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THE GORDIAN KNOT OF THE TREATMENT OF SECONDHAND FACTS UNDER FEDERAL RULE OF EVIDENCE 703 GOVERNING THE ADMISSIBILITY OF EXPERT OPINIONS: ANOTHER CONFLICT BETWEEN LOGIC AND LAW

Edward J. Imwinkelried*

“The life of the law has not been logic”

—Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881)

Some commentators have suggested that the American judicial hearing is becoming trial by expert.¹ In the early 1990s, the Rand Corporation released a study of the use of experts in trials in California courts of general jurisdiction.² Expert witnesses appeared in 86% of the trials studied, and on average there were 3.3 experts per trial.³ It is undeniable that in the United States the role of expert witnesses is growing.

Although commentators sometimes refer to the role of the expert at trial, in truth witnesses who qualify as experts can play at least four different roles. Suppose, for example, that an eminent toxicologist is driving to work and observes a traffic accident. Like any witness who has personal knowledge of a fact, the toxicologist could testify at the trial against the driver that she observed the defendant’s car run a red light.⁴ Next, if the toxicologist had attempted to help the drivers and smelt a strong odor of alcohol on the defendant’s breath, the toxicologist would be competent to give the lay opinion that the defendant was intoxicated.⁵ Thirdly, suppose that the defendant were prosecuted for drunk driving, and the arresting officer testified that on an intoxilyzer test the defendant registered 0.13, exceeding the statutory limit of 0.08.⁶ At the same trial, the prosecutor could call the toxicologist to provide expert testimony about the general reliability of

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¹ William T. Pizzi, *Expert Testimony in the U.S.*, 145 *NEW L.J.* 82 (1995).

² Samuel R. Gross, *Expert Evidence*, 1991 *WIS. L. REV.* 1113, 1120 n. 19 (1991).

³ *Id.* at 1119.

⁴ *FED. R. EVID.* 602.

⁵ *Id.* at *FED. R. EVID.* 701; 1 MCCORMICK, *EVIDENCE* § 11, at 55 n.23 (6th ed. 2006).

⁶ 2 PAUL C. GIANNELLI, EDWARD J. IMWINKELRIED, ANDREA ROTH & JANE CAMPBELL MORIARTY, *SCIENTIFIC EVIDENCE* § 22.01 at 474, 476 (5th ed. 2012).

intoxilyzers as a method of determining blood alcohol concentrations.⁷

Although an expert witness can play any of the above roles, in most instances the attorney calling the witness wants him or her to perform a fourth function, namely, to apply a general theory or technique to the specific facts in the case to generate an opinion. When the expert witness plays this role, the structure of the witness's testimony is essentially syllogistic.⁸ In a classic syllogism, the logician applies a major premise to a minor premise to derive a conclusion.⁹ When an expert witness testifies in this syllogistic manner, the expert's major premise is the general theory or technique that he or she relies on.¹⁰ For example, a psychiatrist who testifies as an expert witness might posit a set of diagnostic criteria for a particular mental illness: If the patient displays symptoms A and B, the patient is probably suffering from psychosis C. The psychiatrist's minor premise is the case-specific data that he applies the major premise to: This patient's case history includes symptoms A and B. The psychiatrist's conclusion is the opinion generated when he employs the general theory to evaluate the significance of the particular facts in the case: Ergo, the patient is probably suffering from psychosis C.

In its landmark decision on the admissibility of scientific evidence, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹¹ the United States Supreme Court indicated that Federal Rule of Evidence 702 governs the question of which theories or techniques an expert may rely on as a major premise.¹² The Court held that to serve as a basis for expert testimony, the theory or technique must qualify as reliable "scientific . . . knowledge" within the meaning of that expression in Rule 702.¹³ In contrast, Federal Rule of Evidence 703 answers the question of the types of case-specific data that the expert may rely on as the minor premise.¹⁴ Effective December 1, 2011, restyled Rule 703 reads:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if 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 to evaluate the opinion substantially outweighs their prejudicial effect.¹⁵

⁷ Federal Rule of Evidence 702 permits an expert to "testify only in the form of an opinion." FED. R. EVID. 702. The original Advisory Committee Notes to Rule 702 state:

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.

Id.

⁸ Edward J. Imwinkelried, *The Educational Significance of the Syllogistic Structure of Expert Testimony*, 87 NW. U. L. REV. 1148 (1993); Edward J. Imwinkelried, *The 'Bases' of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C. L. REV. 1 (1988).

⁹ Imwinkelried, *The Educational Significance of the Syllogistic Structure of Expert Testimony*, *supra* note 8.

¹⁰ *Id.* at 1148.

¹¹ 509 U.S. 579 (1993).

¹² *Id.* at 589-90.

¹³ *Id.*

¹⁴ Edward J. Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, 47 MERCER L. REV. 447, 457 (1996); Edward J. Imwinkelried, *The Meaning of "Facts or Data" in Federal Rule of Evidence 703: The Significance of the Supreme Court's Decision to Rely on Federal Rule 702 in Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 54 MD. L. REV. 352, 372-73 (1995).

¹⁵ FED. R. EVID. 703.

Since Rule 702 served as the foundation for the Court's celebrated *Daubert* decision, Rule 702 has been the principal focus of the scholarly commentary on scientific evidence.¹⁶ However, Rule 703 has proved to be the more controversial statute and has produced a larger number of splits of authority among the lower courts.¹⁷

Until 2012, the United States Supreme Court itself had not entered the fray over Rule 703. However, in June 2012, the Supreme Court finally considered a case, *Williams v. Illinois*,¹⁸ in which Rule 703 played a prominent role. Technically, *Williams* is a constitutional criminal procedure decision that governs only in prosecutions.¹⁹ However, as we shall soon see, *Williams* raises questions about Rule 703 that apply to both civil and criminal litigation.

Williams was charged with rape and his case was set for trial.²⁰ Cellmark is a private laboratory conducting DNA testing.²¹ Before *Williams*'s trial, Cellmark extracted a male DNA profile from the rape victim's vaginal swab.²² Cellmark sent the profile information to the Illinois State Police Laboratory (ISP).²³ At the laboratory Ms. Sandra Lambatos, an ISP specialist, found a match when she compared the Cellmark profile to that of the accused.²⁴ Ms. Lambatos testified at William's bench trial and answered the following question in the affirmative:

Was there a computer match generated of the male DNA profile found in semen from the vaginal swabs of [L.J.] to a male profile that had been identified as having originated from Sandy Williams?²⁵

The issue posed in *Williams* was whether Lambatos's reference to Cellmark's statement about the male DNA profile violated the Sixth Amendment.²⁶ In 2004 in *Crawford v. Washington*,²⁷ the Supreme Court announced that the Sixth Amendment Confrontation Clause precludes the admission of "testimonial" hearsay statements at trial unless (1) the accused had a prior opportunity to question the declarant and (2) the declarant is unavailable at trial.²⁸ However, the *Crawford* Court also indicated that the Confrontation Clause does not apply to a statement if, at trial, the statement is admitted for a nonhearsay purpose, that is, for a purpose other than proof of the truth of the assertion in the statement.²⁹

In *Williams*, the prosecution argued that Lambatos's testimony did not violate the

¹⁶ Imwinkelried, *The Meaning of "Facts or Data" in Federal Rule of Evidence 703*, *supra* note 14, at 358 n.54.

¹⁷ Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, *supra* note 14.

¹⁸ 132 S. Ct. 2221 (2012); see Richard D. Friedman, *Confrontation and Forensic Laboratory Reports, Round Four*, 45 Tex. Tech L. Rev. 51 (2012); *United States v. Turner*, 709 F.3d 1187, 1189 (7th Cir. 2013) ("[T]he divergent analyses and conclusions of the plurality and dissent sow confusion as to precisely what limitations the Confrontation Clause may impose when an expert witness testifies about the results of testing performed by another analyst, who herself is not called to testify at trial.").

¹⁹ *See id.*

²⁰ *Id.* at 2227.

²¹ *Id.*

²² *Id.* at 2229.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 2236.

²⁶ *Id.* at 2238.

²⁷ 541 U.S. 36 (2004).

²⁸ *Id.* at 59.

²⁹ *Id.* at 59 n. 9 (quoting *Tennessee v. Street*, 471 U.S. 409, 414 (1985)).

Confrontation Clause because the reference to the Cellmark statement was not offered for the hearsay purpose of proving the truth of the assertion that the vaginal swab contained that male DNA profile.³⁰ Rather, according to the prosecution, the reference was used for the limited, nonhearsay purpose of showing the basis of Ms. Lambatos's opinion and helping the trier of fact to evaluate the quality of Ms. Lambatos's reasoning.³¹ Both Federal Rule 703 and Illinois law³² permit expert witnesses to rely on third-party out-of-court statements for that purpose.³³ In *Williams*, however, five justices (the "703 majority" including Justice Thomas in concurrence and four dissenters led by Justice Kagan) found that Cellmark's statement had been used for a substantive purpose at trial.³⁴ The justices contended that it is illogical to allow the trier of fact to consider an expert opinion that rests on premises that are unsupported by admissible evidence.³⁵

At the same time, another five-justice majority (the "*Crawford* majority" including Justice Thomas and a four-justice plurality led by Justice Alito) mooted the Rule 703 issue by holding that Cellmark's statement was not testimonial to begin with.³⁶ Based on that holding, these five justices voted to affirm *Williams*' conviction.³⁷ For its part, the plurality characterized the statement as non-testimonial because the police had not identified any suspect at the time of Cellmark's test.³⁸ Justice Thomas also characterized the statement as non-testimonial, but he did so for an entirely different reason, namely, the relative informality of the statement.³⁹ Given the fragmented nature of the decision, the narrowest common ground supporting the affirmance is arguably the proposition that a forensic analyst's statement is non-testimonial if it is both informal and made before the police identified a particular suspect.⁴⁰

The *Crawford* ruling in *Williams* is of concern only to criminal practitioners; the ruling relates to a Sixth Amendment Confrontation Clause limitation on prosecution hearsay.⁴¹ In contrast, although the *Crawford* ruling formally mooted the Rule 703 issue, many lower courts will undoubtedly pay attention to the reasoning of the 703 majority; any time five members of the Supreme Court agree on a proposition, lower court judges tend to sit up and pay attention. The 703 majority's reasoning applies not only to expert evidence offered against a criminal accused but also to expert testimony offered by civil litigants.⁴² What precisely does Rule 703 authorize? Does the use sanctioned by Rule 703 constitute a legitimate nonhearsay use of an out-of-court statement? If not, how should the courts apply Rule 703 in the future?

The 703 majority's position has substantial merit. The thesis of this article, however, is that although the falsity of an essential premise of an expert opinion can render the opinion irrelevant, in most cases it is sound to assign the ultimate relevance

³⁰ *Williams*, 132 S. Ct. at 2230-33.

³¹ *Id.*

³² *Id.* at 2234-35.

³³ *Id.*

³⁴ *Id.* at 2256-59 (Thomas, J., concurring), 2268-72 (Kagan, J., dissenting).

³⁵ *See id.* at 2255-56 (Thomas, J., concurring), 2264-73 (Kagan, J., dissenting).

³⁶ *Id.* at 2240, 2255 (Thomas, J., concurring).

³⁷ *Id.* at 2244 (majority opinion).

³⁸ *Id.* at 2243-44.

³⁹ *Id.* at 2259-60.

⁴⁰ Hugh B. Kaplan, Commentary, *Criminal Law – Confrontation: Divided Supreme Court Says DNA Expert Can Testify About Profile Created By Others*, 80 U.S.L.W. 1747 (2012).

