose of catching “a dangerous [criminal] who [is] still at large.”<sup>256</sup> In the context of police investigation, this category includes statements accusing an individual of criminal activity. This article submits that when plainly accusatory statements fall outside of the ambit of the Confrontation Clause, the Sixth Amendment has been distorted beyond recognition. For that reason, this article urges courts to steer clear of the Targeted Individual Test, and heed Justice Kagan’s advice, who notes that “until a majority of this Court reverses or confines [*Melendez-Diaz* and *Bullcoming*], I would understand them as continuing to govern, in every particular, the admission of forensic evidence.”<sup>257</sup>

### PART III

Despite the infirmities of the Targeted Individual Test, this article submits that the Basis Evidence Rationale is worthy of close scholarly scrutiny. In this Part, the article provides a comprehensive defense of that Rationale, beginning with a review of the nature of expert testimony and the requirements of Rule 702. Second, the article considers the structure of Rule 703 and previews the debate surrounding the purpose for disclosing the bases of experts’ conclusions. Third, the article explains why the current scholarly perspective on Rule 703 is inconsistent with the purposes of Rule 702. Finally, the article considers an alternative understanding of expert disclosures under Rule 703—namely the Basis Evidence Rationale—and contends that its purposes are in line with both Rule 702 and the Confrontation Clause.

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254. *Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012).

255. *Id.* at 2274 (Kagan, J., dissenting).

256. *Id.* at 2243 (plurality opinion).

257. *Id.* at 2277 (Kagan, J., dissenting).

A. *The Nature of Expert Evidence: Rule 702*

The Advisory Committee Note on Rule 702 recognizes at least two types of expert testimony: dissertation testimony and opinion testimony.<sup>258</sup> An expert offers the former, which is the type of testimony preferred by the Rules,<sup>259</sup> when she provides a “dissertation or exposition of scientific or other principles relevant to the case,” but leaves the jury to “apply them to the facts.”<sup>260</sup> This relationship, between the scientific principles and the facts of a particular case, has been long described as syllogistic.<sup>261</sup> Scientific principles constitute the major premise, and the facts of the case the minor.<sup>262</sup> When the major premise is applied to the minor premise, a conclusion can be drawn and the syllogism completed.<sup>263</sup> The advantage of the dissertation method is that the jury, rather than the expert, draws the conclusion about the importance of the case’s facts.<sup>264</sup> This is advantageous because, in our justice system, the jury is intended to be the ultimate finder of fact.<sup>265</sup>

Opinion testimony, by contrast, goes further by allowing the expert to draw a conclusion about how scientific principles relate to the facts of the case.<sup>266</sup> When an expert draws this conclusion, she completes the syllogism herself. The justification for permitting this additional testimony is that, in many instances, the jury is incapable of drawing the kind of conclusion that an expert can draw, even when the expert has done her level best to educate the jury by dissertation.<sup>267</sup> This turns out to be particularly true when a jury is

258. See FED. R. EVID. 702 advisory committee’s note.

259. See *id.* (“[I]t seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference.”). This article expands on the notion of “non-opinion form,” and refers to that more specific idea as “dissertation testimony.”

260. *Id.*

261. Edward J. Imwinkelried, *The “Bases” of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C. L. REV. 1, 2–3 (1988) [hereinafter *Syllogistic Structure*]; see also Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 827, 837 n.38 (2008).

262. *Syllogistic Structure*, *supra* note 260, at 2-3.

263. *Id.* at 3.

264. See FED R. EVID. 702 advisory committee’s note.

265. See Edward J. Imwinkelried, *Trial Judges—Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Testimony Without Invading the Jury’s Province to Evaluate the Credibility and Weight of the Testimony?*, 84 MARQ. L. REV. 1, 1–2 (2000); Ric Simmons, *Conquering the Province of the Jury: Expert Testimony and the Professionalization of Fact-Finding*, 74 U. CIN. L. REV. 1013, 1013–14 (2006).

266. See FED. R. EVID. 702 advisory committee’s note.

267. See Edward J. Imwinkelried, *The Taxonomy of Testimony Post-Kumho: Refocusing on the Bottomlines of Reliability and Necessity*, 30 CUMB. L. REV. 185, 195–96 (2000) [hereinafter *Taxonomy*].

asked to assess scientific and technical expert testimony.<sup>268</sup> As a result—with scientific methods growing increasingly complex, and expert testimony increasingly inaccessible<sup>269</sup>—the inability of the jury to draw the final conclusion has become increasingly common.<sup>270</sup> Indeed, it has long been said that

[t]here is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.<sup>271</sup>

But since Professor Ladd published that oft-quoted article in 1952, the “particular issue” has become far more likely to be chemical, blood, or DNA analysis.<sup>272</sup> And so, in many cases, an expert should not just be called to offer a dissertation, but also to give her opinion: for who among the jury, after receiving an hour of education, will be qualified to determine whether a substance is cocaine, or whether a driver were drunk, or whether two DNA samples match each other?<sup>273</sup>

We can imagine then a kind of spectrum of erudition on which expert testimony can be located. At the low end of the spectrum, we see the kind of testimony that only barely clears the bar set by Rule 702 (because it only barely requires scientific, technical, or other specialized knowledge);<sup>274</sup> when that kind of testimony is presented, judges should encourage dissertation testimony in order to protect the province of the jury from unnecessary invasion. To say it another

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268. See Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 756–57 (1991); Joseph Sanders, *The Merits of the Paternalistic Justification for Restrictions on the Admissibility of Expert Evidence*, 33 SETON HALL L. REV. 881, 901–07 (2003). There is some debate about how complex, exactly, testimony must be before juries experience difficulty in assessing it. Different scholars and different studies draw the line in different places. See Frederick Schauer, *Can Bad Science Be Good Evidence? Neuroscience, Lie Detection, and Beyond*, 95 CORNELL L. REV. 1191, 1210 n.103 (2010) (collecting sources showing that “juries are not nearly as inept at evaluating scientific or expert evidence as is often supposed”). I am not aware of any scholar, however, who insists that juries accurately understand all expert evidence.

269. See *Syllogistic Structure*, *supra* note 260, at 1.

270. See *supra* notes 234–35 and accompanying text.

271. Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952).

272. See *Syllogistic Structure*, *supra* note 260, at 1.

273. See *Taxonomy*, *supra* note 266, at 202 (“In a DNA case, it might be possible to teach the jury enough molecular biology to allow the jury to independently compare the autoradiographs of the samples taken from the crime scene and the suspect. However, even an abbreviated mini-course might require days or weeks of trial time. In that light, it is convenient or relatively necessary to resort to the expert opinion testimony.”).

