

**THE PHILIP D. REED LECTURE SERIES**  
**ADVISORY COMMITTEE ON EVIDENCE RULES**  
**CONFERENCE ON POSSIBLE AMENDMENTS**  
**TO FEDERAL RULES OF EVIDENCE 404(b), 807,**  
**AND 801(D)(1)(a)\***

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*Hon. J. Thomas Marten*  
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*Hon. Virginia A. Phillips*  
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#### I. WELCOME AND INTRODUCTORY REMARKS

PROFESSOR CAPRA: Well, welcome, everybody. I appreciate you coming today and it's going to be an exciting conference. I want to turn it over first to the new chair of the Committee on Rules of Practice and Procedure, which means our boss, and that's Judge David Campbell.

JUDGE CAMPBELL: Thank you, Dan. Thank you all for being here, and thank you especially to Pepperdine for hosting us in this incredible place. I've heard several people comment that if they lived here they would never get any work done. I can relate to that since I'm regularly distracted by my office view of the parking lot. [Laughter] I don't know what I would do with this view out the window.

But for those who were here last night, Dean Tacha was as kind and gracious as she could have been. She greeted us like we were long lost family members and just really welcomed us, and thank you to everybody else at Pepperdine who has made this possible.

It's great to be with the Committee.<sup>1</sup> This is my first evidence meeting; as for a few others, it's their first meeting as well. This Committee is a remarkably talented and experienced group of people. And it's good to know that the Rules,<sup>2</sup> which are so critical to our system of justice, are in such capable hands and, particularly, chaired by somebody as capable and experienced as Judge Sessions.

Additionally, thank you for those of you who have come to help us think through these issues. I just finished about ten years on the Civil Rules Committee, and it was the practice of that Committee to regularly meet with experts, people who are really knowledgeable and experienced in the application of the Rules, and to me that is the most important thing that the Committees do—to get experience from folks like you on how the Rules are working and where changes could be made and what might or might not improve the system. I think to the extent we get it right, it's because of the benefit of the input folks like you provide. So thank you very much for taking time to be here. We know that you have busy lives and that this is a sacrifice to come and we really appreciate it.

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1. The Advisory Committee on Evidence Rules ("the Committee").

2. The Federal Rules of Evidence ("the Rules").

And thanks to Dan Capra. I tell you, Dan, I got exhausted reading your materials. [Laughter] What an amazing effort in putting together these materials and organizing this conference.

So it's great to be with you, and I look forward to the discussion today.

PROFESSOR CAPRA: Thanks, Judge Campbell. I turn it over to my direct boss now, Judge William Sessions.

JUDGE SESSIONS: Yeah, right. Am I your boss? [Laughter]

You know, I was reading the materials that Dan had submitted, and I've been on the Committee for a long time now, and those materials are just phenomenal. In some ways you get the sense that he's able to write these materials with footnotes and citations from memory and observation, but I found a typo. [Laughter]

I asked myself, "Can I call him out?" He can't—you can't.

Well, thanks very much to Pepperdine for hosting us. We had an incredible dinner with Judge Tacha, and I'll just say a little bit about why we're here in Los Angeles. Number one, it's all Dan Collins's fault. He travels across the country for all of our meetings and nobody seems to come out West, so it's important, I think, for the Committee to come out West. This is my only power. I get to pick where the meetings are.

Anyway, the other thing was that Judge Tacha and I have been friends for a long time, going way back into the late '90s and early 2000s. She retired, and she is a star in the judiciary. She's done phenomenal work for all of us in the judiciary, and I just thought it was really a good thing to have a Committee of the Judicial Conference come here just before she retires as a statement to her and to Pepperdine really respecting the work that she's done. You'll find that these symposia are just fascinating. We invite—we will be inviting—everyone to contribute, including the members of our Committee that have observations to make and also all of the experts who have been asked to join us. It's an earnest effort to try to get as much information as we possibly can before we make decisions in regard to changes of the Rules.

We've done this on a number of occasions in the past. It's almost always followed by changes in the Rules of Evidence. Based upon the history of this Committee, the relevance of these particular discussions is very clear.

With that, thank you very much for contributing, and I look forward to the discussion.

PROFESSOR CAPRA: Thank you, Judge. So let's start today with some basic details. There will be a transcript of these proceedings, and it will be published in the *Fordham Law Review*. I'd like to thank the *Fordham Law Review* for taking this on and agreeing to do it.

I want to thank Dan Collins for his help in rounding up some excellent participants and Carol Chase for her help in rounding up the other half of the participants. And thanks to Shelly Cox of the Administrative Office, without whom we could not have convened. She did a wonderful job to get us here and to get this conference functioning.

This is the fifth year in a row that the Committee has convened one of these kinds of conferences, and there have been various goals. Sometimes a goal

is to see how a Rule is working, so we had a conference on Rule 502<sup>3</sup> about five years after it had been enacted to see how that was working.<sup>4</sup>

One goal at some of these conferences is to deal with new developments that may require attention. So, the Committee did a conference on the challenges of electronic evidence,<sup>5</sup> for example, and another on Judge Posner's views on how the hearsay rule should be changed.<sup>6</sup>

Finally, in these conferences the Committee has been considering evidentiary developments that are worth exploring, whether or not there's going to be Rule amendments. If developments are having a significant impact, this Committee should monitor them—that's part of the Committee's goal and structure.

Another motivation that Judge Campbell referred to is to look at a possible amendment before it is issued for public comment by convening a conference with experts in the field. The usual practice is to develop an amendment and then send it out for public comment. The public comment these days is sometimes very useful but sometimes not. So it can be very valuable to get expert comments, through a conference, before a rule gets sent out for public comment. And that is a critical part of this conference.

So we have three topics on the agenda today, but before we get to that we should all introduce ourselves. We'll just go around, and we'll start with Judge Sessions.

JUDGE SESSIONS: My name is Bill Sessions. I'm a district court judge in Vermont. No, senior district court judge in Vermont and chair of this Committee.

JUDGE CAMPBELL: I'm Dave Campbell, a district judge in Phoenix, Arizona, and I'm on the Standing Committee.

JUDGE LIVINGSTON: I'm Debra Livingston. I'm a judge on the Second Circuit, and I'm on this Committee.

PROFESSOR COQUILLETTE: I'm Dan Coquillette. I teach at Boston College and Harvard Law School. And I'm Reporter to the Standing Committee.

JUDGE MARTEN: I'm Tom Marten. I'm a district court judge in Wichita, Kansas, and a member of the Committee.

JUSTICE BASSETT: I'm Jim Bassett. I'm a new member of the Committee. I'm on the New Hampshire Supreme Court.

JUDGE OLIVER: I'm Solomon Oliver, and I'm chief judge of the District Court for the Northern District of Ohio, and I'm the liaison for the Civil Rules Committee.

MS. LOVITT: My name is Traci Lovitt. I'm also one of the new members of the Committee and I'm a partner at Jones Day.

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3. FED. R. EVID. 502 (establishing the attorney-client privilege, the work product privilege, and the limitations on waiving these privileges).

4. *See generally Reinventing Rule 502*, 81 FORDHAM L. REV. 1533 (2013).

5. *See generally Symposium on the Challenges of Electronic Evidence*, 83 FORDHAM L. REV. 1163 (2014).

6. *See, e.g.,* Richard A. Posner, *On Hearsay*, 84 FORDHAM L. REV. 1465 (2016).

MS. SHAPIRO: I'm Elizabeth Shapiro from the Department of Justice on the Evidence Committee.

MR. COLLINS: I'm Dan Collins from Munger, Tolles & Olson here in Los Angeles, and I'm also a member of the Committee.

MR. KRAMER: I'm A.J. Kramer, the Federal Public Defender in Washington, D.C., and a member of the Committee.

MR. GRAHAM: I'm Ken Graham. I'm a retired law professor at UCLA Law School.

PROFESSOR GOLD: Victor Gold, a professor at Loyola Law School here in Los Angeles.

PROFESSOR SCALLEN: I'm Eileen Scallen, and I'm Associate Dean for Curriculum and Academic Affairs and an adjunct professor of law at UCLA School of Law.

MR. ASPERGER: And I'm Jim Asperger. I am a partner at Quinn Emanuel Urquhart & Sullivan here in Los Angeles.

MR. COHEN: Philip Cohen, criminal defense attorney, Los Angeles.

MS. ANDRUES: Mary Andruess, partner at Arent Fox.

MR. DYBWAD: Chris Dybwad, Chief Deputy, Federal Public Defender, Los Angeles.

MS. ZUSMAN: Kelly Zusman, U.S. Attorney's Office, Portland, Oregon.

MR. FOX: Brandon Fox, U.S. Attorney's Office here in Los Angeles.

MR. HOLSCHER: I'm Mark Holscher, a partner at Kirkland & Ellis in Los Angeles.

MS. COATS: I'm Wendy Coats. I'm appellate counsel at Fisher Phillips, and I sit in San Francisco.

MS. MILSTEAD: I'm Virginia Milstead from Skadden Arps here in Los Angeles.

MR. JACKSON: Alan Jackson, criminal defense attorney here in Los Angeles.

PROFESSOR CHASE: Carol Chase, professor at Pepperdine.

PROFESSOR LEVENSON: Laurie Levenson, a professor at Loyola Law School, currently teaching evidence at UCLA School of Law.

JUSTICE MANELLA: I'm Nora Manella. I sit on the California Court of Appeal.

JUDGE PHILLIPS: I'm Virginia Phillips. I'm the chief district judge for the Central District of California in Los Angeles.

JUDGE HAMILTON: And I'm David Hamilton, a judge at the Seventh Circuit headquartered in Bloomington, Indiana.

PROFESSOR CAPRA: And I'm Dan Capra, Fordham Law School, Reporter to the Committee. But before me that was really impressive. That was—that's impressive.

I'm going to turn to the first topic on the agenda today, which is Rule 404(b) and developments in Rule 404(b), the Rule which prohibits evidence of crimes, wrongs, or other acts to prove a person's propensity to commit

those acts.<sup>7</sup> And I'm going to turn with gratitude to Judge Hamilton, who wrote many of the opinions that we are investigating, including the opinion in *United States v. Miller*,<sup>8</sup> which has changed the way that courts have started to think about Rule 404(b).

So, Judge Hamilton, please.

## II. TOPIC ONE: DEVELOPMENTS IN RULE 404(b)

JUDGE HAMILTON: Thank you, and thanks to the Committee for the invitation to be here. This is about as tough an audience as it gets. I usually get to ask questions, but I can't imagine the questions I'm going to be subjected to here.

Rule 404(b) is obviously a constant source of disputes. I have to say that I got some great advice as a brand new district judge from my colleague, John Tinder, who was a veteran prosecutor and criminal defense lawyer. He said, "Dave, just remember you can never get reversed for keeping out 404(b) evidence." It's not quite true, but it's pretty close. I generally took a pretty conservative approach to admitting 404(b) evidence as a trial judge.

And, at the risk of telling everybody here what they already know, this evidence, particularly about prior convictions, just has enormous power. In the years I was a district judge I would always talk with jurors after every verdict and every jury in every criminal case had the same first question: "Has he done this before?" That's what they wanted to know to reinforce the guilty verdict. And, in the course of the work that I've done on the issue, I've also had occasion to look at academic and experimental efforts to test the effects of limiting instructions on 404(b) evidence. The results are not encouraging for appellate courts that say so often, "Well, we count on the jurors to follow the district judge's limiting instructions."

In our circuit, we've had several developments that I want to just talk briefly about how we administer 404(b). The discomfort with excessive use and automatic admission, or nearly automatic admission, of prior bad acts evidence was becoming troubling to a number of judges on our court. This does not track with perceived etiologies, identities, or parties of Presidents who appointed the particular judges. It's across the board.

Just for those of you who know our court well, Frank Easterbrook and I are probably the principal allies pushing this particular development in 404(b) evidence.

What we were seeing was just too much 404(b) evidence without any careful thought in the record from district judges about why this evidence was being admitted. So we have taken steps in a series of cases to try to insist on increased rigor and discipline in making decisions about admitting Rule 404(b) evidence.

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7. FED. R. EVID. 404(b) (establishing the prohibited and permitted use of past crimes, wrongs, or other acts in a current case).

8. 673 F.3d 688 (7th Cir. 2012).

Probably the most significant step is a case, an en banc decision called *United States v. Gomez*,<sup>9</sup> which Dan has written about in the materials,<sup>10</sup> where we were dealing with a drug distribution conspiracy, and one of the fellows had evidence admitted against him that a few weeks after the conspiracy came to an end, he was in possession of a user quantity of cocaine.<sup>11</sup> How this was supposed to be relevant to anything in the distribution charges was unclear. I'll spare you the procedural saga that led to Judge Sykes's opinion for our en banc court, but she did several things that are worth noting.

First, she wrote off the old four-prong test of 404(b). That is: Is the evidence directed toward a matter and issue other than propensity?<sup>12</sup> Is the evidence similar enough and close in time to be relevant?<sup>13</sup> Is the evidence sufficient to support a jury finding that the defendant committed the similar act?<sup>14</sup> And its probative value, is it not substantially outweighed by the danger of unfair prejudice?<sup>15</sup> Kind of a familiar litany for trial lawyers and trial judges, at least in criminal cases.

She concluded and we concluded unanimously in this part of the opinion that it was time to abandon that and to focus more on the text of the Rules and reconstruct a test based on 401, 402, 404(b), and 403.<sup>16</sup> The effort in *Gomez*, following up on a series of cases that had been building up to this (where Easterbrook and I had done some of the writing) is to try to insist that district judges lay out on the record the chain of reasoning—not just identifying a particular item from the list in 404(b) but to describe the chain of reasoning that takes you from the 404(b) evidence to some probative indication of intent, knowledge, identity, motive, et cetera.<sup>17</sup> So, if I may quote briefly from the opinion:

[W]e have cautioned that it's not enough for the proponent of the other-act evidence simply to point to a purpose in the "permitted" list and assert that the other-act evidence is relevant to it. Rule 404(b) is not just concerned with the ultimate conclusion, but also with the chain of reasoning that supports the non-propensity purpose for admitting the evidence.<sup>18</sup>

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9. 763 F.3d 845 (7th Cir. 2014).

10. See Memorandum Regarding Conference on Evidentiary Developments: The Residual Exception, Rule 801(d)(1)(A), and Rule 404(b) from Daniel J. Capra, Reporter for Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules 6 (Oct. 1, 2016) [hereinafter Memorandum Regarding Conference on Evidentiary Developments] (on file with the *Fordham Law Review*).

11. See *Gomez*, 763 F.3d at 851.

12. See *id.* at 852.

13. See *id.*

14. See *id.*

15. See *id.*

16. See *id.* at 853 ("Multipart tests are commonplace in our law and can be useful, but sometimes they stray or distract from the legal principles they are designed to implement.").

17. See *id.*

18. *Id.* at 856.

And then reviewing several recent cases<sup>19</sup>:

The principle that emerges from these recent cases is that the district court should not just ask *whether* the proposed other-act evidence is relevant to a non-propensity purpose but *how* exactly the evidence is relevant to that purpose—or more specifically, how the evidence is relevant without relying on a propensity inference. Careful attention to these questions will help identify evidence that serves no permissible purpose.<sup>20</sup>

Now I don't have any district judges from within our circuit here, but I believe that message has been getting through. I don't know whether this winds up motivating the Committee, or whether it's the kind of thing that can be done by changing the Rule text, but what we've done is basically say from the Rule text, we think to implement it effectively, you've got to impose this disciplined form of thought before 404(b) evidence is admitted.

In your written materials, there was some discussion about the extent to which a particular issue must be placed at issue in the trial in deciding to gauge what 404(b) evidence might or might not come in.<sup>21</sup> I would say our court's response, at least as I understand it, was to avoid bright-line rules on that question. We certainly have tried to get across the idea that the mere fact that a defendant pleads guilty does not mean that intent is always at issue and, therefore, you can put in bad prior acts and prior convictions to show intent.

What we have advised in the *Gomez* opinion is to wait and see—for a trial judge—to see how the case develops before making a final commitment about admitting or keeping out 404(b) evidence.<sup>22</sup>

Then I think I'll just say one other thing briefly, which was about five or six years ago—our circuit also deep-sixed the inextricably intertwined category of evidence that lies somewhere between actual evidence of the crime charged and 404(b) evidence. In our court's experience, we just found that it was an incoherent mess that contributed nothing of value to making the decisions and tended to produce fuzzier thinking and, to the extent that's possible, deny defendants the right to advance notice and the kind of opportunities to resolve such important 404(b) issues before trial. That was in a case called *United States v. Gorman*<sup>23</sup> from 2010.

PROFESSOR CAPRA: Judge, can I ask you a question about the *Gomez* case?

JUDGE HAMILTON: Yes.

PROFESSOR CAPRA: So what's required in the Seventh Circuit is that the district judge must state on the record the chain of inferences that leads to the particular not prohibited purpose.

JUDGE HAMILTON: The probative value, yes. Yes.

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19. *See id.* (citing *United States v. Lee*, 724 F.3d 968, 976–77 (7th Cir. 2013); *United States v. Richards*, 719 F.3d 746 (7th Cir. 2013); *United States v. Ciesiolka*, 614 F.3d 347, 355 (7th Cir. 2010)).

20. *Id.*

21. *See id.* at 845.

22. *See id.* at 860–61.

23. 613 F.3d 711 (7th Cir. 2010).



PROFESSOR CAPRA: That's going to be a requirement, so that's the way you regulate it.