⁴¹ *Williams*, 132 S. Ct. at 2247.

⁴² *See id.* at 2247-48 (Breyer, J., concurring).

decision to the jury. In the typical case it is more satisfactory to use the sort of jury instructions approvingly mentioned in Justice Alito's plurality opinion than to empower the judge to exclude the opinion.⁴³ The first part of this article surveys the state of Rule 703 jurisprudence prior to the *Williams* decision. The second part describes the positions on the Rule 703 issue that the various justices took in *Williams*. The third part highlights the stakes involved in the dispute between the 703 majority and the plurality. The fourth and final part of the article evaluates the merits of the competing positions both as a matter of logic and as a question of statutory construction.

I. THE STATE OF RULE 703 JURISPRUDENCE ON SECONDHAND REPORTS BEFORE THE *WILLIAMS* DECISION

As previously stated, Rule 703 regulates the permissible sources for information about the case-specific data that the expert witness relies on as a basis for an opinion.⁴⁴ What are the sources from which the expert may draw information about, for example, a patient's case history or skidmarks and debris found at a traffic accident scene?

A. The State of the Law Prior to the Enactment of Federal Rule of Evidence 703

At early common law, there was only one permissible source for the expert's knowledge of case-specific information: the expert's firsthand, personal knowledge.⁴⁵ However, it soon became apparent that the personal knowledge limitation was unrealistic; it was frightfully time-consuming for the expert to personally confirm every fact that he or she intended to use as a basis for the opinion.

Consequently, the common law developed the technique of the hypothetical question.⁴⁶ Using this technique, other witnesses supplied admissible evidence of the facts, the attorney asked the expert witness to hypothetically assume the truth of those facts, and the expert testified to an opinion based on the assumed facts:

Dr. Worth, please assume the following facts as true: One, in the accident, the plaintiff sustained a cut three inches in length and 1/8 inch in depth on the right, front part of his head. Two, the plaintiff bled profusely from that cut. Three, immediately after that accident, the plaintiff experienced sharp, painful headaches in the right, front part of his head.⁴⁷

Based on those facts, to a reasonable degree of medical probability, do you have an opinion as to the nature of the injury the plaintiff suffered?

In most cases, the trial judge did not allow the attorney to pose the question to the expert unless the attorney had already⁴⁸ presented enough admissible evidence to permit the jurors to find that all the assumed facts were true.⁴⁹ It is true that in most jurisdictions

⁴³ See *id.* at 2233-34 (majority opinion).

⁴⁴ Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, *supra* note 14; Imwinkelried, *The Meaning of "Facts or Data" in Federal Rule of Evidence 703*, *supra* note 14.

⁴⁵ 1 MCCORMICK, EVIDENCE § 14, at 87(6th ed. 2006).

⁴⁶ *Id.* at 89-90.

⁴⁷ EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS § 9.03(4)(d) (8th ed. 2012).

⁴⁸ See Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583, 587 (1987); see also DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, *THE NEW WIGMORE: A TREATISE ON EVIDENCE - EXPERT EVIDENCE* § 4.5, at 154 (2d ed. 2010) (part of "the evidentiary record").

⁴⁹ 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 7:15, at 892-94 (3d ed. 2007).

the judge had discretion to allow the opinion before the presentation of the admissible evidence and subject to the attorney's later presentation of the evidence.⁵⁰ The trial judge might exercise discretion to permit the later presentation of the foundational evidence if, for instance, the only source of admissible evidence of a certain fact was a physician whose surgical schedule precluded her from testifying before the expert witness. Absent such exceptional circumstances, however, trial judges rarely deviated from the requirement that the admissible evidence be presented prior to admission of the expert's opinion. If a judge did admit the expert opinion first and the attorney later neglected to submit the promised evidence, the trial judge might have to strike the expert's opinion; if the judge believed that it was unrealistic to believe that the jury could follow a curative instruction to disregard the stricken testimony, the judge might have to declare a mistrial.⁵¹

As a general rule at common law, if the expert lacked personal knowledge of a fact and the expert's proponent failed to present other admissible evidence of that fact, the expert could not base an opinion even partially on that fact.⁵² Prior to the adoption of the Federal Rules of Evidence,⁵³ there were only two notable exceptions to the general rule. One exception dealt with testimony by expert physicians.⁵⁴ Under this exception, physicians could rely on statements describing the patient's symptoms even if the statements were not admissible under a recognized hearsay exception.⁵⁵ The second exception concerned real estate valuation experts.⁵⁶ It allowed experts who testified about real estate values to base their opinions on "sources that were technically [inadmissible] hearsay—price lists, newspapers, information about comparable sales, or other secondary sources."⁵⁷ In *In re Cliquot's Champagne*,⁵⁸ a leading 1865 decision, the Supreme Court approved this practice.⁵⁹ In justifying its decision, the Court commented that courts "should not encumber the law with rules which will involve labor and expense to the parties, and delay the progress of the remedy . . . without giving any additional safeguard in the interests of justice."⁶⁰ With those two exceptions, though, the courts forbade experts from relying on inadmissible secondhand reports⁶¹ of facts as a basis for their opinions.⁶²

B. The Change Effected by the Enactment of Rule 703

Like the prior common law, Rule 703 permits experts to base opinions on facts that are observed personally and hypotheses that are supported by independent, admissible evidence.⁶³ The first sentence of Rule 703 states that an expert may base an opinion "on facts or data in the case that the expert has . . . personally observed."⁶⁴ The same sentence also allows the expert to consider "facts or data in the case that the expert has been made

⁵⁰ *Id.* § 7:15, at 894.

⁵¹ *See id.* § 7:15, at 894 n.13.

⁵² *See* 1 MCCORMICK, EVIDENCE § 14, at 89 (6th ed. 2006); *id.* § 7:15, at 897.

⁵³ *Id.* § 7:16, at 897; 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6271(13)-(14), at 302-04 (1997).

⁵⁴ KAYE ET AL., *supra* note 48, at 155-56.

⁵⁵ *Id.* § 4.5.

⁵⁶ *Id.* § 4.5.1, at 154-55.

⁵⁷ *Id.* § 4.5.1, at 154.

⁵⁸ 70 U.S. 114 (1865).

⁵⁹ *Id.* at 141.

⁶⁰ *Id.*

⁶¹ MUELLER & KIRKPATRICK, *supra* note 49 § 7.13, at 886.

⁶² *Id.*

⁶³ FED. R. EVID. 703.

⁶⁴ *Id.*

aware of.”⁶⁵ That language is broad enough to include facts mentioned in a hypothetical question posed to the expert, and the Advisory Committee Note accompanying Rule 703 expressly endorses the continued use of the hypothetical question.⁶⁶

While the first sentence largely tracks the earlier common law, the second sentence introduces an important innovation with respect to secondhand reports.⁶⁷ That sentence reads: “If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.”⁶⁸ Thus, secondhand out-of-court reports can serve as a basis for an opinion even when the report is neither admitted nor admissible.⁶⁹ This provision does not purport to be a hearsay exception⁷⁰ authorizing the trier of fact to consider the content of the report for its truth.⁷¹ The provision appears in Article VII governing opinion evidence, rather than Article VIII regulating hearsay.⁷² Hence, the secondhand report is admissible only for the limited credibility⁷³ purpose of helping the trier of fact to understand the basis of the expert’s opinion.⁷⁴ Given that purpose, under Federal Rule of Evidence 105⁷⁵ the trial judge must give the jury a limiting instruction on the opponent’s request.⁷⁶ The instruction must forbid the jury from treating the report as substantive evidence in the case and explain the permissible nonhearsay use of the evidence.⁷⁷

Even when Rule 703 was initially adopted, there was sharp criticism of the provision permitting the expert to rely on inadmissible secondhand reports as a basis for an opinion. In particular, Professor Paul Rice derided the provision as illogical.⁷⁸ Anticipating the position of the 703 majority in *Williams*, Professor Rice argued that in order to accept the ultimate opinion, the factfinder necessarily had to accept the truth of the bases for the opinion.⁷⁹ In his view, if the factfinder did not assume the truth of the bases, it made no logical sense to accept the opinion purportedly supported by the bases;⁸⁰ the falsity of the premises rendered the opinion itself irrelevant and inadmissible.⁸¹ Moreover, at the time Rule 703 was adopted, many, if not most, other courts in the rest of the common law world still adhered to the traditional view that an expert could not base an opinion on secondhand reports that did not qualify for admission under the hearsay

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ MUELLER & KIRKPATRICK, *supra* note 49 § 7.13, at 886.

⁶⁸ FED. R. EVID. 703.

⁶⁹ 3 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL §703.02[1], at 703-3 (Matthew Bender, 10th ed. 2011).

⁷⁰ 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE §703.05[2] at 703-24-26 (Joseph M. McClaughin, ed., Matthew Bender 2d ed. 1997).

⁷¹ *Id.*

⁷² FED. R. EVID. 703.

⁷³ SALTZBURG ET AL., *supra* note 69 §703.02[4], at 703-8.

⁷⁴ *See id.* §703.02[4], at 703-8-9.

⁷⁵ FED. R. EVID. 105.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Rice, *supra* note 48, at 585-86 (arguing that it is illogical for courts to admit an expert’s opinion without admitting the facts that formed the basis for the expert’s opinion).

⁷⁹ *Id.* at 585.

⁸⁰ *Id.* at 584-85.

⁸¹ *Id.*

rule.⁸² In the words of one Canadian commentator, logically it was “quite impossible” to justify admitting an expert opinion as substantive evidence when the opinion’s essential premises lacked supporting, admissible evidence.⁸³ Although most states followed the federal lead and adopted a version of Rule 703 essentially identical to the federal statute, some states balked.⁸⁴ For example, Ohio substituted a rule requiring that the expert base his or her opinion either on facts the expert had perceived or facts admitted into evidence.⁸⁵

Nevertheless, the Advisory Committee defended the provision as follows:

[T]he rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, experts performed and subject to cross-examination, ought to suffice for judicial purposes.⁸⁶

The drafters’ reference to the needless expenditure of time echoed the Supreme Court’s 19th century decision in the *Cliquot’s Champagne* case.⁸⁷

With few dissents,⁸⁸ it became the orthodox position that under Rule 703 secondhand reports can be used for a legitimate nonhearsay purpose,⁸⁹ namely, allowing the trier of fact to assess the bases of the expert’s opinion⁹⁰ and the quality of the expert’s reasoning.⁹¹ It was also the conventional wisdom that a limiting instruction was the proper mechanism for ensuring that the trier of fact considered the secondhand report only for nonhearsay purposes.⁹²

⁸² Edward J. Imwinkelried, *A Comparativist Critique of the Interface Between Hearsay and Expert Opinion in American Evidence Law*, 33 B.C. L. REV. 1, 23-26 (1991) (citing authorities from Canada, New Zealand, Scotland, and South Africa).

⁸³ J.H. HOLLIES, *Hearsay as the Basis of Opinion Evidence*, in 10 THE CRIMINAL LAW QUARTERLY 288, 303 (Claude C. Savage ed., 1968).

⁸⁴ 2 GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES §52.1, at 1 (1987).

⁸⁵ *Id.*

⁸⁶ FED. R. EVID. 703 advisory committee’s note.

⁸⁷ *In re Cliquot’s Champagne*, 70 U.S. 114, 141 (1865) (courts “should not encumber the law with rules which will involve labor and expense to the parties, and delay the progress of the remedy . . . without giving any additional safeguard to the interests of justice”).

⁸⁸ See 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE § 6272 (1997).