274. See FED. R. EVID. 702.

way, when the jury is capable of drawing conclusions from the major and minor premises, the jurors should be permitted to complete the syllogism themselves.<sup>275</sup> At the high end of the spectrum, however, we see the kind of testimony that clears the 702 bar by an academic mile;<sup>276</sup> when that kind of testimony is presented, courts should be more lenient in allowing experts to render opinion testimony. In those cases, the jurors are less capable of drawing a conclusion from the major and minor premises, and should be permitted to hear an expert's completion of the syllogism in the form of an opinion.<sup>277</sup>

This spectrum of erudition is crucial to a correct understanding of Rule 703. If it is true that some major premises (scientific principles) and some minor premises (the facts of the case) are beyond the comprehension of the jury because they are so technical in nature,<sup>278</sup> then Rule 703, which permits expert witnesses to disclose those major and minor premises, cannot require the jury to weigh those premises for their truth. The Rule cannot require a task which the jury cannot perform. If this is true, then Rule 703 must have another purpose—but what?

*B. An Evaluative Purpose: Rule 703*

Rule 703 might be said to accomplish two overarching aims: describing the permissible bases of an expert's testimony, and prescribing a purpose for which those bases may be disclosed to a jury.<sup>279</sup> As to the first aim, Rule 703 was intended to have a liberalizing effect on the admission of expert evidence.<sup>280</sup> Before the enactment of the rule, expert witnesses were barred from basing their opinions on evidence that was not be admissible in court.<sup>281</sup> But Rule 703 reversed this foreclosure by bringing "the judicial practice into line with the practice of the experts themselves when not in court," and allowing, for example, an expert doctor to rely on "statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays."<sup>282</sup> This liberalization was encouraged because "[t]he physician makes life-and-death decisions in reliance upon them. His

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275. See Sanders, *supra* note 267, at 901 (concluding that "juries are competent in sorting out facts in simple cases").

276. See FED. R. EVID. 702

277. See Sanders, *supra* note 267, at 901, 913 (indicating that complex facts and complex expert testimony present difficulties for jurors).

278. See *id.*

279. See FED. R. EVID. 703.

280. See *Syllogistic Structure*, *supra* note 260, at 18; see also FED. R. EVID. 703 advisory committee's note.

281. See FED. R. EVID. 703 advisory committee's note.

282. *Id.*

validation . . . ought to suffice for judicial purposes.”<sup>283</sup> The permissible bases, then, are presently three:<sup>284</sup> an expert may base her opinion on evidence which she observed firsthand, evidence with which she was presented at trial, and evidence, whether admissible or no, with which she was presented by a third party, and out of court.<sup>285</sup> This last kind of basis evidence is available to the expert only so long as it is the kind on which “experts in the particular field would reasonably rely” in forming their opinions on the subject in question.<sup>286</sup>

As to the Rule’s second objective—prescribing a purpose for which basis evidence may be disclosed to a jury—the Rule is at once both perfectly clear and hopelessly opaque: “[I]f the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.”<sup>287</sup> The rule is plain insofar as it explains that that the only purpose for which disclosure can be made is to help the jury “evaluate the opinion,” but borders on Delphic in failing to give guidance as to what kind of evaluation is to take place.<sup>288</sup> The Advisory Committee Note says little about evaluation directly, merely explaining that the reason for adding the phrase to the Rule is to “specify the proper purpose for offering the otherwise inadmissible information.”<sup>289</sup> It would seem, then, that the disagreement about Rule 703’s purpose, which was the same disagreement that brought *Williams* before the Supreme Court,<sup>290</sup> boils down to this: what does the word “evaluate” mean?

### C. Defining “Evaluate”—Double-Checking?

There are at least two readily apparent readings of Rule 703’s requirement that juries “evaluate” an expert’s opinion.<sup>291</sup> The first is to read evaluation as the “double-checking” of an expert’s ultimate conclusion: under this paradigm, the jury’s task is to weigh the basis evidence for its truth, and then determine whether the expert drew the correct conclusion from that evidence or didn’t.<sup>292</sup> The second is to

283. *Id.*

284. *See id.*

285. *Id.*

286. FED. R. EVID. 703.

287. *See id.*; *cf.* FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following . . .”).

288. *See* FED. R. EVID. 703.

289. FED. R. EVID. 703 advisory committee’s note.

290. *See supra* note 103-04 and accompanying text.

291. *See infra* Part III.C-D.

292. *See infra* Part III.C.

read evaluation as a credibility check of the expert herself: under this paradigm, the jury's task is to consider the process by which the expert arrived at her conclusion, and then give weight to the conclusion in proportion to the proficiency of the expert's process.<sup>293</sup>

The scholars who have addressed this question seem to be proponents of the first reading; they understand Rule 703 to require jurors to weigh basis evidence, and then agree or disagree with the conclusion an expert drew from that evidence.<sup>294</sup> And in order to weigh this basis evidence, these scholars explain, jurors must consider the evidence for its truth.<sup>295</sup> Professor Mnookin writes:

To say that evidence offered for the purpose of helping the jury to assess the expert's basis is not being introduced for the truth of its contents rests on an inferential error. To make rational use of this evidence, a factfinder must first assess the likelihood that it is worth relying upon. Having done so, she may then build upon this first inference in order to assess the likely reliability of the expert's conclusions.<sup>296</sup>

In Professor Mnookin's view, then, the reliability of an opinion must be determined by examining its underpinnings.<sup>297</sup> And according to Professor Mnookin, this requires weighing those underpinnings for their truth:

[T]o decide how much to credit the expert's sources, the jury should, logically, first assess the odds that they are reliable. And what is this but a judgment about the likely truth of their contents? Using the information for the permissible purpose of evaluating the expert thus necessarily requires a preliminary determination about the information's truth.<sup>298</sup>

Professor Mnookin's view is the theoretical equivalent of inspecting the legs of a chair to ensure that the chair is sturdy: if the legs are properly attached, her reasoning seems to say, then the rest of the chair will probably hold up.

Professor Seaman has a similar understanding of Rule 703.<sup>299</sup> She writes that "it is not logically possible for a jury to use the hearsay statements to assess the weight of the expert's opinion other than by considering their truth."<sup>300</sup> Professor Seaman also points out this view was held by members of the Academy in even the earliest scholarly analyses of Rule 703.<sup>301</sup> In her view, any argument to the

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293. See *infra* Part III.D.