JUDGE HAMILTON: That's the way we do that, and obviously it's with the judge typically saying to the prosecutor, "Explain to me how do we get . . . ." In *Gomez*, it was preposterous.

PROFESSOR CAPRA: Yeah. Well, right, because the only reason that the drug act was probative is that it made it more likely that he was the one who did the charged crime. There's a recent case kind of like that—it's a constructive possession of a firearm case—and the government wants to introduce the fact that the defendant possessed a different firearm about a year ago.<sup>24</sup> The only way that act is probative for any mental state is to go through the propensity inference.

MR. COHEN: I just had one follow-up question for Judge Hamilton. When jurors ask you if the defendant had done this before, do you tell them?

JUDGE HAMILTON: Yeah. After they've delivered the verdict, yes, I do.

MR. COHEN: Hopefully not before. [Laughter]

JUDGE HAMILTON: Precisely.

JUDGE OLIVER: When you talk about the example you gave whether it goes to propensity, is it a constructive possession case?

PROFESSOR CAPRA: Constructive possession case.

JUDGE OLIVER: So it may not be propensity then. If it's constructive, then it may go to intent and so forth in turn.

PROFESSOR CAPRA: What does the fact that he had a gun previously say about intent, other than that he is a guy who has a propensity to possess guns? I guess that's the question.

JUDGE OLIVER: Well, I guess when you get something that goes both to propensity and to something else then the question is what do you do? I think it could go to whether he was likely to possess—to have possessed—a gun at that time, depending on the facts.

PROFESSOR CAPRA: Any help on this from my professors here?

PROFESSOR GOLD: Well, I guess what I would say is if you don't take the approach that the *Gomez* Court takes, then I'm not sure what 404 does for us. In other words, if you're able to proceed down a logical train that involves a propensity inference, you can almost always get to a 404(b) point as well.

He's a bad guy, thus he must have had the intent to do this. He's a bad guy, thus that's the guy's identity. So, if we don't follow *Gomez*, what's left of 404?

I think, speaking as someone who's taught probably thousands of evidence students over the years, the position I take is of course you can't proceed through a propensity inference to get to a 404(b) conclusion; otherwise the Rule doesn't mean much. But then I've got to force my students to slow down and think very logically about how is this evidence getting to the 404(b) conclusion. It takes some time, and thus I think the idea of asking the trial

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24. See generally *United States v. Green-Bowman*, 816 F.3d 958 (8th Cir. 2016).

judge to state on the record or the prosecutor to state on the record how we get there is important. It could be of significant value; otherwise I don't see what 404 does for us.

PROFESSOR CAPRA: It actually could be the subject of a Rule, right? The Rule could provide that "the trial judge must state on the record" or something like that. Eileen. I'm going to go with first names even though you're all like famous people. Go ahead.

PROFESSOR SCALLEN: I am intrigued by this approach in *Gomez* because this is exactly what I also try to get students to do. It's just very good at building their legal analysis skills as well as to understand the final purpose of the Rule. However, in practice, especially at trial, I think it's very, very hard to do on the fly. Although some of these difficult cases would be raised by motion in limine, I warn students that it's very hard if you're the defense lawyer when the prosecutor throws all the 404(b) rationales at the trial judge and, of course, the favorite, "It goes to state of mind, Judge." And trying to get judges to understand that state of mind is not a catchall can sometimes be difficult.

I did a lot of training of district judges in Minnesota on evidence rules before I came back to California a few years ago, and 404(b) was one of the major problems that they recognized needed attention. Look at what Minnesota did in 2006;<sup>25</sup> Minnesota is one of the forty-four states that follow the Federal Rules of Evidence. Every change this Committee makes has reverberations throughout the country.

PROFESSOR CAPRA: I think the Committee is well aware of that responsibility.

PROFESSOR SCALLEN: Right, right. So what Minnesota did is to amend 404(b) very specifically to set out a checklist because trial judges love checklists.<sup>26</sup> They just want to be shown what they need to do. And so it now has five basic parts.

One of the parts is the notice requirement that 404(b) has,<sup>27</sup> but the second part is the prosecutor clearly indicates what the evidence will be offered to prove.<sup>28</sup> So it really highlights this relevance portion. You know, what element or what theory under 404(b) are you requiring?

It also, however, takes 404(b) to a new level, and this would require some substantial discussion on the federal part. Minnesota requires, as the third element, that the other crime, wrong, or act be proven by clear and convincing evidence.<sup>29</sup>

PROFESSOR CAPRA: We can talk about that, too, what standard of proof that requires.

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25. MINN. R. EVID. 404 committee comment to 2006 amendment (noting the rule was revised "to provide a clear balancing test to be applied in determining the admissibility of other acts evidence").

26. *See id.*

27. *Compare* FED. R. EVID. 404(b), *with* MINN. R. EVID. 404(b).

28. MINN. R. EVID. 404(b).

29. *Id.*

PROFESSOR SCALLEN: If we really felt 404(b) is out of control, that's another step.

PROFESSOR CAPRA: Yes, Ken.

MR. GRAHAM: Well, one of the problems I think students have dealing with this is the way we tend to teach relevance. Thinking about relevance does not come naturally, and so you've got to spend a lot of time with the students getting them to do that because unless they get that, then they're going to miss that completely.

The other suggestion that I was going to make is if you're going to address a problem, then it's got to be in the text of the rule because I don't think you can accomplish anything with something in the Advisory Committee Note. At least that would be my position until somebody does a study of how often Advisory Committee Notes are actually cited. My off-the-cuff impression is that they almost never see them.

PROFESSOR CAPRA: We actually did a study on Rule 702, the Committee Note from 2000.<sup>30</sup> It's been cited more than 800 times and relied upon, actually.

PROFESSOR SCALLEN: Yeah. Very helpful.

PROFESSOR CAPRA: But, for the record, we don't write Committee Notes like that anymore because they're too treatise-like. The Standing Committee is currently of the position that you shouldn't include cases in a Committee Note, and so it's a different world today. So I think you are right that any change must be to the text of the rule.

Yes, Brandon.

MR. FOX: I probably should say for all of us with the Department of Justice, none of our comments are necessarily those of the Department of Justice—

JUDGE SESSIONS: Do we have to turn off the microphones? [Laughter]

MR. FOX: I practiced in Chicago for nine years as an AUSA and then came here to Los Angeles, and the Ninth Circuit has the same standard that the Seventh Circuit used to apply before *Gomez*. Reading *Gomez*, I find it to be very clear and straightforward. I think what we're looking at is a 403 analysis<sup>31</sup> where the probative value has to be one of the permitted purposes under Rule 404(b), and part of your analysis about whether there's an unfair prejudice is whether this is being used for propensity or not.

And I think that that's a very simple analysis. I think the four-part test that we've used in most of the circuits really goes to that. But I think doing away with that four-part test and just looking at it from a 403 perspective in the way that I've talked about and the way it's in *Gomez* is the way to do it, and I think it makes it so much easier for practitioners.

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30. See FED. R. EVID. 702 advisory committee's note to 2000 amendment.

31. See *id.* 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

Maybe things are different in different cases. Actually, Chris Dybwad here from the Federal Public Defender's office will probably tell you how it is on the defense side in L.A. But I think with 404(b) it should be very rare that we're addressing these issues on the fly. I think that most of these issues are going to be addressed up front, in motions in limine. Even if they're not decided before trial, they're at least briefed or argued before trial, if I'm not mistaken.

PROFESSOR CAPRA: So about 404(b) and 403, I can see how you would come to a different conclusion on which Rule is being applied in a case like *Gomez*. For the Committee the question is, then, which Rule gets amended, and nobody's going to amend Rule 403, right? So, if there were going to be an amendment it would seem to be Rule 404(b). It's an interesting question.

MR. FOX: I don't know that it needs to be amended.

PROFESSOR CAPRA: I understand.

MR. FOX: I have a couple things for Judge Hamilton, if I can turn the table and actually ask another question.

JUDGE HAMILTON: Sure. Fair enough.

MR. FOX: Yes. So two things. If it had been, let's say, a counterfeit case, like production of counterfeit money, and the counterfeit money that looks like it's similar to the kind that was seized a month ago is in his room, do you get to a different place there in *Gomez*?

Two, a separate issue, I read your concurring opinion and dissent in part and the jury instruction that you offered.<sup>32</sup> I assume that that has not been implemented currently in the Seventh Circuit, but you instruct a couple things that I have questions about. You say before using this evidence you must decide whether it's more likely than not.<sup>33</sup> I'm wondering if you're saying that the jury needs to do that unanimously or each individual juror can make that decision.

JUDGE HAMILTON: Ouch.

MR. FOX: Well, I think that matters because you want jurors to take different facts and come to conclusions ultimately based on which facts matter to them, and I can see more jurors getting confused with that if the test is that the finding be unanimous.

JUDGE HAMILTON: Yeah, that's an interesting question. I don't think we were trying to instruct the jury that they would have to find by a preponderance unanimously. I don't think we ever do with respect to particular pieces of evidence. I mean, you have the judge making the preliminary evaluation—

MR. FOX: Right.

JUDGE HAMILTON: —as to whether it comes in and then leave it to the jurors, and they may or may not agree on their views of specific items. But

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32. See *United States v. Gomez*, 763 F.3d 845, 864 (7th Cir. 2014) (Hamilton, J., concurring in part and dissenting in part).

33. See *id.* at 865 (“[Y]ou must decide whether it is more likely than not that the defendant took the actions.”).

I'm trying to imagine the appeals if we tried to order unanimity on particular items of evidence.

MR. FOX: What about the counterfeiting?

JUDGE HAMILTON: The counterfeiting example would probably be a much stronger use. In *Gomez*, what you had was the difference between a medium wholesale operation in cocaine distribution versus, if I recall correctly, about a half an ounce of user quantity cocaine weeks after the distribution operation had been interrupted. I never really saw the nonpropensity inference there.

Before I did anything definitive, I would want to know a little bit more about what issues were being raised about the counterfeit that's charged, the counterfeit currency that's charged, and where the additional evidence comes in. It could just be evidence of the crime that's charged. So allow me to duck a little bit.

PROFESSOR CAPRA: But if his defense is he didn't know it was counterfeit, then you're going to let that in, right?

MR. FOX: Or even identity if it wasn't *Gomez*. If you say, "It's my roommate instead that did it," it seems like that is fair game. If you can show that that counterfeit money came from the production that has already been seized previously, I think that it's probably—

PROFESSOR CAPRA: The same batch.

MR. FOX: Same batch.

JUDGE HAMILTON: Yes. If you can show that he knows it's counterfeit, then that goes a longer way.

PROFESSOR CAPRA: Because that would show he knew that.

JUDGE HAMILTON: Yes.

PROFESSOR CAPRA: Chris, did you have a comment?

MR. DYBWAD: Just very briefly. As a threshold matter, the sort of rule change that we are talking about—requiring articulation of a proper purpose that does not proceed through a propensity inference—would make a lot of sense from my perspective; it encourages the type of rigorous analysis that Judge Hamilton was talking about.

I will say I agree with Brandon that the four-part test in the Ninth Circuit (as you sort of think about at the too remote in time, the substantially similar) is all much ado about nothing.<sup>34</sup> I mean, at the end of the day, I don't know what it really tells you. But actually forcing people to specify, "Here is the inferential chain," I think does make a lot of sense.

I will tell you I routinely receive discovery letters saying, "Here's your discovery. By the way, somewhere in here is something that relates to the following enumerated Rule 404(b) purposes."

PROFESSOR CAPRA: That's the "general nature" of the evidence that is required for disclosure under Rule 404(b)—not very helpful.

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34. See *United States v. Bailey*, 696 F.3d 794, 798–99 (9th Cir. 2012).

MR. DYBWAD: And even in the context of motions in limine. I'll file a motion in limine and receive a response that it's relevant to all the enumerated 404(b) purposes. So rigorous analysis, I think, certainly makes sense.

MR. COHEN: I think Brandon raises an excellent question about this unanimity requirement because—I do much more state court practice than federal as a caveat—so often the response is, “Well, now, counsel, we're getting into a trial within a trial,” and my answer to that is, “We absolutely are because, as His Honor said, why ask the question about whether you tell the jury afterward whether or not he's done this.” My concern is, quite candidly, I want to talk to jurors after a verdict. Facts that they learn posttrial to then support things they may have thought or conclusions they may have been on the fence about reaching during the trial may very well impact questions that I, or my investigator, then subsequently ask them about what they relied upon.

And so, when you get into this concept or objection by a judge, “Hey, we're going to trial within a trial,” my response is “We absolutely are because, as His Honor indicates, it is so critical to human nature and human thinking ‘has this guy done it before?’” Once they reach that determination, the rest becomes so much easier.

And so here's the problem: you have twelve people, nine may be relying on something, three may not. The nine are now trying to convince the three, “Well, he must have done this because he's done that.” If that was, for instance, a Fifth Amendment issue and nine people were saying, “Hey, he didn't testify, he must be guilty,” hopefully the three would say, “We can't consider that.”

So I think it's a great point. I don't know what the fix is and maybe there isn't a fix. But to require a jury to reach this first decision about this very damning evidence at a preponderance standard might be one way to try to guard against it. Then, say if you find this, you may consider it going forward for that.

MR. FOX: And just to be clear, I'm not proposing that. [Laughter]

MR. COHEN: But I am.

PROFESSOR CAPRA: That's good. I like this. So Eileen and then Dan.

PROFESSOR SCALLEN: Going back to Brandon's point about the relationship of 404(b) to 403, and also your point, Philip. We have a special balancing test if the defendant takes the stand and is going to be impeached with prior convictions.

One thing Minnesota does is it incorporates a similar special balancing test for 404(b) as the last element.<sup>35</sup> So there is symmetry in a sense. If you're going to use these other bad acts against the defendant in a criminal case, you have to show that the probative value of the evidence is not outweighed by

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35. See MINN. R. EVID. 404(b).

its potential for unfair prejudice to the defendant. That's not exactly the 609 test for defendants,<sup>36</sup> but it's the parallel test.

And basically what it means to trial judges is if it's a close case the evidence stays out, whereas 403 is tilted toward admissibility. So it doesn't provide an absolute burden to the prosecution in getting it over and admitted, but it does in close cases allow the judge to exclude the evidence.

I do have to point out that despite this really tough 404(b) Rule in Minnesota, they actually do get a lot of 404(b) evidence admitted. This is not the death knell of that evidence, which can be useful.

PROFESSOR CAPRA: Dan.

MR. COLLINS: One of the questions I thought that the *Gomez* opinion raised, and I just wanted to flag for discussion, was whether the relationship between the two subparagraphs in 404(b) is clear enough and whether there should be an amendment to clarify the relationship. *Gomez* puts its finger on that issue and then derives the test that the first one would be nullified if the purpose in the second one evaded the Rule in the first. But that's not necessarily clear from the text.

And when I looked at this issue, I thought of a case I remember from when I was clerking called *Hadley v. United States*,<sup>37</sup> which was ultimately argued the next term and then dismissed as improvidently granted. The U.S. Supreme Court never explains why, but *Hadley* was a very troubling case that sort of flags this issue, and the Ninth Circuit's opinion in *United States v. Hadley*<sup>38</sup> takes a very different view of the relationship between the clauses.

It says, "[W]e have held that Rule 404(b) is an 'inclusionary rule,' under which evidence is inadmissible 'only when it proves nothing but the defendant's criminal propensit[y].'"<sup>39</sup> So that basically says, "Look, subparagraph (2) is a safe harbor, and certainly you look at the clauses and, you know, it's not clear what the relationship is."

In *Hadley*, it was sexual molestation of children, and Hadley's argument was that he didn't do the acts, but if he did do them, they couldn't have occurred by accident, so it certainly isn't an issue of intent because you couldn't do what they said he did by accident.<sup>40</sup> But the government said, "No, we're entitled to prove intent, so we're going to bring in all these other kids who are going to say what you did to them." And, if you look at a relationship between those clauses, it's obvious that it's for propensity purposes.<sup>41</sup>

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36. See FED. R. EVID. 609(a)(1)(B) (including a balancing test for impeaching criminal defendants who choose to testify: the court must determine that the probative value of admitting the impeachment evidence "outweighs its prejudicial effect to that defendant").

37. 506 U.S. 19 (1993).

38. 918 F.2d 848 (9th Cir. 1990).

39. *Id.* at 850.

40. See *id.* at 851.

41. See *id.* at 853.

While the Supreme Court ultimately didn't resolve it, I think it flags, particularly when you look at it with *Gomez*, what's the proper relationship between the clauses?

PROFESSOR CAPRA: It's interesting to think about what it means to be a rule of inclusion, because you've got the exclusion of character evidence in Rule 404(a) when offered to prove conduct, and then Rule 404(b) actually restates that exclusion, but then all of a sudden it's a rule of inclusion. What could that possibly mean?

So the Third Circuit's theory is kind of an interesting one about what it means to be a rule of inclusion. What it means is that the list of proper purposes is not all inclusive. That's all it means, and therefore essentially that means nothing because the Rule itself says "such as,"<sup>42</sup> so it's pretty clear that it's a rule of inclusion of other possible purposes if that's what you mean by inclusion.<sup>43</sup>

But I don't think that's what many courts are saying when they say it's a rule of inclusion. They're not saying that. They're saying virtually everything gets admitted whenever a proper purpose is articulated.

MR. COLLINS: It's a safe harbor.

PROFESSOR CAPRA: Right, it's a safe harbor. Judge Livingston.

