

Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony

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Over thirty years ago, in a Comment in the Harvard Law Review, Laurence Tribe created what he termed the “testimonial triangle” as a framework for analyzing difficult definitional and theoretical issues raised by the hearsay rule. Today, a new hearsay problem demands a new triangle. The widespread use of expert testimony at trial has altered the shape of criminal and civil litigation. Much expert testimony rests, in whole or in part, upon inadmissible hearsay. Worse, the inadmissible hearsay is often hidden: through the vehicle of the expert’s opinion, stealth hearsay sneaks into the jury box under the constitutional radar. This practice raises fundamental questions about our most basic constitutional Due Process rights, about the proper role of expertise at trial, and indeed about the very nature of our system of jury decision-making. It also forces us to question the conflicting paradigms of trust and distrust that bear on the treatment of expert opinion testimony. By drawing together three heretofore disconnected areas of constitutional and evidentiary law, this Article offers some answers to these questions. The Confrontation Clause of the Sixth Amendment, the constitutional right to trial by jury, and the Daubert framework for admissibility of expert testimony triangulate at the point of expert reliance on inadmissible testimonial hearsay. In constructing a new “expert testimonial triangle,” this Article follows Tribe’s example, seeking to reframe the problem of expert opinion testimony and offering a new lens through which to understand the larger issues.

“Now the important thing and the only important thing to notice is that the expert has taken the jury’s place if they believe him.”¹

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INTRODUCTION: TRIANGULATING HEARSAY ANEW

Evidence law has a love-hate relationship with expert witnesses. They are often helpful, and sometimes indispensable. On the other hand, many courts and commentators have expressed the fear that juries will not be able properly to evaluate these experts' opinions, and therefore that an expert may expose the jury to unreliable evidence—"junk science"—that will lead to incorrect or unfair outcomes. Experts are needed, but they are not always to be trusted.

This is a familiar tale and it is the one that largely animates the well-known case of *Daubert v. Merrell Dow Pharmaceuticals*,² which can perhaps be seen as the climax of the story though hardly its denouement. But it is a tale that most often features civil litigation as its setting, plaintiffs' experts as its villains, and defendants as its innocent victims—as in *Daubert* itself. In the criminal setting, in contrast, expert testimony offered by the prosecution tends to be admitted under *Daubert* with little or no critical evaluation.

2. 509 U.S. 579 (1993).

More particularly, there is within the criminal context a certain species of expert witness testimony offered by prosecutors and admitted by courts that highlights fundamental questions about the proper role of expertise at trial, and indeed about the very nature of our system of jury decision-making. Judges frequently allow government experts to state opinions based upon hearsay statements which, if offered directly, would violate not only the rule against hearsay but also the Confrontation Clause of the Sixth Amendment. To take a common example, a prosecution “gang expert” might testify to his opinion that a particular crime was gang-related and that the defendant is a member of a gang. If asked to explain the basis of his opinion, the expert might testify that it was based upon out-of-court conversations with known gang members. Were the expert testifying instead as a lay witness, these hearsay statements would be clearly inadmissible. But because they are presented by an expert witness, the statements may well be admitted by the court and heard by the jury.

Even if the court should decide to preclude the expert from testifying to the hearsay statements themselves, it is overwhelmingly likely the court will allow the expert to testify to the opinion which rests upon them. This is so even if the opinion rests *solely* on the inadmissible hearsay. In such a case, the defendant is free to test the basis of the expert’s opinion through cross-examination, but if he does so he will be unable to object to the disclosure of the statements to the jury. His alternative is to leave the basis of the expert’s opinion unexamined.

In this Article, I propose that this undisclosed hearsay—what I term “stealth testimonial hearsay”—is problematic on a number of levels. Seeking to reframe the problem of expert opinion testimony by offering a new lens through which to understand these larger issues, and drawing inspiration from Professor Tribe’s geometric treatment of hearsay,³ the Article constructs a new, *expert* testimonial triangle. This new framework draws together three heretofore disconnected areas of constitutional and evidentiary law. The Confrontation Clause of the Sixth Amendment,⁴ as recently re-envisioned by the Supreme Court in *Craw-*

3. See Laurence H. Tribe, Comment, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974). Tribe’s article has been very influential and continues to be cited by numerous courts and scholars. See, e.g., *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 233 (2d Cir. 1999); *United States v. Carrigan*, 804 F.2d 599, 606 (10th Cir. 1986) (Moore, J., dissenting); *United States v. Reynolds*, 715 F.2d 99, 101–02 (3d Cir. 1983); *Jacobson v. Deutsche Bank, A.G.*, 206 F. Supp. 2d 590, 595 (S.D.N.Y. 2002); *Bernadyn v. State*, 887 A.2d 602, 610 (Md. 2005); *Opinion of the Justices to the Senate*, 547 N.E.2d 8, 14 (Mass. 1989); *People v. James*, 717 N.E.2d 1052, 1056 (N.Y. 1999); Craig R. Callen, *Hearsay and Informal Reasoning*, 47 VAND. L. REV. 43, 76 n.148 (1994); Richard D. Friedman, *Route Analysis of Credibility and Hearsay*, 96 YALE L. J. 667, 668 n.5 (1987); Norman M. Garland & Jay A. Schmitz, *Of Judges and Juries: A Proposed Revision of Rule of Evidence 104*, 23 U.C. DAVIS L. REV. 77, 92 n.70 (1989); Aviva Orenstein, “My God!”: A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 CAL. L. REV. 159, 167 n.15 (1997); Peter Tillers & David Schum, *Hearsay Logic*, 76 MINN. L. REV. 813, 814 n.5 (1992); Glen Weissenberger, *Reconstructing the Definition of Hearsay*, 57 OHIO ST. L. J. 1525, 1552 n.126 (1996); Olin Guy Wellborn III, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 TEX. L. REV. 49, 52 n.22 (1982).

4. The Confrontation Clause provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI.

ford v. Washington,⁵ is not directly concerned with expert witness testimony. Yet *Crawford* bears directly on the constitutionality of expert disclosure of inadmissible testimonial hearsay and thus forms the first side of the expert testimonial triangle.⁶ The constitutional right to a jury trial,⁷ as explored in Supreme Court cases including *Apprendi v. New Jersey*,⁸ is likewise not explicitly about expertise. Yet the principles of separation of powers and the distrust of government that it embodies speak directly to the admissibility of stealth hearsay offered through expert opinion. *Apprendi* thus forms side two of the expert testimonial triangle.⁹ Finally, the principle of distrust of experts and the corresponding gate-keeping role of the courts,¹⁰ as articulated in *Daubert v. Merrell Dow Pharmaceuticals*¹¹ and the other cases of the *Daubert* trilogy,¹² forms the third side of the expert testimonial triangle. Within the boundaries of this trinity of fundamental principles, the common practice of expert reliance on stealth testimonial hearsay is at once easier to analyze and more profound in its implications.

The triangulation analysis herein is directed, foremost, at the introduction of stealth testimonial hearsay against criminal defendants. However, the implications of the expert testimonial triangle ultimately reach more broadly. Most generally, the construct suggests a useful framework for analyzing the often conflicting paradigms of trust and distrust that inform evidence law in general and the law governing expert witness evidence in particular. Expertise plays a crucial role in much of criminal and

5. 541 U.S. 36 (2004). Between 1980 and the Court's decision in *Crawford*, constitutional challenges to the admission of hearsay were analyzed according to a reliability framework first announced in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Under the *Roberts* test, as applied and refined by subsequent cases, hearsay admitted against a criminal defendant satisfied the Confrontation Clause if it was admitted under a "firmly-rooted" hearsay exception or if it bore "particularized guarantees of trustworthiness." 448 U.S. at 66; see also *Lilly v. Virginia*, 527 U.S. 116 (1999); *White v. Illinois*, 502 U.S. 346 (1992); *Idaho v. Wright*, 497 U.S. 805 (1990); *United States v. Inadi*, 475 U.S. 387 (1986).

6. See *infra* section II.A.

7. The Constitution protects the right to trial by jury in three separate provisions. See U.S. CONST. art. III, § 2, cl. 3 ("The trial of all crimes, except cases of impeachment, shall be by jury . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."); U.S. CONST. amend. VII ("In suits at common law . . . the right of trial by jury shall be preserved . . .").

8. 530 U.S. 466, 490 (2000) (holding that, with the exception of prior convictions, "any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"); see also *Blakely v. Washington*, 542 U.S. 296, 303–05 (2004) (holding that Washington sentencing statute violated defendant's Sixth Amendment right to trial by jury where judge subjected defendant to "exceptional" sentence based on judicial finding of deliberate cruelty based on facts not found by a jury nor admitted by defendant); *United States v. Booker*, 543 U.S. 220, 234–37 (2005) (invalidating federal sentencing guidelines on same grounds); *United States v. Gaudin*, 515 U.S. 506, 511 (1995) (holding that a criminal defendant has a constitutional "right to demand that a jury find him guilty of all the elements of the crime for which he is charged"). The Roberts Court has recently reaffirmed the vitality of this reasoning. See *Cunningham v. California*, 127 S. Ct. 856, 860 (2007).

9. See *infra* section II.B.

10. See *infra* section II.C.

11. 509 U.S. 579 (1993).

12. See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); see also *FED. R. EVID.* 702 (generally understood as codifying the *Daubert* test).

civil litigation,¹³ but experts are often regarded with a great deal of suspicion.¹⁴ Juries, too, are both idealized and patronized.¹⁵ A closer look at the foundations upon which the expert testimonial triangle is built offers some guideposts through this thicket of conflicting intuitions of trust and distrust. Triangulating expert testimonial hearsay thus offers some concrete answers, where stealth testimonial hearsay is admitted against a criminal defendant. In the civil context, or where offered by the criminal defendant, the framework suggests not definite answers but directions for further exploration. Similarly, where other types of expert evidence are at issue, the triangle does not play out directly, but does serve to clarify the questions that should be asked.

Following this introduction, Part I illustrates the problem of stealth testimonial hearsay and describes the approaches that courts and scholars have taken to address it. As this Part shows, the cases and the literature have thus far assumed that only the hearsay rules and the Confrontation Clause apply to expert witness reliance on inadmissible hearsay. Part I argues that this singular focus on the Confrontation Clause is misplaced, and that admission of stealth testimonial hearsay points to a much more complex set of constitutional and normative difficulties than has previously been noted. In order more fruitfully to analyze the true nature of the problem, Part II sets out the expert testimonial triangle with sides composed of *Crawford*, *Apprendi*, and *Daubert*. It demonstrates that

13. A recent article in the journal of the National Association of Criminal Defense Lawyers estimated that expert witnesses are used by the government in almost all federal criminal cases, and encouraged defense attorneys to turn to their own experts to counter the government. See Eric A. Vos, *Experts: How To Identify Them, Confront Them, and Keep Them Off the Stand*, 31 CHAMPION 10, 11 (June 2007); see also McCORMICK ON EVIDENCE § 13 (5th ed. 1999) (citing study showing that by the late 1980s, use of experts had grown exponentially to eighty-six percent of trials in one jurisdiction, and that “[s]ome commentators claim that the American judicial hearing is becoming trial by expert”). In civil litigation, a trial court’s decision to exclude expert testimony can be fatal to the plaintiff’s case. See, e.g., *Knight v. Kirby Inland Marine, Inc.*, 482 F.3d 347 (5th Cir. 2007) (affirming summary judgment in favor of defendant employer after expert testimony that plaintiff’s illness was caused by work-related exposure to benzene was held inadmissible); *Beaudette v. Louisville Ladder, Inc.*, 462 F.3d 22 (1st Cir. 2006) (affirming summary judgment in favor of defendant ladder manufacturer where testimony of plaintiffs’ expert as to manufacturing defects was held inadmissible); *Group Health Plan, Inc. v. Philip Morris USA, Inc.*, 344 F.3d 753 (8th Cir. 2003) (affirming summary judgment in favor of defendant tobacco companies where trial court excluded plaintiff HMO’s expert witness on the issue of damages).

14. The debate over “junk science” exemplifies this distrust. In his 1991 book, Peter Huber argued that scientific research that could not withstand the rigors of academic review had been allowed to enter the courtroom through expert testimony, resulting in “fantastic verdict[s]” based on “a hodgepodge of biased data, spurious inference, and logical legerdemain.” PETER W. HUBER, *GALILEO’S REVENGE: JUNK SCIENCE IN THE COURTROOM* 3 (1991). The Supreme Court’s ruling in *Daubert* was hailed at the time as a decision that would limit the phenomenon. See David G. Savage, *High Court Limits “Junk Science” Claims*, L.A. TIMES, Dec. 16, 1997, at 29. Since *Daubert*, the scientific community has expressed concern that the fear of admitting “junk science” has led courts to exclude relevant scientific evidence. See Sharon Begley, *Ban on “Junk Science” Also Keeps Jurors from Sound Evidence*, WALL ST. J., June 27, 2003, at B1.

15. See Lewis H. LaRue & David S. Caudill, *A Non-Romantic View of Expert Testimony*, 35 SETON HALL L. REV. 1, 12–28 (2004) (critiquing the academic commentary on *Daubert* and examining how various analyses of scientific evidence either romanticize or denigrate the jury’s ability to evaluate scientific evidence presented by expert witnesses); Joseph Sanders, *The Merits of the Paternalistic Justification for Restrictions on the Admissibility of Expert Evidence*, 33 SETON HALL L. REV. 881, 891–99 (2003) (discussing the “paternalistic justification” for the courts’ gatekeeping role and assessing the empirical research supporting this view of jurors’ abilities).

the prosecutor who seeks to offer expert witness opinion testimony that is based upon testimonial hearsay is wholly barred against this course by the boundaries imposed by the three walls of the triangle.

After demonstrating that admission of stealth testimonial hearsay should therefore be impermissible, the Article turns to broader issues of trust and distrust. Part III examines the often conflicting ways in which these themes are revealed in the case law and the literature as they apply to juries, the government, and expert witnesses. Viewed through the prism of the expert testimonial triangle, this confusing scatter of trust and distrust begins to make some sense. Part IV draws on the insights gained from the expert testimonial triangle and the examination of trust and distrust to perform the triangulation of expert witness testimony that contains hidden hearsay. Finally, I conclude by moving beyond the boundaries of the expert testimonial triangle to suggest implications of this analysis for the broader issues surrounding the dilemma of expertise and the meaning of the constitutional rights to jury trial and confrontation of adverse witnesses.

I. STEALTH HEARSAY REVEALED

In the years since the creation of the Tribe Triangle, reliance upon expertise in both civil and criminal trials has grown exponentially.¹⁶ The Federal Rules of Evidence, enacted in 1975, facilitated this explosion of expert influence by loosening the strict common law rules that had restricted expert witness testimony both in substance and in the procedures mandated for eliciting it.¹⁷ For practical and also philosophical reasons, the new rules allowed experts to testify to a much broader range of opinions, so long as the testimony would “assist the trier of fact to understand the evidence or to determine a fact in issue.”¹⁸ And the rules permitted experts to base opinions on facts and data that were

16. The expert witness “business” is today a multi-billion-dollar industry, with public companies devoted to providing expert witnesses growing at fifteen to twenty percent annually. See Barry Schlachter, *Expert Witness Industry Booming*, FORT WORTH STAR-TELEGRAM, May 14, 2006, at F1.

17. According to a leading evidence hornbook:

Article VII of the Federal Rules, Opinions and Expert Testimony, codified a sea change in the American courts’ approach to opinion evidence. The overall liberalizing influence of the Federal Rules has been nowhere more apparent than in its expansion of expert witness testimony in Rules 702 through 706. Testimony of once rare experts has become commonplace, if not overbearing, in courts of every jurisdiction and the limitations on their testimony have been relaxed substantially.

ROGER PARK ET AL., EVIDENCE LAW § 10.03, at 515 (2d ed. 2004) (citation omitted).

18. FED. R. EVID. 702. As originally enacted, the rule provided: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” FED. R. EVID. 702 (1975). In 2000, the rule was amended and the following provision added: “if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” FED. R. EVID. 702. The amendment was a “response to *Daubert v. Merrell Dow Pharms., Inc.*, and to the many cases applying *Daubert*, including *Kumho Tire*

otherwise inadmissible.¹⁹ Predictably, this loosening led to some real and perceived abuses.

In the civil context, and especially in toxic-tort litigation, commentary suggested the fear that an expert witness could be found to testify to nearly anything, and that companies might therefore be held liable for injuries that their products did not actually cause.²⁰ The eventual result was the Supreme Court's decision in *Daubert*, which famously positioned trial judges as sentries to guard the trial gates against introduction of unreliable scientific evidence.²¹ Extended a few years later to non-scientific as well as scientific expertise,²² this

Co. v. Carmichael." FED. R. EVID. 702 advisory committee's note (2000 Amendment) (citations omitted).

19. See FED. R. EVID. 703.

20. See, e.g., David E. Bernstein, *Keeping Junk Science out of Asbestos Litigation*, 31 PEPP. L. REV. 11, 13 (2003) (arguing that "hired gun" physicians misdiagnose lung abnormalities and misidentify causation in asbestos litigation); Walter Olson, *The Case Against Expert Witnesses*, FORTUNE, Sept. 25, 1989, at 133 ("Hardly a liability suit goes forward without an engineer or a doctor swearing that the product was misdesigned, or the injury devastating, or the hospital negligent. The other side then calls its expert to say the exact opposite."); Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301, 374 (1992) (discussing use of expert testimony on both sides in Bendectin litigation). The modern criticisms of the expert witness system are eerily echoed in a description of the reasons for the decline of the medieval practice of trial by battle:

In civil cases, such as disputes over property, the employment of champions, which was once exceptional, had become routine. Champions were hired to do battle on behalf of a litigant whenever one of the parties was unable, for reasons of age, sex, or physical infirmity, to represent himself. The champion was at first a witness who could prove the case of the litigant, but in time champions became professional fighters available for hire in all civil cases, regardless of the physical capacity of the party.

LEONARD W. LEVY, *THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY* 10 (1999).

21. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993) ("Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review.").

22. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999); FED. R. EVID. 702 advisory committee's note (2000 Amendment). In *Daubert*, the Court specifically noted that scientific expertise was the only expertise at issue before the court, and thus it left open the issue of the appropriate admissibility standards for non-scientific expertise. 509 U.S. at 589–90. Following *Daubert*, circuit courts were split on whether to confine the *Daubert* test to scientific expertise or to apply it broadly to all expertise. Courts in the Second, Ninth, and Tenth circuits continued to apply pre-*Daubert* standards to non-scientific evidence. See, e.g., *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1518–19 (10th Cir. 1996) (declining to apply *Daubert* test to automotive engineer's expert testimony which was based on twenty-two years of experience as an automotive engineer); *United States v. Rice*, 52 F.3d 843, 847 (10th Cir. 1995) (applying a traditional Rule 702 analysis to tax attorney's expert testimony which was based upon his personal experiences); *United States v. Muldrow*, 19 F.3d 1332, 1338 (10th Cir. 1994) (applying a traditional Rule 702 analysis to a police officer's expert testimony which was based on specialized knowledge of drug trafficking); *Thomas v. Newton Int'l Enters.*, 42 F.3d 1266, 1270 n.3 (9th Cir. 1994) (declining to apply *Daubert* test to worker's expert testimony which was based on experience as a longshoreman); *Iacobelli Constr. v. County of Monroe*, 32 F.3d 19, 24 (2d Cir. 1994) (declining to apply *Daubert* test to affidavits of a geotechnical or underground-construction consultant); *Tamarin v. Adam Caterers, Inc.*, 13 F.3d 51, 53 (2d Cir. 1993) (declining to apply *Daubert* test to an

threshold requirement of “reliability” for expert testimony served to reinstate some of the barriers that had been imposed by the common law regime’s treatment of expert testimony. It did so, however, by removing information from the fact-finder rather than—as under the common law rules—by requiring that more information be disclosed.²³

In the criminal context, however, courts have tended to embrace the gatekeeping role with much less enthusiasm, at least where prosecution expertise is at issue.²⁴ As a general matter, prosecution experts are often subjected to a much lesser degree of scrutiny as to the reliability of their methods and conclusions.²⁵ More specifically, and critical to the precise issue with which this Article is concerned, prosecutors are routinely permitted to employ experts to put before the jury hearsay evidence that would otherwise be inadmissible. In other words, prosecution experts whose opinions might be of questionable reliability under a more rigorous application of *Daubert* not only are permitted to offer opinions, but are permitted to rest these opinions on untested hearsay. Sometimes this hearsay is disclosed to the jury either on direct or cross-examination, but in

expert accountant’s testimony); *United States v. Locascio*, 6 F.3d 924, 938 (2d Cir. 1993) (declining to extend *Daubert* test to DEA agent’s expert testimony regarding methods used in illegal drug operations); *United States v. Markum*, 4 F.3d 891 (10th Cir. 1993) (applying a traditional Rule 702 analysis to fire chief’s testimony based on personal experiences). Prior to *Kumho Tire*, commentators also debated whether the *Daubert* test was confined to scientific expertise or applicable to all expertise. See, e.g., Brief of Margaret A. Berger, Edward J. Imwinkelried, and Stephen A. Saltzburg as Amicus Curiae in Support of Respondents, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (No. 97-1709) (arguing that the four *Daubert* factors should not be applied rigorously to determine admissibility of non-scientific expert testimony); Edward J. Imwinkelried, *The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 CARDOZO L. REV. 2271, 2283–91 (1994).

23. This distinction has important implications regarding trust and distrust of institutional actors and is developed *infra* section III.B.