294. See *supra* notes 278-89 and accompanying text.

295. See *id.*

296. Mnookin, *supra* note 1, at 816.

297. See *id.*

298. *Id.*

299. See Seaman, *supra* note 260, at 855-56.

300. *Id.*

301. *Id.* at 842-43.



contrary is not only out of step with scholarship, but “betrays all logic.”<sup>302</sup> It turns out that this view—that juries must consider basis evidence for its truth—is the dominant view expressed in both major treatises<sup>303</sup> and in law review articles.<sup>304</sup> It was no surprise, then, when Professor Richard Friedman championed that view as an *amicus* in *Williams*.<sup>305</sup> In his brief, Professor Friedman argued, “[t]he Cellmark report supported Lambatos’s opinion only if it was true . . . . [I]t makes no sense to say that the statement was not presented for its truth because it was used to support the expert’s opinion.”<sup>306</sup> And though the plurality was unpersuaded, the *Williams* dissenters seemed to agree.<sup>307</sup> Justice Kagan contended that “admission of the out-of-court statement in this context has no purpose separate from its truth; the factfinder can do nothing with it *except* assess its truth and so the credibility of the conclusion it serves to buttress.”<sup>308</sup>

The scholars who assume that Rule 703 requires juries to “double-check” the correctness of an expert’s conclusion make persuasive points, but their arguments are undercut by the spectrum of erudition this article explained in the preceding section.<sup>309</sup> Because complex expert testimony is admissible under Rule 702,<sup>310</sup> juries will not always be capable of checking an expert witness’s conclusions for correctness,<sup>311</sup> a reality scholars skirt by focusing their analyses on hypothetical cases at the low end of the erudition spectrum.<sup>312</sup> In those hypothetical examples, it must be admitted that jurors are perfectly capable of assessing the truth of the expert’s minor premise

302. *Id.* at 879; *see also* Mnookin, *supra* note 1, at 816 (arguing that the contrary view “makes almost no sense”).

303. *See* THE NEW WIGMORE § 4.10.1 (2d ed. 2010); *see also* 5 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 703:1 (7th ed. 2007) (citing favorably to *Goldstein*, 843 N.E.2d at 733–34); 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6275 (1st ed. 1997).

304. *See, e.g.*, Aslett, *supra* note 57, at 299 n.8; Thomas F. Burke III, *The Test Results Said What? The Post-Crawford Admissibility of Hearsay Forensic Evidence*, 53 S.D. L. REV. 1, 21 (2008); Paul C. Giannelli, *Confrontation, Experts, and Rule 703*, 20 J.L. & POLY 443, 449 (2012); Kry, *supra* note 62, at 81; Mnookin, *supra* note 1, at 816; Robert P. Mosteller, *Revealing and Thereby Tempering the Abuses of Government-Created Evidence in Criminal Trials*, 75 BROOK. L. REV. 1277, 1281 (2010); Seaman, *supra* note 262, at 879; Ian Volek, Note, *Federal Rule of Evidence 703: The Back Door and the Confrontation Clause, Ten Years Later*, 80 FORDHAM L. REV. 959, 1000 (2011).

305. Brief for Richard D. Friedman as Amicus Curiae in Support of Petitioner at 17, *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (No. 10–8505).

306. *Id.* at 17–18.

307. *See Williams v. Illinois*, 132 S. Ct. 2221, 2269 (2012) (Kagan, J., dissenting).

308. *Id.*

309. *See supra* notes 271–75, 289, 291–304 and accompanying text.

310. *See supra* Part III.A.

311. *See Sanders, supra* note 267.

312. *See infra* notes 315–20 and accompanying text.

and applying it to the expert's major premise.<sup>313</sup> In those examples, jurors can either agree or disagree with the conclusion the expert drew, especially when the expert witness should not have offered her opinion (but rather a dissertation) in the first place.<sup>314</sup> But those examples are not the only situations in which Rule 703 applies.

In her article on expert disclosure, Professor Mnookin asks readers to imagine testimony relating that "John was extremely drunk the night of April 13th."<sup>315</sup> In her hypothetical, the foundation for the witness's testimony is not his personal knowledge, but rather a hearsay statement made by a friend of John's, that "John had consumed seven drinks in the span of two hours."<sup>316</sup> Professor Mnookin then argues:

The fact that [the hearsay statement] informed the witness' judgment about John's drunkenness would not somehow make it non-hearsay, or suggest that it was being introduced for a purpose other than the truth of its contents, assuming that the purpose of the witness' testimony was to assert the conclusion that John was drunk.<sup>317</sup>

The *Williams* dissenters take a similar tack when they ask readers to "[c]onsider a prosaic example not involving scientific reports," and hypothesize a police officer who identifies "Starr," an individual with a star-shaped birthmark, as the perpetrator of a crime.<sup>318</sup> As in Professor Mnookin's hypothetical, the officer does not testify from personal knowledge, but bases his conclusion on a hearsay statement "that the perpetrator had an unusual, star-shaped birthmark over his left eye."<sup>319</sup> Justice Kagan then muses:

[A]sk whether anything changes if the officer couches his testimony in the following way: 'I concluded that Starr was the assailant because a reliable eyewitness told me that the assailant had a star-shaped birthmark and, look, Starr has one just like that. Surely that framing would make no constitutional difference . . . .'<sup>320</sup>

Of course, neither Professor Mnookin nor Justice Kagan suggests that the witness in her hypothetical could actually be qualified as an expert under 702.<sup>321</sup> This seems to be because, from their points of view, the nature of expert testimony has no bearing on the

313. See *supra* note 260 and accompanying text.

314. *Id.*

315. See Mnookin, *supra* note 1, at 817.

316. *Id.*

317. *Id.*

318. *Williams v. Illinois*, 132 S. Ct 2221, 2269 (2012) (Kagan, J., dissenting).

319. *Id.*

320. *Id.*

321. See *id.* ("Consider a prosaic example not involving scientific experts."); Mnookin, *supra* note 1, at 817 ("[C]onsider an example from outside the expert context.").

underlying argument they make about theory.