JUDGE LIVINGSTON: I'm thinking back to when I taught this all these years ago. The Second Circuit also used the language of inclusionary approach when I was trying these cases as a prosecutor. During this period, the Second Circuit had very strong admonitions about the need to balance, to wait to the end of the trial to see how the evidence developed, and to see what nonpropensity use the jury would make of the evidence. I have two questions.

One, I have a background concern about whether this is about a textual change to the Rule or whether this is about recognizing the concepts like the difference between propensity, knowledge, and intent versus concepts like probable cause. They're such difficult and big concepts to apply in practice that judges occasionally have to remind themselves of the purposes. Whether we can capture the concerns we have in a Rule, and I was thinking of one—the counterfeiting example.

Imagine the counterfeiting case, the case for prosecution of a conspiracy to distribute counterfeit currency, and you have a prior counterfeiting conviction. The government's case is entirely circumstantial, meaning they have an undercover who's met with a person who sold counterfeit currency to the undercover—they have a mountain of evidence against this person. But the evidence is that the defendant dealing with the undercover will leave and after saying, "I'm going to go meet with my source," he goes to a place. They have pictures of him meeting at McDonald's. They never have a hand to hand. But this person is always showing up at the right place at the right

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42. FED. R. EVID. 404(b)(2) ("[E]vidence may be admissible for another purpose, *such as* proving motive, opportunity . . . ." (emphasis added)).

43. *See* *United States v. Caldwell*, 760 F.3d 267, 276 (3d Cir. 2014) (discussing what it should mean to interpret Rule 404(b) as a rule of inclusion).



time. It is powerful circumstantial evidence, but the government wants to introduce the counterfeiting conviction from some years ago, completely unrelated, and says, “This goes to his intent, Your Honor.” What this is showing is what his intent was in showing up at these places.

PROFESSOR CAPRA: Explains why he was there.

JUDGE LIVINGSTON: What are the chances? What are the chances that he’s always showing up at the right time in the right place unless he’s showing up with a mind to participate? Is that propensity or is that intent? I’ve always found that very difficult in talking to my students and prosecutors stumble over it when they attempt to argue.

PROFESSOR CAPRA: Yes that is the heart of the problem. Justice Manella?

JUSTICE MANELLA: I think that’s probably what came up in *United States v. Roux*,<sup>44</sup> mentioned in the materials, which is a sexual abuse case, a case where the testimony is a minor accusing someone of sexual abuse and the court permitted evidence of two other minors to testify to acts against them by the defendant.<sup>45</sup> While I see that they affirmed under the Federal Rules this as showing the defendant’s interest in sex with young girls showed his “motive,” it seems more likely in that case that using motive is really more proclivity or inclination, the same as whether if he had an inclination to eat cottage cheese that might show he was eating cottage cheese in this case. I’m not sure it gives him a motive to eat cottage cheese. It just gives him an inclination to do so.

But I will note that obviously in California, they just bit the bullet and they said in sexual abuse cases we’re not going to pretend that this is anything but propensity evidence and we have section 1108 that says it comes in.<sup>46</sup>

PROFESSOR CAPRA: Right.

JUSTICE MANELLA: And at some point people, I think, we have to resolve the tension between the underlying purpose of 404(b), which is not to permit propensity evidence, and if there is a consensus reached that there are certain sorts of offenses that are so difficult to prove without it that we should just be intellectually honest and admit that we are allowing the bad act to prove the defendant’s propensity to commit that crime.

PROFESSOR CAPRA: Well, that’s what Congress did. They were as intellectually honest as the day is long, Rules 413 to 415 allow proof of sexual assaults to prove propensity to commit the sexual assault charged, and now prosecutors don’t have to make the often false argument that they are not offering the evidence for propensity.<sup>47</sup>

Yes, Mark.

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44. 715 F.3d 1019 (7th Cir. 2013).

45. *See id.* at 1021–22.

46. *See* CAL. EVID. CODE § 1108 (West 2016).

47. *See* FED. R. EVID. 413–415 (providing permitted and prohibited uses for disclosing to the court a defendant’s similar civil and criminal crimes involving child molestation and sexual assault).

MR. HOLSCHER: Just briefly. I'm a little concerned about this added potential test—that the defendant must have actively contested the mental state—because the government has the burden of proof beyond a reasonable doubt. I'm a former AUSA. I'm on the defense side now, so I'm of mixed minds here truly on the scales of justice. But I don't think the proper analysis is whether the defendant actively contests. I think it's whether it's an issue that potentially is in dispute, and I think my sense is all of us here think that *Gomez* and *United States v. Smith*<sup>48</sup> were properly decided. It's my sense from what people have said because it was really propensity evidence; someone tried to pigeonhole it in a permissible use under 404(b)(2).<sup>49</sup>

But I think adding something through case law that's not in the Rule in my view is a bit problematic. I don't see how you can add that just because the defendant hasn't actively contested it.

MR. HOLSCHER: The Rule says it may be admissible for another purpose.<sup>50</sup> I think that district courts have discretion with the “may be admissible” language to make that decision, and I think it is right that the court has to carefully figure out, “Is this propensity?” I think all of us can agree that someone dealing drugs at the same location where they're alleged to have possessed guns doesn't seem to really go to any element. The same thing if you're possessing drugs where you're alleged to have distributed.

But I'd be wary of adding something about contesting the element that doesn't appear to be part of the Rule.

PROFESSOR CAPRA: Judge Hamilton.

JUDGE HAMILTON: It's a really interesting question, and it's one where, let's say, we avoided bright-line rules, but to the extent you are trying to balance probative value and potential prejudice under Rule 403 it seems to me that the trial judge's understanding of what is actually in dispute figures into that balance.

For example, and this goes back to the *Miller* case, which I wrote and which is cited in some of the materials, where the drugs that were found were in a large number of sealed plastic bags, some with price tags on them.<sup>51</sup> The government has to prove intent to distribute, but there is no doubt that whoever was in possession of those drugs was intending to distribute those as a practical matter.

The question is did this defendant have sufficient ties so that you tag him with that possession with intent to distribute.

So the approach that I think we were adopting in *Gomez* on that point is not an addition of a requirement but simply an elaboration on what that balancing of probative value and potential prejudice shows.

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48. 49 F.3d 475 (8th Cir. 1995).

49. See FED. R. EVID. 404(b)(2) (establishing that prior crimes, other acts, or character evidence may be admissible for purposes other than impeachment in a criminal case if the defendant is notified prior to trial).

50. See *id.* 404(b) (providing that prior crimes, other acts, or character evidence can be used for reasons other than impeachment).

51. See *United States v. Miller*, 673 F.3d 688, 694 (7th Cir. 2012).

MR. HOLSCHER: So maybe the test is whether the mental state is actually not going to be an issue in dispute. In other words, if it's him, he had the intent. To me, it's not a focus whether a defendant contests it, it's the issue of whether it truly is relevant.

PROFESSOR CAPRA: The question is what it means to be truly in dispute. Mary.

MS. ANDRUES: I have a practical question. Mark and Brandon, and Mark and I actually were fortunate to grow up under the Honorable Norma Manella at the U.S. Attorney's Office in Los Angeles. So we had a pretty strict standard for having to give notice of Rule 404(b) evidence. I thought that there was a pretty stringent test with our district court judges. Pretty much pretrial it had to be in front of our judges, or we weren't going to be able to come in the back door with 404(b).

One of the things that concerns me listening to this now that I do defense work is the notion of reserving the ruling on the 404(b) evidence. I like the notice requirement as a defense lawyer. I never really thought much about it as a prosecutor because I was just trained that was what I had to do, but now I really like it because I want to know what the government's case is going to be, and I don't really like the idea that the court will say, "Well, counsel, we'll just wait and let you know about how we're going to rule on it."

I'm not sure I agree with an amendment to the test because I think clear guidance from the circuit court is good because you can take the factual cases under which the court has admitted it or not admitted it, and determine whether or not the test has been met, once you have the standard that you have to meet because evidence has nuances to it. But this notion that I have to worry about in my defense that the judge is reserving her ruling on the 404(b) evidence, and so I've got to navigate. So, if I know ahead of time what the ruling is, because either the government can meet its test or not, and then I know, well, boy, I sure can't put this at issue in the defense because I could see how the government could come back and what it would say on rebuttal, "Well, Ms. Andruess put this in at issue, Your Honor, and I should be able to bring it in."

So this notion of the motions go in and we just get a wait and see approach concerns me as a practitioner.

MR. COHEN: You also want to voir dire on it.

MS. ANDRUES: Yes.

MR. COHEN: And you want to give it in your opening statement. If they're going to hear it, I'd rather have them hear it from me.

PROFESSOR CAPRA: Yes, Judge Phillips.

JUDGE PHILLIPS: I just want to jump in and say that throughout this discussion, I have been thinking how important the pretrial conference is and the motions in limine, and most of the practitioners both on the defense side and the prosecution in our district really are very good about bringing those issues up because I don't want to be surprised in the middle of trial, and I want to be able to reflect on it a little bit.

And I also agree with what Judge Hamilton said. I take a pretty conservative approach about letting in 404(b) evidence, but it's something I want to know about in advance and rule so there are no surprises, for example, in opening statements.

PROFESSOR CAPRA: Brandon.

MR. FOX: I want to go back to what Mark said, and I think that an "actively contests" standard is unfair to the prosecutors. I think defense attorneys can passively contest things. You could just talk about reasonable doubt, it won't meet your burden beyond a reasonable doubt. You can just say that in opening statement about anything very generic and we're stuck with having to prove all of the elements, and you haven't actively contested a point yet, but you never know how a juror thinks. That's the other thing that you just don't know. There are many times that, if we are able to talk to the jurors afterward, they've thought something completely different than what the attorneys had thought of or what we've argued.

Also, they're not required to accept any stipulations. That's the other thing that we need to keep in mind is that they don't have to agree with our stipulations. I think they generally do, but we just never know what a juror thinks. So I think that a lot of things are at issue even if it's not "actively contested."

PROFESSOR CAPRA: Jim.

MR. ASPERGER: Yeah, Dan, I wanted to come back and just build upon a point that Chris and Philip were making, which I think dovetails with something Brandon was saying on what the jury is thinking.

We all know these are difficult issues, but having more rigor in how they're approached pretrial and how they're decided, and also using that rigor, such as the analysis in the *Gomez* case, is very important in order to have the court have more consistency and play a gatekeeper role. We don't know how the jury is thinking, but there's a very real risk no matter what instruction is given that the jury is going to use bad act evidence for the improper purpose of propensity, and I saw that on both sides of the table as a prosecutor and defense attorney. But in addition, in the last five years I've been on two juries, two criminal juries. I'm not sure why they let me stay. [Laughter]

But it was very instructive in a number of ways. One was a capital case and it wasn't a 404(b) issue, but it does go to the question of what juries actually consider. It was in the death penalty phase, and for those of you who aren't familiar with the instructions given in that phase, one instruction is in deciding whether to impose the death penalty you should not consider the cost. It's a very clear instruction. It's a standard instruction.

And in our case it was a very close case because there were a number of mitigating circumstances, including that the defendant had an IQ of about 70. But there are other ones as well, and over the course of what was a very interesting debate on what penalty to impose, one of the jurors raises his hand and he says, "I know the judge told us we're not supposed to consider this, but I'm in the insurance business, and if we don't impose the death penalty, based upon the actuarial tables, it's going to be a huge cost to the people of the State of California."

MR. COHEN: He whipped out his chart at that point. [Laughter]

MR. ASPERGER: And so, in any event, I think that bears on the 404(b) point because the gatekeeper role is important in having more certainty and more rigor even though the standards are hard to apply. That was one of the things I very much liked about *Gomez*. I think it's very, very helpful in dealing with those sorts of issues that really are a reality.

I will say that sitting on the jury it was very heartening to see how conscientious they take their roles. Just to close the story, I was the foreperson, and I told the jury, you know, the judge said we're not supposed to consider this, but I know whether it's more costly or not, and I'm not going to tell you what the answer is, but don't assume he's right. [Laughter]

JUDGE PHILLIPS: Thank you for your service. [Laughter]

Very seriously. I think it makes such a big difference in selecting a jury during voir dire when lawyers aren't trying to get off. It must have been a big sacrifice for you to serve.

MR. ASPERGER: Two months.

JUDGE PHILLIPS: So thank you so much. What a great example.

PROFESSOR CAPRA: Carol.

PROFESSOR CHASE: Yes, going back to whether such an issue is actively contested, one of the things that strikes me about 404(b) is not all of the proper purposes necessarily should have to fall within that category. For example, if you're using a signature crime to prove identity, that should be part of the prosecutor's case. You shouldn't have to wait for the defendant to say, "No, it wasn't me." I mean, nothing beyond a not guilty plea should be necessary in that example. Other purposes like lack of knowledge, maybe you do want to wait for that to be contested.

So maybe the thing to do is amend the Rule by saying it's admissible for another purpose such as refuting a claim by the opponent of lack of intent, lack of knowledge, or to show identity or motive or some other purposes. So you've got it in two different categories, one where it would normally be in the prosecutor's case-in-chief, and the other where it probably is going to be more prejudicial and less probative in the absence of it being actively contested by the defendant.

PROFESSOR CAPRA: That's an interesting thing to think about, to figure out how it works and how and whether to distinguish among proper purposes.

MR. FOX: I just want to say I think that those distinctions would all be covered by the 403 analysis.

PROFESSOR CAPRA: Judge Campbell.

JUDGE CAMPBELL: I just wanted to raise a question about another word in 404(b)(2), which is the word "purpose."<sup>52</sup>

When I'm confronted with 404(b) issues, it's often the case as we've seen in the hypotheticals discussed today. The evidence goes to one or more of the purposes listed in 404(b), but it also clearly goes to propensity. It can be

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52. See FED. R. EVID. 404(b)(2) ("This [character evidence, crimes, or other acts] evidence may be admissible for another *purpose*, such as . . . ." (emphasis added)).

used for both purposes. And the rule says that I am to consider whether the evidence is admissible for the purpose of proving intent, and I sometimes ask: Whose purpose?

The prosecutor will say, “Well, my purpose for getting this in is to prove intent, and the way you solve that problem, Judge, is tell the jury this is coming in for intent and not for propensity.” Clearly the evidence can have the effect of both propensity and intent.

And I’ve wrestled with the issue and I’m tempted at times to fall back on this assumption that the jury will follow the instruction, but the reality is—particularly with this evidence—it’s very hard for them to do.

And so I don’t know the answer, but I wondered if we shouldn’t be focusing on the purpose for the evidence versus the effect or potential effect of the evidence on the jury.

PROFESSOR CAPRA: That’s a good point. Judge Marten next.

JUDGE MARTEN: Thank you. Frankly, I think that what has thrown us into a state of some disarray is subsection (2) of 404(b) which talks about permitted uses, and if it were up to me, I’d get rid of that altogether—the list—and just leave section (1), subsection (1).

I’d get rid of the permitted uses. You’ll notice we have a pretrial order that we use in criminal cases in our district that requires the government within a certain time period to make the disclosure. So we also order reciprocal discovery to the extent that it’s allowed, and that eliminates a lot of—at least the last minute—kinds of things that come up and which sometimes lead to knee-jerk rulings when they can be avoided.

But it seems to me that subsection (1), prohibited uses, pretty much covers the waterfront, then you can go to a 403 analysis and determine if there is some other appropriate use for it.

PROFESSOR CAPRA: So get rid of 404(b)(2).

JUDGE MARTEN: Right.

PROFESSOR CAPRA: So, at the future meeting when the Committee did that, you wouldn’t be able to get out of the meeting room because there would be lines of DOJ lawyers waiting for you. [Laughter]

JUDGE MARTEN: No, I think you could use the argument—

PROFESSOR CAPRA: Bolt out the back door. Is that what you do? [Laughter]

JUDGE MARTEN: Not at all. Show just with subsection (1) that this is not a prohibited use. Instead of having a finite list which has been interpreted expansively or limiting it in some way, let them make their best pitch, and then use a 403 analysis if you get past such. I’m not too worried about the government’s response, actually, to that kind of thing because they’ve got so many weapons at their disposal anyway.

MS. ZUSMAN: You raised a concern in the materials that I don’t think we’ve addressed yet this morning and that is that 404(b) is not a Rule that only applies to criminal cases. It also applies in civil cases and, in particular, employment discrimination cases.

And I guess I'm concerned. I think we all recognize that evidence is messy. It doesn't fit neatly within either a propensity box or a nonpropensity box. So I think the real concern is does propensity predominate versus is there a propensity element in there at all. And my concern about this requirement of a propensity-free chain of reasoning as applied in the civil context is then that's going to knock out the plaintiff's "me too" evidence in employment discrimination cases, and I'm not sure how we work around that.

PROFESSOR CAPRA: I don't know that the proposal would be for a work-around. It would be that the "me too" evidence, as you describe it, would be prohibited. If all the plaintiff is doing is using prior acts of discrimination to prove propensity, that would be barred under the requirement of propensity-free inferences. You're right. It does have civil consequences. Judge Sessions.

JUDGE SESSIONS: I would like to ask a question more than make a statement. I know that there are a lot of judges who, faced with a 404(b) issue, turn to the government and ask the proper purpose—what's essentially the exception. They identify state of mind, and that's it. That's the level of review.

So, if we as a Committee really want to get judges to think more deeply about propensity, you can either change the Rule or you can do it through Reporter's Notes. Obviously, it's much easier to do the Reporter's Notes. And you made an observation, I think, that nobody reads the Reporter's Notes. Is that correct?