24. See Margaret A. Berger, *Expert Testimony in Criminal Proceedings: Questions Daubert Does Not Answer*, 33 SETON HALL L. REV. 1125, 1125 (2003) (“In civil cases, courts engage in rigorous gatekeeping and often exclude plaintiffs’ experts because the theory underlying their testimony has not been adequately validated. But I see no sign of a parallel approach in criminal cases even where there are problems with the assumptions on which the prosecution’s expert testimony rests.”). Expertise typically offered by criminal defendants, on the other hand, is often excluded under *Daubert*. See, e.g., *United States v. Carter*, 410 F.3d 942, 951 (7th Cir. 2005) (affirming district court ruling that expert testimony on the inaccuracy of eyewitnesses was inadmissible under *Daubert*); *United States v. Dixon*, 413 F.3d 520, 523–24 (5th Cir. 2005) (“[E]xpert testimony that a defendant ‘suffers from the battered woman’s syndrome’ is ‘inherently subjective’ and therefore inadmissible to support a defense of duress.”); *United States v. Henderson*, 409 F.3d 1293, 1301 (11th Cir. 2005) (holding that results of the defendant’s polygraph test were properly excluded under *Daubert*).

25. See D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left at the Dock?*, 64 ALB. L. REV. 99, 99 (2000) (discussing how civil defendants win *Daubert* challenges more often than criminal defendants). Courts have been reluctant to exclude fingerprint evidence under *Daubert*. See Michael J. Saks, *The Legal and Scientific Evaluation of Forensic Science (Especially Fingerprint Expert Testimony)*, 33 SETON HALL L. REV. 1167, 1170–86 (2003). Courts have also refused to exclude handwriting analysis under *Daubert*. See, e.g., *United States v. Prime*, 431 F.3d 1147, 1154 (9th Cir. 2005) (discussing the reliability of handwriting analysis and its “broad acceptance” among law enforcement agencies). *But see United States v. Saelee*, 162 F. Supp. 2d 1097, 1105 (D. Alaska 2001) (excluding handwriting expert’s testimony).

many cases it is never heard by the jury. Rather, the inadmissible hearsay is smuggled in through the expert's opinion: it forms all or part of the basis of the opinion, but the rules do not require the expert to disclose the basis of the opinion. In such instances, the expert's testimony contains stealth hearsay: the jury is permitted to consider the expert's opinion, though it would not be permitted to consider the hearsay basis directly as substantive evidence.

One of the many California gang prosecutions illustrates this problem. In *People v. Thomas*,²⁶ the defendant was charged with, among other crimes, active participation in a criminal street gang in connection with the theft of a truck. At trial, a police officer testified as a gang expert. He was permitted to give his opinion that the defendant was a member of the Elsinore Young Classics (E.Y.C.) gang, and that the theft was committed for the benefit of the gang. The expert revealed upon cross-examination the basis of this opinion: he testified "that he learned through casual, undocumented conversations with other gang members that defendant was a member of E.Y.C., and his gang moniker was 'Little Casper' or 'Villain.'"²⁷ As an additional basis for his opinions, the expert testified that he "had seen an incident report that indicated that defendant had been present at a knife fight or stabbing in 1995 involving another E.Y.C. member."²⁸

Several features of this expert testimony in the *Thomas* case are noteworthy. First, it is quite clear that the statements of the gang members on which the expert rested his opinion are hearsay,²⁹ and that they do not fall under any traditional hearsay exception.³⁰ Were the statements offered directly to prove the defendant's membership in the gang, they would be inadmissible on this ground. Second, not only would the statements, if offered directly, violate the rule against hearsay, their admission would also violate the Confrontation Clause of the Sixth Amendment. As will be discussed more fully in the next Part, these statements easily fall within the class of hearsay whose admission is absolutely barred unless the defendant has an opportunity to cross-examine the

26. 30 Cal. Rptr. 3d 582 (Cal. Ct. App. 2005).

27. *Id.* at 585–86.

28. *Id.* at 584.

29. Under the Federal Rules of Evidence, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). The California Evidence Code definition of hearsay is nearly identical. See CAL. EVID. CODE § 1200(a) ("Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.").

30. See FED. R. EVID. 803 (listing hearsay exceptions for which availability of the declarant is immaterial); FED. R. EVID. 804 (listing hearsay exceptions for which unavailability of the declarant is required); see also FED. R. EVID. 801(d) (excluding certain statements from the definition of hearsay). Though California is among the minority of states that have not adopted the federal rules of evidence, the statements in *Thomas* would likewise not be admissible under the California rules. See generally CAL. EVID. CODE §§ 1220–1370. While the California code contains an express exception for statements regarding gang-related crimes offered by police officers, that exception requires, among other things, that the declarant be deceased in order for the statement to be admissible. See *id.* at §§ 1231–34.

declarant.³¹

In addition, the hearsay statements in *Thomas* were not admitted during direct examination by the prosecution of the gang expert. Rather, the expert's reliance on these statements was brought out during cross-examination.³² A party cannot normally object to evidence that it chooses to put before the jury.³³ Under these circumstances, however, the defendant is faced with a catch-22: he can either leave the basis of the expert's opinion unchallenged, or he can risk having otherwise inadmissible, potentially prejudicial evidence disclosed to the jury. If he chooses not to inquire as to the basis of the expert's opinion, there is no hearsay ground upon which to object to the admission of the hearsay statements of the gang members. The expert witness, however, has relied upon these statements in forming his opinion. Therefore the statements have contributed, and perhaps substantially so, to the evidence upon which the jury bases its guilty verdict. This places the defendant in the untenable position of having to make a choice between two strategies, either of which threatens to deny his constitutional rights. That this mode of presentation of expert opinion testimony is widely permitted—not only in California, but in other states³⁴ and in federal court³⁵—is the direct result of changes to the common law expertise framework that were set in motion by the adoption of the Federal Rules of Evidence.

A. THE RULES

The Federal Rules of Evidence, enacted in 1975 and thereafter adopted in whole or in substantial part by the vast majority of the states,³⁶ greatly liberalized the rules regarding the admissibility of expert opinion testimony.³⁷ Under

31. See *Crawford v. Washington*, 541 U.S. 36, 61 (2004); discussion *infra* section II.A.

32. See *Thomas*, 130 Cal. Rptr. 3d at 585.

33. See *Ohler v. United States*, 529 U.S. 753, 755 (2000) (“Generally, a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted.”); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 1.4, at 11 (3d ed. 2003); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 103.14 (Joseph M. McLaughlin ed., 2d ed. 1998).

34. Most states have adopted the Federal Rules of Evidence in whole or in substantial part, including Rules 703 and 705, which primarily allow for the type of expert reliance on inadmissible hearsay that is the subject of this Part. See *Table of State and Military Adaptations of Federal Rules of Evidence*, in 6 WEINSTEIN’S FEDERAL EVIDENCE T-1 (2d ed. 1998 & Supp. 2007) [hereinafter *State Adaptations*]. In contrast, a number of states have not adopted the *Daubert* test and the corresponding amendment to Rule 702 of the Federal Rules of Evidence. See Alice B. Lustre, Annotation, *Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R. 5TH 453 (2001; updated 2007).

35. See FED. R. EVID. 703, 705; see also *infra* notes 40–43 and accompanying text.

36. Forty-two states have adopted rules of evidence patterned on the Federal Rules. See *State Adaptations*, *supra* note 34, at T-1. Two states have adopted rules identical to Rule 703; an additional thirty-two states have adopted the first two sentences of Rule 703 but omitted the last sentence. See *id.* at T-95 to -101.

37. Rule 702 relaxed the requirement that expert opinion be beyond the knowledge of a lay juror, to allow admission of any opinion based upon specialized knowledge that would be helpful to the jury. Rule 703 expanded the permissible bases on which the expert might rely in forming his opinion. Rule 704 abolished the “ultimate opinion” rule. Rule 705 rejected the rigid requirements surrounding hypothetical questions posed to expert witnesses. Finally, Rule 706 provided for court-appointed experts. See FED. R. EVID. 702–06 (as originally enacted).

prevailing pre-rules doctrine and practice, an expert was permitted to apply specialized knowledge to the particular facts of the case and to testify to an opinion based upon that process.³⁸ However, the facts to which the expert could apply this specialized knowledge were restricted to those based upon evidence presented at trial, either by witnesses and exhibits or in the form of a hypothetical question asking the expert to assume particular facts. Common law practice, as well as logic,³⁹ precluded the expert witness from testifying to an opinion based upon inadmissible evidence.

An important goal of the Federal Rules of Evidence was to institute changes in the common law rules governing expert testimony, including the requirement that the expert's opinion be based only on facts properly before the jury.⁴⁰ One of the most significant changes is contained in Rule 703, which provides that an expert witness may testify to an opinion or inference based upon facts or data "perceived by or *made known to the expert* at or *before the hearing*."⁴¹ The rule makes clear that these facts or data need not be admissible to be a proper basis for the expert's opinion.⁴² Furthermore, Rule 705 allows the expert witness to testify to the opinion without first (or, indeed, ever) testifying to the underlying facts or data.⁴³ However, if the proponent wished to have the expert testify to the underlying data, the rules as originally enacted did not preclude him or her

38. Professor Imwinkelried's syllogistic framework remains the most helpful way of thinking about this process. See generally Edward J. Imwinkelried, *The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C. L. REV. 1, 2-3 (1988) (suggesting scientific testimony is presented as syllogistic application of a major premise, or scientific principle, to a minor premise, the facts of the case); Edward J. Imwinkelried, *The Educational Significance of the Structure of Expert Testimony*, 87 Nw. U. L. REV. 1148, 1148-49 (1993) (reasserting the validity of the syllogistic framework).

39. Wigmore famously called the practice of presenting the facts to the expert in the form of a hypothetical question "one of the few truly scientific features of the rules of Evidence." 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 686 (2d ed. 1923).

40. See *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988) (noting "the Federal Rules' general approach of relaxing the traditional barriers to 'opinion' testimony," specifically that "Rules 702-705 permit experts to testify in the form of an opinion, and without any exclusion of opinions on 'ultimate issues'"); see also *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 588-89 (1993) (quoting *Beech Aircraft*).

41. FED. R. EVID. 703 (emphasis added). The Advisory Committee's Note states that "in this respect the 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." FED. R. EVID. 703 advisory committee's note. According to Professor Rice, "Rule 703 of the Federal Rules of Evidence formally sanctions what the common law prohibited—reliance upon facts not of record." Paul R. Rice, *Inadmissible Evidence as a Basis of Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583, 587 (1987).

42. "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." FED. R. EVID. 703.

43. Rule 705 provides: "The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." FED. R. EVID. 705. This rule was intended to do away with the requirement that the expert testify in response to a hypothetical question. FED. R. EVID. 705 advisory committee's note ("The hypothetical question has

from doing so.⁴⁴

This change in the rules governing expert testimony was meant to bring the courtroom in line with contemporary practice outside the courtroom.⁴⁵ The rules were conceived and drafted during the rise of the modern administrative state;⁴⁶ it is probably no accident that expertise was looked upon favorably as an aid to the truth-finding function of the trial.⁴⁷ Expertise was often helpful to the jury; if helpful, it was assumed that it should be admitted.⁴⁸ Experts relied on various sorts of facts and data in making decisions in their professional lives; it was thought that these facts or data should not be barred to them in the courtroom by anachronistic technical rules of admissibility.⁴⁹

However, this broadening of the permissible bases of expert opinion testimony in some respects turned the logic of the common law rules on its head. Experts have traditionally been permitted to draw conclusions based upon their special understanding not of the facts of the particular case but of some area of technical, scientific, or other uncommon knowledge.⁵⁰ This specialized knowl-

been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming.”).

44. Neither did the rules permit such testimony; as originally enacted, the rules were silent on the issue. As a result, while most federal courts of appeals did not allow such testimony, some admitted it. *Compare* *United States v. Tran Trong Cuong*, 18 F.3d 1132, 1134 (4th Cir. 1994) (finding reversible error where the district court allowed an expert to testify about the findings of a non-testifying expert), *with* *Stevens v. Cessna Aircraft Co.*, 634 F. Supp. 137, 142–43 (E.D. Pa. 1986) (allowing expert to relay to the jury statements of third parties that the expert had gathered during interviews), *aff’d without opinion* at 806 F.2d 252 (3d Cir. 1986). For a general discussion of the courts’ pre-amendment rulings on this issue, see Ronald L. Carlson, *Is Revised Expert Witness Rule 703 a Critical Modernization for the New Century?*, 52 FLA. L. REV. 715, 727–33 (2000). In 2000, Rule 703 was amended to provide that the underlying facts or data, if otherwise inadmissible, “shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.” FED. R. EVID. 703 (2000 amendment).

45. According to the Advisory Committee, this element of the rule was “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.” FED. R. EVID. 703 advisory committee’s note.

46. See generally RICHARD J. PIERCE ET AL., *ADMINISTRATIVE LAW AND PROCESS* (4th ed. 2004).

47. See, e.g., 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 1.7 (3d ed. 1994) (noting that the “explosive growth of administrative agencies during the New Deal” coincided with a general attitude “of reverence for technocratic solutions”).

48. See FED. R. EVID. 702 (allowing a qualified expert to testify regarding “scientific, technical, or other specialized knowledge” if such testimony will “assist the trier of fact to understand the evidence or to determine a fact in issue,” subject to the court’s gate-keeping function).

49. See, e.g., FED. R. EVID. 703 advisory committee’s note (noting that “a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety . . . [and] makes life-and-death decisions in reliance upon them”).

50. See FED. R. EVID. 702 (experts may be qualified by “knowledge, skill, experience, training, or education”); see also *Fineberg v. United States*, 393 F.2d 417, 421 (9th Cir. 1968) (expert testimony must be based on “some science, profession, business or occupation as to be beyond the knowledge of the average layman”); *Jenkins v. United States*, 307 F.2d 637, 644 (D.C. Cir. 1962) (“[I]f experience or training enables a proffered expert witness to form an opinion which would aid the jury, in the absence of some countervailing consideration, his testimony will be received.”); *Nelson v. Brames*, 241 F.2d 256, 257 (10th Cir. 1957) (“It is the general rule that expert testimony is appropriate when the subject

edge was to be applied to the facts as found by the jury in order to reach a conclusion that the jurors would not have been able to reach on their own. However, if the jury rejected the factual bases of the expert's conclusion, it presumably would discount or reject the opinion as well. In allowing the expert to base conclusions upon facts not found (nor even heard) by the jury, Rules 703 and 705 divorced the opinion from the facts as found by the jury.⁵¹

The Advisory Committee that drafted the Federal Rules of Evidence,⁵² along with other commentators,⁵³ had expressed concern about the common law rules that had traditionally restricted the bases of expert opinion testimony. First and foremost, the Committee worried that, even where the underlying facts or data were technically admissible under the hearsay rules, the process of offering each of them into evidence at trial would prove unnecessarily time-consuming and burdensome. Offering the example of a doctor testifying as an expert, the Committee Notes explained that most of the various sources of information upon which "a physician in his own practice bases his diagnosis" would be "admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses."⁵⁴ This expenditure was thought to be unnecessary because the expert could be trusted to know which facts and data were sufficiently reliable to form the basis of his opinion.⁵⁵

But Rule 703 did not apply only to underlying facts or data that would have been admissible, albeit only after sometimes substantial expenditure of time and effort in laying a proper foundation for them. The rule also allowed experts to base their opinions on inadmissible facts or data, so long as they were "of a type reasonably relied upon by experts in the particular field in forming opinions or

of inquiry is one which jurors of normal experience and qualifications as laymen would not be able to decide on a solid basis without the technical assistance of one having unusual knowledge of the subject by reason of skill, experience, or education in the particular field").

51. See Rice, *supra* note 41, at 585 n.9 (1987) ("Although a juror arbitrarily could attach value to an expert's opinion independent of its basis because of the perceived credibility of that expert, this juror's behavior, in effect, would be a relegation to the expert of the juror's factfinding role.").

52. Members of the Advisory Committee on the Federal Rules of Evidence were appointed by Chief Justice Earl Warren in 1965. 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5006 (2d ed. 1987). Six of the committee members were members of the American College of Trial Lawyers, four held high office in the American Bar Association, and two members were appointed to the federal bench during their tenure on the Advisory Committee. *Id.* Congress made no changes in Article VII of the draft, which gives weight to the Advisory Committee notes to the rules contained in that article. See *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 165 n.9 (1988) ("As Congress did not amend the Advisory Committee's draft in any way that touches on the question before us, the Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted.").

53. See, e.g., CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 14–16 (1954); Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 415–16 (1952); Jack B. Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 477 (1986) (noting the Federal Rules of Evidence were adopted "[f]ollowing a good deal of sensible case law and practice that loosened up common law restrictions").

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

55. See *id.* ("The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.").

inferences upon the subject.”⁵⁶ The Advisory Committee’s Note, however, did not distinguish admissible from inadmissible evidence in setting out its primary rationale—that of efficiency—described above. It merely noted that “[m]ost of” the underlying facts or data are generally admissible.⁵⁷ The Notes did mention the issue of inadmissible bases in their final paragraph. Addressing fears that “enlargement of permissible data may tend to break down the rules of exclusion unduly,” the Committee reassured that “the rule requires that the facts or data ‘be of a type reasonably relied upon by experts in the particular field.’”⁵⁸ This requirement, according to the Committee, “would not warrant admitting in evidence the opinion of an ‘accidentologist’ as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied.”⁵⁹

In sum, the drafters of the rules did not appear to be much concerned about expert reliance upon, or even disclosure to the jury of, inadmissible facts and data that underlay the expert’s opinion. The reasonable reliance by experts in the field was sufficient to overcome any problem of “undue” breakdown of the traditional rules of exclusion. In other words, the experts themselves—save for charlatans like the “accidentologist”—could generally be trusted to base their opinions upon reliable evidence.⁶⁰ Ironically, in the guise of liberalizing the rules of admissibility and broadening the types of expert opinion available to the jury, these rules had the effect of taking relevant evidence from the jury and placing the evaluation of that evidence in the hands of the expert witness.

B. THE COMMENTARY

Prior to the adoption of the Federal Rules of Evidence, and then again after the Rules had been in effect for several years, this issue of expert reliance on inadmissible hearsay was addressed in the courts⁶¹ and in the law reviews.⁶²

56. FED. R. EVID. 703.

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

58. *Id.*

59. *Id.*

60. A related impetus for the relaxation of the rules surrounding the admission of the bases of expert opinion was the almost universal criticism of the use of hypothetical questions at trial. Wigmore, for example, said of the hypothetical question that “[i]ts abuses have become so obstructive and nauseous that no remedy short of extirpation will suffice.” WIGMORE, *supra* note 39, at § 686. Though the Federal Rules stopped short of extirpation, they did do away with the necessity for hypothetical questions. Rule 705 provides that an expert witness “may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise.” FED. R. EVID. 705. Again, the Advisory Committee’s Notes reveal a lack of concern with the prospect of the jury’s hearing the expert’s opinion without either knowing or passing on the underlying facts: “If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion.” FED. R. EVID. 705 advisory committee’s note.

61. *See, e.g.*, United States v. 0.59 Acres of Land, 109 F.3d 1493, 1496–97 (9th Cir. 1997) (requiring a limiting instruction when inadmissible evidence was admitted as part of the basis of an expert’s

The debate ultimately culminated in an amendment to Rule 703, which now provides that, when expert opinion is based on inadmissible evidence, the underlying evidence is admissible on direct examination only where “the court determines that [its] probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs [its] prejudicial effect.”⁶³ These earlier analyses focused on the logic of, and the evidentiary and constitutional issues raised by, expert reliance on inadmissible evidence (primarily inadmissible hearsay). Though courts and academics disagreed about the wisdom of admitting the underlying hearsay through the “back-door hearsay exception” of Rule 703, they apparently did not disagree about the wisdom of allowing experts to rely on such hearsay in the first place, so long as it was deemed reliable, either by the expert himself or by the court.⁶⁴ Though the constitutional issues were noted,⁶⁵ they were dismissed without great concern in much the same manner that current court decisions and academic treatments have done.⁶⁶

opinion); *United States v. Rollins*, 862 F.2d 1282, 1292–94 (7th Cir. 1988) (admitting, under FED. R. EVID. 703, out-of-court statements made by a police informant as part of the basis of an expert’s opinion); *United States v. Affleck*, 776 F.2d 1451, 1457–58 (10th Cir. 1985) (admitting hearsay as part of the basis of an expert’s opinion); *United States v. Ramos*, 725 F.2d 1322, 1324 (11th Cir. 1984) (admitting, under FED. R. EVID. 703, out-of-court statements offered to show the basis for the expert’s opinion); *United States v. Williams*, 447 F.2d 1285, 1290–92 (5th Cir. 1971) (admitting expert testimony based on hearsay); *Paschal v. United States*, 306 F.2d 398, 401–02 (5th Cir. 1962) (finding expert testimony based on hearsay statements inadmissible).

62. For post-adaptation discussion, see Ronald L. Carlson, *Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony*, 76 MINN. L. REV. 859, 869–70 (1992) (arguing that experts should not be permitted to disclose inadmissible hearsay to the jury upon direct examination); David L. Faigman, *Struggling To Stop the Flood of Unreliable Expert Testimony*, 76 MINN. L. REV. 877, 878 (1992) (arguing that courts should scrutinize expert testimony for reliability, including the reliability of any underlying hearsay basis for the opinion). For pre-adaptation discussion, see John T. Anderson, Comment, *The Physician’s Testimony—Hearsay Evidence or Expert Opinion: A Question of Professional Competence*, 53 TEX. L. REV. 296 (1975); Hope C. Evans, Comment, *The Expert Witness: Hearsay vs. Opinion*, 24 BAYLOR L. REV. 108 (1972); John Harrison, Note, *Admissibility of an Expert Opinion Based on Inadmissible Hearsay*, 32 OKLA. L. REV. 444 (1979).

63. FED. R. EVID. 703 (2000 Amendment). The opponent may always bring out the basis of the expert’s opinion during cross-examination.