But while this understanding of Rule 703 works well enough outside the expert context, it collapses in cases where expert testimony is at the higher end of the erudition spectrum. In the event that the Rules did permit the disclosure of a statement like, “John had seven drinks in the span of two hours,” a jury would have no trouble completing the following mental exercise: “If we believe the eyewitness who saw John at the bar, then John certainly would be drunk—after seven drinks in two hours, I’d be drunk, too.” It’s also fairly clear that if the statement, “the perpetrator had an unusual, star-shaped birthmark over his left-eye,” were admitted, a jury would be capable of concluding: “If we believe the eyewitness who observed this crime, then the police certainly did get the right man—what are the chances the defendant is a different fellow with the same star-shaped birthmark?” In each of these cases, though, the jury brings its own knowledge to bear on the major premise of the syllogism: in the first, the jury imports its own understanding of alcohol consumption, and, in the second, its own assumptions about the frequency of a certain birthmark in their community. But what happens when the minor premise (the facts of the case) is a pair of electropherograms? And what happens when the major premise (or scientific principle) is an understanding of the procedures for DNA matching? Do we really believe that the jury in *Williams* could have said, “If we assume these electropherograms were produced from the sources Ms. Lambatos claims, then these profiles are definitely a match—I can see here that this allele is spurious, and that this other allele is only visual background noise?”<sup>322</sup>

This imagined cogitation reveals the problem inherent in interpreting Rule 703 to require that juries double-check expert conclusions: that view fails to take into account the kind of complex expert testimony admissible under Rule 702.<sup>323</sup> To put it another way, the notion that one can test the sturdiness of a chair by examining its legs works perfectly well if the chair is a simple one. When the chair has four legs made of wood, joined simply to the seat, the examination can be performed by almost any person. But when the chair is an ergonomic model with a hydraulic lift built into its metal supports, the inspection is not so simple. If a task cannot reasonably be completed by jurors, then we should not read the Federal Rules of Evidence to demand it: Rule 703 cannot require juries to consider the correctness of expert conclusions, not when those conclusions are beyond the comprehension of the jurors.

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322. Cf. *People v. Williams*, 939 N.E.2d 268, 272 (Ill. 2010).

323. See *Syllogistic Structure*, *supra* note 260, at 16 (“Rules 702 and 703 are interrelated parts of the same statutory scheme. As such, they should be reconciled.”) (internal citations omitted).

*D. Defining “Evaluate”—A Credibility Check*

But if Rule 703 doesn't require jurors to double-check an expert's conclusions, what does “evaluate” mean?<sup>324</sup> The alternative reading of Rule 703 is that it requires a jury to give weight to an expert's opinion in proportion to the quality of the process by which she arrived at that opinion. By disclosing the bases for her opinion, the expert subjects her process to the scrutiny of the jury, and the jury has some indicator, apart from its ability to assess the scientific correctness of the expert's opinion or her basis evidence, by which to judge her. This kind of evaluation could fairly be termed a credibility check, rather than a check for correctness.

The *Williams* plurality seems to have arrived at a similar conclusion, though Justice Alito offered little in the way of clarification:

The Rule 703 approach . . . is based on the idea that the disclosure of basis evidence can help the factfinder understand the expert's thought process and determine what weight to give to the expert's opinion. For example, if the factfinder were to suspect that the expert relied on factual premises with no support in the record, or that the expert drew an unwarranted inference from the premises on which the expert relied, then the probativeness or credibility of the expert's opinion would be seriously undermined.<sup>325</sup>

Even if Justice Alito's explanation is incomplete, however, he does elucidate the most central idea inherent in a credibility-based reading of Rule 703: that the jury's primary task in examining basis evidence is to assign weight or value to an expert's testimony, and not to second guess the expert's conclusions by extrapolating from her basis evidence.<sup>326</sup> Justice Alito left the question open, however, as to how juries are to assign this weight.<sup>327</sup>

This article suggests that jurors should assess the value of an expert's opinion by asking (after the expert's disclosure) questions like these: Did the expert witness have access to all the sources of proof that she needed? Did she conscientiously and thoroughly review the evidence on which she claims to have relied? Do her sources seem to be generally reliable, or do they make us question the professionalism of her methods? Does the chain of inferences by which the expert arrived at her conclusion seem reasonable? In light of what she has told us, do her conclusions seem to be supported by the evidence she claims to have relied on? Or do her conclusions seem like a stretch on the facts she used? When she explained her process, did she seem confident and experienced? Or did her own explanation

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324. FED. R. EVID. 703.

325. *Williams*, 132 S. Ct. at 2240.

326. *See id.*

327. *See id.*

confuse her? Having heard her explanation, do we have more or less confidence in her conclusion? When the nature of the assessment is focused on the process by which an expert arrives at her conclusions, and the credibility that process damages or enhances, basis evidence can be realistically disclosed for a purpose other than for its truth. This is the meaning, then, of Rule 703's requirement that basis evidence have probative value in "helping the jury evaluate the opinion."<sup>328</sup>

This reading of Rule 703 is confirmed by the Advisory Committee Note.<sup>329</sup> The text of the rule provides that the underlying facts and data which constitute the expert's basis evidence may only be disclosed "if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."<sup>330</sup> The Advisory Committee Note elaborates on this relevancy bar by identifying both the probative value and dangers of prejudice associated with disclosure.<sup>331</sup> The Note urges trial courts to "consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other."<sup>332</sup> This is consistent with the reading of Rule 703 this article has proposed: the drafters characterize the use of basis evidence to assign weight to an expert's opinion as having "probative value," and characterize the use of basis evidence for substantive purposes—that is, for its truth—as "misuse."<sup>333</sup> The drafters saw a meaningful distinction between considering basis evidence for the purpose of evaluating an expert's credibility and considering basis evidence for its truth.<sup>334</sup> If the Advisory Committee Note is to be given any weight, it cannot be true that the "admission of the out-of-court statement in this context has no purpose separate from its truth; the factfinder can do nothing with it *except* assess its truth."<sup>335</sup> That reading is flatly contradicted by the Note.<sup>336</sup>

At one point in her article, Professor Mnookin considers the policy arguments for and against permitting the disclosure of basis evidence in the first place.<sup>337</sup> In considering a courtroom without expert disclosure, she worries that "the jury may have little choice but to defer (or not) to an expert's credentials, and to assess her

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328. FED. R. EVID. 703.

329. See FED. R. EVID. 703 advisory committee's note.

330. FED. R. EVID. 703.

331. See FED. R. EVID. 703 advisory committee's note.

332. *Id.*

333. *Id.*

334. See *id.*

335. *Williams v. Illinois*, 132 S. Ct. 2221, 2269 (2012) (Kagan, J., dissenting).