I'm interested to know if, in fact, we came up with this idea of just describing this issue in greater depth and requiring judges to make a more detailed analysis of propensity, would that have any effect or is that worth anything?

PROFESSOR CAPRA: Good question. Laurie.

PROFESSOR LEVENSON: And I'd like to respond to that and respond to Judge Marten as well. I actually think that the rules serve dual purposes: first they govern judges' decision making but also it's very much an information rule, an educational book for the advocates and for the judge when the judge is making her decision, and that's why I think keeping some form of 404(b)(2) is really important to get the judges thinking away from propensity, whether there are credible proper purposes for the evidence.

To respond to you, Judge Sessions, I actually do at least require from my students that they be familiar with the Advisory Notes. It is the best treatise, and, as some of you know, many of us go around the country, whether for the Federal Judicial Center or otherwise. We engage in educational programs with judges. I do think that having Reporter's Notes and Advisory Comments will lead to a rash of education, highlighting this as an issue, being able to give judges' hypotheticals in groups they can work together with and so that there will be a better understanding of them.

This is a hot issue. I actually think that's one way to try to improve the practice, rather than jumping into changing the Rule, changing and alerting the judges through an Advisory Reporter's Notes. I'm hopeful that they can be helpful.

PROFESSOR COQUILLETTE: Dan?

PROFESSOR CAPRA: Yes, I know what you're going to say. [Laughter]

PROFESSOR COQUILLETTE: He knows what I'm going to say. I'm Reporter to the Standing Committee on Rules of Practice and Procedure. The Standing Committee has always been very skeptical about putting substance in the Reporter's Notes that are not in the Rule itself. There are a couple reasons for that. One of them is the longstanding practice that you do not change the Reporter's Notes unless you change the Rule itself.

So the idea that you're going to change the Reporter's Notes and not change the Rule is something that we've always avoided.

PROFESSOR CAPRA: Well, we'll just change like three words of the Rule, then have a very lengthy Committee Note.

PROFESSOR COQUILLETTE: This time we'll put in a comma. [Laughter] The second thing is that the Supreme Court, officially, when it promulgates a Rule, does not approve the Notes. So the Notes have a different authority behind them. And the third is just practical, which is that you don't want to create a dichotomy between what's in the Rule itself and what's in the Notes. You don't want something in the Notes that really changes the Rules. So, in general, the Standing Committee, which has to look at suggestions from the five Advisory Committees, is going to be skeptical about a solution that is a Note-based solution.

JUDGE SESSIONS: Can I just respond? I mean, this is not changing the Rule. This is just explaining the process. I mean, you're taking *Gomez*, you're basically using that as a process analysis of 404(b), and then you're just exploring that in the Reporter's Notes. It's not changing the words. It's not changing the Rule. It's just explaining the process by which judges should come to the ultimate decision, right?

PROFESSOR COQUILLETTE: If you're not changing the Rule, you can't change the Notes.

JUDGE CAMPBELL: I think another thought that I've been sensitive to is that this is a Committee under the Rules Enabling Act that's authorized to write rules.<sup>53</sup> It doesn't say anything about writing Notes, and I think we need to be sensitive to our role as rulemakers and not general commenters or general advisers or general educators. It's really not the role of the Advisory Committee to go around and start telling people what we think about the Rules or how they should be applied unless we've done it in a Rule.

We could take a very expanded role, hold seminars and become the experts on what the Rules mean, and that would be stepping well outside of our commission, I think.

So I've always been of the view if we have a change worth making we need to make it in the Rules and provide a sufficient explanation in the Committee Notes, but we shouldn't step outside of the rulemaking function and become general advisers through the Committee Notes.

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53. See 28 U.S.C. § 2072 (2012).



PROFESSOR CAPRA: There was one judge on the Standing Committee several years ago, Dan knows who I'm talking about, who said every Committee Note should have five words: "The Rule speaks for itself." [Laughter] Ken?

MR. GRAHAM: Well, I was just going to say I don't know what people's experience has been, but I've written a lot on Rule 404(b), and I've read a lot of 404(b) cases, and I will tell you that the Notes figured almost nothing in the 404(b) cases.

PROFESSOR CAPRA: The original Note.<sup>54</sup>

MR. GRAHAM: The Notes don't. The 404(b) cases I've read almost never make any mention of the Notes. But, of course, one could say well, that's because they make no mention of the law. [Laughter]

MR. DYBWAD: Very quickly in favor of a textual change to the Rule. Basically national uniformity. If I were in the Seventh Circuit or the Third Circuit right now, I'd certainly be a happy person, and when I'm in the Ninth Circuit I can quote the Seventh and Third Circuit cases, but I have a whole body of case law that says it's a rule of inclusion. Just because it goes to propensity but it could also go to another purpose it comes in. So a textual change of the Rule to promote uniformity seems valuable.

PROFESSOR CAPRA: It would be great if all the courts were of one mind about this, but when they're not, that's traditionally been a problem that should be addressed by rulemaking. That's what the Federal Rules of Evidence are about. They're supposed to be uniform.

PROFESSOR LEVENSON: I'm throwing this out there sort of out of the blue, but in listening to the discussion it strikes me that there's a concern that some judges are not considering all the factors that should be considered under the case law. So, if there were an inclination—I'm not pushing it—to change the Rule, it might be an additional provision that says in making this determination the court may and should or might consider the extent to which the issue gets contested, whether under 403 this is properly considered.

The factors that we hear being discussed here, maybe it's premature right now to come up with the language of that Rule, but if the main concern is that judges are not giving all the factors consideration, maybe that's a change to the Rule that would lead to more focus on those factors.

PROFESSOR CAPRA: I was thinking that the Federal Judicial Center might have something to do here, in the judicial training programs that the Center sponsors. On the other hand what would you be doing? You would be educating a particular circuit that its law was behind the developments in the Seventh Circuit? [Laughter] I don't know. I don't want to be that lecturer. [Laughter]

PROFESSOR LEVENSON: No, no, I wouldn't think that judges would read it that way. I think judges would be excited about the fact that there are a group of judges who have identified a concern. They found an approach, and they welcome others to use that as their own.

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54. See FED. R. EVID. 404 advisory committee's note on proposed rule.

PROFESSOR CAPRA: So maybe there is a Federal Judiciary Center role here. Yes, Justice Manella.

JUSTICE MANELLA: Just as a practical question. I understand the reasoning behind Judge Marten's suggestion that you eliminate subdivision (2), but then what is it that's going to trigger the kind of pretrial inquiry that I think we all agree is desirable to have these issues fleshed out beforehand?

If you only have (1), and it just says you can't get it in for propensity, and some prosecutor sits back and when trial begins says, "I'm not offering it for that. I'm offering it for a perfectly legitimate purpose." I think you need some mechanism that triggers the inquiry that allows for the pretrial resolution of the issue.

Now I admit in state court, which some people here are familiar with, you don't often get that same level of pretrial vetting and that—

PROFESSOR CAPRA: You get it right before they call the witness. [Laughter]

JUSTICE MANELLA: And that explains a lot, including sometimes the rulings from the hurried trial judge who perhaps didn't have the time to make these kind of nuanced decisions. But that would be my concern. I think you have to have some mechanism that triggers fronting the issue.

PROFESSOR CAPRA: Now that I think about it, Judge Marten's proposal would change Rule 404(b) to what the hearsay rule is like. For an out-of-court statement, it's a prohibited use if it's offered for its truth, but the Rules don't articulate any proper purpose, such as for effect on the listener or as a verbal act.

JUSTICE MANELLA: But that's usually one question and answer. Rule 404(b) evidence may be calling up an entirely new witness to testify to a series of events.

PROFESSOR CAPRA: Yes.

JUSTICE MANELLA: It's not always getting in a prior conviction.

PROFESSOR CAPRA: Right.

JUSTICE MANELLA: I think everyone here seems to think it's desirable to be able to confront those issues earlier rather than later. It's often said, if you want to surprise a judge, send flowers. [Laughter] So that's my concern. I don't think any of us, regardless of what happens to the Rule, would want to diminish the likelihood that these issues would be confronted before the trial is underway.

PROFESSOR CAPRA: Good point. Kelly.

MS. ZUSMAN: I guess the argument in favor of a rule change is that there's a problem, as described by Judge Sessions. I can only speak to Oregon, and in Oregon we always lose 404(b) at least initially. I mean, we just do. All of our judges are concerned about reversals on appeal. The Ninth Circuit hasn't adopted the Seventh Circuit's approach, and yet it's still very restrictive.

And so I guess at least in my district I think the Rule has been working very well. Our trial judges have been very rigorous with us. They don't

allow 404(b) in unless there's a very good reason for it, which becomes apparent usually over the course of a trial. I see you shaking your head.

PROFESSOR CAPRA: Yes. I mean, I have too many cases in my backpack there where the opinion takes one sentence and that's it, offered for intent, end of story; offered for intent, end of story. So, I mean, with all due respect, but go ahead.

MS. ZUSMAN: That's not the experience in Oregon. So, in terms of the concern about our judges getting it, again, some of them are applying the Rule as it is currently written in the manner in which I think it was intended to be employed.

PROFESSOR CAPRA: Judge Sessions.

JUDGE SESSIONS: The Committee is in fact going to make one change to 404(b) after unanimous agreement. The defendant has to ask for notice before the government must provide notice, and the Committee has determined that this triggering requirement is just a trap for incompetent defense counsel, and there's no reason for that. So we're going to change the Rule at least in that respect.

Okay. So, if you're going to change the Rule, then you better find some way to change the Advisory Notes. I mean, I was a criminal defense lawyer in real life, and so you start thinking about all these manipulations along the way. Can you just change the Rule?

PROFESSOR CAPRA: That is three words. I think that's our hypothetical, three words. [Laughter]

JUDGE SESSIONS: We can remove that notice requirement and then change the Advisory Notes.

PROFESSOR CAPRA: I like that. Carol.

PROFESSOR CHASE: Yes, just again working off of what Judge Marten said and also what Justice Manella said, the concern she's raised: What if we just have the first paragraph and then had a provision that if the evidence is going to be offered for a purpose other than to show propensity, the proponent of the evidence must provide notice, state specifically what the purpose is and how the purpose is fulfilled without relying on propensity?

PROFESSOR CAPRA: That ends up changing the tone clearly, right, and providing a little bit more guidance?

PROFESSOR CHASE: But it still includes the notice requirement, which would trigger the pretrial motions that Justice Manella was concerned about.

JUDGE SESSIONS: So you would raise the concerns in the notice provision right within the Rule—that's brilliant.

PROFESSOR CHASE: Thank you.

JUDGE SESSIONS: I wouldn't put that in my resume, though, except that it's brilliant.

PROFESSOR CAPRA: Dan.

MR. COLLINS: I just wanted to raise, since we have this distinguished panel here, I wanted to raise one other issue that I also saw in some of the case law. I agree with the judgment that is behind Rule 404(b) and, as you can tell from my description of the *Hadley* case, which as Dan noted,

Congress settled that rule when it had 413 and 415 basically do away with 404(b) in *Hadley*-type cases.

But others have criticized 404(b). When the D.C. Circuit had an en banc around the time of the *Old Chief v. United States*<sup>55</sup> decision, three judges wrote separately and said that

evidence that a defendant charged with drug distribution crime has previously committed drug distribution crimes should be admissible to show likelihood, (propensity, if you will) that the defendant did it again. Probably no segment of American society, other than many of its lawyers (and judges) would think that such reasoning is somehow unreliable.<sup>56</sup>

I just wondered is there anyone who shares that view or thinks there's something wrong with the value judgment in 404(b)?

PROFESSOR CAPRA: Given no response, I think that the record should show general agreement by the panel with the principle that the propensity inference should be barred. Virginia.

MS. MILSTEAD: Well, just following up on that comment about to what extent judges are or are not struggling with the Rule as written or letting bad acts in or not, what we all seem to agree on is that the jury certainly struggles with a limiting instruction once they get it. And what I like about the Seventh Circuit's rule is it seems to shift some of that burden from the jury to the judge to make those distinctions between propensity purposes and permissible purposes, and then that type of evidence that's more likely to cause a problem for a jury is not going to reach them, and so I think that's a good result to lessen some of the difficulty with following instructions.

JUDGE PHILLIPS: But doesn't that go back to one of the themes that's come out from several of the participants today? I've really struggled with this; I read all of this, and most of these issues that come up with 404(b) evidence are really resolved by applying 403.

MR. COHEN: Yes. And the problem with that is the weak—I mean, we heard from Judge Livingston, the weaker that the case-in-chief was, the more reason there was to bring in 404(b).

JUDGE PHILLIPS: Bring in 404(b) evidence.

MR. COHEN: Right. But it shouldn't be. It shouldn't be, "Hey, I really need this, that's why you've got to let it in."

JUDGE PHILLIPS: I have had that exact discussion with counsel.

MR. COHEN: It's Alice in Wonderland thinking. Your case is your case. If you can't prove it with your case, I shouldn't bend the Rules or the Constitution or whatever you want to frame it to help you prove your case. Get a better case.

JUDGE PHILLIPS: I think you must have read one of the transcripts recently where I said the amount that you need is not one of the bases for admission.

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55. 519 U.S. 172 (1997).

56. *United States v. Crowder*, 87 F.3d 1405, 1416 (D.C. Cir. 1996) (en banc) (Silberman, J., concurring).

MR. COHEN: Really, really important.

JUDGE PHILLIPS: Because “you want it” doesn’t count.

MR. COHEN: Because imagine the defense arguing, “Your Honor, I need this stuff to come in because it really, really helps to prove he’s not guilty.” Come on.

JUDGE PHILLIPS: Either side can make that argument. I’ve heard it.

MR. FOX: I hope it wasn’t one of our fine AUSAs that made that argument, Judge.

JUDGE PHILLIPS: I will just say that the issues come up a lot in civil cases, particularly § 1983 cases.

MR. FOX: So what I wanted to ask about actually goes to the notice requirement, and I think the amendment already agreed upon is right. The Department of Justice has taken the position it’s right. It’s part of our practice, as Mary said, it’s been part of our practice forever to provide notice, without a request from the defendant. But if we are getting rid of the “inextricably intertwined” rule, as the Seventh Circuit has done—

PROFESSOR CAPRA: Yes, let’s get to that.

MR. FOX: Yes, so my concern is that with no request from the defendant and no inextricably intertwined rule, if I don’t know what 404(b) evidence necessarily is as the other side or the judge would view it, how do I provide that notice?

So the example that I thought of in my head is possession of a firearm. A felon in possession of a firearm robs a liquor store or holds up a woman two blocks away from where he’s ultimately caught with a gun. Is that going to be 404(b) evidence? Is that direct evidence of the crime? And if we’re not in agreement of what that is, how am I supposed to provide notice?

PROFESSOR CAPRA: Shouldn’t the distinction be between direct and indirect evidence, the latter being covered by Rule 404(b)?

Have you got a comment, Judge Hamilton?

JUDGE HAMILTON: Yes. In short, when in doubt, give the notice I think is the response.

PROFESSOR CAPRA: Yes, there you are. Right.

JUDGE HAMILTON: It doesn’t hurt to at least signal—in terms of the fairness of the overall trial and the ability of everybody to prepare to meet the real issues—a little advance notice about the evidence the government intends to put on should not disrupt it.

MR. FOX: So what type of notice is required? If I disclose a summary of a witness’s statements, and the witness states that he held a gun to my head, and we say we intend to call this witness, is that good enough?

PROFESSOR CAPRA: Yes, I think under Rule 404(b) it is. Rule 404(b) merely requires a description of the general nature of the evidence.

MR. FOX: So we will not have a problem—you know, you don’t think that we’d have a problem with the district judges. You don’t think that we’d have a problem on appeal if all we did was turn over that witness statement.

MS. ANDRUES: Are you asking for an advisory opinion?

MR. FOX: Yes. [Laughter]

JUDGE HAMILTON: And I'm going to duck on the details there simply because I just have not dealt before with any of the fine-grain disputes about the sufficiency of 404(b) and notice, and I'm grateful for that. The prosecution is in the position to take care of that issue and say we're going to put this in. If you might think this is 404(b) evidence, here's the notice.

PROFESSOR CAPRA: You know, the idea of giving notice in doubtful situations is comparable to Rule 701 where the question is: Are they an expert witness or are they a lay witness? The prosecutor has a duty of disclosure for experts but not for lay witnesses. And the Department of Justice was all concerned about figuring out whether to disclose when it was unclear whether the witness was giving expert or lay testimony.

My understanding is what's happened is the prosecutor discloses if there's any doubt in order to avoid a discovery sanction, and I think that would be the same kind of thing happening with evidence that might be considered inextricably entwined with the charged crime, I think. Ken Graham.

MR. GRAHAM: One problem with civil cases and Rule 404(b) is that a lot of those cases involve corporations, which then raises the question of whether a corporation can have character or not because obviously, if corporations can't have character, Rule 404(b) doesn't apply and you're just back to general principles of relevance.

PROFESSOR CAPRA: Laurie.

PROFESSOR LEVENSON: I was just going to piggyback on what Brandon was saying, the way that inextricably intertwined evidence often comes in is when a defendant talks big during the crime, so they say, "I'm going to make this deal like the six other major cocaine deals I did before," and prosecutors see that as opening a door. Now I get to put on all those six priors.