64. See *infra* text accompanying notes 69–76.

65. See, e.g., *United States v. Williams*, 447 F.2d 1285, 1287 (5th Cir. 1971) (“The admission of expert witness testimony based upon records not themselves introduced in evidence potentially raises questions with respect both to the constitutional right of confrontation and to the appropriate federal hearsay rule.”). The court in *Williams* ultimately concluded that the Confrontation Clause was not violated because “[t]here was ample opportunity for the defense to probe the authenticity and accuracy of the sources relied upon by” the government’s expert during cross-examination. *Id.* at 1289.

66. See *infra* notes 88–92 and accompanying text. In a recent article, Professor Jennifer Mnookin examines this issue in detail. Though her analysis is mainly concerned with the constitutionality under *Crawford* of disclosure of underlying testimonial hearsay, Professor Mnookin recognizes that even undisclosed hearsay may raise constitutional concerns. She states: “This [nondisclosure], to be sure, gives the jury less information with which to substantively evaluate the expert’s conclusion; it pushes the jury further toward the deference pole of the deference/education axis. It also raises the intriguing question of whether the logic of *Crawford* places any limitations on the reliance upon testimonial evidence, or simply limits its in-court disclosure, but serious discussion of this question is beyond the scope of this Article.” Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & POL’Y 791, 809 (2007).

Following the adoption of the Federal Rules of Evidence,⁶⁷ Professors Ronald Carlson and Paul Rice set out the terms of the debate over the wisdom and constitutionality of expert reliance on, and possible disclosure to the jury of, inadmissible hearsay.⁶⁸ In a widely cited pair of articles, Carlson and Rice laid out the issues and their respective suggestions and conclusions. The disagreement between these authors centered upon the issue of *disclosure* to the jury of otherwise inadmissible hearsay that forms part of the basis of an expert's opinion; neither argued against Rule 703's allowance of expert *reliance* on otherwise inadmissible hearsay.

Professor Carlson spoke favorably of Rule 703's expansion of the permissible bases of expert testimony.⁶⁹ His quarrel was with the practice of allowing parties to offer inadmissible documents into evidence where those documents formed part of the basis of the expert's opinion. He criticized this "back door exception to the hearsay rule," relying largely on a confrontation analysis.⁷⁰ However, Professor Carlson did not express any concern for the practice of allowing the expert to rely on inadmissible hearsay where that hearsay was not disclosed to the jury. Rather, he endorsed Rule 703's requirement that the evidence be "of a type reasonably relied on by experts in the particular field" as an appropriate safeguard against expert reliance on unreliable facts or data.⁷¹ As a further safeguard, Professor Carlson discussed with approval the practice of those courts that independently evaluated the reasonableness of the expert's reliance on the underlying facts.⁷²

In reply, Professor Rice took issue with the claim that disclosure of the inadmissible evidence underlying the expert opinion was both inadvisable and, in criminal cases, potentially unconstitutional. He instead advocated an explicit recognition that such evidence was sufficiently reliable as to be admissible for its truth—essentially suggesting that Rule 703 be considered an actual exception to the rule against hearsay.⁷³ His argument proceeded in three parts: (1) allowing disclosure of the underlying hearsay for the sole purpose of allowing the jury to assess the weight of the expert opinion but not for its substantive truth is a nonsensical task that the jury is logically unable to perform;⁷⁴ (2) precluding disclosure of the basis of an expert's opinion, as well

67. Prior to the adoption of the Federal Rules of Evidence, the issue of expert reliance on inadmissible evidence surfaced only rarely, primarily because of the general rule requiring experts to base their opinions only on facts properly before the jury.

68. See Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577 (1986); Rice, *supra* note 41. These articles were cited by the Advisory Committee in its Note to the 2000 Amendment of Rule 703. See FED. R. EVID. 703 advisory committee's note (2000 Amendment).

69. See, e.g., Carlson, *supra* note 68, at 592 (concluding that "[o]ne of the great contributions of the Federal Rules of Evidence was the modernization of expert witness practice").

70. See *id.* at 593.

71. See *id.* at 587–88.

72. See *id.* at 588.

73. See Rice, *supra* note 41, at 586.

74. See *id.* at 585–86.

as restricting the jury to considering the underlying facts for a non-hearsay purpose, in effect transforms the expert witness into a “super-factfinder and thirteenth juror;”⁷⁵ and (3) admitting the underlying evidence for its truth poses no constitutional problem⁷⁶ and is the preferable course.

These arguments are illuminating. Professor Rice is undoubtedly correct in his analysis of the illogic of permitting disclosure of the underlying facts or data solely for the purpose of assessing the weight of the expert’s opinion. Though this is the solution that was ultimately adopted by the Federal Rules of Evidence in the 2000 amendment to Rule 703, it remains now as it was then an utterly absurd “fiction [that] cannot be done.”⁷⁷ Because this is the primary rationale advanced by courts in the face of Confrontation Clause challenges to the admission of testimonial statements via expert witnesses after *Crawford*,⁷⁸ the issue has now assumed critical importance. At the time that Professor Rice was writing about the absurdity of the task of considering the facts upon which an expert based an opinion not for their truth but only for their use in evaluating the weight of the expert’s opinion, such criticism had logical but not constitutional resonance. Now, however, it resounds more broadly and raises questions about the constitutionality of Rule 703’s solution to the issue.

C. THE CASES

Since the Supreme Court’s decision in *Crawford*, defendants in numerous cases have challenged their convictions based upon reliance by prosecution experts upon testimonial hearsay in forming their opinions. To date, there have been approximately 120 reported decisions that have addressed the precise issue with which this Article is concerned: expert witness reliance on hearsay statements that, if offered directly, would violate the defendant’s right to confront his accusers.⁷⁹ Many, like the *Thomas* case described at the beginning of this Part,⁸⁰ have arisen in the context of prosecution of gang-related crimes—many as prosecutions under California’s anti-gang STEP Act.⁸¹ Others have arisen where experts have been permitted to rely upon or introduce forensic reports prepared by another person who was not present at trial. And some of the cases cannot easily be pigeonholed as belonging to a certain type.

Before addressing the cases in which the expert testimonial triangle is

75. *Id.* at 596.

76. Professor Rice argued that disclosure of otherwise inadmissible hearsay by the expert did not violate the Confrontation Clause because it satisfied the reliability requirement of *Ohio v. Roberts*, 448 U.S. 56 (1980). See Rice, *supra* note 41, at 594–95. Of course, at the time that the article was written, *Roberts* was the governing standard for Confrontation Clause objections and this conclusion was undoubtedly correct as a matter of Supreme Court doctrine.

77. Rice, *supra* note 41, at 585.

78. *Crawford v. Washington*, 541 U.S. 36 (2004); see discussion *infra* notes 93–98 and accompanying text.

79. See, e.g., cases cited *infra* notes 93–103.

80. See *supra* notes 26–31 and accompanying text.

81. CAL. PENAL CODE §§ 186.20–.33 (West 2007).

squarely implicated, I should note that there are two groups of cases with which this Article is not centrally concerned. First, there are a number of cases in which the confrontation issue is raised by the defendant but rejected on other grounds, for example that the Confrontation Clause does not apply in civil commitment proceedings or sentencing hearings, or that error, if any, was harmless.⁸² Though they raise significant questions about fairness, due process, and the proper role of the jury in contemporary litigation,⁸³ strictly speaking they are outside the bounds of the expert testimonial triangle and thus are not addressed in this section. A second group of cases falls closer to the central concern of this Article: those in which the confrontation claim was rejected by the court because it finds that the hearsay relied upon by the expert is not testimonial.⁸⁴ Here, the issue is more complicated. Some of these holdings are probably incorrect, and the admission of the challenged hearsay would therefore fall within the expert testimonial triangle.⁸⁵ In others the non-testimonial find-

82. See, e.g., *United States v. Reynolds*, 171 F. App'x 961 (3d Cir. 2006) (any error was harmless); *State v. Rose*, No. 31966, 2006 WL 1459803 (Idaho Ct. App. May 30, 2006) (probation proceeding); *In re G.B.*, Nos. A104780, A109415, A107689, 2006 WL 1382426 (Cal. Ct. App. May 22, 2006) (civil proceeding).

83. See, e.g., John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967 (2005) (arguing that all Sixth Amendment rights, including Confrontation, should apply at capital sentencing); Richard D. Friedman, *Crawford and Davis: A Personal Reflection*, 19 REGENT U. L. REV. 303 (2006–2007) (arguing that the “confrontation principle” should apply at capital sentencing and other proceedings); Michael S. Pardo, *Confrontation Clause Implications of Constitutional Sentencing Options*, 18 FED. SENT'G REP. 230 (2006) (discussing the implications of *Booker* and *Crawford* on confrontation at sentencing); Penny J. White, “*He Said,*” “*She Said,*” and *Issues of Life and Death: The Right to Confrontation at Capital Sentencing Proceedings*, 19 REGENT U. L. REV. 387 (2006–2007) (discussing the right to confrontation at capital sentencing hearings); Nigel Hugh Holder, Comment, *Confrontation at Sentencing: The Logical Connection Between Crawford and Blakely*, 49 HOW. L.J. 179 (2005) (arguing that the Confrontation Clause should apply to sentencing).

84. See, e.g., *United States v. Del Rio*, 168 F. App'x 923 (11th Cir. 2006); *United States v. Trucchio*, No. 8:04-CR-348-T-24 TGW, 2006 WL 1529073 (M.D. Fla. May 26, 2006); *State v. Lackey*, 120 P.3d 332 (Kan. 2005). In several of these cases, the courts have held that the reports were non-testimonial based on a holding that they fell under the business records exception to the rule against hearsay. See, e.g., *Mitchell v. State*, 191 S.W.3d 219 (Tex. App. 2005) (holding that autopsy report prepared by a non-testifying examiner was a business record and therefore not testimonial). In *Crawford*, the Supreme Court stated in dicta that “[m]ost of the hearsay exceptions [developed at common law] covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy.” *Crawford v. Washington*, 541 U.S. 36, 56 (2004). Though it is probably accurate to say that most statements that typically fall under the business records exception are non-testimonial, there is a strong argument that records generated by governmental, prosecutorial authorities in connection with criminal investigation or prosecution are testimonial, though they may technically fall under the business records exception.

85. See, e.g., *United States v. Feliz*, 467 F.3d. 227, 233–37 (2d Cir. 2006) (finding autopsy report not testimonial and admissible despite the absence of the report’s preparer); *People v. Geier*, 161 P.3d 104, 133–40 (Cal. 2007) (finding DNA report not testimonial and admissible despite the absence of the report’s preparer); *Commonwealth v. Verde*, 827 N.E.2d 701, 704–06 (Mass. 2005) (finding laboratory report that detailed weight of cocaine found in defendant’s possession not testimonial and admissible despite the absence of the report’s preparer); *People v. Durio*, 794 N.Y.S.2d 863, 867–69 (Sup. Ct. 2005) (finding autopsy report not testimonial and admissible despite the absence of the report’s preparer); *Moreno Denoso v. State*, 156 S.W.3d 166, 180–83 (Tex. App. 2005) (finding autopsy report not testimonial and admissible despite the absence of the report’s preparer).

ing is supportable and does not raise constitutional concerns.⁸⁶ Where courts have affirmed convictions based on a questionable finding that a certain statement was not testimonial, the case actually falls within the expert testimonial triangle and should be counted as an example of an unconstitutional denial of the defendant's Sixth Amendment rights. These cases, however, most centrally involve the definition of testimonial hearsay rather than the problem of expert witness testimony and are therefore not of primary concern to the analysis presented here.⁸⁷

It has been the rare court that, faced with a Confrontation Clause challenge to the basis of expert opinion testimony, has held that the testimony violated the defendant's constitutional rights⁸⁸ and reversed the conviction.⁸⁹ In *People v. Pena*, the single California decision to have found a Confrontation Clause violation under these circumstances, the primary violation consisted in the direct use of a co-defendant's incriminating testimonial statement against the defendant.⁹⁰ In a single sentence and footnote, the court also mentioned the use of the statement by a prosecution "gang expert," stating that "[a]s to the assault itself, we are unable to say with confidence that the erroneous admission and use of [the co-defendant]'s statement (by both the prosecutor and the expert witness) is harmless beyond a reasonable doubt."⁹¹ The decision thus did not turn in large part on the expert's reliance on the statement, but on its direct use; it is not clear that the case would have come out the same way had the direct violation not occurred.⁹²

86. See, e.g., *United States v. Baker*, 458 F.3d 513, 518–19 (6th Cir. 2006) (finding postal records admitted to prove mail fraud not testimonial); *Corbray v. Carter*, No. C06-5043, 2006 WL 3020019, at *15–16 (W.D. Wash. Oct. 20, 2006) (finding statements made to treating physician in emergency room not testimonial); *Moen v. Czerniak*, No. CV-02-10-JE, 2006 WL 2270879, at *4 (D. Or. Aug. 8, 2006) (finding statement made to treating physician not testimonial).

87. For analysis of the proper definition of testimonial hearsay after *Crawford*, see Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 BROOK. L. REV. 241 (2005). See generally Symposium, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of its Past*, 71 BROOK. L. REV. 1 (2005).

88. See, e.g., *United States v. Buonsignore*, 131 F. App'x 252 (11th Cir. May 13, 2005); *United States v. Wright*, No. 02-00116-03-CR-W-FJG, 2006 WL 2043090 (W.D. Mo. July 20, 2006); *People v. Pena*, 28 Cal. Rptr. 3d 69 (Cal. Ct. App. 2005); *People v. Goldstein*, 843 N.E.2d 727 (N.Y. 2005); *State v. Crager*, 844 N.E.2d 390 (Ohio Ct. App. 2005).

89. As noted *supra* at note 82, several courts have held that harmless error analysis applies to *Crawford* violations and have upheld convictions on this ground even where expert testimony containing testimonial hearsay was found to violate the Confrontation Clause. See, e.g., *United States v. Ward*, 182 F. App'x 779 (10th Cir. 2006); *United States v. Reynolds*, 171 F. App'x 961 (3d Cir. 2006); *People v. Johnson*, No. E036424, 2006 WL 308094 (Cal. Ct. App. Feb. 10, 2006).

90. *Pena*, 28 Cal. Rptr. 3d at 76.

91. *Id.* at 81 & n.6.

92. A very small number of cases have upheld defendants' claims under *Crawford*. In *United States v. Buonsignore*, a prosecution expert testified to a drug valuation opinion based upon figures given him by another individual. The Eleventh Circuit held that this expert testimony was inadmissible under *Crawford* because it "was based on information obtained from an unidentified individual at the DEA in Washington, D.C." and was "testimonial in nature." 131 F. App'x at 257. The circumstances facing the court in *Buonsignore* were somewhat unusual, in that it was constrained by an earlier decision based on

In nearly every other case to have considered the question, courts have rejected the defendants' Confrontation Clause claims under *Crawford*. Courts have typically relied upon one or more of three rationales to reject defendants' Confrontation Clause claims: the non-hearsay rationale, the non-disclosure rationale, and the expert-is-confronted rationale. Because it is important to understand these arguments in order to see why they fail under the expert testimonial triangle, the rationales are set out in some detail below.

1. The Non-Hearsay Rationale

The most common basis for court holdings rejecting a Confrontation Clause challenge to the introduction of expert opinion is that the statements relied on by the experts in forming their opinions were not offered for their truth, but only as a basis for the expert's opinion.⁹³ Because the Supreme Court in *Crawford*

almost identical facts in which it had expressly held that the statements were hearsay but were reliable under the *Roberts* test. *Id.* at 256. The non-hearsay rationale was therefore unavailable based on the court's recent precedent. *See id.* at 256–57.

In *United States v. Wright*, the district court considered the defendant's motion *in limine* to exclude testimony by a police detective whom the prosecution wished to offer as an expert on street gangs. 2006 WL 2043090, at *1. The officer would have testified, among other things, that the defendant was a member of a street gang, based upon "police reports (i.e., what was said by others), Field Interview Forms (i.e., opinions and statements of other officers), [and] interviews of suspects in custody (i.e., what was said by others)." *Id.* at *7. The court ruled as a preliminary matter that the testimony was not admissible. *Id.* at *8. Though the basis of the ruling is not entirely clear, the court did cite *Crawford* and held that the statements were testimonial. *Id.* The opinion suggests that the detective would be permitted neither to testify to the statements, nor to rely on them should he be allowed to testify as an expert on street gang activity. *See id.* at *9.

New York's highest court has held squarely that a defendant's "constitutional right to be confronted with the witnesses against him was violated when a psychiatrist who testified for the prosecution recounted statements made to her by people who were not available for cross-examination." *Goldstein*, 843 N.E.2d at 728. The court's reasoning suggests, however, that it was the expert's disclosure of the statements to the jury, and not her reliance on them in forming her opinion, that led to the Confrontation Clause violation. *See id.* at 732–34.

Finally, *State v. Crager* involved admission of a DNA report prepared by a forensic analyst who was unavailable to testify at the defendant's trial because she was on maternity leave. 844 N.E.2d at 394. Instead, another analyst from her office testified concerning the DNA evidence, and the report was admitted over the defendant's objection. *Id.* The court held that its admission, as well as the testifying expert's conclusions based upon the report, violated the defendant's confrontation rights. *Id.* at 398–400.

93. Lest the reader remain skeptical that many courts actually rely on this rationale, it seems necessary to cite them all. *See United States v. Harris*, 200 Fed. App'x 472, 485–86 (6th Cir. 2006); *United States v. Allen*, 190 F. App'x 785, 787 (11th Cir. 2006); *Bao v. Adams*, 139 F. App'x 841, 841 (9th Cir. 2005); *Sharrieff v. Cathel*, 2006 WL 3511156, at *13–14 (D.N.J. Dec. 5, 2006); *In re Celestino B.*, 2006 WL 3366172, at *4–5 (Cal. Ct. App. Nov. 21, 2006); *People v. Palomino*, 2006 WL 3334948, at *2 (Cal. Ct. App. Nov. 17, 2006); *People v. Vasquez*, 2006 WL 3262556, at *4 (Cal. Ct. App. Nov. 13, 2006); *People v. Ramirez*, 2006 WL 3262557, at *4 (Cal. Ct. App. Nov. 13, 2006); *People v. Huerta*, 2006 WL 3262558, at *4 (Cal. Ct. App. Nov. 13, 2006); *People v. Villa*, 2006 WL 3190343, at *6 (Cal. Ct. App. Nov. 6, 2006); *People v. Avalos*, 2006 WL 2913896, at *5 (Cal. Ct. App. Oct. 12, 2006); *People v. Tran*, 2006 WL 2790460, at *5–6 (Cal. Ct. App. Sept. 29, 2006); *People v. Flores*, 2006 WL 2473498, at *9 (Cal. Ct. App. Aug. 29, 2006); *People v. Vasquez*, 2006 WL 2349190, at *7–8 (Cal. Ct. App. Aug. 15, 2006); *People v. Nguyen*, 2006 WL 2128392, at *8 (Cal. Ct. App. Jul. 21, 2006); *People v. Hartman*, 2006 WL 1752429, at *8–9 (Cal. Ct. App. June 28, 2006); *People v. Rodriguez*, 2006 WL 1620190, at *6 (Cal. Ct. App. June 13, 2006); *In re Daniel D.*, 2006 WL 1365111, at *6 (Cal. Ct. App.

clearly stated that the decision applied only to testimonial statements offered for their truth,⁹⁴ a finding of a non-hearsay purpose allows these courts to hold that their admission does not amount to a constitutional violation.

A representative example of such non-hearsay reasoning is this statement from a case involving a California gang prosecution:

Crawford limits the introduction of hearsay directly against a defendant but does not affect the type of evidence relied upon by an expert in forming his opinion. In our case, the prosecution did not offer the contents of the police reports as hearsay evidence of the truth of the matters asserted in the reports. The reports were mentioned only as a basis for [the expert's] opinion that [the defendant] was a Sureno gang member. [The defendant] had the opportunity to challenge the testimony by demonstrating the underlying information was incorrect or unreliable. He did not. There was no denial of his confrontation rights.⁹⁵

If, as the court says, the appropriate manner for the defendant to challenge the expert's opinion would be to demonstrate that the underlying information is "incorrect or unreliable," then it is plain that it is in fact being offered for its truth. If it were not offered for its truth, its reliability would be irrelevant. The court's own description of the jury instruction given in the case supports the conclusion that the testimonial statements were indeed offered for their truth. The jury in *Valerio* "was advised that the expert's opinion was only as good as the facts and reasons on which it was based, and that the jury should consider the proof of such facts in determining the value of the expert's opinion."⁹⁶

Furthermore, if the opinion is only as good as the facts on which it is based, and if those facts consist of testimonial hearsay statements that were not subject to cross-examination, then it is difficult to imagine how the defendant is expected to "demonstrate the underlying information was incorrect or unreli-

May 19, 2006); *People v. Olivarez*, 2006 WL 1149250, at *3 (Cal. Ct. App. May 2, 2006); *In re Jacob R.*, 2006 WL 1074898, at *3 (Cal. Ct. App. Apr. 24, 2006); *People v. Rubalcava*, 2005 WL 3540595, at *19–20 (Cal. Ct. App. Dec. 28, 2005); *People v. Vasquez*, 2005 WL 3163797, at *5–6 (Cal. Ct. App. Nov. 29, 2005); *People v. Vega*, 2005 WL 3146833, at *16–17 (Cal. Ct. App. Nov. 22, 2005); *People v. Delamora*, 2005 WL 2746643, at *8–9 (Cal. Ct. App. Oct. 25, 2005); *People v. Morales*, 2005 WL 2387641, at *4 (Cal. Ct. App. Sept. 29, 2005); *People v. Thomas*, 30 Cal. Rptr. 3d 582, 587 (Cal. Ct. App. 2005); *People v. Ortiz*, 2005 WL 851716, at *7–8 (Cal. Ct. App. Apr. 12, 2005); *People v. Valerio*, 2005 WL 351788, at *14 (Cal. Ct. App. Feb. 15, 2005); *In re Julio D.*, 2004 WL 2786375, at *3 (Cal. Ct. App. Dec. 6, 2004); *People v. Coonrod*, 2006 WL 1290871, at *2–3 (Mich. Ct. App. May 11, 2006); *State v. Taylor*, 2006 WL 1147300, at *2 (N.C. Ct. App. May 2, 2006); *State v. Durham*, 625 S.E.2d 831, 834–35 (N.C. Ct. App. 2006); *State v. Bunn*, 619 S.E.2d 918, 920 (N.C. Ct. App. 2005); *State v. Bethea*, 617 S.E.2d 687, 695 (N.C. Ct. App. 2005); *State v. Delaney*, 613 S.E.2d 699, 700–01 (N.C. Ct. App. 2005); *Commonwealth v. Dargan*, 897 A.2d 496, 500–02 (Pa. Super. Ct. 2006); *State v. Monschke*, 135 P.3d 966, 978 (Wash. Ct. App. 2006).