336. See FED. R. EVID. 703 advisory committee's note.

337. See Mnookin, *supra* note 1, at 802.

demeanor rather than unpack her arguments. Without disclosure, the jury may lack the fundamental building blocks that could permit it to evaluate the substantive merits of the expert's conclusion."<sup>338</sup> But Professor Mnookin and other proponents of the double check evaluation fail to see is that this deference is what juries already do, at least when expert testimony is beyond their ability to weigh independently.<sup>339</sup> Professor Sanders has explained that when jurors encounter highly complex expert evidence, they begin to employ peripheral or heuristic processing.<sup>340</sup> When jurors rely on this kind of processing, "they adopt shortcuts to determine the value of a message. People rely on factors such as the number of arguments (rather than their quality), the attractiveness of the communicator, and the communicator's credentials."<sup>341</sup> Obviously, some of these shortcuts lead to more accurate assessments of information than others<sup>342</sup>: surely the physical attractiveness of an expert witness can have no bearing on the correctness of the conclusions she draws. For this reason—because jurors employing heuristic processing may rely on relevant as well as irrelevant information<sup>343</sup>—Professor Seaman has written that such processing "should certainly not be encouraged by the rules."<sup>344</sup> But Professor Sanders does not suggest that jurors would not use heuristic processing if disclosures are not made. Heuristic processing, it seems, is a given, and juries will rely on whatever indicia are available to them, whether those indicia are sufficient to inform their decisions or not.<sup>345</sup> Shouldn't, then, courts permit disclosure under Rule 703 to offer jurors heuristic indicia that actually have bearing on the correctness of the expert's conclusion? By making this information available, courts harness the kind of processing jurors already use,<sup>346</sup> and direct that processing toward the most relevant information.<sup>347</sup>

#### PART IV

Even if this article has established that basis evidence can be

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338. *Id.*

339. *See Sanders, supra* note 267, at 909–13.

340. *See id.* at 913.

341. *Id.* at 909.

342. *See id.* at 911–12.

343. *Id.* at 911 ("[P]eripheral processing can be a better or worse decision making strategy depending on the peripheral cues used to come to a decision because some cues are better indicia of reliability than others.")

344. Seaman, *supra* note 260, at 856 n.144.

345. *See Sanders, supra* note 267, at 911–12 (relating that jurors consider heuristic factors like the gender of the expert and her rate of compensation).

346. *See id.* at 913.

347. *See id.* at 912 (relating that some research suggests that jurors' attention can be directed to relevant information like "the *Daubert* factors of general acceptance, and peer review").

disclosed for the purpose of evaluating an expert's opinion (as a purpose distinct from offering that evidence for its truth) Rule 703 still indicates that courts must take precautions to prevent juries from considering basis evidence for an improper purpose.<sup>348</sup> Though it is true that the jury has inherent limitations, and is often incapable of double-checking an expert's conclusions for correctness,<sup>349</sup> it is also true that the juries may nonetheless attempt that improper assessment. In this section, this article describes three tools for preventing improper use of basis evidence, and implementing the credibility-based model of Rule 703.

#### *A. The First Tool: The Relevancy Bar*

The first tool for implementing the credibility-based model of Rule 703 is the relevancy bar built into Rule 703, which this article previewed in Part III D.<sup>350</sup> To reiterate, the relevancy bar requires that the otherwise inadmissible<sup>351</sup> underlying facts and data which constitute the expert's basis evidence be disclosed "only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."<sup>352</sup> The Advisory Committee Note provides a helpful gloss on this requirement by identifying the probative value and prejudicial effects which the Committee intended trial courts to consider.<sup>353</sup> The Note encourages trial courts to weigh "the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other."<sup>354</sup>

The Committee's identification of "prejudicial effect[s]" as "the jury's potential misuse of the information for substantive purposes"<sup>355</sup> suggests that the relevancy bar should operate in concert with the spectrum of erudition implicit in Rule 702. In cases at the low end of the spectrum, jurors are more likely to consider basis evidence for its truth, as they are more likely to understand

348. See FED. R. EVID. 703 advisory committee's note.

349. See *supra* notes 303-04 and accompanying text.

350. See *supra* Part III. D.

351. It might be argued that if the basis evidence is not asserted for its truth, but only for the purpose of helping the jury to evaluate the expert's opinion, then the basis evidence is not hearsay in the first place, and so is not "otherwise inadmissible," and therefore not subject to Rule 703's relevancy bar. See FED. R. EVID. 801(c)(2). But, for the reasons that follow, courts should not attempt to avoid the relevancy bar by circular interpretation.

352. FED. R. EVID. 703.

353. See FED. R. EVID. 703 advisory committee's note.

354. *Id.*

355. *Id.*

low-complexity basis evidence in the first place.<sup>356</sup> In these situations, the value the basis evidence might have in enhancing or detracting from expert credibility is probably minimal: jurors are not using heuristic or peripheral processing because they are capable of weighing the basis evidence independently.<sup>357</sup> Because this misuse of basis evidence for substantive purposes is precisely the danger the Rule envisions,<sup>358</sup> the relevancy bar should prevent expert disclosure in cases where expert testimony (and the basis evidence that accompanies it) is located at the low end of the spectrum. By contrast, when expert testimony is located at the high end of the spectrum, jurors are less likely to consider basis evidence for its truth, as they are less likely to understand its substantive significance.<sup>359</sup> Indeed, in high-complexity cases, jurors are more likely to make decisions based on their perceptions of the expert's credibility, and not on the merits of the expert's argument.<sup>360</sup> Disclosing basis evidence in those cases, then, is useful for enhancing or detracting from the expert's credibility, and helping the jury determine how much weight to accord her testimony.<sup>361</sup> Because this use of basis evidence is precisely the use the Rule encourages,<sup>362</sup> courts should lift the relevancy bar and permit expert disclosure in cases at the high end of the erudition spectrum. By applying (and not applying) the relevancy bar with the erudition spectrum in mind, courts can ensure that Rule 703 disclosures serve the purpose they were intended to serve: to give the jury indicia by which to measure credibility, and prevent the same disclosures from serving an improper purpose: providing the jury with inadmissible evidence for substantive use.<sup>363</sup>

### *B. The Second Tool: Limiting Instructions*

In the event that basis evidence is deemed to be substantially more probative than prejudicial, the proponent of that evidence must still meet an additional requirement before an expert disclosure can be made.<sup>364</sup> This requirement, the limiting instruction, serves as an additional tool to help courts ensure that juries are considering basis evidence for its proper purpose.<sup>365</sup> The Advisory Committee writes, "In determining the appropriate course, the trial court should

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356. See Sanders, *supra* note 267, at 901, 909.