I do think it's appropriate, absolutely, to give notice for even a logistical reason. I think the judge needs to know how many trials she is going to have to hear, one on this drug deal or six other ones.

PROFESSOR CAPRA: It would be interesting to figure out how to write an inextricably intertwined takeout. That is to say, not to allow the exception to Rule 404(b) anymore. And the circuit court opinions that are in the reading, to me, they say, well, we're not going to do it anymore, but then, then there's a direct/indirect distinction that you have to deal with. And the line between direct and indirect evidence can be fuzzy, as seen in some of the cases.

So maybe this just can't be solved. But on the other hand, many courts retain this broad inextricably intertwined doctrine that's problematic because it limits the scope of Rule 404(b) and it means that defendants get no notice of the evidence.

JUDGE CAMPBELL: I have found the inextricably intertwined doctrine helpful because I can ask the question: "Can I pull this piece out of your case and can you still present a coherent case?" If the answer is no, it's inextricable. If the answer is yes, then I need to set it aside and consider it under Rule 404(b), and that for me at least has been a relatively easy way to judge.

PROFESSOR CAPRA: Well, that's an interesting thought I guess, but what if the proponent says, "Well, I need it for context, Your Honor, because the jury is not going to understand this document?"

JUDGE CAMPBELL: Well, then I consider that. If they really do, then I think it should come in.

PROFESSOR CAPRA: But that's not 404(b) evidence then for context.

JUDGE CAMPBELL: Yes. But if they can tell the story coherently and present their case without that act, then I should consider that separately under 404(b), and you can't get it in just because it's part of the chain of events or part of the story they want to tell.

PROFESSOR CAPRA: Judge Sessions.

JUDGE SESSIONS: So we're talking about quality of notice. Now let me ask the government lawyers here. So what would you think about a change in which, as a part of that notice, there is a requirement that you disclose your theory as to how it falls within a proper, nonpropensity purpose? You disclose what the purpose is and how it's particularly relevant. You require that in the notice, and that would be within the Rule. Would you have any strenuous objection to that?

MR. FOX: My concern is exactly what I was just talking about, which is maybe I consider something to be 404(b) or not. So, if I consider it to be direct evidence of the crime, I'm not going to provide that same level of notice that you're looking for.

JUDGE SESSIONS: But then you just argue in the alternative. We think it's part of the crime, but if it's not, it's 404(b), and we suggest that it's being admitted pursuant to this particular nonpropensity purpose.

MR. FOX: I'll just tell you what my practice is. My practice is to have open communications with the defense attorney about what my case is way before trial. So we will talk about his or her theory for admissibility in discussions. If this is going to be a written requirement, that adds another element to it, but if Chris and I had a case together and he said, "Why are you calling this witness? What's the purpose?" I would absolutely tell him why we're calling this witness, and we would have a discussion about how we think it's admissible under 404(b).

MR. ASPERGER: I mean, the challenge from the defense side is not all prosecutors do that. [Laughter] There are many who don't. And so the notice on the defense side, I think, of the type you're describing would be quite helpful.

PROFESSOR CAPRA: Alan.

MR. JACKSON: Just to dovetail on that same point—I'm a former prosecutor, now a defense attorney. So, along with my colleagues, some of my colleagues, I wear two hats and struggle with this a little bit.

My question would be if the prosecutor proffers a particular theory or set of theories under 404(b) for prior bad acts, are they limited to that on appeal?

In the case that Professor Capra and I have spoken about extensively, the *People v. Spector*<sup>57</sup> case.

PROFESSOR CAPRA: Yes, let's hear about that, the *Spector* case.

MR. JACKSON: I prosecuted a famous music producer who—law school exam kind of set of facts—a classic case of no witnesses when a man walked into a foyer and a woman ends up dead after a gunshot. The man walks out, according to some witnesses, with a gun in his hand and makes a statement. The defense was that she shot herself. Obviously, I had a different theory.

There were seventeen separate events over the course of about thirty years that I could point to and I could prove fit a very specific pattern of conduct. I was limited, according to Judge Fidler's assessment, to using five prior women and seven different acts involving those women with a significant amount of similarity.

Well, I presented that as under 1101(b),<sup>58</sup> which is the 404(b) equivalent in California, almost identical.<sup>59</sup> I presented that under an absence of mistake and used what Judge Fidler thought was a relatively novel theory. It's not an absence of mistake of the defendant. It was an absence of mistake or accident of the victim. It was not her mistake. It was not her accident. It was not her suicide, and therefore I could establish a pattern to show that it was unreasonable to believe that he had all these events in his past, and yet on this occasion this woman happened to grab this gun and shoot herself.

PROFESSOR CAPRA: The only way that it's an absence of mistake that way is because he's got a propensity to do this, isn't that right?

MR. JACKSON: So that brings up the point. Exactly. And this goes to Justice Manella's point a little bit earlier. There is an intellectual struggle between propensity and what I call the rule of "of course he did it." As a prosecutor, I had a rule in my head that was "of course he did it," because he did all the others. If the jury, judge, or trier of fact ultimately is going to come to a conclusion of "of course they did it," then how is that not propensity?

But much smarter than me, the Second Appellate District presented an argument and presented a theory that I had not presented, which was the theory of logical relevance. I love it. I just ate it up when I read it. It's been cited as the doctrine of chances, but we haven't discussed that, right, so that comes from the *United States v. Woods*<sup>60</sup> case, I think.

PROFESSOR CAPRA: The *Blue Baby* case.

MR. JACKSON: That's right, the *Blue Baby* case. Boy, you know your cases. Do you ever get out? [Laughter] How is it possible? How could you possibly pull that out of your head? Mention the Fourth Circuit, and you say the *Blue Baby* case. It's an infanticide case dating back some years, and in that case the court reasoned that the doctrine of chances doesn't ask the jurors to utilize the defendant's propensity as a basis for their verdict; it asks the

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57. No. BA255233, 2009 WL 1560040 (Cal. Super. Ct. 2009).

58. CAL. EVID. CODE § 1101 (West 2016).

59. Compare *id.*, with FED. R. EVID. 404(b).

60. 484 F.2d 127 (4th Cir. 1973).



jurors to consider the objective improbability that this happened by chance. But I don't see the difference. But, in other words, if Brandon puts forth absence of mistake pursuant to your suggestion, which I think is a good one, as a defense attorney I want that, I want some notice, I want to hold Brandon's feet to the fire, but if he puts forth that absence of mistake theory and ultimately on appeal my question would be is he limited, or is the government relegated to that theory when there might be a smarter set of justices who come up with the doctrine of chances or something else?

JUDGE SESSIONS: But the pluses of this particular provision would be that it's out front. The fact is these issues are all resolved in motions in limine. The defense needs to know whether a criminal act is going to be coming in—

MR. JACKSON: I agree.

JUDGE SESSIONS: —before opening statements, so these are all resolved in advance. Why not require, by way of Rule, a provision that requires the government to say this is the theory by which we are seeking to introduce this 404(b) material, put the defense on notice, and then the judge is on notice?

PROFESSOR CAPRA: That's interesting; let's say the appellate court goes off on a different purpose for which the bad act evidence would be admissible.

MR. JACKSON: Right.

PROFESSOR CAPRA: That's equivalent to a trial judge admitting something under a particular hearsay exception but the appellate court says, that is wrong, but it was admissible under a different exception.

And then the appellate court says, "It's harmless error"—

MR. JACKSON: Sure.

PROFESSOR CAPRA: —if it's all been argued before. But I guess if you could have made an argument on the different purpose that was never entertained, then you could argue that it's been harmful error, right?

MR. JACKSON: Or if you had put it in your notice requirement. If that becomes part of it, then it could become harmful error.

PROFESSOR CAPRA: Right.

JUDGE HAMILTON: Not to mention the role of the limiting instruction.

MR. JACKSON: I'm sorry?

JUDGE HAMILTON: If the limiting instruction is given limiting the jury to a particular purpose, and the appellate court says it could have been admitted for a different purpose, then you're going to have a problem.

MR. JACKSON: That's right.

MR. COHEN: Why is it when the government fails to argue the proper theory, there's an umpire there, supposedly an umpire who fixes it? When a defense attorney fails to argue it, it's trial strategy? [Laughter]

MR. FOX: It doesn't matter.

MS. ANDRUES: With the notice requirement the possibility is that the prosecutor will list every one of the proper purposes, and then you play a game back and forth with the prosecutors, okay, which one is it going to be?

And they say, “Well, I don’t know yet. We’re getting our case ready for trial.” And so it then would take a motion in limine from the defense to say, okay, they haven’t told—they just said 404(b), here we are, we’re back at all of these different theories of the case. I think we’re limited to twenty-five pages for every one of those as to why we don’t think it comes in.

### III. TOPIC TWO: THE RESIDUAL EXCEPTION: PROPOSED CHANGES TO RULE 807 AND ITS BREADTH

PROFESSOR CAPRA: So now we’re going to talk about the residual exception Rule 807 to the Federal Rules of Evidence,<sup>61</sup> and the Committee has, for the last couple of meetings now, been considering changes to that Rule. It comes from a number of sources of suggested change, and certainly there’s been pressure coming from statements from Judge Posner and others that the residual exception might take on a whole new kind of power to substitute for some of the standard exceptions.

And while the Committee has not agreed with that provision, that idea, the Committee does think that there would be usefulness in having some changes to the residual exception. And you might argue it’s because of a policy decision that it should be broader, but also the Committee is considering that there are changes that might be useful regardless of what you think about how broad the residual exception should be.

But I think we could start with just general discussions about the residual exception, its breadth, and whether it should be broadened to cover more hearsay, more reliable hearsay. Then we could talk about the specific kind of problems with the current rule that might be fixed as a matter of good rulemaking.

The working proposal for change to the residual exception provides as follows [provided to the panel on a PowerPoint presentation]:

#### **Rule 807. Residual Exception**

**(a) In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- ~~(1) the statement has equivalent circumstantial guarantees of trustworthiness the court determines, after considering the totality of circumstances and any corroborating evidence, that the statement is trustworthy; and~~
- ~~(2) it is offered as evidence of a material fact;~~
- ~~(3) 2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and~~
- ~~(4) admitting it will best serve the purposes of these rules and the interests of justice.~~

**(b) Notice.** The statement is admissible only if, ~~before the trial or hearing~~ the proponent gives an adverse party reasonable *written* notice of ~~the an~~ intent to offer the statement ~~and its particulars, including the declarant’s name and address,~~ *including its substance and the declarant’s name*—so

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61. FED. R. EVID. 807 (providing a residual hearsay exception).

that the party has a fair opportunity to meet it. *The notice must be provided before the trial or hearing—or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.*

I'd like to turn to Victor, who has some thoughts about the residual exception and possible amendments to it.

PROFESSOR GOLD: Okay. Thanks, Dan. I want to talk generally about the idea of process, procedure. I'm agnostic on the subject, the specific subject of expanding or changing the residual exception. But I think it's very important whenever this group considers a change to a specific Rule that it has in mind whether that change will have unintended consequences for other Rules. And the residual exception obviously is a piece of a much larger part of the Federal Rules of Evidence, namely the hearsay law.

The residual exception used to be, of course, part of 803 and 804,<sup>62</sup> and then those sections were given their own Rule, but I think it's clear that the intention was originally that the residual exception be applied and read in light of its place in the larger part of hearsay law and specifically the other exceptions. So, as the Advisory Committee considers the possibility of expanding the residual exception, I think it's very important to think about what effect this will have on the other exceptions, on all the rest of hearsay law.

For example, we know that some courts approach or use what's been called a "near miss" approach to hearsay exceptions. If you're close to one of the existing exceptions, but you don't quite make it, maybe we can shoehorn it into 807.<sup>63</sup> If the idea is to streamline 807, make it easier to apply, I think it's natural to expect that the near miss doctrine is going to be expanding. It's important to realize that's a likely result and consider if that is the intended result.

It's also important from a process standpoint to think about how a change to the residual exception affects how lawyers and judges do their jobs. So for a trial judge, for example, if the trial judge is presented with a Rule that says well, you can take an open-ended approach to the question of what hearsay is trustworthy without it being tethered in any way, shape, or form to the other specific hearsay exceptions, what does that judge do? How does that judge approach resolving that question?

And I want to make a reference to a more recent amendment to the Rules as a possible illustration of what could happen. Rule 702<sup>64</sup> was amended in light of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>65</sup> and *Kumho Tire Co. v. Carmichael*,<sup>66</sup> when it was broken out into specific subsections to

62. *Id.*; *see id.* 803(24), 804(b)(5). In 1997, these rules were combined into a single residual exception, Rule 807. *See id.* 807 advisory committee's note.

63. For a discussion of the near miss application of Rule 807, see 4 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, *FEDERAL RULES OF EVIDENCE MANUAL* § 807.02 (11th ed. 2015).

64. FED. R. EVID. 702(c) (expert testimony may be allowed if "the testimony is based on sufficient facts or data"); *id.* 702(d) (providing expert testimony is admissible if "[t]he expert has reliably applied the principles and methods to the facts of the case").

65. 509 U.S. 579 (1993).

66. 526 U.S. 137 (1999).

reference aspects of what the Supreme Court was trying to do, and specifically you have 702(c) and (d), which break out the analysis concerning reliability into two parts.<sup>67</sup> Reliability is not exactly the same thing as trustworthiness, but it's a broad concept. They're both broad concepts nonetheless.

I've read a lot of 702 cases since the Rule was amended, and I can tell you roughly, if you go to Westlaw, roughly there are 1,000 cases a year that pop up citing Rule 702. Most of them are not published. Most of them are district court decisions that just make a passing reference. A tiny percentage of those cases actually refer to the specific subsections that 702 now has been divided into.

In other words, they make a passing reference to 702 and they make a beeline for the factor analysis laid out in the *Daubert* case.<sup>68</sup> That is, here are the four, five, six, seven factors that might constitute a way practically for a judge to approach judging whether evidence is reliable or not.

PROFESSOR CAPRA: So your point is that unintended consequences are that courts won't follow what you do.

PROFESSOR GOLD: So one possibility is that you can be well intentioned in changing a Rule, but in the end, if you don't do that with the thought in mind that judges are going to have to apply this Rule and a general standard doesn't give them a whole lot of help without some fleshing out, as I think was the case with the original residual exception as it was tethered right in 803 and 804 and as the current residual exception is making explicit reference, references to the existing exceptions.

Something that's completely untethered like that doesn't give the judge guidance and inevitably I think is going to lead to a lot of inconsistency at the trial court level. Then when you get to the appellate level, let's be honest: evidence rulings almost always are resolved at the appellate level on a harmless error basis.

And so, if the intention is to expand the admissible hearsay, to expand the near miss doctrine, to give trial judges a broad base of discretion, then so be it. But if that's not the intention, then we ought to proceed cautiously. Unintended consequences frequently follow from Rule changes.

PROFESSOR CAPRA: So the problem of tethering is that the current Rule tethers the court to "equivalent" circumstantial guarantees of trustworthiness—that's what we're talking about here, equivalent circumstances.

PROFESSOR GOLD: Yes.

PROFESSOR CAPRA: What in the world does that mean when you compare the residual hearsay to all the exceptions in Rule 803 and 804? The spectrum of reliability from 803 to 804 is profound.

PROFESSOR GOLD: Absolutely.

PROFESSOR CAPRA: Yes.

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67. See FED. R. EVID. 702 advisory committee's note to 2000 amendment.

68. See *Daubert*, 509 U.S. at 593–94.

PROFESSOR GOLD: So the word equivalent—

PROFESSOR CAPRA: Means nothing.

PROFESSOR GOLD: —means very little.

PROFESSOR CAPRA: It's like it's equivalent to air or something. It's so unguided. So I'm not sure that actually the tethering is useful in the existing Rule.

And if we're talking about judicial discretion, judges have tons of discretion now to pick the exception that they want to compare the hearsay to or not to compare it to. So, if a judge wants to admit the hearsay, they say well, it's just as reliable as the ancient documents exception. There's actually an opinion like that in the appendix.<sup>69</sup> Well, what does that mean?

That means it's just as reliable as a completely unreliable statement. So the equivalence standard basically allows about as much discretion as it would if you didn't have it. Yes, Judge Livingston?

JUDGE LIVINGSTON: I had a question for our distinguished group, and I'm looking forward to hearing this discussion.

Framing the question, at our last symposium, Judge Posner asked us to look at the question whether much broader discretion in the hands of a judge in admitting reliable hearsay would be a benefit at trials because most academics—he's an academic judge in the field of evidence—have argued for many years that the hearsay exceptions don't have strong justifications, that there is probably reliable hearsay that could be admitted and considered by a jury.<sup>70</sup>

So we had a symposium, and the trial lawyers said, with a great deal of passion and persuasiveness, that you really need some degree of predictability, and even though each individual hearsay exception may not have a rich justification in social science to say, for example, that the present sense impression is really reliable, we should categorically admit it. They believed the Rules work in giving the trial lawyers the predictability they need.

And so the idea with thinking of this proposal is not to open the floodgates to discretion on the trial court but to signal in some ways to the trial court that the residual exception doesn't have to be viewed as rare and exceptional as it seems to be viewed in the cases that we reviewed.

So the question is whether it's possible in the text and the Advisory Notes to communicate what Dan so aptly says in the materials. We want somewhat more of a residual exception.

PROFESSOR CAPRA: Yes. So how does that work? Let's turn to practicing lawyers. Would somewhat expanded judicial discretion to admit hearsay be a problem? Jim?