⁸⁹ 3 BARBARA E. BERGMAN & NANCY HOLLANDER, WHARTON’S CRIMINAL EVIDENCE § 13.11, at 456 n. 17 (15th ed. 1999)(citing *Barrett v. Acevedo*, 169 F.3d 1155 (8th Cir. 1999); MUELLER & KIRKPATRICK, *supra* note 49 § 7:16, at 910; SALTZBURG ET AL., *supra* note 69 § 703.04[4] at 703-8 to 703-9.

⁹⁰ *Id.* at 703-9; BERGMAN & HOLLANDER, *supra* note 89 § 13.11, at 457 (citing *Barrett v. Acevedo*, 169 F.3d 1155 (8th Cir. 1999); MUELLER & KIRKPATRICK, *supra* note 49 § 7:16 at 912-13.

⁹¹ SALTZBURG ET AL., *supra* note 69 § 703-9.

⁹² BERGMAN & HOLLANDER, *supra* note 89 § 13.11, at 457.

II. THE POSITIONS OF THE JUSTICES IN *WILLIAMS* ON THE EVIDENTIARY STATUS OF SECONDHAND REPORTS USED UNDER RULE 703

In *Williams*, Justice Alito wrote for a four-justice plurality, Justice Breyer filed a concurrence, Justice Thomas concurred in the judgment, and Justice Kagan authored an opinion for a four-justice dissent.⁹³ The opinions written by Justices Alito, Thomas, and Kagan all addressed the topic of the evidentiary status⁹⁴ of secondhand reports ostensibly admitted for the limited purpose of establishing the basis for an expert opinion.⁹⁵

A. Justice Alito's Plurality Opinion

For the most part, Justice Alito's opinion endorses the conventional wisdom described above in subpart I.B. Justice Alito points out that in *Williams* the prosecutor did not attempt to introduce the Cellmark report itself during Ms. Lambatos's testimony.⁹⁶ He then insists that the secondhand oral report about Cellmark's finding was not used to prove the truth of the assertions in the report: "Lambatos did not testify to the truth" of the male DNA profile found by Cellmark.⁹⁷ Quoting the Advisory Committee Note to Rule 703, Justice Alito stated that secondhand reports such as the reference to Cellmark's finding "assist[t] the jury to evaluate the expert's opinion."⁹⁸ The justice asserted 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."⁹⁹ The justice then elaborated on the possible nonhearsay uses of secondhand reports.¹⁰⁰ For example, in the plurality's view the factfinder may weigh the reports to determine whether "the expert drew an unwarranted inference from the premises on which the expert relied."¹⁰¹ In other words, assuming *arguendo* the truth of the premises, do the premises provide adequate support for the opinion? Alternatively, the factfinder could consider the secondhand reports to decide whether "the expert's reasoning [process] was . . . illogical."¹⁰² Did the expert commit any evident logical fallacies in reasoning about and from the premises to the conclusion embodied in the opinion? The factfinder can conduct both of those inquiries regardless of the truth of the assertions in the secondhand reports.¹⁰³

However, Justice Alito acknowledged that the falsity of the secondhand reports can sometimes render the ultimate opinion irrelevant.¹⁰⁴ He stated that "[i]f there was no proof that Cellmark produced an accurate profile based on that sample, Lambatos'[s] testimony regarding the match would be irrelevant . . ."¹⁰⁵ Justice Alito does not propose,

⁹³ *Williams*, 132 S. Ct. at 2227.

⁹⁴ Rice, *supra* note 48, at 583.

⁹⁵ 132 S. Ct. at 2233-69.

⁹⁶ *Id.* at 2235 ("Lambatos . . . made no other reference to the Cellmark report, which was not admitted into evidence and was not seen by the trier of fact.").

⁹⁷ *Id.*

⁹⁸ *Id.* at 2239-40.

⁹⁹ *Id.* at 2240.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2237.

¹⁰⁵ *Id.* at 2238. For that matter, in addition to demonstrating the scientific soundness of the analysis of the sample, the prosecution must establish the chain of custody for the sample analyzed; to do so the prosecution must present independent, admissible evidence of the chain. PAUL C. GIANNELLI, EDWARD J. IMWINKELRIED, ANDREA ROTH & JANE CAMPBELL MORIARTY, *SCIENTIFIC EVIDENCE* § 7.03 (5th ed. 2012); The identification of physical evidence, including chain of custody, is a conditional relevance issue. Edward J. Imwinkelried, *Determining*

however, that the irrelevance problem be dealt with by tasking the trial judge to pass on the sufficiency of any independent admissible evidence of the fact mentioned in the secondhand report, as the judge would do today if the issue were the sufficiency of the foundation for a hypothetical question.¹⁰⁶ Instead, he seems to contemplate that the trial judge will give the jurors instructions assigning the relevance determination to them.¹⁰⁷ Near the end of his opinion, Justice Alito endorses the general proposition that “the trial judges may, and under most circumstances, must instruct the jury . . . that an expert’s opinion is only as good as the independent evidence that establishes its underlying premises.”¹⁰⁸ Justice Alito’s opinion goes farther. Earlier in the opinion, in discussing hypothetical questions, Justice Alito approvingly quoted a jury instruction from *Forsyth v. Doolittle*.¹⁰⁹ The instruction informed the jurors that “[i]f the statements in these questions are not supported by the proof, then the answers to the questions are entitled to *no weight*, because based upon false assumptions or statements of fact.”¹¹⁰ Near the end of his opinion and immediately after discussing jury instructions, Justice Alito harks back to *Forsyth* and adds that “if the prosecution cannot muster any independent admissible evidence to prove the foundational facts that are essential to the relevance of the expert’s testimony, then the expert’s testimony cannot be given *any weight* by the trier of fact.”¹¹¹ That passage lends itself to the interpretation that, rather than precluding the proponent from exposing the jury to the opinion, the judge is to charge the jury to disregard the opinion if it finds that the prosecution has failed to muster such “independent admissible evidence.”¹¹²

B. Justice Thomas’ Concurrence

As previously stated, Justice Thomas concurred in the judgment affirming Williams’s conviction.¹¹³ He agreed with the plurality’s conclusion that the Cellmark report was not testimonial.¹¹⁴ The plurality reached that conclusion on the ground that the primary purpose of the report:

was not to accuse petitioner or to create evidence for use at trial. When the ISP lab sent the sample to Cellmark, its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time.¹¹⁵

Justice Thomas found the plurality’s rationale unpersuasive.¹¹⁶ However, in his view only statements “bearing ‘indicia of solemnity’” can constitute testimonial

Preliminary Facts Under Federal Rule 104, 45 AM. JUR. TRIALS 1, 44 – 45 (1992). Consequently, the prosecution’s foundational testimony must satisfy the technical evidentiary rules. *Id.* at 58. If the record did not contain such evidence, on proper motion the defense would be entitled to a judgment of acquittal as a matter of law. FED. R. CRIM. P. 29. However, in *Williams* the various opinions do not discuss this argument as an alternative basis for disposing of the case.

¹⁰⁶ 132 S. Ct. at 2241.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 2234.

¹¹⁰ *Id.* (quoting *Forsyth v. Doolittle*, 120 U.S. 73, 77 (1887)) (emphasis added).

¹¹¹ *Id.* at 2241 (emphasis added).

¹¹² *Id.*

¹¹³ *Id.* at 2255-65.

¹¹⁴ *Id.* at 2255 (Thomas, J., concurring in judgment).

¹¹⁵ *Id.* at 2243 (plurality opinion).

¹¹⁶ *Id.* at 2258-60 (Thomas, J., concurring in judgment).

assertions.¹¹⁷ On that basis he distinguished the relatively formal forensic certificates that the Court had previously ruled testimonial in *Melendez-Diaz v. Massachusetts*¹¹⁸ and *Bullcoming v. New Mexico*.¹¹⁹ The upshot of Justice Thomas's perspective was that although he rejected the plurality's reason for characterizing the report as nontestimonial, he reached the same result as the plurality and, hence, cast the fifth vote affirming the conviction.¹²⁰

Just as he rejected the plurality reasoning on the testimonial issue, Justice Thomas rebuffed the plurality's position on Rule 703.¹²¹ He declared that "[t]here is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth."¹²² In a footnote, he asserted that "the purportedly 'limited reason' for such testimony—to aid the factfinder in evaluating the expert's opinion—necessarily entails an evaluation of whether the basis testimony is true."¹²³ As support for his position, Justice Thomas quoted the following passage from the expert testimony text coauthored by Professors Kaye, Bernstein, and Mnookin:

To use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment whether this information is true. If the jury believes that the basis evidence is true, it will likely also believe the expert's reliance is justified; inversely, if the jury doubts the accuracy or validity of the basis evidence, it will be skeptical of the expert's conclusions.¹²⁴

Justice Thomas ultimately concluded that "basis testimony is admitted for its truth"¹²⁵ rather than "a 'legitimate' nonhearsay purpose"¹²⁶

As previously stated, in his lead opinion Justice Alito conceded that the falsity of the facts mentioned in secondhand reports can sometimes render the opinion irrelevant.¹²⁷ Even in those cases, however, Justice Alito apparently contemplated that the judge would go no farther than delivering jury instructions assigning the relevance or weight determination to the jury; he did not raise the possibility of excluding the opinion itself.¹²⁸ In his concurrence, Justice Thomas did not reach the question of whether the judge should bar the opinion itself when the evidentiary record does not contain independent, admissible evidence of the facts mentioned in the secondhand reports the expert relies on.¹²⁹

¹¹⁷ *Id.* at 2259-61 (Thomas, J., concurring in judgment) (quoting *Davis v. Washington*, 547 U.S. 813, 836-37, 40 (2006) (Thomas, J., concurring in judgment in part and dissenting in part)).

¹¹⁸ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-312 (2009).

¹¹⁹ *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717 (2011).

¹²⁰ *Williams*, 132 S. Ct. at 2255. (Thomas, J., concurring in judgment).

¹²¹ *Id.* at 2256.

¹²² *Id.* at 2257 (Thomas J., concurring in judgment).

¹²³ *Id.* at 2257 n.1.

¹²⁴ *Id.* at 2257 (quoting KAYE ET AL., *supra* note 48, at 196).

¹²⁵ *Id.* at 2258.

¹²⁶ *Id.* at 2258 n.4 (quoting *Tennessee v. Street*, 471 U.S. 409, 417 (1985)).

¹²⁷ *Id.* at 2241 (plurality opinion).

¹²⁸ *Id.*

¹²⁹ *Id.* at 2258 (Thomas, J., concurring in judgment) (discussing out-of-court statements relied on by the expert).