94. See *Crawford v. Washington*, 541 U.S. 36, 59 n.9, 68 (2004).

95. *People v. Valerio*, 2005 WL 351788, at *14 (Cal. Ct. App. Feb. 15, 2005).

96. *Id.* at *13. The court noted that the trial court had "properly instructed the jury on expert testimony." *Id.*

able.”⁹⁷ According to *Crawford*, the only constitutionally sanctioned manner in which the reliability of testimonial hearsay may be tested is by cross-examination.⁹⁸

2. The Non-Disclosure Rationale

In other cases, courts have suggested that undisclosed testimonial statements—that is, statements on which an expert relies in forming an opinion but which are not specifically repeated in court—are not covered by the *Crawford* ruling. The D.C. Circuit, in the course of finding that a defendant had not demonstrated exceptional circumstances so as to excuse his failure to raise his Confrontation Clause claim on direct appeal, stated:

Crawford, however, did not involve expert witness testimony and thus did not alter an expert witness’s ability to rely on (without repeating to the jury) otherwise inadmissible evidence in formulating his opinion under Federal Rule of Evidence 703. In other words, while the Supreme Court in *Crawford* altered Confrontation Clause precedent, it said nothing about the Clause’s relation to Federal Rule of Evidence 703.⁹⁹

The court here viewed the defendant’s claim as purely evidentiary, not constitutional. According to this reasoning, *Crawford*, by its terms, does not apply where testimonial hearsay is not repeated to the jury.

3. The Expert-Is-Confronted Rationale

In a related strand of reasoning, several opinions note that, because the expert herself is subject to cross-examination, the Confrontation Clause is satisfied. For example, in a case involving an autopsy report that had “concluded that the death [at issue in the homicide prosecution] was a homicide,” the pathologist who prepared the report had retired by the time of the trial and did not testify.¹⁰⁰ Instead, the chief medical examiner, who had signed the report but who had not personally participated in preparing it, testified as an expert witness as to the cause of death.¹⁰¹ The court, in rejecting the defendant’s Confrontation Clause challenge, noted that the chief medical examiner “testified and was subject to cross-examination.”¹⁰² Similarly, the Ninth Circuit has held that where an

97. *Id.* at *14.

98. See *Crawford*, 541 U.S. at 68–69 (“Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”).

99. *United States v. Henry*, 472 F.3d 910, 914 (D.C. Cir. 2007) (footnote omitted).

100. *Terrazas v. State*, No. 03-05-00344-CR, 2006 WL 2080381, at *5 (Tex. Ct. App. Nov. 15, 2006).

101. See *id.* The report was introduced into evidence, and the defendant challenged its admission. *Id.* at *4–5.

102. *Id.* The court also found that the report was a public record, though it is unclear why this would affect its admissibility under the Confrontation Clause, especially in light of the Court’s statement that “we need not address whether the autopsy report was testimonial or non-testimonial in nature.” *Id.* The court therefore was

expert witness “testified and was available for cross-examination, her reliance on hearsay to form her opinion did not violate the Confrontation Clause.”¹⁰³

In sum, the vast majority of courts to have considered the issue have rejected Confrontation Clause challenges to expert opinion testimony based upon testimonial hearsay. While several of these turn on the definition of “testimonial” under *Crawford*, many others accept that the underlying basis of the expert opinion consists of testimonial statements, but, nevertheless, find no constitutional violation. The most common rationale advanced for this holding is that the statements, when offered as the basis of an expert’s opinion, are not offered for their truth and are, therefore, not covered at all by the Confrontation Clause. Under this reasoning, even where the statements are disclosed to the jury, their admission does not present a constitutional problem. Other courts note that, because the expert is subject to cross-examination, the Confrontation Clause is satisfied. Finally, several courts have held or implied that, so long as the expert does not disclose to the jury the testimonial statements that form the basis of her opinion, the Confrontation Clause is not implicated. In effect, these courts have held that stealth testimonial hearsay does not raise a constitutional claim. The next Part demonstrates that each of these rationales is blocked by one or more sides of the expert testimonial triangle.

II. THE EXPERT TESTIMONIAL TRIANGLE

As the cases examined in the previous Part reveal, courts have typically dealt with the problem of hidden testimonial hearsay by holding either that it is not hearsay at all,¹⁰⁴ that its use by expert witnesses in forming their opinions does not violate the Confrontation Clause where the hearsay statements are not disclosed to the jury,¹⁰⁵ or that the expert witness is subject to cross-examination, which satisfies constitutional requirements.¹⁰⁶ None of these rationales is supportable; rather, the reliance by expert witnesses on testimonial hearsay—whether hidden or revealed—violates the Sixth Amendment and contravenes Supreme Court reasoning regarding scientific and other expert testimony. Where the testimonial hearsay statement is disclosed to the jury, *Crawford* is directly implicated; despite the non-hearsay rationale, this is and should be the easy case.¹⁰⁷ Where undisclosed hearsay is involved, permitting an expert

not reasoning that public records are, by their nature, non-testimonial. Cf. *United States v. Oates*, 560 F.2d 45, 63–84 (2d Cir. 1977) (holding that a lab report could not be admitted against a criminal defendant where the official who prepared the report was not available for cross-examination; though an evidentiary holding, the reasoning suggested constitutional underpinnings in the Confrontation Clause).

103. *United States v. Wells*, 162 F. App’x 754, 757 (9th Cir. 2006).

104. See *supra* notes 93–98 and accompanying text.

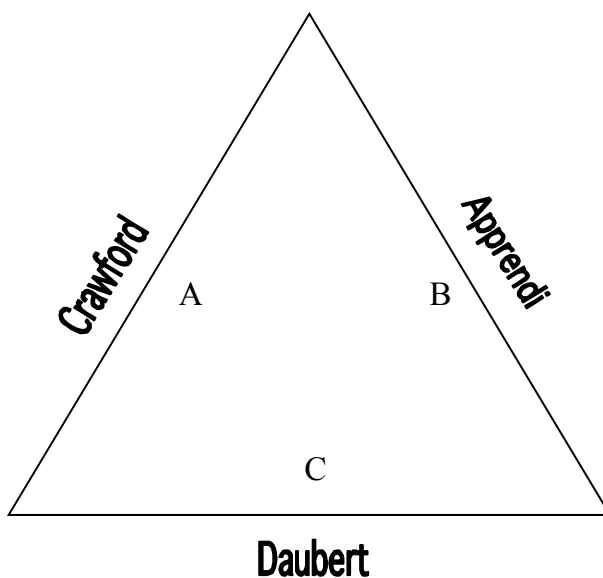
105. See *supra* note 99 and accompanying text.

106. See *supra* notes 100–03 and accompanying text.

107. This argument is ably made in Ross Andrew Oliver, Note, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford*, 55 HASTINGS L.J. 1539 (2004). Like previous scholars, Oliver is primarily concerned when the testimonial hearsay is revealed to the jury in form or substance. He argues that courts “must prohibit an expert from testifying to an opinion in those cases where the opinion relies upon testimonial hearsay

witness to testify to her opinion sits at the intersection of three distinct lines of Supreme Court case law. These three disparate bodies of doctrine and principle converge in such cases to require that experts not be permitted to testify to opinions based in whole or in part on testimonial hearsay.

None of the rationales offered by courts and scholars to permit the introduction of stealth testimonial hearsay provides an escape from the boundaries of the expert testimonial triangle. Rather, as will be demonstrated in this Part, each proposed solution runs up against a different side of the triangle. Side *A*, represented by the Supreme Court's opinion in *Crawford v. Washington*, consists of the Sixth Amendment's requirement that a criminal defendant be afforded the opportunity to cross-examine the "witnesses against him."¹⁰⁸ Side *B*, represented by the Supreme Court's opinion in *Apprendi v. New Jersey*, is the criminal defendant's right, also situated in the Sixth Amendment, to have a jury determine the facts upon which his conviction is based.¹⁰⁹ Side *C*, represented by the Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*, completes the triangle with the principle of judicial oversight of expert opinion and scrutiny of the methodologies, facts, and data upon which these opinions are based.¹¹⁰ In graphic form, the triangle appears thus:



to such an extent that it substantially transmits to the jury the content of the hearsay, unless the defendant has an opportunity to test the hearsay by cross-examination." *Id.* at 1540.

108. U.S. CONST. amend. VI; see *Crawford v. Washington*, 541 U.S. 36 (2004).

109. See U.S. CONST. amend. VI; *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

110. See *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

As will be seen, where testimonial hearsay forms all or part of the basis of an expert witness's opinion, it falls squarely (so to speak) within the three corners of this triangle and requires exclusion not just of the hearsay, but of the opinion itself. Allowing the expert witness to repeat the testimonial hearsay in court runs afoul of *Crawford*, attempts to define the statements as non-hearsay notwithstanding. Permitting the expert to provide the opinion without disclosing the inadmissible basis contravenes *Apprendi*. And the various arguments and solutions offered in both of these contexts are in substantial tension with the principles that underlie both of these cases as well as *Daubert* and its progeny.

A. CRAWFORD AND THE RIGHT TO CONFRONTATION

In *Crawford v. Washington*,¹¹¹ the Supreme Court abandoned nearly twenty-five years of Confrontation Clause¹¹² jurisprudence that had allowed courts to dispense with cross-examination of hearsay declarants by criminal defendants so long as the court determined that the hearsay at issue was reliable.¹¹³ Relying primarily upon a historical and textual understanding of the Sixth Amendment confrontation right, the Court laid down a bright-line test: where “testimonial hearsay”¹¹⁴ is offered against a criminal defendant, its admission violates the Confrontation Clause unless the declarant is unavailable and there has been an

111. 541 U.S. 36 (2004).

112. The Confrontation Clause of the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI.

113. See *Crawford*, 541 U.S. at 61–62. Under the *Roberts* test, as applied and refined by subsequent cases, hearsay admitted against a criminal defendant satisfied the Confrontation Clause if it was admitted under a “firmly-rooted” hearsay exception or if it bore “particularized guarantees of trustworthiness.” See *Ohio v. Roberts*, 448 U.S. 56, 57 (1980); see also *Lilly v. Virginia*, 527 U.S. 116, 117 (1999); *White v. Illinois*, 502 U.S. 346, 356 (1992); *Idaho v. Wright*, 497 U.S. 805, 814–15 (1990); *U.S. v. Inadi*, 475 U.S. 387 (1986).

114. See *Crawford*, 541 U.S. at 53 (introducing the term “testimonial hearsay”). Under the Federal Rules of Evidence, hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” FED. R. EVID. 801(c). The Court in *Crawford*, though making clear that not all hearsay equally implicates the Confrontation Clause, declined to formulate a precise definition of “testimonial hearsay,” preferring to “leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” *Crawford*, 541 U.S. at 68. Instead, the Court offered several examples of hearsay that is and is not testimonial, and quoted three possible definitions offered by various parties and amici. See *id.* at 51–52. Further, it elaborated at some length upon the values that underlie the Constitutional protection. See *id.* at 53. In the wake of *Crawford*, courts in literally hundreds of cases have begun the process of defining the term. See, e.g., *United States v. Arnold*, 486 F.3d 177, 187–88 (6th Cir. 2007); *United States v. Townley*, 472 F.3d 1267, 1272 (10th Cir. 2007). Scholars, likewise, have weighed in on the issue. See Carol A. Chase, *Is Crawford a “Get Out of Jail Free” Card for Batterers and Abusers? An Argument for a Narrow Definition of “Testimonial.”* 84 OR. L. REV. 1093 (2005); Friedman, *supra* note 87; Josephine Ross, *After Crawford Double-Speak: “Testimony” Does Not Mean Testimony and “Witness” Does Not Mean Witness*, 97 J. CRIM. L. & CRIMINOLOGY 147 (2006). Recently, the Supreme Court revisited the question in *Davis v. Washington* and provided some guidance to lower courts applying the rule in specific situations. See *Davis v. Washington*, 126 S. Ct. 2266 (2006).

opportunity for the defendant to cross-examine the declarant.¹¹⁵ The test admits of virtually no exception;¹¹⁶ therefore the definition of “testimonial hearsay” takes on great weight.¹¹⁷ Every item of hearsay that is swept into the testimonial rubric is one tool less in the prosecutorial arsenal. This result applies no matter how important the evidence for the prosecution and no matter how reliable it appears.¹¹⁸

In *Crawford*, the defendant was convicted of assault after seeking out and stabbing a man whom he believed had tried to rape his wife.¹¹⁹ Michael Crawford admitted to the stabbing, but claimed that he acted in self-defense after he and the victim argued and the victim appeared to draw a weapon.¹²⁰ After the incident, Michael and his wife, Sylvia, were interrogated separately by police.¹²¹ In response to questioning, Sylvia made a highly ambiguous statement that potentially called into question Michael’s assertion that he thought he had seen the victim “goin’ for somethin’ before, right before everything happened . . . I think that he pulled somethin’ out and I grabbed for it and that’s how I got cut.”¹²² In contrast to her husband’s account, Sylvia stated that after Michael stabbed him, she saw the victim fall with his arms and hands out-

115. If the declarant is not unavailable, the prosecution may introduce the testimonial hearsay statements so long as the declarant testifies as a witness and the defendant therefore has an opportunity to cross-examine her or him about the out-of-court statements. See *Crawford*, 541 U.S. at 59 n.9 (“[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.”). Though this language seems to require some measure of effective cross-examination in that it suggests that the declarant should actually “defend or explain” the prior statement, the Court has previously held that the Confrontation Clause essentially requires only that the declarant be present for cross-examination and that the Clause is satisfied even where the witness-declarant has suffered severe brain damage and has no memory of the event or of the prior statement. See *United States v. Owens*, 484 U.S. 554, 565–64 (1988). Thus, though the *Crawford* test is presented as having two requirements—unavailability and cross-examination—in effect it has but one requirement: a past or present opportunity to cross-examine the declarant. The unavailability requirement is actually a statement that the prosecution must either produce the declarant or forego use of the statement if there has been no prior cross-examination. Only in cases in which the declarant is genuinely unavailable will the *Crawford* rule have the draconian effect of excluding potentially crucial and seemingly reliable evidence.

116. The *Crawford* test may allow exceptions for dying declarations, see *Crawford*, 541 U.S. at 55 n.6, and forfeiture by wrongdoing, *id.* at 62 (“[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.”).

117. *Crawford* had a dramatic and immediate effect in cases involving domestic violence and child abuse. See generally Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747 (2005); Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511 (2005); Allie Phillips, *A Flurry of Court Interpretations: Weathering the Storm after Crawford v. Washington*, PROSECUTOR, Nov.–Dec. 2004, at 37; Deborah Tuerkheimer, *Crawford’s Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1 (2006).

118. Justice Scalia, in typical pithy fashion, wrote: “Dispensing with confrontation because hearsay is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.” *Crawford*, 541 U.S. at 62.

119. See *id.* at 38.

120. See *id.* at 39.

121. See *id.* at 38.

122. *Id.* at 39.

stretched. In response to a detective's question¹²³ whether she "[saw] anything in his hands at that point," Sylvia stated "um um (no)."¹²⁴ Because of the operation of the state spousal privilege, Sylvia did not testify at trial.¹²⁵ Her recorded statement was played for the jury and the defendant was convicted.¹²⁶

The State argued, and the Washington Supreme Court held, that this hearsay statement exhibited sufficient indicia of reliability under the *Roberts* test to allow its admission though the defendant had no opportunity to cross-examine the declarant.¹²⁷ The Supreme Court, in contrast, viewed the case as a paradigmatic Confrontation Clause violation and used the opportunity to reject the very framework that would permit a court to assess the reliability of testimonial hearsay. Dismissing any judicial role in assessing the reliability of testimonial hearsay statements, the Court stated categorically: "The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising."¹²⁸ That procedure, the Court made undeniably clear, is cross-examination by the accused. In *Crawford*, testimonial hearsay was admitted against the accused despite his having had no opportunity to cross-examine the declarant. "That alone," said the Court, "is sufficient to make out a violation of the Sixth Amendment."¹²⁹ The Court rejected in the most unequivocal terms any other avenue for testimonial hearsay to come before the jury, holding that "the only indicium of reliability sufficient to satisfy constitutional demands is

123. The Supreme Court characterized the questions as "leading" and the context of the questioning as potentially coercive in that Sylvia "made her statement while in police custody, herself a potential suspect in the case" and having been informed by police that her release would "'depend[] upon how the investigation continues.'" *Id.* at 65.

124. *Id.* at 39–40.

125. *See id.* Washington's spousal testimonial privilege allows the defendant spouse to prevent the witness spouse from testifying. *See id.*; *cf.* Trammel v. United States, 445 U.S. 40, 53 (1980) (holding that under federal spousal testimonial privilege, the witness spouse alone holds the privilege and the defendant spouse cannot prevent her from testifying). The Court in *Crawford* did not reach the issue whether such action by the defendant constituted a waiver of his Confrontation Clause claim because the Washington Supreme Court had found no waiver and the State had not challenged this finding. *See Crawford*, 541 U.S. at 42 n.1.

126. *See Crawford*, 541 U.S. at 36.

127. *See State v. Crawford*, 54 P.3d 656, 664 (Wash. 2002). The trial court had allowed the statement to be admitted under the *Roberts* test, but the intermediate appellate court had reversed on the ground that the statement was not sufficiently trustworthy. *State v. Crawford*, 107 Wash. App. 1025 (Wash. Ct. App. 2001). This holding was in turn reversed by the Washington Supreme Court, which found the statement reliable on the ground that it "interlocked" with the defendant's own statement. 54 P.3d at 664. The United States Supreme Court not only rejected the notion that the statements "interlocked" so as to indicate reliability, but also relied on the disparate holdings by the various courts which heard the case to support its finding that the *Roberts* reliability test was inherently flawed. *See Crawford*, 541 U.S. at 66 ("The case is thus a self-contained demonstration of *Roberts*' unpredictable and inconsistent application.").

128. *Crawford*, 541 U.S. at 67.

129. *Id.* at 68.

the one the Constitution actually prescribes: confrontation.”¹³⁰

Recently, the Supreme Court reaffirmed the strict *Crawford* exclusionary rule in a decision that provided the Court an opportunity to clarify and apply the definition of testimonial hearsay in the context of police interrogation. *Davis v. Washington* and its companion case, *Hammon v. Indiana*, involved statements to police or their agents by victims in domestic violence scenarios.¹³¹ For purposes of the expert testimonial triangle, *Davis* is most notable for the Court’s treatment of the practical difficulty of prosecuting domestic violence crimes and the potential problems that exclusion of these statements would pose. Accepting the premise of the government and several amici that “[t]his particular type of crime is notoriously susceptible to intimidation or coercion of the victim” and that this might “give[] the criminal a windfall,” the Court nevertheless stated that “[w]e may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free.”¹³² By this reasoning, increased difficulty or decreased efficiency in prosecuting cases is not sufficient reason to allow expert witnesses to convey testimonial hearsay to the jury.

Applying the *Crawford* rule in the context of testimonial hearsay conveyed through the vehicle of expert opinion testimony, it is at the very least clear that such statements may not constitutionally be disclosed to the jury on direct examination as is permitted by Federal Rule of Evidence 703¹³³ and as has been further countenanced by numerous courts after *Crawford*.¹³⁴ Though these courts offer various justifications for allowing such statements to be disclosed to the jury, the most common reason is that they are not offered to prove the truth

130. *Id.* at 69.

131. *Davis v. Washington*, 126 S. Ct. 2266, 2270–72 (2006). *Davis* involved a 911 call by a woman who had just been assaulted by her former boyfriend. *Id.* at 2270–71. In *Hammon*, statements were made to police who responded to the scene of a domestic dispute. *Id.* at 2272–73. The Court characterized both cases as involving the issue of “which police interrogations produce testimony,” and stated that questioning by a 911 operator in the course of an emergency call would be considered questioning by a police agent. The Court noted, however, “that statements made in the absence of any interrogation” were not necessarily non-testimonial. *See id.* at 2274 n.1.

132. *Id.* at 2279–80. The Court suggested that the appropriate course in cases of coercion or intimidation of the potential witness would be a finding of forfeiture of the Confrontation Clause claim by the defendant, rather than exceptions for particular types of cases. *See id.* at 2280.