357. See *id.* at 909–10.

358. See FED. R. EVID. 703 advisory committee's note.

359. See Sanders, *supra* note 267, at 901.

360. See *id.* at 909.

361. See *id.*

362. See FED. R. EVID. 703 advisory committee's note.

363. *Id.*

364. *Id.*

365. See FED. R. EVID. 105.



consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances.”<sup>366</sup> At first glance, the Note’s suggestion that courts consider whether a limiting instruction is likely to be effective seems to put the court in a jurisprudential dilemma: on the one hand, there is significant empirical literature suggesting that limiting instructions are often disregarded;<sup>367</sup> on the other hand, there is a nearly conclusive legal presumption that limiting instructions are effective.<sup>368</sup> Can the Advisory Committee be asking judges to choose the empirical evidence over precedent? On the contrary, it seems more likely that the Advisory Committee has a less disruptive goal in mind: to encourage judges to consider *ex-ante* whether a limiting instruction will be practically effective, because once the instruction is given, the presumption that jurors have obeyed its orders will be nearly conclusive.<sup>369</sup> In this way, the Committee echoes (whether it intended to or not) the concerns of the scholarship about the efficacy of limiting instructions.<sup>370</sup> Despite the empirical literature, the limiting instruction will still prove a useful instrument for the implementation of a credibility-based model of expert disclosure, as basis evidence at the high end of the spectrum of erudition is less likely to trigger concern.

Because the controversy surrounding Rule 105 is familiar to many, this article reviews only a small sample of the scholarship here, and then draws a general conclusion about complex expert testimony and Rule 105. In reviewing the literature, one of the most salient concerns in the scholarship seems to be the jury’s ability to disregard inflammatory evidence after that evidence has already been presented at trial.<sup>371</sup> Examples of the kinds of inflammatory

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366. See FED. R. EVID. 703 advisory committee’s note.

367. See *infra* note 370 and accompanying text.

368. See *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (The presumption is “a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.”). *But see* *Bruton v. United States*, 391 U.S. 123, 126 (1968) (providing for a narrow exception to the presumption when a defendant is implicated by his co-defendant’s confession).

369. See *supra* note 367 and accompanying text.

370. See *infra* note 371 and accompanying text.

371. See generally Anthony N. Doob & Hershi M. Kirshenbaum, *Some Empirical Evidence on the Effect of § 12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. L.Q. 88 (1972) (focusing on evidence of criminal history); Lisa Eichhorn, *Social Science Findings and the Jury’s Ability to Disregard Evidence under the Federal Rules of Evidence*, 52 LAW & CONTEMP. PROBS. 341, 350-53 (1989) (focusing on evidence of past sexual behavior); Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763 (1961) (focusing on evidence of criminal history); J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 86-87 (1990) (summarizing studies focusing on evidence of illegally obtained incriminating evidence, unfavorable character evidence, and criminal history *inter*

evidence that have stoked scholarly concern include evidence of past sexual behavior, illegally obtained incriminating evidence, unfavorable character evidence, and evidence of prior conviction.<sup>372</sup> It is worth noting that these kinds of evidence are probably more likely to be presented in low-complexity cases, if they are to be presented at all. The greatest concern, then, about the efficacy of a limiting instruction, should be in the low-complexity case, as these cases are the most likely to present the kind of basis evidence which jurors have the greatest difficulty cabining. By contrast, the kinds of basis evidence disclosed in high-complexity cases can include scientific analysis of illegal substances, blood and DNA.<sup>373</sup> This article submits that these kinds of basis evidence, being by nature less inflammatory, will simply be easier for jurors to cabin with the help of a limiting instruction. Just as the relevancy bar tracked the scale of erudition, then, so does the efficacy of the limiting instruction generally increase as basis evidence becomes more complex.

As an additional measure, the instruction's efficacy can be improved by admonishing the jury by both prohibition and prescription. Though many limiting instructions simply prohibit the use of evidence for a certain purpose, the Rule permits judges to prescribe, in addition, the proper purpose for which evidence should be used.<sup>374</sup> If the purpose of the instruction is to prevent the jury from applying basis evidence substantively,<sup>375</sup> then which instruction is more effective: An instruction that commands the jury not to consider the basis evidence for its truth? Or an instruction that explains to the jury that basis evidence must not be applied substantively, but should be considered in assessing the quantum of weight to accord the expert's testimony? What about an instruction that not only includes a prohibition and prescription, but also explains the prescription by providing questions like the ones this article suggests in Part III.D? Though courts should take care to avoid unduly prejudicing the defendant by bolstering the State's expert, there is no compelling reason the limiting instruction should be only prohibitory in nature,<sup>376</sup> and many reasons an improved version can ensure that juries consider basis evidence for its proper purpose.

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372. See *supra* note 370 and accompanying text.

373. See, e.g., *Williams v. Illinois*, 132 S. Ct. 2221, 2227 (2012); *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2709 (2011); *Melendez-Díaz v. Massachusetts*, 557 U.S. 305, 307 (2009).

374. See 21A WRIGHT ET AL., *supra* note 302, § 5066 (2d ed. 2005).

375. See FED. R. EVID. 703 advisory committee's note.

376. See 21A WRIGHT ET AL., *supra* note 302, § 5066 (2d ed. 2005).

*C. The Third Tool: Hypothetical Questions*

The final tool at the courts' disposal is not mentioned in the text of Rule 703, or in the Advisory Committee Notes, but in both the plurality and dissenting opinions in *Williams*.<sup>377</sup> In their respective opinions, both factions engage in extended discussion of the use of hypothetical questions in the expert witness context, despite the fact that the practice fell out of popular use with the enactment of the Federal Rules of Evidence.<sup>378</sup> In the event that the Supreme Court revisits the questions it took up in *Williams*, hypothetical questions will not only be a tool at the Court's disposal, they may be the only common ground on which the Court can build consensus for the adoption of a credibility-based understanding of Rule 703.