C. Justice Kagan's Dissenting Opinion

While disagreeing with Justice Thomas's characterization of the Cellmark report as nontestimonial, the dissenters agreed with his rejection of the plurality's contention that the reference to the Cellmark report had been used for a nonhearsay purpose.¹³⁰ The dissent advances two different arguments as bases for rejecting the plurality's contention.¹³¹ One argument is that it is unrealistic to believe that the jury will be willing and able to follow a limiting instruction precluding the jury's substantive use of the secondhand report.¹³² Citing the Kaye text, the dissent dismisses that belief as "factually implausible" and "sheer fiction."¹³³ The dissent then makes the alternative argument that "as a simple matter of logic,"¹³⁴ it is "nonsense"¹³⁵ to believe that the secondhand report can be used for a nonsubstantive, nonhearsay purpose.¹³⁶ Just as Justice Thomas professed that he could find no "meaningful distinction" between the hearsay and purported nonhearsay uses of secondhand reports under Rule 703, the dissenters quoted *People v. Goldstein*,¹³⁷ a 2005 New York decision, to the effect that "[t]he distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful."¹³⁸ On the facts of the case, the dissent felt that "the only way the factfinder could consider whether [Cellmark's] statement supported her opinion (that the DNA on L.J.'s swabs came from Williams) was by assessing the statement's truth."¹³⁹

There is a further parallel between the dissent and Justice Thomas's concurrence. As previously stated, Justice Thomas stopped short of discussing the implications of his conclusion that secondhand reports under Rule 703 are necessarily used for the hearsay purpose of proving the truth of the report. In particular, Justice Thomas did not discuss the nature of the judge's authority to admit or exclude an expert opinion when the record is devoid of independent, admissible evidence establishing the truth of a secondhand report that forms an essential premise of the opinion. Likewise, the dissent avoided discussing the implications of its conclusion that secondhand reports are used for hearsay purposes. In the context of *Williams*, the failure to reach that issue is understandable. Although he found that the statement had been used for its truth, Justice Thomas was able to moot the 703 hearsay issue by focusing his analysis on the formality requirement for testimonial statements.¹⁴⁰ In the case of the dissenting justices, their rejection of the plurality's 703 argument led them directly to the testimonial issue, which is where they parted company with Justice Thomas.¹⁴¹

The rub is that in *Williams* five Supreme Court justices clearly expressed the view that, in order to be used under Rule 703, a secondhand report must be put to a hearsay purpose.¹⁴² In the procedural setting, neither Justice Thomas nor Justice Kagan

¹³⁰ *Williams*, 132 S. Ct. at 2272 (Kagan, J., dissenting).

¹³¹ *Id.* at 2268-70.

¹³² *Id.*

¹³³ *Id.* at 2269 (quoting KAYE ET AL., *supra* note 48, at 196.)

¹³⁴ *Id.* at 2271.

¹³⁵ *Id.* at 2269.

¹³⁶ *Id.*

¹³⁷ *People v. Goldstein*, 843 N.E.2d 727, 732-33 (N.Y. 2005), *cert. denied*, 126 S. Ct. 2293 (2006).

¹³⁸ *Williams*, 132 S. Ct. at 2269 (Kagan, J., dissenting) (quoting *People v. Goldstein*, 843 N.E.2d 727, 732-33 (N.Y. 2005)).

¹³⁹ *Id.* at 2271.

¹⁴⁰ *Id.* at 2260-63 (Thomas, J., concurring in judgment).

¹⁴¹ *Id.* at 2265 (Kagan, J., dissenting).

¹⁴² *Id.* at 2226 (plurality opinion).

found it necessary to explore the implications of that view. However, since a majority of the Court's members has stated that view, it will now be on the mind of many lower court judges who must apply Rule 703 in post-*Williams* cases.¹⁴³ What are the implications of that view? What are the stakes involved in the dispute between the Rule 703 majority and the plurality? The two remaining parts of this article turn to those issues.

III. THE STAKES INVOLVED IN THE DISPUTE OVER THE EVIDENTIARY STATUS OF SECONDHAND REPORTS USED UNDER RULE 703

In his plurality opinion, Justice Alito acknowledges that at least in some circumstances the falsity of a secondhand report used under Rule 703 can render the opinion irrelevant.¹⁴⁴ He does not seem to believe, however, that the lack or insufficiency of independent, admissible evidence of the fact mentioned in the report calls into question the admissibility of the opinion itself.¹⁴⁵ Rather, he apparently views the problem as one of the weight of the opinion.¹⁴⁶ As previously stated, near the end of his opinion he asserts that "the trial judges may and, under most circumstances, must instruct the jury that . . . an expert's opinion is only as good as the independent evidence that establishes its underlying premises."¹⁴⁷ He specifically discusses the extreme fact situation in which the proponent "cannot muster any independent admissible evidence to prove the foundational facts that are essential to the relevance of the expert's testimony"¹⁴⁸ In addressing that situation, he does not even mention the possibility of outright judicial exclusion of the opinion. Rather, he states that in such a circumstance, "the expert's testimony cannot be given any weight by the trier of fact."¹⁴⁹ In that circumstance, the trial judge would presumably give an instruction like the *Forsyth* jury charge that Justice Alito approvingly quoted earlier in his opinion: "If the [facts mentioned in the secondhand reports] are not supported by [independent] proof, then the answers to the questions are entitled to no weight"¹⁵⁰

As noted in subparts II.B and II.C, unlike Justice Alito, Justice Thomas and Justice Kagan do not explore the consequences of their conclusion that the secondhand report about the Cellmark test had to be admitted for its truth; after reaching that conclusion, both justices immediately segue to their analysis of the Sixth Amendment Confrontation Clause issue in *Williams*.¹⁵¹ Yet the obvious, unanswered question is: Where does the logic of their position lead? Their position could lead to the conclusion that the lack or insufficiency of admissible evidence of the fact mentioned in the secondhand report poses an admissibility problem, not merely a weight problem. There is certainly a plausible argument that if (1) secondhand reports are necessarily admitted for the truth of the report, (2) the falsity of the reports renders the opinion irrelevant, and (3) in a given case there is either no admissible evidence or insufficient admissible evidence of the truth of the fact mentioned in the secondhand report, the opinion itself should be excluded. The proper enforcement mechanism would arguably be a judicial ruling

¹⁴³ See, e.g., *State v. Nararette*, 81 U.S.L.W. 1068 (N.M. Sup. Ct. Jan. 17, 2013).

¹⁴⁴ *Williams*, 132 S. Ct. at 2238 (Kagan, J., dissenting).

¹⁴⁵ *Id.* at 2239.

¹⁴⁶ *Id.* at 2237.

¹⁴⁷ *Id.* at 2241.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 2234.

¹⁵¹ *Id.* at 2259, 2272.

excluding the opinion, not the weaker measure of a *Forsyth*-style judicial instruction telling the jury to assign the opinion “no weight.”¹⁵²

Ultimately, the position taken by the 703 majority in *Williams* could lead to the abolition of many of the procedural distinctions between hypothetical questions and questions based on secondhand reports used under Rule 703.¹⁵³ As subpart I.A explained, in the case of hypothetical questions, before posing the question to the expert the proponent must ordinarily present independent, admissible evidence of every fact included in the hypothesis.¹⁵⁴ If the proponent neglects to do so, the judge bars the question and prevents the jury’s exposure to the opinion.¹⁵⁵ In contrast, if the proponent opts for an opinion based on secondhand reports under Rule 703 rather than a hypothetical question, the judge does not impose the condition precedent that the proponent submit independent, admissible evidence of the fact mentioned in the report.¹⁵⁶ At most, as Justice Alito’s opinion indicates, the judge instructs the jury that they should consider the lack of independent evidence of the fact in deciding how much weight to ascribe to the opinion.¹⁵⁷ However, if the 703 majority’s position is sound, at first blush the differential treatment of hypothetical questions and questions based on secondhand reports seems indefensible. The position strongly implies that if the presentation of admissible evidence *aliunde* is a condition precedent to posing the hypothetical question, the judge should impose the same condition in the case of questions resting on secondhand reports under Rule 703.

IV. A CRITICAL EVALUATION OF THE MERITS OF THE DISPUTE OVER THE EVIDENTIARY STATUS OF SECONDHAND REPORTS USED UNDER RULE 703

We now turn to the merits of the dispute over the evidentiary status of secondhand reports. We shall evaluate the dispute from two perspectives. Initially, we shall consider whether, as a matter of logic, the plurality or the 703 majority has the better argument. Then we shall analyze the issue as a problem of statutory construction.

A. The Logic of the Use of a Secondhand Report as a Basis for an Expert Opinion

A dissection of the logic of using secondhand reports poses several subissues:

1. Nonhearsay Uses of Secondhand Reports

Can a secondhand report that is used as the basis for an expert opinion ever possess legitimate, nonhearsay logical relevance?

Both Justices Thomas and Kagan believe that whenever an expert relies on a secondhand report as the basis for an opinion, the contents of the report are necessarily being put to a hearsay, substantive use.¹⁵⁸ As subpart III.C noted, when Congress enacted the Federal Rules, most jurisdictions in the common law world were of the same mind.¹⁵⁹

¹⁵² *Id.* at 2234.

¹⁵³ *Id.* at 2239.

¹⁵⁴ *Id.* at 2241.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 2228.

¹⁵⁷ *Id.* at 2240.

¹⁵⁸ *Id.* at 2259, 2272.

¹⁵⁹ *Id.* at 2239; Edward J. Imwinkelried, *A Comparativist Critique of the Interface Between Hearsay and Expert Opinion in American Evidence Law*, 33 B.C. L. REV. 1, 24-29, 34 (1991).

That view, however, was not universal throughout the common law world.¹⁶⁰ One English commentator, Keane, took the position that when secondhand reports serve as the basis for an expert opinion, the reports have “no hearsay quality.”¹⁶¹ A Canadian evidence scholar, McWilliams, agreed that so long as the judge gives the jury a “careful” instruction specifying the proper use of the report, the report is not subject to a hearsay objection.¹⁶² In short, just as the plurality and the 703 majority disagree in *Williams*,¹⁶³ the authorities in other countries are divided over the evidentiary status of secondhand reports.

The question recurs: Can such reports possess legitimate nonhearsay logical relevance? The answer is Yes. Justice Alito’s opinion suggests two examples.¹⁶⁴

In one passage, Justice Alito states that a secondhand report possesses plausible nonhearsay relevance to the question of whether “the expert’s reasoning was . . . logical.”¹⁶⁵ The justice explains that the factfinder’s consideration of the secondhand report can help the factfinder assess the quality of “the expert’s thought process.”¹⁶⁶ By reviewing the secondhand reports mentioned by the expert and the manner in which the expert processed the reports, the factfinder can determine whether the expert committed any evident logical fallacies in reasoning to his or her opinion.¹⁶⁷ The factfinder can make that determination regardless of the truth of the secondhand report.¹⁶⁸ Putting aside the question of the truth of the report, the factfinder’s consideration of the report for this purpose can give the factfinder some insight into the caliber of the expert’s reasoning.¹⁶⁹ Even if the secondhand report is false, a consideration of the report can help the jury decide whether the expert correctly connected the dots in his or her reasoning.¹⁷⁰

In another passage, Justice Alito indicates that the factfinder’s consideration of the secondhand reports can aid the factfinder in deciding whether “the expert drew an unwarranted inference from the premises on which the expert relied.”¹⁷¹ The factfinder can review all the secondhand reports cited by the expert and inquire whether, cumulatively, they have adequate probative value to support the inference the expert proposes drawing.¹⁷² Considered together, do the secondhand reports furnish sufficient warrant for the expert’s claim? Do the reports justify the proposed inference, or is the expert overstating the conclusion that can be drawn from the premises? Once again the factfinder can put the report to this use regardless of its truth.

This second use of secondhand reports brings a traditional nonhearsay use of out-of-court statements—mental input—into play. Under the mental input theory of logical relevance, the trial judge admits the statement for the limited purpose of showing its effect

¹⁶⁰ Imwinkelried, *supra* note 159, at 23-24.

¹⁶¹ ADRIAN KEANE, *THE MODERN LAW OF EVIDENCE* 369-70 (2d ed. 1989).

¹⁶² PETER K. MCWILLIAMS, *CANADIAN CRIMINAL EVIDENCE* 251 (2d ed. 1984).

¹⁶³ 132 S.C t. at 2239.