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69. See Memorandum Regarding Expanding the Residual Exception to the Hearsay Rule from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules (Oct. 1, 2016), in *ADVISORY COMMITTEE ON RULES OF EVIDENCE OCTOBER 2016 AGENDA BOOK* 109 app. 1, at 226 (2016), <http://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf> (discussing *Virola v. XO Communications, Inc.*, No. 05-CV-5056 (JG)(RER), 2008 WL 1766601 (E.D.N.Y. 2008)) [<https://perma.cc/T9GH-DHXD>].

70. See generally *Symposium on Hearsay Reform*, 84 *FORDHAM L. REV.* 1323 (2016).

MR. ASPERGER: I can start with some observations. Having been in front of a number of different judges of trials and seeing already how much discretion there is and also how common it is for judges to apply the rules differently, my concern about doing this is opening up something that looks like another broader exception that creates more discretion than intended and a lack of predictability. So my sense is once you have an exception that is fairly discretionary and untethered, it's easier to admit the evidence than not.

So, Dan, I think your paper does a very good job of pointing out the problems in the existing wording, and it does seem that it can be improved. But my concern would be that without some clear indication and guidance, this is still a limited exception and should be applied only in circumstances where there's very high reliability, that it doesn't open up the floodgates, so to speak.

PROFESSOR CAPRA: So we're in a state that doesn't have a working residual exception. There is nothing in the California Code of Evidence that is equivalent to Federal Rule 807. There's case law. There's a residual-type analysis for certain niche kinds of cases, and the case law also says, if I understand this correctly, that you never know. We might apply it more broadly. So how is that working? Justice Manella?

JUSTICE MANELLA: I just don't recall the issue coming up. I guess somebody who had done the kind of exhaustive, encyclopedic survey that you have in the federal cases might draw some conclusions that this has caused judges to stretch or torture exceptions to the hearsay rule. That's possible, but I haven't done that study, so I don't know. I guess it's one fewer thing for trial judges to think about.

PROFESSOR CAPRA: Well, there was a study done in the State of Washington, where initially there wasn't a residual exception. What happened was—and it was especially child sex abuse cases—statements were offered and admitted under 803(2), excited utterance, 803(4), statements to doctors, which the facts indicated neither applied.<sup>71</sup>

And so by the end of a five-year period, the Washington Advisory Committee saw 803(2) become this kind of formless exception where judges were admitting hearsay not covered by the exception, because it was reliable. And so the decision was made, at least that's my understanding, to have a residual exception.

JUSTICE MANELLA: I do not know whether that's under consideration now in California. I don't know.

PROFESSOR CAPRA: Kelly, did you have a comment?

MS. ZUSMAN: I think, at least in my mind, I see this in two parts. First, you've got the civil side and then on the criminal side. Criminal defendants have this notion of fairness that's associated with the Confrontation Clause, which is always going to backstop 807 and residual hearsay.

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71. WASH. CODE. EVID. 803(2), (4); *see, e.g.*, *State v. Ramirez*, 730 P.2d 98, 102 (Wash. Ct. App. 1986) (noting that addition of a residual exception will allow the court to "reinstate the integrity of the 'spontaneous declaration' element of the excited utterance exception" that had become stretched in the absence of a residual exception).

PROFESSOR CAPRA: Agreed.

MS. ZUSMAN: The other three parties do not, so there isn't that Confrontation Clause safety net, if you will. And the concern that I have about expanding 807 too far is that it's really about fairness and it's about the notion that we want people to come into court. We want adversarial testing.

So those out-of-court declarants, and the example that you give in the materials for the *Draper v. Rosario*<sup>72</sup> case from the Ninth Circuit where you have the inmate who says "I saw the guard do X," and I'm thinking if I'm representing the guard how am I going to test that before a jury? How can I question that person's perspective or bias or motive in coming forward with that kind of an affidavit or a declaration?

So that's a concern that I have about expanding it too far. If our basic principle is we want adversarial testing, we want that in-court testimony, then I think our exceptions need to be constrained.

PROFESSOR CAPRA: Ken?

MR. GRAHAM: Well, I hate to say this, but now that Scalia is gone I think there's probably going to be a majority on the Court to overturn *Crawford v. Washington*<sup>73</sup> and return to something like the *Ohio v. Roberts*<sup>74</sup> original rules.

PROFESSOR CAPRA: Which then brings 807 back into play as it were.

MR. GRAHAM: That's right. The point is there will be no backstop to 807 in criminal cases because you'll be back to the *Roberts* thing where if it resembles one of the existing hearsay exceptions, it's okay.

PROFESSOR CAPRA: This is off point, but I'm thinking that when that change of the Court comes what gets lost is *Melendez-Diaz v. Massachusetts*,<sup>75</sup> but not a complete return to *Roberts*.

MR. GRAHAM: Yeah.

PROFESSOR CAPRA: That's my thought, but then again, since we have a minute on this and we have experts here, any thoughts?

PROFESSOR SCALLEN: I think you're right. That's been the troublesome area and—

PROFESSOR CAPRA: The certificates.

PROFESSOR SCALLEN: —you know, if you look at the other Confrontation Clause cases, a lot of them center on statements against interests, so there may be something that gets done in that context, but for the most part I think the confrontation—I agree there's going to be a shift, but the question is will they go back to what they castigated very clearly or will they do something in the middle? I think they'll do something in the middle.

PROFESSOR CAPRA: Yeah. I think members of the Court are content with the idea that you can't admit grand jury testimony against a criminal defendant who has not been cross-examined.

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72. 836 F.3d 1072 (9th Cir. 2016).

73. 541 U.S. 36 (2004).

74. 448 U.S. 56 (1980).

75. 557 U.S. 305 (2009).

The fact that it's under oath doesn't mean much and so that probably won't change, but I guess we'll see what happens. Any other comments about that? Christopher?

MR. DYBWAD: I think there is some interplay between the Confrontation Clause and a proposed expansion of the residual exception. Kelly is right. I mean, from the criminal defense perspective, the backstop we have is *Crawford*, but there could be cases where an alleged child victim makes a statement that perhaps is not considered testimonial, and that that kind of statement would start to come in under 807.

So, perhaps not a Confrontation Clause violation in terms of a testimonial statement, but any expansion would start to get outside of testing by cross-examination of pretty key witnesses.

PROFESSOR CAPRA: I guess that's true, but that's just to state it's hearsay. That's what I don't get about these opinions. You say well, we're not going to let it in. Well, why aren't we going to let it in? Well, because the guy wasn't cross-examined. Well, that's what made it hearsay, that it's an out-of-court statement that wasn't cross-examined. Why would that be a reason to exclude it when the question is should it be admitted under an exception? I don't get it.

MR. DYBWAD: To me, the difference in that one example is you really have one principal accuser and that principal accuser is making statements that you're admitting only hearsay basically, right? You could try the case by just putting it under the residual. It's all hearsay, but it's really striking at the heart of—

PROFESSOR CAPRA: You're not okay with that, but you're okay that they made a statement to a doctor, which is currently admissible, and that was the case?

MR. DYBWAD: Well, okay with it?

PROFESSOR CAPRA: My point is, what's the distinction?

MR. DYBWAD: I'd probably quibble with okay with it. I'd probably want the right to cross-examine no matter what, but I understand your point. It could fit into a different exception.

PROFESSOR CAPRA: Right.

MR. DYBWAD: Right. I worry that something that's more formless would start to come in.

PROFESSOR CAPRA: Anybody else want to weigh in about the residual or what might be done about it?

PROFESSOR GOLD: I just want to say it strikes me, Dan, that a lot of your comments go to the intelligence of the overall system, all of the old exceptions, everything in 803, 804, yet you can challenge the whole thing.

My point is simply if we try to tinker with one piece, it's going to affect the whole system. So, if you think something is fundamentally wrong with the system, that needs to be confronted, and we need to look at all the rules as one piece. And if we try to address the issues raised by Judge Posner by tinkering with one piece, it's going to have consequences with other Rules that we probably don't want.



PROFESSOR CAPRA: Judge Campbell?

JUDGE CAMPBELL: The general question I guess that I would put to the experts who are here is whether it is your sense that our system is unfairly or improperly excluding hearsay evidence that ought to come in.

There's lots of flaws that we identified in wording or different exceptions, but my basic question is whether our sense that the system is broken because we're not letting in enough reliable hearsay evidence. And I just have in my own little world never heard that sentiment expressed by lawyers or parties or others, and I would be interested in what this group—

PROFESSOR CAPRA: Yes, Eileen?

PROFESSOR SCALLEN: First of all, if you could get rid of the language "admitting it will best serve the purposes of these rules and the interests of justice,"<sup>76</sup> I'd be thrilled. I always feel like I have to run the flag up and salute whenever I quote that language. I have no idea what it means.

PROFESSOR CAPRA: Neither does the judge in applying it.

PROFESSOR SCALLEN: I have no idea what it does.

PROFESSOR CAPRA: Just runs the flag up and down.

PROFESSOR SCALLEN: But I am actually opposed to expanding the 807 exception. I have not seen situations that are just screaming injustice leaving out certain kinds of hearsay.

If there were those situations and they happened on a regular basis, I would expect this Committee to be presented with a proposal for a new hearsay exception, and I think that's the way it's been done in California. The child sexual abuse example is a prime case of that.

I understand why Congress passed the residual exception. I understand why states like it as a safety valve. I just think it does undermine. I like the exceptional circumstances language. I think it puts a brake on judges who feel bad that the hearsay didn't make it under the other hearsay exceptions and would like to let it in, but it's a constraining piece of language.

But I have a question for you, Professor Capra. What does the language, this one of the elements, the court determines after considering the pertinent circumstances and any corroborating evidence? I get what corroborating evidence means. I have a separate question about that. But what are the pertinent circumstances? What does that mean?

PROFESSOR CAPRA: The circumstances surrounding the statement.

PROFESSOR SCALLEN: Okay. Then that leads to my other question, which is in *Bourjaily v. United States*,<sup>77</sup> the Committee ultimately decided, my recollection is, that we can consider the circumstances surrounding the making of the statement to let in the statement, but we generally don't, I think, look at corroborating evidence. Am I remembering incorrectly?

PROFESSOR CAPRA: That's not my understanding, no.

PROFESSOR SCALLEN: Okay.

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76. FED. R. EVID. 807(a)(4).

77. 483 U.S. 171 (1987).

PROFESSOR CAPRA: In *Bourjaily*, you actually are looking at corroborating evidence, the fact that the tip—

PROFESSOR SCALLEN: You're looking at other evidence in the case, not just the circumstances surrounding—the making of the statement.

PROFESSOR CAPRA: The case you're talking about I think is *White v. Illinois*,<sup>78</sup> which is a Confrontation Clause case.

PROFESSOR SCALLEN: Yes. But would you also allow them to use the statement itself?

PROFESSOR CAPRA: I think you would as part of it.

PROFESSOR SCALLEN: And the residual?

PROFESSOR CAPRA: I think that the statement itself is considered as part of the analysis.

PROFESSOR SCALLEN: Okay.

PROFESSOR CAPRA: Laurie?

PROFESSOR LEVENSON: So, to address your prior question, I don't sense that there are many situations where we're having a problem with the court not finding a way to let in an important statement in the case.

I am concerned about the expansion, and to build on what Eileen just said, the court determines after considering pertinent circumstances. My concern is wouldn't you do that for every single Rule, consider the pertinent circumstances? Then we have to identify what the pertinent circumstances are. I think that ambiguity is one that would keep judges either tied up or they would completely ignore it.

As to the interest of justice, again, isn't that the standard that in some ways when the courts have discretion on a Rule you want them to use for all the Rules? But having said that, if this is one where we want to convey the message to use this on a limited basis, only use this when you really feel a strong need to, then language along those lines seems to me not out of place.

I think the overall exception says think about the underlying principles of evidence and only go beyond the limited Rules when those principles are not being served by the other Rules.

PROFESSOR CAPRA: Alan?

MR. JACKSON: Can I offer just an outlier's opinion or an outlier's perspective? I'm a state court guy, almost twenty years in the District Attorney's Office. I have not practiced federal courts, in the federal system. In California we don't have a residual exception, as Justice Manella indicated.

My question is this: Why do you need this at all? Why do you need a big basket, a giant bucket to stick stuff in that doesn't fit anywhere else? I'd be very interested, and, Professor Capra, I bet you've done this study. I'd be very interested in finding out if anybody's looked at the cases in which material evidence has been allowed under 807 that could not have been allowed under any other exception that you all have. In other words, has a

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78. 502 U.S. 346 (1992).

material injustice—would a material injustice have occurred had it not been for 807?

And I'll bet you, because there's some really smart folks not just in this room but populating courtrooms throughout the country, that if this didn't exist, the Brandon Foxes of the world, the Phil Cohens of the world on the prosecution and the defense side who operate in federal courts before you all over the country, would find another argument, would find another way to get that evidence in.

Professor Levenson makes a very good point. I fear expanding this, and why don't we pull back and pull the reins back. And my question is why not excise it? Why do you need this? Where's the justification?

PROFESSOR CAPRA: Well, I'll rely on evidence professor colleagues for an answer. I think we can all say that we've found cases where the statements wouldn't have been admissible if not for the residual exception.

PROFESSOR LEVENSON: The recent Supreme Court decision in *Ohio v. Clark*,<sup>79</sup> which was, of course where you had the child who was just too young and it didn't fall under the—

PROFESSOR CAPRA: Didn't make it to a doctor, wasn't excited.

PROFESSOR LEVENSON: Right. And yet it was the whole case and it turned out not to be testimonial, but it was initially let in under 807.

PROFESSOR CAPRA: And is that a good thing or not? I mean, that's a value judgment for sure. Mary?

MS. ANDRUES: Yes. And I see it as a weighing. And I agree with Jim. You don't want to let the floodgates open, but you have a safety net. And that's how I think of the Rule as working.

If you go through the analysis and you go through the Rules, and most of the time when I'm preparing to go to trial and I'm thinking how do I get this in, it's the old-fashioned thing. That's not going to work. That's not going to work. Where do I go? Where do I go? The residual is that safety net.

But from my perspective now as a defense lawyer—I might have liked it as a prosecutor, but now as a defense lawyer, I feel like it's going to go way too far. So I'd like some structure to it.

JUSTICE MANELLA: I was just going to say it's a fair question to ask, whether there has been miscarriages of justice without the rule. The problem I think is in measuring that. We simply don't know what case the District Attorney did not file on, or plead down to something far less serious because of that. I mean, unfortunately we can't know the unknowable.

PROFESSOR CAPRA: Right. And that goes back to Judge Campbell's do we know of instances in which there's been hearsay that has been rejected but should be allowed? It's really hard to find on the record. But that doesn't mean it doesn't exist.

JUSTICE MANELLA: Isn't the only way you can really look is to look at the cases where it's come in under the exception and where you've read the opinion and said, you know, that seems to me consonant with the interests

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79. 135 S. Ct. 2173 (2015).

of justice and with the safeguards that the rules of evidence as a whole are designed to provide.

PROFESSOR CAPRA: So that's what I tried to do with those 200 cases.

JUSTICE MANELLA: You're the only one who really knows here.

PROFESSOR CAPRA: I don't actually know. I have to rely on the court's description of the evidence. What does it mean? For example, there's a letter from a doctor. They don't produce it as an exhibit that you can read. They don't put it in context. So it's really hard to know whether it's reliable or not. And then it's described in probably a result-oriented way, so it is very difficult to get reliable empirical data. Timothy?

MR. LAU: At the last meeting, I presented a report on how you even determine what one of the excited elements and present sense impression hearsay exceptions is all about.<sup>80</sup>

And how I even get to that was you have to go through 100 to 200 scientific articles and read a lot of them and try to get to some synthesis of the whole, and you get to some answer that is like, not a bulletproof case, but maybe good enough. So how you would even do that for other types of evidence and do 100 to 200 scientific articles to get to that point, assuming that all of them you could do the same, is problematic.

PROFESSOR CAPRA: Yes, it is. Wendy?

MS. COATS: Alan, I am appellate counsel in a management side defense firm. I reached out to our trial people with this same question of whether this is a problem. Do you have cases where if this Rule changed, it would have let stuff in that arguably as defense side would have most likely hurt us more than helped us? And also our teams are uniquely in California, so they operate both in state and federal court—and so in their trial prep in state court they don't even have to deal with this exception. And largely the response that I got back was we don't think this is that much of a problem because the residual exception right now as applied is so rare we don't worry about it except in really rare cases. Now, in candidness, my friends in the plaintiffs' bar, who I don't necessarily see as much with us today at the moment, would probably feel very differently because it would play out more so in their arsenal.

PROFESSOR CAPRA: Something they would want.

MS. COATS: So it wasn't surprising that to some extent we didn't feel we had much of a problem keeping the exception limited to rare cases so that we could plan for it and know it isn't coming unless the facts of that specific case were unusual.

PROFESSOR CAPRA: Judge Campbell?

JUDGE CAMPBELL: Well, I guess it's a question I have. One question is whether we think not that can we find specific cases where there isn't any justice, but rather, whether system-wide, it is a problem that we're not getting enough reliable hearsay in.

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80. Memorandum from Timothy Lau, Fed. Judicial Ctr., to Advisory Comm. on Rules of Evidence (Mar. 5, 2016) (on file with the *Fordham Law Review*).