In *Williams*, the plurality first raised the subject of hypothetical questions by analogy.<sup>379</sup> Justice Alito explained that, at common law, experts were asked to assume certain facts and then offer opinions based on those assumptions.<sup>380</sup> The truth of the assumed facts "could then be established through independent evidence," and the correctness of the expert's opinion confirmed.<sup>381</sup> The justice explained, however, that the Rules of Evidence have "dispens[ed] with the need" to frame questions as hypotheticals.<sup>382</sup> The modern equivalent, Justice Alito related, is embodied in Rule 703, which provides the expert an opportunity to disclose the facts she relied upon in forming her opinion, without testifying to their truth.<sup>383</sup> This analogy, of Rule 703 disclosures to hypothetical questions, must have seemed useful from the plurality's perspective because it solved a problem with Sandra Lambatos's testimony: that her "disclosure" of the offensive statements had not seemed very deliberate.<sup>384</sup> In fact, Lambatos did not even "disclose" the statements herself: she simply responded in the affirmative to the question, "Was there a computer match generated of the male DNA profile found in semen from the vaginal swabs of [L.J.] to a male DNA profile that had been identified as having originated from Sandy Williams?"<sup>385</sup> Lambatos's affirmation seems a far cry from the traditional hypothetical question, which might have sounded something like, "Assuming that the DNA profile Cellmark created was accurately produced from semen found in vaginal swabs which were taken from L.J., was that

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377. See *infra* notes 389-96.

378. See FED. R. EVID. 705 advisory committee's note.

379. See *Williams v. Illinois*, 132 S. Ct. 2221, 2228 (2012).

380. *Id.*

381. *Id.* at 2234.

382. *Id.*

383. *Id.*

384. See *id.* at 2236

385. *Id.*

profile a computer match for the profile that originated from Sandy Williams?" But, in Justice Alito's view, the formal hypothetical question was not necessary because the offensive fact served as "a mere premise of [the] prosecutor's question" which Lambatos simply "assumed . . . to be true when she gave her answer."<sup>386</sup>

Justice Kagan was not persuaded.<sup>387</sup> She responded by characterizing the plurality's analysis as "rewriting Lambatos's testimony about the Cellmark report."<sup>388</sup> In her view, Lambatos did not "assume" basis evidence, but rather "affirmed, without qualification" the offensive facts,<sup>389</sup> an affirmation that was the equivalent of offering the basis evidence for its truth, and so violative of the Confrontation Clause.<sup>390</sup> Importantly, however, Justice Kagan did not deny that hypothetical questions have a place in the dialogue about modern expert testimony.<sup>391</sup> Instead, she indicated that Lambatos could have given a hypothetical *answer*, and so avoided implicating the Confrontation Clause: "Lambatos could have added that *if* the Cellmark report resulted from scientifically sound testing of L.J.'s vaginal swab, *then* it would link Williams to the assault."<sup>392</sup> Justice Kagan's concession on this point is telling: it indicates that she sees a way forward that would involve only minimal alteration to the way in which experts testify about basis evidence. In the model Justice Kagan suggests, the experts (or the prosecutors questioning the experts) need only clarify which parts of their minor premises are assumed, and which parts are asserted for their truth.<sup>393</sup> In her view, "the statement 'if X is true, then Y follows' differs materially—and constitutionally—from the statement 'Y is true because X is true (according to Z).'"<sup>394</sup> In a footnote-response, the plurality indicated that it viewed Justice Kagan's alterations as inconsequential, but, crucially, did not find fundamental fault with her proposal.<sup>395</sup>

We arrive, then, at some common ground. This consensus is important because, as this article mentioned in Part II, the Supreme Court usually revisits the questions on which it issues only plurality opinions.<sup>396</sup> On that score, this article argues that the Supreme Court should only grant certiorari if the case below is tried to a jury. This article takes that position primarily because the justices would likely

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386. *Id.*

387. *See id.* at 2270 (Kagan, J., dissenting).

388. *Id.*

389. *Id.*

390. *Id.*

391. *See id.*

392. *Id.*

393. *See id.*

394. *Id.* at n.2.

395. *Id.* at 2236 n.3 (plurality opinion).

396. *See supra* note 202 and accompanying text.

remain divided if the finder-of-fact below were a judge. In that trial, if similarly offensive statements were elicited, the plurality could simply regurgitate its argument from *Williams*: that no matter how garbled the expert's delivery is, a trial judge is presumed to adhere to the Federal Rules of Evidence, and those rules do not permit the introduction of basis evidence for its truth.<sup>397</sup> If that were the case, the *Williams* plurality could probably find, once again, no Confrontation Clause violation.<sup>398</sup> However, if the trial below were before a jury, the plurality has already indicated that it would change its tune.<sup>399</sup> In *Williams*, Justice Alito noted, "The dissent's argument would have force if petitioner had elected to have a jury trial. In that event, there would have been a danger of the jury's taking Lambatos' testimony as proof that the Cellmark profile was derived from the sample obtained from the victim's vaginal swabs."<sup>400</sup> In that kind of case, the plurality could maintain that basis evidence is not introduced for its truth, but concede that juries need as much help as the courts can give them in drawing fine evidentiary distinctions. And if the prosecutor below does not pose his questions in the subjunctive, the plurality would be able to find a Confrontation Clause violation without overturning *Williams*. Such a case would also provide the Court an opportunity to explain the relevancy bar, the appropriate limiting instruction, and the hypothetical questioning regime on which its members appear to agree. These reasons, too, counsel in favor of granting certiorari in a case that is tried before a jury.

*D. Resurrecting the Hypothetical Question: The Way Forward?*

If, then, the grant of certiorari in such a case is at least probable,<sup>401</sup> and if consensus is most likely to be forged over prosecutorial use of hypothetical questions,<sup>402</sup> what kinds of hypothetical questions should the Court encourage? The practice of asking expert witnesses hypothetical questions was not abandoned for no reason.<sup>403</sup> The Advisory Committee's Note to Rule 705 relates that the practice "has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming."<sup>404</sup> The latter was of particular concern to Professor Ladd, who wrote (before the adoption of the Federal Rules of Evidence) about

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397. See *Williams v. Illinois*, 132 S. Ct. 2221, 2235–37 (2012).