¹⁶⁴ *Id.* 2240.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ ROBERT J. KREYCHE, *LOGIC FOR UNDERGRADUATES* Ch. 2-3 (3d ed. 1970) (listing the fallacies of equivocation, amphiboly, composition and division, accent, accident, special case, ignoring the issue, begging the question, and complex question).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ 132 S. Ct at 2240.

¹⁷² *Id.*

on the state of mind of the hearer or reader.¹⁷³ Suppose, for example, that a plaintiff sued a police officer for false arrest. Under the law of the jurisdiction, the officer is not liable if she based the arrest on a reasonable, albeit mistaken, belief that the defendant had committed a crime. At trial, the officer attempts to testify that before she arrested the plaintiff, a third party told her that he had just observed the plaintiff selling cocaine. Even if the third party's report to the officer is false, the officer's receipt of the report can produce in her mind an honest, reasonable belief that the plaintiff had perpetrated a felony. Under Rule 105, the trial judge would give the jury a limiting instruction that although they could not treat the report as substantive evidence that the plaintiff sold cocaine, they may consider the report in evaluating the honesty and reasonableness of the officer's belief.¹⁷⁴

By the same token, an expert's receipt of a secondhand report can help establish the reasonableness of the expert's thought process.¹⁷⁵ The jury is surely entitled to inquire whether, on its face, the expert's analytic process is reasonable. The more secondhand data the expert receives, the better grounded the opinion will be. In footnote 3 in his concurrence, Justice Thomas dismisses the application of the mental input theory.¹⁷⁶ However, he considers one variation of the mental input theory: offering the secondhand report of the Cellmark finding "to explain what prompted [Ms. Lambatos] to search the DNA database for a match."¹⁷⁷ He is correct in concluding that use of the evidence in this way would not necessitate disclosing the details that Cellmark had found a male DNA profile in the semen from L.J.'s vaginal swabs.¹⁷⁸ But using the report to explain the recipient's subsequent conduct is only one variation of the mental input theory. As the preceding paragraph demonstrates, the report could also be used to show the honesty and reasonableness of the recipient's state of mind. A proponent offering a secondhand report to establish the reasonableness of an expert's thought process is invoking a variation of the mental input theory. The trial judge may permit a reference to the report for that nonhearsay purpose and give the jury a limiting instruction specifying that purpose.¹⁷⁹

2. Hearsay Uses of Secondhand Reports

Even if the secondhand report possesses nonhearsay logical relevance, is it realistic to think that the lay jurors will be able and willing to follow the limiting instruction? Or are they likely to disregard the instruction, misuse the evidence for a hearsay purpose, and treat the report as substantive evidence of the fact mentioned in the report?

In many instances, a single item of evidence is logically relevant to the facts on multiple theories.¹⁸⁰ In the preceding discussion, we saw that secondhand reports can sometimes be logically relevant on a nonhearsay theory for the purpose of helping the factfinder evaluate the quality of the expert's reasoning. However, the same report may be relevant for a hearsay purpose as well. Suppose, for example, that a testifying physician relies on a nurse's secondhand report about the plaintiff patient's symptoms. It is clear that the Advisory Committee contemplated Rule 703's application to such reports.¹⁸¹ The

¹⁷³ EDWARD J. IMWINKELRIED ET AL., *COURTROOM CRIMINAL EVIDENCE* § 1004, at 10-17-24 (5th ed. 2011).

¹⁷⁴ *Id.*

¹⁷⁵ Imwinkelried, *supra* note 159, at 14.

¹⁷⁶ 132 S. Ct. at 2258 n.3 (Thomas, J., concurring in the judgment).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ IMWINKELRIED ET AL., *supra* note 173 § 1004, at 10-17-24.

¹⁸⁰ DAVID P. LEONARD, *THE NEW WIGMORE: SELECTED RULES OF LIMITED ADMISSIBILITY* § 1.4, (2002).

¹⁸¹ FED. R. EVID. 703 advisory committee's note (reports and opinions from nurses).

nurse's report, however, could also be logically relevant as substantive evidence on the issue of the plaintiff's damages. The rub is that although relevant to damages, the nurse's report could be inadmissible for that purpose because it might not fall within any hearsay exception.¹⁸² In these dual relevance fact situations when an item of evidence is admissible for one purpose but not for another, the common law solution has been to admit the evidence but to require a limiting instruction.¹⁸³ Federal Rule of Evidence 105 continues the traditional practice.¹⁸⁴

Because the hearing in *Williams* was a bench trial, there was minimal risk that any secondhand report would be misused.¹⁸⁵ The risk of misuse is much greater when the factfinder is a jury of laypersons. In the 1980s Professor Rice asserted that it is an absurd fiction that the jurors can and will comply with the limiting instruction in this setting.¹⁸⁶ More recently, in their text on scientific evidence, Professors Kaye, Bernstein, and Mnookin state that it is "highly unlikely that juries are capable of such mental gymnastics."¹⁸⁷ If the jurors disregard the limiting instruction, Rule 703 becomes a backdoor hearsay exception that admits the secondhand report as substantive evidence.¹⁸⁸

Evidence scholars are not the only commentators who have expressed skepticism about the jurors' compliance with the limiting instruction. To begin with, as Professors Kaye, Bernstein, and Mnookin point out, there is an extensive body of psychological research indicating that in some circumstances, lay jurors are likely to ignore limiting instructions, including instructions about the limited evidentiary status of secondhand reports.¹⁸⁹ A number of courts have voiced the same skepticism.¹⁹⁰ On the particular facts of specific cases, the United States Supreme Court has occasionally held that it was unrealistic to believe that a limiting or curative instruction to disregard would be effective.¹⁹¹ Indeed, as amended in 2000, Rule 703 itself reflects an awareness of this danger. In that year, the rule was amended to codify a presumptive rule that the expert may not go into detail elaborating the content of an otherwise inadmissible secondhand report.¹⁹² The Advisory Committee Note accompanying the amendment mentions the danger of "the jury's potential misuse of the information as substantive evidence."¹⁹³ The

¹⁸² Cf. FED. R. EVID. 803(4) (exception to the rule against hearsay: statement made for medical diagnosis or treatment).

¹⁸³ LEONARD, *supra* note 180 § 1.4. For instance, with a limiting instruction, a judge might admit an accused's prior conviction for impeachment under Rule 609 but bar its use as bad character evidence on the historical merits under Rules 404-05. Likewise, a judge could permit the introduction of evidence of an accused's prior crime on a noncharacter theory to show motive under Rule 404(b) but preclude the prosecution from treating the act as evidence of the accused's general bad character under Rule 404(a).

¹⁸⁴ *Id.* § 1.5.

¹⁸⁵ *Williams*, 132 S. Ct. at 2222, 2242.

¹⁸⁶ Rice, *supra* note 48, at 585.

¹⁸⁷ KAYE ET AL., *supra* note 48 § 3.7.2; see also BARBARA & NANCY HOLLANDER, WHARTON'S CRIMINAL EVIDENCE § 4:8, (15th ed. 2012).

¹⁸⁸ 3 *Federal Rules of Evidence Manual*, § 703.2[4] (Matthew Bender 10th ed.).

¹⁸⁹ KAYE ET AL., *supra* note 48 § 3.7.2, at n. 37 (2004).

¹⁹⁰ *E.g.*, *People v. Coleman*, 695 P.2d 189 (Cal. 1985).

¹⁹¹ RONALD L. CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS § 15.3(A), at 439-41 (4th ed. 2010) (discussing *Shepard v. United States*, 290 U.S. 96 (1933), *Jackson v. Denno*, 378 U.S. 368 (1964), and *Bruton v. United States*, 391 U.S. 123 (1968)).

¹⁹² The last sentence of restyled Rule 703 now provides: "But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if the probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."

FED. R. EVID. 703.

¹⁹³ FED. R. EVID. 703 advisory committee's note (amended 2000).

Note counsels trial judges to “consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances.”¹⁹⁴

This line of argument is not so much an attack on Rule 703 as it is a plea for the more frequent invocation of Rule 403. In general terms, Rule 403 allows trial judges to exclude otherwise inadmissible evidence when they believe that the attendant probative dangers such as unfair prejudice substantially outstrip the probative worth of the evidence.¹⁹⁵ The Advisory Committee Note to Rule 403 explains that unfair prejudice includes the danger that the jury will decide the case on an improper basis.¹⁹⁶ More to the point, the Note indicates that the risk of unfair prejudice arises when evidence is admissible only for a limited purpose but the judge believes that the jury will misuse the evidence for another, inadmissible purpose.¹⁹⁷ When a juror misuses the item of evidence and that misuse influences the juror’s vote, the misuse can prompt a verdict on an improper basis. Given the right facts and the psychological research into the efficacy of limiting instructions, trial judges should be more receptive to the argument that Rule 403 trumps Rule 703 in a given case because there is an intolerable risk that the jury will ignore the limiting instruction. However, the Supreme Court has rarely found such an intolerable risk.¹⁹⁸ Typically, the Court has done so only when a “perfect storm” created the risk: The out-of-court statement was directly relevant to a critical issue in the case, the declarant presumably had personal knowledge of the fact asserted, and the declarant was a key player in the case—the accused himself or herself, a co-conspirator, or the named victim.¹⁹⁹ In many cases, secondhand reports used under Rule 703 will lack one or more of these characteristics: The report might not bear directly on a vital issue in the case, it may be doubtful whether the declarant possessed firsthand knowledge, or the declarant may have only a minor role in the transaction. Perhaps trial judges should accept such Rule 403 arguments more often, but this line of argument does not undermine Rule 703 itself. In contrast, the next argument represents a more formidable, fundamental challenge to Rule 703.

Even if the secondhand report possesses nonhearsay logical relevance, does the factfinder have to put the report to hearsay use and treat it as substantive evidence of the truth of the report in order to make an intelligent decision whether to accept the opinion based on the report?

The attack discussed above rests on a prediction that in some cases jurors will disregard the limiting instruction and put the report to a substantive, hearsay use. In the final analysis that attack sounds in Rule 403 rather than Rule 703. The next argument, however, rests on logic rather than a prediction of juror behavior. According to this argument, in every case the factfinder must put the report to a substantive, hearsay use in order to decide whether the opinion is relevant and should be accepted.²⁰⁰ The thrust of the argument is that as a matter of logic, the secondhand report must always be used for that purpose; if the fact mentioned in the report is essential to the validity of the opinion and there is no sufficient admissible evidence of the truth of the fact, the opinion is irrelevant

¹⁹⁴ *Id.*

¹⁹⁵ FED. R. EVID. 403.

¹⁹⁶ FED. R. EVID. 403 advisory committee’s note.

¹⁹⁷ *Id.* (Specifically: “In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.”).

¹⁹⁸ *United States v. Martinez*, 939 F.2d 412, 414-415 (7th Cir. 1991).

¹⁹⁹ CARLSON & IMWINKELRIED, *supra* note 191 § 15.3, at 441.