But the second question I have is how often folks are encountering this. In thirteen years on the trial court and over 100 trials, my experience, and I don't know if it's representative, is that 95 percent of the hearsay submissions are made under an exception. Now the lawyers will often say if it doesn't come in under that we'll get it in under 807, but the focus is on the exception and that's where the battle is, and there are very few instances where the battle really is 807. It just doesn't come up very often, but I'm interested in if that is the general experience.

JUDGE PHILLIPS: I have seventeen years on the district court, and when I was reviewing these materials I really struggled to think of more than one time that—maybe less than five times would be more accurate, and usually when it's being argued that something should come in under the residual exception it falls in the category that we were talking about earlier of but I really need it. I really, really have to have it because I don't have a case or a defense otherwise, but it comes up so rarely.

PROFESSOR CAPRA: It is kind of interesting that of the over 200 cases I looked through, none of the panel had written an opinion on any of these. I don't know if that's just chance. Judge Oliver?

JUDGE OLIVER: Yes. I just want to chime in on that. I've been on the court now about twenty-three years, and I can't say stuff has never been raised, but I don't recall it ever being raised, and I don't ever remember having to definitively rule on it.

PROFESSOR CAPRA: Judge Sessions?

JUDGE SESSIONS: One of the advantages of Rule 807 is that you don't have to manipulate the other exceptions to get evidence in. And so I agree with Professor Gold that everything is related, and if you don't have a fallback position, then all of a sudden you start manipulating the various exceptions, and they no longer become sacrosanct or reliable, and that's one of the big advantages of having the residual exception.

I mean, I will say from our own experience on this Committee we talked about removing the ancient documents exception, then we talked about a provision in there which suggested well, if you've got a problem with not being able to get in your ancient document because we've removed the rule, well, then you just go to 807, right? And so in fact that is becoming more and more, it seems to me, prevalent as a backstop because there are exceptions to every rule, and rather than bend the rule turn to 807.

PROFESSOR CAPRA: Right. Betsy?

MS. SHAPIRO: Judge Sessions said exactly what I was going to say is that one of the quantification problems is that you can't just look at 807 cases. You have to look at the other exceptions and see whether they are meaningful anymore or whether we've distorted the other exceptions because of the absence of a residual exception that truly works. And that was I think one of the primary rationales that we started talking about the expansion of 807 so that we didn't have to do that.

PROFESSOR CAPRA: Professor Gold?

PROFESSOR GOLD: Well, I was just going to say if 807 is the backstop and the sense is that that's the appropriate role that it should play, going back

to my initial issue, which is let's not have unintended consequences, we ought not to want to streamline 807 in a way that makes it the exception of first resort.

If it's stated so broadly, well, if the hearsay is trustworthy you can admit it, then there aren't many lawyers that aren't going to go there first as opposed to trying to shoehorn their hearsay into much more complicated exceptions. So that would be my concern, that we undermine the other exceptions by creating such a broad—

JUDGE SESSIONS: Can I just respond to that?

PROFESSOR GOLD: Sure.

JUDGE SESSIONS: What you're really talking about is the rare and exceptional language.

PROFESSOR GOLD: Yes.

JUDGE SESSIONS: We want to make sure we leave the exception to the rare and exceptional, which is really not a part of the Rule, but is the precedent.

PROFESSOR GOLD: We don't lose that.

JUDGE SESSIONS: You want to leave that. That's fine. If you have 807, you agree to the idea of a backstop so that these exceptional circumstances are warranted. Well, then why not correct the language in 807 as long as you don't do it in such a way as to make rare and exceptional no longer relevant, right?

PROFESSOR GOLD: Agreed.

JUDGE SESSIONS: So, as far as the changes that Dan is suggesting here, I mean, they seem to be fairly obvious. As long as they don't necessarily open up the floodgates, what's the problem with making a rule which was wrong in the first place better?

PROFESSOR GOLD: Most of the changes Dan has suggested—I agree streamlining it would not change the position that it currently occupies in a structure of hearsay law. My concern is removing the reference to the other exceptions. We can tinker with that language, but once we completely untether this from the other exceptions, then the trial judge doesn't have the point of reference that the trial judge currently has.

PROFESSOR CAPRA: So speaking of unintended consequences, when this Rule got moved to 807, there was an unintended consequence because originally, when you had an unavailable declarant you compared to 804 exceptions, and when you had an available declarant you compared to the Rule 803 exceptions.

PROFESSOR GOLD: Right.

PROFESSOR CAPRA: Now it's just a mishmash and you're comparing to both 803 and 804 no matter whether the declarant is unavailable or not. I believe that was an unintended consequence of the move to Rule 807. Mark?

MR. HOLSCHER: I've got a little bit different view than Professor Gold. First, I think that as currently under 807(a)(1), the statement has to have equivalent circumstantial guaranteed trustworthiness, and that goes back to 803 and 804. To me, that's something that's impossible to apply. So I think

the change makes it much better. And so also I don't think you're opening the floodgates, because you're requiring written notice in advance, including the substance and declarant's name. So, if I'm in a trial setting and I'm floundering, I can't say, "Oh, Your Honor, 807." And so I don't think you're opening the floodgates. I think you're actually bringing some rigor and some gate check to do it in advance. In fact, so as to 803, 804, 807, you have to do more for 807 in advance. So I think the language is much better and I think what you're saying is you have to consider the circumstance of corroborating evidence, which is the test you want applied rather than saying okay, there's thirty different exceptions in 803 and 804, so in that world how does this fit?

And so I hear people saying we're not sure we should even bother. No one will use this Rule, so should we change it? I guess I'm here just in this conference room looking at the language, so if you've already passed that threshold, this is much improved language. I don't think it opens the floodgate. I think you're replacing a test—807(a)(1)<sup>81</sup>—that's deeply flawed; in my view, a deeply flawed language with something that can be applied.

PROFESSOR CAPRA: We got that down on record, right? That's an excellent comment. Brandon?

MR. FOX: I think that having rules of evidence that are very clear on what comes in or not helps us out so much in making charging decisions, determining when do we have enough evidence, where do we go, how do we find this evidence, and the clearer we are with what would come in helps us out so much, and I think it also helps out the defense bar as well.

PROFESSOR CAPRA: Virginia?

MS. MILSTEAD: Looking at the proposed language of an amendment to Rule 807, my assumption is that it's not intending to limit it to the consideration of corroborating evidence, but a judge would also be able to consider contradictory evidence. But I wonder if by calling out corroborating evidence that somehow could be read as a limitation on what the court can consider as far as the circumstances.

PROFESSOR CAPRA: Well, the proposed change would require consideration of the pertinent circumstances and any corroborating evidence. That's two things. And it definitely can be improved. This is just like a working draft.

So the reason that corroborating evidence is added to the proposal is that there are courts that don't allow a judge applying the residual exception to look at the corroborating evidence, which I think is wrong.

MS. MILSTEAD: But even if the phrasing was something like any corroborating or contradictory evidence, or any pertinent evidence.

PROFESSOR CAPRA: Any corroborating evidence or the lack of corroborating evidence.

MS. MILSTEAD: Right.

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81. FED. R. EVID. 807(a)(1) (admitting hearsay if "the statement has equivalent circumstantial guarantees of trustworthiness").

PROFESSOR CAPRA: Well, no. You're saying more. Not just the lack of, but contradictory evidence.

MS. MILSTEAD: Right. It's almost like the totality of the circumstances. Instead of just pertinent circumstances or corroborating evidence, it's looking at everything.

PROFESSOR CAPRA: The totality, yes. Got it.

MS. MILSTEAD: Look at the evidence that supports it, the evidence that contradicts it.

PROFESSOR CAPRA: That's good.

MS. MILSTEAD: Lack of evidence, all those things.

PROFESSOR CAPRA: Good. That's very helpful. Eileen?

PROFESSOR SCALLEN: I just wondered why you shied away from the word "reliability" in that same provision.

PROFESSOR CAPRA: Instead of trustworthy?

PROFESSOR SCALLEN: Yes.

PROFESSOR CAPRA: Well, just carrying on from the original, right?

PROFESSOR SCALLEN: Yes. Okay. And I just wanted to make clear—assuming you work out any tinkering with that language, once you explained what you meant by pertinent circumstances—I love these changes.

The thing that I was concerned about is this impetus to get rid of the notion that this would be used in exceptional circumstances. And I wanted to ask Judge Sessions, were you suggesting that the exceptional circumstances language be moved into the text of the rule or—

JUDGE SESSIONS: No. I wasn't suggesting that. I mean, I may disagree. I'm not concerned about exceptional circumstances frankly. But regardless, the fact it is used rarely and as long as we make it clear in Dan's Notes—we won't call the Reporter.

PROFESSOR CAPRA: Or the Committee Notes.

PROFESSOR SCALLEN: Right.

PROFESSOR CAPRA: Actually, they're not even our Committee's Notes. They're the Standing Committee's Notes technically. Anyway, in the Note you can make it clear that this is not intended to open up the floodgates with some language.

PROFESSOR CAPRA: Judge Hamilton?

JUDGE HAMILTON: At the risk of stating the obvious on this, in that language you're suggesting, would it be appropriate to say that the court determines that the statement is trustworthy notwithstanding the opponent's inability to cross-examine the declarant, just to emphasize? I know that's implicit in all this in any of the hearsay points, but—

PROFESSOR CAPRA: That's good. I like it.

JUDGE HAMILTON: —since you've got such an exceptional situation we're talking about.

PROFESSOR CAPRA: Yes. An informal poll has said—an instant poll.

JUDGE SESSIONS: All the heads are going up and down.



PROFESSOR CAPRA: Yeah. That's our informal poll; Judge Hamilton's suggestion will be added to the working draft. Judge Campbell?

JUDGE CAMPBELL: Well, the general concern I have is if we use the language in (a)(1), how is it that that does not become an eye-of-the-beholder standpoint? If the judge looks at all the facts and says this looks trustworthy to me, it comes in.

And how do lawyers know before trial whether or not any hearsay is going to be excluded? It can't fit under any of the exceptions, but they don't know if this judge will look at all the circumstances and say well, that's trustworthy enough for me.

PROFESSOR CAPRA: Right. We're back to where we started. That actually is the problem of the residual exception itself.

JUDGE LIVINGSTON: And this is the debate that was had at the last symposium.

PROFESSOR CAPRA: And the debate that was had in Congress when the Rule was first developed.

JUDGE CAMPBELL: But if that's true, that it really is going to depend on how that judge happens to look at the facts.

PROFESSOR CAPRA: Correct.

JUDGE CAMPBELL: It seems to me we've lost predictability and we have made this the exception of first choice because why not take a ruling of the judge saying it's trustworthy before you go through the steps of 803(6).<sup>82</sup>

PROFESSOR CAPRA: But this is what happens now under the current Rule. In other words, it's very judge dependent and judges can find hundreds of ways to admit residual hearsay as being reliable and hundreds of ways to deny it, and I think the cases show that. So I don't know that it changes.

It's actually the real fundamental argument about do you want a residual exception because it's going to give rise to judges saying I find it trustworthy—I might have a little explanation for why and the appellate court is going to affirm—or I find it untrustworthy. And that's what's happening, and the appended cases indicate that.<sup>83</sup> That's the challenge we face.

JUDGE SESSIONS: And if you don't have an exception, people are going to shoehorn every issue into the standard exceptions.

JUDGE CAMPBELL: But we've got the exception now. We're not talking about eliminating that.

JUDGE SESSIONS: Right.

PROFESSOR CAPRA: But this exception, it already—and actually that was when the Committee was working on limiting or eliminating the ancient documents exception, and the comments were we can't use a residual exception because it's too unpredictable. Some judges might allow it. Other judges won't allow it.

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82. *Id.* 803(6) (establishing the exception to the rule against hearsay for records of a regularly conducted activity).

83. *See* Memorandum Regarding Expanding the Residual Exception to the Hearsay Rule from Daniel J. Capra, *supra* note 69, at 128.

JUDGE CAMPBELL: Well, let me ask one other question, just to play devil's advocate. Congress created this. Congress said in its legislative history it should be exceptional and rare. This Rule has to go back before Congress. If we were to adopt this language and it's in front of Congress and Congress says to us why isn't this broadening the rule? Why is this not getting rid of our exceptional, rare intention—

PROFESSOR CAPRA: In terms of the statutory rare and exceptional.

JUDGE CAMPBELL: You're changing what we intend, as clearly stated in our legislative history.

PROFESSOR CAPRA: Right.

JUDGE CAMPBELL: What's our answer?

PROFESSOR CAPRA: Well, that would be a challenge for the Committee, but I think the answer is we've lived with the Rule for a long time and found out that the standard of equivalent circumstance guarantees of trustworthiness does not work, so we are fixing it with a less clumsy standard.

And so without any intent to expand it, just fixing up the language, I guess that would be the pitch. Judge Marten?

JUDGE MARTEN: Well, it seems to me that we could modify the language of 807(a) to some extent to put the focus back on the enumerated exceptions and put this in the place of last resort by saying a hearsay statement not specifically covered by a hearsay exception in Rule 803 or 804 is not excluded by the rule against hearsay if—and I think that puts the focus on 803 and 804 to start with—that is where we begin with this being the last place.

I agree totally with the people who have said that if we don't have a residual exception we're going to end up with tortured interpretations of exceptions in an effort to try and let otherwise reliable statements in. And I agree that eliminating the language about admitting it will best serve the purposes of these rules is a good idea. That's a judgment call about as nebulous as anything could possibly be, and I think that we have at the same time sharpened what the judge needs to do and the test that's to be used without the fear of actually opening the floodgates.

I think this strikes a nice balance. We need the residual exception, and I think that we can modify the language a bit just to say look at 803 and 804 first, and this is the exception of last resort.

PROFESSOR CAPRA: Right. And there is case law on that where a judge says I'm not looking at the residual exception until we go through 803, 804, and that is a good point. It would probably be useful to add in a Committee Note as well. Judge Hamilton?

JUDGE HAMILTON: At the risk of just a war story that's on my mind, on the eye-of-the-beholder point, our court recently split very sharply en banc<sup>84</sup> not under residual hearsay but on the constitutional exception under *Chambers v. Mississippi*<sup>85</sup> in a capital murder case where essentially the only

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84. See *Kubsch v. Neal*, 800 F.3d 783, 788 (7th Cir. 2015).

85. 410 U.S. 284 (1973).

evidence other than the defendant's denial indicating he was not guilty was a videotaped statement by a nine-year-old girl about having seen two of the victims at a time and place that would have exonerated the defendant.

She didn't remember giving the statement.<sup>86</sup> She didn't remember the circumstances years later.<sup>87</sup> It doesn't qualify as past recollection recorded, and the question was did it come in under the constitutional standard for critical, reliable evidence under *Chambers*, which Dan may tell me I'm hopelessly fuzzing up there.

But in a life and death circumstance, our court divided very sharply on whether that should be deemed sufficiently reliable, and if you want the details, Judge Wood, who wrote for the majority—I dissented—put the full transcript of the little girl's interview in the opinion.

It's a case called *Kubsch v. Neal*,<sup>88</sup> and it's a good signal of just how difficult and how critical some of these—it would be easy to treat that under federal law as a residual question and very, very difficult to apply.

PROFESSOR CAPRA: Another thing to note is while the court has discretion under the residual exception, there's a lot of discretion under the generalized exceptions, too. Is something excited enough? What's the time between the event and the statement for present sense impressions? We can go on and on in terms of discretion. Mark?

MR. HOLSCHER: A procedural question. Can you put something in the Advisory Committee Notes that says this is intended to clarify the test that appears to apply to the notice requirement and this is intended to remain an exceptional circumstance?

PROFESSOR CAPRA: That's an improvement because you then have it in a Note as opposed to somewhere in some legislative history that's forty years old.

MR. HOLSCHER: Because my response to you, Judge, is that I understand you're worried about the district courts having discretion, but they have it now under a test of: Has equivalent circumstance guaranteed the trustworthiness across a whole set of different hearsay exceptions?

I don't even know how a district court judge could ever really apply that test without literally—if you rigorously can apply that—you need to go through every 803, 804 exception, how credible and reliable those statements would be under those exceptions versus this, which is an impossible task.

But I think you're replacing a horrible standard with something better and more straightforward. I hear the concerns you don't want to open the floodgates, but if you could put something in the Notes that this is to clarify the test to be applied, but this is meant to be a rare exception, you may have solved the problem.

PROFESSOR CAPRA: Virginia.

MS. MILSTEAD: Well, just to follow up whether there might even be a justification for putting the rare exceptional standard into the Rule.

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86. *See Kubsch*, 800 F.3d at 793.

87. *See id.*

88. 800 F.3d 783 (7th Cir. 2015).

PROFESSOR CAPRA: Yes. Oklahoma does that, puts exceptional in there,<sup>89</sup> but I don't know. I don't even know what that means.

MS. SHAPIRO: I just think we need to be honest with ourselves. I mean, one of the reasons that we talked about amending 807 was so that it wouldn't be so rarely and exceptionally limited because if you're going to change the Rule in order to not torture the other Rules and to have a meaningful rule of last resort, then judges can't be afraid to use it, and right now the reason 807 is never used is because it's so embedded in our collective practice that it's so rare and exceptional.

If we're putting that in the Rule or in the Note, then I'm not sure that there's much point in changing the Rule.

PROFESSOR CAPRA: Yes, Kelly?

MS. ZUSMAN: And so, if we want to move away from that but not too far away from that—

PROFESSOR CAPRA: That's what we're trying to do.