133. The rule provides that expert witnesses may base opinions on facts or data that are themselves inadmissible, so long as they are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” FED. R. EVID. 703. The rule further allows such inadmissible facts or data to be disclosed to the jury by the proponent of the evidence, subject to a balancing test that is weighted against admissibility but nonetheless does allow it in some instances. *See id.*

134. *See, e.g.*, *United States v. Harris*, 200 Fed App’x 472, 485–86 (6th Cir. 2006); *United States v. Allen*, 190 F. App’x 785, 787 (11th Cir. 2006); *People v. Vasquez*, No. B180933, 2005 WL 3163797, *5–6 (Cal. Ct. App. Nov. 29, 2005); *People v. Coonrod*, No. 258726, 2006 WL 1290871, *2–3 (Mich. Ct. App. May 11, 2006); *State v. Bunn*, 619 S.E.2d 918, 920 (N.C. Ct. App. 2005); *Commonwealth v. Dargan*, 897 A.2d 496, 499–502 (Pa. Super. Ct. 2006); *State v. Monschke*, 135 P.3d 966, 978 (Wash. Ct. App. 2006).

of the matter asserted, and therefore that they are not hearsay.¹³⁵ According to these decisions, hearsay that would admittedly be testimonial if it were offered directly is not hearsay at all when offered by the expert as a basis of his opinion testimony.¹³⁶

The *Crawford* Court made clear that its rule applies only to statements offered for their truth. In a parenthetical aside contained at the end of a lengthy footnote, the Court noted that “[t]he [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”¹³⁷ It cited for this proposition *Tennessee v. Street*, in which an accomplice’s confession was introduced in order to rebut the defendant’s testimony that his own confession was coercively derived from that of the accomplice.¹³⁸ The Court there found a clear non-hearsay purpose for the out-of-court statement because the jury, in comparing the two confessions, could reasonably conclude that the defendant’s confession was not derived from the accomplice’s, and therefore might disbelieve the version of events to which defendant testified at trial.¹³⁹ That the statement might be subject to misuse by the jury for an impermissible (hearsay) purpose was, according to the Court, a distinct question that in the particular case did not require exclusion of the statement.¹⁴⁰

In the post-*Crawford* cases that rely on this non-hearsay rationale to permit expert witnesses to repeat testimonial statements at trial, courts reason that the statements are offered not for their truth, but only “to show the bases of [the expert’s] opinions.”¹⁴¹ Such reasoning is widespread. Of the more than one hundred cases applying *Crawford* to expert reliance on testimonial hearsay, over thirty rely on this particular non-hearsay rationale to hold that there is no constitutional violation.¹⁴² However, as discussed above, it is not logically possible for a jury to use the hearsay statements to assess the weight of the

135. See, e.g., *Harris*, 200 Fed App’x at 485–86; *Sharrieff v. Cathel*, Civil No. 05-4525, 2006 WL 3511156, at *13–14 (D.N.J. Dec. 5, 2006); *People v. Vasquez*, No. F047543, 2006 WL 3262556, at *4 (Cal. Ct. App. Nov. 13, 2006); *Coonrod*, 2006 WL 1290871, at *2–3; *Bunn*, 619 S.E.2d at 920.

136. See cases cited *supra* note 135. Other courts that have permitted experts to repeat hearsay statements at trial have held that the statements were not testimonial under *Crawford*. Some of these holdings are clearly correct, but others are questionable. See, e.g., cases cited *supra* note 77.

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

138. *Tennessee v. Street*, 471 U.S. 409, 411–12 (1985).

139. See *id.* at 413–16.

140. See *id.* at 414–17.

141. *People v. Vasquez*, No. F047543, 2006 WL 3262556, at *4 (Cal. Ct. App. Nov. 13, 2006); see also *People v. Ramirez*, No. F047544, 2006 WL 3262557 (Cal. Ct. App. Nov. 13, 2006) (using same reasoning and language); *People v. Huerta*, No. F047517, 2006 WL 3262558 (Cal. Ct. App. Nov. 13, 2006) (same).

142. Other cases illustrate different non-hearsay uses of testimonial statements that are much less problematic in that, as was the case in *Street*, their relevance truly can be said to be distinct from their truth. See, e.g., *Sharrieff v. Cathel*, Civil No. 05-4525, 2006 WL 3511156, at *13 (D.N.J. Dec. 5, 2006) (finding that testimonial statements offered “for the purpose of establishing background or context for the officers’ actions” were non-hearsay).

expert's opinion other than by considering their truth.¹⁴³ Unless the jury is thought to evaluate the expert's opinion simply based on the *quantity* of facts or data on which it relies, or perhaps on the type of data relied upon,¹⁴⁴ it cannot but consider the substance of the hearsay statements that form the basis of the opinion. After all, should the jury find that the hearsay statements are false, it is difficult to imagine how the statements might support the expert's opinion; only if they are true can they reasonably be said to offer any weight to the opinion.

In *People v. Thomas*,¹⁴⁵ the case described in Part I as a paradigm example of introduction of stealth testimonial hearsay,¹⁴⁶ the defendant objected to the expert's testimony on the ground that it violated his Confrontation Clause rights under *Crawford*. The court held that "*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions."¹⁴⁷ Reasoning that the expert himself remains subject to cross-examination, the court stressed that the use of the testimonial statements was a non-hearsay use: "the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion."¹⁴⁸ The court found that the expert police officer's discussions with gang members "were mentioned only as a basis for [his] opinion that defendant was a gang member," and therefore that the Sixth Amendment was not violated by the expert's revealing those conversations to the jury.¹⁴⁹

The statements of the other gang members to the effect that the defendant was a member of the gang, given as part of the basis of the expert's opinion that the defendant was a gang member, could not possibly support that opinion unless they were true. The weight of the opinion is entirely dependant upon the accuracy and substantive content of the out-of-court statements. Given that the court seemed to accept that the statements were testimonial,¹⁵⁰ they should have been excluded under *Crawford*. In the earlier debate over using Rule 703 as a "back-door" hearsay exception, even those scholars who advocated allowing the statements to be introduced in certain circumstances recognized that they were

143. See *supra* notes 95–96 and accompanying text.

144. Though the jury might do this, such a method of evaluation should certainly not be encouraged by the rules. See Joseph Sanders, *The Merits of the Paternalistic Justification for Restrictions on the Admissibility of Expert Evidence*, 33 SETON HALL L. REV. 881, 909 (2003) (discussing research regarding the peripheral processing mode of decision making, by which "people do not attend to the quality and validity of arguments," but rather "adopt shortcuts . . . [which] rely on factors such as the number of arguments (rather than their quality), the attractiveness of the communicator, and the communicator's credentials").

145. 30 Cal. Rptr. 3d 582 (Cal. Ct. App. 2005).

146. See *supra* notes 26–28 and accompanying text.

147. *Thomas*, 30 Cal. Rptr. 3d at 587.

148. *Id.*

149. *Id.*

150. See *id.* at 586–87. This assumption is undeniably correct, as the officer had talked to the gang members in connection with his investigation of the crime.

offered for their truth.¹⁵¹ And while a back-door hearsay exception is arguably problematic, a back-door Confrontation Clause exception is wholly unworkable. In sum, Side A of the expert testimonial triangle requires that experts not be permitted to disclose to the jury the basis of their opinions where this basis consists of testimonial hearsay statements that would violate the Confrontation Clause if offered directly for their truth.

B. APPRENDI AND THE RIGHT TO JURY DETERMINATION OF FACTS

If disclosure to the jury of testimonial hearsay violates the Confrontation Clause, one response is simply to allow the expert to testify to the opinion without disclosing its basis. As discussed above, such a process is permitted—indeed encouraged—by the rules of evidence.¹⁵² Rule 703 permits an expert to testify to an opinion based upon otherwise inadmissible evidence, and weights the balancing test against admission of the underlying evidence.¹⁵³ Furthermore, several courts in the wake of *Crawford* have validated such an approach under the non-disclosure rationale.¹⁵⁴ Though the constitutionality of such a course may be debatable under the Confrontation Clause alone, that Clause does not apply alone to the hidden hearsay. Rather, there are two additional and fundamental principles that must be brought to bear on the question; these two principles form the balance of the expert testimonial triangle. The first of these is the Sixth Amendment right to a trial by jury, represented in the diagram at Side B and exemplified by the Supreme Court case of *Apprendi v. New Jersey*.¹⁵⁵

The Sixth Amendment provides, in addition to the confrontation right, that criminal defendants “shall enjoy the right to a speedy and public trial, by an impartial jury.”¹⁵⁶ This right to trial by jury—in essence, the right to have a jury determine the facts of a case¹⁵⁷—is guaranteed by three separate provisions of

151. See Carlson, *supra* note 62; Faigman, *supra* note 62; Rice, *supra* note 41.

152. See discussion *supra* notes 40–49 and accompanying text.

153. Under Rule 703 as amended in 2000, “facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.” FED. R. EVID. 703. Prior to the 2000 amendment, courts were divided as to the proper method of determining when otherwise inadmissible evidence could be disclosed. Compare *United States v. 0.59 Acres of Land*, 109 F.3d 1493, 1496–97 (9th Cir. 1997) (finding reversible error where an expert used inadmissible hearsay to explain his opinion and the court failed to instruct the jury that the hearsay evidence was not to be considered substantive evidence), with *United States v. Rollins*, 862 F.2d 1282, 1293 (7th Cir. 1988) (allowing admission of hearsay statements of a government informant as part of the testimony of an FBI agent acting as an expert on the meaning of a code language).

154. See *supra* note 99 and accompanying text.

155. 530 U.S. 466 (2000).

156. U.S. CONST. amend. VI.

157. In addition to determining the facts, the jury has often been held up as the judge of the law, or at the least the body charged with applying the law to the facts as it sees fit even in contradiction to the court’s instructions. See, e.g., RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 245 (2003) (“When this country was founded, juries were not required to apply the law as the judge gave it to them; instead, they could define it for themselves. Thus, juries decided the law as well as the facts.”); see generally LEVY, *supra* note 20. While this concept remains strong in the criminal context, the increasing use of

the United States Constitution¹⁵⁸ as well as by the constitutions of all fifty states.¹⁵⁹ Indeed, at the time of the American Revolution, “[e]very state that framed a constitution secured trial by jury,” and “[n]o other personal right received protection from the constitutions of so many states.”¹⁶⁰

In *Apprendi*, the Court considered a statute under which a trial judge was authorized to impose

an “extended term” of imprisonment if [he or she found], by a preponderance of the evidence, that “[t]he defendant in committing the crime [of which he has been convicted or to which he has pleaded guilty] acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity.”¹⁶¹

After the defendant pleaded guilty to the underlying substantive offense of having fired several bullets into the home of an African-American family, the trial court held a hearing on the application of the hate-crime enhancement.¹⁶² At the hearing, the defendant testified that he had not acted out of racial bias, but rather had acted stupidly after drinking too much alcohol. He offered psychological and reputational evidence to the effect that he did not harbor bias against African-Americans. After hearing the evidence, the judge found by a preponderance of the evidence that the incident was motivated by racial bias and that the statutory enhancement therefore applied.¹⁶³

Based on this factual finding by the court, the defendant became eligible for a higher maximum sentence than would have been permitted had he only been convicted of the underlying offense. The Supreme Court, per Justice Stevens, struck down the state law provision on the ground that it violated the defendant’s constitutional right to trial by jury. The Court held that “any fact (other than prior conviction) that increases the maximum penalty for a crime must be . . . submitted to a jury, and proven beyond a reasonable doubt.”¹⁶⁴

In recent years, beginning with *Apprendi*,¹⁶⁵ the Supreme Court has reinvigo-

procedures such as summary judgment, special verdicts, and remittitur has weakened the role of the jury in the civil context. See generally Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687 (2004).

158. In addition to the Sixth Amendment guarantee, Article III provides that “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.” U.S. CONST. art. III, § 2, cl. 3. The Seventh Amendment provides that “[i]n suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” U.S. CONST. amend. VII.

159. See, e.g., CAL. CONST. art. I, § 15; CONN. CONST. amend. art. XXIX; GA. CONST. art. I, § 1, ¶ XI.

160. LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 227 (1999).

161. *Apprendi v. New Jersey*, 530 U.S. 466, 468–69 (2000) (first alteration in original; subsequent alterations added).

162. *Id.* at 470.

163. *Id.* at 471.

164. *Id.* at 476.

165. The *Apprendi* holding was foreshadowed the prior term by the Court’s opinion in *Jones v. United States*, 526 U.S. 227, 239, 248 (1999) (construing a federal criminal statute so as to avoid the

rated and reaffirmed this right to have a jury determine, beyond a reasonable doubt, all of the facts upon which a criminal conviction and sentence are based.¹⁶⁶ The most recent cases apply this constitutional protection to facts relied upon to increase penalties at the sentencing phase,¹⁶⁷ but they rest upon cases upholding the right to jury determination of facts during the guilt phase of the trial, and their reasoning and dicta are broad. These cases suggest that, taken together, the Sixth Amendment rights to confront adverse witnesses and to jury determination of operative facts impose constraints upon prosecutors and judges in the manner in which expert witnesses are used to present evidence against criminal defendants. Further, they counsel some skepticism about contemporary trends, codified in the Federal Rules of Evidence, in the area of expert opinion testimony in both criminal and civil cases.

In the context of expert witness testimony, then, the question becomes whether it contravenes these fundamental constitutional principles for a prosecution expert in a criminal trial to rely on testimonial hearsay that, if presented directly to the jury, would violate the Confrontation Clause guarantee. The expert, by assumption, has necessarily determined that the testimonial statements are reliable.¹⁶⁸ The expert has therefore performed a fact-finding function that would otherwise be committed to the province of the jury.¹⁶⁹ If the expert's opinion is relevant,¹⁷⁰ then it must compose some part of an element of the offense for which the defendant is on trial.¹⁷¹ The jury, however, is not apprised of the evidence and is not able to assess the reliability of the evidence.¹⁷² Nor

“grave and doubtful constitutional question[.]” and noting that “there is reason to suppose that in the present circumstances . . . the relative diminution of the jury’s significance would merit Sixth Amendment concern”).

166. See Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts After Booker: What the Seventh Amendment Can Teach the Sixth*, 39 GA. L. REV. 895, 897–98 (2005) (noting that, prior to the decision in *Apprendi*, the Court had given almost unlimited discretion to legislatures to define elements versus sentencing factors and had held that the latter were not subject to the right to trial by jury); cf. Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767 (2005) (arguing that the Court has exhibited “judicial modesty” in policing the bounds of judicial power in relation to that of the jury in the criminal context, whereas it has not exercised such restraint in the civil context but rather has allowed judicial power to increase at the expense of the jury).

167. See *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004).

168. There seems to be no other way in which one can understand the expert to “rely on” the statements in forming his or her opinion.

169. Under the common law approach, the question of the reliability of the underlying facts was firmly within the province of the jury. See *supra* notes 38–39 and accompanying text.

170. Under the Federal Rules, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401.

171. Of course, it may be that the evidence is, on balance, fairly unimportant. In such a case, on appeal, harmless error analysis would apply. See *supra* note 89.

172. One scholar has argued that the constitutional right to a jury trial prevents courts from excluding a defendant’s expert evidence based upon a finding that the evidence is unreliable. See Katherine Goldwasser, *Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom About Excluding Defense Evidence*, 86 GEO. L.J. 621 (1998). Professor Goldwasser’s analysis pre-dates the *Apprendi* line of cases and

could the jury constitutionally do so, because the evidence consists of testimonial hearsay statements for which confrontation is required under *Crawford*.¹⁷³ It is difficult to imagine that the Court would permit the expert to perform a function—assessing the reliability of the testimonial statements—that *Crawford* has so uncompromisingly held is committed by the Constitution to determination by the jury. The *Apprendi* line of cases stands for the proposition that the jury—not the judge, and by extension not the prosecution nor any of its witnesses—must find the facts that support a criminal conviction. The nondisclosure rationale thus does not operate to remove expert opinion testimony that rests upon stealth testimonial hearsay from within the contours of the expert testimonial triangle.

C. DAUBERT AND THE COURT'S VIEW OF EXPERTS

It may be argued, finally, that the admission of stealth testimonial hearsay can be saved from triangulation by the expert-is-confronted rationale. Courts have reasoned that the jury remains the factfinder because it is the jury which assesses the credibility and weight of the expert witness's testimony. Viewed in light of the expert testimonial triangle, however, this argument is doubly problematic. In the first place, it fails to take into account *Crawford* and Side A of the triangle. If the jury is not permitted to assess testimonial hearsay (other than by cross-examination of the declarant by the defendant) directly under *Crawford*,¹⁷⁴ then it should not be allowed to assess it indirectly by crediting the expert's evaluation of the declarant's credibility. Furthermore, this rationale ignores the principles that underlie the last part of the expert testimonial triangle: the *Daubert* trilogy and the requirement that expert opinion be reliable. In effect, permitting the jury to rely on the credibility determination of the expert as to the underlying evidence is indistinguishable from admitting expert opinion based upon nothing but "the *ipse dixit* of the expert."¹⁷⁵

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹⁷⁶ the Supreme Court

understands the right to a jury determination of facts to apply to evidence introduced at trial. She contends that when a court excludes relevant evidence because it finds the evidence unreliable, it has invaded the province of the jury and violated the defendant's constitutional right to have the jury make this determination. My argument is thus the converse of that offered by Professor Goldwasser: whereas she addresses the *exclusion* of expert testimony offered by the *defendant*, I am concerned with the *admission* of expert testimony offered by the *prosecution*. Both arguments are premised upon the impermissibility, under the Sixth Amendment, of a court determination of reliability or unreliability of the expert evidence.

173. Of course, the government would be free to call the declarant as a witness and then to have the expert rely on the statements.

174. This conclusion follows from *Crawford*: were the jury capable of discounting the reliability of the testimonial hearsay, there would be no reason to exclude it. For a discussion of this aspect of the Supreme Court's interpretation of the Confrontation Clause, which evinces a distrust of juries' ability to assess the reliability of hearsay, see *infra* section III.C.

175. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); see also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158 (1999).

176. 509 U.S. 579 (1993).

interpreted the Federal Rules of Evidence—primarily Rule 702¹⁷⁷—to hold that scientific evidence was admissible provided that it satisfied the twin requirements of reliability and relevance.¹⁷⁸ Though perhaps not readily apparent from the language of *Daubert* itself,¹⁷⁹ the decision is generally understood to have

177. At the time of the decision in *Daubert*, Rule 702 provided: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” FED. R. EVID. 702 (1975). In 2000, the rule was amended to further provide that such expert opinion was admissible “if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” FED. R. EVID. 702. This language was added in response to *Daubert* and subsequent cases that applied *Daubert*. See FED. R. EVID. 702 advisory committee’s note (2000 Amendment). The *Daubert* decision also interpreted and applied Rules 703 (bases of expert testimony), 402 (relevance), and 403 (prejudice versus probative value).

178. See *Daubert*, 509 U.S. at 589 (“Under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable.”). The Court subsequently held that the *Daubert* reliability requirement applied not only to scientific evidence, but to all technical and other expertise as well. See *Kumho Tire Co.*, 526 U.S. 137.

179. There is language in *Daubert* that suggests that the Court viewed the decision as expansive of the admissibility of expert opinion testimony. The Court reversed a Ninth Circuit decision that had applied the *Frye* test for admissibility of scientific evidence to exclude the plaintiffs’ evidence that the drug Bendectin could have caused their birth defects. The Supreme Court held that the *Frye* test, which looked to general acceptance in the relevant field, was not incorporated by the Federal Rules of Evidence and was but one possible factor to be considered by courts in determining the admissibility of scientific evidence. The decision described the *Frye* test as “rigid” and “austere,” in contrast to the “liberal thrust” and “permissive” philosophy of the Federal Rules of Evidence. *Id.* at 588–89. At the time of the decision, commentators disagreed about its likely effects. See, e.g., Bert Black et al., *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715 (1994) (arguing that *Daubert* called for a deeper review of scientific evidence than previously required); G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 CREIGHTON L. REV. 939, 953 (1996) (arguing that *Daubert* would have the effect of being “at the same time both more restrictive of expert evidence and less restrictive of expert evidence”); Richard D. Friedman, *The Death and Transfiguration of Frye*, 34 JURIMETRICS J. 133 (1994) (predicting that *Daubert* would not have a dramatic impact on evidentiary decisions); Lisa Gonzales, *The Admissibility of Scientific Evidence: The History and Demise of Frye v. United States*, 48 U. MIAMI L. REV. 371 (1993) (concluding that *Daubert* was a more relaxed standard of admissibility than *Frye*); Edward J. Imwinkelried, *Coming to Grips with Scientific Research in Daubert’s “Brave New World”: The Court’s Need To Appreciate the Evidentiary Differences Between Validity and Proficiency Studies*, 61 BROOK. L. REV. 1247 (1995) (concluding that *Daubert* was a step towards a more sophisticated use of science by courts); Linda Sandstrom Simard & William G. Young, *Daubert’s Gatekeeper: The Role of the District Judge in Admitting Expert Testimony*, 68 TUL. L. REV. 1457 (1994) (arguing, in part, that *Daubert* did not relax expert admissibility requirements). With the passage of time, however, it has become generally agreed that application of the *Daubert* test operates to exclude relatively more expert evidence than *Frye* or other state variants. See Jeffrey D. Cutler, *Implications of Strict Scrutiny of Scientific Evidence: Does Daubert Deal a Death Blow to Toxic Tort Plaintiffs?*, 10 ENVTL. L. LITIG. 189 (1995) (concluding that *Daubert* results in a stricter standard of admissibility for plaintiffs’ experts); Lloyd Dixon & Brian Gill, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision*, 8 PSYCHOL. PUB. POL’Y & L. 25 (2002) (finding that standards for admitting expert testimony tightened post-*Daubert*); Mark Hanson, *Admissions Test: Fewer Post-Daubert Federal Judges Allow Experts To Testify Without Limitation in Civil Trials, Study Finds*, A.B.A. J., Feb. 2001, at 28; Carol Krafka et al., *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL. PUB. POL’Y & L. 309 (2002) (concluding that study results suggested that judges were more likely to exclude expert testimony

positioned the trial judge as “gatekeeper” in the realm of scientific and other technical expert testimony.¹⁸⁰ Before the jury hears such testimony, the proponent must convince the judge that the evidence is methodologically valid and that it demonstrates sufficient “fit” with the particular facts of the case so as to be relevant.¹⁸¹

Though *Daubert* is not a constitutional case, and though the decision involves the strictly statutory issue of the proper interpretation of the Federal Rules of Evidence, there exists some significant tension between the balance struck in *Daubert* between the judge and the jury on the one hand, and that required by the Constitution as set out in *Crawford* and the *Apprendi* line of cases on the other. *Daubert* vests in the court the power¹⁸² to pre-screen expert testimony for reliability;¹⁸³ *Crawford* and the jury-right cases vest the power to determine the reliability of evidence in the jury. *Daubert*, in its suspicion of the basis of expert

post-*Daubert*); Joseph Sanders et al., *Legal Perceptions of Science and Expert Knowledge*, 8 PSYCHOL. PUB. POL'Y & L. 139, 141 n.13 (2002) (noting that “in practice the *Daubert* test has been more restrictive than *Frye*”). For a thorough review of recent and historical scholarship on the *Daubert* vs. *Frye* debate, see Edward K. Cheng & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471 (2005). The civil defense bar has lobbied in favor of legislative adoption of *Daubert* in those states in which *Frye* or other more liberal standards remain in force. For example, in 2005, as part of tort reform legislation resulting from lobbying efforts by the insurance industry and other special interest groups, Georgia abandoned its more liberal *Harper* standard in favor of the *Daubert* standard in civil cases. See Hannah Yi Crockett et al., *Torts and Civil Practice*, 22 GA. ST. L. REV. 221 (2005); Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 151, 165 (2006); Marc T. Treadwell, *Evidence*, 58 MERCER L. REV. 187, 205 (2005). Because prosecutors lobbied against its adoption, however, the *Daubert* standard in Georgia is limited to civil cases. See Crockett et al., *supra*, at 241–42 (2005).