²⁰⁰ Ian Volek, *Federal Rule of Evidence 703: The Back Door and the Confrontation Clause, Ten Years Later*, 80 *FORDHAM L. REV.* 959, 977-8 (2011).

and should be excluded.²⁰¹

A number of respected commentators subscribe to this line of argument.²⁰² They contend that it is “logically incoherent” to admit the opinion absent admissible evidence of the truth of its premises.²⁰³ The validity and relevance of the opinion necessarily depend on the truth of its premises.²⁰⁴ Absent such evidence of the truth of the premises, the opinion is unsubstantiated and irrelevant.²⁰⁵ If sufficient admissible evidence supporting the opinion’s premises is not available, it is illogical to admit the opinion as substantive evidence in the case.²⁰⁶ It is fallacious for the factfinder to accept the truth of the opinion absent admissible proof of the truth of the premises.²⁰⁷ Some courts have embraced this argument²⁰⁸ and, as previously stated, even Justice Alito acknowledged in *Williams* that the falsity of the premise of the truth of Cellmark’s report would render Ms. Lambatos’s opinion irrelevant.²⁰⁹

As a generalization, this line of argument is correct. When a conclusion or opinion rests on certain premises, the opinion is conditional in nature.²¹⁰ When a conclusion is said to be conditional on a certain fact, the validity of the conclusion is contingent on the truth of the condition.²¹¹ That understanding of the nature of a condition is pervasive in the law. For example, Contracts law treats the concept of a condition in that manner.²¹² The Federal Rules of Evidence also reflect the concept of conditional validity.²¹³ If the validity of an opinion is conditional upon the truth of a certain premise, a decision maker cannot accept the opinion as valid unless and until the premise is proven to be true.

There is an important qualification, though, to this generalization: The generalization holds true only when the premise essential to the conclusion. In some instances a secondhand report used under Rule 703 lends further support to the expert’s opinion but the fact mentioned in the report is not an essential premise. Consider, for example, a defense psychiatrist’s opinion that a person is suffering from a certain mental disorder. The disorder is one of the illnesses for which there are Feigner inclusionary criteria.²¹⁴ Assume that the American Psychiatric Association’s *Diagnostic and Statistical Manual (DSM) IV-TR* states that there are four classic symptoms of the disorder and that before diagnosing a subject as suffering from the disorder, the psychiatrist must find that

²⁰¹ *Id.*

²⁰² KAYE ET AL., *supra* note 48 § 4.7.2, at 178-81; Charles Alan Wright et al., 29 FED. PRAC. & PROC. EVIDENCE § 6272 (1997); Rice, *supra* note 48, at 585.

²⁰³ KAYE ET AL., *supra* note 48, at 179.

²⁰⁴ Rice, *supra* note 48, at 585.

²⁰⁵ KAYE ET AL., *supra* note 48, at 179.

²⁰⁶ Wright et al., *supra* note 202, at 320.

²⁰⁷ KAYE ET AL., *supra* note 48, at 179; Rice, *supra* note 48, at 585.

²⁰⁸ See, e.g., *People v. Goldstein*, 6 N.Y.3d 119, 127 (2005) (the court did not see how a factfinder could accept an opinion “without accepting [the] premise . . . that the statements were true . . .”).

²⁰⁹ *Williams*, 132 S. Ct. 2221, 2238 (2012).

²¹⁰ Edward J. Imwinkelried, *A Comparativist Critique of the Interface Between Hearsay and Expert Opinion in American Evidence Law*, 33 B.C. L. REV. 1, 33 (1991).

²¹¹ *Black’s Law Dictionary* 293 (6th ed. 1990).

²¹² E. ALLAN FARNSWORTH, *CONTRACTS* § 8.2, at 519 (3d ed. 1999).

²¹³ FED. R. EVID. 104(b).

²¹⁴ See generally Jules B. Gerard, *The Usefulness of the Medical Model to the Legal System*, 39 Rutgers L. Rev. 377, 402 (1987) (explaining the Feighner Criteria, their application to certain mental illnesses, and how they are used in legal processes).

the subject's case history includes at least three of the four symptoms.²¹⁵ The psychiatrist is prepared to testify that the accused suffers from the disorder and that the basis for her opinion consists of 703 secondhand reports about all four symptoms. Suppose further that while the record contains independent, admissible evidence of three symptoms, there is no such evidence of the fourth. In these circumstances, the prosecution could attack the weight of the psychiatrist's opinion by pointing to the absence of admissible evidence of the fourth symptom. However, since the diagnostic criteria require a finding of only three symptoms, the lack of admissible evidence of the fourth symptom would not render the opinion irrelevant; even if the fourth symptom is absent, there is an adequate basis for the opinion. The absence of independent evidence of the fourth symptom would not make it illogical for the factfinder to accept the psychiatrist's opinion.

Vary the hypothetical. Assume that there is either no evidence or insufficient independent evidence of both the third and fourth symptoms or that the factfinder rejects the evidence of the existence of the third or fourth symptoms. Now the state of the evidentiary record undercuts an essential premise of the opinion; *ex hypothesi* only two of the three necessary symptoms are present in the accused's case history. Given these assumptions, the opinion is irrelevant and it would be illogical for the factfinder to embrace the opinion. Simply stated, the falsity of a truly essential premise²¹⁶ invalidates the expert's conditional opinion.

3. The Allocation of the Factfinding Responsibility Between the Judge and Jury with Respect to Secondhand Reports

Does the fact that the falsity of an essential premise of a conditional opinion renders the opinion irrelevant dictate the conclusion that the trial judge should be assigned the task of deciding the truth of the premise and empowered to exclude the opinion whenever he or she would conclude that the essential premise is false? Or is jury is generally competent to perform that task?

As we have seen, the falsity of an essential premise of an opinion can render the opinion irrelevant; if an essential premise of an opinion is false, it is illogical for the factfinder to accept the opinion as true. That analysis, however, does not dictate the conclusion that in all cases the trial judge should be authorized to decide whether an essential premise is false and, if so, bar the opinion. The basic question is one of the allocation of factfinding responsibility between the judge and jury.²¹⁷

In several cases, the common law of Evidence and the Federal Rules assign to the jury the responsibility of deciding facts which determine the logical relevance of an item of evidence.²¹⁸ Concededly, the trial judge usually resolves factual questions that determine the admissibility of evidence.²¹⁹ Federal Rule of Evidence 104(a) recognizes this practice.²²⁰ For example, suppose that an opponent makes a hearsay objection to testimony about an out-of-court statement offered as an excited utterance under Federal

²¹⁵ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR, (4th ed. text revision 2010).

²¹⁶ In the analogous context of hypothetical questions, the trial judge has authority to bar the question when the judge believes that the hypothesis omits an essential premise. The judge determines whether the hypothesis furnishes "an adequate basis" for the expert's opinion. KENNETH BROUN ET AL., MCCORMICK ON EVIDENCE § 14, at 90 (6th ed. 2006).

²¹⁷ Rice, *supra* note 48, at 588.

²¹⁸ See generally Edward J. Imwinkelried, *Determining Preliminary Facts Under Federal Rule 104*, 45 AM. JUR. TRIALS 1, § 33 (1992).

²¹⁹ FED. R. EVID. 104(a).

²²⁰ *Id.*

Rule 803(2).²²¹ The trial judge decides the foundational question of whether the declarant was in a state of nervous excitement at the time of the statement. Similarly, assume that an opponent objects to a question on the ground that the question calls for the disclosure of a communication protected by the attorney-client privilege under Federal Rule 501.²²² These issues fall into the category of foundational or preliminary facts conditioning the “competence” of evidence.²²³ The judge decides the question of the existence or truth of these facts.

However, there is another category of foundational facts—those conditioning the logical relevance of evidence.²²⁴ This category includes such foundational facts as a lay witness’s possession of personal knowledge²²⁵ under Rule 602 and the authenticity of exhibits²²⁶ under Rule 901.²²⁷ Federal Rule of Evidence 104(b) codifies the conditional relevance doctrine: “When the [logical] relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.”²²⁸

When a fact falls under Rule 104(b), the trial judge plays a limited, screening role.²²⁹ Rather than passing on the credibility of the proponent’s foundational testimony, the trial judge accepts the testimony at face value.²³⁰ The judge then conducts a limited inquiry: If the jury chooses to believe the foundational testimony, does the testimony have sufficient probative value to support a rational, permissive inference of the existence of the foundational fact such as, for instance, the fact that the witness saw the accident or the plaintiff actually authored the letter?²³¹ Assume the trial judge ruled that there was sufficient evidence. The trial judge would then allow the lay witness to testify about the accident or permit the letter’s proponent to submit it to the jury. In the final jury charge, the judge would instruct the jurors that they have to decide the issue of whether the lay witness possessed firsthand knowledge of the accident or whether the plaintiff signed the letter.²³² More specifically, the trial judge tells the jurors that:

- If they find that the preliminary fact is true, they may consider the lay witness’s testimony or the exhibit during the balance of their deliberations.
- However, if they find that the preliminary fact is false, they should completely disregard the testimony and exhibit during their deliberations.²³³

²²¹ Imwinkelried, *supra* note 218, at § 50.

²²² *Id.* § 42.

²²³ EDWARD J. IMWINKELRIED ET AL., *COURTROOM CRIMINAL EVIDENCE* § 133 (5th ed. 2011).

²²⁴ *Id.* § 134.

²²⁵ Imwinkelried, *supra* note 218, at § 10.

²²⁶ *Id.* § 20-22.

²²⁷ *Id.*

²²⁸ FED. R. EVID. 104(b).

²²⁹ Imwinkelried, *supra* note 218, at § 31.

²³⁰ *Id.* § 31.

²³¹ 45 Edward J. Imwinkelried, *Determining Preliminary Facts Under Federal Rule 104* AM. JUR. TRIALS § 31 (1992).

²³² *Id.* § 65.

²³³ 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, 11 (2000).

Federal Rules of Evidence 602 and 901 make it clear that the conditional relevance doctrine governs the preliminary facts of a lay witness's personal knowledge and an exhibit's authenticity.²³⁴ For its part, Rule 602 states that a lay witness may testify about a fact or event "if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."²³⁵ Rule 901(a) adds that in the case of exhibits such as letters, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it to be."²³⁶

Why treat these preliminary facts differently than the run-of-the-mill preliminary facts that fall under Rule 104(a) and that are assigned to the trial judge? The title of the doctrine codified in Rule 104(b), "conditional relevance," is suggestive.²³⁷ Suppose that at the outset of their deliberations, the jurors decide that the lay witness called by the plaintiff does not have personal knowledge of the accident he testified about; they are convinced that the witness is lying or mistaken. On that supposition, common sense will naturally lead the jury to disregard the witness's testimony during the remainder of its deliberations. The jurors have literally decided that this witness "doesn't know what he's talking about." This is a common sense notion, not a technical legal doctrine. The justification for classifying the authenticity of exhibits as falling under Rule 104(b) is similar.²³⁸ Assume that, at the beginning of their deliberations, the jurors decide that the letter purportedly signed by the plaintiff is a forgery. Again, they should have no difficulty putting aside the letter for the remainder of their deliberations. Here they have decided that the letter "isn't worth the paper it's written on." Foundational facts are categorized under 104(b) when they condition the logical relevance of the evidence in such a fundamental sense that even lay jurors without legal training will see that the falsity of the fact renders the evidence irrelevant.²³⁹ For that reason, we trust the jury to make the ultimate determination whether the witness has firsthand knowledge or whether the exhibit is authentic. If the jurors decide that the preliminary fact is false, their prior exposure to the witness's testimony or the letter is unlikely to taint the remainder of their deliberations; once they decide that the preliminary fact is false, they will view the evidence as irrelevant and worthless. They should be perfectly capable of putting the testimony out of mind.

There is a strong analogy between these "conditional relevance" preliminary facts and the question of the truth of the essential premises for an expert opinion. If a lay witness lacks personal knowledge of the accident he proposes to testify about, his lack of firsthand knowledge renders his testimony irrelevant. Again, if an exhibit is not genuine, its inauthenticity renders the exhibit irrelevant and patently worthless. Similarly, when an essential premise of an expert opinion is false, its falsity renders the opinion irrelevant.