MS. ZUSMAN: —and to build on simply what Judge Hamilton mentioned, instead of amending subpart (1), what if subpart (2) were amended, for example, along the lines of if the proponent establishes that the probative value substantially exceeds any prejudice to the opposing party it's admissible so that we place a higher burden on the proponent to rely upon 807 as kind of a gatekeeping function?

PROFESSOR CAPRA: But you already have 403. I don't get how that works. You're going to reverse 403.

MS. ZUSMAN: Right.

PROFESSOR CAPRA: I don't know, because these are still regulated under 403 in terms of once we get past the hearsay regulation.

MS. ZUSMAN: Could there be some symmetry?

PROFESSOR CAPRA: Okay.

JUDGE LIVINGSTON: Kelly made my point. I was just going to say that the idea as to maybe not rare and exceptional, and there are two things about this modification and I think I agree with both of them. One, that maybe the rule doesn't have to be rare and exceptional, but it can't displace the general hearsay rules.

So we're talking about a little bit of somewhat, and it will focus the district court on what it should be focused on, not on these equivalent circumstantial guarantees of trustworthiness, but whether this evidence is reliable so that it should come in.

In this narrow circumstance—not Judge Posner's big circumstance—the district court has to judge reliability in every case, but in the narrow residual exception, that's where we should want the district court to be focused.

PROFESSOR CAPRA: One more. Sol?

JUDGE OLIVER: I was looking at the rule where we say the statement has the equivalent circumstantial guarantees of trustworthiness as it relates to the other hearsay, 803 and 804. I never read that to mean that I had to go

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89. OKLA. EVID. CODE §§ 2803–2804.

through every single one of those as I was analyzing that. The way I read it was when you talk about what other things that undergird the reliability in 803 or 804 if you were to sit down and discuss and talk about them, then the question is whether there is something similar to the things that undergird the different hearsay exceptions that are there in regard to the statement you're looking at. So I didn't take it that I had to go through each and every one.

PROFESSOR CAPRA: But even as limited you've got a problem there because 804(b)(1), it's reliable because it was cross-examined and there's a similar motive. 804(b)(2) is reliable because the person is dying. And so on: 804(b)(3) is reliable because it is against interest, state of mind because of a unique perception.<sup>90</sup>

How do you put all that together when you're just evaluating a single statement? I guess that's the difficulty, right? I mean, even if you don't go through every one, any two exceptions have different guarantees. I guess that's the problem.

JUDGE OLIVER: Well, I thought it was a statement that was more of a general nature that if you look at the bases for why we accept these exceptions, is there something of equivalent value in terms of—

PROFESSOR CAPRA: Well, it's an interesting take. Like the Second Circuit says, what we look at is the hearsay problem. That problem is inability to regulate sincerity, faulty narration, misperception, and bad memory. And let's look at our statement—is there anything in the circumstances that address those four problems? But the flaw in that analysis is that not all the hearsay exceptions actually regulate all those problems.

#### IV. TOPIC THREE: THE ADMISSIBILITY OF PRIOR INCONSISTENT STATEMENTS TO INCLUDE VIDEO RECORDS AVAILABLE FOR PRESENTATION AT TRIAL

PROFESSOR CAPRA: So we'd like to spend the remaining ten minutes on the final proposal, which I'm going to put up on PowerPoint, which is a proposal to expand the substantive admissibility of prior inconsistent statements<sup>91</sup> to include those where they were video recorded and available for presentation at trial. [The PowerPoint provided as follows]:

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90. *See* FED. R. EVID. 804.

91. *See id.* 801.

**Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay**

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 (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and ~~was~~:

(i) was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or

(ii) was recorded on video and is available for presentation at trial; or

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

PROFESSOR CAPRA: Jim, let's go to you for this to start this off.

MR. ASPERGER: I was talking to Dan at the break. The second jury I was on involved precisely this issue, not with the video recording, but it was a gang shooting where there was a code of silence so the prosecution couldn't bring any live witness to trial that would identify the defendant in court.

There was one witness, though, the victim, who identified the defendant in a statement to one of the police officers when he was in the hospital and so the whole case turned upon that, and that was problematic for a number of reasons because it was in dispute. It was not recorded. It was the police officer testifying, and we found out afterward there was a second police officer that they didn't even bring to testify to give more added reliability to the case.

And the bottom line is that the case hung. It probably never should have been brought based upon that evidence alone, but that's sort of the flip side of what you have here. I think what it does is reinforce that the Committee has picked out a very narrow circumstance where you've got a recording and the jury can evaluate it and it falls on a much more reliable part of the spectrum.

And so, as I look at the proposal, my only question was if somebody tries to do that how much of the statement can come in because, based upon my experience as a prosecutor is you have one statement that's helpful, but the defendant is going to make a lot of statements that are exculpatory and so the defense is going to want to get those in, and it could happen in a civil case as well.

PROFESSOR CAPRA: Yes, Justice Manella?

JUSTICE MANELLA: Most of the people in this room, perhaps with the exception of Alan, who are prosecutors were in federal court, and the complement of cases is very different. In state court the case Jim saw was not unusual, and as you all know in California these inconsistent statements

come in for their substantive value without the limitation of having been tape recorded. The only limitation is section 770,<sup>92</sup> and that's a very low bar to me. And even that is subject to the interest of justice, so, basically, it can come in and they do come in quite commonly, at least the cases I see coming up. Criminal cases, gang cases, it is not at all uncommon.

The case you described may have been pretty thin, but it is not—I would say it is almost the norm in the cases I see where a victim has identified his or her assailant in the hospital or shortly thereafter but will not do so at trial. Other witnesses have done so but will not do so at trial. If those statements were admissible only for impeachment, you couldn't possibly bring these cases.

And the other area in which it's the most common, maybe even more common, is domestic violence. It is the norm. I mean, it really is the norm that police are called, victim gives a statement to police, police record it, sometimes bruises, physical injuries, sometimes not, comes to trial—

PROFESSOR CAPRA: And the prosecutor calls the witness—

JUSTICE MANELLA: Calls the witness first.

PROFESSOR CAPRA: —solely to introduce their inconsistent statement.

JUSTICE MANELLA: Well, calls the witness first. The witness will not testify, yes, consistent with, let's say in this case, her prior statement. The prosecutor goes through. The witness either says I don't recall or whatever. The prosecutor calls the arresting officer at the scene and that's the case. And Alan probably has a lot more experience in seeing that than I do.

MR. JACKSON: I spent about five and a half years doing nothing but gang cases, and I was sort of salivating when you were telling me about that case. I was like, God, that's a good case.

It is the norm. My wife currently is a prosecutor with the DA's Office and she works in family violence and does domestic violence cases, sort of high-level domestic violence cases every day. Every day she has to do a preliminary hearing or a trial with evidence exactly as Justice Manella suggested.

And if we didn't have some way to *California v. Green*<sup>93</sup> when these—I mean, to *Green* a witness. *Green* is the case that gives us the opportunity to do that. If we didn't have that opportunity, we simply could not try hardcore gang cases in Los Angeles. Couldn't do it.

PROFESSOR CAPRA: Interesting. Chris, can I ask you, when this happens here and when it would be expanded this way—

MR. DYBWAD: You know, I actually think the expansion in the limited way of videotape makes some amount of sense. I must say in federal court it comes up I think much more rarely and it's usually the AUSA who's going to have the opportunity to use it and it's usually a grand jury transcript, so in the more complicated cases perhaps a number of witnesses have been put in front of the grand jury. And so at the moment the only person who has the

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92. CAL. EVID. CODE § 770 (West 2016).

93. 399 U.S. 149 (1970).

opportunity to admit substantive prior inconsistent statements in federal court is the prosecutor.

PROFESSOR CAPRA: Yes. It's not going to be you, right?

MR. DYBWAD: It is not me. Actually, it's come up at least once in my time when it was a state cop who testified contrary to a prior testimony he'd given in state court that he didn't know we had, so yes, but the videotape would actually probably expand it somewhat for us to get prior inconsistent statements in substantively, and it would create an incentive to videotape.

PROFESSOR CAPRA: Yes, Carol?

PROFESSOR CHASE: This is just a minor point. I don't think I'd refer to it as recorded on video. I wouldn't refer to the technology. I would refer to it as maybe audiovisual recording because a lot of it's going to be digital or who knows what the next—

PROFESSOR CAPRA: So video recorded would be antiquated.

PROFESSOR CHASE: Yes. I would say audiovisual recording if you want both, but—

PROFESSOR CAPRA: No, we don't. No. The idea was to keep it visual.

PROFESSOR CHASE: You want visual. Okay. Audiovisual would be both, audio and visual. Then that was my next point was well, what about an audio recording?

PROFESSOR CAPRA: In the long history of this proposal, the concerns were that the prior statements would be made up and then they couldn't be cross-examined because the witness would just deny the statement. The argument was that you can't cross-examine a declarant who doesn't even admit he made the statement.

What about audio recording? Well, the thought was that somebody could say, "Well, that's not my voice." What they can't say is, "That's not my face."

PROFESSOR CHASE: Could the jury listen to the voice and make the comparison?

PROFESSOR CAPRA: That is interesting. Arguably that will lead to a collateral inquiry. I don't mean to speak for the Committee about this; adding admissibility for audio recordings might be something to consider. Judge Phillips?

JUDGE PHILLIPS: Well, I was just going to add I've had cases where the issue comes up that well, not who's speaking, but has it been altered.

JUSTICE MANELLA: Has it been manipulated? Altered?

PROFESSOR CAPRA: Right. Well, you have the authentication rules that would apply here, right? But, yes.

JUSTICE MANELLA: The other issue, of course, is the effectiveness of a limiting instruction. It's my belief that it's very difficult to let one portion of a cat out of a bag. If you've ever tried to put a cat in a cage, you know that as soon as the word is out. And so I recognize and the rules recognize that we do give limiting instructions, and God knows how many times I've written an opinion that says that the court presumes the jury followed the judge's instructions. But if you're really talking about a prior inconsistent



statement and the jury hears it, the notion that the jury individually or as a whole will be able to compartmentalize that and say of course we can't consider that for its substantive meaning, whatever the hell that means, but only for impeachment, I just think we're kidding ourselves.

PROFESSOR CAPRA: Judge Campbell?

JUDGE CAMPBELL: I was just going to ask would this include off-camera statements? I've had a wrongful death case with a police officer's chest camera. There's a bunch of people talking. It's video recorded, but it's not an interrogation in my witness room.

PROFESSOR CAPRA: Draftspersonship is required for drawing that line. It is certainly a question to consider. I think the goal was to make sure that the statement could not be denied and so some visual indication that it was the witness talking would be required. Judge Hamilton?

JUDGE HAMILTON: Just one quick thought as I was thinking about this was I had some concern about the asymmetry that this sets up. Assume that the technology is cheap enough so that both sides, both defense and prosecution, plaintiff and defense in civil cases, can afford the technology. But I'm thinking in civil cases, for example, about a rather asymmetric ability for an employer say to lock its witnesses in to ex parte video recordings that the plaintiff will not have an opportunity to do with the other employees.

PROFESSOR CAPRA: What should be done about that?

JUDGE HAMILTON: I don't know. I want to throw out the strategic use and exploitation of some of those asymmetries in power that may be a problem.

PROFESSOR CAPRA: Thank you.

JUDGE SESSIONS: I had just one other question. And that's a public policy issue. Of course, there's probably a related issue as to whether we should be involved in public policy questions, but when you highlight video as opposed to audio, I think it was your observation, Chris, and I agree with that, that the Rule will encourage law enforcement agencies to use video.

We were told that the government has the pattern of taking wobbly witnesses and bringing them before the grand jury so that their testimony under Rule 801(d)(1)(a) will come in. Well, does that mean that with this particular provision, when a person is arrested and they're taken down before a federal agent, they turn on the video machine because they know that evidence is now coming in if the witness changes his tune at trial, and so that becomes a public policy issue as to whether we encourage use of videos in law enforcement?

JUDGE CAMPBELL: And a related question is every criminal defense attorney is going to be turning on their iPhone to get a video recording of every witness interview so they can come within this.

PROFESSOR CAPRA: That would be a consequence.

PROFESSOR LEVENSON: An added complication to that is—

PROFESSOR CAPRA: Is that a complication or—

PROFESSOR LEVENSON: No. I just raise the concern that videotaping people without their permission differs by states. In some states, it's illegal.

In some states, it's permissible. So it's going to be hard to have a national standard.

PROFESSOR CAPRA: I can see that point, but that can't determine the Rule, right?

PROFESSOR LEVENSON: I think it can raise concerns about whether you're going to have a Rule that's going to provide the type of uniformity and fairness that you want to have. That's all.

PROFESSOR CAPRA: So your point was that there should be no Rule because of these different state statutes?

PROFESSOR LEVENSON: I think we should appreciate how that as we start to think who's going to have the advantage of using the provisions how it will be applied differently in different parts of the country.

PROFESSOR CAPRA: That's interesting. Brandon?

MR. FOX: Judge Hamilton brought up a point that just reminded me of a string of cases that I've prosecuted, and it involved a police agency here that in its jails had a pattern and practice that's been alleged and they've agreed to of abusing inmates.

And during that time, they would get a bunch of inmates around who saw the incident, and they would have the same deputies who were involved in the abuse interview on videotape the inmates, and with those cases the inmates would invariably say I didn't see anything or the other inmate who had been abused was the aggressor. They were doing that because they were afraid a lot of the time that they would be subject to retribution.

And again, there's a history that that was happening. So I hadn't thought about that until Judge Hamilton raised the point, but just because it's videotaped does not mean that it's necessarily reliable. It may be. So that's one thing.

But I think that the other thing that Judge Hamilton raised is usually here we've got a binary choice, and I don't know how much the Rule actually matters about whether it's substantive or not because if you're going to cross-examine a witness, whether it's on videotape or not, a prior inconsistent statement, they're saying now the light is red. Before they said it was green. Any attorney is going to argue the light was green at that point, and a witness limiting instruction will not really matter in that instance, so—

PROFESSOR CAPRA: Yes. It probably doesn't matter to the jury, but it matters in summary judgment.

MR. FOX: It matters.

PROFESSOR CAPRA: It matters. Or on a directed verdict. That's where it matters.

MR. FOX: Of course. I'm just pointing out that you're right. It does matter there. So anyway, going back to my earlier point, I think that there also needs to be consideration about what are the circumstances of these interviews.

PROFESSOR CAPRA: You're right. It doesn't mean it's reliable, but actually that's not the point of the exception. The exception is not there

because the statements are reliable. The exception is there because the witness can be cross-examined about it.

So I assume then in your situation, if a person was legitimately intimidated, if they came up on the stand and they had a prior inconsistent statement, you could cross-examine them and that would come out.

MR. FOX: You're absolutely right.

MR. ASPERGER: And, Dan, I also assume you're doing this so you can watch to see the demeanor of the witness when they made the hearsay statement.

PROFESSOR CAPRA: That's a good point in response to Judge Campbell's case about the body camera. An off-camera statement shouldn't count under the Rule because you can't see the declarant's demeanor.

MR. ASPERGER: It should be where the declarant can be seen.

PROFESSOR CAPRA: How do you write "on-camera" is the question. We have to think about it.

MR. ASPERGER: The flip side of that, though, is if it's a live officer recording and a bunch of things are going on, nobody knows they're being videotaped, so it might be reliable. There are a lot of facts and circumstances that are going to go into the reliability.

PROFESSOR CAPRA: Are we saving all our best comments for overtime, I see? Mark?

MR. HOLSCHER: On the federal criminal side, one of the real problems is the use of 302s,<sup>94</sup> where there's a strong incentive not to videotape, not to record. The agents give their depiction of what occurred, and in the bigger cases they actually do composite 302s where they take five, six, seven statements where they may well have been inconsistent for the witnesses they intend to use, and they make one composite 302 and make it impossible to use.

So I think any Rule that encourages the videotape in the criminal system encourages the accuracy of the prior statements, and I think the idea that the FBI now still writes up 302s and takes hours and hours and hours rather than push a button on an iPhone is wrong—and I'm a former federal prosecutor. I'm not a bleeding heart here. There's a real problem with the system, and anything to do with these Rules to encourage the video and the actual testimony is helpful.

MR. DYBWAD: So please note my prior enthusiasm for the recording because I spend my days reading 302s.

MS. ANDRUES: Something that the defense can do defensively is to videotape a witness after the government has not. And so the video isn't actually being used as the Rule would allow it as an inconsistent statement. It's impeaching the practice of the law enforcement officers as well.

PROFESSOR CAPRA: Okay. I'm going to turn to Judge Sessions for a closing statement.

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94. Form FD-302 is an FBI form used for summarizing interviews.

JUDGE SESSIONS: Yes. I want to thank you all. I actually want to thank a number of people. First, Dan. [Applause]

His work continues to amaze me, but in running and conducting this conversation, he does it so effortlessly and engages everyone. I think that's an incredibly difficult task, but he does it beautifully.

So to Pepperdine also to host us both last night and today. This is one of the most beautiful places for a law school or actually one of the worst because I can't imagine how you can concentrate.

But then for all of you who have obviously busy lives. I really hope that you enjoyed the discussion. I want to say that I found this to be fascinating. All of your observations from all of your experiences are just incredibly valuable to this process, and little things and pieces may be taken out of this conversation, and quite frankly you may very well see them in a Rule or—

PROFESSOR CAPRA: Your name up in lights.

JUDGE SESSIONS: —you may see them hidden down there somewhere in the Notes. But hopefully we'll take what you've said in good faith, and I really thank you all.

PROFESSOR CAPRA: And I thank you all as well personally. [Applause]