180. See, e.g., FED. R. EVID. 702 advisory committee’s note to 2000 amendment (“In *Daubert* the Court charged district judges with the responsibility of acting as gatekeepers to exclude expert testimony that is not reliable.”); *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995) (on remand) (referring to the Supreme Court’s gatekeeping mandate, Judge Alex Kozinski wrote: “Mindful of our position in the hierarchy of the federal judiciary, we take a deep breath and proceed with this heady task.”); Fenner, *supra* note 179, at 952; Michael H. Graham, *The Expert Witness Predicament: Determining “Reliable” Under the Gatekeeping Test of Daubert, Kumho, and Proposed Amended Rule 702 of the Federal Rules of Evidence*, 54 U. MIAMI L. REV. 317 (2000); Peter B. Oh, *Gatekeeping*, 29 J. CORP. L. 735 (2004); Jay P. Kesan, Note, *An Autopsy of Scientific Evidence in a Post-Daubert World*, 84 GEO. L.J. 1985 (1996).

181. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591–92 (1993).

182. Under the *Daubert* regime, courts are vested not only with the power, but also with the responsibility to prevent unreliable expert testimony from reaching the jury. As Justice Scalia noted in his concurrence in *Kumho Tire*, the Court’s opinion in that case “makes clear that the discretion it endorses—trial-court discretion in choosing the manner of testing expert reliability—is not discretion to abandon the gatekeeping function.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158–59 (1999) (Scalia, J., concurring). He added that it is also “not discretion to perform the function inadequately.” *Id.*; see also *Daubert*, 509 U.S. at 589 (“Under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”).

183. Of course, in a sense the judge is vested with the authority to pre-screen all evidence under the guise of the relevancy determination. See FED. R. EVID. 104(a); FED. R. EVID. 402. However, the requirement of reliability as outlined by *Daubert* is of a different magnitude than the threshold relevancy determination. See John H. Mansfield, *An Embarrassing Episode in the History of the Law of Evidence*, 34 SETON HALL L. REV. 77, 82 (2003) (“If the result of *Daubert* is to require that scientific evidence, to be admissible, must be not merely relevant, but reliable—that is to say, have a certain probative value—*Daubert* gave no reason for this requirement other than that unless evidence has this probative value, it is not really science or scientifically valid.”).

opinion testimony and its refusal to allow expert witnesses free rein to put before the jury evidence whose reliability is based only on “the *ipse dixit* of the expert”¹⁸⁴ completes the expert testimonial triangle.

In *Daubert* and its progeny,¹⁸⁵ the Supreme Court validated the practice of treating expert testimony quite differently from other evidence. This differential treatment is grounded in the recognition that expert testimony is not subject to the usual strictures that apply to lay testimony. The Court in *Daubert* noted that, unlike lay witnesses, experts are “permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation.”¹⁸⁶ As a sort of quid pro quo for this relaxation of the “common law insistence upon ‘the most reliable sources of information,’”¹⁸⁷ the Court opined that the rules contemplate that “the expert’s opinion will have a reliable basis in the knowledge and experience of his discipline.”¹⁸⁸ Whether this reliable basis exists is to be determined by the court.¹⁸⁹

Whereas the first two components of the expert testimonial triangle require that the reliability of evidence be assessed by the jury and not by the judge alone, this third component, represented by *Daubert*, prevents the jury from hearing evidence unless the court first determines that it bears a sufficient degree of reliability. Under *Daubert*, the expert may not testify to an opinion grounded upon scientific, technical, or any other basis unless those bases satisfy this preliminary requirement of reliability. As applied to the issue of stealth testimonial hearsay, this principle suggests that it is wholly inappropriate to permit the expert, alone, to assess the reliability of the hearsay bases of his or her opinion. Granting the expert such latitude where testimonial hearsay is concerned would give the expert permission to conduct exactly the sort of reliability evaluation that, under *Daubert*, the Court does not trust experts to do without judicial oversight. Furthermore, any argument that this preliminary screening function may legitimately be performed by the expert by virtue of the judicial oversight contemplated by *Daubert* runs afoul of the Confrontation Clause. Under *Crawford*, the only actor that may constitutionally assess the reliability of testimonial hearsay is the jury, and that the only way that such hearsay may be tested is through cross-examination of the declarant.

184. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

185. *See id.* (holding that standard of review on appeal of *Daubert* determinations is abuse of discretion); *Kumho Tire Co.*, 526 U.S. 137 (holding that rule in *Daubert* applies to technical as well as scientific expertise). The three cases are often referred to as the “*Daubert* trilogy.”

186. *Daubert*, 509 U.S. at 592; *see also* FED. R. EVID. 703 (expert opinion may be based upon facts or data “made known to the expert at or before the hearing”) (emphasis added).

187. *Daubert*, 509 U.S. at 592 (quoting FED. R. EVID. 602 advisory committee’s notes).

188. *Id.*

189. *Id.* (“Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.”).

III. INTERSECTING LINES OF DISTRUST

When shone through the prism of the expert testimonial triangle, expert opinion that contains stealth testimonial hearsay scatters into an array of sometimes conflicting assumptions about which actors in the criminal justice system are to be trusted and which are not. Under both *Crawford* and *Apprendi*, distrust of the government provides a foundational rationale for the Sixth Amendment protections that those cases implement; the jury is needed to provide a bulwark against governmental overreaching. Under *Crawford*, only the jury is to be trusted to evaluate the reliability of testimonial statements; the judge is not.¹⁹⁰ Yet the jury is *not* trusted to evaluate the statements in any way other than by allowing the defendant the opportunity to cross-examine the declarant. And under the regime created by *Daubert*, the judge is trusted to assess the reliability of expertise: the decision reveals a distrust of experts who might put forth unreliable “junk science” and thus hoodwink the jury, and of juries who are not able to see through the aura of infallibility that expertise is thought to confer. This Part examines these ambivalent cross-tensions of trust and distrust, of reliability and unreliability, that appear when expert testimony includes or is based upon testimonial hearsay.

A. DISTRUST OF GOVERNMENT

Both the right to a trial by jury and the right to confront adverse witnesses are grounded largely in a distrust of government. It is widely agreed that the Constitution’s jury trial guarantees were intended and understood to protect individual liberty and property against abuse of power. With respect to criminal trials, the jury has long been viewed as a “sacred palladium”¹⁹¹ of liberty: in contrast to the inquisitorial systems that developed on the Continent, the English practice of trying criminal cases before a jury of the defendant’s countrymen interposed between the Crown and the defendant a group of more or less unbiased individuals who might reject the proof of the accusation.

190. One scholar, for example, has argued that the rejection of the *Roberts* framework, and its replacement by *Crawford*, signals a shift from distrust of juries to distrust of government. See Dale A. Nance, *Rethinking Confrontation After Crawford*, 2 INT’L COMMENT. ON EVID. 1, 12–13 (2004):

Should we see the Clause as constitutionalizing a distrust of the jury? The *Roberts* reliability framework at least implicitly depends on this, for without distrust of the jury’s ability rationally to take into account the hearsay quality of evidence, why would the courts, or the drafters or adopters of the Constitution, care whether a piece of relatively unreliable information is introduced? If we have confidence in the jurors, we can trust that they will ignore, or suitably discount, unreliable hearsay, just as we routinely trust them to ignore or discount relatively unreliable *viva voce* testimony *Crawford*’s seeming rejection of the *Roberts* reliability framework should signal the rejection of a jury distrust theory of Confrontation and its replacement with a theory grounded in distrust of the government

However, as this Part argues, the question is complex: the *Crawford* framework continues to distrust the jury to “ignore, or suitably discount, unreliable hearsay,” while at the same time also distrusting the judge to remedy the problem by screening the hearsay for reliability.

191. LEVY, *supra* note 160, at 226 (1999) (quoting BLACKSTONE’S COMMENTARIES).

Discussions at the time of the founding acknowledged the right to a jury trial in criminal cases as crucial to prevent governmental abuse of prosecutorial power.¹⁹² In civil cases, the preservation of the jury right was viewed at the time of the founding as almost equally critical to the preservation of liberty and democracy.¹⁹³ Indeed, the omission of mention of this right was a potent weapon of the anti-federalists in their opposition to ratification of the Constitution.¹⁹⁴

In the criminal context, the trial jury has been held up as a check against abusive prosecutorial power.¹⁹⁵ For a variety of reasons, including relative lack of corruptibility, lack of bias or hardened interests, the necessity for discussion

192. Alexander Hamilton, in Federalist No. 83, noted that both “[t]he friends and the adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.” THE FEDERALIST NO. 83, at 464 (Alexander Hamilton) (Isaac Kramnick ed. 1987). Indeed, at the time of the Revolutionary War, “trial by jury was probably the most common right in all the colonies. Americans saw it as a basic guarantor of individual freedom.” LEVY, *supra* note 20, at 85. The classic cases generally cited as paradigms of the jury as bulwark of political and religious liberty are trials for seditious libel or incitement against the government. For example, in the 1735 trial of John Peter Zenger, a printer was charged with seditious libel for printing articles critical of the governor of New York. See *Rex v. Zenger*, reprinted in 16 AM. ST. TRIALS 5 (John D. Lawson, ed., 1928). The judge instructed the jury they were only to decide whether Zenger printed the articles, not whether they were libelous. *Id.* at 16. However, the jury did not abide by the judge’s instructions and acquitted Zenger. *Id.* at 39. The right of jurors to reach a verdict that conflicts with the judge’s assessment of the evidence has its roots in an English case regarding religious liberties. In *Bushell’s Case*, the English Court of Common Pleas held that jurors could not be punished for voting to acquit two Quakers who were charged with preaching to an unlawful assembly. (1670) 24 Eng. Rep. 1006, 1009 (C.P.D.).

193. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES ch. 38, at 1762 (1833) (arguing that right to jury trial in civil cases is “a privilege scarcely inferior to that in criminal cases, which is conceded by all persons to be essential to political and civil liberty”) (quoted in ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 271 n.3 (Arthur Goldhammer trans., Olivier Zunz ed., 2004) (1835)). Note, however, that Hamilton in THE FEDERALIST NO. 83 was a bit less certain about the importance to liberty of the right to jury trial in civil cases. THE FEDERALIST NO. 83, *supra* note 192, at 464 (“But I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases.”).

194. This Article focuses primarily on the issue of stealth expert fact-finding in the criminal context. There is sufficient distinction between the civil and criminal contexts when it comes to the need for, and constitutional requirements regarding, jury fact-finding that an exploration of both is beyond the scope of this Article. However, the theoretical, practical, and normative problems raised by stealth expert fact-finding in civil cases are not insignificant and are ripe for consideration as well. For an analysis proposing an integrated and consistent theory of the jury’s constitutional authority in both civil and criminal cases, see Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723 (1993). For other views regarding the respective roles of juries in civil and criminal trials, see Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1131 (2003) (“The combination of a more forceful jury guarantee in the Sixth Amendment and the prohibition of double jeopardy in the Fifth Amendment produces very different conditions on the jury right in criminal cases.”) (footnotes omitted); Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767 (2005) (arguing that institutional considerations should compel judges in civil cases to defer to juries to a much greater extent, as they do in criminal cases under various doctrines).

195. De Tocqueville opined that even in the worst case in which the people were tyrannically “bent on conviction,” the institution of the criminal jury because of its “composition . . . and the fact that it cannot be called to account would give an innocent man some chance.” DE TOCQUEVILLE, *supra* note 193, at 273 n.5. The chapter of DEMOCRACY IN AMERICA in which he discusses trial by jury is entitled

and compromise in order to reach a verdict, and just general good sense, the jury has been viewed as a neutral and relatively objective actor that is more likely than a judge alone to arrive at correct fact and policy decisions in criminal trials.¹⁹⁶ Wigmore called trial by jury “the best system of trial ever invented for a free people in the world’s history,” and stated that “a system of trying facts by a regular judicial official, known beforehand and therefore accessible to all the arts of corruption and chicanery, would be fatal to justice.”¹⁹⁷

While various academic sources have discussed the relative abilities of juries and judges accurately to determine the facts at issue in a trial,¹⁹⁸ the desire for accurate fact-finding was not the impetus for the constitutional guarantees and has not been the basis of the Supreme Court’s jurisprudence in this area. Rather, nearly always front and center in any discussion of the nature of the constitutional right to trial by jury is a political and institutional argument that stands the jury as a bulwark of liberty between the individual and either the state (in the criminal context) or some powerful social group (in the civil context). Though likely related to reliability on a systemic level,¹⁹⁹ this institutional

“What Tempers the Tyranny of the Majority.” *Id.* at 262–76; *see also* *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (describing jury as “circuitbreaker in the State’s machinery of justice”).

196. *See generally* JONAKAIT, *supra* note 157; Murphy, *supra* note 194, at 734–35 (arguing that the jury is the more appropriate institutional actor for fact-finding because “it brings the common sense, experience, and training of several individuals” to the process, because it “is likely to be less partial with respect to factfinding,” and because it acts as “a shield against [government] manipulations and thus serves as a safeguard against abuses of governmental power”). *But see* Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 459 (1899) (“I confess that in my experience I have not found juries specially inspired for the discovery of truth. I have not noticed that they could see further into things or form a saner judgment than a sensible and well trained judge.”).

197. John H. Wigmore, *To Ruin Jury Trial in the Federal Courts*, 9 J. AM. JUD. SOC. 61, 61 (1925). Wigmore, in this article, argues against a proposed Senate Bill that would have forbidden trial judges in federal court from commenting on the credibility of witnesses or upon the weight of evidence. Wigmore was a firm supporter of the jury system, but he believed that it required the judge to act as “the thirteenth juror” in order that jury trial not become “merely a system of mob justice.” *Id.* (emphasis in original). Blackstone, too, waxed rhapsodic over the jury: “[T]he trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law.” *See* 3 WILLIAM BLACKSTONE, COMMENTARIES 379 (quoted in *Apprendi v. New Jersey*, 530 U.S. 466, 479 n.6 (2000)).

198. *See* JONAKAIT, *supra* note 157, at 41–63 (offering several reasons that juries are likely better at factual determinations than judges, including jury advantages in the areas of group recall, group interpretation of evidence, confronting and overcoming bias and prejudice, strength in diversity, group advantage in complex matters, determining credibility from demeanor, credibility determinations through story construction, paying attention, consensus decision-making, and one-time assembly); Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 205 (1989) (arguing that the jury’s strength lies in its number and its “ability to reflect the perspectives, experiences, and values of the ordinary people in the community”); Kirgis, *supra* note 166, at 945–46 (discussing research suggesting that jury is more competent than judge at determining historical fact). For a review of the empirical research on jury decision-making specifically in the context of scientific and other complex expert testimony, *see* Sanders, *supra* note 15, at 899–941 (2003).

199. *See* Sanders, *supra* note 15, at 895–96 (arguing that “[t]he primary goal . . . of the law of evidence, and of the trial itself, is to uncover the truth”); *id.* at 940 (noting the procedural justice view of the law of evidence and of the purpose of trials).

rationale is not primarily concerned with reliability in the individual case.²⁰⁰ The right to trial by a jury of one's peers is a procedural right that applies alike to federal and state defendants under the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment.²⁰¹ Consequently, like the right to confront and cross-examine adverse witnesses, the right of a criminal defendant to a jury determination of relevant facts may not be dispensed with on the ground that some other actor might more efficiently or even more accurately determine those facts.²⁰²

The Sixth Amendment right to jury fact-finding in criminal trials reflects, foremost, a balance of power between judge and jury.²⁰³ "Jury," in this balance, is equivalent to "the People," and therefore this separation of function implements the intent of the jury trial guarantee by interposing between the government (judge and prosecutor) and the individual (defendant) a bulwark of liberty (the people) as a check against abusive and tyrannical governmental power. The criminal jury trial guarantee thus reflects a profound distrust of governmental power, including judicial power. A shift in function from jury to judge necessarily affects this constitutional balance.

Supreme Court decisions implementing the right to a jury trial reflect this distrust of governmental power in language that describes the respective roles of judge and jury. In *Blakely*, for example, the Court characterized the judge's action in sentencing the defendant based upon facts neither found by a jury nor admitted by the defendant as "exceed[ing] his proper authority."²⁰⁴ The right of jury trial, according to the Court, is a "fundamental reservation of power in our

200. Cf. *Whorton v. Bockting*, 127 S. Ct. 1173, 1182–83 (2007) (unanimously holding that *Crawford* is not retroactive to cases on collateral review, and stating that "*Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials").

201. See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding that the right to a jury trial in criminal cases applies to the states through incorporation into the Due Process Clause of the Fourteenth Amendment). In contrast, the Seventh Amendment jury right applies only in federal court, though virtually every state constitution also guarantees, to one extent or another, the right to trial by jury in civil cases. See Paul B. Weiss, Comment, *Reforming Tort Reform: Is There Substance in the Seventh Amendment?*, 38 CATH. U. L. REV. 737, 739 n.11 (1989) (listing state constitutional provisions guaranteeing jury trial right in civil cases).

202. See *Blakely v. Washington*, 542 U.S. 296, 313 (2004) ("Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals . . ."); cf. *Crawford v. Washington*, 541 U.S. 36, 67 (2004) ("The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising."). This theme is common in separation of powers analyses. See, e.g., *INS v. Chadha*, 462 U.S. 919, 958–59 (1983) (stating that constitutional checks and balances may not be circumvented in the service of convenience or efficiency).

203. In *Blakely*, the Court stated that "[t]here is not one shred of doubt . . . about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury." 542 U.S. at 313.

204. *Id.* at 304.

constitutional structure . . . meant to ensure [the people's] control in the judiciary."²⁰⁵ In *Booker*, the Court characterized the federal guidelines' sentencing scheme as impermissibly furthering a shift in power between judge and jury.²⁰⁶ The Court has characterized its recent line of decisions in the criminal sentencing area as the constitutionally mandated answer to "the question how the right of jury trial could be preserved, in a meaningful way, guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime" in which fact-finding for purposes of sentencing was increasingly shifting to the judge and away from the jury.²⁰⁷

The Sixth Amendment right to confront one's accusers similarly rests to a significant extent upon distrust of governmental power and separation of power between judge and jury. In *Crawford*, the Court emphasized that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."²⁰⁸ The Confrontation Clause, according to the Court, is concerned with "testimonial" hearsay because only statements that resemble testimony involve the type of governmental abuses against which the protections of the Clause were aimed.²⁰⁹ Requiring the prosecutorial authorities to gather and present their evidence in court before the defendant and the jury, rather than in private, limits prosecutorial power and distinguishes the common law adversarial system from the civil law inquisitorial system.²¹⁰

As between the judge and the jury, *Crawford* places the function of determining the reliability of testimonial hearsay squarely in the domain of the latter. Invoking the infamous political trials that at the time of the founding were still fairly recent history, the Court asserted that the Framers "knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people."²¹¹ The great failing of the *Roberts* reliability framework, which allowed admission of hearsay deemed trustworthy by a court, was that it "allow[ed] a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability."²¹² In language that is remarkably similar to that of the cases applying the right to trial by jury, the Court in *Crawford* grounded its new bright-line Confrontation Clause test in the danger

205. *Id.* at 306.

206. *See* *United States v. Booker*, 543 U.S. 220, 236 (2005) ("The effect of the increasing emphasis on facts that enhanced sentencing ranges, however, was to increase the judge's power and diminish that of the jury.").

207. *Id.* at 237.

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

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

210. *See id.* ("Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.").

211. *Id.* at 67.