The question is whether we can generally trust the jury to determine the falsity of the essential premise. The bottom line issue is whether we can be confident that the jurors can and will disregard the expert's opinion if they conclude that an essential premise is false. That does not seem to be too much to ask of lay jurors. Any reasonably intelligent person can understand this common sense argument: A (the opinion) is true only if B (the essential premise) is true; B is false; ergo, A is false. One does not need a college degree,

²³⁴ David S. Schwartz, *A Foundation Theory of Evidence*, 100 GEO L.J. 95, 100 (2011).

²³⁵ FED. R. EVID. 602.

²³⁶ FED. R. EVID. 901(a).

²³⁷ EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 134 (5th ed. 2011).

²³⁸ *Id.* § 401.

²³⁹ John Kaplan, *Of Mabrus and Zorgs—An Essay in Honor of David Louisell*, 66 CALIF. L. REV. 987, 995 (1978); Edward J. Imwinkelried, *Judge Versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence?* 25 WM. & MARY L. REV. 577, 594 (1984).

much less a J.D. or a B.S., to realize that the conclusion follows inexorably from the premises. We can therefore safely entrust the decision to the jury.²⁴⁰

Admittedly, Federal Rule 104(a)'s competence procedure governs some of the foundational facts conditioning the admissibility of expert opinions.²⁴¹ For example, in the majority opinion in the celebrated *Daubert* decision, Justice Blackmun explicitly stated that 104(a) controls the judge's determination whether the theory or technique the expert proposes employing has been validated by adequate, methodologically sound empirical reasoning and data.²⁴² However, the admissibility of a single item of evidence is often conditioned on multiple preliminary facts, some falling under 104(a) and others under 104(b).²⁴³ For example, suppose that a defense counsel offers a conviction to impeach a prosecution witness. Under Federal Rule of Evidence 609(c), the trial judge determines whether the conviction is inadmissible because the witness has been pardoned for the prior crime.²⁴⁴ However, the conviction is obviously irrelevant and inadmissible for the purpose of impeaching this witness unless the witness is the person who suffered the conviction.²⁴⁵ The determination of the witness's identity as the convict falls under Rule 104(b).²⁴⁶ Thus, it is quite possible to assign the jury the task of determining the sufficiency of the admissible evidence of the facts mentioned in the secondhand reports under Rule 703 even though the trial judge has the determinative vote on many of the other facets of the admissibility of the expert's opinion.

If the jury can be assigned this task, the approach outlined in Justice Alito's plurality opinion is generally satisfactory. In the typical case, rather than personally deciding whether the opinion's essential premises are true, the judge instructs the jurors that they have that task; they are to weigh the independent, admissible evidence of the fact stated in the secondhand report to decide whether that fact is true. Moreover, as in *Forsyth*, the judge bluntly tells the jurors that if they find that one of the opinion's essential premises is false, they must give the opinion "no weight."²⁴⁷

What about the exceptional situation in which the expert's proponent fails to present sufficient independent evidence of the truth of the facts stated in the secondhand reports used under Rule 703? In that situation, does logic dictate that the opinion is irrelevant and the trial judge should bar the proponent from submitting the opinion to the jury?

The previous paragraphs developed a parallel to Federal Rule of Evidence 104(b).²⁴⁸ That statute assigns the ultimate conditional relevance determination to the jury. By its terms, however, the statute also prescribes that the trial judge must submit that

²⁴⁰ In a given case, it might be tenable to argue that under Rules 403 and 611(a) the trial judge is authorized to deviate from the normal rule allocating the responsibility to the jury. Suppose, for example, that the foundational testimony about the scientific evidence consumed hours of courtroom time and hundreds of pages of transcript. "Understandably, when jurors listen to hours of foundational scientific testimony, they [may] have difficulty ignoring the proof during their deliberations [even after] they find that" the opinion is inadmissible. Imwinkelried, *supra* note 239, at 605. That argument is plausible when the jury realizes that the evidence is being excluded for a technical legal reason. The argument carries less weight in a setting such as here in which the jury has decided that the opinion is irrelevant.

²⁴¹ Imwinkelried, *supra* note 231, at § 47.

²⁴² *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593 (1993).

²⁴³ Imwinkelried, *supra* note 231, at § 47.

²⁴⁴ FED. R. EVID. 609(c).

²⁴⁵ *Id.* at advisory committee's note (1974 Enactment).

²⁴⁶ Imwinkelried, *supra* note 231, at §19.

²⁴⁷ *Williams v. Illinois*, 132 S. Ct. 2221, 2234 (2012).

²⁴⁸ FED. R. EVID. 104(b).

ultimate decision to the jury only when the proponent has “introduced [proof] sufficient to support a finding [by the jury] that the fact does exist.”²⁴⁹ Rule 602’s restatement of the standard is explicit; according to Rule 602, the judge must permit the jury to make the final decision “*only* if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”²⁵⁰ Suppose that after reviewing the record, the judge concludes either that the proponent has presented no evidence of the fact or that, as a matter of law, the proponent’s evidence is insufficient to support a rational inference. In that situation, the judge makes a peremptory ruling, never submits the question to the jury, and excludes the evidence. In that state of the record the jury could not make a rational finding that the witness possessed firsthand knowledge; to regulate the rationality of the verdict, the judge bars the testimony.

Consider a parallel situation involving secondhand reports. Assume that after reviewing the state of the record at the time the proponent proffers the opinion, the judge concludes that there is no admissible evidence of the fact stated in an essential secondhand report or that the independent evidence is too flimsy to sustain a rational inference. Even if the jurors chose to believe the independent evidence, they could not find the essential premise to be true. As under Rule 104(b), the state of the record calls out for the judge to make a peremptory ruling and exclude the expert opinion.²⁵¹ It makes no sense to expose the jury to the opinion when it is clear that it would be irrational for the jury to find the existence of one or more of the essential premises of the opinion. It would hardly enhance the integrity of the factfinding process to give the jury an opportunity to make an undeniably irrational decision.

B. The Legislation Governing the Use of a Secondhand Report as a Basis for an Expert Opinion

Subpart A demonstrates how logic strongly indicates that at least in some cases, the trial judge should bar expert opinions supported by secondhand reported used as the basis for the opinion under Rule 703.²⁵² Logic, however, is not the only force that shapes the law.²⁵³ Moreover, the use of secondhand reports is not a matter of common law in most jurisdictions; there are statutes on point.²⁵⁴ In federal practice Rule 703 governs, and the majority of jurisdictions have state statutes modeled after Rule 703.²⁵⁵ What issues arise under the statute?

Did the drafters perceive a distinction between the facts recited in the attorney’s hypothetical question and facts stated in secondhand reports?

It is understandable that the courts and legislatures have insisted that the facts recited in hypothetical questions be supported by independent, admissible evidence. Aside from the independent evidence, the only mention of the fact is the attorney’s reference in the question he or she poses to the expert. In virtually every American jurisdiction, there is a pattern jury instruction that the attorney’s statements during trial are not evidence.²⁵⁶

²⁴⁹ *Id.*

²⁵⁰ FED. R. EVID. 602.

²⁵¹ Imwinkelried, *supra* note 231, at 10.

²⁵² Dana G. Deaton, *The Daubert Challenge to the Admissibility of Scientific Evidence*, 60 AM. JUR. TRIALS § 8 (1996).

²⁵³ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (1881).

²⁵⁴ *See, e.g.*, ALA. R. EVID. 703 (advisory committee notes) (West 2012); CONN. CODE OF EVIDENCE, §7-4(b) (West, 2012).

²⁵⁵ JOSEPH & SALTZBURG, *supra* note 84 § 52.2 (1987).

²⁵⁶ *E.g.*, Cal. Jury Instructions: Criminal §§ 1.02, 5002 (2012).

However, the drafters of Rule 703 viewed secondhand reports as having much more substance than an attorney's bare assertion.²⁵⁷ Rather than emanating from attorneys, in the words of the Advisory Committee Note, secondhand reports come from other sources such as "nurses, technicians and . . . doctors . . ."²⁵⁸ The Note adds that, to an extent, the witness screens or "expertly perform[s]" a "validation" of the report.²⁵⁹ For instance, over the course of his or her career a forensic pathologist gains considerable experience working with findings from toxicology laboratories and in the process the pathologist may develop a "special talent[]" for evaluating such findings.²⁶⁰ The Note concludes by pointing out that experts "make[] life-and-death decisions in reliance upon" such secondhand reports.²⁶¹ If the expert is willing to place such faith in secondhand reports, it seems silly to bar their use at trial.²⁶² Professor Rice has gone to the length of arguing that the expert's screening creates such a strong inference of trustworthiness that any secondhand report passing muster under Rule 703 should be treated as admissible hearsay and received as substantive evidence.²⁶³ Citing Professor Rice, Professors Kaye, Bernstein, and Mnookin observe that many secondhand reports are at least as reliable as the out-of-court statements routinely admitted under some hearsay exceptions.²⁶⁴ Even if one is unwilling to go as far as Professor Rice, the drafters' conclusion that a secondhand report is a more substantial basis for an expert opinion than an attorney's statement in a hypothetical question is defensible.

If the drafters discerned a distinction between secondhand reports and an attorney's statement in a hypothetical question, did they also manifest an intent to treat secondhand reports differently procedurally? In particular, did they manifest an intent to dispense with any necessity for the proponent of an opinion based on secondhand reports to present independent, admissible evidence of the facts stated in the reports?

The Advisory Committee Note to Rule 703 not only demonstrates that the drafters perceived a distinction between secondhand reports and an attorney's reference to a fact in a hypothetical question. More importantly, the Note also indicates that given the perceived distinction, the drafters wanted to treat hypothetical questions and questions based on secondhand reports differently in a procedural sense.²⁶⁵ Early in the first paragraph in the Note, the drafters mention the requirement that the proponent of a hypothetical question must present independent evidence of the facts recited in the hypothesis.²⁶⁶ The drafters describe the variant of the hypothetical question in which the expert attends trial, "hear[s] the testimony establishing the facts,"²⁶⁷ and later opines on the basis of the testimony that has already been admitted.²⁶⁸ In the middle of the paragraph, the drafters shift the focus from the traditional hypothetical question practice to their innovation permitting reliance on secondhand reports.²⁶⁹ In the third to last sentence

²⁵⁷ FED. R. EVID. 703 advisory committee's note (1972 Proposed Rules).

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Rice, *supra* note 48, at 591.

²⁶¹ FED. R. EVID. 703 advisory committee's note.

²⁶² SALTZBURGET AL., *supra* note 69 § 702.02[3] at 702-12.

²⁶³ Rice, *supra* note 48, at 587-88.

²⁶⁴ KAYE ET AL., *supra* note 48 § 4.7.2, at 180.

²⁶⁵ FED. R. EVID. 703 advisory committee's note.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

in the paragraph, the drafters state that they intend to allow proponents to use secondhand reports “with[out] the expenditure of substantial time in producing and examining various authenticating witnesses.”²⁷⁰ In the next sentence, the drafters assert that the witness’s “validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.”²⁷¹

Those two sentences are informative. Requiring the proponent to present independent, admissible evidence of the truth of the secondhand reports would directly frustrate the drafters’ express intent to obviate the need for the proponent to expend “substantial time in producing and examining various authenticating witnesses.”²⁷² Furthermore, if the presentation of such evidence is a formal requirement, the expert’s screening of the secondhand report no longer “suffice[s]” as a basis for introducing the opinion.²⁷³ Adding that requirement as a judicial gloss would flatly contradict the intent clearly expressed in the Advisory Committee Note. Whatever the appeal or merit of the logic underlying the 703 majority’s position in *Williams*, it is difficult, if not impossible, to justify construing Rule 703 as a mandate that the proponent submit such evidence as a condition precedent to presenting the expert opinion to the factfinder.²⁷⁴

Even if the drafters intended to treat hypothetical questions and questions based on secondhand reports differently, is the differential treatment unconstitutional?