398. See *id.*

399. See *id.* at 2236.

400. *Id.*

401. See *supra* note 202 and accompanying text.

402. See *supra* notes 394–398 and accompanying text.

403. FED. R. EVID. 705 advisory committee's note.

404. *Id.*

hypothetical questions in the courtroom: “It is not uncommon that a single question may run into several typewritten pages and in one case extended over 83 pages of the reporter’s transcript followed by an objection covering 14 pages.”<sup>405</sup> Wigmore expressed similar concern, writing that “[t]he hypothetical question, misused by the clumsy and abused by the clever, has in practice led to an intolerable obstruction of truth.”<sup>406</sup> Wigmore also called the question “a mere waste of time and a futile obstruction.”<sup>407</sup> For these reasons, many of the model codes developed in anticipation of the Federal Rules urged abolition,<sup>408</sup> and when the Rules themselves were published, they followed suit.<sup>409</sup> Surely these authorities, then, would caution against a return to the use of hypothetical questions in the expert witness context.

But this article does not suggest a wholesale return to the hypothetical question. Rather, it advocates for narrow application in a narrow context, and after a judge has made several findings: that the possibility that a jury might consider the basis evidence for its truth is substantially outweighed by the probative value in helping the jury to evaluate the expert’s opinion, that a limiting instruction is likely to be effective,<sup>410</sup> and that the statements at issue are testimonial.<sup>411</sup> It is only after those requirements have been met that disclosure should be made. The limited application of this rule, then, should be enough to satisfy the concerns of the pre-Rules scholars, who seem most troubled with the inefficiencies of lengthy questions and answers.<sup>412</sup>

It is also true that a hypothetical question regime would have significant benefits for criminal defendants. Under such a regime, the testimonial hearsay on which expert witnesses rely would always be preceded by a word like “assuming.” This would flag the issue for the jury, and make the judge’s subsequent limiting instruction more plausibly obeyed. Experts would still be permitted to disclose testimonial information, but as a result of the disclosure, would be forced to couch their conclusions in the subjunctive. The use of hypothetical questions would also make cross-examination easier for the jury to understand. The defense attorney would then be permitted to say to the expert witness, “[y]ou’ve just admitted that you’ve assumed a lot of facts in this case, haven’t you?” to which the expert would have to concede that she had. The defense attorney

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405. Ladd, *supra* note 270, at 427.

406. 2 WIGMORE, EVIDENCE § 686 (Chadbourn rev. 1979).

407. *Id.*

408. See 29 WRIGHT ET AL., *supra* note 304, § 6291 n.6. (1st ed. 1997).

409. See FED. R. EVID. 705.

410. See FED. R. EVID. 703 advisory committee’s note.

411. See *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004).

412. See *supra* notes 404–08 and accompanying text.

could then proceed to number all of the assumed facts and data, and conclude by forcing the expert witness to admit that she could not testify to the truth of any of those facts. If this were to transpire, and if the prosecution failed to offer the testimonial statements for their truth, then the defense attorney would have a strong argument that the prosecution's evidence was insufficient to sustain a verdict.<sup>413</sup>

Imagine, if *Williams* had been tried before a jury under a hypothetical question regime, what questions her own attorney would have been required to ask: "Now, assuming the report you received from Ms. Abbinanti was correctly drafted, and assuming the report you received from Cellmark was equally correct, did you find a match between the two profiles?" The cross-examination could have been wonderfully succinct: "You didn't conduct the tests for Ms. Abbinanti, did you? And you didn't conduct the tests at the Cellmark laboratory, right? So you don't know whether those tests were conducted properly, do you? You've just assumed that both were correct?" Though the issue was not raised in *Williams*, it seems that the defendant would have had a strong argument for reversal if he had complained that the evidence were insufficient to sustain the verdict against him.<sup>414</sup> Indeed, for the plurality's reading of the case to be plausible, it must admit that the testimonial statements were never received into evidence for their truth, but were instead merely disclosed to the jury for an evaluative purpose.<sup>415</sup>

It should be noted that a regime which "requires the prosecution to rely" on hypothetical questions in eliciting basis testimony from expert witnesses, while not requiring the same of defendants, creates an obvious asymmetry. And if the Court were to find that the text of Rule 703 mandated such a requirement, the asymmetry would probably be unjustifiable: nothing in the text of the rule indicates that it should be applied in one way to the State and another way to the defense,<sup>416</sup> and an addition to that effect would surely run afoul of the Rules Enabling Act.<sup>417</sup> But if *Williams* is any indication, the Court seems to understand hypothetical questions as a function of the Confrontation Clause, and not of the Rules of Evidence.<sup>418</sup> If this is the case, the asymmetry is justified for the same reasons the Confrontation Clause's asymmetry is justified: the Constitution requires it.<sup>419</sup>

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413. See FED. R. CRIM. P. 29.

414. See *id.*

415. See *Williams v. Illinois*, 132 S. Ct. 2221, 2240 (2012).

416. See FED. R. EVID. 703.

417. See 28 U.S.C. § 2072 (2006).

418. See *Williams*, 132 S. Ct. at 2270 n.2 (Kagan, J., dissenting).

419. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .").

## CONCLUSION

In the event that the Supreme Court revisits the question posed by *Williams*, the Basis Evidence Rationale deserves a second look. And though this article has argued that courts should permit expert witnesses to disclose testimonial statements as part of their basis evidence, this article denies that Rule 703 is an “end-around” the Confrontation Clause. When properly applied, Rule 703 is no sinister device for admitting evidence when no other provision will allow it; nor is the Rule some formalist fantasy, utterly disconnected from the way jurors actually process information. Rather, the Rule’s purpose, to offer jurors indicia for assessing the credibility—and, by proxy, the correctness—of expert testimony, is a real purpose, and one that serves the interests of justice.

This article has elucidated the spectrum of erudition implicit in Rule 702, and this article has argued that the present scholarship, in its analysis of Rule 703, fails to take this spectrum into account. This article has also argued that a credibility-based understanding of Rule 703 comports with the spectrum of erudition, and is the only understanding of Rule 703 that can be read in harmony with Rule 702. This article has also established that the revelation of basis evidence works in concert with the way jurors process information in complex cases, and so serves the criminal defendant by providing jurors with the most relevant information possible. Finally, this article has suggested that three safeguards—Rule 703’s relevancy bar, a thorough limiting instruction, and a modified regime of hypothetical questioning—will prevent improper disclosure of testimonial statements in low-complexity cases, where jurors are most likely to put the statements to substantive use.

And though there is no guarantee that the Supreme Court will revisit the issues raised in *Williams*, there is a guarantee that lower courts will continue to grapple with the conflict between the Confrontation Clause and Rule 703. Those courts will go the furthest in vindicating the purposes of both Rule 703 and the Confrontation Clause if they permit the disclosure of testimonial statements for the purpose of evaluating an expert’s opinion.