212. *Id.* at 62.

of governmental abuse in politically charged prosecutions and the consequent need to reduce judicial discretion by preserving the power of the jury to evaluate the reliability of evidence offered against the accused.²¹³

Viewed in this light, the right to trial by jury and the right to confront and cross-examine accusers are grounded in very similar notions of distrust of governmental power and implement that distrust in similar ways. Both constitutional guarantees vest the jury with fact-finding power as against the judge, who acts as a part of the prosecutorial machinery of the state. Both are concerned with reliability as a secondary effect—or ultimate goal—of the institutional separation and balance of powers as crafted by the Framers. Both are attempts to frustrate prosecutorial abuses that have tended to characterize political trials at which evidence was developed *ex parte* and without sufficient checking by the adversarial process and the jury. And both place significant trust in the jury as the appropriate institution to check the prosecutorial power of the state. Where expert testimony is concerned, however, Supreme Court doctrine is in some significant tension with these fundamental principles. This tension is illustrative of the general theoretical and practical difficulties inherent in the use of scientific and technical expertise at trial.

B. DISTRUST OF JURIES

In contrast to this strong institutional preference for jury determination of the reliability of evidence as embodied in cases interpreting the Confrontation Clause and the guarantee of the right to a jury trial, *Daubert* and its progeny manifest a profound distrust of juries. Where expert witness evidence is concerned, the *Daubert* trilogy places the preliminary determination as to reliability firmly in the hands of the judge. If *Crawford* and *Apprendi* evidence a distrust of judges—as a facet of a more generalized distrust of government—where criminal fact-finding is concerned, the *Daubert* line of cases manifests a distrust of juries and a preference for judicial determination of the reliability of evidence. As between the judge and the jury, *Daubert* is at odds with *Crawford* and *Apprendi* with respect to which institutional actor the Court is more willing to entrust with the task of determining whether evidence is reliable.

This discussion proceeds on the theory that trust in juries generally correlates with rules and decisions that provide it information and allow it to come to a decision based upon the greatest possible amount of relevant, noncumulative evidence. Distrust, on the other hand, is signaled by rules that prevent relevant information from reaching the jury. Most of the non-constitutional exclusionary

213. *See id.* at 68 (“Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like [Sir Walter] Raleigh’s—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear. It is difficult to imagine *Roberts*’ providing any meaningful protection in those circumstances.”).

rules of evidence,²¹⁴ such as the rule against hearsay and the prohibition on character evidence offered to prove propensity,²¹⁵ keep certain types of relevant evidence from the jury on the theory that jurors are unable rationally to assess the reliability or probative value of such evidence.²¹⁶ Thus, for example, the catch-all exclusionary provision contained in Rule 403 of the Federal Rules of Evidence²¹⁷ is in large part directed against evidence which, though unquestionably relevant, might “induc[e] decision on a purely emotional basis.”²¹⁸ As the Supreme Court described the danger in *Old Chief v. United States*,²¹⁹ certain kinds of evidence—in that case character evidence—might “lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.”²²⁰

Distrust of juries can take several distinct, though related, forms. First, jury distrust may be based upon a model of the jury as gullible, unsophisticated, and thereby subject to improper influence.²²¹ This idea of the jury as susceptible of being misled, as almost childlike, is the model of the jury that is revealed in the Advisory Committee Notes to Rule 403 and in the language chosen by the Supreme Court in *Old Chief*. Words such as “induce” and “lure” suggest an image of the jury as impressionable and somewhat weak. The *Daubert* Court quotes Judge Weinstein as explaining that “[e]xpert evidence can be both

214. In contrast, the constitutional exclusionary rules, such as the Fifth Amendment privilege against self-incrimination and the Fourth Amendment exclusionary rules for unlawful searches and seizures, reflect not a distrust of juries but a distrust of government; they are designed as prophylactic rules to ensure that government actors behave in conformity with the Constitution and do not profit from failure to do so.

215. See FED. R. EVID. 404(a) (“Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion” subject to certain exceptions); see also FED. R. EVID. 404(b) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”).

216. While some of the exclusionary evidence rules—most notably the privilege protections—rest upon public policy rationales rather than upon jury distrust, the majority are meant to constrain improper jury decision-making. See, e.g., PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE § 1.09 (2d ed. 2005) (“The paramount goal of a trial is truth-seeking (accurate fact-finding), but that is not the only goal. The law of privileges, for example, precludes the admissibility of evidence that may be both relevant and reliable.”); MUELLER & KIRKPATRICK, *supra* note 33, at § 1.1.

217. Rule 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403. The first set of bases for exclusion relates to distrust of the jury; the second set includes non-trust factors of efficiency and cost.

218. FED. R. EVID. 403 advisory committee’s note. The Advisory Committee goes on to explain that “[u]nfair prejudice’ . . . means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” *Id.*

219. 519 U.S. 172 (1997).

220. *Id.* at 180.

221. See Rochelle Cooper Dreyfuss, *Galileo’s Tribute: Using Medical Evidence in Court*, 95 MICH. L. REV. 2055, 2067–68 (reviewing MARCIA ANGELL, SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE (1996) and SHEILA JASANOFF, SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA (1995)) (characterizing juries, in the view of Angell—at the time the executive editor of the *New England Journal of Medicine*—as “easily manipulated by lawyers, experts, and jury consultants”).

powerful and quite misleading.’”²²² The idea of the jury as weak in the face of this type of evidence suggests the need to protect a vulnerable group from being manipulated. Further, these words imply an improper motive, or at least a wiliness, on the part of the actor that offers such evidence.²²³

Professor Joseph Sanders’s concept of paternalism toward the jury as a justification for restrictions on the admissibility of expert evidence is an example of this species of distrust of juries.²²⁴ He characterizes restrictions on evidence presented to the jury, such as are imposed by the *Daubert* rule, as growing out of “alleged listener shortcomings”—in this context, perceived juror shortcomings in the ability to rationally evaluate the quality of the evidence.²²⁵ This type of distrust, then, is directed not at any intentional misbehavior on the part of the jury,²²⁶ but rather at its inherent competency to evaluate particular

222. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 592 (1993) (quoting Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)).

223. Of course, it may well be that we expect zealous advocates to be wily, and that attempting to lure or induce a jury into a decision on a non-rational basis is well within the bounds of what most would consider appropriate advocacy. Thus, it may be that the adversarial system itself contains the seeds of jury distrust of this sort, where the distrust is directed both at the jury and at the parties.

224. Professor Sanders’s treatment is a very careful examination of whether and how the available empirical evidence supports paternalism toward juries in cases involving scientific proof. I do not mean to suggest that he views jurors as unsophisticated or unintelligent.

225. Sanders, *supra* note 15, at 894. In an interesting section of the article, Professor Sanders analogizes restrictions on jury information to restrictions on commercial speech. *See id.* at 891–94. He notes the very strong First Amendment presumption against speech restrictions, and then asks, “Why have paternalistic arguments in [the commercial speech] area been more central to, and met with slightly greater success, than in other areas of First Amendment jurisprudence?” *Id.* at 893. He attributes the greater success of paternalistic justifications for restrictions of commercial speech to the particular focus on the listener, rather than the speaker, in this subset of free speech case law. *Id.* Because such speech is more easily viewed in a contextual, relational manner than is non-commercial speech, Sanders concludes that “[r]estrictions on paternalistic grounds are most easily justified within the context of a specific set of communications directed at a defined purpose where parties play defined roles.” *Id.* at 894 (agreeing with the approach outlined in Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771 (1999)). However, the context described in this statement is sufficiently broad that it accurately characterizes all litigation, and therefore the analogy to commercial speech does not provide a basis to distinguish restrictions on *expert* testimony from other types of evidence. It may be, rather, that restrictions on commercial speech tend to be more successful than most other speech restrictions because such speech occurs in a context in which the listener is thought to be susceptible to improper influence, just as the jury is thought to be susceptible to the “lure” and “inducement” of certain evidence that tends to appeal to other than jurors’ rational capacities. Marketing and advertising are noted for their appeals to non-rational processes. Likewise obscenity, hate speech, and speech directed at minors, which also give rise to paternalistic arguments, *see id.* at 892 n.58 (citing Catherine J. Ross, *Anything Goes: Examining the State’s Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 495 (2000)), tend more strongly to appeal to non-rational cognitive faculties. *Cf.* CATHARINE MACKINNON, *ONLY WORDS* 3–41 (1993) (arguing that pornography is a sexual act, not expression); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2338 (1989) (“However irrational racist speech may be, it hits right at the emotional place where we feel the most pain.”).

226. According to Sanders, “[i]f there is one universal finding in jury research, it is that juries take their job very seriously. If they fail to arrive at appropriate results, normally it is not due to lack of effort.” Sanders, *supra* note 15, at 900. An example of an intentional disregard of the probative value

types of evidence. It is a distrust of the *ability* of juries accurately to weigh certain evidence, not of their *willingness* to do so.

Distrust of juries, however, may take another form. Juries may also be suspected of intentionally over- or under-weighting certain evidence because of inherent biases toward or against particular parties or because of substantive policy predilections. In the civil context, it is often asserted that juries tend to be pro-plaintiff because of a natural human sympathy and desire to compensate those who have been injured and a belief that large corporations or insurance companies have “deep pockets.”²²⁷ Closely related to this concern, juries may be suspected of manipulating liability judgments in order indirectly to alter legal rules with which they disagree. Particularly in products liability cases in which the evidence of causation is arguably weak, “it could be that, in some of these cases, the jurors are holding the manufacturer liable for failing to conduct enough research.”²²⁸ In the criminal context, this juror behavior—some would say misbehavior—might take the form of nullification: acquittal of a defendant despite the jury’s belief in his legal guilt because of disagreement with the substantive legal rules or suspicion of the government’s motives.²²⁹

The language of *Daubert* itself is somewhat ambivalent on the question of jury distrust. Although *Daubert* positioned trial courts as gatekeepers with respect to scientific evidence,²³⁰ it did so based not upon any explicit rationale

of evidence would be an act of jury nullification. See JONAKAIT, *supra* note 157, at 245–64. This type of jury decision is addressed, *infra*, text and note 229, in the discussion of distrust of juries premised upon bias or political motives.

227. See Michael H. Gottesman, *Admissibility of Expert Testimony After Daubert: The “Prestige” Factor*, 43 EMORY L.J. 867, 880 (1994) (“[T]he Court may distrust the bona fides of some juries, believing that they will compensate a plaintiff-victim at the expense of a deep-pocket defendant even if unpersuaded by the plaintiff’s expert—a sort of jury nullification.”); Neil Vidmar, *Are Juries Competent To Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice*, 43 EMORY L.J. 885 (1995) (describing these critiques of jurors’ abilities and concluding that many of these criticisms are not borne out by the available empirical data).

228. Dreyfuss, *supra* note 221, at 2069 (1997). Professor Dreyfuss goes on to explain: “instead of using the lack of evidence to decide that there is no relationship between the product and the harms alleged by the defendant—as a scientist would do—jurors may be responding to the lack of evidence with a sense of communal outrage that manufacturers sell products without first testing them for safety. In other words, we may be seeing something of a new liability rule rather than a mistake in factfinding.” *Id.* at 2069–70.

229. As previously noted, one of the earliest instances of jury nullification in the United States occurred in *Rex v. Zenger*. AM. ST. TRIALS, *supra* note 192, at 1. More recently, jury nullification has occurred in cases where jurors opposed the legislation under which the defendant was tried (for example, firearms and drug laws) or sentenced (for example, mandatory minimum sentences and “three-strikes” laws). See Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 332 (2003).

230. In its opinion, the *Daubert* Court twice refers to the trial court’s role as performing a “screening” function. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993) (“Nor is the trial judge disabled from screening such evidence.”); *id.* at 596 (“recognition of a screening role for the judge.”). Only once does the Court use the term “gatekeeping.” See *id.* at 597 (“We recognize that, in practice, a gatekeeping role for the judge . . . on occasion will prevent the jury from learning of authentic insights and innovations.”). In later Supreme Court cases, as well as in lower court cases and academic commentary, the gatekeeping metaphor has come to predominate. See *supra* text accompanying note 180.

of distrust of juries, but rather on a textual interpretation of Rule 702 and the meaning of the words “scientific . . . knowledge.”²³¹ As interpreted by the Court, Rule 702 imposes a threshold reliability requirement upon expert witness testimony in part because the Federal Rules of Evidence relax the requirement that would otherwise serve to safeguard the reliability of witness testimony—that of firsthand knowledge.²³² Because the expert is permitted to offer opinions based upon secondhand knowledge, there is “an assumption that the expert’s opinion will have a reliable basis in the knowledge and experience of his discipline.”²³³

In addition, there is language toward the end of the Court’s opinion that suggests an attitude of faith in jurors’ ability to evaluate expert evidence. Confronting the respective horrors paraded by the parties and their amici, the Court addressed the “apprehension that abandonment of ‘general acceptance’ as the exclusive requirement for admission will result in a ‘free-for-all’ in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions.”²³⁴ This apprehension, according to the Court, is misplaced because it puts too little faith in the “capabilities of the jury and of the adversary system generally.”²³⁵ Jurors can be trusted, aided by the usual elements of the adversarial process, to weed out such “absurd and irrational” expert claims through exposure to “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.”²³⁶ This language suggests a trust in juries with respect to expert evidence, because the solution is framed as consisting in providing more information to the jury rather than preventing information from reaching the jury.

Notwithstanding this rhetorical ambiguity, and despite some initial thought that *Daubert* might have the effect of liberalizing the admissibility of expert evidence,²³⁷ the Court has subsequently made clear that the decision reflects an

231. *Daubert*, 509 U.S. at 589–90 (“The subject of an expert’s testimony must be ‘scientific . . . knowledge.’ The adjective ‘scientific’ implies a grounding in the methods and procedures of science. Similarly, the word ‘knowledge’ connotes more than subjective belief or unsupported speculation.”) (ellipsis in original).

232. *See id.* at 592. The Court quoted the Advisory Committee’s Note to Rule 602, the firsthand knowledge rule, to the effect that this rule is “a ‘most pervasive manifestation’ of the common law insistence upon ‘the most reliable sources of information.’” *Id.*

233. *Id.*

234. *Id.* at 595. Professor Michael Gottesman, who represented the plaintiffs in *Daubert*, has amusingly discussed this portion of the opinion, noting that “[i]n this remarkable section, the Court announces that it has just construed the Federal Rules of Evidence to admit ‘absurd and irrational pseudoscientific assertions’ but to exclude ‘authentic insights and innovations.’” Gottesman, *supra* note 227, at 872. Professor Gottesman goes on to make the serious point that this part of the Court’s opinion makes sense only if one recognizes the crucial distinction drawn by Justice Blackmun between methodology and conclusions. *See id.* This distinction has since been watered down by the Court. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (stating that “conclusions and methodology are not entirely distinct from one another” and holding that a court is not required to ignore “an analytical gap between the data and the opinion proffered”).

235. *Daubert*, 509 U.S. at 596.

236. *Id.*

237. In the *Daubert* case itself, the Supreme Court reversed a finding of summary judgment against the plaintiffs and offered the possibility that the plaintiffs’ scientific evidence might be admissible,

attitude of jury distrust. In *Kumho Tire*,²³⁸ Justice Breyer's opinion for a unanimous Court²³⁹ noted that expert testimony often encompasses experience that is "foreign" to jurors, and therefore that the trial judge's screening of such evidence for reliability "can help the jury evaluate that foreign experience."²⁴⁰ Of course this statement is rather disingenuous, since excluding the evidence altogether is scarcely how one would normally go about "helping" someone to "evaluate" such evidence. Justice Breyer was somewhat more direct in his concurrence in *Joiner*,²⁴¹ though he softened his critique of jury decision-making by using the passive voice. Discussing the justification for entrusting judges with the admittedly difficult task of exercising their gatekeeper duties in light of judges' own lack of expertise with respect to scientific and other technical evidence, Justice Breyer highlighted the importance of the screening role. He noted that individuals—presumably including individual jurors—were justly concerned about the dangers of exposure to chemicals, particularly in light of the very high rates of cancer deaths in the United States. And yet this understandable fear may be irrational in the particular case and therefore dangerous to the general social good:

[M]odern life, including good health as well as economic wellbeing, depends upon the use of artificial or manufactured substances, such as chemicals. And it may, therefore, prove particularly important to see that judges fulfill their *Daubert* gatekeeping function, so that they help assure that the powerful engine of tort liability, which can generate strong financial incentives to reduce, or to eliminate, production, points toward the right substances and does not destroy the wrong ones.²⁴²

In other words, jurors might be inclined, because of their genuine concerns

whereas it had been excluded under the *Frye* test that had been applied below. On remand, however, the Ninth Circuit again held that the evidence was inadmissible. *See Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1322 (9th Cir. 1995); *see also Mansfield, supra* note 183, at 81 (stating that "[t]here was uncertainty following the *Daubert* decision as to whether it had made it more or less difficult for expert testimony to gain admission").

238. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

239. All nine justices joined Parts I and II of the opinion; Justice Stevens dissented from Part III on the grounds that it went beyond the question upon which certiorari was granted. *See* 526 U.S. at 159 (Stevens, J., concurring in part and dissenting in part).

240. *Id.* at 149 (majority opinion) (quoting Hand, *supra* note 1, at 54).

241. *See* *General Elec. Co. v. Joiner*, 522 U.S. 136, 147–49 (1997) (Breyer, J., concurring).

242. *Id.* at 148–49; *see* Leslie A. Lunnie, *Protecting Juries from Themselves: Restricting the Admission of Expert Testimony in Toxic Tort Cases*, 48 SMU L. REV. 103, 165–68 (1994) (discussing pre-*Daubert* "restrictive" decisions that excluded expert testimony in toxic tort cases based upon a fear that questionable or inconsistent jury verdicts might "tend to produce a suboptimal amount of new drug development") (quoting *Brock v. Merrell Dow Pharms., Inc.*, 874 F.2d 307, 310 (5th Cir. 1989), *modified*, 884 F.2d 166 (5th Cir. 1989)); *cf.* David Schkade, Cass R. Sunstein, & Daniel Kahneman, *Are Juries Less Erratic than Individuals? Deliberation, Polarization, and Punitive Damage* 33 (John M. Olin Law and Economics Working Paper No. 81 (2d Series)), available at law.uchicago.edu/Lawecon/wkngPprs_76-100/81.crs.Juries.pdf (discussing potential problem of overdeterrence in risk-averse defendants caused by unpredictability of jury verdicts).

about cancer and their unsophisticated understanding of causation, to impose liability where it is not justified and thus to distort the market and cause beneficial products to be withdrawn or underproduced. For this reason, according to Justice Breyer, courts must be especially vigilant to prevent unreliable and potentially misleading scientific evidence from being placed before the jury.

Under the *Daubert* regime, less—not more—evidence comes before the jury for its determination.²⁴³ Judging strictly by results, then, *Daubert* demonstrates a distrust of juries. Subsequent Supreme Court case law, state and lower federal court cases attempting to apply *Daubert*'s mandate,²⁴⁴ and academic commentary²⁴⁵ all support the view that the *Daubert* rule reflects a posture of judicial distrust of jury decision-making. As noted above, this distrust can take several forms, including distrust of jurors' abilities to understand and properly weigh certain kinds of evidence, suspicion of bias against or in favor of certain types of litigants, a fear that juries will disregard evidence to express dissatisfaction

243. See, e.g., Jean Macchiaroli Eggen, *Clinical Medical Evidence of Causation in Toxic Tort Cases: Into the Crucible of Daubert*, 38 Hous. L. Rev. 369, 371 (2001) (noting that despite initial celebration by both plaintiffs' and defendants' attorneys, "[w]hen the dust settled . . . the district courts weighed in on the side of increased exclusion of evidence"). In criminal cases, in contrast, *Daubert* has not had much of an impact on the admissibility of expert testimony. See, e.g., Jennifer L. Groscup & Steven D. Penrod, *Battle of the Standards for Experts in Criminal Cases: Police vs. Psychologists*, 33 SETON HALL L. REV. 1141, 1151 (2003) (finding no change in rates of admission after *Daubert* for expert police or psychologists); Jennifer L. Groscup et al., *The Effect of Daubert on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCHOL. PUB. POL'Y & L. 339, 344–45 (2002) (finding little change in admissibility rates in pre- versus post-*Daubert* expert testimony in a study of appellate state and federal criminal cases). Empirical research regarding civil cases, however, suggests that the application of *Daubert* has led judges to exclude more expert testimony. See, e.g., Lloyd Dixon & Brian Gill, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision*, 8 PSYCHOL. PUB. POL'Y & L. 251, 297–98 (2002) (finding that judges in civil cases were more likely to exclude expert testimony under the *Daubert* standard); Krafska et al., *supra* note 179, at 329 (same). These empirical findings are further bolstered by the tendency of certain interest groups to push for *Daubert*'s adoption in the states. See, e.g., Brief of U.S. Chamber of Commerce as Amicus Curiae in Support of Respondents at 5, *Aguilar v. ExxonMobil Corp.*, No. S132167 (Cal. Oct. 7, 2005) (urging California Supreme Court to adopt the *Daubert* standard); Brief of U.S. Chamber of Commerce as Amicus Curiae in Support of Petitioner at 22, *CSX Transp. v. Miller*, No. 124 (Md. March 2, 2005) (urging Maryland Court of Appeals to abandon the *Frye* test in favor of the *Daubert* standard).

244. See, e.g., *Hernandez v. State*, 53 S.W.3d 742, 751 (Tex. App. 2003) ("From their inception, *Daubert* and its Texas progeny have been roundly criticized as . . . reflecting a distrust of jurors . . .").