If the 703 majority in *Williams* is correct, the admission of an expert’s opinion based on secondhand reports as substantive evidence is illogical when the record does not contain sufficient, admissible evidence of the facts stated in the reports. Does that conclusion damn Rule 703 to unconstitutionality?

It certainly does not have that effect in civil actions. Consider the related issue of the constitutionality of “illogical” presumptions in civil cases: presumptions in which the basic fact lacks sufficient probative value to support an inference of the existence of the presumed fact.²⁷⁵ On the civil side, the due process clause imposes minimal constraints.²⁷⁶ The prevailing view is that the presumption can be constitutional even when, without more, the basic fact would not support a rational, permissive finding that the presumed fact exists.²⁷⁷ In fashioning a presumption for a civil case, the court or legislature may consider factors other than probability.²⁷⁸ For example, they may consider policy factors and convenience.²⁷⁹ The decisionmaker may consider the very sorts of factors that the drafters mentioned in the Advisory Committee Note accompanying Rule 703.²⁸⁰ The drafters could reasonably conclude that if the witness has “expertly performed” a “validation”²⁸¹ of a secondhand report of a fact, there is little to be gained by also requiring admissible evidence of the fact. Further, the drafters may legitimately weigh the

²⁷⁰ *Id.*; see also 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6272 (1st ed. 1997).

²⁷¹ FED. R. EVID. 703 advisory committee’s note.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Williams v. Illinois*, 132 S. Ct. 2221, 2225 (2012).

²⁷⁵ 2 CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE 522 (6th ed. 2006).

²⁷⁶ *Id.* at 523.

²⁷⁷ *Id.* at 522-23.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 522.

²⁸⁰ FED. R. EVID. 703 advisory committee’s note.

²⁸¹ *Id.*

inconvenience of “the expenditure of substantial time in producing and examining various authenticating witnesses.”²⁸² That inconvenience was one of the policy factors the Court weighed in *Cliquot’s Champagne*.²⁸³

Criminal cases are a different matter. There are at least two situations in which the adoption of the 703 majority’s position could lead to a finding of a constitutional violation. First, assume that in *Williams*, the Cellmark report was a formal certificate, like the certified reports in *Mellendez-Diaz*²⁸⁴ and *Bullcoming*.²⁸⁵ If that has been the case, Justice Thomas would have sided with the four dissenters on the question of whether the report was testimonial. He concurred with the plurality on the testimonial issue only because the Cellmark report was not a “formalized statement[] . . . characterized by solemnity”²⁸⁶ If we vary the facts in that respect, there would have been five votes both for the proposition that the report was testimonial and that Lambatos’s reference to the report was used for the truth of the content of the report. On those assumptions, a majority of the justices would have found a violation of the Sixth Amendment Confrontation Clause.

Justice Alito’s plurality opinion suggests another possibility. In footnote 8, the justice mentions the Court’s 1979 decision in *Jackson v. Virginia*.²⁸⁷ In *Jackson*, the Supreme Court announced that the Due Process Clause controls the standard the trial judge must use to determine whether the prosecution has sustained its initial burden of production and made out a submissible case for the jury.²⁸⁸ More specifically, the Court ruled that the trial judge must determine that a hypothetical juror could find the existence of every essential element of the charge beyond a reasonable doubt.²⁸⁹ The prosecution must meet its burden by presenting admissible, substantive evidence of each element of the offense.²⁹⁰ Suppose that in a given case, the only substantive prosecution evidence of an essential element is an expert opinion resting on secondhand reports. Assume further that the record does not contain admissible, independent evidence of the truth of an essential premise supported by only a secondhand report. Citing the view of the 703 majority in *Williams*, the defense could argue that it is illogical to treat the opinion as substantive evidence absent such admissible corroborating evidence.²⁹¹ Research reveals no case in which a defense counsel has pressed this argument, but post *Williams* it may be only a matter of time before someone does.

While these constitutional attacks are viable, like the Rule 403 argument discussed in subpart IV.A.2, they do not amount to facial attacks on Rule 703 itself. For the most part,²⁹² the Supreme Court has confined facial constitutional attacks to legislation burdening First Amendment activity.²⁹³ In other contexts, a constitutional attack must be

²⁸² *Id.*

²⁸³ *In re Cliquot’s Champagne*, 70 U.S. 114, 141 (1866).

²⁸⁴ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

²⁸⁵ *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2707 (2011).

²⁸⁶ *Williams v. Illinois*, 132 S. Ct. 2221, 2261 (2012) (Thomas, J., concurring in the judgment).

²⁸⁷ *Id.* at 2238 n.8 (citing *Jackson v. Virginia*, 443 U.S. 307, 314 (1979)).

²⁸⁸ *Jackson v. Virginia*, 443 U.S. 307, 314 (1979).

²⁸⁹ *Id.* at 313-14.

²⁹⁰ *Id.* at 313-14, 317.

²⁹¹ *Williams*, 132 S. Ct. at 2258.

²⁹² *But see* *Berger v. New York*, 388 U.S. 41, 51 (1967) (a Fourth Amendment case involving electronic surveillance).

²⁹³ *Arriaga v. Mukasey*, 521 F.3d 219, 223 (2d Cir. 2008) (explaining that facial constitutional attacks are “generally limited to statutes that threaten First Amendment interests.”); *United States v. Dang*, 488 F.3d 1135,

as-applied. If a court adopted the view of the 703 majority in *Williams*, the court might find that a particular application of 703 violated the Fifth or Sixth Amendment.²⁹⁴ However, even in a criminal case the court would not strike down Rule 703 entirely.²⁹⁵

V. CONCLUSION

There are many variations of the famous legend of the Gordian Knot.²⁹⁶ According to one version, at one time the Phrygians were without a king.²⁹⁷ An oracle predicted that an eagle would land on the cart of the new king.²⁹⁸ A peasant named Gordias was driving his ox-cart into town when an eagle landed on the cart.²⁹⁹ Gordias was proclaimed king.³⁰⁰ Out of gratitude, Gordias's son Midas dedicated the cart to the Phrygian gods and tied the cart to a post with an intricate knot.³⁰¹ An oracle later prophesied that whoever untied the knot would become the king of all Asia.³⁰² While wintering nearby in 333 B.C., Alexander the Great was challenged to untie the knot.³⁰³ Alexander could not unravel the mystery of the knot.³⁰⁴ Frustrated, he unsheathed his sword and slashed through the rope—cutting the Gordian knot.³⁰⁵ The expression, “cutting the Gordian knot,” has become a metaphor for overcoming a seemingly intractable problem by a bold stroke.

The remarks of the 703 majority in *Williams* have converted the evidentiary status of secondhand reports used under Rule 703 into a Gordian knot of sorts. Those remarks introduce a tension into Rule 703 jurisprudence. When a secondhand report is an essential premise of an expert opinion, the logic of the 703 majority's position points to the substantive conclusion that the lack of independent, admissible evidence of the facts stated in the report renders the opinion irrelevant. In turn, that substantive conclusion seems to dictate the procedural outcome that at least in extreme cases, the judge should exclude the opinion and bar its presentation to the jury. However, that logic collides with the legislative intent manifest in the original Advisory Committee Note to Rule 703.³⁰⁶ The drafters asserted that the expert's screening of the second report ought to “suffice.”³⁰⁷ The drafters were equally emphatic that it would be unnecessary for the expert's proponent to go to the length of incurring “the expenditure of substantial time in

1142 (9th Cir. 2007) (explaining that the constitutional claim must fail because the overbreadth doctrine does not implicate “First Amendment protections.”); *Coleman v. DeWitt*, 282 F.3d 908, 914 (6th Cir. 2002) (“Neither the Supreme Court nor this court has applied the overbreadth doctrine when the First Amendment was not implicated.”); Edward J. Imwinkelried & Donald N. Zillman, *An Evolution in the First Amendment: Overbreadth Analysis and Free Speech Within the Military Community*, 54 TEX. L. REV. 42, 50-55 (1975).

²⁹⁴ *Williams*, 132 S. Ct. at 2223, 2232.

²⁹⁵ *See id.* at 2262, 2264.

²⁹⁶ JOHN MAXWELL O'BRIEN, *ALEXANDER THE GREAT: THE INVISIBLE ENEMY: A BIOGRAPHY* 69 (1992).

²⁹⁷ *Id.* at 68.

²⁹⁸ *See id.*

²⁹⁹ *See id.*

³⁰⁰ *See id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* at 69.

³⁰⁵ *Id.*

³⁰⁶ FED. R. EVID. 703 advisory committee's note.

³⁰⁷ *Id.*

producing and examining . . . authenticating witnesses.”³⁰⁸ The tension between the 703 majority’s logic and the drafters’ intent creates a knotty problem for the lower courts.³⁰⁹

There may be a way to cut this Gordian knot. A few lower courts have treated Rule 703 as a hearsay exception.³¹⁰ In his often cited 1987 article on Rule 703, Professor Rice called for an amendment to Rule 703 to convert the statute into a hearsay exception.³¹¹ In the ensuing years other respected commentators have lent support to Professor Rice’s proposal.³¹² That proposal squarely poses the question whether the witness’s expert screening of the secondhand report is a sufficient guarantee of the report’s reliability to lift the bar of the hearsay rule.³¹³ Whatever else may be said about the wisdom of the proposal, it would directly and cleanly cut through the Gordian knot created by the comments of the 703 majority in *Williams*. The problem would vanish because any secondhand report used under Rule 703 would be automatically admissible as substantive evidence of the truth of the fact stated in the report.

However, until some legislature or court is bold enough to adopt this proposal, lower courts will have to cope with the tension generated by the 703 majority’s position. At the very least it would be advisable for lower courts to administer the sort of jury instructions that Justice Alito approvingly mentioned in his plurality opinion. In an extreme case in which the expert’s proponent has presented no or clearly insufficient admissible evidence of an essential premise in a secondhand report, the trial judge ought to charge the jury that without such evidence the opinion is “entitled to no weight.” In such extreme cases the judge will have to struggle with the decision whether to take the next step seemingly mandated by logic and bar the proponent from presenting the expert opinion to the jury. That struggle is an important reminder of the contemporary relevance of Justice Holmes’s insight that “[t]he life of the law [is] not [exclusively] logic”³¹⁴

³⁰⁸ *Id.*

³⁰⁹ The pun is obvious but apt.

³¹⁰ WRIGHT & GOLD, *supra* note 53, at 318; *United States v. Unruh*, 855 F.2d 1363, 1376 (9th Cir. 1987) (“the expert testimony exception to the hearsay rules”); *United States v. Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971) (“this exception to the rule against hearsay”).

³¹¹ Rice, *supra* note 48 at 587-88.

³¹² WRIGHT & GOLD, *supra* note 53 at 318-20; KAYE ET AL., *supra* note 48 §4.6.

³¹³ *Cf. Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 156, 166-68 (1988) (the Court construes Federal Rule 803(8)(C), dealing with the admissibility of findings in government investigative reports; the Court makes it clear that such findings can qualify for admission even if they are not based on the investigator’s personal knowledge; in deciding whether to admit the finding, the trial judge should consider whether the investigator possesses relevant expertise).

³¹⁴ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