245. See, e.g., Gottesman, *supra* note 227, at 880 ("Plainly, *Daubert* reflects a radical diminution in the Court's confidence that juries can (or will) 'separate the wheat from the chaff.'"); Mansfield, *supra* note 183, at 83 ("[A]lso to be taken into account as a factor contributing to *Daubert* is an ideology, far from decisively eliminated in our political debates, which cannot see the sense in entrusting to twelve persons picked at random from the general population important and difficult questions of fact."); Thomas O. McGarity, *Proposal for Linking Culpability and Causation To Ensure Corporate Accountability for Toxic Risks*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 1, 40 (2001) ("The post-*Daubert*/Joiner judicial eagerness to exclude expert testimony may also reflect a growing distrust of juries on the part of the current personnel on the bench. Judges may not believe that lay jurors can assign the proper weight to the scientific studies underlying expert testimony, even with the aid of vigorous cross-examination."); Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH. J. GENDER & L. 1, 3–4 (1998) ("*Daubert* expresses a fundamental distrust of community-based, collaborative, non-hierarchical decision-making—that is, the decision-making of juries.").

with the substance of legal rules, or apprehension that emotion will cause the jury improperly to weigh the evidence.

C. DISTRUST OF EXPERTS

Finally, in addition to distrust of juries, the Court's treatment of expertise in the *Daubert* trilogy also reveals a posture of distrust toward experts and, by extension, of the parties that proffer them. As one commentator has written, "[t]he *Daubert* Court's enthusiasm for barring some scientific testimony has to reside in an unstated cynicism, about both the character of some expert witnesses (they are charlatans) and the capacities of juries (compared to judges) to detect charlatans."²⁴⁶ In light of this attitude of distrust of experts on the part of the Court, the practice of permitting expert witnesses to assess the reliability of testimonial hearsay statements without subjecting those statements to testing by the jury is highly problematic.

Summarizing the change wrought by *Daubert*, the authors of the preeminent treatise on scientific evidence state that:

The *Daubert* revolution was largely about one simple, albeit fundamental, change in judicial perspective. Under the predominant rule before *Daubert* . . . courts were expected to evaluate whether the scientific evidence proffered had "gained general acceptance in the field in which it belonged." *Daubert* changed this deference-to-the-field approach to one in which judges themselves have the responsibility to evaluate the basis of expert testimony.²⁴⁷

Deference to experts implies trust; by contrast, a rejection of a deferential approach in favor of judicial scrutiny of expert evidence must imply some measure of distrust of experts. This distrust is both general and specific. It is general in the sense of "requir[ing] that fields justify their claims"²⁴⁸ and therefore that the entire field demonstrate a measure of reliability rather than simply enjoy a consensus around a certain method or result.²⁴⁹ And it is specific in the sense that the expert in the particular case is subject to question and his methodology and conclusions held up to the light of judicial scrutiny.

The factors articulated by the Court in *Daubert* reflect both kinds of distrust.²⁵⁰ The first factor, testability,²⁵¹ goes to the question whether the field qualifies as "science" at all. Though the science/non-science dichotomy was

246. Gottesman, *supra* note 227, at 879.

247. David L. Faigman, David H. Kaye, Michael J. Saks, & Joseph Sanders, *How Good Is Good Enough?: Expert Evidence Under Daubert and Kumho*, 50 CASE W. RES. L. REV. 645, 655 (2000) (emphasis added) (quoting *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)).

248. *Id.* at 656.

249. *See id.*

250. Of course, these factors were dicta and were only by way of "general observations." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593 (1993). Nonetheless, as they represent the Court's thinking about how judges might assess the reliability of evidence presented by expert witnesses, they are instructive of the precise nature of its suspicion of that evidence.

ultimately rejected as a basis for a court's obligation to act as a gatekeeper against unreliable expert evidence,²⁵² the Court's positioning this inquiry as "a key question"²⁵³ is a signal that experts should not be trusted to claim to be doing science when—in the Court's view—their theory or technique is non-scientific. Similarly, an examination of the known or potential error rate and the existence of "standards" as another factor²⁵⁴ signals suspicion about whether what purports to be a rigorous scientific field actually is one.

The second and fourth factors set out by the Court are directed more at the trustworthiness of the individual expert than of the field as such. The second *Daubert* factor is "whether the theory or technique has been subjected to peer review and publication," and the fourth is the old *Frye* question of "general acceptance" in the field.²⁵⁵ Both of these factors ask whether this particular expert and his methods or conclusions are taken seriously by his peers in the relevant field of expertise. In a sense, then, these elements of the *Daubert* inquiry place trust in experts in general in the service of weeding out those who are unworthy of trust individually.

Other factors that courts have crafted also reveal a distrust of individual experts. When a court asks whether an expert's proposed testimony flows "naturally and directly out of research [he or she] has conducted independent of the litigation" or rather whether the expert developed the opinion "expressly for the purposes of testifying,"²⁵⁶ the court is expressing the suspicion that the expert might have crafted his or her testimony in order to satisfy a paying client. Such distrust of the expert's motives is a prominent theme in both judicial and popular descriptions of expert witness abuses. Similarly, a court's inquiry "[w]hether the expert 'is being as careful as he would be in his regular professional work outside his paid litigation consulting'"²⁵⁷ is a not-very-subtle insinuation that experts cannot necessarily be assumed to treat their task with integrity.²⁵⁸

251. *See id.* ("Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested.")

252. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

253. *Daubert*, 509 U.S. at 593.

254. *See id.* at 594 ("[T]he court ordinarily should consider the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation.") (internal citations omitted).

255. *Id.* at 593–94.

256. FED. R. EVID. 702 advisory committee's note (2000 Amendment) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995)).

257. *Id.* (quoting *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997)). The Supreme Court implied as much with respect to the tire expert in *Kumho Tire*: "Indeed, no one has argued that Carlson himself, were he still working for Michelin, would have concluded in a report to his employer that a similar tire was similarly defective on grounds identical to those upon which he rested his conclusion here." 526 U.S. at 157.

258. A further signal of the suspicion with which the Court views experts is the manner in which it permits judges to evaluate the basis of an expert's opinion. In both *Joiner* and *Kumho Tire*, the Court approved a mode of judicial scrutiny that combed through each piece of data upon which the expert

The widespread concern with admission of “junk science”²⁵⁹ that gave rise to *Daubert* reflects a deep distrust of expert witnesses. Indeed, hand in hand with the suspicion of jurors’ ability and willingness to assess expert evidence is the suspicion that experts are likely to try to “hoodwink” juries. If experts could be trusted to present reliable evidence, courts would not be in a position of having to protect juries from themselves.²⁶⁰

IV. TRIANGULATION, TRUST, AND STEALTH TESTIMONIAL HEARSAY

This Article has thus far described the evidentiary framework and rationales that have permitted introduction of stealth hearsay by expert witnesses, laid out the expert testimonial triangle, and analyzed the various strands of trust and distrust that the foundational principles underlying the triangle reveal. In this Part, I bring these several pieces together to demonstrate why the admission of stealth testimonial hearsay cannot survive application of the expert testimonial triangle. In addition, this Part examines how the various themes of trust and distrust analyzed above converge with the triangulation analysis to suggest that prosecution experts should not be permitted to disclose nor rely on stealth testimonial hearsay in forming their opinions.

Where the government seeks to introduce stealth testimonial hearsay through the vehicle of expert witness opinion, the expert testimonial triangle blocks every avenue of admission. Disclosure by the expert is in many ways the easiest case, because *Crawford* and Side A of the triangle operate directly to prohibit admission of the testimonial hearsay statements. Rule 703 and similar state rules of evidence allow expert witnesses to rely on inadmissible hearsay in forming opinions and to disclose such evidence where the court finds the balancing test is satisfied. Yet despite this rule, and despite Congress’s attempt to liberalize the rules regarding admission of expert opinion, the Confrontation Clause absolutely bars admission of testimonial hearsay where the defendant has not had the opportunity to cross-examine the declarant. The argument that the statements are not hearsay—because they are not offered for their truth but

based his opinion and rejected the reliability of each one seriatim. See Lisa Heinzerling, *Doubling Daubert*, 14 J.L. & POL’Y 65, 69 (2005) (criticizing Chief Justice Rehnquist’s opinion in *Joiner* for “looking at each study in isolation from the other . . . [and] condoning the exclusion of the entire group of studies purporting to show a link between PCB’s and cancer”).

259. See *Kumho Tire*, 526 U.S. at 159 (Scalia, J., concurring) (describing trial court goal as “excluding expertise that is *fausse* and science that is junky”); Heinzerling, *supra* note 258, at 66 (arguing that “[t]he ‘junk science’ movement that has fed *Daubert* and its progeny was a pet project of the scientifically challenged tobacco industry”); Mansfield, *supra* note 183, at 82 (arguing that *Daubert* was the result of a “campaign [by powerful economic interests] of sloganeering, employing such labels as ‘junk science’ or ‘faux science’ or ‘bad science,’ aimed at casting scorn on those who testified to opinions thought to warrant these labels”); Joseph Sanders, *Scientific Validity, Admissibility, and Mass Torts After Daubert*, 78 Minn. L. Rev. 1387, 1389 (1994) (describing this concern as an “important reason for the Court’s recent interest” in the reliability of scientific evidence).

260. Cf. Lunnie, *supra* note 242, at 167 (characterizing restrictive courts’ rationale as based “on public policy considerations implicated by the tort system,” including the desire to insulate drug companies from the uncertainties of jury trials).

only to show the weight of the expert's opinion—betrays all logic. The jury cannot assess the weight of the expert's opinion based upon consideration of the hearsay without considering the hearsay for its truth.

Moreover, disclosure of the testimonial hearsay statement by the prosecution expert implicates the right to jury determination of facts as represented by *Apprendi* and Side *B* of the triangle, because the Supreme Court has made clear that the only permissible method for the jury to assess the weight of testimonial statements is through cross-examination of the declarant, not of a third-party witness who acts as the conduit for such statements. The jury must find the facts that the prosecution wishes to prove, and in this instance the jury may find those facts in only one way—through confrontation of the true witness by the defendant.

The non-disclosure rationale, furthermore, does not solve the constitutional problem because such an avenue is blocked by *Apprendi* and *Daubert*, Sides *B* and *C* of the triangle. Many courts, and several scholars who considered the issue under the *Roberts* reliability regime, have asserted that so long as the expert witness does not disclose the inadmissible (and, after *Crawford*, testimonial) hearsay to the jury, there is no Confrontation Clause violation. According to this reasoning, the Clause is violated only by introduction at trial of testimonial hearsay; if the expert does not disclose the basis of his opinion, the hearsay is not introduced. In essence, these courts and scholars take the position that stealth hearsay does not pose a constitutional problem.

Normally, where a statement is inadmissible, simple exclusion will suffice to prevent a violation of the defendant's rights. However, exclusion is not sufficient if the inadmissible statement is a necessary component of other evidence that comes before the jury. If the prosecution expert offers an opinion that is based upon testimonial hearsay, the jury will be denied the opportunity to properly assess the expert's opinion and the defendant will be faced with a choice between two options, each of which raises serious constitutional concerns. The defendant can elect to explore the basis of the expert's opinion on cross-examination, in which case the testimonial hearsay will be revealed to the jury, or the defendant can leave the opinion's basis unchallenged, in which case the jury has no means of assessing its proper weight.

Should the defendant choose to elicit the testimonial hearsay basis of the opinion on cross-examination, the situation is in principle indistinguishable from that presented in *Crawford* itself. A defendant should not be deemed to forfeit the right to confront the witnesses against him because their testimony is concealed within another witness's expert opinion. Under these circumstances, the *Crawford* leg of the expert testimonial triangle applies to bar the expert from relying on the testimonial hearsay statement. And should the defendant elect to leave the basis of the expert's opinion unexamined, then the other two sides of the triangle operate to disallow the expert's testimony.

The expert's reliance on stealth testimonial hearsay has the effect of removing a critical factual determination from the jury and instead allowing that fact

to be determined by a witness who is called—and likely paid—by the government. Such a course is prohibited by Side *B* of the triangle, the right to a jury determination of facts under *Apprendi*. An accusatory statement by an absent witness is precisely the type of factual issue for which jury determination is crucial. Indeed, it may be the paradigm case for invocation of the jury trial right. Both the right to confrontation and the right to jury trial would be hollow guarantees indeed if they could be bypassed merely by having an expert testify to an opinion that essentially parrots an accusatory, testimonial statement by relying upon it to form an opinion of the same nature. If a gang expert can opine that the defendant is a member of a certain gang based upon testimonial statements by absent witnesses to the effect that the defendant belongs to the gang, then a critical factual question has been removed from the province of the jury and placed in the hands of the government witness.

And, finally, the responses that the expert witness is subject to cross-examination and that the basis of his opinion must be reliable to be admissible under Rule 703 are both unavailing under a triangulation analysis because they run afoul of *Daubert* and the last leg of the expert testimonial triangle. The expert witness is not meaningfully subject to cross-examination, because the basis of his opinion cannot be tested according to the constitutionally prescribed procedure for assessing testimonial hearsay: cross-examination of the hearsay declarant. Cross-examination of the expert simply allows the expert to assert his own assessment of the reliability of the declarant's statement. This places the expert witness in a position that *Daubert* forbids by permitting potentially unreliable expert evidence to come before the jury. Furthermore, *Daubert*'s solution—requiring the judge to screen the evidence for reliability—brings us back around to *Crawford* and to the very reason that the *Roberts* reliability test was rejected in the context of the Confrontation Clause. The judge may not substitute her opinion of the reliability of testimonial hearsay for that of the jury. Stealth testimonial hearsay, in sum, falls squarely within the expert testimonial triangle. Triangulation from the three loci of *Crawford*, *Apprendi*, and *Daubert* requires that such expert opinion testimony be excluded unless it can reasonably be supported by facts and data that do not include inadmissible testimonial hearsay statements.

A consideration of the underlying themes of trust and distrust likewise argues for exclusion of expert opinions that smuggle testimonial hearsay into trial underneath the constitutional radar. All of the reasons to trust the jury, to distrust the government (including the judge), and to distrust the expert witness converge in the context of prosecution expert witnesses and stealth testimonial hearsay; conversely, none of the circumstances that might give rise to distrust of the jury are present.

Crawford, *Apprendi*, and *Daubert* considered together rest upon the premise that juries should be trusted to decide certain kinds of facts and that they might not be trustworthy to decide certain other kinds of facts. The paradigm facts that are reserved to the province of the jury are historical facts specific to the

particular case. Indeed, under both *Crawford* and *Apprendi*, the jury *must* decide these facts—courts are constitutionally prohibited from taking such factual determinations from the jury.

However, with respect to historical factual evidence of a particular type—that is, accusatorial statements that fall under the Supreme Court’s definition of testimonial hearsay statements—the jury may only be entrusted to determine those facts in a particular way. In order for such evidence to be admissible at all, it must be put before the jury in a direct form so that the jury may determine the reliability of the statements by evaluating the credibility of the person making them. Only the jury, and not the judge nor a witness who heard such statements out of court, is to be trusted with this particular kind of factual determination.

This conclusion rests as much upon distrust of the government and of experts as upon trust of juries. Both *Crawford* and *Apprendi* evince a preference for jury determination of certain kinds of facts because of the danger of governmental abuse of power. These are precisely the kinds of facts at issue in cases of stealth testimonial hearsay introduced by prosecution experts. Furthermore, neither the court nor the government expert should be trusted to substitute its judgment of this evidence for that of the jury because both are sufficiently connected with the prosecutorial power of the state so as to pose the very danger against which the Confrontation Clause and the jury trial guarantee are aimed.

Daubert and its posture of jury distrust are not to the contrary. *Daubert* was decided against a backdrop of dissatisfaction with jury decision-making in toxic tort cases, and its reasoning was primarily grounded in the specific features of scientific or otherwise complex expert evidence. Though *Daubert*’s reasoning and rule have subsequently been extended to cover all manner of expertise,²⁶¹ to the extent that the decision rests upon a distrust of juries in certain kinds of cases and with respect to certain kinds of evidence,²⁶² it does not easily translate to the typical case involving stealth testimonial hearsay introduced against a criminal defendant. In those cases, the embedded hearsay upon which the expert relies is—almost by definition—a straightforward, accusatory statement rather than a technical or complex scientific proposition. Such testimonial statements do not raise the kinds of issues of distrust that have been foremost in the *Daubert* discussion about jury competence and bias. Rather, this is the type of evidence that courts have typically had the *most* faith in juries to evaluate by means of judging the credibility of the person making the statement.

Both the criminal context of the stealth hearsay examined herein and the type of evidence typically at issue in these cases justify an attitude of trust for the jury and concomitant distrust of the government and of the expert witness.

261. In *Kumho Tire*, the Court held that the trial judge’s obligation to screen expert evidence applies to all forms of expert evidence covered by Rule 702. See *Kumho Tire*, 526 U.S. at 158.

262. Whether this distrust is well-founded is another matter. See Vidmar, *supra* note 227, at 906 (concluding that “[a]necdotes about the widespread malperformance of juries do not stand up to systematic data” in the context of medical malpractice cases); Sanders, *supra* note 15 (reviewing the empirical data on the question).

Daubert's particular reasons for distrusting juries generally do not apply, while its reasons for distrusting experts do. And *Crawford* and *Apprendi*'s reasons for trusting the jury are triggered here, while their reasons for distrusting the government and judges are likewise implicated in this context. In sum, all of the various lines of trust and distrust converge in this situation to support the triangulation analysis and the conclusion that testimonial hearsay may not be used to support a prosecution expert's opinions at trial.

CONCLUSION: THINKING OUTSIDE THE TRIANGLE

The need for experts in litigation and their use and misuse in both civil and criminal trials has for some time hinted at a broader truth: when it comes to evidence law, theory and practice operate across a sometimes large divide. A fundamental premise of the adversarial system—that the fact-finder can and should determine historical truth based upon its assessment of the evidence presented by the parties—has often, in the case of expert testimony, been honored in the breach. The division of tasks between judge and jury, the inconsistent treatment of hearsay and its many exceptions,²⁶³ and the debate over the distinction between questions of fact and those of law²⁶⁴ illustrate the tension in evidence law between trust and distrust of the jury. The illusion of the jury as sole fact-finder has proven impossible to sustain when it comes to the presentation of expert opinion.

This tension between theory and practice, between trust in and suspicion of the jury's ability to sift fact from bluster, between a view of the expert as indispensable educator and necessary evil, generally operates below the surface. Occasionally, however, the rift emerges and illuminates the ambivalence of the system toward both expert witnesses and jurors. Such is the case after *Crawford*, which begs for a re-examination of the inconsistency between allowing expert witnesses to base opinions upon testimonial hearsay statements and the defendant's right to confront his accusers. The expert testimonial triangle—composed of *Crawford*, *Apprendi*, and *Daubert*—offers a useful framework for examining fundamental constitutional as well as normative questions about the rules that have evolved to accommodate the benefits and dangers associated with expert evidence, both in the criminal and civil contexts. The practice of permitting expert witnesses to rely on unexamined facts and data to reach conclusions to which they testify at trial highlights a genuine dilemma of modern litigation.

In attempting to resolve this dilemma and to find a principled line between legitimate and illegitimate expert reliance on out-of-court evidence, the expert testimonial triangle offers both concrete answers and some direction for further

263. For a very amusing demonstration of the unpredictability of the hearsay rules, see G. Michael Fenner, *Law Professor Reveals Shocking Truth About Hearsay*, 62 UMKC L. Rev. 1 (1993).

264. See, e.g., Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 Nw. U. L. Rev. 1769 (2003).

thought. With respect to prosecution experts who testify in the form of opinions based upon testimonial hearsay statements, the answer is clear: such opinions should not be permitted. They fall squarely (so to speak) within the three corners of the expert testimonial triangle and sit at the convergence of the various lines of trust and distrust of juries, government, and experts. In other contexts, however, the answers are less clear. Where a government expert relies on evidence that is inadmissible, but not testimonial, *Crawford* and the Confrontation Clause do not apply and thus only two legs of the triangle are implicated. And with respect to a criminal defendant's offer of expertise that rests on otherwise inadmissible hearsay, or in civil litigation, the expert testimonial triangle offers not concrete answers but rather directions for further exploration.

Expert testimony offered by a criminal defendant does not raise a Confrontation Clause issue. However, trust of the jury and of the expert remain relevant questions. With respect to the jury, the matter is complicated. The right to a jury trial and distrust of government are implicated whether the evidence is offered by the defendant or by the prosecution. Where the judge excludes defense evidence based upon reliability rather than relevance, factual determinations are removed from the province of the jury by a governmental actor. Yet where an underlying reliability determination is relegated to the expert witness under Rule 703, the factual question is likewise removed from the jury in a significant sense and *Daubert* counsels attention to the trustworthiness of the expert. An answer to this question will require close attention to the particular type of expert testimony at issue and a comparison of the relative impact of these two courses upon the jury trial right.

With respect to expert testimony offered in the course of civil litigation, the expert testimonial triangle provides some direction and tentative answers. Though the right to confrontation of adverse witnesses does not apply in the civil context, the Seventh Amendment right to a jury trial remains relevant, along with its underlying purpose of protecting the individual as against powerful societal interests.²⁶⁵ Attention to the nature of the parties, the type of expert evidence involved, and the relative competencies of the court, jury, and expert witness will be crucial.

The increasingly prevalent practice of using experts as a vehicle for introduction of stealth testimonial hearsay raises grave evidentiary, constitutional, and normative concerns. Application of the expert testimonial triangle demonstrates that such expert opinion testimony should not be admitted when offered by the government against the defendant in a criminal trial. Further, the framework presented herein serves to illuminate the questions that should be asked in order

265. The debate leading up to the adoption of the Seventh Amendment demonstrates that this idea was central to those who supported it, as proponents commonly invoked themes such as the protection of debtors, the rights of private citizens in litigation against the government, and the protection of litigants from biased judges. See Charles W. Wolfram, *Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 670–71 (1973).

to analyze the admissibility of expert testimony that falls outside the strict boundaries of the triangle but that raises some of the same concerns. The issues of trust and distrust of government, juries, and experts that are highlighted by this construct may help to frame the analysis in the important, controversial, and perennially difficult area of admissibility of expert witness testimony.